Children's Law Center of Indiana

ADOPTIONS WITHOUT PARENTAL CONSENT

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March 2019

A. Notice

1. Notice: Implied Consent and Pre-Birth Notification Requirements

Actual notice of a potential adoption may be served on the putative father by a licensed child placing agency, an attorney representing prospective adoptive parents of the child, or an attorney for the mother. IC 31-19-3-1. When an adoption petition is filed, the person who provides actual notice to the putative father must submit an affidavit to the court detailing the circumstances surrounding the service of actual notice including the time, if known, date, and manner in which actual notice was provided. IC 31-19-3-3. However, IC 31-19-3-2 states that providing notice to the putative father does not obligate the mother to proceed with adoptive placement.

The form of the actual notice is described at IC 31-19-3-4. The form states that, if the putative father wishes to contest the adoption, he must file a paternity action within thirty days of receipt of the notice. This time period may expire before the child's birth; consequently, IC 31-14-4-1(2)(B) allows an expectant father of an unborn child to file a paternity action. The form of actual notice also states that if the putative father fails to timely file a paternity action or is unable to establish paternity, the putative father's consent to adoption or the voluntary termination of the putative father's parent-child relationship under IC 31-35-1 or both shall be irrevocably implied. The IC 31-19-3-4 notice provides that if the putative father fails to timely file the paternity action or fails to establish paternity, the putative father loses the right to contest the adoption, the validity of his implied consent to adoption, the termination of the parent-child relationship, or the validity of his implied consent to termination of the parent-child relationship. The putative father also loses the right to establish paternity of the child. IC 31-19-3-4. The notice also provides the notice complies with Indiana law, but it is not exhaustive regarding a putative father's legal obligations. IC 31-19-3-4.

In each case that addressed the form of the pre-birth notice, the Court opined that the notice received by the putative father substantially complied with IC 31-19-3-4 and was therefore adequate notice. In In Re Adoption of Fitz, 805 N.E.2d 1270, 1273-74 (Ind. Ct. App. 2004), *trans. denied*, the Court stated that IC 31-19-3-4, which specifies the language and information which the notice must contain, does not require that the adoptive parents be named. In In Re Paternity of Baby W., 774 N.E.2d 570, 575-77, n.4 (Ind. Ct. App. 2002), the putative father claimed that the notice he had received did not substantially comply with the statutory requirements because the letter from the adoptive parents' attorney which accompanied the notice misadvised him of his options and failed to advise him that he should retain his own counsel. The Court stated that substantial compliance with the statutory notice provision will be sufficient if the party receives notice which achieves the purpose for which the statute was intended. Id. at 576, quoting Matter of Paternity of Baby Girl, 661 N.E.2d 873, 877 (Ind. Ct. App. 1996). The Baby W. Court held that the putative father received the notice contemplated by the statute in verbatim form. The notice explicitly stated that "nothing…anyone…says to [putative father] relieves [putative father] of his obligations under this notice." Baby W. at 577. The Court determined the putative father was alerted that only the statutory notice contained the required legal information, and any statements made in the letter that were inconsistent with the terms of the notice should not have been considered. Id. The Court noted that the putative father's trial court objection that the notice was defective on its face for failure to be signed and dated by the adoptive parents' attorney was untenable because the statute does not require that the notice be signed. Id. at 577 n.4. The Court also found that the attorney's letter to the putative father plainly stated that the attorney represented people who were interested in adopting the child, and this was fair notice that the attorney represented interests adverse to those of the putative father. Id. at 577. The Court stated that the statute does not require that the notice advise the putative father of his right to be represented by counsel. Id.

In In Re Paternity of M.G.S., 756 N.E.2d 990 (Ind. Ct. App. 2001), *trans. denied*, the putative father claimed that the notice was confusing, misleading, and improperly served. The Court observed that the notice to the putative father followed the form set forth in the statute, except for the omission of the word "or" in the first paragraph. Id. at 1001. The Court opined that the omission of the word "or" in the notice was a minor typographical or grammatical error, was not materially misleading, and did not render the notice defective. Id. The Court rejected the putative father's claim that the notice was defective because it failed to inform him of his rights to establish paternity pursuant to IC 31-19-9-17(b) if neither a petition for adoption nor a placement in a proposed adoptive home is pending because the statute for the notice does not require reference to IC 31-19-9-17(b) or its contents. Id. at 1002. The Court noted that the body of the notice and the acknowledgment of receipt paragraph in the notice both indicated that the putative father may not rely on any representations by the mother to avoid his responsibilities under the statute. Id. The Court opined that the language about representations by the mother had received double emphasis because it was repeated in the acknowledgement paragraph. Id. The Court further found it "irrelevant to the sufficiency" of the notice that the attorney named on the notice was not the attorney handling the adoption, because the adoptive parents had retained the first attorney to prepare the notice. Id. The Court discounted the putative father's argument that he was misled by a consent provision at the bottom of the notice was without merit because there

was no consent provision at the bottom of the notice; there was only a signature line for acknowledgment of receipt of the notice. Id. at 1002-03. The M.G.S. Court was also not persuaded by the putative father's claim that service of the notice was defective because the mother's brother, instead of an attorney or licensed child placing agency, personally served him with the notice. Id. at 1003. The putative father's lastly asserted that there was no proper identifying date upon the notice, which would allow for proper computation of the thirty-day time limit; however, the Court found that IC 31-19-3-1 does not require that a service date appear on the notice, that the notice clearly stated that the putative father must file a paternity action not more than thirty days after receiving the notice, that the expiration of the thirty-day time limit was easily calculable, and that the notice was not defective. Id.

IC 31-19-3-8 provides that the Indiana Rules of Trial Procedure do not apply to giving pre-birth notice. In order for pre-birth notices to be used effectively, the correct pre-birth statutory notice must be served on the putative father. See Matter of Paternity of Baby Girl, Born 6/7/94, 661 N.E.2d 873 (Ind. Ct. App. 1996) (judgment of adoption, denial of putative father's motion to contest adoption, and dismissal of paternity petition were all reversed because the putative father had not received the statutorily required pre-birth notice form and had been affirmatively misled by the post-birth notice form which he received). Department of Child Services attorneys can use pre-birth notices to provide for adoptions for mothers who seek or are already receiving agency services, including pregnant wards who desire to place their unborn children for adoption.

IC 31-19-3-5 requires a putative father who receives actual notice under the pre-birth notice statute to notify the agency or attorney arranging the adoption if the putative father decides to file a paternity action. The notice must include the name of the court in which the paternity action has been filed, the cause number, and date when the action was filed. If the putative father does not provide the required notice concerning his paternity action, IC 31-19-3-6 requires the court with jurisdiction over the paternity action to allow the prospective adoptive parents to intervene in the paternity action on the adoptive parents' motion pursuant to Ind. Trial Rule 24. If paternity has already been established and the putative father has failed to provide the required notice under IC 31-19-3-5, the court is required by IC 31-19-3-7 to set aside the paternity determination and to allow the prospective adoptive parents to intervene on their motion pursuant to Ind. Trial Rule 24. See also IC 31-14-21.

IC 31-19-3-9(a) provides that a pre-birth notice that is appropriately served on a putative father who is an Indiana resident is valid, regardless of whether the notice is served within or outside of Indiana. Section (b) provides that a pre-birth notice that is appropriately served outside Indiana on a putative father who is not an Indiana resident is valid if the child was conceived in Indiana. The pre-birth notice under Section (b) is also valid if the child was conceived outside Indiana, if the laws of the state in which either the father is served notice or resides, or the child was conceived allows a paternity or similar action to be filed before the birth of the child.

2. Notice: After Birth Notice Requirements and Exemption From Notice

a. General Requirements and Practice Notes

IC 31-19-2.5-1 through 4 provide general notice requirements in adoption proceedings, while IC 31-19-4.5-1 through 5 provide notice requirements for "Other Persons Entitled to Notice of Adoption," which are specifically noted to not affect the notice rights of putative fathers. The two chapters should be read together. IC 31-19-2.5-5 provides that a notice served in accordance with IC 31-9-4 or IC 31-19.4.5 is valid regardless of whether it is served within or outside Indiana.

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 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 be 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.

If the child is a CHINS and the mother's rights have been involuntarily terminated, but the putative father's name is unknown to DCS, adoption attorneys should request an affidavit from the DCS case manager. The affidavit should include the following information: (1) upon review of the records, the DCS does not have the name of the putative father; (2) the mother did not give the name or address of the putative father in the course of the CHINS or termination proceedings; (3) the DCS case manager has no memory that the name or address of the putative father has ever been provided by the mother; (4) no father's name is listed on the child's birth certificate; (5) the mother was not married at the time the child was conceived; and (6) any information about whether the child was conceived in Indiana or outside the state. Note that IC 31-19-4-3(b) provides that the only circumstance in which notice to the unregistered putative father by publication is necessary is when the child was conceived outside the state of Indiana as described by IC 31-19-4-3(a).

b. Who Must Be Given Notice

IC 31-19-10-1 states that only a person entitled to notice of an adoption under IC 31-19-4 or IC 31-19-4.5 may contest an adoption. IC 31-19-2.5 addresses which persons are entitled to notice of adoption proceeding because their consent to adoption is required; it also addresses which persons are not entitled to notice. IC 31-19-2.5-2(b) states that notice of the adoption must be sent to the putative father or a parent if the petition alleges that the person's consent to adoption had not been obtained and is unnecessary under one of the following subcategories of IC 31-19-9-8: (1) IC 31-19-9-8(a)(1) [child abandoned]; (2) IC 31-19-9-8(a)(2) [parent failed to support or have significant communication with the child]; (3) IC 31-19-9-8(a)(4)(B) [child conceived out of wedlock as a result of biological father's act of child molestation but criminal conviction not required]; (4) IC 31-19-9-8(a)(4)(C) [child conceived out of wedlock as a result of biological father's act of sexual misconduct with a minor but criminal conviction not required]; (5) IC 31-19-9-8(a)(9) [parent declared incompetent or mentally defective if court dispenses with parent's consent to adoption]; and (6) IC 31-19-9-8(a)(11) [parent proven unfit and adoption in child's best interests]. IC 31-19-2.5-3(b) provides that, if the parent-child relationship has been terminated under IC 31-35 (or IC 31-6-5 before its repeal), notice of the pendency of the adoption shall be given to the licensed child placing agency or the local [DCS] office of which the child is a ward. See also IC 31-19-2.5-4 and In Re Adoption of C.B.M., 992 N.E.2d 687 (Ind. 2013), discussed infra at A.2.c., Who Does Not Need To Be Given Notice.

IC 31-19-2.5-3(a)(1) states that the persons listed in IC 31-19-9-1 must be given notice. The persons listed in IC 31-19-9-1 include: (1) each living parent of a child born in wedlock, including a man who is presumed to be the child's biological father under IC 31-14-7-1(1) if the man is the biological or adoptive parent of the child; (2) the mother of a child born out of wedlock and the father whose paternity has been established by a separate paternity proceeding or a paternity affidavit, unless the father's consent was implied pursuant to IC 31-19-9-15; (3) each person, agency, or local [DCS] office having lawful custody of the child whose adoption is sought; (4) the court having jurisdiction of custody of child if the legal guardian or custodian of child is not empowered to consent to adoption; (5) the child if the child is more than fourteen years of age; (6) the spouse of the child if the child is married; and (7) the parent or guardian of a parent who is less than eighteen years of age, if the court determines that the consent of the parent's parent or guardian is in the best interest of the child to be adopted. However, if a person fits within one of the above categories, but also fits within the categories listed at IC 31-19-2.5-4 for which no notice is required, then no notice of the adoption proceeding is required. IC 31-19-2.5-3(a)(2) states that a putative father who is entitled to notice under IC 31-19-4 must be given notice of an adoption petition, except as provided by section 4 of the same chapter.

A parent may need to receive notice of an adoption petition if a parent has not consented to adoption, or if the parent has not had parental rights terminated, either voluntarily or involuntarily, under IC 31-35. IC 31-19-4-1 and IC 31-19-4-2 require notice to be given to the putative father whose name and address is provided by the birth mother on or before the date she consents to adoption and to the putative father who has timely registered with the putative father registry within thirty days after the child's birth or on the date of the filing of the adoption petition, whichever occurs later. Also, IC 31-19-4-3 requires publication notice to be given

pursuant to Ind. Trial Rule 4.13 when the child is conceived outside the state of Indiana by a putative father whom the mother does not name.

In In Re Adoption of L.G.K., 113 N.E.3d 767 (Ind. Ct. App. 2018), the Court held that Mother's fraudulent claim that she did not know the identity of the child's father warranted granting Putative Father relief from the judgment, which was the granting of the adoption. In finding that Mother and Maternal Grandfather had defrauded Putative Father and the trial court, and in affirming the trial court's decision to overturn the adoption order, the Court noted that: (1) Mother had held Putative Father out as the child's father to everyone, including Maternal Grandfather; (2) Putative Father and the child had a loving, involved, relationship; (3) Putative Father had no notice of the adoption; (4) Putative Father was induced by Mother not to exercise his legal rights regarding establishing paternity; and (5) revoking the adoption would protect the rights of Putative Father and the child.

In In Re Paternity of G.W., 983 N.E.2d 1193 (Ind. Ct. App. 2013), the Court reversed the trial court's decision to deny Mother's two motions to dismiss the paternity action filed by Birth Father. The Court opined that the trial court erred in denying Mother's motion to dismiss the paternity action; the Court found that, as Birth Father failed to timely register with the putative father registry, he had impliedly consented to the child's adoption and was now barred from establishing paternity. Id. at 1198. Mother asserted that Birth Father's failure to take timely action resulted in his implied consent to the child's adoption and waiver of any notice of the adoption proceedings. Birth Father argued that, while acknowledging his lack of registration, the provisions of the putative father registry are not applicable to him because Mother disclosed his name to her attorney and a search of the putative father registry was conducted.

The G.W. Court looked to the Indiana Putative Fathers' Registry established in 1994 and observed that the statute imposes registration requirements on putative fathers who wish to contest their child's adoption or those who petition for paternity while an adoption petition is pending. Id. at 1196-97. The Court quoted IC 31-19-5-1, which provides:

> (a) This chapter applies to a putative father whenever:
> (1) an adoption under [IC] 31-19-2 has been or may be filed regarding a child who may have been conceived by the putative father; and
> (2) on or before the date the child's mother executes consent to the child's adoption, the child's mother has not disclosed the name *or* address, or both, of the putative father to the attorney or agency that is arranging the child's adoption.
> (b) This chapter does not apply if, on or before the date the child's mother executes consent to the child's adoption, the child's mother discloses the name *and* address of the putative father to the attorney or agency that is arranging the child's adoption.

(Emphases in original) Id. at 1197. The Court noted that a putative father who registers within thirty days after the child's birth or the date the adoption petition is filed, whichever occurs later, is entitled to notice of the child's adoption, citing IC 31-19-5-4 and IC 31-19-5-12. Id. The Court, citing IC 31-19-5-5, said that if, on or before the date the mother executes a consent to adoption, she does not disclose to the attorney or agency that is arranging the adoption, the name

or address, or both, of the putative father, the putative father must register to entitle him to notice of the child's adoption (emphasis in original). Id. The Court opined that the repercussions of failing to register with the putative father registry are far-reaching and include foregoing notice of the adoption proceeding and "an irrevocably implied consent to the child's adoption," quoting IC 31-19-5-18. Id. The Court said that the evidence reflects that, although Mother disclosed Birth Father's name to the attorney arranging the child's adoption by Stepfather, Mother never divulged Birth Father's address. Id. The Court found that the provisions of the registry applied to Birth Father because both the name and address have to be revealed to fall outside the application of the putative father registry. Id. The Court concluded that, as Birth Father acknowledges that he never registered, he is not entitled to notice of the adoption proceeding, and has irrevocably and implicitly consented to the child's adoption by Stepfather. Id. The Court said that its conclusion is supported by Indiana's strong interest in providing stable homes for children, as "early and permanent placement of children with adoptive families is of the utmost importance," quoting In Re Paternity of Baby Doe, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000). G.W. at 1197. See also In Re I.J., 39 N.E.3d 1184 (Ind. Ct. App. 2015) (Court found that, because Putative Father registered before the child was thirty days old, his registration was timely; Putative Father therefore was entitled to notice of the adoption and should have been permitted to contest the adoption).

Non-parents who have custody of a child, such as guardians and other "lawful custodians" of a child, may need to be given notice. See In Re Adoption of B.C.H., 22 N.E.3d 580 (Ind. 2014), and In Re Adoption of L.C.E., 940 N.E.2d 1224 (Ind. Ct. App. 2011). Grandparents who have or who are entitled to seek grandparent visitation must be given notice. IC 31-19-2.5-3(a)(3) provides that a grandparent described in IC 31-19-4.5-1(3) is entitled to notice; thus, grandparents who, at a time prior to the filing of the adoption petition, are the grandparents of a child sought to be adopted, and have an existing right to petition for grandparent visitation, and a right to visitation that will not be terminated under IC 31-17-5-9 after the adoption.

In In Re Adoption of B.C.H., 22 N.E.3d 580 (Ind. 2014), the Court held that for purposes of IC 31-19-9-1(a)(3), "lawful custody" encompasses individuals who fit the statutory definition of a de fact custodian at the time a petition for adoption is filed, and since Maternal Grandparents qualified as "lawful custodians" of the child, they were entitled to notice of the adoption and the opportunity to consent to the adoption proceedings. In determining what the word "lawful" meant in IC 31-19-9-1(a)(3), the Court concluded that it simply meant "custody that is not unlawful", and that the Indiana legislature only meant to exclude a person who illegal obtains or retains custody of a child. Id. at 585. Consequently, a court order is not required to give a person "lawful custody" under IC 31-19-9-1(a)(3), and results in a person who qualifies as a de facto custodian being a person with lawful custody. Id. at 585-6. Although the Court determined that it would not consider Maternal Grandparents' court-adjudicated status as de facto custodians, since that status was granted after the adoption petition was granted, it did look at the circumstances surrounding Maternal Grandparents' caregiving to the child. Id. The Court noted that, at the time the adoption petition was filed: (1) Maternal Grandparents had cared for and financially supported the child every day and night for the first forty-five months of her life; (2) they had formed a strong bond with the child; and (3) they continued to act as primary care givers even

after the adoption was granted, an adoption which they had no notice of or chance to participate in. Id. at 586-7. The Court concluded that "[b]ased on this circumstances, we believe that [Maternal] Grandparents were *exactly* the type of caregivers the General Assembly had in mind when they chose the term 'lawful custody'…in IC 31-19-9-1(a)(3)." Id. at 587. In vacating the adoption, the Court noted that Maternal Grandparents' opportunity to withhold consent was not the same as a chance to veto the adoption for any reason; the trial court could find that their reasons for withholding consent were not in the child's best interests, and grant the adoption if it is in the child's best interests, pursuant to IC 31-19-9-8(a)(10). Id.

In Re Adoption of L.C.E., 940 N.E.2d 1224 (Ind. Ct. App. 2011), the Court reversed the Lawrence Circuit Court's grant of the grandfather's petition to adopt the child, holding that the trial court had erred when it failed to consider the child's legal court-ordered custodian's objection to the adoption, and when it failed to grant the custodian's motion to vacate the adoption. Stepfather had custody of the child due to a Johnson County court order. In petitioning for adoption, the grandfather noted that the stepfather was entitled to notice but asserted that the stepfather could not object to the adoption. The trial court denied the stepfather's objection to the adoption, and the stepfather appealed. The Court held that since the stepfather was the child's legal court ordered custodian, Lawrence Circuit Court erred when it failed to consider his objection and grant his motion to vacate the adoption. Id. at 1228. The Court concluded that, under Trial Rule 69(B)(8), the stepfather had reason for relief from the judgment granting the child's adoption. Id. at 1227. The Court, noting that the stepfather is the child's legal custodian, reasoned that the stepfather had a meritorious defense to the adoption order he wished to have set aside. Id. at 1226. The Court, noting that IC 31-19-9-1(a)(3) requires written consent of each person, agency, or local county office of family and children having lawful custody of the child before a child may be adopted, opined that the stepfather's consent is required for the child to be adopted because the stepfather is the child's lawful custodian. Id. Since the stepfather timely filed his objection, the Lawrence Circuit Court erred in granting the grandfather's petition for adoption prior to the expiration of the thirty days provided for objection to be filed. Id.

c. Who Does Not Need To Be Given Notice

IC 31-19-2.5-4(1) provides that a person whose consent to adoption was filed with the adoption petition does not have to be given notice of the adoption proceeding. IC 31-19-2.5-4 provides for several situations in which notice of pending adoptions proceedings does not need to be given to various individuals. However, several of the subsections that state that notice is not required to a certain group of individuals are either implicitly or explicitly contradicted by other statutes. The subsections that are not contradicted by other statutes will be discussed first, followed by the subsections that may be contradicted by other statutes.

IC 31-19-2.5-4(2) provides that putative fathers and others do not have to be given notice of the adoption proceeding when allegations are made in the adoption petition that consent is not required for any of the following reasons:

(1) IC 31-19-9-8(a)(4)(A) [biological father of child conceived out of wedlock by father's rape of mother for which father was convicted];

(2) IC 31-19-9-8(a)(4)(D) [biological father of child conceived out of wedlock by biological father's incest with mother but criminal conviction not required];
(3) IC 31-19-9-8(a)(5) [putative father whose consent is irrevocably implied because he did not file paternity action within 30 days of actual pre-birth notification under IC 31-19-3 (notice that child may be placed for adoption after birth), whether the child was born before or after expiration of 30 days; also applies to putative father who timely filed the paternity petition after actual pre-birth notification, but failed to establish paternity];
(4) IC 31-19-9-8(a)(6) [biological father who established his paternity by court paternity proceeding or paternity affidavit after the adoption petition was filed, but did not timely comply with putative father registry when he was required to because mother did not disclose his name or address];
(5) IC 31-19-9-12 [putative father who either failed to file a motion to contest the adoption or a petition to establish paternity within 30 days after notice of the adoption proceeding, failed to appear for the hearing on the motion to contest the adoption proceeding, filed a paternity petition but failed to establish paternity, or failed to register with the Putative Father Registry within the time limits, when required to do so] (see also In re Adoption of B.W., 908 N.E.2d 586, 594 (holding that the putative father's filing of a paternity action was sufficient to preclude a finding that his consent to the adoption was irrevocably implied, even though he did not also a file a motion to contest the adoption));
(6) IC 31-19-9-15 [same as IC 31-19-9-8(a)(5) above].

IC 31-19-2.5-4(2) also provides that putative fathers and others do not have to be given notice of the adoption proceeding when allegations are made in the adoption petition that consent is not required for any of the following reasons:

(1) IC 31-19-9-8(a)(7) [parent who relinquished parental right to consent to adoption as provided by IC 31-19-9-9 et seq.]. IC 31-19-9-8(a)(7) provides that "consent to the adoption is not required from a parent who has relinquished the parent's right to consent to adoption as provided in this chapter [chapter 9]." This may reference IC-31-19-9-9, which provides that "a court shall determine that consent to adoption is not required from a parent if the: …(3) court determines, after notice to the convicted parent and a hearing, that dispensing with the parent's consent to adoption is in the child's best interests." Since IC 31-19-8(a)(7) references a statute that requires notice to be given to the person whose rights are to be terminated, it would be best practice to give notice in this situation. However, IC 31-19-9-8(a)(7) may instead reference IC 31-19-9-2(c), in which case, there may not be a notice problem, as this statute refers to consent that has already been given at an earlier date in the adoption process.
(2) IC 31-19-9-8(a)(8) provides that consent is not required from a parent whose parent-child relationship was terminated voluntarily or involuntarily under the juvenile code termination statutes at IC 31-35. IC 31-19-2.5-4 further provides that notice does not need to be given to a person described at IC 31-19-9-8(a)(8). However, recent case law has indicated that even if a parent's parental rights have been terminated, if there is a pending appeal, the parents whose rights were terminated could be given notice and even included in the adoption proceedings to guard against the possibility of a reversal of the termination judgment. See In Re Adoption of C.B.M., 992 N.E.2d 687 (Ind. 2013).

(3) IC 31-19-9-9 provides for situations in which consent is not required from a parent [parent was convicted of and incarcerated at the time of the filing of adoption petition for murder (IC 35-42-1-1), causing suicide (IC 35-42-1-2), voluntary manslaughter (IC 35-42-1-3), an attempt under IC 35-41-5-1 to commit one of these crimes, or a crime in another state that is substantially similar to these crimes; if victim of the crime is the child's other parent]. However, IC 31-19-9-9(3) also provides that after a hearing and notice to the convicted parent, the court must determine that dispensing with the parent's consent is in the child's best interests. This appears to contradict IC 31-19-2.5-4, which provides that notice does not need to be given to a person described at IC 31-19-9-9.
(4) IC 31-19-9-10 provides for situations where the court shall determine that consent to adoption is not required from a parent [parent is convicted of and incarcerated at time the adoption petition is filed for murder (IC 35-42-1-1), causing suicide (IC 35-42-1-2), voluntary manslaughter (IC 35-42-1-3), rape (IC 35-42-4-1), criminal deviate conduct (IC 35-42-4-2), child molesting as a Class A or Class B felony (IC 35-42-4-3), incest as a class B felony (IC 35-46-1-3), neglect of a dependent as a Class B felony (IC 35-46-1-4), battery of a child as a Class C felony (IC 35-42-2-1(a)(3)), battery as a Class A felony (IC 35-42-2-1(a)(5)) or Class B felony (IC 35-42-2-1(a)(4)), or an attempt under IC 35-41-5-1 to commit one of these crimes; the child or child's sibling, half-blood sibling, or step-sibling of the parent's current marriage is the victim of the offense]. However, IC 31-19-9-10(3) also provides that after a hearing and notice to the convicted parent, the court must determine that dispensing with the parent's consent is in the child's best interests. This appears to contradict IC 31-19-2.5-4, which provides that notice does not need to be given to a person described at IC 31-19-9-10(3).
(5) IC 31-19-9-18 provides for consent to an adoption being irrevocably implied under certain circumstances [a person who has been served with notice under IC 31-19-4.5, if the person fails to file a motion to contest the adoption as required under IC 31-19-10 not later than 30 days after service of the notice; or who files a motion to contest the adoption but fails to appear at the hearing to contest the adoption and prosecute the motion to contest without unreasonable delay]. However, IC 31-19-9-18 also provides that this category of people must be served with notice before their consent can be irrevocable implied. This appears to contradict IC 31-19-2.5-4, which provides that notice does not need to be given to a person described at IC 31-19-9-18.

Although IC 31-19-2.5-4(2) provides that notice does not need to be given to this category of individuals, please note that the best practice would be to give notice.

IC 31-19-2.5-4(3) states that notice of the pendency of the adoption does not have to be given to the hospital where an infant is born or to which an infant is transferred for medical reasons after birth if the infant is being adopted at or shortly after birth. IC 31-19-2.5-4(4) and (5), respectively, provide that notice need not be given to a person whose parental rights have been terminated before the entry of a final decree of adoption, or to a person who has waived notice under IC 31-19-4-8 or IC 31-19-4.5-4.

Attorneys for adoption petitioners should be cautious in interpreting IC 31-19-2.5-4 as not requiring notice because of due process concerns. In In Re Adoption of C.B.M., 992 N.E.2d 687 (Ind. 2013), the Indiana Supreme Court reversed the adoption court's judgment denying Mother's petition to set aside the adoption of her children (the Twins). The Court remanded with instructions to vacate the adoption decree within seven days of the Supreme Court's opinion being certified, to reset the adoption petition for a contested hearing, and to promptly serve notice and summons of that hearing on Mother. Mother's parental rights were terminated in January 2008; she appealed, but did not make any effort to file for a stay of the termination judgment. Mother's termination appeal was still pending at the time the adoption was finalized. None of the parties to the adoption notified Mother of the adoption proceedings, because IC 31-19-2.5-4(4) states that notice to a parent whose rights have been terminated is not required. Eventually the termination judgment was reversed. Mother petitioned the adoption court in January 2009 to set aside the adoption decree, which was eventually denied. On appeal, the Court of Appeals reversed the adoption court's decision at In Re Adoption of C.B.M., 979 N.E.2d 174 (Ind. Ct. App. 2012). The Indiana Supreme Court accepted transfer, thereby vacating the Court of Appeals opinion.

The C.B.M. Court concluded that the adoption court abused its discretion by refusing to set aside the Twins' adoption. Id. at 695. The Court said that reversal of the termination judgment is significant because consent is ordinarily a vital part of an adoption. Id. at 693. The Court, citing In Re Adoption of N.W.R., 971 N.E.2d 110, 117 (Ind. Ct. App. 2012), noted that when consent is required, a defect in consent will render the adoption decree invalid, and require the adoption to be reversed and remanded. C.B.M. at 693. The Court observed that even though notice and consent are generally required, in some situations, the natural parent is not entitled to notice, and generally this category is based on a prior judicial finding of misconduct, such as Natural Mother's termination judgment in this case. Id. at 694. The Court explained that, in these cases, notice is deemed unnecessary because the parent had the opportunity to contest the allegations in a prior proceeding. Id. The Court looked to Ind. Trial Rule 60(B)(7), which states that a judgment may be set aside when " a prior judgment upon which it is based has been reversed or otherwise vacated." C.B.M. at 694. Quoting Dempsey v. Belanger, 959 N.E.2d 861, 868 (Ind. Ct. App. 2011), *trans. denied*, the Court said that TR 60(B)(7) "applies only to related judgments where the second judgment is based upon the first judgment, and the first has been reversed or otherwise vacated." C.B.M. at 694. The Court opined that, in this case, the adoption "is based upon" the termination judgment because if not for the preclusive effect of the prior termination judgment, the Twins' adoption would have required notice to Natural Mother. Id. at 695. The Court said that, accordingly, Natural Mother became entitled to relief from the adoption when the termination judgment was "reversed or otherwise vacated" on appeal. Id. The Court observed that, since Natural Mother's petition is within T.R. 60(B)(7)'s specific provisions, she need not show a "meritorious defense" as T.R. 60(B)(8) would require. Id. The Court said that, since the only judicial determination that Natural Mother is unfit to retain her parental rights had been overturned on appeal, letting the adoption stand would be an overreach of State power into family integrity; therefore, the adoption must be set aside. Id.

The C.B.M. Court said that, to potentially avoid the harsh effect of vacating a child's adoption, parties always may, and sometimes ought to exceed the bare minimum of due process notice requirements. Id. at 695-96. The Court observed that, while Adoptive Parents were not required to serve notice on Natural Mother due to IC 31-19-2.5-4(2)(F), doing so voluntarily may well have saved the adoption from reversal. Id. at 695. The Court explained that, had Natural Mother been served, Adoptive Parents could then have requested a contested adoption hearing for litigating an *alternative* basis for dispensing with consent under IC 31-19-9-8(a) (emphasis in opinion). Id. at 695-96. The Court said that Natural Mother would then have been offered a "day in court" independent of the termination, giving the Court an alternative basis to affirm the adoption, because either she would have appeared and been heard, or else failed to appear and been properly defaulted. Id. at 696. The Court emphasized that such notice is not *required,* and adoptive parents have the statutory right to rely solely on a trial-level termination judgment and seek adoption pending the termination appeal, but cautioned that such reliance comes at the adoptive parents' peril (emphasis in opinion). Id.

See also In Re Adoption of D.C., 887 N.E.2d 950, 958 (Ind. Ct. App. 2008) (holding that adoption petitioner's failure to give birth mother notice of adoption by means reasonably calculated to apprise birth mother of adoption proceedings did not comport with due process; and adoption proceedings which terminated birth mother's parental rights were void). But see Matter of Adoption of D.V.H., 604 N.E.2d 634 (Ind. Ct. App. 1992) (adoption decree entered thirteen days after involuntary termination judgment was not invalidated due to lack of notice to birth mother); see also Adoptive Parents of M.L.V. v. Wilkens, 598 N.E.2d 1054 (Ind. 1992) (putative father never established paternity in a separate court proceeding; therefore his consent to adoption was not needed and his allegations of misrepresentation in obtaining his consent were irrelevant).

d. Form of Notice Pursuant to IC 31-19-4.5

IC 31-19-4.5-1 states that IC 31-19-4.5 "shall not be construed to affect notice of an adoption provided to a putative father under IC 31-19-4." The statute does apply to a father who has abandoned, failed to support, or failed to communicate with the child, and to others such as mothers, legal guardians, or DCS. The notice form established at IC 31-19-4.5-3 must be given to persons other than putative fathers who are entitled to notice.

The notice at IC 31-19-4.5-3 requires "a brief description of the reason(s) the consent is not required." IC 31-19-4.5-5 states that the description of the reasons consent to adoption is not required needs to include only enough information to put a reasonable person on notice that the petition alleging the person's consent is unnecessary is pending. The description "does not require an exhaustive description of the reasons" that consent is not required. IC 31-19-4.5-4(a) provides that service of notice under IC 31-19-4.5-4 may be waived in writing before or after the child's birth. IC 31-19-4.5-4(b) states that the waiver must: (1) be in writing and signed in the presence of a notary public; (2) acknowledge that the waiver is irrevocable; and (3) acknowledge that the person signing the waiver will not receive notice of the adoption proceedings. The acknowledgement that notice will not be received was added in a 2005 amendment to IC 31-19-

4.5-4(b). IC 31-19-4.5-4 further provides that a person who waives notice of an adoption may not challenge or contest the adoption.

3. Notice to Putative Fathers

IC 31-19-4-2 requires notice to be given to the putative father whose name and address is provided by the birth mother on or before the date she consents to adoption and to the putative father who has timely registered with the putative father registry within thirty days after the child's birth or on the date of the filing of the adoption petition, whichever occurs later. See also In Re Paternity of G.W., 983 N.E.2d 1193 (Ind. Ct. App. 2013), discussed previously at A.2.b, Who Must Be Given Notice. IC 31-19-4-4 prescribes the form of the publication notice which must be given to unnamed, out of state fathers. IC 31-19-4-5 prescribes the form of notice to be given to named fathers. Both notices advise the putative father that he must file a motion to contest adoption within thirty days after service of the notice or his consent will be irrevocably implied. Practitioners should note that the instructions given to the putative father in the notice statutes, IC 31-19-4-4 and IC 31-19-4-5, differ from what Indiana law requires of putative fathers as set out in IC 31-19-9-12.

IC 31-19-9-12 states that the putative father's consent is irrevocably implied if he fails to file a motion to contest and a paternity action within thirty days of service of notice. The putative father is also required to do the following according to IC 31-19-9-12; (1) appear at the contested adoption hearing; (2) file a paternity action and establish paternity; (3) register if required with the putative father registry.

IC 31-19-4-8 provides that the putative father may waive his right to notice in writing either before or after the birth of the child. IC 31-19-4-9 states that if actual notice has been given pursuant to the pre-birth notice statute, no additional notice is necessary. This statute also provides that notice is not necessary if a person attempted to give notice to a putative father at a particular address under IC 31-19-3 and the putative father could not be located at that address, unless the putative father registers that address with the putative father registry under IC 31-19-5. IC 31-19-4-6 provides that a putative father who has not registered with the putative father registry in a timely manner and whose name or address are not disclosed by the mother on or before the date she signs an adoption consent is not entitled to notice unless the child was conceived outside the state.

In In Re I.J., 39 N.E.3d 1184 (Ind. Ct. App. 2015) [pages citations not available], the Court reversed the trial court's orders which denied Putative Father's motions to intervene in the child's adoption and for genetic testing to determine whether he was the child's biological father. The Court found that, because Putative Father registered before the child was thirty days old, his registration was timely. Putative Father therefore was entitled to notice of the adoption and should have been permitted to contest the adoption. The Court observed that pursuant to IC 31-19-5-12, a putative father would still be entitled to notice of an adoption if he registered "no later than… thirty (30) days after the child's birth…" because the deadline is thirty days after the birth *or* the date a petition for adoption is filed, "*whichever occurs later.*" (Emphasis in opinion). The

Court found that Putative Father registered after the petition for adoption was filed, but that did not foreclose his right to challenge the adoption if he registered before the child was thirty days old. Since Putative did register before the child was thirty days old, he was entitled to notice and to contest the adoption. The Court also found that Putative Father's timely registration with the putative father registry entitled him to an opportunity to challenge the presumption that Husband was the child's father.

In In Re Adoption of K.G.B., 18 N.E.3d 292 (Ind. Ct. App. 2014), the Court opined that, because Putative Father failed to timely register with the Registry, he had irrevocably waived his right to notice of the child's adoption; therefore, he had impliedly consented to the adoption and was barred from contesting the adoption. Id. at 299. The Court noted: (1) the Registry provides notice to a putative father that a petition for adoption has been filed; (2) the Registry applies to a putative father whenever an adoption under IC 31-19-2 has been or may be filed regarding a child who may have been conceived by the putative father; and on or before the date the child's mother executes a consent to the child's adoption, the child's mother has not made the noted disclosures (IC 31-19-5-1(a)); (3) the filing of a paternity action by a putative father does not relieve him from the obligation of registering or the consequences of failing to register unless paternity has been established before the filing of the adoption petition (IC 31-19-5-6); (4) to be entitled to notice of an adoption, a putative father must register not later than thirty days after the child's birth; or the earlier of the date of the filing of a petition for the child's adoption, or termination of the parent-child relationship between the child and the child's mother; whichever occurs later (IC 31-19-5-12(a)); (5) a putative father who fails to register within the period specified by IC 31-19-5-12 waives notice of an adoption proceeding and the putative father's waiver *constitutes an irrevocably implied consent to the child's adoption* (IC 31- 19-5-18); (6) a putative father whose consent has been implied may not challenge the adoption or establish paternity (IC 31-19-9-13 and -14) (emphasis in opinion). Id. at 297. Although Father acknowledged that he failed to register timely, he argued that he was entitled to notice of the adoption petition because circumstantial evidence suggested that Mother had disclosed his name or address to the attorney who was arranging the adoption on or before the date she executed her adoption consent. The Court concluded that the record was insufficient to sustain a reasonable inference that Mother disclosed Putative Father's identity as a potential putative father on or before the date she consented to the child's adoption by Grandfather. Id. at 299. Because Putative Father impliedly consented to the child's adoption, the Court concluded that, pursuant to IC 31-19-9-14, he was also barred from establishing paternity, and the trial court did not err in dismissing his petition. Id. at 304. The K.G.B. Court also concluded that Putative Father failed to meet his burden of proving that the challenged statutes were unconstitutional as applied to him. Id. at 302 (citing Lehr v. Robertson, 463 U.S. 248, 262 103 S. Ct. 2985 (1983)).

In In Re B.W., 908 N.E.2d 586, 594 (Ind. 2009), 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. In reaching this holding, the Court noted, among other things, that the notice the putative father received "substantially tracked the language of IC 31-19-4-5," and stated that "the notice informed the 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." Id. at 591 (emphasis provided by the Court).

In Mathews v. Hansen, 797 N.E.2d 1168 (Ind. Ct. App. 2003), *trans. denied*, and In Re Adoption of J.D.C., 751 N.E.2d 747, 751, n.2 (Ind. Ct. App. 2001) the Court opined that putative fathers who failed to register with the putative father registry were not entitled to notice of the adoption. In J.D.C. the Court held that an inquiry of the putative father's whereabouts was not required due to his failure to register. The Court further noted that IC 31-19-4-6 imposes no duty on the biological mother to disclose the identity or address of the putative father.

IC 31-19-4 also provides several sections that govern service of notice. IC 31-19-4-7 states that putative fathers need not actually receive the notice of adoption proceedings so long as service is provided in compliance with Ind. Trial Rule 4.1 or Rule 4.13. Practitioners should note that this statute applies only to putative fathers, not to other persons who must receive notice. See Matter of Adoption of M.A.S., 695 N.E.2d 1037 (Ind. Ct. App. 1998) (registry indicated a paternity affidavit had been signed by both parents and was on file with the state health department; adoption was reversed because institutionalized putative father did not receive correct legal notice pursuant to Ind. Trial Rule 4.3); see also In Re Adoption of A.K.S., 713 N.E.2d 896 (Ind. Ct. App. 1999) (holding that paternity affiant father was entitled to notice).

IC 31-19-4-1 (name and address of putative father provided by mother) and IC 31-19-4-2 (putative father has registered with putative father registry) both require the putative father to be given notice pursuant to Rule 4.1 of the Indiana Rules of Trial Procedure. IC 31-19-4-3(b) states that publication notice to an unregistered putative father is required only when the child is conceived outside Indiana and the consenting mother does not disclose the putative father's name or address.

4. Notice to Persons Other Than Putative Fathers

IC 31-19-4.5-1 through 5 provides a form and procedural requirements for notice to other persons of an adoption. IC 31-19-4.5-2 states that, except as provided by IC 31-19-2.5-4, if it is alleged that a person's consent to adoption is not required under IC 31-19-9-8, notice must be given to the person from whom consent is allegedly not required. If the person's name and address are known, notice shall be given in the same manner as a summons and complaint are served under Rule 4.1 of the Indiana Rules of Trial Procedure. If the person's name and address are not known, notice shall be given in the same manner as a summons is served by publication under Rule 4.13 of the Indiana Rules of Trial Procedure. The form of the notice is prescribed at IC 31-19-4.5-3.

IC 31-19-4.5-5 states that the description in the notice under IC 31-19-4.5-3 concerning the reasons consent to adoption is not required; the notice need include only enough information to put a reasonable person on notice that an adoption petition is pending which alleges the person's consent is not required. An exhaustive description of the reasons the person's consent is not required does not need to be included in the notice.

Notice pursuant to IC 31-19-4.5-2 must be given to the following persons, if they have not consented to the adoption or parental rights have not been terminated, and it is alleged that their consent is not required: (1) each living parent of a child born in wedlock; (2) the mother of a child born out of wedlock and the father whose paternity has been established by a separate paternity proceeding or a paternity affidavit, unless the father's consent was implied pursuant to IC 31-19-9-15; (3) each person, agency, or local [DCS] office having lawful custody of the child whose adoption is sought; (4) the court having jurisdiction of custody of child if the legal guardian or custodian of child is not empowered to consent to adoption; (5) the child if the child is more than fourteen years of age; (6) the spouse of the child if the child is married; (7) the parent or guardian of a parent who is less than eighteen years of age, if the court determines that the consent of the parent's parent or guardian is in the best interest of the child to be adopted. IC 31-19-9-1.

Note that IC 31-19-4.5-2 states that notice must be given "except as provided in IC 31-19-2.5-4." See also In Re Adoption of B.C.H., 22 N.E.3d 580 (Ind. 2014) (holding that "lawful custodians" must be given notice and defining "lawful" custodian of a child), and In Re Adoption of L.C.E., 940 N.E.2d 1224 (Ind. Ct. App. 2011) (holding that legal guardian and custodian of a child must be given notice of adoption and chance to object). But see discussion at A.2.c, Who Does Not Need To Be Given Notice.

Grandparents who have or who are entitled to seek grandparent visitation must be given notice. IC 31-19-2.5-3(a)(3) provides that a grandparent described in IC 31-19-4.5-1(3) is entitled to notice; thus, grandparents who, at a time prior to the filing of the adoption petition, are the grandparents of a child sought to be adopted, and have an existing right to petition for grandparent visitation, and a right to visitation that will not be terminated under IC 31-17-5-9 after the adoption.

In Matter of C.W., 723 N.E.2d 956 (Ind. Ct. App. 2000), maternal grandparents appealed the denial of two kinship placement petitions in a CHINS case. The Court affirmed the denial of the first petition based on the evidence, and affirmed the denial of the second petition due to lack of standing because the child had been adopted by foster parents. Although the issue of notice of the foster parents' petition for adoption to the grandparents was not before the Court, in footnote 6, the Court opined, "...we can envision a situation where competing Petitions for Adoption are filed in different counties, or as in the present case, a Petition for Adoption has been filed while a CHINS proceeding has been initiated on a child's behalf in a different court. Thus, we believe that in order for an adoption court to fulfill its duty to notify appropriate parties, it has an affirmative duty to conduct an initial inquiry to determine whether or not all of the "interested parties" have been given notice of the Petition for Adoption, and if there are any competing actions pending in other courts." Id. at 960. In footnote 7, the Court also criticized the DFC, stating that they acted "inappropriately" when they did not inform the grandparents of the petition for adoption filed by the foster parents. The Court noted that the grandparents had attempted to maintain close ties with the child and had taken measures to increase the likelihood that the child would be placed with them. Id. The Court opined that DFC's failure to inform the

grandparents of the foster parents' adoption petition foreclosed any chance the grandparents may have had to contest the adoption and gain custody. Id.

In In Re Adoption of I.K.E.W., 724 N.E.2d 245 (Ind. Ct. App. 2000), the grandparents were not given notice of the foster parents' adoption petition, and consequently, the foster parents' adoption was reversed by the Court of Appeals. The Court concluded that IC 31-19-4-10 required the trial court to give notice and the opportunity to file objection to interested parties. The Court found that the grandparents, having filed a competing petition for adoption, were "unquestionably" interested parties. Id. at 250. The Court found that the trial court's failure to notify the grandparents of the foster parents' adoption hearing deprived the grandparents of their opportunity to contest the petition and was an abuse of discretion. Id. The Court held that the requirement for notice by the court necessarily imposed upon trial courts an affirmative duty to inquire as to who may be an interested party entitled to notice under the statute. Id. at 251. The Court found that the duty to inquire about interested parties was not limited to a query of the petitioner. Id. The Court also opined that, given that more than one judge may have jurisdiction in adoption cases and that competing petitions to adopt the same child may be filed in different counties, the necessity of imposing an affirmative duty to inquire became even more apparent. Id.

In In Re Adoption of D.C., 887 N.E.2d 950, 955-58 (Ind. Ct. App. 2008), the Court reversed and remanded the trial court's denial of the biological mother's motion to set aside the adoption decree. The Court held that the trial court did not have personal jurisdiction over the mother because the service of process on the mother in the adoption proceedings was ineffective, and the adoption proceedings terminating her parental rights were therefore void. The Court reasoned as follows: (1) ineffective service of process prohibits a trial court from having personal jurisdiction over a respondent; (2) a judgment rendered without personal jurisdiction over a defendant violates due process and is void; and (3) because a void judgment is a complete nullity and without legal effect, it may be collaterally attacked at any time, and the "reasonable time" limitation under Ind. Trial Rule 60(B)(6) does not apply.

The D.C. Court stated that whether process was sufficient to permit a trial court to exercise jurisdiction over a party involves two issues: whether there was compliance with the Indiana Trial Rules regarding service, and whether such attempts at service comported with the Due Process Clause of the Fourteenth Amendment. As to the first issue, the Court examined the attempted service on the mother by certified mail under the requirements of T.R. 4.1 and by publication under the requirements of T.R. 4.13. The Court held that the requirements of T.R. 4.1 had not been met in that (1) T.R. 4.1(A)(1) requires that service by certified mail be accompanied by a return receipt showing receipt of the letter; (2) here, it is undisputed that the adoptive mother's attempt at service by certified mail was returned as undelivered; and (3) "unclaimed service upon a former residence is insufficient, in and of itself, to establish a reasonable probability that a party received notice or to confer personal jurisdiction. See Munster [v. Groce,] 829 N.E.2d [52, 59 (Ind. Ct. App. 2005)]." D.C. at 956. The adoptive mother's attempted service of process by publication was also insufficient under T.R. 4.13(A) in that her filings did not include the required submission of "supporting affidavits that diligent search has

been made that the defendant cannot be found, has concealed his whereabouts, or has left the state."

Regarding the second issue, whether the attempts at service comported with due process, the D.C. Court (1) cited cases holding that "[a]n elementary and fundamental requirement of due process in any proceeding, which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," and "[W]hen notice is a person's due, process which is a mere gesture is not due process[;] [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it;" and (2) concluded that, given the trial court's factual findings, the adoptive mother's efforts at service were not reasonably calculated to apprise birth mother of the adoption proceedings and therefore did not comport with due process. Id. at 957-58 (citations omitted). The Court noted: (1) the trial court made the factual determination that a diligent search would have uncovered the birth mother's actual address; (2) the trial court found that the adoptive mother could have easily obtained the birth mother's address through an inquiry to the Office of Child Support Enforcement; and (3) the adoptive mother and the father were in adequate contact with the mother to continue to receive her child support payments up to three days before the adoption hearing and after it, yet they were somehow not sufficiently in touch to notify her of the adoption action. The Court also found that T.R. 4.15, which provides for the validity of summonses which are technically defective but nevertheless satisfy due process, was inapplicable because the trial court determined that the adoptive mother's efforts at service were not reasonably calculated to inform the birth mother of the adoption proceedings, and they therefore did not satisfy due process.

With regards to service of notice, special attention must always be paid to due process concerns. In In Re Adoption of L.D., 938 N.E.2d 666 (Ind. 2010), the Court remanded the case to the trial court with directions to grant the birth mother's Trial Rule 60(B) motion, thereby vacating the child's adoption. The Court held that the service of process in this case did not meet the requirements of the Due Process Clause. The Court concluded that because the paternal grandparents and their counsel failed to perform the diligent search for the mother required by the Due Process Clause, notice and service by publication was insufficient to confer personal jurisdiction over the mother. L.D. at 671. The Court said that the dispositive issue in this appeal is whether the mother received the notice required by law that a case had been filed in court seeking the adoption of the child. Id. at 669. The Court opined that, if the notice was not adequate, the mother's T.R. 60(B) motion to set aside the adoption should have been granted for the reason that the adoption would have been void for want of personal jurisdiction. Id. The Court observed that both Indiana's adoption statute and Trial Rules set forth certain standards for notice and service of process that are applicable in adoption cases, but these rules operate under the Due Process Clause of the Fourteenth Amendment. Id. Notice and service of process that may technically comply with a state statute or the Trial Rules does not necessarily comport with due process. Id. The Court said that the adoption statute and the Trial Rules provide the mechanism of notice or service of process by publication, but the Due Process Clause demands a diligent search before attempting notice by publication. Id.

The L.D. Court noted that case law makes clear that service by publication is inadequate when a diligent effort has not been made to ascertain a party's whereabouts. Id. Among the cases cited by the Court were Smith v. Tisdal, 484 N.E.2d 42, 44 (Ind. Ct. App. 1995) (notice of adoption given by publication in an Indiana newspaper when mother was a resident of Alaska was held insufficient) and In Re Adoption of D.C., 887 N.E.2d 950, 957-58 (Ind. Ct. App. 2008) (there was not a diligent search where a simple inquiry would have uncovered mother's address). L.D. at 669-70. The L.D. Court observed that, where service by publication adequate has been found to confer jurisdiction, it has only been upon an adequate showing of diligent search. Id. at 670. The Court cited, inter alia, D.L.D. v. L.D., 911 N.E.2d 675, 679 (Ind. Ct. App. 2009), *trans. denied* (wife had attempted to serve husband by mail at his last known address, had tried to locate him at homes of his best friend and mother, and had enlisted help of the local prosecutor's office, all prior to seeking service by publication; Court found adequate showing of due diligence) and Bays v. Bays, 489 N.E.2d 555, 557 (Ind. Ct. App. 1986), *trans. denied* (father had attempted to locate mother by contacting her parents several times over the course of three years and by employing a private investigator, all prior to publishing notice; Court found these efforts constituted diligent search). L.D. at 670.

The L.D. Court commented that the paternal grandparents, who had previously successfully given notice to the mother at the maternal grandmother's address made no attempt to do so here, they made only the most obtuse and ambiguous attempt to ask the maternal grandmother about the mother's whereabouts, and they affirmatively concealed from the maternal grandmother the very fact that they were filing an adoption petition. Id. at 671. The Court said ,"[o]ne need look no further than the fact that [maternal grandmother and mother] filed their motion in court less than two weeks after Paternal Grandparents told [Maternal Grandmother] that the adoption had been granted to see how little effort would have been required for Paternal Grandparents to find Mother had they involved [Maternal Grandmother]." Id.

B. Right to Counsel for Parents

1. Court Advisement to Parents and Court Appointed Counsel

The rights afforded to parents in involuntary termination of the parent-child relationship statutes (IC 31-32-2-5, IC 31-32-4-3, and IC 31-35-1-12) apply in adoption proceedings where the petitioners seek to adopt over the objections of one or both of the natural parents. In Re Adoption of Baby W., 796 N.E.2d 364, 375 (Ind. Ct. App. 2003). IC 31-32-2-5 states that a parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship. IC 31-32-4-3(a) states that if: (1) a parent in proceedings to terminate the parent-child relationship does not have an attorney who may represent the parent without a conflict of interest; and (2) the parent has not lawfully waived the right to counsel under IC 31-32-5, the juvenile court shall appoint counsel for the parent at the initial hearing or at any earlier time. IC 1-35-1-12, the voluntary termination of parent-child relationship statute, includes in the required advisement to parents that "(7) the parents are entitled to representation by counsel, provided by the state if necessary, throughout any proceedings to terminate the parent-child relationship against the will of the parents." In Matter of Laney, 489 N.E.2d 551 (Ind. Ct. App. 1986), the Court opined that a putative father was entitled to court appointed counsel in proceedings by a private licensed child

placing agency to terminate his rights. See also Petition of McClure, 549 N.E.2d 392 (Ind. Ct. App. 1990), in which the trial court's granting of stepfather's adoption was reversed because the incarcerated indigent father requested but was denied court appointed counsel.

Practitioners should note that Indian parents have special rights in adoption proceedings of the Indian Child Welfare Act applies. The U.S. Supreme Court issued a decision on June 25, 2013, Adoptive Couple v. Baby Girl, 133S.Ct.2552, which explains the applicability of ICWA standards.

The trial court has the duty to advise parents of their right to counsel in a contested adoption proceeding. In Taylor v. Scott, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991), an adoption petition was filed by nonparent third parties who had been awarded custody of a child in a dissolution proceeding. The child's birth father was represented by three different attorneys, and fired his third attorney on the morning of the hearing. The trial court allowed birth father's third attorney to withdraw, and, without any judicial advisement to birth father about the right to counsel or the hazards of proceeding without counsel, the trial court proceeded with the hearing. The birth father did not request a continuance to obtain new counsel, but after the court had heard a substantial portion of the adoption petitioners' case, birth father requested a continuance to allow himself more time to organize his presentation of his case. The request for continuance was denied, the adoption petition was granted, and birth father appealed. The Court of Appeals reversed the trial court's granting of the adoption and held that birth father had three related statutory rights: (1) the right to be represented by counsel; (2) the right to have counsel provided if he could not afford private representation; and (3) the right to be informed of the two preceding rights, which the trial court had failed to do. The Court found that birth father had been deprived of an essential right and reversed and remanded for a new hearing at which he could be afforded the right to counsel. See In Re Adoption of G.W.B, 776 N.E.2d 952 (Ind. Ct. App. 2002), a case involving a stepfather's petition for adoption, in which the trial court refused to grant birth father's request for a continuance to have an attorney. The trial court said that birth father had a sufficient amount of time to hire an attorney in the two and a half months between his filing of his motion to contest the adoption and the hearing. The Court of Appeals reversed the trial court's granting of stepfather's petition for adoption, finding that: (1) the trial court did not advise birth father of his rights; (2) since there was only one hearing, there was no prior occasion upon which the trial court could have impressed upon birth father the serious consequences he faced if he represented himself; (3) consequently, birth father did not knowingly, intelligently, and voluntarily waive his right to counsel. Id. at 954. The Court remanded the case and instructed the trial court to vacate the hearing and all proceedings thereafter and conduct further proceedings consistent with the opinion. Id. at 954-55.

In Matter of Adoption of C.J., 71 N.E.3d 436 (Ind. Ct. App. 2017), the Court concluded that Birth Mother's due process rights were violated by the adoption court's failure to, at the beginning of the consent hearing, either afford Birth Mother with her right to counsel or otherwise ensure that her waiver of the right to counsel was knowing and voluntary. Id. at 444. Birth Mother was not given counsel until after Stepmother rested; Birth Mother contended that, had she been represented by an attorney during Stepmother's case-in-chief, her attorney could

have explored inconsistencies in the testimony of Father and Stepmother, which might have impacted the adoption court's decision on the necessity of Birth Mother's consent. The Court found it clear that the proceedings concerning Birth Mother's consent, including the time when she was not represented, flowed directly into the adoption court's decision to terminate her parental rights. Id. at 443. The Court disagreed with the adoption court's finding that Birth Mother had made a "voluntary choice" to proceed without the assistance of counsel. Id. at 444. Once Birth Mother learned that she might be able to have court appointed representation, she made it clear that she preferred to have the assistance of an attorney instead of proceeding pro se. Id. Nothing in the record demonstrated that the adoption court did anything to impress upon Birth Mother the serious consequences she faced if she represented herself. Id.

In In Re Adoption of A.G., 64 N.E.3d 1246 (Ind. Ct. App. 2016), the Court reversed the trial court's adoption decree and remanded for further proceedings. The Court held that the trial court abused its discretion in allowing Mother's court appointed attorney to withdraw from representation of Mother. Id. at 1249.

In In Re Adoption of K.W., 21 N.E.3d 96 (Ind. Ct. App. 2014), the Court held that: (1) the trial court's failure to rule on Father's request for court appointed counsel was a violation of his right to due process and his statutory right to counsel in an adoption proceeding; and (2) Father did not waive his statutory right to counsel. The Court noted that parental rights are among the most cherished and fundamental rights, and as such, require due process protections. Id. at 97-98. The Court agreed with Father that the trial court's ignoring his request for appointed counsel in the adoption proceedings was a violation of his due process rights. Id. at 98. IC 31-32-2-5 provides that a parent is entitled to counsel in any proceeding that may terminate the parent-child relationship. Id. Since the Court had previously held in Taylor v. Scott, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991) that this statute also applies to adoption proceedings, Father was entitled to representation. Id. Grandparents argued that Father waived his right to counsel when he filed a pro se appearance and other documents, and that he had waived his right to counsel by failing to ask for a hearing on his motion to appoint counsel, as well as failing to repeat his request for counsel at the adoption hearing. Id. In disagreeing with these arguments, the Court noted In Re G.P., 4 N.E.3d 1158, 1165 (Ind. 2014), which stated "'Nor have we ever held that a litigant who has been told that they would receive appointed counsel must continually request said counsel at each and every hearing where an attorney is not provided to her.'" The Court also noted that it was undisputed that Father was incarcerated, unable to hire an attorney, and had very little funds. Id. 99. K.W. at 98-99. The Court concluded that Father was entitled to representation, and he had not waived that right by filing pro se documents or failing to repeat his request for counsel. Id. at 99.

In In Re Adoption of Baby W., 796 N.E.2d 364 (Ind. Ct. App. 2003), the putative father appealed the dismissal of his objection to the adoption petition, arguing, *inter alia*, that he was denied due process because the adoptive parents' attorney never informed him of his right to counsel. The Court found putative father's argument without merit, noting that: (1) the letter sent to putative father by adoptive parents' attorney served as fair notice that the attorney

represented interests contrary to interests of putative father; (2) it was the duty of the adoption court, not adoptive parents' attorney, to inform putative father of his right to counsel; (3) a review of the record revealed that the adoption court did not inform putative father of his right to be represented by counsel; (4) putative father was represented by the same counsel during the totality of the paternity and adoption proceedings, including the adoption appeal, so any error in the trial court's failure to inform putative father of his right to counsel was harmless. Id. at 375-76. The Court affirmed the adoption. But see In Re Adoption of J.D.C., 751 N.E.2d 747, 752 (Ind. Ct. App. 2001) (failure to appoint counsel for putative father who had failed to register in putative father registry was harmless because his consent was irrevocably implied and counsel would not have been of assistance).

The Taylor v. Scott opinion does not require that a parent be indigent for the court to appoint counsel for a parent who wishes to contest an adoption. Since the Taylor opinion and Petition of McClure, 549 N.E.2d 392 (Ind. Ct. App. 1990) applied the statutory right to counsel in termination cases to adoption cases, arguably a parent in a contested adoption who does not have counsel that can represent the parent without a conflict of interest has the right to court appointed counsel even if the parent is not indigent. But see Matter of Adoption of A.M.K., 698 N.E.2d 845, 848 (Ind. Ct. App. 1998), in which the Court affirmed the trial court's decision terminating father's representation by court appointed counsel and ordering father to reimburse the county for counsel's fees because father misrepresented his indigent status. Certainly appointment of counsel is always within the trial court's discretion and provides more legal security for the child by removing a reason for appeal which could result in a reversal of the child's adoption.

2. Joint Representation of Birth Parents

If the court appoints an attorney to represent both parents in a contested adoption, the appointed attorney must first determine whether both parents may be represented by the same attorney without a conflict of interest. Although the authors are unaware of published adoption cases that discuss the issue of joint representation, the Indiana Supreme Court addressed the issue of joint representation in Baker v. County Office of Family & Children, 810 N.E.2d 1035 (Ind. 2004), an involuntary termination of parental rights case. In Baker, the parents, who were not married to each other, claimed that the trial court did not adequately inquire about their decision to go forward with representation by the same lawyer. The Court opined that the parents' joint representation did not result in a conflict of interest. Id. at 1042. The Court further said: (1) the parents preserved the same interests, namely maintaining parental rights over their child; (2) there was no solid evidence showing their interest were "adverse and hostile"; (3) the parents were not presenting evidence against one another; (4) neither parent stood to gain significantly by separate representation; (5) nothing suggested that representation by a single lawyer led to a fundamentally unfair hearing. Id.

C. Withdrawal of Consent and Motions to Contest to Adoption

Motions to contest adoptions are a related matter to withdrawals of consent to adoptions. An attorney who is representing a birth parent who wishes to contest an adoption should file a

motion to contest adoption with the court not later than thirty days after service of notice of the pending adoption, if the birth parent has not already done so. IC 31-19-10-1(b). IC 31-19-9-18 provides that the consent of a person who had been served with notice of an adoption petition is irrevocably implied if the person files a motion to contest the adoption, but then fails to appear at the hearing to contest the adoption and fails to prosecute the motion without unreasonable delay. See K.S. v. D.S., 64 N.E.3d 1209 (Ind. Ct. App. 2016) (Court held that the trial court's finding that Birth Mother's consent to the adoption was irrevocably implied due to her failure to appear and prosecute her motion to contest the adoption was clearly supported by the evidence); but see L.G. v. S.L., 76 N.E.3d 157 (Ind. Ct. App. 2017) (Court reversed the trial court's order dismissing Father's motion to contest the adoption, and held that Father's consent to the adoption could not be implied; trial court erred when it based its dismissal of Father's motion to contest the adoption on Father's failure to appear in person at the motions hearing, as that hearing was not the hearing set to contest the adoption). See also Matter of Adoption of J.R.O., 87 N.E.3d 37 (Ind. Ct. App. 2017) (Court held the trial court erred when it concluded that Father's consent to the adoption was irrevocably implied because he did not file a written motion to contest the adoption; the purpose of IC 31-19-9-18 was satisfied in this case by an oral objection; a motion to contest an adoption need not be in writing and that the oral objection by Father's counsel was a valid motion to contest the Adoption Petitioners' adoption of the child).

IC 31-19-10-2 provides that a person seeking to withdraw consent to adoption under IC 31-19-10-3 or contesting an adoption must give notice of intent to withdraw consent to or contest the adoption to all parties to the adoption and a person whose consent to adoption is required by IC 31-19-9. See In Re Adoption of K.M., 31 N.E.3d 533 (Ind. 2015) (Court held that: (1) IC 31-19-9-8 did not violate Mother's constitutional rights by deeming her consent to be irrevocably implied, without also holding a hearing on irrevocably implied consent, due to her failure to timely file a motion to contest the adoption; and (2) Mother was not entitled to equitable deviation in the interests of justice from the thirty day time limit).

A consent to adoption may be withdrawn not later than thirty days after the consent is signed if: (1) the court finds, after notice and opportunity to be heard afforded to the adoption petitioner, that the person seeking to withdraw consent is acting in the best interest of the person sought to be adopted; and (2) the court orders the withdrawal of consent. IC 31-19-10-3(a). IC 31-19-10-1(c) requires a person seeking to withdraw the person's consent to an adoption to file a motion to withdraw consent to adoption with the court not later than 30 days after service of notice of the pending adoption. IC 31-19-10-3(b)(1) provides that a consent to adoption may not be withdrawn after thirty days after the consent to adoption is signed. IC 31-19-10-3(b)(2) and (3) provide that a consent to adoption may not be withdrawn if the person who signs the consent appears, in person or by telephone or video conferencing, before a court in which the petition for adoption has been or will be filed or before a court of competent jurisdiction if the parent is outside Indiana, and acknowledges the following: (1) the person understood the consequences of the signing of the consent; (2) the person freely and voluntarily signed the consent; and (3) the person believes that adoption is in the best interests of the person to be adopted. IC 31-19-10-4 states that consent to adoption may be withdrawn only as provided IC 31-19-10 and may not be withdrawn after entry of the adoption decree.

Indiana case law on withdrawal of adoption consent includes In Re Adoption of N.J.G., 891 N.E.2d 60 (Ind. Ct. 2008), in which the Court reversed and remanded for further proceedings the trial court's denial of birth mother's request to withdraw her adoption consent. The Court held that mother's pre-birth consent was void because it was executed pre-birth and did not meet statutory requirements that consent be executed in the presence of the court, a notary public, or an authorized agent of state or county department of family and children or licensed child placing agency. None of the documents in the record that were signed after the child's birth met the requirements for valid consents to adoption.

See also In Re Adoption of M.L.L., 810 N.E.2d 1088 (Ind. Ct. App. 2004) (Court affirmed trial court's order granting the adoption despite the birth mother's signed revocation of her adoption consent; Mother had expressed desire for cousin to adopt the child before she was arrested or volunteered as confidential informant, so her consent was not given under threat of force or arrest; validity of the mother's consent was governed not by Tennessee law, but by Indiana law, and as such, executing her consent before a notary public was sufficient to make it valid); Bell v. Adoption of A.R.H., 654 N.E.2d 29 (Ind. Ct. App. 1995), in which the Court affirmed the trial court's denial of the birth mother's petition to withdraw her consent to adoption, finding no evidence that birth mother's consent was involuntary because birth mother's grief over her grandmother's death did not rise to the level of overcoming her volition. Birth mother's claim that she believed she had a two week grace period to change her mind after signing the consents was unsupported by written documents she had signed. Birth mother also failed to prove that withdrawal of her consent was in the children's best interests. Other cases on withdrawal of consent include Matter of Adoption of Johnson, 612 N.E.2d 569 (Ind. Ct. App. 1993) (Court affirmed order allowing birth mother to withdraw consent because adoptive parents had been diagnosed with AIDS and birth mother feared the adoptive parents' deaths would leave child without parents); Matter of Adoption of H.M.G., 606 N.E.2d 874 (Ind. Ct. App. 1993) (Court found that sixteen-year-old birth mother's consent given twenty-seven days prior to child's birth was not void but voidable; voidable pre-birth consent could be ratified by post-birth act which sufficiently manifests a present intention to give the child up for adoption; case remanded for full evidentiary hearing on question of post-birth ratification); Matter of Adoption of Hewitt, 396 N.E.2d 938 (Ind. Ct. App. 1979) (the fact that eighteen-year-old mother's consent had been given in hospital two days after child's birth was insufficient to void her consent; emotions, tensions and pressure are insufficient to void consent unless a parent can show they rose to the level of overcoming parent's volition).

A birth parent may also allege that consent is invalid because it was obtained through fraud or duress or any other consent-vitiating factor. To be valid, consent must be made with knowledge of the essential facts. See Hewitt, 396 N.E.2d 938 (Ind. Ct. App. 1979); Matter of Adoption of Topel, 571 N.E.2d 1295 (Ind. Ct. App. 1991) (father's consent was allowed to be withdrawn because he did not understand that consenting to child's adoption meant he would have no right to see the child again); Adoptive Parents of M.L.V. v. Wilkens, 598 N.E.2d 1054 (Ind. 1992) (putative father whose consent to adoption was not necessary could not prevail on fraud allegation based on adoptive parents having permitted visitation between putative father and

children); Matter of Snyder, 438 N.E.2d 1171 (Ind. Ct. App. 1981) (mother did not meet burden of proof that her facially valid adoption consents had been procured by undue influence; essence of undue influence is destruction of one's free agency).

Consent may be deemed to be involuntary if there are too many suspect circumstances surrounding the consent. In In Re Adoption of M.P.S., Jr., 963 N.E.2d 625 (Ind. Ct. App. 2012), the Court reversed the trial court's judgment which denied the mother's request to set aside the child's adoption by the grandparents. The Court held that the mother's consent to adoption of her child was involuntary, as she was assured by the grandparent's attorney that it was revocable and she did not intend to relinquish contact with her child. M.P.S., Jr. at 630. The Court cited Matter of Adoption of Topel, 571 N.E.2d 1295, 1298-99 (Ind. Ct. App. 1991), which held that a parent may not validly consent to the termination of parental rights where that consent is conditioned upon retaining a right to exercise visitation with that child. M.P.S., Jr. at 629. The Court observed that the parents, the grandparents, and the attorney anticipated that parental contact would survive the execution of the consents to adopt. Id. at 630. The Court noted that both parents clearly expected live-in contact, but the mother's expectation was ultimately not met; at the very least the grandparents had promised her visitation. Id. The Court said that even if it is assumed that the mother's execution of the consent was not a product of threats and coercion, the mother's consent was nevertheless involuntary. Id. The Court noted that the mother did not manifest an intention to permanently relinquish all parental rights. Id.

The M.P.S. Court noted several instances of noncompliance with applicable adoption statutes. The Court observed that IC 31-19-9-2 provides that a consent to adoption may be executed at any time after the birth of the child in the presence of the court, a notary public, or any authorized agent of DCS or a licensed child placement agency. M.P.S. at 629. The Court said that it is undisputed that the consents at issue were not signed before a notary public, since the attorney's notary commission had expired. Id. The Court determined that the statutory compliance could not be liberally construed in an adoption matter, and so the intent of the statute could not be satisfied by the Indiana Grandparent's argument that their attorney functioned as an officer of the court. Id. The Court also found that there was a lack of compliance with statutory home study procedures, and concluded that the trial court lacked adequate information to support the factual conclusions incorporated in the adoption decree. Id. at 631. The Court noted: (1) the social worker admitted that she was not licensed to perform home studies; (2) no court-ordered waiver of the home study for grandparent petitioners as allowed by IC 31-19-8-5 had been made; (3) testimony at the post-adoption hearing clearly established that the home study did not adequately apprise the trial court of the totality of relevant circumstances so that the trial court could assess the child's best interests. Id. at 630-31. The Court observed that the social worker who did the home study was completely unaware of the existence of the grandmother's minor child who lived in Virginia and with whom the grandmother did not exercise parenting time. Id. at 631. Lastly, the Court found that it was unclear whether a comprehensive criminal background check was performed in accordance with IC 31-9-2-22.5. Id.

Given these irregularities, the M.P.S. Court held that the circumstances surrounding notice of the adoption hearing indicated that the mother's consent was not consensual. Id. at 625. There was

discrepancy between the mother's and the Father's testimony on whether the mother received notice of the adoption hearing, and the fact that the court order setting the hearing listed for distribution only the grandparents' attorney. Id. at 631. Although IC 31-19-2.5-4(1) provides that notice does not have to be given to one whose consent has been filed with the petition to adopt, the Court nevertheless found the circumstances surrounding the final hearing relevant to an inquiry as to the voluntariness of the mother's consent. Id. The Court observed that: (1) the circumstances and timing of the mother's trip to Virginia that the father and the grandparents planned seemed potentially calculated to keep the mother from attempting to withdraw consent; and (2) parents' absence at the hearing allowed the grandparents' misrepresentations that parents had never independently cared for the child and that the grandparents had cared for him continuously since his birth to go unchallenged. Id. at 631-32. The Court characterized the record as "replete with evidence of procedural error, involuntariness, and fraud upon the court." Id. at 632. The Court concluded that the mother had met her burden to set aside the adoption in light of the extremely irregular and—to some extent—fraudulent circumstances surrounding the child's adoption. Id.

The ability to withdraw consent also extends to DCS when the child is a ward of DCS. See IC 31-19-9-1(a)(3) (providing that 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 local [DCS] office having lawful custody of the child whose adoption is being sought) (emphasis added). 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 the 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 the foster parents' adoption petition; consequently, the adoption decree was entered without the consent required by statute, and was thus invalid.

In N.W.R., the child was placed with the foster parents when he was only a few days old, and was adjudicated a CHINS in December 2009. The child's biological paternal aunt asked DCS in December 2009 to place the child with her in East Chicago. The child's three older siblings had already been placed with her, and during the pendency of the case, the aunt adopted the three siblings. Although DCS refused to do so, the aunt persisted in contacting DCS, and DCS allowed the aunt and the child's siblings to visit the child starting in May 2010. The visitations increased between May 2010 and the time of the December 2010 hearing. The parents' parental rights were terminated in September 2010, and the foster parents filed a petition to adopt the child. DCS executed a consent to the adoption by the foster parents, but thirty days later, DCS filed a motion to intervene in the 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, the aunt filed a petition to adopt the child. 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 the foster parents' petition to adopt the child.

The N.W.R. Court held that the trial court should have granted DCS' motion to withdraw its consent to the 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 the foster parents' adoption petition. Id. at 117. 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." 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. In N.W.R., DCS executed a written consent to the adoption by the foster parents, but later filed a motion to intervene and withdraw its consent. Id. at 112. The county director of the DCS office testified in part that that DCS sought to withdraw its consent because the department 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 the foster parent's adoption, and that because of this misunderstanding, the aunt had not been fully investigated as a possible placement. Id. at 114. 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 N.W.R. Court further concluded that DCS' lack of proper consent to the 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. 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 the 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 change and 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. The most important interests 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. 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. The N.W.R. 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 N.W.R. 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 the aunt as a potential adoptive placement; (2) DCS shall then file its report and recommendation regarding placement with the aunt; (3) DCS shall file its consent to adoption by either the aunt, the foster parents, or both; (4) the trial court must reconsider evidence from the July 2011 hearing along with DCS' new report on the 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 supports its decision. Id.

D. Legal Grounds for Dispensing with Consent

IC 31-19-9-1 provides that the following persons must consent to the child's adoption: (1) each living parent of the child born in wedlock; (2) the mother of a child born out of wedlock and the father whose paternity has been established by a court proceeding other than the adoption proceeding, except as provided in IC 31-14-20-2 [failure to register with putative father registry and its effect on adoption proceedings], or by a paternity affidavit unless the putative father gives implied consent under IC 31-19-9-15; (3) each person, agency, or local [DCS] office having lawful custody of the child whose adoption is being sought; (4) the court having jurisdiction of the custody of the child if the legal guardian or custodian is not empowered to consent to adoption; (5) the adoptive child who is more than fourteen years old; (6) the adoptive child's spouse. The consent of a father who has signed a paternity affidavit is required unless another provision allowing the court to dispense with his consent, such as abandonment or failure to pay child support, applies. See In Re Adoption of A.K.S., 713 N.E.2d 896, 898 (Ind. Ct. App. 1999) (paternity affiant father was entitled to notice of adoption). See also Matter of Adoption of M.A.S., 695 N.E.2d 1037, 1039 (Ind. Ct. App. 1998) (adoption reversed due to incorrect legal notice to incarcerated father who had signed a paternity affidavit and whose consent was required). In In Re Adoption of J.E.H., 859 N.E.2d 288 (Ind. Ct. App. 2006), the Court affirmed the trial court's denial of the stepmother's petition to adopt her two stepsons, ages fourteen and ten, because the fourteen-year-old stepson had not consented to the adoption as required by IC 31-19-9-1(a)(5), and because it was not in the best interests of the ten-year-old child to have a different mother than his brother.

After hearing evidence, the adoption court may make a finding that a required consent may be dispensed with in situations listed at IC 31-19-9-8 through 10, IC 31-19-9-12, IC 31-19-9-15, and IC 31-19-5-18. See In Re Adoption of J.M., 10 N.E.3d 16, 20-21 (Ind. Ct. App. 2014) (holding that when there are competing adoption petitions, and parents have consent to one petitioner's request to adopt the children, but not the other petitioner's request to adopt the children, a consent hearing must be held; after finding that parents' consents were not necessary, the trial court was not required to determine whether their prior consents were in the child's best interests).

1. Standard and Burden of Proof

The standard of proof in contested adoptions is clear and convincing when the adoption petitioners are requesting that the court dispense with a needed consent. IC 31-19-10-0.5 provides that the party bearing the burden of proof in a proceeding to contest an adoption or withdraw consent to adoption must prove the party's case by clear and convincing evidence. In In Re Adoption of M.A.S., 815 N.E.2d 216, 220 (Ind. Ct. App. 2004), the Court looked to a statute on burden of proof in termination of the parent-child relationship (IC 31-37-14-2) and guardianship case law (In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002)) in discussing the standard of proof in adoptions where the petitioner seeks to prove that the parent's consent to adoption is unnecessary. The Court also considered IC 31-19-9-8(a)(11)(A), which allows the court to dispense with the need for parental consent if an adoption petitioner proves by clear and convincing evidence that the parent is unfit and that adoption is in the child's best interests. The Court concluded that the stepfather, who had petitioned for adoption, met the requirement of proving by clear and convincing evidence that the father's consent was not required. The Court also quoted the following language from B.H. in applying the clear and convincing standard:

> In reviewing a judgment requiring proof by clear and convincing evidence, an appellate court may not impose its own view as to whether the evidence is clear and convincing but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence. In Re Guardianship of B.H. at 288.

Recent case law has affirmed this standard of proof. In In Re Adoption of S.W., 979 N.E.2d 633 (Ind. Ct. App. 2012), the Court held that Maternal Grandparents had the burden of proving their petition for adoption without Father's consent by "clear and convincing evidence." Id. at 640. Father claimed that Maternal Grandparents had the burden of proving the elements of IC 31-19-9-8(a)(2) by "clear, cogent, and indubitable evidence." The Court disagreed, observing that in In Re Adoption of M.A.S., 815 N.E.2d 216, 219-20 (Ind. Ct. App. 2004), the Court had examined the applicable law and held that the burden of proof for an adoption without consent, under any of the subsections in IC 31-19-9-8, is that of "clear and convincing evidence." S.W. at 640.

IC 31-19-10-1.2 clarifies who has the burden of proving that the court should dispense with the need for a parent's consent to adoption. The adoption petitioner has the burden of proof in most

situations under this statute. The burden depends on which statutory exception to the need for the consent is alleged in the adoption petition.

If the parent properly files a motion to contest the adoption, the adoption petitioner carries the burden of proof that parental consent is not required in the following situations: (1) IC 31-19-9-8(a)(1) (abandonment); (2) IC 31-19-9-8(a)(2) (knowing failure to support or failing without justifiable cause to communicate significantly with the child for at least one year); (3) IC 31-19-9-8(a)(9) (parent judicially declared incompetent or mentally defective); (4) IC 31-19-9-8(a)(11) (parent unfit and adoption would serve child's best interests); (5) IC 31-19-9-9 (parent convicted of and incarcerated at time of filing of adoption petition for murder, causing suicide or voluntary manslaughter, victim is the other parent, and dispensing with parental consent is in child's best interests); (6) IC 31-19-9-10 (parent convicted and incarcerated at time of filing of adoption petition for specific crimes against child, child's sibling, or step-sibling and dispensing with parental consent in child's best interests).

If the biological father properly files a motion to contest the adoption, and the petition for adoption alleges that the biological father's consent is unnecessary under: (1) IC 31-19-9-8(a)(4)(B) (child born out of wedlock who was conceived as a result of child molesting); or (2) IC 31-19-9-8(a)(4)(C) (child born out of wedlock who was conceived as a result of sexual misconduct with a minor), the parent has the burden of proving that the child was not conceived under circumstances that would cause the parent's consent to be unnecessary under IC 31-19-9-8(a)(4). The absence of a criminal prosecution and conviction is insufficient to satisfy the biological father's burden of proof. IC 31-19-10-1.2(b). If a petition for adoption alleges that a legal guardian or lawful custodian's consent to adoption is unnecessary under IC 31-19-9-8(a)(10) (legal guardian or lawful custodian's failure to consent is not in child's best interests), the legal guardian or lawful custodian has the burden of proving that withholding consent to adoption is in the child's best interests. IC 31-19-10-1.2(d).

It is crucial that a parent who files a motion to contest an adoption prosecute the motion timely. IC 31-19-10-1.2(g) states that if a court finds that the person who filed the motion to contest is failing to prosecute the motion "without undue delay," the court shall dismiss the motion to contest with prejudice, and the person's consent to the adoption shall be irrevocably implied. See In Re Adoption of K.M., 31 N.E.3d 533 (Ind. 2015) (Court held that: (1) IC 31-19-9-8 did not violate Mother's constitutional rights by deeming her consent to be irrevocably implied, without also holding a hearing on irrevocably implied consent, due to her failure to timely file a motion to contest the adoption; and (2) Mother was not entitled to equitable deviation in the interests of justice from the thirty day time limit).

IC 1-19-10-1.4 gives direction on the basis of the court's determination if the adoption petitioner is seeking to have the need for parental consent dispensed with because the parent is unfit and dispensing with parental consent is in the child's best interests (IC 31-19-9-8(a)(11)). IC 31-19-10-1.4 states that the court may not base its determination solely on a finding that a:
(1) petitioner for adoption would be a better parent for a child than the parent who moved to contest the adoption; or (2) parent has a biological link to a child sought to be adopted.

IC 31-19-10-5 states that the court shall set a hearing to contest the adoption whenever a motion to contest adoption is filed. IC 31-19-10-7(a) states that the court may send all notices of the filing of a motion to contest an adoption; conduct bifurcated hearings; and issue an order protecting the anonymity of a petitioner for adoption. IC 31-19-10-7(b) states that the order protecting anonymity may include an order directed to an attorney who represents a party contesting or seeking to withdraw consent to adoption. IC 31-19-10-6 provides that, after hearing evidence, the court shall: (1) dismiss the adoption petition if the court: (A) finds that the person who moved to contest the adoption has established that it is in the child's best interests that the motion to contest the adoption be granted; (B) finds that a required consent has not been obtained in writing or implied; or (C) permits a necessary consent to be withdrawn; or (2) deny the motion to contest the adoption. If the court dismisses the adoption, IC 31-19-11-5 states that the court shall determine the person who should have custody of the child.

Practitioners should also note that there are criminal convictions which bar a person from adopting a child. See IC 31-19-11-1(c). See also In Re Adoption I.B., 32 N.E.3d 1164 (Ind. 2015) (holding that IC 31-19-11-1(c)(15), which states that a trial court may not grant an adoption if the petitioner has been convicted of neglect of a dependent, was constitutional, and barred Maternal Grandmother and Fiancée from adopting the children).

2. Abandonment

IC 31-19-9-8(a)(1) states that consent to adoption is not required from "[a] parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption." Note that the statute specifies the timing of the filing of the petition for adoption to plead abandonment as a reason for the court to dispense with the need for parental consent. Abandonment may be actual or constructive. For the court to determine abandonment, it is only necessary that the parent voluntarily fail to perform his required parental duties and obligations. Emmons v. Dinelli, 133 N.E.2d 56, 63 (Ind. 1956). Abandonment as used in the statute means any conduct by the parent which evinces an intent or settled purpose to forego all parental duties and to relinquish all parental claims to the child. In Re Adoption of Childers, 441 N.E.2d 976, 979 (Ind. Ct. App. 1982). IC 31-19-9-8(b) states that "[i]f a parent has made only token efforts to support or to communicate with the child, the court may declare the child abandoned by the parent."

In K.S. v. D.S., 64 N.E.3d 1209 (Ind. Ct. App. 2016), the Court held that the trial court's finding that Birth Mother abandoned the child was clearly supported by the evidence. Id. at 1215. The Court listed the following evidence which supported the trial court's finding: (1) it was undisputed that Birth Mother had not visited the child since March 2015; (2) according to Father, Birth Mother stopped showing up for visits, and when he contacted her to see if she was coming to visit, he received no response; (3) after March 2015, Birth Mother never requested visitation, and the dissolution court suspended her visitation in September 2015; (4) Birth Mother texted Father in November 2015 asking to talk to the child on the phone, but Father did not allow the telephone call because he believed the dissolution court order prohibited Mother from having

contact with the child; (5) Adoptive Mother testified that Birth Mother had sent a card to the child in December 2015, but there was no support in the record for Birth Mother's assertion that Father and Adoptive Mother prevented the child from receiving it. Id. at 1214-15. The Court held that Birth Mother's "meager and belated" efforts to contact the child did not undermine the trial court's finding that she had abandoned the child for the purpose of the adoption statutes. Id. at 1215.

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 because of Mother's drug use. 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. However, Father and Fiancée were aware that Mother would see the child when the child visited his maternal grandmother. 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. 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" and that the relevant time period was six months before the filing of the adoption petition. J.T.A. at 1254. 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.

3. Lack of Significant Contact

IC 31-19-9-8(a)(2) provides that consent to adoption is not required of a parent of a child in the custody of another person if, for a period of at least one year, the parent fails, without justifiable cause, to communicate significantly with the child when able to do so. Case law provides that efforts of a noncustodial parent to hamper or thwart communication between parent and child are relevant in determining the ability to communicate; see In Re Adoption of Augustyniak, 505 N.E.2d 868, 871 (Ind. Ct. App. 1987); Lewis v. Roberts, 495 N.E.2d 810, 812-813 (Ind. Ct. App. 1986).

Indiana cases in which the Court of Appeals found that parental consent could be dispensed with due to failure to significantly communicate with the child include: In Re Adoption of E.A., 43 N.E.3d 592 (Ind. Ct. App. 2015), trans. denied (Court affirmed the trial court's order granting Stepfather's adoption petition; although imprisonment does change what constitutes significant communication it does not alone justify a parent's failure to maintain significant communication); In Re Adoption of O.R., 16 N.E.3d 965, 974-5 (Ind. 2014) (Court affirmed the

trial court's order granting adoption as there was clear and convincing evidence that Father's consent to the child's adoption was not required because, while the child was in the custody of another person for at least one year, Father failed without justifiable cause to communicate significantly with the child when able to do so; Father had communicated with the child one time in six years, had never tried to write letters while incarcerated, never requested visits via court order, and adoption was in the child's best interests); In Re Adoption of S.W., 979 N.E.2d 633 (Ind. Ct. App. 2012) (Court affirmed trial court's order granting Maternal Grandparents' adoption of the child because of Father's lack of significant communication with the child; the Court opined that Maternal Grandparents were not required to prove that Father had *no* communication with the child, but they had to prove that he, for a period of one year, "fail[ed] without justifiable cause to communicate *significantly* with the child when able to do so", and further noted that, under the facts presented, it could not say that the trial court clearly erred by failing to consider Paternal Grandmother's visits with the child as significant communication by Father); In Re Adoption of T.W., 859 N.E.2d 1215 (Ind. Ct. App. 2006) (father conceded that he had not attempted to personally communicate with children for three years by time of adoption trial; even though guardianship court had denied father in-jail visitation, guardianship court had not denied written or telephonic communication); In Re Adoption of C.E.N., 847 N.E.2d 267 (Ind. Ct. App. 2006) (Court affirmed trial court's decision that due to mother's sporadic, brief visits and lack of communication with the child for several years, mother's consent was not required); In Re Adoption of R.L.R., 784 N.E.2d 964 (Ind. Ct. App. 2003) (Court found birth mother's consent to adoption was not required and reversed trial court's denial of stepmother's adoption petition; child had no direct or indirect contact with birth mother for more than three years and child had established strong, healthy relationship with stepmother); Rust v. Lawson, 714 N.E.2d 769 (Ind. Ct. App. 1999) (father's failure to communicate with child for a twenty-two month period warranted trial court's granting of guardian's adoption petition); In Re Adoption of J.P., 713 N.E.2d 873 (Ind. Ct. App. 1999) (mother's brief monthly visits to child who had been adjudicated CHINS were not significant communications; foster parent's petition for adoption was granted); Adoption of T.H. v. Perry, 677 N.E.2d 605 (Ind. Ct. App. 1997) (father filed but later dismissed paternity action and did not visit child for a period of more than two years); Williams v. Townsend, 629 N.E.2d 252 (Ind. Ct. App. 1994) (father, who was serving fifty year prison sentence for murdering his child's mother, had abandoned child by sending only occasional letters and cards via child's paternal aunt and failing to take legal action to enable visitation or communication); In Re Adoption of Subzda, 562 N.E.2d 745 (Ind. Ct. App. 1990) (father did not call, visit, or correspond with the child for a period of two years despite knowledge of child's address and access to transportation); Matter of Adoption of Herman, 406 N.E.2d 277 (Ind. Ct. App. 1980) (incarcerated father had the means of regular communication available to him through letters and telephone calls, was not prevented from communicating with the child by the birth mother, took no measure to enforce his visitation rights through the courts, and could have enlisted the help of the child's paternal grandparents who lived in the same town as the child); Rosell v. Dausman, 373 N.E.2d 186 (Ind. Ct. App. 1978) (mother had trouble picking up the children for visitation but was not prevented from making telephone calls or corresponding; nevertheless she exhibited only complete silence toward the children); In Re Adoption of Thornton, 358 N.E.2d 157 (Ind. Ct. App. 1976) (while birth mother may not have known where child was, nothing indicated that she had inquired about

the child; statute contemplates actual communication with the child and not merely involvement in litigation relating to the child's custody).

Cases in which the Court of Appeals opined that parental consent could not be dispensed with due to alleged failure to significantly communicate include: In Re The Adoption of E.M.L., 103 N.E.3d 1110 (Ind. Ct. App. 2018) (Court held that the trial court erred when it found that Father failed without justifiable cause to communicate significantly with the child in the year before the adoption petition; the evidence was clear and undisputed that Mother made repeated efforts to curtail and completely terminate Father's ability to contact or communicate with the child); E.B.F. v. D.F., 93 N.E.3d 759 (Ind. 2018) (Court held that Mother failed to have significant communication with the child for a one year period; however, Mother also had justifiable cause for her failure to communicate during this period as Father and Stepmother thwarted Mother's attempts to communicate with the child); In Re Adoption of J.S.S., 61 N.E.3d 394 (Ind. Ct. App. 2016) (Court affirmed trial court's decision denying Foster Parents' petition to adopt the children, and held that evidence must favorable to the trial court's determination showed that Father had never gained the ability to contact the children, which supported the trial court's decision that Foster Parents had not met their burden of proof); E.W. v. J.W., 20 N.E.3d 889 (Ind. Ct. App. 2014) (Court held that trial court did not err in determining that Mother's consent was still required on the grounds of failure to communicate with the children; under the circumstances and limitations, Mother's communication with the children was significant, the one year period to which Appellants pointed was long in the past, and Father actively thwarted and prevented Mother from communicating with the child for over a year leading up to the adoption hearing); D.D. v. D.P., 8 N.E.3d 217 (Ind. Ct. App. 2014) (Court held that the trial court did not err in denying Stepfather's petition to adopt the children on the grounds of Father's failure to communicate with the children; Father had demonstrated justifiable cause for his failure to communicate with the children, as Mother had thwarted and hampered all of Father's efforts to communicate with the children); McElvain v. Hite, 800 N.E.2d 947, 949 (Ind. Ct. App. 2003) (Court reversed trial court's grant of stepfather's adoption petition; father had visited children without mother's knowledge while children were staying with a friend; father also had overnight visitation and visited one of the children at school after she had injured herself); In Re Adoption of Augustyniak, 505 N.E.2d 868 (Ind. Ct. App. 1987), reh'g granted at 508 N.E.2d 1307 (father lived in Florida and could not visit child regularly but sent child cards and gifts and offered to drive to Indiana for a visit which mother refused); Matter of Adoption of Thomas, 431 N.E.2d 506 (Ind. Ct. App. 1982) (Louisiana divorce decree denied visitation to father, but he attempted communication; personal visits by paternal grandmother from Louisiana with children constituted indirect significant communication; father paid substantial child support without any legal compulsion to do so); Lewis v. Roberts, 495 N.E.2d 810 (Ind. Ct. App. 1986) (incarcerated adjudicated father's letters, gifts, visits and requests for visits displayed a continuing interest in his daughter).

4. Failure to Support

IC 31-19-9-8(a)(2)(B) provides that the court may dispense with parental consent if the child is in the custody of another person and 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.

In In Re Adoption of M.S., 10 N.E.3d 1272 (Ind. Ct. App. 2014), the Court held that the trial court had correctly determined that Mother had failed to pay child support for over one year, that she had the ability to pay but failed to do so, and that the adoption was in the child's best interests. The trial court had aggregated Mother's missed child support payments prior to January 2011, which totaled over $2,900; the trial court then divided this total by Mother's weekly support requirement, and determined that she had not paid support for a total of 58 weeks, which was more than one year. Id. at 1277. Mother argued that this aggregation was an improper calculation of the statutory period for failure to pay child support. Id. at 1278. The Court noted that this calculation did not matter, as Mother failed to provide support to the child for one continuous year, from January 12, 2011, to January 18, 2012. Id. at 1279. However the Court, noting Adoption of Infants Reynard, 251 N.E.2d 413 (Ind. 1969), opined that small token amounts of child support could not be paid in order to avoid "comply with the terms of the statute and thus necessitate [a parent's] consent." M.S. at 1279-80. In light of this reasoning, Mother's single payment of $300 during a one year and four month time period was insufficient to require her consent. Id. at 1280.

In In Re Adoption of T.L., 4 N.E.3d 658 (Ind. 2014), the Court held that there was sufficient evidence to support the trial court's decision granting the adoption on the grounds that Father had knowingly failed to provide for the care and support of the child when able to do so as required by law or judicial decree. Father's history of payment and non-payment of child support supported the trial court's conclusion that Father was able to pay child support while incarcerated, but chose not to do so, and this finding supported the trial court's judgment that Father's consent to the adoption was not required; consequently, the Court held that the trial court's judgment was not clearly erroneous. Id. at 662-3. In response to Father's argument that he could not pay child support because he was incarcerated, the Court noted that it had said before that it "cannot imagine that the legislature intended for incarcerated parents to be granted a full reprieve from their child support obligations" and that such a position would "cut against the established common law tradition that has long held parents responsible for the support of their offspring." Id. at 663 (citing Lambert v. Lambert, 861 N.E.2d 1176, 1179 (Ind. 2007)). The Court determined that the proper way to decide the child support obligation of an incarcerated parent was to use the "non-imputation approach" described in Lambert, which would impose a minimal level of support without ignoring the realities of incarceration. T.L. at 663 (citing Lambert at 1181). The Court opined that Father's own actions demonstrated that Father had not been incarcerated during the entire duration of the support order, and that even while Father was incarcerated, he demonstrated an ability to pay at least some support. T.L. at 663. In determining that Father was able to pay child support, the Court noted the following: (1) Father was ordered to pay child support in 2002, and was not incarcerated until November 2004; (2) From 2002 until his 2004 incarceration, Father made only one child support payment; (3) Even if Mother and Father agreed that Father did not have to pay child support as long as he was involved in the children's lives, parties cannot contract away child support rights, since the child support is a right that belongs to the child; and (4) During the time that Father testified he was incarcerated,

he made a child support payment, which indicated Father had the ability to pay child support even while he was incarcerated. Id. at 662-3.

In In Re Adoption of J.L.J., 4 N.E.3d 1189 (Ind. Ct. App. 2014), the Court affirmed the trial court's orders which found that, *inter alia*, Father's consent to the Twins' adoption was not required. Id. at 1200. The Court found that sufficient evidence supported the trial court's determination that Father's consent to adoption was not required based on his knowing failure to provide care and support for the Twins despite an ability to do so. Id. at 1197. The Court noted the parties did not dispute that Father had never paid any child support. Id. at 1194. The Court observed that, although Father testified he was unaware of the paternity determination or that he had been directed to pay support, it is well settled that parents have a duty to support their children regardless of a court mandate to pay. J.L.J. at 1194, citing In Re Adoption of N.W., 933 N.E.2d 909, 914 (Ind. Ct. App. 2010), *opinion adopted*, 941 N.E.2d 1042 (Ind. 2011). The Court observed that, while Guardian did not offer documentation of Father's financial resources, there was sufficient evidence that Father failed to provide for the Twins to the best of his ability: (1) Father claimed that he supported the Twins by purchasing car seats, diapers, and formula; (2) Father was able to afford his own residence in Benton Harbor, and he had funds to purchase cigarettes and travel back and forth between Benton Harbor and South Bend; (3) Father admitted that he intentionally did not pay support based on his belief that he was satisfying his obligation by "taking care of" the Twins; (4) Father clarified that he could work but couldn't play basketball anymore; (5) Father testified that his Social Security disability payments were stopped in April of 2010, based on Social Security's finding that he was *not* disabled (emphasis in opinion.) Id. at 1195-97.

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. When Father was awarded custody of the child in 2004 because of Mother's drug use, Mother was ordered to pay child support. Mother never paid any child support until the adoption petition was filed in 2011 by Fiancée. In affirming the trial court's denial of the adoption petition, the Court opined 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 quoted IC 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. However, the Court found that the record was 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. Practitioners should also note the J.T.A. opinion contains helpful language regarding adoptions by the custodial parent's domestic partner when the parties are not married.

In Matter of Adoption of A.M.K., 698 N.E.2d 845 (Ind. Ct. App. 1998), the Court of Appeals affirmed the trial court's order dispensing with parental consent of the birth father who had signed a paternity affidavit due to the birth father's failure to support the child. The Court noted that the paternity affidavit signed shortly after the child's birth acknowledged the father's obligation to support the child. Id. at 847. The following evidence supported the trial court's determination: (1) birth father withdrew from high school prior to the child's birth and did not work or offer financial support for the first year of the child's life; (2) birth father testified he paid a total of $300.00 to $400.00 in support which he paid to the paternal grandmother; (3) birth father was voluntarily unemployed; (4) birth father made no claim that he was unable to work or suffered an impairment which prevented him from working. The A.M.K. opinion is noteworthy because it indicates that birth father had a duty to pay child support based on his execution of the paternity affidavit. See also Irvin v. Hood, 712 N.E.2d 1012 (Ind. Ct. App. 1999), in which the Court of Appeals affirmed the trial court's order dispensing with the consent of birth father who signed a paternity affidavit but did not support the child financially for three years despite the father's earning regular income and being able to travel to Europe to play rugby. The Court opined that Indiana law imposes upon a parent a duty to support his children which exists apart from any court order or statute. Id. at 1014.

Contempt orders may play a role in adoption based upon a parent's failure to pay child support when able to do so. See In Re Adoption of K.F., 935 N.E.2d 282 (Ind. Ct. App. 2010) and In Re Adoption of K.S., 980 N.E.2d 385 (Ind. Ct. App. 2012).

In In Re Adoption of K.F., 935 N.E.2d 282 (Ind. Ct. App. 2010), the Court affirmed trial court's grant of the stepmother's petition to adopt the mother's two children, and held that the evidence was sufficient to show that the trial court did not err when granting the stepmother's adoption petition without the mother's consent. In granting the stepmother's petition for adoption, the trial court noted the dissolution court's contempt findings against the mother on three occasions for failure to pay child support. The stepmother presented evidence that the mother had entered into three agreed orders for contempt regarding the mother's failure to pay child support; these agreements included the mother's concessions that she had knowingly and intentionally failed to pay child support as ordered. Id. In response to this evidence the mother (1) testified that she has struggled to maintain employment, and that she has been mostly unemployed, but did not testify about wages or living expenses; and (2) contended that she suffered from bipolar disorder, and the stepmother did not prove that she could work in spite of her disability. Id. The Court determined that the mother's admission in the agreed entries of her knowing and intentional

failure to pay child support for years could not now be contradicted after the fact with an excuse of mental illness. Id.

In In Re Adoption of K.S., 980 N.E.2d 385 (Ind. Ct. App. 2012), Father and Stepmother appealed the trial court's denial of their Verified Petition for Adoption of Father's child by Stepmother. The Court reversed and remanded for further proceedings to determine whether the adoption will be in the child's best interests, and held that Mother's consent to the adoption of her child by Stepmother was not required due to Mother's failure to provide child support when able to do so. Id. at 389-90. The Court noted that Father and Stepmother were required to prove by clear and convincing evidence that Mother's consent was not required. K.S. at 388. The Court opined that, because Mother was found in contempt for failure to pay child support, the trial court must necessarily find that Mother had the ability to financially support the child and willfully failed to do so. Id. at 389. The Court said that, because the child support order was issued on January 11, 2010, and made retroactive to December 3, 2009, and the petition for adoption was filed on December 19, 2011, Mother willfully failed to pay support for more than one year. Id. The Court also noted that a petition for adoption is not automatically granted following a showing that a natural parent failed to provide support when able to do so. Id. The Court observed that, once the statutory requirements are met, the court may then look to the arrangement that will be in the best interest of the child. Id.

Other cases which affirmed the trial court's determination to dispense with parental consent due to knowing failure to support include: In Re Adoption of D.C., 928 N.E.2d 602 (Ind. Ct. App. 2010) (Father's consent was not required due to his failure to provide support when able to do so because evidence showed that Father was under court order to pay support, was able to do so, and failed to do so); In Re Adoption of B.R., 877 N.E.2d 217 (Ind. Ct. App. 2007) (Trial court erroneously found that birth father's consent was necessary because there was no court order or other requirement that birth father pay child support; Court opined that birth father had the common law duty of a parent to support his child, and his failure to do so satisfied IC 31-19-9-8(a)(2)(B)); In Re Adoption of M.A.S., 815 N.E.2d 216 (Ind. Ct. App. 2004) (Father's consent was not needed because he had failed to support the child; Father failed to pay child support for two years while he was employed and able to pay for other items, such as bail; Father had a duty to support the child which existed apart from any court order or statute; Father's occasional provision of groceries, diapers, formula, clothing, presents, and cash were gifts, not child support); In Re Adoption of A.K.S., 713 N.E.2d 896 (Ind. Ct. App. 1999) (paternity affiant father was entitled to notice of adoption petition but his consent was dispensed with due to his failure to pay child support for three years; fathers have a common law duty to support their children); In Re Adoption of M.J.C., 590 N.E.2d 1095 (Ind. Ct. App. 1992) (paternity judgment ordered father to pay $17.50 per week child support, but father paid nothing from 1982 through 1986, $40.00 in 1987, and $75 in 1990; father had income of $9,500 in 1984 and approximately $15,000 every year thereafter); and Matter of Adoption of Marcum, 436 N.E.2d 102 (Ind. Ct. App. 1982) (dissolution court ordered father to pay $15.00 per week child support; father had employment as a coal miner averaging $200.00 per week and later received unemployment benefits; father conceded he had made no support payments in the year preceding the filing of the adoption petition).

Cases in which the Court of Appeals affirmed trial court determinations that parental consent could not be dispensed with due to alleged failure to pay support include In Re The Adoption of E.M.L., 103 N.E.3d 1110 (Ind. Ct. App. 2018) (trial court's finding that Father knowingly failed to provide for the child's support during the specified time periods was clearly erroneous; the Court held that (1) Stepfather failed to show Father had the ability to pay child support for one alleged period of nonpayment; (2) Father's incarceration and abated child support could not be counted as the second period of alleged nonpayment; and (3) the fact most of the child support for the third period of alleged nonpayment came from tax intercepts could not be held against Father); E.W. v. J.W., 20 N.E.3d 889 (Ind. Ct. App. 2014) (Court held that the trial court did not err in refusing to conclude that Mother's consent could be dispensed with on the grounds of failure to support the child. Although all the parties agreed that Mother had never paid child support, the child support order explicitly only made Mother responsible for one half of the child's medical expenses, and Father never altered Mother to any expenses; Mother also attempted to provide clothes and necessities for the child, but Father thwarted Mother's efforts); In Re Adoption of M.B., 944 N.E.2d 73, 77-78 (Ind. Ct. App. 2011) (Court found that the stepfather had not shown that the father failed to provide support within the year that preceded the filing of the adoption petition; therefore, the stepfather had not met his burden of showing that the father's consent was not required; evidence included findings that the father provided daycare, the mother refused support money, there was no support order in place, the father was routinely under or unemployed); In Re the Adoption of N.W., 933 N.E.2d 909, 913-14 (Ind. Ct. App. 2010) (adopted by the Indiana Supreme Court at 941 N.E.2d 1042) (Court reversed the trial court's grant of the stepmother's adoption petition, determining that the stepmother failed to show by clear and convincing evidence that the mother's consent was not required, and that the totality of the evidence established that the mother supported the child to the best of her ability; the mother was under "negative" child support order, supported her child in nonmonetary ways, and earned an extremely low income); McElvain v. Hite, 800 N.E.2d 947 (Ind. Ct. App. 2003), in which the trial court's order granting stepfather's petition for adoption was reversed. Stepfather alleged that birth father's consent to the adoption was not needed due to birth father's failure to provide support to the children. In reversing, the Court noted the following evidence: (1) birth father failed to maintain his support obligations after losing his unemployment benefits; (2) after losing his benefits birth father was unable to pay support and had to move in with family members; (3) once birth father secured part-time employment, he had support payments withheld from his salary; and (4) the trial court had determined that birth father was not in contempt for failing to maintain child support when it determined his arrearage.

See also In Re Adoption of Augustyniak, 505 N.E.2d 868 (Ind. Ct. App. 1987), reh'g granted at 508 N.E.2d 1307 and Graham v. Starr, 415 N.E.2d 772 (Ind. Ct. App. 1981). In Augustyniak, the trial court denied stepfather's petition to adopt the child and stepfather appealed. Stepfather argued, inter alia, that birth father's consent to adoption was not required because birth father had failed to make child support payments as required by the dissolution decree for a period of at least one year. The birth father failed to pay court ordered child support of $20.00 per week despite an average income of $9,000.00 per year, but the Court held that an inability to pay support cannot be shown by proof of income standing alone. The totality of circumstances,

including whether income is steady or sporadic, and the parent's reasonable expenses must also be considered. "There may be a level of income so high that, standing alone, it would be sufficient to show the ability to make child support payments." Id. at 1308. In Graham, the trial court denied stepfather's petition for adoption, in which he alleged that birth father's consent was not needed due in part to failure to pay child support. The Court affirmed, finding that birth father's medical expenses for his wife and later surgery for himself which prevented him from working for eleven months, along with birth father's resumed payment of support when he returned to work were "mitigating circumstances" in that birth father was unable to provide support. Id. at 774. See also Matter of Adoption of D.H. III., 439 N.E.2d 1376 (Ind. Ct. App. 1982) (birth father made only one $20.00 child support payment in a twenty-two month period, but Court reversed trial court's adoption judgment because adoption petitioner did not prove that father was able to pay support and knowingly failed to do so.)

5. Sexual Malfeasance by Putative Father

IC 31-19-9-8(a)(4) states that the biological father's consent to adoption is not required for a child born out of wedlock who was conceived as a result of rape for which the father was convicted under IC 35-42-4-1, child molesting, sexual misconduct with a minor, or incest.

In In Re Adoption of J.D.B., 867 N.E.2d 252 (Ind. Ct. App. 2007), the Court held that the probate court's finding that birth father's consent to adoption was not required, was not contrary to law, and affirmed the trial court's judgment granting the foster parent's adoption. The foster parent had filed a petition for adoption alleging that birth father's consent was not required because the child was born out of wedlock and was conceived as a result of birth father's sexual misconduct with a minor. Citing IC 31-19-10-1.2 (b)(2) and IC 31-19-10-0.5, the Court noted that, contrary to birth father's contention, the burden of proof regarding whether the child was conceived as a result of sexual misconduct with a minor was birth father's burden rather than the adoptive parent's burden, and the absence of a criminal prosecution was insufficient to satisfy that burden of proof. Id. at 258. The birth father also contended that he did not commit sexual misconduct with a minor because he did not knowingly or intentionally perform or submit to sexual intercourse with the fourteen-year-old mother, because the mother had sexual intercourse with him while he was asleep. Id. at 259. The mother's testimony at the consent hearing was consistent with the birth father's contention. Id. The Court held that the fact that a twenty-nine-year old man and a fourteen-year-old girl had sexual intercourse and conceived a child solidly supports an inference that the man intended and/or knew that he was engaging in sexual intercourse. Id. In Mullis v. Kinder, 568 N.E.2d 1087 (Ind. Ct. App. 1991), the twenty-one-year old father met the fifteen-year-old mother in Florida and had sexual intercourse which resulted in conception of a child whom the mother sought to place for adoption in Indiana. Father was not criminally convicted of child molesting and lacked notice of the potential legal implications regarding his consent to the adoption of a child conceived by sexual intercourse with a fifteen-year-old. The Court of Appeals held that to establish by a preponderance of evidence that father committed child molesting, adoptive parents must show only father's and mother's respective ages and that father had sexual intercourse with mother. Id. at 1090. See also Pena v. Mattox, 84 F. 3d 894 (7th Cir. 1996) (Court opined that society rightly disapproved of the alleged father's act

in impregnating a fifteen-year-old girl and the Constitution does not forbid states from penalizing father's illicit and harmful conduct by refusing to grant him parental rights to block the adoption).

6. Parental Unfitness and Child's Best Interest

IC 31-19-9-8(a)(11) was added in 2003 to provide that consent to adoption is not required from 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.

Evidence of unfitness is considered and a determination is made at the time of the hearing on whether consent from a parent is required. See In Re Adoption of J.M., 10 N.E.3d 16, 22 (Ind. Ct. App. 2014) (holding that since the trial court had already determined that parents' consents were not necessary due to unfitness at the time of consent hearing, the trial court was not required to reevaluate parental fitness at the time of the adoption hearing; evidence of unfitness at consent hearing included parents' historical difficulty with alcohol, drug use, and domestic violence).

In J.H. v. S.S., 93 N.E.3d 1137 (Ind. Ct. App. 2018), the Court held that the evidence was sufficient to support the trial court's conclusion that Mother was unfit and that her consent to the child's adoption by Grandmother was not necessary. Mother argued here was insufficient evidence to show her unfitness, and further challenged the trial court's other conclusions that Mother's consent was not required because she failed to communicate and support the child. Id. at 1140 n.1. However, the Court noted that the provisions of IC 31-19-9-8 are written in the disjunctive, and each ground is a separate ground on which parental consent could be deemed unnecessary. Id. at 1140. Because the Court ultimately agreed with the trial court that Mother was unfit and her consent was not necessary, the Court did not need to address Mother's arguments. The Court noted that while there is no statutory definition of unfitness, prior case law holds that termination of the parent-child relationship case law provides useful guidance was to what unfitness entails. Id. at 1141. The Court noted the following evidence supporting the trial court's determination that Mother was unfit and her consent was not needed: (1) Mother's long history of substance abuse and mental health issue; (2) Mother's log history of failed treatment of those addictions and issues; (3) Mother's multiple arrests related to controlled substances and alcohol; (4) Mother's apparent unwillingness to change her behavior and cease abusing various illicit substances; (5) Mother's long history of instability in housing and employment; and (6) Mother's lack of support of the child. Id.

In Adoption of D.M., 82 N.E.3d 354 (Ind. Ct. App. 2017), the Court affirmed the trial court's judgment which found that the child's Father was an unfit parent, and found the child's best interest was served by finding that Father's consent to the child's adoption was not required. In response to Father's challenge to the trial court's consideration of his Class C felony child

molesting conviction in determining his unfitness, the Court opined that the plain and ordinary meaning of the statutory language of IC 31-19-9-8-(a)(11) does not preclude a trial court from considering the circumstances of a parent's criminal activity in determining unfitness. Id. at 360. Father's crime of child molesting of the child's Half-sister was committed in the child's home when Father had a parental and moral duty to provide care, nurture, and protection to the child and Half-sister. Id. The Court found that Father's sexual misconduct and convictions were relevant to whether he was unfit to be a parent under the statute. Id. The Court noted the following evidence on Father's unfitness: (1) he made no effort to pay support for the child; and (2) he did not pursue parenting time with the child although he was directed to file a petition for visitation by the dissolution decree. Id. The Court also noted the following trial court findings that the child's best interests would be served by dispensing with Father's consent to Stepfather's adoption: (1) the child had no recollection of Father; (2) the child was happy and well-rounded and had a sibling relationship with Half-sister; and (3) the child had a long-standing three year relationship with Stepfather. Id. at 361.

In E.W. v. J.W., 20 N.E.3d 889 (Ind. Ct. App. 2014), the Court held, *inter alia*, that the evidence was sufficient to support the trial court's finding that Mother was not unfit to be a parent, and the adoption petition was denied. Father and Grandmother, the adoptive petitioners, argued that Mother's history of drug abuse, relationships with abusive men, and past encounters with DCS were clear and convincing evidence of Mother's unfitness. Id. at 894-5. However, the Court noted that the trial court judged Mother's fitness at the time of the trial, recognized her history of issues, but more heavily weighted her more recent and prolonged stability and signs of improvement, and concluded that Mother was not unfit. Id. at 895.

In In Re Adoption of M.L., 973 N.E.2d 1216 (Ind. Ct. App. 2012), the Court affirmed the trial court's order which had granted Adoptive Parents' petition to adopt their grandson's half-brother ("the child") without Father's consent; the Court held that there was sufficient evidence to support the trial court's conclusions that Father is not a fit parent and that the adoption is in the child's best interests. Id. at 1224. The Court noted that the statute does not provide a definition of "unfit", but that both Father and Adoptive Parents have looked to cases where parental rights have been terminated as a result of a petition made by the Department of Child Services (DCS) for guidance. Id. at 1223. The Court noted that, although the termination statute (IC 31-35-2-4) does not use the word "unfit," the Court has frequently referred to its provisions as indicators of a parent's fitness, and termination cases clearly deal with a parent's suitability or competence to be a parent. Id. The Court opined that the termination statutes and adoption statutes strike a similar balance between the parent's rights and the child's best interests, and thus, termination cases provide useful guidance as to what makes a parent "unfit." Id. The Court noted that in termination cases the Court has considered factors such a parent's substance abuse, mental health, willingness to follow recommended treatment, lack of insight, instability in housing and employment, and ability to care for a child's special needs. Id. The Court determined that each of these factors was present in this case, noting: (1) Father has a long history of depression and self-medicating with drugs and alcohol; (2) he is reluctant to follow treatment advice for his mental health or substance abuse issues; (3) he minimizes the seriousness of these issues and

believes that he can control them on his own despite the fact that his untreated conditions have resulted in suicide attempts, cutting himself, arrests, loss of his license, and difficulty maintaining employment and stable housing; (4) he has hidden the extent of his drinking from his friends and family members; (5) there is no indication that he intends to quit drinking; (6) the trial court found that Father attempted to downplay the extent of his drinking and drug use in his testimony and that his demeanor on the stand was consistent with Adoptive Parents' description; (7) Father has not been able to provide the stable home that the child needs, has contributed little to the child's support, and struggled financially; and (8) the child came to Adoptive Parents with developmental delays in his speech and growth, which have been improving under their care. Id. at 1223-24.

With regard to the child's best interests, the M.L. Court noted the following in support of the trial court's conclusion that adoption was in his best interests: (1) it was undisputed that Adoptive Parents have provided the child with a stable, nurturing environment and that the child has a strong bond with his half-brother, Adoptive Parents' grandson; (2) the child views Adoptive Parents as his parents and their home as his home; (3) the child is not bonded with Father on that level; and (4) Adoptive Parents are able to provide for all the child's needs, including his special developmental needs. Id.

In In Re Adoption of H.N.P.G., 878 N.E.2d 900, 906-08 (Ind. Ct. App. 2008), the Court affirmed the trial court's denial of birth father's motion to contest the adoption of his daughter. The Court affirmed the trial court's order granting of the petition for adoption filed by the child's foster parents. The Court found the trial court's conclusion that birth father's consent to the adoption was not required was not clearly erroneous. The foster parents proved that birth father was unfit to be a parent and that the adoption was in the child's best interests. Id. at 907. The Court quoted IC 31-19-9-8(a)(11) regarding when adoption consent is not required from a parent and referenced the trial court's finding that clear and convincing evidence of birth father's unfitness as a parent had been presented. Id. The finding delineated as factors birth father's (1) poor work history; (2) expected difficulty finding employment as a convicted felon; (3) historical inability and difficulty staying off drugs even while incarcerated, and (4) lack of support he has provided to the child, not merely because of his incarceration. Id. at 906-7. In arriving at its holding, the Court noted (1) due to his incarceration, birth father had never met or communicated with the child; (2) birth father's substantial history of illegal drug use and his drug use since he was a juvenile; (3) birth father's current incarceration due to his convictions for dealing in methamphetamine and possession of precursors with intent to manufacture methamphetamine; (4) birth father's earliest possible release date was in 2010 and he might not be released until 2017, at which time the child will be about thirteen years old; (5) birth father did not challenge the trial court's finding that he has historically been unable to maintain employment, and will likely have a difficult time finding employment and supporting the child; (6) it is well-settled law that those who pursue criminal activity run the risk of being denied the opportunity to develop relationships with their children; (7) after birth father's release from prison, there is no guarantee he will be able to provide for the child or that he will ever obtain custody of her; (8) the child's needs are too important to force her to wait until a determination can be made that birth father will be able to be a fit parent to her; (9) birth father did not challenge the trial court's finding that

foster parents' adoption was in the child's best interests; and (10) ample evidence supported the trial court's conclusion that the child's best interests were served by granting foster parents' adoption petition. Id.

In In Re Adoption of T.W., 859 N.E.2d 1215, 1218-19 (Ind. Ct. App. 2006), the Court opined that the adoption petitioners, who were the children's great-uncle and great-aunt, had presented clear and convincing evidence to obviate the necessity of the birth father's consent to the adoption of his two children, ages five and eight. Id. at 1218-19. The adoption petitioners, who had been the children's legal guardians for three years at the time of the conclusion of the adoption hearing, alleged two legal reasons why the birth father's consent to adoption was not required: (1) birth father had failed without justifiable cause for at least one year to communicate significantly with the children who had been in the custody of another person (IC 31-19-9-8(a)(2)(B)); and (2) birth father was unfit to be a parent and the children's best interests would be served if the court dispensed with his consent. (IC 31-19-9-8(a)(11)).

The T.W. Court opined that the provisions of IC 31-19-9-8 are disjunctive; as such, either provides independent grounds for dispensing with parental consent. Id. at 1218. The Court noted the following evidence in support of the trial court's determination that birth father's consent could be dispensed with pursuant to IC 31-19-9-8(a)(11): (1) he was presently unable to care for the children and suggested the adoption petitioners retain custody until he was in a better financial condition; (2) he had been unable to care for the children due to his drug use and criminal convictions for criminal recklessness and dealing methamphetamine for which he had received sentences totaling twenty-one and one-half years; (3) at the time of the adoption hearing, birth father was on house arrest; (4) birth father did not provide financial support for the children during their guardianship, and historically used his income to purchase methamphetamine; (5) although birth father was apparently free of methamphetamine, as reflected by mandatory drug screening, he had to pay probation fees and could barely take care of himself financially; (6) birth father opined that parental drug use did not harm children as long as drug use did not occur in the same location as the children; (7) there was ample evidence that the adoption petitioners had consistently provided for the children's needs, and the children had thrived in their care. Id.

In In Re Adoption of K.F., 935 N.E.2d 282 (Ind. Ct. App. 2010), the Court affirmed trial court's grant of the stepmother's petition to adopt the mother's two children, holding that the evidence was sufficient to show that the trial court did not err when granting the adoption petition without the mother's consent. The K.F. Court held that the evidence was sufficient to show that the mother was unfit to be a parent. Id. at 289. The Court noted the following evidence in favor of the trial court's unfitness conclusion: (1) the mother battled a serious substance abuse problem since her divorce from Father; (2) the mother tested positive for cocaine, Hydromorphone, Oxycodone, Oxymorphone, Morphine, and Codeine in 2008; (3) the mother tested positive for Percocet that was not prescribed to her as recently as March 2010, and admitted to have taken prescription drugs and heroin before the test; (4) the mother was in a drug court program which involved regular drug screening as a result of her 2009 arrest for dealing heroin; (5) the mother had only supervised visitation with the children since 2007 and did not seek unsupervised

visitation; (6) the children's visits with the mother caused the children stress, and they were unable to understand why the mother did not prioritize them. Id. The Court also addressed the issue of the mother's failure to pay child support. Id. at 288. Because of the mother's unfitness, failure to pay child support, and the fact the children were thriving with the father and stepmother, the Court opined that the trial court did not err when it granted the stepmother's adoption petition without the mother's consent. Id. at 289.

A court must conclude that adoption is in the best interests of the child before granting the adoption petition. In In Re the Adoption of N.W., 933 N.E.2d 909 (Ind. Ct. App. 2010), the Court reversed the trial court's grant of the stepmother's adoption petition, in part based on the lack of evidence that the adoption was in the best interests of the child, and no showing that the mother was unfit. The Court held that there was absolutely no evidence indicating that this adoption could be in the best interests of the child, and that the adoption could be reversed on this basis alone. Id. at 915. In reaching this conclusion, the Court noted that (1) the child resided with both parents during the first four years of her life; (2) the mother visited the child every weekend and then every other weekend after the mother's employment changed; (3) the mother wanted to remain a loving presence in the child's life; (4) the child indicated through notes to the mother that she wanted the mother as a part of her life, and the notes were in the record; (5) the stepmother did not claim that the mother was unworthy or that the mother neglected the child. Id.

IC 31-19-9-9 and 10 state that the court shall dispense with the consent of a convicted, incarcerated parent after notice and hearing if the parent is convicted of certain crimes against the child's other parent, the child or the child's sibling, and if dispensing with consent is in the child's best interests. The applicable crimes against the other parent for which the statute applies are: murder, causing suicide, voluntary manslaughter or an attempt to commit murder, causing suicide, or voluntary manslaughter. The criminal conviction may occur in Indiana or another state, if the crime is "substantially similar" to one of the listed crimes. The applicable crimes against the child, the child's sibling, half-sibling or stepsibling of the parent's current marriage are: murder, voluntary manslaughter, causing suicide, rape, criminal deviate conduct, child molesting as a Class A or B felony, incest as a Class B felony, neglect of a dependent as a Class B felony, battery as a Class A, B, or C felony, or attempt of any of the above crimes. For both statutes the parent whose consent is dispensed with must be incarcerated at the time of the filing of the adoption petition. Please note that IC 31-19-9-10 has two versions; IC 31-19-9-10 Version a is effective until July 1, 2014, and IC 31-19-9-10 Version b will become effective on July 1, 2014. The changes primarily deal with changes in the related criminal statutes referenced in IC 31-19-9-10.

7. Dispensing with Guardian's Consent

The court may order that the guardian's or custodian's consent to adoption is not required if the court finds that the reasons for withholding consent are not in the child's best interests. IC 31-19-9-8(a)(10). The guardian or custodian includes the Department of Child Services (DCS) which has wardship of the child due to a CHINS proceeding. Id. at 409. In In Re Adoption of H.L.W.,

Jr., 931 N.E.2d 400 (Ind. Ct. App. 2010), the Court reversed the trial court's grant of an adoption petition filed by the child's foster parents. DCS wished to reunite the child with his birth father, who had established paternity and was substantially compliant with the services recommended by DCS, including unsupervised visitation with the child. The Court concluded that DCS met its burden of demonstrating by clear and convincing evidence that its withholding of consent was in the child's best interests. In In Re Adoption of S.A., 918 N.E.2d 736 (Ind. Ct. App. 2009), the Court affirmed the trial court's denial of the foster parents' petition to adopt their foster child. The Court affirmed the trial court's determination that adoption of the child by the adoptive petitioner, with whom the child's biological siblings lived, was in the child's best interest. DCS had wardship of the child pursuant to a CHINS proceeding. DCS had consented to the child's adoption by the foster parents, but had not consented to adoptive petitioner's adoption of the child. The Court was not persuaded by the foster parents' contention that the adoption decree must be set aside because DCS had not consented to the adoptive petitioner's adoption of the child. Id. at 742-43. The Court stated that the trial court is solely responsible for making the determination of the child's best interest in an adoption, and DCS is not granted the unbridled discretion to refuse consent. Id. at 742. The Court further noted: (1) DCS initially consented to adoptive petitioner's adoption, but later withdrew its consent and consented to foster parents' adoption; (2) the DCS case manager could not explain why DCS had withdrawn its consent to adoptive petitioner's adoption; (3) the DCS case manager could not identify any information that would warrant the DCS's determination that adoptive petitioner's home might have been inappropriate for the child. Id. at 742-43.

In In Re Adoption of L.M.R., 884 N.E.2d 931 (Ind. Ct. App. 2008), the Court affirmed the trial court's order granting the adoption petition filed by the child's former foster mother, despite DCS's withholding of consent to her adoption of the child. The Court also affirmed the trial court's denial of the adoption petition filed by the child's paternal grandparents. DCS had removed the child from her foster mother, placed the child with her siblings at the paternal grandparents' home, and later consented to the paternal grandparents' adoption. The Court held that the trial court properly determined that DCS had failed to act in the child's best interest by refusing to consent to the former foster mother's adoption. The child had been born testing positive for drugs, exhibited withdrawal symptoms, and suffered from allergies, asthma, eye infections, and Sensory Integration Disorder (SID). Id. at 938. The Court observed that the former foster mother, who took custody of the child two days after birth: (1) studied information about caring for drug babies; (2) consulted medical experts to make the child's withdrawal as easy as possible; (3) took leave from her employment when the child exhibited withdrawal signs; (4) contacted First Steps for evaluation and advice when the child started hitting herself; (5) informed herself on the child's SID diagnosis; (6) remained by the child's bedside day and night when the child was hospitalized with Respiratory Syncytial Virus (RSV) and pneumonia; and (7) basically altered her life to focus on the child's care and needs. Id. at 937. The Court contrasted the paternal grandparents' conduct including their (1) refusing to accept that the child had special needs; (2) being unaware of the child's SID diagnosis; (3) refusing to further involve First Steps in the child's development; and (4) limiting their contact with the child while she was in the hospital with RSV to one hour of paternal grandmother's time. Id. In response to paternal grandparents' second argument, that their adoption of the child was the way to keep the three

siblings together, the Court pointed to former foster mother's actions in the past, and assurances to keep the child in close contact in the future with her two brothers who were adopted by paternal grandparents. Id. at 938. The Court also stated that it was not convinced as to paternal grandparents' third contention, that DCS's decision to withhold consent to the former foster mother's adoption request was based on the agency's knowledge and experience. Id. The Court noted (1) for the first eighteen months of the child's life, DCS consistently recommended temporary placement of the child with former foster mother and made no recommendation regarding permanent placement; (2) then, without any change in circumstances of the child's care and without any advance notice to former foster mother, DCS changed its position and advocated for the removal of the child from her care and for permanent placement with paternal grandparents; and, (3) although the family case manger testified that he complied with DCS policy to review the child's medical records, he admitted he did not contact First Steps or discuss the child's SID diagnosis. Id.

In In Re Adoption of Z.D., 878 N.E.2d 495, 498-99 (Ind. Ct. App. 2007), former paternal grandmother appealed Benton Circuit Court's dismissal of her adoption petition because adoption of the child by the foster parents had been finalized in Tippecanoe County. The Court noted, among other things, that (1) the Tippecanoe County Department of Family and Children (TCDFC) had refused to consent to grandmother's adoption of the child; (2) IC 31-19-9-1 required TCDFC's written consent in that it had lawful custody of the child; (3) in accordance with IC 31-19-9-8(a)(10), TCDFC's refusal to consent required the trial court to determine whether TCDFC was acting in the best interests of the child in doing so; (4) from the record it appeared that TCDFC was acting in the child's best interests by refusing consent in that grandmother had indicated that she would allow contact between the child and the biological father, a child molester whose parental rights to the child had been terminated. Id.

In In Re Infant Girl W., 845 N.E.2d 229, 244 (Ind. Ct. App. 2006), the Court considered whether Marion Probate Court properly granted the unmarried same sex couple's petition for adoption of their foster child despite Morgan County OFC's refusal to consent to the adoption. The Court noted that, because OFC was the child's guardian, its consent would normally have been required. Id. at 244. Because the Probate Court concluded that the reasons for OFC's refusal to consent were not in the child's best interests, then OFC's consent was not necessary. Id.

Attorneys who are representing clients who are petitioning to adopt adjudicated Children in Need of Services should be aware that the juvenile code and adoption case law differ on the preference for children to be placed with relatives. The juvenile code, IC 31-34-4-2(a) and (b), requires DCS to consider placement with a suitable and willing blood or adoptive relative, a de facto custodian, or stepparent before considering any other out-of-home placement. Adoption case law, on the other hand, does not give preferential treatment to blood relatives who seek to adopt a child. See In Re Adoption of B.C.S., 793 N.E.2d 1054 (Ind. Ct. App. 2003); In Re Adoption of I.K.E.W., 724 N.E.2d 245 (Ind. Ct. App. 2000); In Re Adoption of Childers, 441 N.E.2d 976 (Ind. Ct. App. 1982).

E. **Custody Determination When Adoption Pending Or Dismissed**

1. Custody Determination When Adoption Pending

IC 31-19-2-13 provides that, except for a child who is under the care and supervision of DCS, a petitioner for adoption may file a separate, ex parte, verified petition requesting temporary custody of a child sought to be adopted at the time of any time after the filing of a petition for adoption. The court may grant the petition if the court finds that the petition for adoption is in proper form, and that placing the child with the adoption petitioner pending hearing on the petition is in the best interests of the child. If the petition is granted, the adoption petitioner is legally and financially responsible for the child unless ordered otherwise by the court.

In In Re Adoption of C.B.M., 992 N.E.2d 687 (Ind. 2013), the Indiana Supreme Court reversed the adoption court's judgment denying Natural Mother's petition to set aside the adoption of her children (the Twins). The Court remanded with instructions to vacate the adoption decree within seven days of the Supreme Court's opinion being certified, to reset the adoption petition for a contested hearing, and to promptly serve notice and summons of that hearing on Natural Mother. The Court said that, pending the contested adoption hearing, the trial court could exercise its authority to entertain motions regarding temporary custody of the Twins under IC 31-19-2-13, until final judgment is entered.

2. Custody Determination When Adoption Dismissed

IC 31-19-11-5 provides that if the court dismisses the petition for adoption, the court shall determine who should have custody of the child. The court is permitted by IC 31-19-11-5(b) to implement a gradual change of custody regardless of a person's immediate right to custody. The gradual change of custody to ease the child's transition may be ordered unless the gradual change would endanger the child's physical health or significantly impair the child's emotional development. The court may do the following: (1) implement a change of custody by gradually increasing the child's visitation with each person who is entitled to custody; (2) order counseling for the child and persons involved in the custody change so that a plan for gradual change of custody may be implemented; (3) consult with the counselor to determine an order for the gradual change of custody that meets the child's best interests. IC 31-19-2-14(a) requires consolidation of the pending adoption and paternity court proceedings regarding the same child in the adoption court. IC 31-19-2-14(b) states that, if the adoption petition is dismissed, the court hearing the consolidated adoption and paternity proceeding shall determine who has custody of the child under IC 31-19-11-5. IC 31-19-2-14(c) states that, following a dismissal of the adoption petition under subsection (b), the court may: (1) retain jurisdiction over the paternity proceeding; or (2) return the paternity proceeding to the court in which it was originally filed. If the paternity proceeding is returned to the court in which it was originally filed, the court assumes jurisdiction over the child subject to any provisions of the consolidated court's order under IC 31-19-11-5.

For an example of how the adoption court determined custody when the adoption was dismissed, see Blasius v. Wilhoff, 863 N.E.2d 1223 (Ind. Ct. Ap. 2007), in which the father established paternity and the adoptive parents' petition to adopt the child was denied. The trial court awarded

the adoptive parents custody of the child, age three, who had resided with the adoptive parents since birth. The Court affirmed the trial court's order giving custody to the adoptive parents, noting the trial court's findings that the father was an unfit parent due to his drug usage, criminal history, lack of positive support system and lack of financial stability and the significant emotional bond between the child and the adoptive parents. The Court concluded that the trial court's findings were not clearly erroneous and observed that the trial court applied the standard of review set out for third party custodianships set out in In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2000). The Court found that the trial court was clearly convinced that placement with the adoptive parents represented a substantial and significant advantage to the child. See also In Re Adoption of Dzurovcak, 600 N.E.2d 143 (Ind. Ct. App. 1992), where the Court clarified the adoption court's duty to determine custody if the adoption is dismissed. Despite the putative father's establishment of paternity in another court after the adoption petition was filed, the Court found that, since the adoption court assumed jurisdiction over the custody determination first, the adoption court could not hold its jurisdiction temporarily and then unilaterally offer permanent jurisdiction to the paternity court. Id. at 147. The Court found that the adoption court further erred by not conducting a full evidentiary hearing on the child's best interests prior to making a custody determination and by not allowing the adoptive petitioners to be parties to the permanent custody hearing. Id. at 148.

F. **Time Period for Challenging Adoption Decree**

Before an adoption decree can be challenged in an appeal, it must be a final adoption decree; in other words, it must be a final order of the trial court. See In re the Adoption of S.J., 967 N.E.2d 1063 (Ind. Ct. App. 2012). In S.J., the Court held that the trial court's order that the father's consent was not require was not a final judgment, did not contain the necessary language from Trial Rule 54(B) to allow an appeal despite the lack of a final judgment, and was not an appealable interlocutory order under Appellate Rule 14. Id. at 1065, 1066. The appeal was dismissed *sua sponte* for lack of subject matter jurisdiction. Id. at 1065. The trial court's order only determined that father's consent was not needed; it did not determine that the adoption was in the best interests of the child, and it did not grant the adoption. Id. The Court opined that the trial court's order was not a final judgment, as it did not dispose of all issues as to all parties, and that the trial court had not used the language required by Trial Rule 54(B) in order to make its order "final," despite its lack of disposing of all claims and parties. Id. at 1065, 1066. The Court also noted the trial court's order was not an appealable interlocutory order under Appellate Rule 14(A), interlocutory appeals as a matter of right, or Appellate Rule 14(B), interlocutory appeals that are certified by the trial court and accepted by the appellate court, as the father had met none of the criteria of Appellate Rule 14. Id. at 1066.

IC 31-19-14-1 states that an appeal of an adoption decree shall be decided on an expedited basis. IC 31-19-14-2 states that the time limits for a person whose parental rights are terminated by an adoption decree to challenge the decree are not more than the later of: (1) six months after the entry of an adoption decree; or (2) one year after the adoptive parents obtain custody of the child. IC 31-19-14-2 provides that the court shall sustain the adoption decree unless the person

challenging the decree establishes, by clear and convincing evidence, that modifying or setting aside the adoption decree is in the child's best interests.

Some persons may not challenge an adoption decree. These include the following: (1) a person who has consented to an adoption may not withdraw consent after the entry of the decree (IC 31-19-14-3(a)); (2) a person who is served with notice of an adoption may not contest the adoption or establish paternity more than thirty days after the date of service of notice of the adoption (IC 31-19-14-3(b)); (3) a person who receives actual [pre-birth] notice of an adoption under IC 31-19-3 may not contest the adoption or establish paternity more than thirty days after the date of receiving actual notice of the adoption (IC 31-19-14-3(c)). IC 31-19-14-3(d) states that a person who is prohibited from taking action under IC 31-19-14-3(a), (b), or (c) may not challenge an adoption decree. IC 31-19-14-4 states that after the expiration of the time period described in IC 31-19-14-2 [six months after entry of decree or one year after adoptive parents obtain custody of child], neither a person whose parental rights are terminated by the entry of an adoption decree nor any other person may challenge the adoption decree even if (1) notice was not given; or (2) the adoption proceedings were in any other manner defective.

Practitioners should also note that IC 31-19-11-6 was amended in 2014 to provide that a court may not grant a petition for adoption if the parent-child relationship was terminated and one or more of the following apply: "(A) The time for filing an appeal (including a request for transfer or certiorari) has not elapsed. (B) An appeal is pending. (C) An appellate court is considering a request for transfer or certiorari." Previously, this statute allowed for an adoption petition to be granted if an appeal was pending.

In In Re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014), the Court concluded that, in light of Father's attempt to perfect a timely appeal, and the constitutional dimensions of the parent-child relationship, Father's otherwise forfeited appeal deserved a determination on its merits. Id. at 972. On May 9, 2013, the trial court entered an order in favor of Adoptive Parents. The deadline for filing a Notice of Appeal from the trial court's order was June 10, 2013. Father wrote a letter to the trial court clerk which the clerk filed on June 6, 2013, requesting the appointment of appellate counsel to appeal the decision. Father's trial counsel did not file a Notice of Appeal. On June 19, 2013, Father's trial counsel filed a motion to withdraw, and the trial court granted the motion on July 1, 2013. On July 3, 2013, twenty-three days after the deadline to appeal had passed, the trial court entered an order appointing appellate counsel for Father. Fifteen days later, on July 18, Father's appellate counsel filed in the Court of Appeals a petition to accept "Amended Notice of Appeal," which was tendered with the petition. Father's counsel argued that Father's June 6 *pro se* letter to the trial court clerk should be deemed a timely filed Notice of Appeal in substantial compliance with the appellate rules. The Court of Appeals *sua sponte* dismissed Father's appeal on the grounds that it lacked subject matter jurisdiction because Father did not timely file a Notice of Appeal. The Indiana Supreme Court granted Father's petition to transfer, thereby vacating the Court of Appeal dismissal of Father's appeal.

The O.R. Court opined that the untimely filing of a Notice of Appeal is not a jurisdictional deflect depriving the Appellate Courts of the ability to entertain an appeal, abrogating prior case

law. Id. at 971. The Court noted that the current Appellate Rule 9(A), effective in 2012, states that a party initiates an appeal by filing a Notice of Appeal with the Clerk within thirty days after the entry of a Final Judgment is noted in the Chronological Case Summary and, unless the Notice of Appeal is timely filed, *the right to appeal shall be forfeited* except as provided by Post Conviction Rule 2. Id. at 969 (emphasis in opinion). The Court explained that: (1) the language of current Rule 9(A) does not mention jurisdiction at all; (2) forfeiture and jurisdiction are not the same; (3) forfeiture is defined in part as "[t]he loss of a right, privilege, or property because of a … breach of obligation or neglect of a duty," quoting Black's Law Dictionary 765 (10th ed. 2014); (4) jurisdiction on the other hand "speak[s] to the power of the court *rather than to the rights or obligations of the parties*," quoting Reed Elservier, Inc. v. Muchnick, 559 U.S. 154, 160-61 (2010) (emphasis added). O.R. at 970-971. The Court opined that the timely filing of a Notice of Appeal is jurisdictional only in the sense that it is a Rule-required prerequisite to the initiation of an appeal in the Court of Appeals. Id. at 971.

The O.R. Court then concluded that, in light of Appellate Rule 1, Father's attempt to perfect a timely appeal, and the constitutional dimensions of the parent-child relationship, Father's otherwise forfeited appeal deserved a determination on the merits. Id. at 972. The Court said that even though the right to appeal had been forfeited, there were extraordinary compelling reasons why this forfeited right should be restored. Id. at 971. The Court looked to In Re Adoption of T.L., 4 N.E.3d 658, 661 (Ind. 2014), and observed that our appellate rules exist to facilitate the orderly presentation and disposition of appeals, and our procedural rules are merely means for achieving the ultimate end of orderly and speedy justice. O.R. at 971-72. The Court also noted that this policy has been incorporated into our Rules of Appellate Procedure. Id. at 972. The Court quoted App. R.1, which provides in part that: "The Court may, upon the motion of a party or the Court's own motion, permit deviation from these Rules." Id. The Court said that the Rules themselves provide a mechanism allowing the Court to resurrect an otherwise forfeited appeal. Id. The Court further observed: (1) Father sought the appointment of appellate counsel for the express purpose of appealing the decision; (2) counsel was ultimately appointed, but long after the deadline for the timely filing of his Notice of Appeal; (3) appellate counsel filed an Amended Notice of Appeal, which the motions panel of the Court of Appeals accepted as being sufficient; (4) perhaps most important, the Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. Id. The Court opined that it is this unique confluence of a fundamental liberty interest along with "one of the most valued relationships in our culture" that has often influenced this Court as well as our Court of Appeals to decide cases on their merits, rather than dismissing them on procedural grounds (multiple citations omitted). Id.

In In Re the Adoption of T.L., 4 N.E.3d 658 (Ind. 2014), a case mainly about failure to provide child support, the Court granted transfer to determine Father's case on the merits, in spite of the appeal's procedural defects, because of the importance of Father's constitutional right to parent his children. Id. at 661 n.2. Father had remained incarcerated during the adoption trial. The adoption petition was granted on July 13, 2012, and the clerk issued notice to Father's attorney on July 17, 2012. Father, who was still incarcerated and now without an attorney, mailed a letter to the Court on August 13, 2012, exactly thirty days after the entry of the adoption judgment.

Father's letter set forth his intent to appeal the decision and asked the trial court to appoint him a new attorney. The trial court treated it as a Notice of Appeal and assigned Father a new attorney. Father's new attorney filed an Amended Notice of Appeal on August 23, 2012. Mother and Mother's Husband sought to dismiss Father's appeal for the following reasons: (1) Father's letter indicting his intent to appeal was not a proper Notice of Appeal and did not contain the information required by Appellate Rule 9; and (2) Father's appeal was not timely, as the Amended Notice of Appeal was not filed by Father's counsel until August 23, 2012, which was after the time allotted to file a Notice of Appeal. Id. at 661. The Court of Appeals had granted Mother's and Mother's Husband's Motion to Dismiss. Id. However, the Court agreed with Father that his case should be heard on the merits, because the case involved his constitutional right to parent his children. Id. at 661 n.2. The Court noted in a footnote that the appellate rules "exist to facilitate the orderly presentation and disposition of appeals" and that the appellate procedural rules are the "means for achieving the ultimate end of orderly and speedy justice", but that when "substantial rights are at issue before the Court, [it] often [prefers] to decide cases on their merits rather than dismissing them on procedural grounds." Id. (internal citations omitted). Because Father's claim involved a substantial right, namely, the right to parent his children, the Court proceeded to the merits of Father's claim and denied Mother's and Mother's Husband's Motion to Dismiss. Id.

In In Re Adoption of C.B.M., 992 N.E.2d 687 (Ind. 2013), the Indiana Supreme Court reversed the adoption court's judgment denying Mother's petition to set aside the adoption of her children (the Twins). The Court remanded with instructions to vacate the adoption decree within seven days of the Supreme Court's opinion being certified, to reset the adoption petition for a contested hearing, and to promptly serve notice and summons of that hearing on Mother. Mother's parental rights were terminated, and she appealed, but did not make any effort to file for a stay of the termination judgment. None of the parties to the adoption notified Mother of the adoption proceedings, because IC 31-19-2.5-4(4) states that notice to a parent whose rights have been terminated is not required. Two months after the Twins' adoption was finalized, the Court of Appeals reversed the termination judgment against Mother. Mother petitioned the adoption court to set aside the adoption decree. The adoption court denied Mother's motion.

The C.B.M. Court declined to hold that Mother was required to file a stay in order to preserve a meaningful appellate remedy for her parental rights. Id. at 693. The Attorney General and Adoptive Parents argued that Mother's termination appeal was rendered moot when the adoption was granted, and that, if she wished to preserve her rights, she should have asked the court which granted the termination petition to stay its judgment pending appeal. The Attorney General and Adoptive Parents argued that, without such a request, the Twins' need for a speedy and permanent placement trumps Mother's rights. The Court could not agree with their arguments because: (1) Mother's parental rights are precious and protected by our Federal and State Constitutions; and (2) apart from the importance of Mother's substantive parental rights, Indiana is particularly solicitous of the right to appeal. Id. at 692. The Court said that it would offend Mother's rights as both a mother and an appellate litigant to let her parent-child relationship with the Twins become contingent upon a "race to the courthouse", hinging on whether the adoption could be finalized before the termination appeal was complete. Id. Although Adoptive Parents

and the Attorney General argued that it was Mother's sole responsibility to avoid such a "race" by seeking a stay of the termination judgment pending her appeal, the Court said that Court of Appeals precedent suggests otherwise. Id. at 693. The Court said that, while Mother certainly could have sought a stay of the termination judgment, DCS was also a party to the appeal, and unlike Mother, DCS also participated in the adoption through the power to consent (or not) to the adoption. Id. The Court said that DCS was in a better position than Mother to inform the Court of Appeals of post-judgment issues that may affect the outcome of a pending appeal as well as DCS's intent to consent to the adoption. Id. The Court observed that DCS had every right to rely on the trial court's termination judgment and consent to the adoption while the appeal was still pending (pursuant to IC 31-19-11-6), but such bold reliance came at its own, and the Twins' peril. Id.

The C.B.M. Court strongly suggested that in the future, DCS's best practice would be to leave any underlying CHINS cases open until any related termination appeal is completed. Id. at 696. The Court said that children may have a particularly great "need of services" when a termination judgment is reversed on appeal, because, by that time, they will have been removed from the parents' home for a substantial time and will be bonding into a new home, especially when, as here, the foster parents plan to adopt. Id. The Court said that, even if they are not unfit, the natural parents may also be in need of services before the children could appropriately return to their original home. Id. The Court noted that IC 31-19-2-13 could authorize Adoptive Parents to seek temporary custody of the Twins while the adoption is pending, which may very well be beneficial to the Twins, but falls far short of the services a CHINS case would permit. Id.

The C.B.M. Court reiterated that granting an adoption pending termination appeal is a *discretionary* decision of the trial court. Id. at 696. The Court said that our Legislature has authorized the practice, and there are surely cases in which it will be entirely appropriate to expedite the adoption. Id. The Court encouraged adoption courts to exercise their authority to grant such adoptions with an abundance of caution in view of the potentially devastating consequences of having an adoption invalidated by a termination appeal. Id.

In In Re Adoption of D.C., 887 N.E.2d 950 (Ind. Ct. App. 2008), the Court reversed and remanded the trial court's denial of the birth mother's motion to set aside the decree granting stepmother's adoption. The trial court had denied birth mother's motion after determining that the adoption proceedings had been defective for lack of personal notice but that, pursuant to the terms of IC 31-19-14-4, the time period to challenge the adoption due to any such defect had expired. The facts of the case indicate that notice of the adoption petition was sent to birth mother's former address in Louisville but delivery of this notice was unsuccessful. Stepmother's attorney published a three-week notice in the Louisville Voice-Tribune Newspaper. After the adoption petition was filed, the child's father and stepmother continued to receive support payments for the child from the birth mother via the Hopkinsville Friend of the Court, including payment made three days before the final adoption hearing. Father and stepmother made no attempt to locate birth mother's current address through the Friend of the Court. Father also knew that birth mother's grandmother lived in El Paso, Texas. The child was adopted by stepmother on July 5, 2005. Birth mother continued to make child support payments through

2007. Birth mother discovered that the child had been adopted by stepmother in January of 2007 and filed her motion for relief from judgment on March 13, 2007.

The D.C. Court concluded that IC 31-19-14-4, which specifies the permissible time period for challenging adoption decrees, created an unconstitutional due process violation when it was applied to bar birth mother's challenge to the adoption proceedings in this case. The Court quoted IC 31-19-14-2, which specifies the permissible time period for challenging an adoption decree, and IC 31-19-14-4, which provides that after the expiration of the time set forth in section 2, "a person whose parental rights are terminated by the entry of an adoption decree may not challenge the adoption decree even if: (1) notice of the adoption was not given to the child's putative father; or (2) the adoption proceedings were in any other manner defective;" and noted that, here, the parties agreed that birth mother's challenge to the adoption decree did not fall within the time specified in IC 31-19-14-4. The Court opined that (1) birth mother had the fundamental right to make decisions regarding the care, custody, and control of the child, and this right fell within the protections of the Due Process Clause of the Fourteenth Amendment; and (2) parental rights are sufficiently vital that, under the appropriate circumstances, they merit constitutional protection that will supersede state law.

In Mathews v. Hansen, 797 N.E.2d 1168 (Ind. Ct. App. 2003), a stepparent adoption, putative father did not register with the putative father registry and did not receive notice of the adoption proceeding. The putative father had not seen, supported, or communicated with the five-year-old child for over one year. The trial court granted the adoption and putative father filed a motion to vacate the adoption eighteen months after the adoption decree had been entered. The Court concluded that the trial court properly granted stepfather's motion to dismiss putative father's challenge to the adoption. The Court discussed IC 31-19-4-2 and IC 31-19-14-4. The Court opined that, inasmuch as the statutes operate as statutes of limitation, such statutes are favored because they provide security against stale claims and promote the welfare and peace of society. The Court held that because putative father failed to register in a timely fashion, he could not now challenge the adoption decree. The Court noted that putative father had failed to file his motion to vacate the adoption within six months after the adoption decree had been entered or one year after the adoptive parents obtained custody of the child. The Court also held that IC 31-19-14-4 operated to preclude putative father's argument because his motion to vacate the adoption was filed over eighteen months after the entry of the adoption decree and beyond the one year requirement of stepfather's custody of the child. The Court noted that IC 31-19-14-4 specifically precluded putative father from contesting the adoption decree, even if notice had not been given to him. The Court stated that to permit putative father to vacate the adoption decree in these circumstances would contravene the intended purpose and specific language of the applicable statute of limitations.