CHAPTER 13
ADOPTION

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I. OVERVIEW OF CHAPTER

Adoption is the legal process which creates a new, permanent parent-child relationship, and forever severs a former biological parent-child relationship, as well as all other biological relationships that hinged upon that parent-child relationship. Matter of Adoption of Thomas, 431 N.E.2d 506, 512 (Ind. Ct. App. 1982); Mariga v. Flint, 822 N.E.2d 620, 629-31 (Ind. Ct. App. 2005); In Re C.W., 723 N.E.2d 956, 963 (Ind. Ct. App. 2000) (after child's adoption, maternal grandparents no longer held status as child's grandparents).

When an adoption is granted, the parent-child relationship is terminated by operation of law; consequently, an adoption decree has the effect of relieving the biological parents of all legal duties and obligations to the adopted child and to divest the biological parents of all rights to the child. IC 31-19-15-1. After the adoption, the child may obtain a new birth certificate. IC 31-19-13-1.

There are some exceptions to this general rule of ending all rights and duties between a parent and a child as a result of an adoption. For example, if the adoptive parent is married to a biological parent, the parent-child relationship between that biological parent who is married to the adoptive parent and the child is not affected by the stepparent's adoption. IC 31-19-15-2. Another example of an exception to this rule includes agreed upon postadoption visitation or contact privileges, pursuant to IC 31-19-16-1, and discussed more in this Chapter at XII.

There is often overlap between adoption cases and CHINS cases. If a permanency plan for a CHINS includes adoption, some children's factual situations may allow for the filing of an adoption petition requesting that the court dispense with the need for parental consent, instead of filing a petition for the involuntary termination of the parent-child relationship in juvenile court. The grounds for dispensing with parental consent are discussed in this Chapter at V.

Case law has provided rulings on and clarification to adoption law in Indiana. Some of the more recent and major topics which case law has addressed include: subsequent adoptions by a second parent and adoptions by unmarried couples; the jurisdictional tension between juvenile and probate courts regarding jurisdiction of adoption of children adjudicated to be CHINS; irrevocably implied consent by putative fathers; and the granting adoption petitions while an appeal of the termination of the parent-child relationship is pending.

Indiana adoption statutes have been amended numerous times in significant ways. Some of the changes in recent years include: (1) the ability to award adoption petitioners custody of the child pending adoption, along with certain limitations (see this Chapter at III.G); (2) the imposition of extra duties upon adoption agencies, county offices of family and children, and attorneys who arrange adoptions (see this Chapter at IX); (3) the significant overhaul of all statutes and DCS policies affecting postadoption financial assistance (see this Chapter at XIII); and (4) the inclusion of certain subsets of grandparents as persons deserving of notice of an adoption (see this Chapter at II.B.3).

II. JURISDICTION AND STANDING

II. A. Statutes

Probate courts have exclusive original jurisdiction over adoption matters in each Indiana county that has a separate probate court. IC 31-19-1-2. See also **In Re Adoption of J.T.D.**, 21

N.E.3d 824 (Ind. 2014) (Court held that the statutory provision which gave exclusive jurisdiction of all adoption matters to probate courts in any county that had a separate probate court did not confer exclusive adoption jurisdiction on the Superior Court's civil division). A child born in one state who is sought to be adopted by a person in another state is subject to the Interstate Compact on the Placement of Children ("ICPC"). IC 31-19-1-1. The ICPC is codified at IC 31-28-4 and IC 31-28-6.

If a paternity action and an adoption petition regarding the same child are pending at the same time, practitioners should consult IC 31-19-2-14. The court in which the petition for adoption has been filed has exclusive jurisdiction over the child, and the paternity proceeding must be consolidated with the adoption proceeding. IC 31-19-2-14(a). When the paternity and adoption cases are consolidated, the court having jurisdiction over the paternity action must comply with IC 31-14-21-9(b) (conduct an initial hearing not more than 30 days after the child's birth or the filing of the paternity petition, whichever occurs later, except as provided under IC 31-14-21-13). The court having jurisdiction over the paternity action must also comply with IC 31-14-21-9.1 (order all parties to undergo blood or genetic testing, except as provided under IC 31-14-21-13), and IC 31-14-21-9.2 (subject to IC 31-19-2-14 and IC 31-14-21-13, court must conduct a final hearing to determine paternity not later than 90 days after the initial hearing and issue its ruling not later than fourteen days after the final hearing). IC 31-14-21-9.1(b) states that if the alleged father is unable to pay for the initial costs of the testing, the court shall order that the tests be paid by the state department of health from putative father registry fees collected under IC 31-19-2-8(2). The department of health may recover the costs from an individual found to be the biological father.

Many of the above statutes list exceptions provided by IC 31-14-21-13. This statute provides that when a paternity court has notice that an adoption court assumed jurisdiction of a paternity matter, the paternity court must stay all paternity proceedings until further order from the adoption court.

If a paternity proceeding was consolidated into an adoption petition, and the adoption petition is later dismissed, practitioners should consult IC 31-19-2-14(b) and (c). If the petition for adoption 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. Following a dismissal of the adoption petition, the adoption 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 original paternity court, the paternity court assumes jurisdiction over the child, subject to any provisions of the consolidated court's order under IC 31-19-11-5.

Venue is addressed at IC 31-19-2-2. A petition for adoption may be filed with the clerk of court having probate jurisdiction in any of the following counties: (1) the county where the adoption petitioner resides; (2) the county where the licensed child placing agency or governmental agency with custody of the child is located; or (3) the county where the child resides. See this Chapter at II.B.1. and III.B. for more discussion of venue.

II. B. Case Law

II. B. 1. Jurisdiction

A probate court has exclusive original jurisdiction over adoption cases in each Indiana county that has a separate probate court. IC 31-19-1-2. See **In Re Adoption of J.T.D.**, 21 N.E.3d 824 (Ind. 2014) (Court held that: (1) the statutory provision which gave exclusive jurisdiction of all adoption matters to probate courts in any county that had a separate probate court did

not confer exclusive adoption jurisdiction on the Superior Court's civil division; (2) the Superior Court's four divisions were for administrative convenience and venue, rather than imposition of jurisdictional limits; and (3) the Superior Court lacked discretion to retain venue of the proposed adoptions, and was obligated to transfer the case to the Juvenile Court); **Holderness v. Holderness**, 471 N.E.2d 1157 (Ind. Ct. App. 1984) (holding that the dissolution court lack jurisdiction to approve the father's voluntary termination of parental rights); **Devlin v. Peyton**, 946 N.E.2d 605, 607 (Ind. Ct. App. 2011) (holding that Dissolution Court erroneously addressed issues involving Stepfather's petition to adopt the children, and since Stepfather's adoption petition was pending in Adoption Court, Dissolution Court could not properly exert jurisdiction over the issue); see also **Mariga v. Flint**, 822 N.E.2d 620, 629-31 (Ind. Ct. App. 2005) (although Adoptive Mother and Biological Mother were now separated, Indiana statutes do not predicate the court's jurisdiction upon the parents' status as to each other; Adoptive Mother had assumed all rights and duties of a biological parent through the adoption, and the court with proper jurisdiction to address child support was the superior court, as both common law and statutes vest superior courts with jurisdiction to award child support).

Subject matter jurisdiction over an adoption is not lost if there are deficiencies in the adoption petition. See **Matter of Adoption of H.S.**, 483 N.E.2d 777, 781 (Ind. Ct. App. 1985).

Jurisdictional conflicts between a CHINS case and an adoption case are highly fact sensitive. If there is no termination of parental petition filed, and the permanency plan is still reunification, then the probate court may lack jurisdiction to hear and issue an order on the adoption petition. See **In Re Adoption of H.L.W., Jr.**, 931 N.E.2d 400 (Ind. Ct. App. 2010) (Court found that trial court erred when it determined that DCS's withholding of consent to foster parents' adoption was not in child's best interest; DCS was working with child's father on reunification and Father was complying with DCS services); **In Re Adoption of E.B.**, 723 N.E.2d 4 (Ind. Ct. App. 2000) (because CHINS petition with goal of reunification of child and father was pending, the probate court lacked jurisdiction to hear the foster parents' adoption petition; fact situation was outside the holding of prior case law allowing probate court to hear adoption petition). See also Chapter 3, II.G.1 for further discussion on the resolution of the jurisdictional conflict between CHINS, TPR, and adoption cases involving the same child or children.

If a termination of parental rights petition has been filed, or if the plan is not reunification, then a probate court may be able to hear the adoption petition and issue orders upon it. See **In Re Adoption of H.N.P.G.**, 878 N.E.2d 900, 904, 906 (Ind. Ct. App. 2008) (court with probate jurisdiction may adjudicate adoption matter simultaneously with juvenile court's adjudication of CHINS proceeding where, as here, DCS does not pursue reunification in CHINS proceeding), *trans. denied*; **In Re Adoption of J.D.B.**, 867 N.E.2d 252, 255 n.5 (Ind. Ct. App. 2007) (Court held probate court had jurisdiction to rule on adoption petition despite pendency of CHINS and TPR proceedings in juvenile court with regard to same child, but, citing K.S. v. State, 849 N.E.2d 538, 541 (Ind. 2006), Court noted that "jurisdictional" issue raised might be more properly explored in terms of comity), *trans. denied*; **Matter of Adoption of T.B.**, 622 N.E.2d 921 (Ind. 1993) (initiation of a CHINS proceeding, over which the juvenile court had exclusive jurisdiction, did not deprive the circuit court which had granted the adoption of the child of jurisdiction over a petition to revoke the adoption).

The case of Infant Girl W. is perhaps the most edifying case as to how to resolve the tension between a CHINS case where reunification is not the permanency plan and a competing adoption petition. In **In Re Infant Girl W.**, 845 N.E.2d 229, 238-41 (Ind. Ct. App. 2006),

trans. denied sub nom. In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006) (Dickson, J. dissenting), Morgan County had placed the child with Foster Parents under a CHINS proceeding. Foster Parents petitioned for adoption in Marion County, which was granted without the consent of the Morgan County OFC. On appeal, Morgan County OFC argued that the Marion Probate Court should not have granted the petition for adoption because Probate Court was prevented from exercising jurisdiction over the case as a result of the pending CHINS case in Morgan Circuit Court. The Court held first that OFC had waived the jurisdiction argument by failing to raise a timely and specific objection. The Court also addressed the tension between the adoption, CHINS, and Termination of the Parent-Child relationship cases. The Court noted that probate courts have exclusive jurisdiction over all adoption matters and that juvenile courts have no authority to create permanent parent-child ties through adoption. The Court was persuaded that the adoption consent statute, IC 31-19-9-1(a)(3), which gave OFC as the child's legal guardian an opportunity to consent to the adoption, enabled Probate Court to retain exclusive jurisdiction over an adoption proceeding even as it respected the opinion of OFC as the child's legal guardian and the petitioner in the simultaneous TPR proceeding. The Court further found that the mere fact that there were pending CHINS and TPR proceedings did not in any way divest the Probate Court of its exclusive jurisdiction over all adoption proceedings. The Court concluded that the Probate Court had properly exercised jurisdiction over the adoption petition.

See Chapter 3, II.G.1 for further discussion on the resolution of the jurisdictional conflict between CHINS, TPR, and adoption cases involving the same child or children.

Venue of an adoption petition has also been addressed by case law. See:

In Re Adoption of W.M., 55 N.E.3d 386, 388-9 (Ind. Ct. App. 2016), in which the Court affirmed the order of the Greene Circuit Court transferring Grandparents' adoption petition to the Monroe Circuit Court, where the child's CHINS case, the termination of parental rights case, and Aunt and Uncle's adoption petition were pending. Greene Circuit Court did not have exclusive jurisdiction over the adoption proceeding, and the preferred venue for the case was Monroe Circuit Court. Grandparents properly filed their adoption petition in Greene County because that was their county of residence; Aunt and Uncle also properly filed their adoption petition in Monroe County, where the child was a ward. Monroe Circuit Court was not required to divest itself of jurisdiction just because Grandparent's adoption petition was pending in Green Circuit Court. Since neither court had exclusive jurisdiction, the case should be decided in the court that was the preferred venue. The preferred venue for this case was the Monroe Circuit Court because the child's CHINS and termination of parental rights cases and Aunt and Uncle's adoption petition were all pending in the Monroe Circuit Court.

In Re Adoption of Z.D., 878 N.E.2d 495, 497-98 (Ind. Ct. App. 2007), where the Court held that (1) IC 31-19-2-2 permitted adoption petitions to be filed in both Benton County and Tippecanoe County and, under Ind. Trial Rule 75(A), preferred venue was in Tippecanoe County; and (2) Tippecanoe Circuit Court was not required to divest itself of jurisdiction and render its decree of adoption by Foster Parents void because grandmother's petition to adopt the child was pending in Benton County. The Court noted that there was no longer a statute requiring either the Tippecanoe Circuit Court or the Tippecanoe County DCS to provide notice of that adoption proceeding.

In Re Adoption of Infants H., 904 N.E.2d 203, 206-07 (Ind. 2009), *reh'g denied*, 935 N.E.2d 146 (Ind. 2009), where the Court held that under these facts—a New Jersey resident who came to Indiana to adopt twins born in Indiana to a South Carolina woman who had been inseminated with biological material from California—the adoption court should transfer the matter to the county where the children are located. The Court noted

further that (1) when the petitioner is not an Indiana resident, venue lies only in the county in which the LCPA or governmental agency with custody of the child is located, or in the county where the child resides, and (2) venue is not jurisdictional but courts should still observe the directives of the statute.

The Interstate Compact on the Placement of Children (ICPC) must be followed and all of its detailed requirements addressed and met, when it actually applies to the case. See **In Re Adoption of Infants H.**, 904 N.E.2d 203, 206-07 (Ind. 2009), *reh'g denied*, 935 N.E.2d 146 (Ind. 2009) (reversed and remanded in part due to lack of compliance with the ICPC; holding that all requirements of the ICPC had not been properly addressed and met, and without such compliance, the matter must be remanded).

For case law on when the ICPC is not implicated, see **In Re Adoption of M.L.L.**, 810 N.E.2d 1088, 1092-93 (Ind. Ct. App. 2004) (holding that the trial court had not erred when it found that Mother had abandoned the child for purposes of the UCCJA, as Mother had shown a "settled purpose to forego all parental duties and relinquish all parental claims to the child"; also holding that Tennessee did not retain jurisdiction over the matter pursuant to the ICPC, as the ICPC does not apply to the sending or bringing of a child into a receiving state by the child's parent and leaving the child with a non-agency guardian, and since Mother had sent the child to Indiana to live with relatives whom she designated as guardians, this was not governed by the ICPC).

II. B. 2. ICWA Jurisdiction

In **Adoptive Couple v. Baby Girl**, 133 S. Ct. 2552, 2559-64 (2013), an ICWA decision, the U.S. Supreme Court reversed the judgment of the South Carolina Supreme Court. The U.S. Supreme Court remanded the case for further proceedings not inconsistent with its opinion. Baby Girl was classified as an Indian because she is 3/256 Cherokee. Biological Father was a member of the Cherokee Nation. Birth Mother and Biological Father broke off their engagement, and eventually, Biological Father told Birth Mother that he relinquished his rights. Birth Mother decided to put Baby Girl up for adoption, and her attorney contacted the Cherokee Nation to determine whether Biological Father's status, but misspelled Biological Father's first name and incorrectly stated his birthday. The Cherokee Nation could not verify Biological Father's membership in the tribal records. Birth Mother consented to Baby Girl's adoption by Adoptive Couple. Biological Father provided no financial assistance at any point, he was served with notice of the adoption, and he signed papers stating that he accepted service and that he was not contesting the adoption. He later changed his mind and contacted a lawyer. Around the same time, the Cherokee Nation identified Biological Father as a registered member and concluded that Baby Girl was an "Indian Child" as defined in the Indian Child Welfare Act (ICWA). The Cherokee Nation intervened in the litigation.

A trial took place in the South Carolina Family Court, by which time Baby Girl was almost two years old. The Family Court concluded that Adoptive Couple had not carried the heightened burden under section 1912(f) of the ICWA, which provides that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt.... that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" (emphasis in opinion). The Family Court denied Adoptive Couple's petition for adoption, awarded custody to Biological Father, and at the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met. The South Carolina Supreme Court affirmed the Family Court's denial of the adoption petition and awarded custody of Baby Girl to Biological Father.

The U.S. Supreme Court said that it is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law. The U.S. Supreme Court did not decide whether Biological Father is a "parent", but assuming for the sake of argument that he is a "parent", the Court held that neither section 1912(f) nor 1912(d) bars the termination of his parental rights. The Court held that the phrase "continued custody of the child" in section 1912(f) refers to custody that a parent already has (or at least had at some point in the past) and does not apply where the Indian parent *never* had custody (emphasis in opinion). The Court observed that this reading comports with the statutory text, which demonstrates that the ICWA was designed primarily to counteract the unwarranted *removal* of Indian children from Indian families (emphasis in opinion). The Court said that the ICWA's primary goal is not implicated when and Indian child's adoption is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights. The Court opined that section 1912(f) does not apply in cases where the Indian parent never had custody of the Indian child.

Section 1912(d) applies only when an Indian family's "breakup" would be precipitated by terminating parental rights. The Court said that the term "breakup" refers in this context to "[t]he discontinuance of a relationship," or "an ending as an effective entity". When an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" to be discontinue[d]" and no "effective entity" to be "end[ed]" by terminating the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and section 1912(d) is inapplicable. The Court observed that this interpretation is consistent with the explicit congressional purpose of setting certain "standards for the removal of Indian children from their families," section 1902 and with Bureau of Indian Affairs Guidelines.

Finally, the Court opined that section 1915(a)'s adoption-placement preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. The Court said that Biological Father is not covered by section 1915(a) because he did not seek to *adopt* Baby Girl, instead he argued that his parental rights should not be terminated (emphasis in opinion). The Court noted that parental grandparents never sought custody of Baby Girl and no other members of the Cherokee Nation or "other Indian families" sought to adopt her.

ICWA jurisdiction was also thoroughly addressed and discussed in **Matter of Adoption of T.R.M.**, 525 N.E.2d 298 (Ind. 1988), where the Porter Circuit Court was found to have good cause for denying transfer of jurisdiction to the tribal court of an Indian child who had never lived on the reservation and had been voluntarily placed with a non-Indian adoptive family by her Indian birth mother. The Court first addressed §1911(a), which gives an Indian trial court exclusive jurisdiction if the child resides or is domiciled within the reservation or if the tribal court has wardship of the child. The trial court found that neither Mother nor the child were residing or domiciled within the reservation, the wardship order that the tribal court entered was over a year after the child's birth, when the child had already been abandoned by Mother and was not living or domiciled within the reservation, and several months after the Tribe had filed habeas corpus petitions. Since the record supported these findings, §1911(a) did not give the tribal court exclusive jurisdiction. The Court then addressed §1911(b), which would require a transfer of the matter to a tribal court "absent good cause to the contrary." The Court held that the trial court's findings that not only was there good cause to the contrary, but also that it was in the best interests of the child not to grant transfer to a tribal court, were supported by the record. Mother and the tribe also asserted several other jurisdictional arguments, all of which the Court dismissed or declined to accept.

ICWA may not apply if the removal of a child was not a removal from custody within an Indian family. See **In Re Adoption of D.C.**, 928 N.E.2d 602, 605-6 (Ind. Ct. App. 2010), *trans. denied* (affirming trial court determination that ICWA was not applicable because the proposed adoption would not remove a child from an Indian home; holding that Indiana Supreme Court had already determined that ICWA is inapplicable where there was no "removal" from custody within an Indian family as contemplated by 24 U.S.C. sections 1902 and 1912; Court declined to give credit to Father's argument that he, child's sister, and the child constituted an Indian family, where the child had never lived with Father and the child was not enrolled as a member of the tribe); **Matter of Adoption of T.R.M.**, 525 N.E.2d 298, 303 (Ind. 1988) (holding that ICWA did not apply to the case; although parties stipulated that the child was an Indian child, the Court noted that ICWA was only applicable when the matter dealt with the removal of Indian children from their families, and in this case, other than the first five days of her life, the child had lived with adoptive parents for her entire life of seven years; Court opined that since the child "was abandoned to the adoptive mother essentially at the earliest practical moment after childbirth and initial hospital care, we cannot discern how the subsequent adoption proceeding constituted a 'breakup of the Indian family.'")

See Chapter 2 at III.C. for further discussion of the Indian Child Welfare Act.

II. B. 3. Standing

Only a person entitled to notice of an adoption under IC 31-19-4 or IC 31-19-4.5 has standing to contest an adoption. IC 31-19-10-1(a). People who are entitled to notice is discussed more in this Chapter at VII.

Generally, persons whose consent is needed have standing to participate in an adoption hearing or to intervene in the case. IC 31-19-9-1 provides for categories of people whose consent is needed; these people have standing an adoption case.

Thus, if a person is given by statute the right to notice or a chance to object to or consent to an adoption, they have standing. Beyond biological parents, this can also include guardians, stepparents who have been granted custody, and persons who qualify as de facto custodians. See **In Re Adoption of L.C.E**, 940 N.E.2d 1224, 1226-8 (Ind. Ct. App. 2011) (holding that since Stepfather was the child's legal custodian, the trial court erred when it failed to consider Stepfather's objection and grant his motion to vacate the adoption; Stepfather had not been given notice or a chance to intervene in the adoption, and IC 31-19-9-1(a)(3) requires written consent of each person having lawful custody of the child before a child may be adopted. Since Stepfather was the lawful custodian of the child, his consent was required for adoption); **In the Matter of the Adoption of B.C.H.**, 22 N.E.3d 580, 585-6 (Ind. 2014) (holding that for purposes of IC 31-19-9-1(a)(3), "lawful custody" encompasses individuals who fit the statutory definition of a de facto custodian at the time a petition for adoption is filed. Maternal Grandparents were lawful custodians of the child, and as such, were entitled to notice and an opportunity to consent to the adoption proceedings. "Lawful" did not just mean via court order, but rather meant something that is not contrary to law, and therefore, "lawful custody means custody that is not unlawful." The use of this language likely reflected the General Assembly's policy decision that adoption trial courts should be able to hear, and want to be able to hear from a party "with care, custody, and control of the child in question—regardless of whether the party's responsibility derives from a court order").

DCS may also have standing to intervene in and participate in an adoption case; if a child is a ward of DCS, then DCS is an "agency or local office having lawful custody of the child whose adoption is being sought" and their consent is needed. IC 31-19-9-1(3). See **In Re Infant Girl W.**, 845 N.E.2d 229, 238 (Ind. Ct. App. 2006), *trans. denied sub nom*. In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2000) (Dickson, J. dissenting) (Court held that OFC was a party to the adoption case with standing to appeal; Court noted the following: (1) normally OFC's consent to the adoption would have been required because it had legal custody of the child and was responsible for the child's care and placement; (2) OFC was entitled to receive notice of the pending adoption pursuant to IC 31-19-2.5-3 and IC 31-19-9-1(a)(3); and (3) OFC had been heavily involved in the child's adoption at every key juncture, as it should have been because it was the child's legal guardian).

Persons who are not entitled to notice of an adoption, or are not entitled to object or consent to an adoption generally do not have standing in an adoption matter. See **In Re Adoption of Z.D.**, 878 N.E.2d 495, 498 (Ind. Ct. App. 2007) (it is well-settled that "noncustodial grandparents do not have standing to intervene in adoption proceedings"); **In Re Adoption of J.B.S.**, 843 N.E.2d 975, 978-79 (Ind. Ct. App. 2006) (holding that while Maternal Aunt had been granted visitation privileges in a guardianship case, Maternal Aunt was not a party in the adoption, had no standing to participate in the adoption proceedings, and no standing to object to those proceedings once final; the Court further opined that maternal aunts were not comparable to grandparents, who under some circumstances can petition a court for visitation rights, as no such right exists for aunts).

Although grandparents who might be entitled to grandparent visitation rights may, in some circumstances, qualify as persons to whom notice of an adoption must be given, the notice itself is limited to the issue of visitation, and may not be used to contest an adoption. IC 31-19-4.5-1.5(1). In effect, the statute that provides that they must be given notice does not give them standing. IC 31-19-4.5-1(3); IC 31-19-4.5-1.5(1).

III. PETITIONING FOR ADOPTION

III. A. Who May Petition

III. A. 1. In General

A husband and wife must join in an adoption petition, unless it is a stepparent adoption; in this case, only the stepparent needs to petition to adopt. IC 31-19-2-2. If a person who filed to adopt a child decides not to adopt or is unable to adopt the child, the adoption petition can be amended, or a second petition can be filed in the same action to substitute another person as the petitioner for adoption. IC 31-19-2-2(c). The amended petition or second petition relates back to the date of the original petition. IC 31-19-2-2.

Indiana residents may petition to adopt any child, but non-Indiana residents may only petition in Indiana to adopt a "hard to place" child. IC 31-19-2-2 and -3. Non-Indiana residents may petition to adopt an Indiana child who is not hard to place, but the adoption should be filed in the petitioner's home state and the Interstate Compact at IC 31-28-4 and IC 31-28-6 applies. A "hard to place" child is a child who is "disadvantaged because of ethnic background, race, color, language, physical, mental or medical disability, age, or because the child is a member of a sibling group that should be placed in the same home." IC 31-9-2-51.

III. A. 1. a. Case Law On Unmarried Couple Petitions or Same Sex Couple Petitions

A second parent who wishes to adopt a child does not need to be married to the biological parent; this includes both unmarried opposite sex couples as well as same-sex couples.

In Re Adoption of J.T.A., 988 N.E.2d 1250, 1251-4 (Ind. Ct. App. 2013), *trans. denied*, where the Court found that the trial court erred in determining that Father's parental rights would have been terminated if Fiancée's adoption petition had been granted; holding that it was clear that both Father and Fiancée were acting as parents to the child, that this was in intra-family adoption, that neither Fiancée nor Father wished to have Father's parental rights terminated by the adoption, and that "it would be absurd and contrary to the intent of the legislature to divest Father of his parental rights where he would continue to live in a family unit with the [c]hild and parent the [c]hild") (affirmed on other grounds).

In Re Adoption of A.M., 930 N.E.2d 613, 621 (Ind. Ct. App. 2010), where the Court concluded that the trial court erred in denying Grandfather's petition to adopt his granddaughter. Both Mother and Father consented to the adoption, but the petition included that Mother was not relinquishing her legal maternal rights, resulting in Grandfather and Mother being co-parents of the child. The Court looked to IC 31-10-2-1, which provides that it is the "policy of this state and the purpose of this title to: (1) recognize the importance of family and children in our society; (2) recognize the responsibility of the state to enhance the viability of children and family in our society… (4) strengthen family life by assisting parents to fulfill their parental obligations". While the legislature did not define "family," IC 31-9-2-44.5 provides that "[a]n individual is a 'family or household member' of another person if the individual…is related by blood or adoption to the other person." The Court said that Grandfather is considered family under the statute. The Court noted that: (1) Grandfather is the child's biological grandfather; (2) Mother and Grandfather live only fifteen minutes apart; (3) the child stays overnight with Grandfather almost every weekend and has contact with Grandfather three or four times per week; (4) Grandfather takes the child to church, dance class, and the park; (5) Grandfather provides discipline and financial support. The Court said, "[i]n summary, the record reveals that Grandfather and Mother are both acting as parents."

In Re Infant Girl W., 845 N.E.2d 229, 242-44 (Ind. Ct. App. 2006), *trans. denied sub nom.* In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006) (Dickson, J. dissenting), where the Court concluded that, under the Indiana Adoption Act, an unmarried couple may file a joint petition to adopt a minor child. The same sex foster parents jointly petitioned to adopt their eighteen-month-old foster child who had resided with them since she was two days old; the adoption was granted over DCS's objections. This issue is not limited by or related to the sexual orientation of the would-be adoptive parents. IC 31-19-2-2(a) provides that "a resident of Indiana" may file a petition to adopt a child under the age of eighteen. The Court stated that it is a well-settled rule of statutory construction that words used in their singular also include their plural. Upon examining the statute regarding adoption by married couples, IC 31-19-2-4, the Court concluded that the purpose of requiring married persons to both petition for adoption was for public policy reasons to guarantee harmony on the part of the adoptive parents. The Court opined that it does not follow that the legislature was simultaneously denying an unmarried couple the right to petition for adoption jointly.

Mariga v. Flint, 822 N.E.2d 620, 626-27 (Ind. Ct. App. 2005), the Court applied In Re Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004) retroactively in response to

the former domestic partner adoptive mother's contention in her 2004 petition to vacate adoption that the trial court had lacked authority to grant her petition for adoption of her domestic partner's biological children in 1997. The Court stated that generally, "pronouncements" of common law made in rendering judicial opinions of civil cases have retroactive effect unless such pronouncements impair contracts made or vested rights acquired in reliance on an earlier decision.

In Re Adoption of K.S.P., 804 N.E.2d 1253, 1257-60 (Ind. Ct. App. 2004), where the Court reversed and remanded the trial court's denial of a domestic partner's petition to adopt the biological children of her same sex partner. The trial court denied the domestic partner's adoption petition because of its interpretation that IC 31-19-15-1 provided that Mother would be divested of all rights to the children after the adoption. The Court concluded that, in light of the purpose and spirit of Indiana's adoption laws, the legislature could not have intended a "destructive and absurd" result of divesting Mother's right to her children by granting the domestic partner's adoption petitions. The Court stated that resolution of the instant case affected many possible benefits and legal entitlements for the children and that entitlement to benefits from a second parent cannot rationally hinge on whether the child's natural parent is a biological or adoptive parent. Allowing continuation of the rights of both the biological and adoptive parents, where compelled by the best interests of the child, was the only rational result.

In Re Adoption of M.M.G.C., 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003), where the Court concluded that, consistent with the General Assembly's policy of providing stable homes through adoption, Indiana's common law permits a second parent to adopt a child without divesting the rights of the first adoptive parent. In this case, one member of same-sex domestic partnership had adopted children, her partner sought to adopt the children as a second parent, and the trial court had denied the petition.

III. A. 1. b. Substitution of Adoption Petitioners

IC 31-19-2-2(c) provides that, subject to IC 31-19-9-3, if a person who filed to adopt a child decides not to adopt or is unable to adopt the child, the adoption petition can be amended, or a second petition can be filed in the same action to substitute another person as the petitioner for adoption. This statute also provides that the amended petition or second petition relates back to the date of the original petition.

IC 31-19-9-3 addresses substitution of an adoption petitioner as it pertains to the mother's consent. IC 31-19-9-3(b) states that an adoption petitioner may be substituted under IC 31-19-2-2 if the mother executed a written consent to the substitution, or the initial consent contains a statement by the mother that she voluntarily agrees to a substation of adoption petitioners without her additional consent. This statute further provides that the mother's consent "is not conditional regardless of whether the mother consents or does not consent to the substitution of petitioners under this subsection." For case law on blanket consents, see **Johnson v. Cupp**, 274 N.E.2d 411, (Ind. Ct. App. 1971).

There are also statutes which directly relate to a putative father's attempt to establish paternity and the possibility of a failed adoption. IC 31-19-9-17(b) bars a putative father whose consent to adoption is implied under IC 31-19-9-15 from establishing paternity in Indiana or in any other jurisdiction unless the putative father submits an affidavit prepared by the licensed child placing agency or the attorney that served the putative father with pre-birth notice of the adoption. The affidavit must state that neither a petition for adoption nor placement of the child in a prospective adoptive home is pending. These

requirements are jurisdictional and must be strictly adhered to by the putative father and the court. IC 31-19-9-17(c) states: "An individual who is otherwise barred from establishing paternity under this article may establish paternity in relation to a child if an adoption for the child is not pending or contemplated. A petition for adoption that is not filed or a petition for adoption that is dismissed is not a basis for enabling an individual to establish paternity under this section unless the requirements of subsection (b) are satisfied." Please note that case law such as In Re Adoption of Infant Female Fitz, 778 N.E.2d 432, 438-39 (Ind. Ct. App. 2002 has been rendered null, since this decision was issued before the amendments to IC 31-19-9-17.

III. A. 1. c. DCS Initiates Adoption

DCS could initiate an adoption proceeding for a CHINS whose permanency plan of adoption has been approved by the court. See IC 31-34-21-5.8(b)(2) which states that DCS shall make reasonable efforts to complete whatever steps are necessary to finalize the permanent placement of the child in a timely manner.

The Court explored this question in **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865, 871-72 (Ind. Ct. App. 2006), where DCS argued that Putative Father did not have standing to challenge the termination of his parental rights by the juvenile court because he had taken no action to establish paternity. The Court discussed IC 31-35-1-4.5 (voluntary termination statute) and IC 31-19-9-15(a) (adoption statute), both of which state that the putative father's consent to adoption is irrevocably implied without further court action in certain situations when the putative father has failed to file a paternity action. The Court contrasted these statutes with the involuntary termination statutes at IC 31-35-2, which do not require the putative father to take any steps to establish his paternity in order to contest a termination action where an adoption is not pending. The Court opined "[w]here a child services agency has developed a plan for adoption of a child in a particular home, that agency is free to choose between these two statutory frameworks in proceeding with the termination of a putative father's parental rights." Consequently, that DCS could initiate adoption proceedings and, under IC 31-35-1-4.5, provide the putative father with notice of the proceedings. Then, if the putative father failed to take steps to establish his paternity under 31-35-1-4.5, he would be presumed to consent to the adoption, and DCS could proceed unhindered by any claim he might thereafter bring.

Practice Note: Practitioners are cautioned that IC 31-35-1-4.5 and IC 31-19-9-15(a) discussed in In Re Parent-Child Relationship of S.M., 840 N.E.2d 865 (Ind. Ct. App. 2006), apply only in limited factual situations where the putative father has received actual pre-birth notice under IC 31-19-3 of Mother's intention to proceed with adoptive placement of the child. Most CHINS cases do not involve pre-birth adoption notices or mothers consenting to adoption. Practitioners must be careful to send the statutorily required adoption notice to the putative father which is appropriate to the facts of the individual situation. Also, there are ethical conflict of interest issues to consider for practitioners representing both DCS and the adoption petitioners. See Ind. Professional Conduct Rules 1.7 and 1.8. Conflict of interest issues could arise when there is a dispute between DCS and the adoption petitioners regarding availability and amounts of adoption subsidy or adoption assistance or postadoption issues regarding parental or birth sibling contact.

III. A. 2. Foster Parent Petitioners

Foster parents may petition for adoption. For issues on jurisdiction between CHINS proceedings, termination of the parent-child relationship proceedings, and adoption proceedings, see Chapter 3 at II.D and II.F.

For case law in which a foster parent's petition for adoption was granted, see:
In Re Adoption of A.S., 912 N.E.2d 840, 850 (Ind. Ct. App. 2009) (adoption petitions of Second Foster Mother and her adult daughter granted; Court concluded that parties whose consent is required for an adoption to be granted may execute subsequent consents, and, here, the biological parents and MCDCS executed subsequent consents allowing Second Foster Mother and her adult daughter to adopt the children, which resulted in their petitions being supported by the necessary consents);
In Re Adoption of L.M.R., 884 N.E.2d 931 (Ind. Ct. App. 2008) (Court affirmed trial court's grant of adoption petition of child's former foster mother and denial of adoption petition of child's paternal grandparents; trial court properly determined that DCS failed to act in child's best interest by refusing to consent to former foster mother's adoption);
In Re Adoption of H.N.P.G., 878 N.E.2d 900, 904, 906 (Ind. Ct. App. 2008) (Court affirmed probate court's grant of foster parents' petition to adopt child where foster parents proved that Father was unfit to be parent and adoption of child by foster parents was in child's best interests), *trans. denied*;
In Re Adoption of Z.D., 878 N.E.2d 495, 497 (Ind. Ct. App. 2007) (adoption petition of foster parents granted; under the circumstances of this case, Tippecanoe Circuit Court was not required to divest itself of jurisdiction and render its decree of adoption void because Dawson's petition to adopt the child was pending in Benton County);
In Re Adoption of J.D.B., 876 N.E.2d 252 (Ind. Ct. App. 2007) (in adoption case foster parents proved that father's consent to adoption was not needed because child was born out of wedlock and conceived as a result of sexual misconduct with a minor; DCs consented to foster parents' adoption), *trans. denied*;
In Re Infant Girl W., 845 N.E.2d 229 (Ind. Ct. App. 2006), *trans. denied sub nom.* In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006) (Dickson, J. dissenting) (Court affirmed the Marion Probate Court's grant of the unmarried, same sex foster parents' petition for adoption of their eighteen-month-old foster child. The Morgan County OFC had filed a CHINS petition shortly after the child's birth because the child's mother decided to place the child for adoption. The Morgan County OFC objected to the adoption, but the Marion Probate Court found that the reasons for OFC's refusal to consent to the adoption were not in the child's best interests, and, consequently, that OFC's consent was not required);
In Re Adoption of J.P., 713 N.E.2d 873 (Ind. Ct. App. 1999) (a foster parent, with the consent of DFC, adopted a child who was in the custody of DFC; the probate court dispensed with the birth mother's consent due to her failure to communicate significantly with the child. The Court of Appeals affirmed the adoption).

For case law where a foster parent's petition for adoption was ultimately denied, see:
In Re Adoption of J.S.S., 61 N.E.3d 394 (Ind. Ct. App. 2016) (Court held that the trial court did not err in determining that Foster Parents failed to meet their burden of proof to show that Father's consent to the adoption was not necessary. Foster Parents were required to show by clear and convincing evidence that Father's consent was not required under IC 31-19-9-8(a), and they did not);
In Re Adoption of C.B.M., 992 N.E.2d 687 (Ind. 2013) (Supreme Court vacated children's adoption by foster parents because adoption was based upon termination of natural mother's parental rights which had been reversed on appeal after adoption was granted);

In Re Adoption of N.W.R., 971 N.E.2d 110 (Ind. Ct. App. 2012) (Court held that DCS's motion to withdraw consent to foster parents' adoption so DCS could investigate alternative placement with relative should have been granted by trial court);
In Re Adoption of H.L.W., Jr., 931 N.E.2d 400 (Ind. Ct. App. 2010) (Court found that trial court erred when it determined that DCS's withholding of consent to foster parents' adoption was not in child's best interest; DCS was working with child's father on reunification and Father was complying with DCS services);
In Re Adoption of E.B., 733 N.E.2d 4 (Ind. Ct. App. 2000) (the Court affirmed the probate court's denial of an adoption petition by foster parents of an adjudicated CHINS on jurisdictional grounds).

Regarding stays of proceedings, see **A.D. v. Clark**, 737 N.E.2d 1214 (Ind. Ct. App. 2000), in which the Court affirmed the trial court's order granting a stay of the involuntary termination proceeding pending a hearing on the foster parent's petition for adoption.

III. A. 3. Relative Petitioners and Sibling Placements

Case law provides that relatives have no preferential legal right to adopt, and that it is not completely necessary for siblings to be adopted together. For case law on this topic, see
In Re Adoption of J.L.J, 4 N.E.3d 1189, 1199-1200 (Ind. Ct. App. 2014) (Court affirmed trial court's decision denying Grandmother's petition for adoption, and granting Guardian's petition to adopt the children. The Court, quoting In Re Adoption of Childers, 441 N.E.2d 976, 980 (Ind. Ct. App. 1982), noted that a "[b]lood relationship, while a material factor, is not controlling... Relatives have no preferential legal right to adopt.");
In Re Adoption of A.S., 912 N.E.2d 840 (Ind. Ct. App. 2009) (Court affirmed adoption of one of four siblings by foster mother and adoption of other three by foster mother's adult daughter)
In Re Adoption of L.M.R., 884 N.E.2d 931 (Ind. Ct. App. 2008) (Court affirmed trial court's grant of adoption petition of child's former foster mother and denial of adoption petition of child's paternal grandparent, where child had two siblings, neither of whom was adopted by foster mother)
In Re Adoption of Z.D., 878 N.E.2d 495, 498 (Ind. Ct. App. 2007) (when parental rights of Father, petitioner's son, were terminated, any of petitioner's derivative due process rights with respect to visitation, custody, or adoption were effectively extinguished)
In Re Adoption of B.C.S., 793 N.E.2d 1054, 1062-63 (Ind. Ct. App. 2003) (Court affirmed the trial court's order granting the adoption petition filed by Mother's former long term companion and denying Great-Aunt and Great-Uncle's adoption petition, who had previously adopted the child's half-brother; Indiana law does not give preferential treatment to blood relatives who seek to adopt a child, and Court determined that IC 31-19-8-6 while that subsection could be read to imply a preference for placing sibling groups in the same home, it by no means indicates that siblings must be placed in the same home, and that these half siblings had not grown up in the same household)
In Re Adoption of I.K.E.W., 724 N.E.2d 245, 249 n.6 (Ind. Ct. App. 2000) (Court cited Childers for the principle that it is well settled that relatives have no preferential legal right to adopt in Indiana; Foster Parents' adoption of child was reversed because the trial court failed to notify Grandparents, who had also petitioned for adoption, of Foster Parents' adoption hearing);
In Re Adoption of Childers, 441 N.E.2d 976, 980 (Ind. Ct. App. 1982) (Court stated that blood relationship, while a material factor, is not controlling. The controlling factor is the best interests of the child).

See Chapter 3 at II.C.4 for further discussion.

III. B. Where to File a Petition

Indiana residents may file their petition for adoption in their county of residence, in the child's county of residence, or in the county where the agency which has custody of the child is located. IC 31-19-2-2(a). Non-residents may file their petition for adoption in the child's county of residence or in the county where the agency having custody of the child is located. IC 31-19-2-3(a).

Case law regarding where to file an adoption petition includes:

In Re Adoption of W.M., 55 N.E.3d 386, 388-9 (Ind. Ct. App. 2016), in which the Court affirmed the order of the Greene Circuit Court transferring Grandparents' adoption petition to the Monroe Circuit Court, where the child's CHINS case, the termination of parental rights case, and Aunt and Uncle's adoption petition were pending. Greene Circuit Court did not have exclusive jurisdiction over the adoption proceeding, and the preferred venue for the case was Monroe Circuit Court. Grandparents were proper in filing their adoption petition in Greene County, their county of residence; Aunt and Uncle also properly filed their adoption petition in Monroe County, where the child was a ward. The Monroe Circuit Court was not required to divest itself of jurisdiction just because Grandparent's adoption petition was pending in Green Circuit Court. Since neither court had exclusive jurisdiction, the case should be decided in the court that was the preferred venue, which was the Monroe Circuit Court because the child's CHINS and termination of parental rights cases and Aunt and Uncle's adoption petition were all pending in the Monroe Circuit Court.

In Re Adoption of Infants H., 904 N.E.2d 203, 206-07 (Ind. 2009), *reh'g denied*, 935 N.E.2d 146 (Ind. 2009), where a New Jersey resident who came to Indiana to adopt twins born in Indiana to a South Carolina woman who had been inseminated with biological material from California. The Court reversed and remanded for want of compliance with the Interstate Compact; the adoption court should transfer the matter to the county where the children are located. When the petitioner is not a resident of Indiana, venue lies only in the county in which the licensed child placing agency or governmental agency having custody of the child is located, or in the county where the child resides. Venue is not jurisdictional but courts should still observe the directives of the statute. The disconnect between the adoption and the CHINS proceedings underscored the importance of honoring the legislative judgment about venue. The Supreme Court left open the question of whether Indiana courts have authority to grant adoption requests made by non-residents for children who are not residents.

In Re Adoption of Z.D., 878 N.E.2d 495, 497-98 (Ind. Ct. App. 2007), where Grandmother argued that Benton Circuit Court had exclusive jurisdiction over the child's adoption because her petition was filed in that court before Foster Parents' petition was filed in Tippecanoe Circuit Court. The Court held that (1) in accordance with IC 31-19-2-2, adoption petitions could properly be filed in both Benton County and Tippecanoe County and, under Ind. Trial Rule 75(A), preferred venue was in Tippecanoe County; (2) Tippecanoe Circuit Court was not required to divest itself of jurisdiction and void the adoption because Grandmother's petition to adopt the child was pending in Benton County; and (3) there was no longer a statute requiring either the Tippecanoe Circuit Court or the Tippecanoe County DFC to provide notice of that adoption proceeding.

III. C. Form and Contents of Petition

IC 31-19-2-6 provides that several pieces of information are necessary in a petition for adoption. The petition must contain the name, age, place of residence, date and place of marriage of the adoptive petitioners. IC 31-19-2-6(a)(4). It also must state whether the adoption petitioners have been convicted a felony or a misdemeanor relating to the health and safety of children, and, if so, the date and description of the conviction. IC 31-19-2-6(a)(7).

The petition must include the following information about the child: child's name (if known), sex, race, age or approximate age (if known), place of birth, proposed adoptive name, and the length of time (if any) which the child has resided with the petitioners. IC 31-19-2-6(a)(1), (2), and (6). The petition must also note whether the child possesses real or personal property and the property's description and value must also be included in the petition. IC 31-19-2-6(a)(3).

The petition must also contain information about the birth parents, or others who may have custody of or a legal relationship to the child. These pieces of information are: the name and address of the birth parents (if known), the name and address of the child's guardian or nearest kin if the child is an orphan, the name of the court or agency which has wardship of the child and the name of the agency sponsoring the adoption. IC 31-19-2-6(a)(5).

If there is a current, ongoing child support order or medical support order in effect, the petition must so state. IC 31-19-2-6(a)(8). Furthermore, if there is such a child support or medical order for the child, the following must be filed with the adoption petition: (1) A copy of the child support order or medical support order; and (2) A statement as to whether the child support order or medical support order is enforced by the prosecuting attorney through the Title IV-D child support program. IC 31-19-2-6(b).

An adoption petition must also specify any "[a]dditional information consistent with the purpose and provisions of this article that is considered relevant to the proceedings." IC 31-19-2-6(a)(9).

The child's medical report, prepared on a form prescribed by the state registrar, must accompany the adoption petition, or it must be filed not later than sixty days after the petition. IC 31-19-2-7(a). The description of what the medical report must include can be found at IC 31-19-2-7(b), and who it must be sent to can be found at IC 31-19-2-7(c). This statute should not be construed as authorizing the release of medical information that would result in the identification of an individual. IC 31-19-2-7(d).

Adoption subsidies are defined at IC 31-19-26.5-1, and it may be necessary to include a request for the adoption subsidies in the adoption petition. It is important for practitioners to note that all postadoption financial assistance agreements must be finalized prior to the granting of an adoption. See this Chapter at XIII for further discussion of postadoption financial assistance.

IC 31-19-2-5 provides that an adoption petition must be filed in triplicate, unless the petition for adoption is sponsored by a licensed child placing agency; in that case, the adoption petition must be filed in quadruplicate. The original copy of a petition for adoption must be verified by the oath or affirmation of each petitioner for adoption.

The court clerk shall send one copy of the adoption petition to a licensed child placing agency, as described in IC 31-9-2-17.5, with preference given to the agency sponsoring the adoption. IC 31-19-2-12.

Agency placement of the child in the adoptive petitioners' home is not a prerequisite to the court's consideration of the adoption petition on its merits. See Stout v. Tippecanoe Cty. Dept. of Pub. Welfare, 395 N.E.2d 444, 452 (Ind. Ct. App. 1979); IC 31-19-7-1.

III. D. Adoption Filing Fees

The adoption filing fee in 2017 is $156.00. The fee changes frequently, so practitioners should check and confirm the fee amount. IC 31-19-2-8 provides that the $20.00 adoption history fee and

the $50.00 putative father registry fee must be paid to the state department of health at the time of filing the adoption petition. The registry fee is used to administer the registry and pay for paternity or genetic testing in a paternity action in which an adoption is pending in accordance with IC 31-14-21-9.1. Adoption petitioners must also pay the fees and other costs for a criminal history check pursuant to IC 31-19-2-7.5(c). However, if the adoption petitioner seeks to adopt a child under the care and supervision of DCS at the time of filing the adoption petition or at any time thereafter, DCS may pay the fees and other costs of the required criminal history check. IC 31-19-2-7.5(d). See this Chapter at III.E.1.

Practice Note: IC 31-19-12-3.5 is a new statute and requires that before a birth certificate can be processed with respect to an adoption record, the following must first happen: (1) the adoption history fee and the putative father registry fee have been paid as required by IC 31-19-2-8; and (2) the report required to be prepared under IC 31-19-17-2 has been submitted to the state health department.

Counsel for the adoptive petitioners should save copies of the fee receipts to present to the court at the final hearing. The court may order any or all of the above fees waived due to the low income of the adoptive petitioners, if such circumstances exist. An affidavit regarding the adoptive petitioners' income and expenses should be attached to the motion for fee waiver, along with a proposed order for the judge's signature which directs the clerk to waive the fee.

III. E. Criminal History Check For Adoptive Petitioners

III. E. 1. Statutory Requirements

IC 31-19-2-7.5 requires that adoptive petitioners shall submit the necessary information, forms, or consents for a licensed child placing agency or the local office which conducts the inspection and investigation needed for adoption under IC 31-19-8-5 to conduct a criminal history check of the petitioners. However, this statute does not apply to a petitioner for adoption who provides the licensed child placing agency or the local office with the results of a criminal history check conducted in accordance with IC 31-9-2-22.5, and not more than one year before the date on which the petition is filed. IC 31-19-2-7.5(a). Practically speaking, it may be easier to furnish these forms, information, and consents to a licensed child placing agency or the local office.

IC 31-19-2-7.3 prohibits a court from waiving any criminal history check requirements set forth in IC 31-19-2.

Criminal history check is defined at IC 31-9-2-22.5. It includes a fingerprint based criminal history background check of both state and national databases for persons who are at least 18 years old. It also includes, for certain delineated persons, the collection of substantiated reports of child abuse or neglect in a jurisdiction where the person resided within the past five years, conducting checks in the National Sex Offender Registry, and conducting checks of local law enforcements records for all jurisdictions where a person lived. IC 31-9-2-22.5 is a lengthy statute and for more details, should be consulted in full.

The agency's report must contain the criminal history check information, among other things, and the information is required for the court to grant the adoption. See IC 31-19-8-6(c) and IC 31-19-11-1(a)(8). In addition, IC 31-19-2-7.6 mandates an adoption petitioner to notify the court in writing if the petitioner is charged with a felony or a misdemeanor relating to the health and safety of children while the adoption proceeding is pending.

In cases regarding adoption of CHINS children, a criminal history check will usually have been completed prior to the filing of the adoption petition, since most adoption petitioners are licensed foster parents or approved relative placements.

In **In Re Adoption of S.O.**, 56 N.E.3d 77, 82-3 (Ind. Ct. App. 2016), the Court reversed the trial court's order granting Stepmother's petition to adopt the three children. The Court remanded with instructions to order a statutorily compliant background check. The Court held that a background check that complies with IC 31-9-2-22.5 is an essential particular of the adoption process, and its absence renders an adoption petition fatally deficient. Stepmother's Johnson County and CPS checks complied with only two of the five requirements of a criminal history check under IC 31-9-2-22.5. Stepmother's criminal history check did not comply with the statute because there was no check of state and national records using fingerprints, there was no check of the national registry containing reports of child abuse and neglect, and there was no check of the national sex offender registry. The Court observed that IC 31-19-2-7.3 provides that no part of a criminal history check can be waived.

In **In Re Adoption I.B.**, 32 N.E.3d 1164, 1169-71 (Ind. 2015), the Supreme Court found that IC 31-19-11-1 is constitutional because its prohibitions are rationally related to the classifications they draw. Maternal Grandmother and Fiancé were barred from adopting the children because of their disqualifying felony convictions. IC 31-19-11(c) states that a court may not grant an adoption if a petitioner has been convicted of neglect of a dependent (IC 35-46-1-4(a)(1) and IC 35-46-1-4(a)(2)) or if a petitioner has a felony conviction involving a weapon unless the conviction did not occur within the past five years. The Court found there was no constitutional defect in barring adoptions by petitioners with felony child-neglect convictions. The Court noted that "there is no fundamental right to adopt" because the adoption process depends on so many variables, and that convicted felons are not a protected class. The Court opined that distinguishing between child-neglect felons and non-felons was rationally related to the legitimate legislative goal of ensuring that children will not be adopted into a neglectful home.

In **Moore v. State**, 845 N.E.2d 225, 229 (Ind. Ct. App. 2006), *trans. denied*, the Court reversed the OFC case manager Moore's conviction for obstruction of justice, finding that the charges had been filed outside the statute of limitations and the evidence was insufficient. The Court noted that the evidence was insufficient to support Moore's conviction because: (1) it was IFFSA's policy to ignore misdemeanor convictions and felony theft convictions when considering placement of children in potential homes; (2) based on IFSSA policies, Moore's statement in the Adoptive Home Study was not false because there was no material criminal history to report; (3) there was no evidence that Moore knew of the adoptive family's previous contact with OFC and falsely reported that there was none; (4) negligent conduct is not a criminal act in Indiana; (5) there was "not a shred of evidence" that Moore actually intended to mislead a public official. See Chapter 2 at VIII. for further discussion.

Practice Note: Practitioners should note the seriousness of adoption home study information and be especially careful to thoroughly research criminal history and DCS abuse and neglect history of adoptive petitioners for inclusion in adoption reports to the court.

III. E. 2. Criminal Convictions Which Can Prevent Adoption

There are criminal convictions which may prevent an adoption from proceeding, and a list of these can be found at IC 31-19-11-1(c). The following convictions of an adoption petitioner mean that a court cannot grant the adoption:

(1) Murder (IC 35-42-1-1)

(2) Causing suicide (IC 35-42-1-2)
(3) Assisting suicide (IC 35-42-1-2.5)
(4) Voluntary manslaughter (IC 35-42-1-3)
(5) Reckless homicide (IC 35-42-1-5)
(6) Domestic battery (IC 35-42-2-1.3)
(7) Aggravated battery (IC 35-42-2-1.5)
(8) Kidnapping (IC 35-42-3-2)
(9) A felony sex offense under IC 35-42-4
(10) Incest (IC 35-46-1-3)
(11) Neglect of a dependent (IC 35-46-1-4(a)(1) and IC 35-46-1-4(a)(2))
(12) Child selling (IC 35-46-1-4(d)
(13) An offense relating to material or a performance that is harmful to minors or obscene under IC 35-49-3
(14) A felony under the laws of another jurisdiction, including a military court, that is substantially equivalent to any of these offenses.

Other convictions of an adoption petitioner may not necessarily bar an adoption; the court may still grant the adoption if the date of the conviction did not occur within the immediately preceding five year period. IC 31-19-11-1(c). These include:

(1) Battery as a felony (IC 35-42-2-1)
(2) Criminal confinement (IC 35-42-3-3)
(3) Carjacking (IC 35-42-5-2) (repealed)
(4) Arson (IC 35-43-1-1)
(5) A felony involving a weapon under IC 35-47 or IC 35-47.5
(6) A felony relating to controlled substances under IC 35-48-4
(7) A felony under IC 9-30-5 [Operating a vehicle while intoxicated]

Other permissible basis for a court to deny an adoption include an adoption petitioner's: juvenile adjudication for an act listed at IC 31-19-11-1(c) that would be a felony if committed by an adult; conviction of a misdemeanor related to the health and safety of a child, or conviction of a felony not listed in IC 31-19-11-1(c).

Lastly, a court may not grant an adoption if the petitioner is a sex or violent offender (as defined in IC 11-8-8-5) or a sexually violent predator (as defined in IC 35-38-1-7.5). IC 31-19-11-1(d). In addition to IC 11-8-8-5 providing a definition of sex or violent offender, IC 11-8-8-5(c) also provides that the court shall consider expert testimony" in making the determination as to whether the delinquent child who is fourteen years of age or older is likely to repeat an act that would be an offense described in subsection 5(a) if committed by an adult.

In **In Re Adoption I.B.**, 32 N.E.3d 1164, 1169-71 (Ind. 2015), the Supreme Court found that IC 31-19-11-1 is constitutional because its prohibitions are rationally related to the classifications they draw. Maternal Grandmother and Fiancé were barred from adopting the children because of their disqualifying felony convictions. IC 31-19- 11(c) states that a court may not grant an adoption if a petitioner has been convicted of neglect of a dependent (IC 35-46-1-4(a)(1) and IC 35-46-1-4(a)(2)) or if a petitioner has a felony conviction involving a weapon unless the conviction did not occur within the past five years. The Court found there was no constitutional defect in barring adoptions by petitioners with felony child-neglect convictions. The Court noted that "there is no fundamental right to adopt" because the adoption process depends on so many variables, and that convicted felons are not a protected class. The Court opined that distinguishing between child-neglect felons and non-felons was rationally

related to the legitimate legislative goal of ensuring that children will not be adopted into a neglectful home.

In Re Adoption of J.L.S., 908 N.E.2d 1245, 1250 (Ind. Ct. App. 2009) (Court determined that, although jury had found prospective adoptive father guilty of aggravated battery, he was sentenced only for, and judgment of conviction was entered only for attempted murder, which IC 31-19-11-1(c) does not list as conviction prohibiting a court from granting an adoption; therefore, because his conviction "does not appear to impede the prospective parents' adoption petition as the law now stands," Court reversed and remanded case to determine whether adoption was still in best interests of child and whether prospective parents were of sufficient ability to rear the child and furnish suitable support and education pursuant to IC 31-19-11-1(a)(1) and (2)).

III. F. Adoptive Petitioner's Input in Termination Proceedings

Prospective adoptive parents must receive notice of a hearing on a petition or motion filed under IC 31-35-2 if anyone one of the following conditions is met: (A) each consent to adoption of the child that is required has been executed in the form and manner required and filed with the local office or DCS; or (B) the court having jurisdiction in the adoption case has determined that consent to adoption is not required from a parent, guardian, or custodian; or (C) a petition to terminate the parent-child relationship between the child and any parent who has not executed a written consent to adoption, has been filed and is pending. IC 31-35-2-6.5(c)(3)

Prospective adoptive parents and foster parents have the right to be heard and to make recommendations to the court at the termination hearing. This includes the right of prospective adoptive parents and foster parents to submit written statements to the court that may be made part of the record if the statements are properly served on all parties to the CHINS proceedings. IC 31-35-2-6.5(e).

Neither a foster parent nor prospective adoptive parents are made parties to the case as a result of the right to notice and the right to be heard. IC 31-35-2-6.5(g).

III. G. Custody of Child Pending Adoption

IC 31-19-2-13 allows petitioners for adoption to file a separate, ex parte, verified petition requesting temporary custody of a child sought to be adopted at the time of the filing of the adoption petition or any time thereafter. This statute does not apply to children who are under the care and supervision of DCS. The custody petition must be verified and signed by each petitioner for adoption. IC 31-19-2-13(a). The Court may grant the custody petition pending the hearing on the petition for adoption if the court finds that: (1) the petition for adoption is in proper form; and (2) placing the child with the petitioner(s) pending the adoption hearing is in the child's best interests. IC 31-19-2-13(b). If temporary custody is granted, the petitioner(s) are legally and financially responsible for the child until otherwise ordered by the court. IC 31-19-2-13(c). A new subsection provides that a temporary order regarding custody under this statute controls to the extent that another custody order issued by another court conflicts with an order entered under this statute. This does not apply to courts having appellate jurisdiction. IC 31-19-2-13(d).

Either a party to the adoption or a person who had custody of or parenting time or visitation the child before the temporary custody order was issued under this statute may file a petition to suspend, modify, or revoke the temporary custody order granted under this statute. IC 31-19-2-13(e). If such a petition is filed, the court must set the matter for hearing. IC 31-19-2-13(f). The court may suspend, modify, or revoke the temporary custody order if the court determines

suspension, modification, or revocation of the temporary custody order is in the best interests of the child. IC 31-19-2-13(g).

In **In Re Adoption of C.B.M.**, 992 NE.2d 687, 695, 697 (Ind. 2013), the Court determined that the children's adoption must be set aside. The children had been adjudicated CHINS and the natural mother's parental rights were later terminated, so the children's foster parents petitioned to adopt them. The adoption by the children's foster parents was granted by the adoption court before Mother's appeal of the termination order was resolved, and the termination order was ultimately reversed. The Indiana Supreme Court instructed the adoption court to vacate the adoption decree, to reset the adoption petition for a contested hearing, and to promptly serve notice and summons of that hearing on the natural mother. The Court observed that, pending the hearing, the trial court could exercise its authority to entertain motions regarding temporary custody of the children under IC 31-19-2-13 until final judgment is entered.

Practice Note: Counsel for adoption petitioners are cautioned that several Indiana Supreme Court opinions have sanctioned attorneys for obtaining ex parte orders without notice or compliance with Ind. Trial Rule 65. See **Matter of Robison**, 856 N.E.2d 1202, 1203 (Ind. 2006) (public reprimand for attorney who obtained ex parte order removing wife from residence without notice or certification of why notice should not be given); **Matter of Anonymous**, 786 N.E.2d 1185, 1190 (Ind. 2003) (private reprimand for attorney who engaged in ex parte communication with the judge resulting in order without complying with requirements of T.R. 65(E) by alleging that an injury would result to the moving party if no immediate order were issued); **Matter of Wilder**, 764 N.E.2d 617, 621 (Ind. 2002) (attorney suspended from practice of law for three days due to obtaining ex parte order with lack of adequate notice to opposing counsel and failure to satisfy conditions for relief without notice pursuant to T.R. 65); **Matter of Anonymous**, 729 N.E.2d 566, 569 (Ind. 2000) (private reprimand for attorney who obtained ex parte order regarding emergency custody based on GAL report without notifying opposing counsel of intention to seek immediate emergency judicial relief or complying with T.R. 65). Judges should review Ind. Code of Judicial Conduct Rule 2.9 which forbids ex parte communications, except in certain situations. See **Matter of Jacobi**, 715 N.E.2d 873, 875 (Ind. 1999) (judge suspended for three days without pay for violation of Judicial Conduct Canons 1, 2, and 3 by signing ex parte order without notice or compliance with T.R. 65). Even though IC 31-19-2-13 allows an ex parte petition, the Court is not precluded from holding a hearing on temporary custody before issuing a custody order pending the adoption hearing. In fact, if a petition is filed according to IC 31-19-2-13(e), then the court must hold a hearing.

III. H. Court Orders to Protect Anonymity of Petitioners

The Court may issue an order protecting the anonymity of adoption petitioners with specific orders to the attorneys for the parties to the case. IC 31-19-10-7. See this Chapter at VIII.D.3 for detailed discussion.

IV. ADOPTION CONSENTS

IV. A. In General

A consent to an adoption may be signed at any time after the child's birth in the presence of the court, a notary public, or an authorized agent of a licensed child placing agency or DCS. IC 31-19-9-2. See **Bell v. Adoption of A.R.H.**, 654 N.E.2d 29, 31 (Ind. Ct. App. 1995), for a description of the process of accepting consents in the presence of a Probate Commissioner.

A child's mother may not execute a consent to adoption before the birth of the child. IC 31-19-9-2(b). But see **Matter of Adoption of H.M.G.**, 606 N.E.2d 874 (Ind. Ct. App. 1993) (there is no

doubt the statute contemplates execution of the adoption consent after the child's birth; however, a pre-birth consent can be ratified by the biological mother's post-birth actions). A child's father may execute a written, notarized consent to adoption that contains an acknowledgement that the consent is irrevocable and that he will not receive notice of the adoption proceedings before the birth of the child. IC 31-19-9-2(c). A child's father who so consents to adoption may not challenge or contest the child's adoption. IC 31-19-9-2(d).

If the birth parent has counsel, counsel should be notified by a family case manager or social worker before accepting the birth parent's consent to adoption. See **In Re A.M.H.**, 732 N.E.2d 1284 (Ind. Ct. App. 2000). A consent must be voluntary to be valid; consent is voluntarily given if it is an act of the parent's own volition, free from fraud, duress or other consent-vitiating factors, and if it is made with knowledge of the essential facts. See **Matter of Adoption of Topel**, 571 N.E.2d 1295, 1298 (Ind. Ct. App. 1991).

Except as otherwise provided, a person who executes a written consent for adoption may not execute a second or subsequent consent for adoption for the same child unless one the following circumstances applies: (1) Each original petitioner provides a written statement that the petitioner is not adopting the child; or (2) The person consenting to the adoption has been permitted to withdraw the first consent to adoption under IC 31-19-10; or (3) The court dismisses the petition to adopt the child filed by the original adoptive petitioner(s); or (4) The court denies the petition to adopt the child filed by the original adoptive petitioner(s). IC 31-19-9-2(e). One of the noted exceptions is that DCS may execute more than one written consent to the adoption of the child if DCS determines that the execution of more than one written consent is in the best interests of the child. IC 31-19-9-2(f). The second exception provides that the parents of a child who is a ward of the state may execute a second or subsequent consent if the court with jurisdiction over the CHINS case determines that the adoption by the person to whom consents were originally signed is not in the child's best interests, or if the child's placement with the person who has petitioned or intends to petition to adopt the child is disrupted. IC 31-19-92(g).

A consent to an adoption does not need to name the prospective adoptive parents as long as the consent to adoption contains a statement, by the person consenting to adoption, that the person consenting to adoption voluntarily executed the consent to adoption without disclosure of the name or other identification of the petitioner for adoption. IC 31-19-9-3. An adoption petitioner may be substituted under IC 31-19-2-2 if Mother executed a written consent to the substitution, or the initial consent contains a statement by Mother that she voluntarily agrees to a substation of adoption petitioners without her additional consent. IC 31-19-9-3(b). This statute further provides that Mother's consent "is not conditional regardless of whether Mother consents or does not consent to the substitution of petitioners under this subsection."

Copies of the signed consent shall be filed with the clerk of the court where the adoption petition is pending and with the investigating agency which is preparing the court adoption report. IC 31-19-9-5.

The birth parent who consents to adoption must be provided with a copy of the state registrar's non-release form for adoption history and must receive an explanation of the availability of adoption history information under IC 31-19-17 through 25.5 and the birth parent's option to file a nonrelease form. IC 31-19-9-6.

Please note that effective July 2018, this statute will change; instead of using the term "nonrelease form", IC 31-19-9-6 will provide that there must be an explanation that identifying information

may be released unless the birth parent files the contact preference form with the state registrar indicating the birth parent's lack of consent to the release of identifying information, and that form must be sent to the birth parent. Currently, the subsection provides that identifying information about an adoption may be released unless the birth parent files the nonrelease form with the state registrar. IC 31-19-9-6(1)(C).

Practice Note: Practitioners should include with the consent form or by separate affidavit the parent's notarized statement regarding whether the parent does or does not claim membership or eligibility for membership in an American Indian tribe or is an Alaska Native member of a Regional Corporation. If the parent claims tribe membership or eligibility for membership, the identity of the tribe, if known, should be included in the parent's consent. 25 U.S.C.A. 1913 establishes specific procedures for adoption consents if the parent is Indian, which include that the consent was executed in writing, recorded before a judge who certified that the terms and consequences were fully explained and understood, and the court's certification that the parent understood the explanation in English or that it was interpreted in a language the parent understood. A consent given prior to or within ten days after an Indian child's birth is invalid, and an adoption consent by an Indian parent may be withdrawn for any reason prior to the entry of the adoption decree. Notice of the child's adoption must also be given to the Indian Tribe, or to the Secretary of the Interior, if the name of the tribe is not known. See Chapter 2 at III.C. for discussion of the Indian Child Welfare Act.

In **In Re Adoption of M.P.S., Jr.**, 963 N.E.2d 625, 629-30 (Ind. Ct. App. 2012), the Court held that Mother's consent to adoption of her child was involuntary where she was assured it was revocable and she did not intend to relinquish contact with her child. 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. The Court said that it is undisputed that the consents at issue were not signed before a Notary Public, as the attorney before whom they signed their consents had let her commission lapse. The Court disagreed with Grandparents' argument that because the attorney was an officer of the court, the intent of the Notary Public element of the statute was satisfied. The Court also observed that the parents, Grandparents, and Grandparents' attorney anticipated that parental contact would survive the execution of the consents to adopt. The Court noted that Mother did not manifest an intention to permanently relinquish all parental rights.

In Re Adoption of A.S., 912 N.E.2d 840, 846-50 (Ind. Ct. App. 2009) concluded that (1) parties whose consents are required for an adoption to be granted may execute subsequent consents, and (2) here, the biological parents and Marion County DCS (MCDCS) executed subsequent consents allowing the Second Foster Mother and her adult daughter to adopt the children, which resulted in their petitions being supported by the necessary consents. First Foster Mother argued that, since she received the initial consents to adopt the Children and they were not withdrawn, only she may adopt the Children. However, the Court found (1) no basis for holding that all subsequent consents are void; (2) nothing indicates a limitation on the ability to file additional consents, although Indiana Code limits the ability to withdraw a consent or to substitute a petitioner; and (3) public policy does not dictate a contrary result, in that allowing competing petitions and subsequent consents gives a probate court a choice between two families to determine if placement with one of them is in the best interest of the child, avoids a "race" to obtain a parental consent, and allows biological parents whose rights have not yet been terminated and a county DCS to address changing circumstances.

In **In Re Adoption of Infant Child Baxter**, 799 N.E.2d 1057, 1062-63 (Ind. 2003), the Court reversed and remanded to the trial court for a determination of whether the consents were valid

and authentic even though they were not executed in the presence of any one of the six entities specified in the consent statute. The Court quoted the consent statute, IC 31-19-9-2, noting that a consent to adoption can be executed at any time after a child's birth in the presence of one of the following: (1) the court; (2) a notary public or other person authorized to take acknowledgements; or (3) an authorized agent of the division of family and children, a county office of family and children, or a licensed child placing agency. The Court held that, if the written consent is not executed in the presence of any one of the six specified entities, the validity of the consent may nevertheless be satisfied by evidence that signatures are authentic and genuine in all respects and manifest a present intention to give the child up for adoption.

In **In Re Adoption of N.J.G.**, 891 N.E.2d 60, 64-65, 67 (Ind. Ct. App. 2008), the Court reversed and remanded for further proceedings the trial court's order to the extent that it concluded that Mother consented to and may not contest the child's adoption. In making its finding, the Court noted that Matter of Adoption of H.M.G., 606 N.E.2d 874, 875 (Ind. Ct. App. 1993) had held that the intent of the statute was best served by finding a pre-birth consent to adoption to be voidable rather than void, and therefore one that could be ratified by a post-birth act which sufficiently manifested a present intention to give the child up for adoption. The Court found, however, that when the legislature amended IC 31-19-9-2 in 2005, it explicitly provided that "[t]he child's mother may not execute a consent to adoption before the birth of the child," and that this new language "indicates a clear legislative intent that pre-birth consents to adoption are void, rather than voidable."

IV. B. Hearing on Consent on Uncontested Adoptions

Practice Note: The person or agency who accepts the birth parent's consent may request a consent hearing be held before the court having jurisdiction over the adoption. This consent hearing may occur before the adoption petition is filed. The hearing may be conducted based on the written or oral motion of DCS, a licensed child placing agency, or an attorney arranging an adoption. A record may be made of the consent hearing. This practice is recommended if the birth parent is a minor or suffers from developmental disability, mental illness, or some other possible consent vitiating condition. The birth parent may be represented by counsel, and the person accepting the consent may request court appointed counsel or provide private, independent counsel for the birth parent. Expert evidence of the birth parent's physical or mental condition, including the parent's ability to comprehend the meaning of consenting to adoption could be offered to the court to forestall future issues. Before attempting such a hearing, practitioners should check with local rule or determine local practice.

A consent to an adoption may not be withdrawn more than thirty days after the consent is signed. IC 31-19-10-3(b)(1). A consent also may not be withdrawn after a person who signs the consent appears, in person or by telephonic communications or video conferencing, before a court in which the petition for adoption has been or will be filed or a court of competent jurisdiction if the person is outside of Indiana, and acknowledges that the person understood the consequences of signing the consent, freely and voluntarily signed the consent, and believes that adoption is in the best interests of the person sought to be adopted. IC 31-19-10-3(b)(2) and (3). If such a hearing is conducted by telephonic communication or video conferencing, "the court shall ensure that the hearing is recorded." IC 31-19-10-3(c). Of these two provisions by which consent cannot be withdrawn, whichever occurs first is the date past which the consent cannot be withdrawn. IC 31-19-10-3(b).

Practice Note: This statute could be used in a hearing on an adoption consent and clarify that the person who consented is foreclosed from seeking to withdraw the consent after the hearing. Although this statute does not directly address the issue in this manner, the person or agency who

accepts the birth parent's consent may request a consent hearing be held before the court having jurisdiction over the adoption. This consent hearing may occur before the adoption petition is filed, and a record would be made of the proceeding. This practice is recommended if the birth parent is a minor or suffers from developmental disability, mental illness, or some other possible consent vitiating condition. The birth parent may be represented by counsel, and the person accepting the consent may request court appointed counsel or provide private, independent counsel for the birth parent. Expert evidence of the birth parent's physical or mental condition, including the parent's ability to comprehend the meaning of consenting to adoption could be offered to the court to forestall future issues.

A consent to an adoption may be withdrawn no later than thirty days after the consent is signed if the court finds, after notice and opportunity to be heard afforded to the petitioner for adoption, that the person seeking the withdrawal is acting in the best interest of the person sought to be adopted; and (2) the court orders the withdrawal. IC 31-19-10-3(a). As evidenced by the necessity of a hearing, this potential ability to withdraw consent is not an automatic right. Furthermore, a person who seeks to withdraw consent under this statute must give notice of this intention to all parties to the adoption and to a person whose consent to adoption is required by IC 31-19-9.

IV. C. Minor Parent's Consent

A parent who is under eighteen years old may consent to the adoption of her/his child. IC 31-19-9-1(b). The parent or legal guardian of a minor birth parent need not concur in the minor's consent unless the court requires the concurrence due to the best interests of the child to be adopted. IC 31-19-9-1(b). Although her age was not an issue on appeal, the Court of Appeals held that a sixteen-year-old mother's pre-birth consent could be ratified by her post-birth actions in **Matter of Adoption of H.M.G.**, 606 N.E.2d 874 (Ind. Ct. App. 1993). However, practitioners are encouraged not to rely on post-birth ratification of a birth mother's pre-birth consent, since such consent is not permitted according to Indiana Code.

IV. D. Required Consents

Unless another statutory provision applies, the following persons must consent to the child's adoption (IC 31-19-9-1(a)):

(1) each living parent of the 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 court proceeding other than the adoption proceeding (except as provided in IC 31-14-20-2), established by a paternity affidavit (executed under IC 16-37-2-2.1), unless the putative father has given implied consent to the adoption under IC 31-19-9-15;
(3) each person, agency, or local office having lawful custody of the child;
(4) the court having jurisdiction of the custody of the child if the legal guardian is not empowered to consent to adoption;
(5) the adoptive child who is over fourteen years old;
(6) the adoptive child's spouse.

Since paternity affidavits legally establish a man was a child's legal father, practitioners must remember that the consent of a father who has signed a paternity affidavit is required unless another provision allowing the court to dispense with his consent applies. See IC 16-37-2-2.1; **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); **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).

As discussed in this Chapter at section V., a court may dispense with the consent requirement in certain factual situations if clear and convincing evidence is offered. Putative fathers who are entitled to notice and who establish paternity in a timely manner may legally block the adoption. See **In Re M.B.H.**, 571 N.E.2d 1283 (Ind. Ct. App. 1991). For more information on the putative father notice requirements see this Chapter at VII.C. for specific details, and this Chapter at VII.A., VII.B., and VII.D for more general details.

Regarding consent being required from a child who is fourteen years or older, see **In Re Adoption of J.E.H.**, 859 N.E.2d 388, 390 (Ind. Ct. App. 2006), where the Court affirmed the trial court's denial of Stepmother's petition to adopt her two stepsons, who were ages fourteen and ten at the time of the adoption hearing. The fourteen-year-old had not consented to the adoption as required by IC 31-19-9-1(a)(5). Stepmother contended that the older stepson's consent was not required because he was only thirteen years of age when she filed her adoption petition. The Court concluded that IC 31-19-9-1(a) is not ambiguous and that its clear language provides that a trial court may not grant a petition for adoption of a child more than fourteen years of age unless the child has executed a written consent to adoption.

For more case law on consent and obviating the need for consent, see this Chapter at V.

IV. E. Guardian or Lawful Custodian's Ability to Withhold Consent

Each person, agency, or local office having lawful custody of the child has to give consent to an adoption. IC 31-19-9-1(a)(3). This includes the local DCS office who has wardship over a while. See **A.D. v. Clark**, 737 N.E.2d 1214, 1217 (Ind. Ct. App. 2000). It can also include a guardian, or stepparent, grandparent, or other non-parent who has been given third party custody. See **In Re Adoption of L.C.E**, 940 N.E.2d 1224, 1226-8 (Ind. Ct. App. 2011).

It is important for practitioners to note that "person having lawful custody" can include people beyond those who have court-ordered custody of a child. It can include people with whom a child resides without such a court order. See **In the Matter of the Adoption of B.C.H.**, 22 N.E.3d 580 (Ind. 2014).

Although the consent of such individuals, agencies, or DCS local offices is required, their consent can be dispensed with under certain circumstances. IC 31-19-9-8(a)(10) provides that a legal guardian or lawful custodian of the person to be adopted who has failed to consent to the adoption for reasons found by the court not to be in the best interests of the child.

For case law on persons who have court-ordered custody of a child, such as guardians or third party custodians and the necessity of their consent, see:

In Re Adoption of L.C.E, 940 N.E.2d 1224, 1226-8 (Ind. Ct. App. 2011), where the Court held that, since Stepfather was the child's legal court ordered custodian, Lawrence Circuit Court erred when it failed to consider Stepfather's objection and grant his motion to vacate the adoption. Mother and Grandfather argued that Stepfather was not a lawful custodian because Johnson Circuit Court did not have jurisdiction over the child, as the child was not a child of the marriage nor was Stepfather declared a de facto custodian. The Court characterized this argument as a request to review the validity of an order that had not been appealed, and was not an issue before the Court. Under Trial Rule 69(B)(8), Stepfather has reason for relief from the judgment granting the child's adoption. IC 31-19-9-1(a)(3) requires written consent of each person, agency, or county office of family and children having lawful

custody of the child before a child may be adopted. Since Stepfather was the lawful custodian of the child, his consent was required for adoption. Citing IC 31-19-10-1(b), the Court said that when a person with standing pursuant to IC 31-19-9-1 objects to the adoption, he must "file a motion to contest the adoption with the court not later than thirty (30) days after service of notice of the pending adoption." Stepfather filed an objection to the adoption on June 4, which was twenty-nine days after the petition for adoption was filed; therefore, Lawrence Circuit Court had to consider Stepfather's objection prior to granting Grandfather's petition.

In Re Adoption of M.J.C., 590 N.E.2d 1095 (Ind. Ct. App. 1992), where the adoption reversed and remanded for purpose of determining whether grandmother/legal guardian's consent was being unreasonably withheld). As with other guardianship or wardship situations, a ward of the county office of family and children may be adopted without the consent of the county office of family and children.

For case law on persons who do not have court-ordered custody of a child, but may nevertheless qualify as "lawful custodians", see:

In the Matter of the Adoption of B.C.H., 22 N.E.3d 580, 585-6 (Ind. 2014), where 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 facto custodian at the time a petition for adoption is filed. Maternal Grandparents were lawful custodians of the child, and as such, were entitled to notice and an opportunity to consent to the adoption proceedings. Maternal Grandparents argued that they had lawful custody of the child during the adoption proceedings because they qualified as de facto custodians by statute, even though the juvenile court had not yet adjudicated them as such; however, the Court noted that it would not consider Maternal Grandparents' court-adjudicated status as de facto custodians, since that status was not recognized and ordered by the juvenile court until after the adoption petition had already been granted. The Court instead focused on the circumstances surrounding Maternal Grandparent's apparent custody of the child, and held that "lawful" meant something that is not contrary to law, and therefore, "lawful custody means custody that is not unlawful." The Court further stated that the use of this language likely reflected the General Assembly's policy decision that adoption trial courts should be able to hear, and want to be able to hear from a party "with care, custody, and control of the child in question—regardless of whether the party's responsibility derives from a court order."

For case law on DCS being a child's legal guardian or custodian, and dispensing with DCS's consent in an adoption, see:

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

In Re Adoption of H.L.W., Jr., 931 N.E.2d 400, 408-10 (Ind. Ct. App. 2010), where the Court reversed the trial court's grant of Foster Parents' petition to adopt the child. On appeal, DCS argued, *inter alia*, that the trial court erred when it found that DCS was not acting in the child's best interest by withholding its consent to Foster Parents' adoption. The Court found the trial court erred when it determined that DCS's withholding of consent to Foster Parents' adoption was not in the child's best interest. DCS was the child's legal custodian, so its consent to the adoption was required by IC 31-19-9-1. DCS had the burden of demonstrating by clear and convincing evidence that its withholding of consent was in the child's best

interests. The Court agreed with DCS that the trial court had applied the wrong standard by requiring DCS to show that Foster Parents were "not fit." The Court noted the evidence in support of its conclusion that DCS met its burden of demonstrating by clear and convincing evidence that its withholding of consent to the adoption was in the child's best interests.

In Re Adoption of S.A., 918 N.E.2d 736, 742-3 (Ind. Ct. App. 2009), *trans. denied*, where the Court held that Adoptive Mother did not need DCS's consent for her petition for the child's adoption to be granted because DCS failed to consent for reasons that were not in the child's best interest. The trial court determined that adoption of the child by Adoptive Mother was in the child's best. Foster Parents and DCS appealed. The Court was not persuaded by Foster Parents' contention that the adoption must be set aside because DCS had consented to Foster Parents' adoption but not to Adoptive Mother's adoption. The Court, citing Stout v. Tippecanoe County Dep't. of Pub. Welfare, 182 Ind. App. 404, 411, 395 N.E.2d 444, 448 (1979), 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. The evidence showed: (1) DCS initially consented to Adoptive Mother's request for adoption, but later withdrew its consent in favor of Foster Parents; and (2) the DCS case manager could not explain why DCS had withdrawn consent.

In Re Adoption of L.M.R., 884 N.E.2d 931, 936-38 (Ind. Ct. App. 2008), where 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 Foster Mother's adoption of the child. IC 31-19-9-8(a)(10), permits DCS, as the child's legal guardian, to express its opinion regarding the adoption, and, if the trial court finds that DCS' consent to the adoption was unreasonably withheld, the Court can review that determination for reasonableness. It is the prospective adoptive parent's burden to show that DCS is not acting in the child's best interests in withholding consent. In support of this conclusion, the Court noted many pieces of evidence which showed large discrepancies in the way Foster Mother diligently cared for and parented the child, who had extreme special needs, versus Grandparents' more indifferent approach.

In Re Adoption of Z.D., 878 N.E.2d 495, 498-99 (Ind. Ct. App. 2007), where the Court noted that (1) the Tippecanoe County Department of Family and Children (TCDFC) had refused to consent to her adoption of the child; (2) IC 31-19-9-1 required TCDFC's written consent as 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.

In Re Infant Girl W., 845 N.E.2d 229, 244 (Ind. Ct. App. 2006), *trans. denied sub nom*. In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006) (Dickson, J., dissenting), where the Court briefly 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. Because the Probate Court concluded that the reasons for OFC's refusal to consent were not in the child's best interests, OFC's consent was not necessary.

See also **A.D. v. Clark**, 737 N.E.2d 1214, 1217 (Ind. Ct. App. 2000) (Court noted at footnote 4 that the adoption petition might be granted over the MCOFC's refusal to consent if it were shown that MCOFC was not acting in the child's best interest in withholding consent); **Matter of Adoption of L.C.**, 650 N.E.2d 726 (Ind. Ct. App. 1995) (adoptive petitioners have a heavy burden in demonstrating unreasonable withholding of consent in light of the implicit statutory presumption that the legal guardian is acting in the child's best interests); **Stout v. Tippecanoe**

Cty. Dept. of Pub. Welfare, 395 N.E.2d 444, 450 (Ind. Ct. App. 1979) (county department is not vested with the power of a natural parent to withhold consent to an adoption).

IV. F. Withdrawal of Consent

IV. F. 1. Statutes

As evidenced by the statutes noted within this section, the potential ability to withdraw consent is not an automatic right.

A consent to an adoption may be withdrawn no later than thirty days after the consent is signed if the court finds, after notice and opportunity to be heard afforded to the petitioner for adoption, that the person seeking the withdrawal is acting in the best interest of the person sought to be adopted; and (2) the court orders the withdrawal. IC 31-19-10-3(a). This places the burden of proof on the person seeking to withdraw his or her consent; the person must do so by clear and convincing evidence. IC 31-19-10-0.5. Furthermore, a person who seeks to withdraw consent under this statute must give notice of this intention to all parties to the adoption and to a person whose consent to adoption is required by IC 31-19-9.

A consent to an adoption may not be withdrawn more than thirty days after the consent is signed. IC 31-19-10-3(b)(1). A consent also may not be withdrawn after a person who signs the consent appears, in person or by telephonic communications or video conferencing, before a court in which the petition for adoption has been or will be filed or a court of competent jurisdiction if the person is outside of Indiana, and acknowledges that the person understood the consequences of signing the consent, freely and voluntarily signed the consent, and believes that adoption is in the best interests of the person sought to be adopted. IC 31-19-10-3(b)(2) and (3). If such a hearing is conducted by telephonic communication or video conferencing, "the court shall ensure that the hearing is recorded." IC 31-19-10-3(c). Of these two provisions by which consent cannot be withdrawn, whichever occurs first is the date past which the consent cannot be withdrawn. IC 31-19-10-3(b).

Consents to adoption may only be withdrawn as is provided in IC 31-19-10, and they may not be withdrawn after the entry of the adoption decree. IC 31-19-10-4. A court may bifurcate a hearing in this matter. IC 31-19-10-7.

IV. F. 2. Case Law

Case law pertaining to withdrawing consent via statute and motion includes:

In **In Re Adoption of N.W.R.**, 971 N.E.2d 110, 113-4, 115-7 (Ind. Ct. App. 2012), the Court reversed and remanded with instructions the trial court's order granting Foster Parents' adoption petition. The Court held that the trial court should have granted DCS' motion to withdraw its consent to Foster Parents' adoption petition because DCS failed to perform its statutory duty to investigate placement alternatives, and thus, DCS had not given valid consent to Foster Parents' adoption petition. The child's status as a DCS ward 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. 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. DCS's lack of proper consent to Foster Parents' adoption petition satisfied the clear and convincing evidence test to show that the withdrawal of consent was in the child's best interests. Once consent is given, it can only be withdrawn by filing a motion in court. The party seeking to withdraw consent must prove by clear and convincing evidence that withdrawal is in the best interests of the child. The county director of the DCS office

testified that DCS was seeking to withdraw its consent in order to fully explore the best interests of the child.

In **In Re Adoption of N.J.G.**, 891 N.E.2d 60, 65-67, n.3 (Ind. Ct. App. 2008), the Court reversed and remanded for further proceedings the trial court's order to the extent that it concluded that Mother consented to and may not contest the child's adoption. But, the Court noted that its holding did not terminate the adoption proceedings "inasmuch as under certain circumstances, Mother's consent may not be required for the adoption to occur. See [IC 31-19-9-8]." Mother's pre-birth consent to the child's adoption was void pursuant to IC 31-19-9-2 because it was executed pre-birth, as well as because it did not meet the requirement of IC 31-19-9-2(a) that it be executed in the presence of the court, a notary public, or an authorized agent of the state department of family and children, a county office of family and children, or a licensed child placing agency. None of the documents in the record that were signed after the child's birth meet the requirements of IC 31-19-9-2 to be valid consents to the adoption. The Court noted it was troubled by many of the circumstances and financial aspects of the case.

In **In Re Adoption of M.L.L.**, 810 N.E.2d 1088, 1094-95 (Ind. Ct. App. 2004), Mother's contention on the voluntariness issue was that she would not have signed the consent to adoption if the deputy sheriff had not threatened her with jail time and having her child taken from her. The Court was unpersuaded by this argument because (1) Mother had first expressed her desire that her relative take the child to live with him and his wife in Indiana before she was arrested or volunteered to work as a confidential informant; and (2) the Court could not say the only conclusion to be gleaned from the evidence was that the deputy sheriff's pressure on Mother to serve as a confidential informant overcame Mother's volition regarding adoption. Mother also contended that her consent was invalid because it did not comply with Tennessee law, the Court determined that the validity of Mother's consent was governed by Indiana law because the Indiana trial court had jurisdiction over the adoption. Indiana law, IC 31-19-9-2, allows a consent to adoption to be executed in the presence of the court or a notary public. Because Mother executed her consent before a notary public, her consent was valid, and the trial court did not err when it granted the adoption.

See also **Bell v. Adoption of A.R.H.**, 654 N.E.2d 29, 33-35 (Ind. Ct. App. 1995) (no evidence Mother's consent was involuntary because the birth mother's grief over her grandmother's death did not rise to the level of overcoming Mother's volition; Mother failed to prove that withdrawing her consent was in the child's best interests); **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); **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 consent; emotions, tensions and pressure are insufficient to void consent unless parent can show they rose to the level of overcoming her 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, a consent must be made with knowledge of the essential facts. For case law on attempting to withdraw consent by alleging that the consent was obtained through fraud or duress or any other consent-vitiating factor,

see **In Re Adoption of M.P.S., Jr.**, 963 N.E.2d 625, 630-2 (Ind. Ct. App. 2012), 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. The Court noted that the mother did not manifest an intention to permanently relinquish all parental rights, and intended contact to continue after signing the consent. The Court noted many irregularities: (1) 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, and this was not accomplished; (2) there was no compliance with statutory home study procedures; (3) it was unclear if the a comprehensive criminal background check was performed in accordance with IC 31-9-2-22.5; and (4) there was discrepancies as to whether Mother actually received proper notice. The Court characterized the record as "replete with evidence of procedural error, involuntariness, and fraud upon the court." 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.

See also **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 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); **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).

IV. G. Criminal Statutes on Child Selling and Profiting From an Adoption

Adoption practitioners should familiarize themselves with the criminal statute, IC 35-46-1-9, profiting from an adoption. IC 35-46-1-9(c) provides that except as otherwise provided, "a person who, with respect to an adoption, transfers or receives any property in connection with the waiver of parental rights, the termination of parental rights, the consent to adoption, or the petition for adoption commits profiting from an adoption, a Level 6 felony." Furthermore, all the limitations of this statute apply regardless of the state or country in which the adoption is finalized. IC 35-46-1-9(h). However, IC 35-46-1-9(b) provides that this section does not apply if the birth mother is not a resident of Indiana; and the adoption takes place in a jurisdiction outside Indiana.

The exceptions to this rule are found in IC 35-46-1-9(d), which lists multiple instants in which the exchange of money in connection with an adoption does not result in a felony. These exceptions include:

(1) reasonable attorney's fees;
(2) hospital and medical pregnancy and childbirth expenses incurred by the birth mother;
(3) reasonable fees from a child placing agency licensed or DCS;
(4) reasonable expenses for psychological counseling regarding the adoption incurred by the birth parents;
(5) reasonable costs of housing, utilities, and phone service for the birth mother, but only during the second or third trimester of pregnancy until six weeks after childbirth;
(6) reasonable costs of maternity clothing for the birth mother;
(7) reasonable travel expenses, related to the pregnancy or adoption, incurred by the birth mother;

(8) additional itemized necessary living expenses for the birth mother. These extra expenses must occur during the second or third trimester of pregnancy until six weeks after childbirth, cannot be the expenses already outlined in this statute, and the amount cannot exceed $1,000;
(9) other fees approved by the court, which may include reimbursement of actual wages lost as a result of the inability of the birth mother to work at her normal existing job due to a physical medical condition if the birth mother's doctor has ordered or recommended that she cease working, and the physical medical condition and its relation to her pregnancy are documented by the doctor. This subsection also makes provision for the calculation of the wage reimbursement.

Although these exceptions cover a wide range of areas in which fees and expenses could be paid by prospective adoptive parents in the course of an adoption, practitioners should also be mindful of IC 35-46-1-9(e). This subsection provides that payments made under IC 35-46-1-9(d)(5) through (d)(9) may not exceed four thousand dollars and must be disclosed to the court supervising the adoption. This four thousand dollar limit for IC 35-46-1-9(d)(5) through (d)(9) may be exceeded if the court approves the expenses after making a determination that: (1) the expenses are not being offered as an inducement to proceed with an adoption; and (2) failure to make the payments may seriously jeopardize the health of either the child or the birth mother and the direct relationship is documented by a licensed social worker or the attending physician.

IC 35-46-1-9(f) further clarifies the payment limit by providing that the payment limitation under IC 35-46-1-9(e) applies to the total amount paid under IC 35-46-1-9(d)(5) through (d)(9) in connection with an adoption from all prospective adoptive parents, attorneys, and licensed child placing agencies.

Attorneys and licensed child placing agencies (LCPA) must inform a birth mother of the penalties for committing adoption deception (IC 35-46-1-9.5) before the attorney or the LCPA transfers a payment for adoption related expenses to the birth mother. IC 35-46-1-9(g).

Practitioners should also become informed regarding local court policies concerning expenses which adoptive parents may legitimately pay to birth parents. Additionally, practitioners and attorneys for licensed child placing agencies must be familiar with IC 35-46-1-9.5, which provides that adoption deception, a Level 6 felony, is committed when a birth mother or a woman who holds herself out to be a birth mother knowingly or intentionally benefits from adoption related expenses paid:
(1) when she knows or should have known that she is not pregnant;
(2) induces two or more sets of prospective adoptive parents to pay adoptions expenses to her at the same time in an effort to adopt the same child;
(3) when she does not intend to make an adoptive placement.
In addition to any other penalty imposed, a court may order the person who commits adoption deception to make restitution to a prospective adoptive parent, attorney, or licensed child placing agency that incurs an expense as a result of the offense.

V. LEGAL GROUNDS FOR DISPENSING WITH PARENTAL CONSENT

V. A. In General

An adoption petition may be granted without parental consent in situations delineated at IC 31-19-9-8 through IC 31-19-9-19. If an adoption petition is filed the court may find, after notice, appointment of counsel for the parent, and hearing, that there is a statutory reason for dispensing with parental consent. The adoption may then be granted without a separate termination proceeding and order obtained under IC 31-35-2 or IC 31-35-3. If there is a pending CHINS

matter, jurisdiction issues must be considered. See this Chapter at II.A and II.B.1., and see Chapter 3, II.G.1 for further discussion on the resolution of the jurisdictional conflict between CHINS, TPR, and adoption cases involving the same child or children.

Indiana law provides for many different situations in which a judicial determination to dispense with consent; some of these may be made:

- abandonment;
- lack of significant contact for specified period of time;
- knowing failure to support when able to do so;
- various types of sexual misconduct by putative father;
- alleged father's failure to take timely action to register with putative father registry and establish paternity;
- judicial declaration of incompetency;
- parental rights were terminated in a termination of the parent-child relationship proceeding;
- a parent's unfitness and the child's best interests;
- a guardian or lawful custodian who fails to consent to an adoption for reasons not in the child's best interests;
- an alleged father's written denial of paternity under certain circumstances;
- conviction of certain crimes against the adoptive child's other parent;
- and conviction of certain crimes against the adoptive child or the adoptive child's sibling.

In addition to these factual situations, the court may find that a parent has otherwise relinquished their ability to consent to an adoption as provided in this chapter; this includes when a putative father's consent to adoption is implied by his failure to do certain things, such as register with the putative father registry, establish paternity, contest an adoption, and other circumstances.

Practitioners should note that the various provisions of IC 31-19-9-8 are disjunctive; as such, either provides independent grounds for dispensing with parental consent. See **In Re Adoption of T.W.**, 859 N.E.2d 1215, 1218-19 (Ind. Ct. App. 2006).

V. B. Standard and Burden of Proof

The standard of proof in adoptions is clear and convincing evidence. The standard of proof was clarified by statute and case law. 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.

For case law discussing the standard and burden of proof, see **In Re Adoption of S.W.**, 979 N.E.2d 633 (Ind. Ct. App. 2012) (Court held that Maternal Grandparents had the burden of proving their petition for adoption without Father's consent by clear and convincing evidence); **In Re Adoption of M.B.**, 944 N.E.2d 73, 77 (Ind. Ct. App. 2011) (Court held that the burden of proof for an adoption without consent, under any of the subsections in IC 31-19-9-8, is the clear and convincing standard); **In Re Adoption of M.A.S.**, 815 N.E.2d 216, 220 (Ind. Ct. App. 2004) (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 discussing the standard of proof in adoptions where the petitioner seeks to prove that the parent's consent to adoption is unnecessary; 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).

IC 31-19-10-1.2 clarifies who has the burden of proving that a parent's consent to adoption is unnecessary. 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 under IC 31-19-10-1, 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 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). IC 31-19-10-1.2(a), (c), (e), (f).

If the biological father properly files a motion to contest the adoption under IC 31-19-10-1, 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 (IC 35-42-4-3); 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 (IC 35-42-4-9), the biological father has the burden of proving that the child was not conceived under circumstances that would cause the father'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).

V. C. Abandonment

IC 31-19-9-8(a)(1) states that parental consent to adoption is not required if the child is adjudged to have been abandoned or deserted for at least six months immediately preceding the date of the filing of the petition for adoption. Abandonment may be actual or constructive; meaning, that if "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." IC 31-19-9-8(b).

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**, 235 Ind. 249, 133 N.E.2d 56, 63 (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).

In **K.S. v. D.S.**, 64 N.E.3d 1209, 1215 (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. IC 31-19-9-8(a)(1) provides that "[i]f a parent has made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent." The Court noted the trial

court's finding that Birth Mother's consent to the adoption was not required because she had abandoned the child for at least six months immediately preceding the date the adoption petition was filed. 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.

In **In Re Adoption of J.T.A.**, 988 N.E.2d 1250, 1254-5, 1257 (Ind. Ct. App. 2013), *trans. denied*, the Court affirmed the trial court's denial of Father's Fiancée's petition to adopt Father's child without the consent of Mother. 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. 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." The J.T.A. Court noted that the relevant time period is at least six months immediately preceding the date of the filing of the petition for adoption. 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. The Court said that the record did not indicate that Mother otherwise evinced an intent to relinquish all parental claims.

Practitioners should note that **In Re Adoption of M.L.L.**, 810 N.E.2d 1088, 1092 (Ind. Ct. App. 2004) does not address the legal standard for abandonment in adoption at IC 31-19-9-8(a)(1), but the language of this opinion may be helpful in defining Indiana law regarding abandonment. The M.L.L. Court opined that the trial court did not err when it found that the birth mother had abandoned the child for purposes of the Uniform Child Custody Jurisdiction Act (UCCJA). The Court quoted In Re Adoption of Force, 131 N.E.2d 157, 160 (Ind. Ct. App. 1956) for the common law principle that "abandonment exists when there is such conduct on the part of a parent which evidences a settled purpose to forego all parental duties and relinquish all parental claims to the child…" The M.L.L. Court noted the following conduct by the birth mother which supported the trial court's finding of abandonment for purposes of the UCCJA: (1) birth mother requested that Adoptive Parents take the child from Tennessee to live with them in Indiana; (2) birth mother signed a consent to guardianship and consent to adoption; (3) birth mother helped Adoptive Parents pack the child's belongings, including giving the child's birth certificate and social security card to adoptive parents.

V. D. Lack of Significant Contact

IC 31-19-9-8(a)(2)(A) provides that consent to adoption is not needed from 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. IC 31-19-9-8(b) provides that if a parent has made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent. 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:

Adoption of E.B.F. v. D.F., 79 N.E.3d 394, 401 (Ind. Ct. App. 2017), the Court affirmed the trial court's judgment which found that the child's Birth Mother failed without justifiable cause to communicate significantly with the child for over one year when she was able to do so. The Court noted: (1) Birth Mother did not seriously contest that her only contacts with the child over the time period in question were few, fleeting, and sometimes unintended, and therefore not significant; (2) even her *proposed* communications with the child were not significant; (3) outside of chance publics run-ins, her only attempted contacts were phone calls that for various reasons were not connected; (4) she never attempted to write, participate in the child's school life, seek court enforcement of her parenting time, or investigate other reasonable means of communication (emphasis in opinion). Although Birth Mother argued that she had one significant communication with the child when she expressed a desire to continue parenting him after she encountered the child, Father, and Stepmother at the local baseball fields, the Court found that, at best, this incident manifested her desire to have significant communication with the child, which was not the same as having a significant communication.

In Re Adoption of E.A., 43 N.E.3d 592, 595, 598-9 (Ind. Ct. App. 2015), *trans*. *denied*, where the Court affirmed the trial court's order granting Stepfather's adoption petition, and finding that Father's consent to the adoption was not required. The Court found that Father's consent to the child's adoption was not required under IC 31-19-9-8(a)(2)(A). Stepfather held the burden of proving that there was a lack of communication for the specified time period and that during that time period the ability to communicate existed. Although imprisonment does change what constitutes significant communication it does not alone justify a parent's failure to maintain significant communication. The Court found that Father did not persist in his communications with the child and that he voluntarily chose to stop trying to communicate with the child for over two years at the time Stepfather filed his adoption petition. Therefore, Father's consent to the adoption was not required.

In Re Adoption of O.R., 16 N.E.3d 965, 973-5 (Ind. 2014), where the Court affirmed the trial court's conclusion that Father's consent to his child's adoption was not required and that Adoptive Parents' adoption was in the child's best interest. The Court found 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. The Court noted the following evidence: (1) Father did not dispute that the child was in the custody of another person for a period of at least one year; (2) Father admitted that the only communication he had with the child in over a six year period of time was a phone call in 2011; (3) Father admitted that, while incarcerated over the last several years, he had never attempted to write a letter to the child or to communicate with her at all; (4) Father's claim that the judge had ordered Adoptive Parents to bring the child to visit him in prison was contradicted by the record; (5) although he blamed his failure to investigate a means of obtaining the child's address by communicating with Adoptive Parents' counsel or the court, Father's claim of unfamiliarity with the court system was undermined by his adjudication as an habitual offender.

In Re Adoption of S.W., 979 N.E.2d 633, 640-1 (Ind. Ct. App. 2012), where the Court held that the trial court had not clearly erred in finding that Father failed to communicate significantly with the child for a period of one year even though he was able to do so. 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" (emphasis added in opinion). The Court noted the following evidence in support of the trial court's determination: (1) Father had few visits with the child and failed to appear for scheduled visits with the child; (2) Father had no contact at all with the child from 2002 until Mother was released from prison in 2005; (3) after his incarceration, Father had little communication with the child despite Maternal Grandparents' willingness to let the child visit Father in prison. The Court also refused to hold 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, 1218-19 (Ind. Ct. App. 2006), where the Court affirmed the trial court's order granting Aunt and Uncle's petition for adoption; Father's consent was not required under IC 31-19-9-8(a)(2)(A). The Court found that the following evidence supported the determination that Father failed to communicate significantly with the children: (1) the guardianship court denied in-jail visitation with the children, but not written or telephonic communication; (2) Father did not try to write to or telephone the children; (3) Uncle offered to buy Father's stamps and stationary, but Father refused; (4) Father conceded that he had not attempted to personally communicate with the children for three years by the time of the adoption trial. The Court was not persuaded by Father's argument that, *if* he had tried to communicate with the children, Aunt and Uncle *would* have thwarted his efforts.

In Re Adoption of C.E.N., 847 N.E.2d 267, 272 (Ind. Ct. App. 2006), where the Court affirmed the trial court's decision that, due to Mother's lack of visits and communication with the child, Mother's consent to the adoption was not required. The Court noted that the six-year-old child had been in custody of Adoptive Parents since he was eight months old.

In Re Adoption of R.L.R., 784 N.E.2d 964, 969-970 (Ind. Ct. App. 2003), where the Court reversed and remanded with instructions to grant Stepmother's adoption petition without Mother's consent, even though Mother had been clean and sober for a couple of years and showed an interest in her child. Mother had no contact with her daughter for more than three years including six months when mother was incarcerated. During this time, the child lived with and developed a very close mother-daughter relationship with her stepmother.

See also **Rust v. Lawson**, 714 N.E.2d 769 (Ind. Ct. App. 1999) (Father failed to communicate with child for a twenty-two month period); **In Re Adoption of J.P.**, 713 N.E.2d 873 (Ind. Ct. App. 1999) (Mother's brief monthly visits to adjudicated CHINS were not significant communications); **Williams v. Townsend**, 629 N.E.2d 252 (Ind. Ct. App. 1994) (Father was serving fifty year prison sentence; sent only occasional letters and cards and took no other action); **In Re Adoption of Thornton**, 358 N.E.2d 157 (Ind. Ct. App. 1976) (Mother may not have known where child was, but nothing indicated that she had inquired about the child; statute contemplates communication with the child itself and not merely involvement in litigation relating to the child's custody).

Cases in which the Court of Appeals opined that parental consent due to alleged failure to significantly communicate could not be dispensed with include:

In **In Re Adoption of J.S.S.**, 61 N.E.3d 394, 397-9 (Ind. Ct. App. 2016), the Court affirmed the trial court's decision denying Foster Parents' petition to adopt the children, and held that the trial court did not err in determining that Foster Parents failed to meet their burden of proof to show that Father's consent to the adoption was not necessary. Foster Parents were required to show by clear and convincing evidence that Father's consent was not required because Father failed to communicate with the children when able to do so (IC 31-19-9-8(a)(2)(A)). The Court determined that In Re O.R., 16 N.E.3d 965 (Ind. 2014) was not as broad an opinion as Foster Parents argued. While Foster Parents conceded that Father could

not communicate with the children when there were court orders in place preventing contact, they argued that Father could have had visitation with the children if he had acted in a more timely manner to contact the children's therapist. Foster Parents argued that this case meant that they could be relieved of their obligation to show that Father was able to communicate with the children and failed to do so, because other than his single, late contact with the therapist, he had no contact with the children. The Court disagreed that this alleviated them from their burden of proof. The Court found 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. **D.D. v. D.P.**, 8 N.E.3d 217, 220-22 (Ind. Ct. App. 2014), where the Court held that the trial court had not erred when it found that Mother hampered and thwarted Father's efforts to communicate with the children. The Court then held that since Father had demonstrated justifiable cause for not initiating direct communication with his children, Stepfather had not met his burden of showing by clear and convincing evidence that Father's consent was not needed as provided in IC 31-19-9-8(a)(2)(A). The Court stated that even if Father was required to directly communicate with the children, there were multiple emails where Father had laid out plans to re-establish contact between himself and the children, and Mother never responded to these emails. The Court opined that this was an indication that Father was attempting to establish parenting time in a way that was least disruptive to the children. **McElvain v. Hite**, 800 N.E.2d 947, 949 (Ind. Ct. App. 2003), where the Court reversed the trial court's grant of Stepfather's petition for adoption which alleged that Father's consent was not needed due to failure to communicate significantly with the children. The Court noted the following evidence: (1) Father had visited the children without Mother's knowledge, while the children were staying with a mutual friend; (2) Father had overnight visitation with the children and visited one of the children at school after she had injured herself requiring stitches; and (3) Mother testified that father had visited the children seven months prior to the filing of the adoption petition.

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 (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 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).

V. E. Knowing Failure to Support When Able

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.

Cases in which parental consent was not needed due to knowing failure to support when able to do so include:

In Re The Adoption of T.L., 4 N.E.3d 658, 662-3 (Ind. 2014), where the Court affirmed 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 supported the trial court's judgment that Father's consent to the adoption was not required. The Indiana legislature did not intend for incarcerated parents to be granted a complete reprieve from their child support obligations, and the proper way to decide the child support obligation of an incarcerated parent was to use the "non-imputation approach" described in Lambert v. Lambert, 861 N.E.2d 1176, 1179 (Ind. 2007), which would impose a minimal level of support without ignoring the realities of incarceration. 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.

In Re Adoption of M.S., 10 N.E.3d 1272, 1279-81 (Ind. Ct. App. 2014), where the Court held that Mother's consent was not needed because of Mother's knowing failure, for a period of a year, to support the child when able to do so, and that the adoption was in the child's best interests. The Court did not need to address Mother's arguments about the trial court's aggregation of child support arrearage, because even if the Court were to interpret the word "year" to only mean a calendar year, Mother still failed to support the child for over a year (between January 12, 2011 and January 18, 2012). The Court determined that the payments that Mother did make over a year and four month time period were insufficient to provide support for the child. Token payments are not sufficient to comply with the terms of the statute to make consent from the parent necessary. Mother made only one payment of $300 between September 17, 2010 and January 18, 2012. Although this exceeded to amount noted as a token payment in prior case law, it was only the equivalent of six weeks' worth of child support payments, was the only payment Mother made in one year and four months, and was insufficient to provide for the child's maintenance and support. The Court concluded that there was clear and convincing evidence to show that Mother did not support the child when she was able to do so, noting several of the trial court's finding indicating Mother's ability to pay.

In Re Adoption of J.L.J., 4 N.E.3d 1189, 1194-5, 1197 (Ind. Ct. App. 2014), where Father's consent to the adoption of his twin children was not required based on his knowing failure to provide care and support for them despite an ability to do so. Quoting In Re Adoption of J.T.A., 988 N.E.2d 1250, 1253 (Ind. Ct. App. 2013), the Court observed that a parent's failure to support may have occurred during "any year in which the parent had an obligation and the ability to provide support, but failed to do so." The J.L.J. Court observed that parents have a duty to support their children regardless of a court mandate to pay. Among many other items of evidence, the Court noted that Father: (1) never claimed he was unable to afford the support payments; (2) admitted that he intentionally did not pay support based on his belief that he was satisfying his obligation by "taking care of" the twins; (3) testified that his disability payments were stopped based on Social Security's finding that he was *not* disabled; (4) clarified that he could work.

In Re the Adoption of T.L., 4 N.E.3d 658, 662-3 (Ind. 2014), where the Court affirmed the trial court's decision granting the adoption on the grounds that Father, who was incarcerated, 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 both payment and non-payment of child support, even while incarcerated, 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. The Court opined 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." (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.

In Re Adoption of K.S., 980 N.E.2d 385, 389-90 (Ind. Ct. App. 2012), where the Court concluded that Mother's consent to the child's adoption was not required due to Mother's failure to pay child support when able to do so. Because Mother was found in contempt for failure to pay child support on May 4, 2012, the Court must necessarily find that Mother had the ability to financially support the child and willfully failed to do so. 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.

In Re Adoption of K.F., 935 N.E.2d 282, 288-9 (Ind. Ct. App. 2010), *trans. denied*, where the Court affirmed the trial court's grant of Stepmother's petition to adopt Mother's two children. The children lived in Father's physical custody since their parents' divorce. Mother entered into three agreed orders on dissolution court contempt actions in 2006, 2007, and 2009, where she conceded that she had knowingly and intentionally failed to pay child support as ordered. The Court held that the evidence was sufficient to prove that Mother had the ability to pay but failed to pay child support for at least one year.

In Re Adoption of D.C., 928 N.E.2d 602, 606-7 (Ind. Ct. App. 2010), *trans. denied*, where the Court concluded that Adoptive Parents established that Father failed to provide for the child's care and support when able to do so, and his consent was not needed. The following evidence was noted: (1) Father was ordered to pay support of $322.78 per month for the child; (2) Father paid no more than $500 in the 12 months before the adoption petition; (3) there was no showing that Father made any single conforming child support payment for the child's benefit during the year preceding the filing of the adoption petition although a substantial child support arrearage had accrued.

In Re Adoption of B.R., 877 N.E.2d 217, 218-19 (Ind. Ct. App. 2007), where the Court held that Father had the common law duty of a parent to support his child, and that his failure to do so satisfied IC 31-19-9-8(a)(2)(B). The trial court had found that Father had failed to pay support when, at various times in the past five years, he had the ability to pay; but, inasmuch as there was no court order or other requirement that Father pay child support, Father's consent to the adoption was necessary.

In Re Adoption of M.A.S., 815 N.E.2d 216, 220-21 (Ind. Ct. App. 2004), where the Court affirmed the trial court's grant of Stepfather's adoption. The Court noted the following evidence: (1) Father failed to pay child support for two years during which time he was employed and also paid for bail; (2) even though the trial court's order to pay child support terminated when the CHINS action was dismissed, Father still had a common law duty to support the child; (3) Father was aware that the child support he was paying applied only to his two older children; and (4) Father's occasional provision of groceries, diapers, formula, clothing, presents, and cash were gifts, not child support.

See also **Irvin v. Hood**, 712 N.E.2d 1012, 1014 (Ind. Ct. App. 1999) (paternity affiant father did not pay child support for three years despite employment; Indiana law imposes upon a parent a duty to support his children which exists apart from any court order or statute); **In Re Adoption of A.K.S.**, 713 N.E.2d 896 (Ind. Ct. App. 1999) (paternity affiant father's 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); **Matter of Adoption of A.M.K.**, 698 N.E.2d 845, 847 (Ind. Ct. App. 1998) (paternity affidavit signed shortly after the child's birth acknowledged the father's obligation to support the child).

Cases in which a parent's consent was needed under IC 31-19-9-8(a)(2)(B) include:

In Re Adoption of J.T.A., 988 N.E.2d 1250, 1251, 1254-5 (Ind. Ct. App. 2013), *trans. denied*, where the Court found that Fiancée failed to carry her burden of proof that Mother's failure to support the child was a reason for the trial court to determine that Mother's consent to the child's adoption was not required. 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. 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). The Court found that the record was silent as to Mother's ability to provide support during those years. 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.

In **In Re Adoption of M.B.**, 944 N.E.2d 73, 77-8 (Ind. Ct. App. 2011), where the Court concluded that Father provided support by providing childcare during his parenting time one workday per week and that Father cared for the child. The Court found that Stepfather had not shown that Father failed to provide support; therefore, Stepfather had not met his burden of showing that Father's consent is not required.

In Re Adoption of N.W., 933 N.E.2d 909, 913-4 (Ind. Ct. App. 2010), adopted by the Indiana Supreme Court at 941 N.E.2d 1042 (Ind. 2011) where the Court concluded that Stepmother failed to prove by clear and convincing evidence that Mother's consent to adoption was not required. The Court opined that the mere showing that Mother had a regular income, standing alone, is not sufficient to indicate Mother's ability to provide support (emphasis added by Court). The evidence established that Mother provided for the child to the best of her ability: (1) both parties agreed that due to Mother's economic situation no child support payments were required; (2) the trial court concluded that Mother had a "negative child support obligation"; (3) Mother remained under a common law duty to provide support to the child when able to do so; (4) Mother fulfilled her duty of support in non-monetary terms by providing the child with housing, clothing, food, etc. during parenting time.

McElvain v. Hite, 800 N.E.2d 947, 950 (Ind. Ct. App. 2003), where the Court reversed the trial court's grant of Stepfather's petition for adoption which alleged that Father's consent was not needed due to his failure to provide support to the children. The Court noted the following evidence: (1) Father failed to maintain his support obligations after losing his unemployment benefits; (2) after losing his benefits Father was unable to pay support and had to move in with family members; (3) once Father secured part-time employment, he had support payments withheld from his salary; and (4) the trial court had determined that Father was not in contempt for failing to maintain 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 (Court held that an inability to pay support cannot be shown by proof of income standing alone; totality of circumstances, including whether income is steady or sporadic, and the parent's reasonable expenses must also be considered).

V. F. Sexual Malfeasance by Putative Father

IC 31-19-9-8(a)(4) states that the consent to adoption is not required by a biological father of 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 (IC 35-42-4-3); sexual misconduct with a minor (IC 35-42-4-9); incest (IC 35-46-1-3); or a crime in any other jurisdiction in which the elements of the crime are substantially similar to the elements of a crime listed previously.

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 biological father has the burden of proving that the child was not conceived under circumstances that would cause the father'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).

In **In Re Adoption of J.D.B.**, 867 N.E.2d 252, 258-59 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the court's judgment granting the foster parent's adoption and determining that Father's consent was not required. The petition for adoption alleged that Father's consent was not required because the child was born out of wedlock and was conceived as a result of Father's sexual misconduct with a minor. The Court noted that, contrary to Father's contention, the burden of proof regarding whether the child was conceived as a result of sexual misconduct with a minor, was his burden. The absence of a criminal prosecution was insufficient to satisfy that burden of proof. 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 14-year old mother, because she "had sexual intercourse with him while he was asleep, he did not wake up, and he had no knowledge of having had sex with [her]." The girl's testimony at the consent hearing was consistent with Biological Father's contention. The Court noted, however, that Biological Father "presented no evidence that the medication he had taken was capable of causing him, a 180-pound man, to remain asleep while a teenage girl, weighing only 120 pounds, removed his pants and had sexual intercourse with him," and 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."

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); **Mullis v. Kinder**, 568 N.E.2d 1087 (Ind. Ct. App. 1991) (although Father was not criminally convicted of child molesting and lacked notice of potential implications of sexual intercourse with a fifteen-year-old, the Court held that to establish by a preponderance of evidence that the father committed child molesting, adoptive parents must show only Father's and Mother's respective ages and that Father had sexual intercourse with Mother).

V. G. Judicial Declaration of Incompetency

IC 31-19-9-8(a)(9) provides that consent is not needed from a parent who is judicially declared incompetent or mentally defective, "if the court dispenses with the parent's consent to adoption." The terms "incompetent" and "mentally defective" are not defined in Title 31. A separate guardianship incompetency adjudication could be used to meet the statutory standard. Expert psychological or psychiatric evidence may be required to prove the parent is incompetent or mentally defective.

The authors of this Deskbook are unaware of any adoption case law pertaining to IC 31-19-9-8(a)(9), but termination of parental rights case law premised upon a parent's emotional or mental impairment may be found in Chapter 11 at IX.C.

V. H. Parental Conviction and Incarceration

IC 31-19-9-9 and 10 both pertain to certain crimes that parent has committed, been convicted of, and is incarcerated for, and how these crimes make a parent's consent unnecessary, after notice and a hearing.

IC 31-19-9-9 provides that a court shall determine that consent to adoption is not required from a parent if that parent is convicted of and incarcerated at the time of the filing of the 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 these crimes. IC 31-19-9-9(2) provides that the victim must be the other's parent. The Court must determine, 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. IC 31-19-9-9(3).

IC 31-19-9-10 provides that a court shall determine that consent to adoption is not required from a parent if that parent is convicted of and incarcerated at the time of the filing of the adoption petition 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) (before its repeal)
- child molesting (IC 35-42-4-3) as a Class A or Class B felony or a Level 1, Level 2, Level 3, or Level 4 felony
- incest (IC 35-46-1-3) as a Class B felony or a Level 4 felony
- neglect of a dependent (IC 35-46-1-4) as a Class B felony or Level 1 or Level 3 felony
- battery of a child (IC 35-42-2-1) as a Class C felony or a Level 5 felony
- battery (IC 35-42-2-1) as a Class A or Class B felony or a Level 2, Level 3, or Level 4 felony
- domestic battery (IC 35-42-2-1.3) as a Level 5, Level 4, Level 3, or Level 2 felony
- aggravated battery (IC 35-42-2-1.5) as a Level 3 or Level 1 felony
- an attempt under IC 35-41-5-1 to commit an offense described in this subdivision.

The victim must be the child or the child's sibling, half sibling, or stepsibling of the parent's current marriage. IC 31-19-9-10(2). The Court must determine, 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. IC 31-19-9-10(3).

Practitioners should note That IC 31-19-9-10(1)(E) addresses the effect of a conviction for criminal deviate conduct on a parent's consent to an adoption, and criminal deviate conduct as a separate, independent crime was repealed. However, criminal deviate conduct was added as part of the definition of rape at IC 35-42-4-1, and IC 31-19-9-10(1)(D) addresses rape.

Proof of conviction and incarceration can be offered by certified copy of criminal conviction, (Ind. Evidence Rule 803(22)) and Department of Correction records (Ind. Evidence Rule 803(8)). See also **Payne v. State**, 658 N.E.2d 635 (Ind. Ct. App. 1995).

Parental incarceration, standing alone, generally does not establish abandonment so as to allow adoption without parental consent. **Murphy v. Vanderver**, 349 N.E.2d 202 (Ind. Ct. App. 1976). An incarcerated parent may fail to communicate significantly with his child, thus establishing

legal cause for dispensing with his consent. **Williams v. Townsend**, 629 N.E.2d 252 (Ind. Ct. App. 1994). Imprisonment alone is generally not deemed a justifiable reason for failing to maintain significant contact with one's child. **Matter of Adoption of Herman**, 406 N.E.2d 277 (Ind. Ct. App. 1980).

V. I. Irrevocably Implied Consent

IC 31-19-9-12 through 19 establish irrevocably implied consent to adoption by operation of law for a person, mostly a putative father, who fails to take certain legal actions at certain times. A putative father whose consent to the adoption is deemed irrevocably implied is not permitted to challenge the adoption or the validity of his implied consent. IC 31-19-9-13; IC 31-19-9-16; IC 31-19-9-19.

A putative father whose consent is irrevocably implied may also be barred from establishing paternity, either by a court proceeding or by executing a paternity affidavit, in Indiana or in any other jurisdiction. IC 31-19-9-14; IC 31-19-9-17(a). There may be exceptions to this general rule, but they are extremely limited. See IC 31-19-9-17(b) and (c); see also this Chapter at V.I.2 and V.I.4.

For more detailed information on the various ways in which consent can be deemed irrevocably implied, see V.I.1 and V.I.3.a through c.

V. I. 1. Irrevocably Implied Consent When Actual Pre-Birth Notice Received

If a putative father receives actual pre-birth notice (IC 31-19-3) of the mother's intention to place the child for adoption, the putative father's consent is irrevocably implied unless he files a proper paternity action within thirty days of receiving the notice. IC 31-19-9-15. The paternity action must be filed regardless of whether the child is born before or after the thirty day period. IC 31-19-9-15(a)(1).

The putative father who receives actual pre-birth notice may also have his consent irrevocably implied if he fails to establish paternity in the paternity proceeding under IC 31-14 after filing the action. IC 31-19-9-15(a)(2). Arguably, this requires the putative father to comply with the notice and time deadlines of IC 31-14-21 for paternity actions filed when an adoption is pending.

A putative father whose consent to an adoption is irrevocably implied under IC 31-19-9-15 is not permitted to contest the adoption, and is not permitted to contest the validity of his implied consent to adoption. IC 31-19-9-16.

See this Chapter at V.I.2 and V.I.4. below for establishment of paternity consequences.

In **In Re Adoption of Fitz**, 805 N.E.2d 1270, 1273-74 (Ind. Ct. App. 2004), *trans. denied*, the Court opined that Putative Father's consent to adoption was irrevocably implied because Putative Father failed to file a paternity action not more than thirty days after receiving actual pre-birth notice of Mother's intent to proceed with an adoptive placement of the child. Putative Father filed his paternity action after the attorneys for Adoptive Parents contacted him, thirty-one days after receipt of pre-birth notice. The Court found that the trial court had not erred in denying Putative Father's motion to set aside the judgment of irrevocably implied consent.

In **In Re Paternity of Baby W.**, 774 N.E.2d 570, 578-79, n.6 (Ind. Ct. App. 2002), the Court was unpersuaded by Putative Father's argument that he substantially complied with IC 31-19-

9-15 by initiating DNA testing within the thirty day time period after receiving pre-birth notice. Putative Father had received the pre-birth notice contemplated by IC 31-19-9-15, which is a nonclaim statute, and Putative Father's failure to file a paternity action within thirty days resulted in his consent to the child's adoption being irrevocably implied. The Court rejected Putative Father's contention that IC 31-19-9-15 is unconstitutional, citing its decision in In Re Paternity of M.G.S., 756 N.E.2d 990, 1006 (Ind. Ct. App. 2001), *trans. denied*, and stated that Putative Father had not raised any additional argument that would cause the Court to hold otherwise. The Court noted that "it would be both appropriate and desirable" to appoint a guardian ad litem to represent the child in the adoption proceedings.

In **In Re Paternity of M.G.S.**, 756 N.E.2d 990, 997-1000, 1007 (Ind. Ct. App. 2001), *trans. denied*, the Court ruled that from the clear language of IC 31-19-9-15 and the corresponding pre-birth notice and intervention provisions, it is apparent that no right of action exists outside of the thirty-day statutory time limit; therefore, IC 31-19-9-15 is a nonclaim statute and is not subject to any equitable deviation. The Court defined a nonclaim statute as "one which creates a right of action and has inherent in it the denial of a right of action. It imposes a condition precedent – the time element which is part of the action itself." Nonclaim statutes limit the time in which a claim may be filed or an action brought; they have nothing in common with general statutes of limitation. The Court noted that, while an ordinary statute of limitations may be waived and is subject to equitable tolling, a nonclaim statute is not. The Court concluded that Putative Father's consent to adoption was irrevocably implied because he failed to file a paternity action within the statutory time limit. The Court clarified that its opinion in In Re Adoption of A.N.S., 741 N.E.2d 780 (Ind. Ct. App. 2001), does not stand for the proposition that the Court accepts that equitable arguments justify circumvention of the thirty-day time limit. The Court found that Putative Father had it within his own power to assert his rights and obtain an opportunity to be heard by filing for paternity within the thirty-day statutory time limit, but his own failure to act on the notice given him deprived him of the opportunity to be heard. The Court concluded, in a matter of first impression, that the implied consent provision of Indiana's adoption statutes does not violate the constitutional right to due process. In a concurring opinion, Judge Robb opined that the appointment of a guardian ad litem to represent the child's interests at the adoption proceeding would be highly appropriate.

But see **In Re Adoption of A.N.S.**, 741 N.E.2d 780 (Ind. Ct. App. 2001) (although not addressed on appeal, adoption court concluded that irrevocably implied consent was inequitable when putative father filed paternity action thirty-eight days after receipt of pre-birth notice; clarified in In Re Paternity of M.G.S., 756 N.E.2d 990, 997-1000, 1007 (Ind. Ct. App. 2001))

V. I. 2. Establishment of Paternity When Adoption Does Not Take Place After Actual Pre-Birth Notice

A putative father whose consent to an adoption is deemed irrevocably implied under IC 31-19-9-15 is not entitled to establish paternity of the child either in a court proceeding or by executing a paternity affidavit. IC 31-19-9-17(a).

However, there is an exception to this rule. If neither a petition for adoption nor placement of the child in a proposed adoptive home is pending, IC 31-19-9-17(b) allows the putative father who received actual pre-birth notice to establish paternity in Indiana or another jurisdiction. To do so, the putative father must submit an affidavit prepared by the licensed child placing agency or attorney that served him with the pre-birth notice. IC 31-19-9-17(b)(1). The affidavit must state that neither a petition for adoption nor placement of the child in an

adoptive home is pending. IC 31-19-9-17(b)(1). The affidavit must be submitted with the putative father's paternity petition. IC 31-19-9-17(b)(1). Paternity may then be established if the court finds on the record that neither a petition for adoption nor a prospective adoptive placement is pending. IC 31-19-9-17(b)(2).

This potential ability to establish paternity as set forth by IC 31-19-917(b) is very limited; the "requirements of this subsection are jurisdictional and must be strictly adhered to by the putative father and the court." IC 31-19-9-17(b).

IC 31-19-9-17(c) does further provide for other situations beyond actual pre-birth notice. It states that a person, not just a putative father, who is otherwise barred from establishing paternity under IC 31-19 may be able to establish paternity of a child if an adoption for the child is not pending or contemplated. However, a "petition for adoption that is not filed or a petition for adoption that is dismissed is not a basis for enabling an individual to establish paternity under this section unless the requirements of subsection (b) are satisfied." IC 31-19-9-17(c).

In **In Re Adoption of K.G.B.**, 18 N.E.3d 292, 294-5, 297-9, 303-4 (Ind. Ct. App. 2014), the Court affirmed the trial court's orders dismissing Putative Father's petition to establish paternity, and striking Putative Father's motion to contest the child's adoption. Because Putative Father failed to timely register with the Registry, he had irrevocably waived his right to notice of the child's adoption, had impliedly consented to the adoption, and was barred from contesting the adoption. A putative father who fails to register within the period specified by IC 31-19-5-12 waives notice of an adoption proceeding, which constitutes an irrevocably implied consent to the child's adoption (IC 31- 19-5-18), and a putative father whose consent has been implied may not challenge the adoption or establish paternity (IC 31-19-9-13 and -14). The Court concluded that Putative Father's implied consent also meant he was barred from establishing paternity (IC 31-19-9-14). Putative Father argued that his amended paternity petition, styled as being filed on behalf of the child, endured; but this argument ignored IC 31-14-5-9, which explicitly states that "[a] man who is barred under [Indiana Code article] 31-19 from establishing paternity may not establish paternity by: (1) filing a paternity action as next friend of the child." The Court also held that Putative Father failed to meet his burden of proving that the challenged statutes were unconstitutional as applied to him.

In **In Re Adoption of Infant Female Fitz**, 778 N.E.2d 432, 438 (Ind. Ct. App. 2002), the Court reversed and remanded with instructions to hold a hearing on Putative Father's T.R. 60(B) motion. The Court opined that Putative Father's consent to the first adoptive family's petition was irrevocably implied because he did not file a paternity action within thirty days of receiving pre-birth notice. The Court went on to state that if the first adoptive family's petition for adoption fell through for any reason, including voluntary dismissal by petitioners, Putative Father was entitled to establish paternity pursuant to IC 31-19-9-17(b).

V. I. 3. Irrevocably Implied Consent In Other Situations

IC 31-19-9-12 provides that a putative father's consent to an adoption is irrevocably implied if he does any of the following:

(1) fails to file a motion to contest the adoption within thirty days after service of notice under IC 31-19-4 in the court in which the adoption is pending;

(2) if he files a proper motion to contest the adoption, he then fails to appear at the hearing set to contest the adoption;

(3) if he files a paternity action in Indiana or any other jurisdiction, he then fails to establish paternity in the action; or
(4) if he is required to but fails to register with the putative father registry within the period under IC 31-19-5-12.

A putative father whose consent to an adoption is irrevocably implied under IC 31-19-9 or IC 31-19-5-18 is not permitted to challenge the adoption, and is not permitted to challenge the validity of his implied consent to the adoption. IC 31-19-9-13. Furthermore, unless a putative father falls into the exception noted at IC 31-19-9-17(b) and (c), the putative father whose consent to an adoption is irrevocably implied cannot establish paternity of a child, by affidavit or otherwise, in Indiana or any other jurisdiction. IC 31-19-9-14. See also In Re Adoption of K.G.B., 18 N.E.3d 292, 294-5, 297-9, 303-4 (Ind. Ct. App. 2014) (Putative Father's implied consent also meant he was barred from establishing paternity (IC 31-19-9-14). Putative Father argued that his amended paternity petition, styled as being filed on behalf of the child, endured; but this argument ignored IC 31-14-5-9, which explicitly states that "[a] man who is barred under [Indiana Code article] 31-19 from establishing paternity may not establish paternity by: (1) filing a paternity action as next friend of the child"). For more case law on this topic, see this Chapter at V.I.2, V.I.4., and VI.F.

If a putative father's motion to contest an adoption is denied, he is barred from establishing paternity by affidavit or otherwise, in Indiana or any other jurisdiction. IC 31-19-10-8.

For discussion of irrevocably implied consent due to failure to prosecute a motion to contest an adoption, see V.I.3.c.

V. I. 3. a. Irrevocably Implied Consent When Pre-Birth Notice Has Not Been Served; When Actual Post Birth Notice Received

IC 31-19-9-12 was amended after the 2009 Indiana Supreme Court Case of In Re B.W., 908 N.E.2d 586 (Ind. 2009). IC 31-19-9-12 now provides that consent to an adoption is irrevocably implied for a putative father without further court action in any one of the following situations:

- The putative father fails to contest the adoption in accordance with IC 31-19-10 within thirty (30) days after service of notice under IC 31-19-4 in the court in which the adoption is pending; or
- The putative father fails to appear at the hearing set to contest the adoption, having filed a motion a motion to contest the adoption in accordance with IC 31-19-10; or
- Having filed a paternity action under IC 31-14 or in any other jurisdiction, the putative father fails to establish paternity [see also IC 31-14-21 for time requirements for establishing paternity]; or
- The putative father is required to but fails to register with the putative father registry within the period described under IC 31-19-5-12.

If a putative father fails to meet one of these deadlines, his consent can be deemed to be irrevocably implied, which will have consequences for his ability to contest an adoption or establish paternity. A putative father whose consent to an adoption is irrevocably implied under IC 31-19-9 or IC 31-19-5-18 is not permitted to challenge the adoption, and is not permitted to challenge the validity of his implied consent to the adoption. IC 31-19-9-13. Furthermore, unless a putative father falls into the exception noted at IC 31-19-9-17(b) and (c), the putative father whose consent to an adoption is irrevocably

implied cannot establish paternity of a child, by affidavit or otherwise, in Indiana or any other jurisdiction. IC 31-19-9-14.

IC 31-19-9-17(c) provides that a person, not just a putative father, who is otherwise barred from establishing paternity under IC 31-19 may be able to establish paternity of a child if an adoption for the child is not pending or contemplated. However, a "petition for adoption that is not filed or a petition for adoption that is dismissed is not a basis for enabling an individual to establish paternity under this section unless the requirements of subsection (b) are satisfied." IC 31-19-9-17(c). The requirements of IC 31-19-9-17(b) are: (1) the putative father must submit an affidavit prepared by the licensed child placing agency or attorney that served him with the pre-birth notice. IC 31-19-9-17(b)(1); (2) the affidavit must state that neither a petition for adoption nor placement of the child in an adoptive home is pending; (3) IC 31-19-9-17(b)(1). The affidavit must be submitted with the putative father's paternity petition; (4) IC 31-19-9-17(b)(1); (5) Paternity may then be established if the court finds on the record that neither a petition for adoption nor a prospective adoptive placement is pending. IC 31-19-9-17(b)(2).

In Re B.W., 908 N.E.2d 586, 592-94 (Ind. 2009), was decided before the statutory amendment of IC 31-19-9-12, and this case should now be read in light of the amendments to IC 31-19-9-12. Practitioners should be cautious in citing to this case, given the sweeping amendments to the statute. 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. (emphasis in opinion). Boehm, J, concurred with separate opinion "to observe that these statutes, taken together, seem to provide multiple opportunities for confusion or even intentional obfuscation," and with the hope that "the General Assembly will consider requiring that a putative father wishing to contest an adoption or declare paternity must file in the court in which an adoption action is pending or otherwise assure consolidation of these two proceedings..."

See also **In Re Adoption of E.L.**,913 N.E.2d 1276, 1279-81 (Ind. Ct. App. 2009) (relying on In Re B.W., 908 N.E.2d 586 (Ind. 2009), Court held that, contrary to trial court's finding, because Putative Father timely filed a paternity petition, his failure to file a motion contesting adoption did not imply consent to adoption under IC 31-19-9-12(1), but Putative Father's failure to register as a putative father constituted an irrevocably implied consent to the child's adoption).

V. I. 3. b. When Putative Father Fails to Timely Register with the Putative Father Registry When Required

In order for a putative father to be entitled to a notice of an adoption under IC 31-19-3 or -4, he must register with the putative father registry within than the later of the following options (IC 31-19-5-12(a):

(1) thirty days after the child's birth; or
(2) the earlier of the date of the filing of a petition for the:
    (A) child's adoption; or
    (B) termination of the parent-child relationship between the child and the mother.

A putative father may register with the putative father registry before the child's birth. IC 31-19-5-12(b).

If a putative father fails to register within the period specified by IC 31-19-5-12 waives notice of an adoption proceeding. This waiver by the putative father constitutes an irrevocably implied consent to the adoption. IC 31-19-5-18.

In **In Re I.J.**, 39 N.E.3d 1184, 1187-8 (Ind. Ct. App. 2015), the Court reversed the trial court's orders which: (1) denied Putative Father's motions to intervene in the child's adoption; (2) denied Putative Father's motion for genetic paternity testing; and (3) granted the child's adoption. 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 looked to IC 31-19-5-12 for the timeline under which a putative father must register with the putative father registry. The Court observed that, pursuant to the statute, 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." 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 Father registered before the child was thirty days old, his registration was timely, he was entitled to notice of the adoption, and he should have been permitted to contest it. The Court also held that Putative Father's timely registration gave him standing to challenge the adoption petition in the trial court and in the appellate court. The Court further found that Putative Father's timely registration with the putative father registry entitled him to an opportunity to challenge the presumption that Husband is the child's father. The presumption of fatherhood created by IC 31-14-7-1(1) can be rebutted by "direct, clear, and convincing evidence" that someone else is the father, which is often done via genetic testing.

In **In Re Adoption of K.G.B.**, 18 N.E.3d 292, 294-5, 297-9, 303-4 (Ind. Ct. App. 2014), the Court affirmed the trial court's orders dismissing Putative Father's petition to establish paternity, and striking Putative Father's motion to contest the child's adoption. Because Putative Father failed to timely register with the Registry, he had irrevocably waived his right to notice of the child's adoption, had impliedly consented to the adoption, and was barred from contesting the adoption. A putative father who fails to register within the period specified by IC 31-19-5-12 waives notice of an adoption proceeding, which constitutes an irrevocably implied consent to the child's adoption (IC 31- 19-5-18), and a putative father whose consent has been implied may not challenge the adoption or establish paternity (IC 31-19-9-13 and -14). The Court disregarded Putative Father's unsupported arguments that the putative father registry did not apply to him because of his allegations 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 Putative Father's implied consent also meant he was barred from establishing paternity (IC 31-19-9-14). Putative Father argued that his amended paternity petition, styled as being filed on behalf of the child, endured; but this argument ignored IC 31-14-5-9, which explicitly states that "[a] man who is barred under [Indiana Code article] 31-19 from establishing paternity may not establish paternity by: (1) filing a paternity action as next friend of the child." The Court also held that Putative Father failed to meet his burden of proving that the challenged statutes were unconstitutional as applied to him.

In **In Re Paternity of G.W.**, 983 N.E.2d 1193, 1194, 1197 (Ind. Ct. App. 2013), the Court held that, as Birth Father acknowledged that he never registered with the putative

father registry, he was not entitled to notice of the adoption proceeding, and had irrevocably and implicitly consented to the child's adoption. A putative father who registers within thirty days of the child's birth or the date the adoption petition is filed, whichever occurs later, is entitled to notice of the child's adoption (IC 31-19-5-4 and IC 31-19-5-12). The Court, citing IC 31-19-5-5, said that if, on or before the date 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 for the putative father, the putative father must register to entitle him to notice of the child's adoption (emphasis added by the Court). The Court opined that the repercussions of failing to register with the putative father registry are far-reaching and include irrevocably implied consent to an adoption (IC 31-19-5-18).

In **In Re Adoption of E.L.**, 913 N.E.2d 1276, 1279-80 (Ind. Ct. App. 2009), the Court held that, by operation of IC 31-19-5-18, Putative Father's failure to register as a putative father constituted irrevocably implied consent to the adoption. Since Putative Father's consent was implied, he was not entitled to establish paternity while the adoption was pending (IC 31-19-9-14). Putative Father's timely filing of the paternity petition did not render moot the requirement that he file with the putative father registry (IC 31-14-20-1(b) and IC 31-19-5-6(b)). A putative father who fails to register with the putative father registry set forth by IC 31-19-5-12 waives notice of the adoption proceeding and this constitutes irrevocably implied consent (IC 31-19-5-18 and IC 31-19-9-12(4)), and is also barred from establishing paternity (IC 31-19-9-14). However, if an adoption is no longer "pending or contemplated," the bar on establishing paternity is lifted (IC 31-19-9-17(c)). See this Chapter at VI.D. for discussion of IC 31-19-5-12, the statute which provides the time period by which the putative father must register to be entitled to notice of an adoption.

V. I. 3. c. Irrevocably Implied Consent Due to Failure to Prosecute Motion to Contest Adoption

Who bears the burden of proof in a contested adoption depends on what statutory reason for dispensing with the need for consent is alleged. IC 31-19-10-1.2. If the court finds that the person who filed the motion to contest adoption 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. IC 31-19-10-1.2(g). The party who bears the burden of proof must prove the party's case by clear and convincing evidence. IC 31-19-10-0.5.

It is important to note that IC 31-19-9-18 does not apply to the consent of an agency or DCS local office that is served with notice of an adoption petition under IC 31-19-4.5 and has lawful custody of a child whose adoption is being sought. IC 31-19-9-18(a).

A person who is served with notice of an adoption under IC 31-19-4.5 may have their consent to an adoption irrevocably implied if they fail to take certain timely actions. IC 31-19-9-18(b). A person served with such notice can have their consent deemed irrevocably implied if the person:

(1) fails to properly file a motion to contest the adoption within thirty days after service of notice; or
(2) properly files a motion to contest the adoption but fails to:
    (A) appear at the hearing to contest the adoption; and
    (B) prosecute the motion to contest without unreasonable delay.

If a court finds that the person who filed the motion to contest is failing to prosecute the motion without unreasonable delay, the court shall dismiss the motion to contest the adoption with prejudice and the person's consent to the adoption shall be irrevocably implied. IC 31-19-9-18(c).

In **L.G. v. S.L.**, 76 N.E.3d 157 (Ind. Ct. App. 2017), the Court held that the trial court erred when it dismissed Father's motion to contest the adoption in part because of his failure to appear in person at a hearing. The trial court concluded that IC 31-19-9-12(2) provided that a putative father's consent could be irrevocably implied if, having filed a motion to contest the adoption, the putative father then failed to appear at the hearing set to contest the adoption, and that Father had failed to appear without justifiable cause. The Court noted that the record showed, unequivocally, that the hearing at which Father failed to appear was not the hearing set to contest the adoption, and instead, was a motions hearing on other matters. Father's motion to contest the adoption was set for hearing on a different date. Therefore, IC 31-19-9-12(2) was inapplicable.

In **K.S. v. D.S.**, 64 N.E.3d 1209, 1214 (Ind. Ct. App. 2016), the Court held 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. 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. The Court noted the following: (1) Birth Mother's attorney made every effort to personally notify her of the hearings, but her disappearance made it impossible for him to do so; (2) Birth Mother could not short-circuit the adoption proceedings by vanishing; (3) the trial court was not obligated to accept Birth Mother's claim that she was in drug treatment as true; (4) even if Birth Mother was in drug treatment, that would not excuse her complete failure to maintain contact.

In **In Re Adoption of K.M.**, 31 N.E.3d 533, 536-8 (Ind. 2015), the Court affirmed the trial court's order granting the adoption petition, and held that: (1) Mother's procedural due process rights were not violated by having her consent irrevocably implied pursuant to IC 31-10-1 and IC 31-19-9-18; and (2) because IC 31-19-9-18 is a nonclaim statute, Mother was not entitled to equitable deviation from the statutory thirty day time limit to file a motion to contest the adoption. Both IC 31-19-10-1 and IC 31-19-9-18 provided Mother with procedural due process; it was Mother's failure to timely file a motion to contest the adoption, not any State action, that prevented Mother from further opposing Stepmother's adoption petition. Mother received proper notice and failed to file her motion to contest the adoption in the thirty day time period. However, Mother argued that it was unconstitutional for IC 31-19-9-18 to allow her consent to be irrevocably implied without a hearing, in essence arguing that a hearing on consent must be held in all adoption cases. The Court noted that there was nothing in the statutory language that required a hearing before deeming a person's consent to be irrevocably implied under IC 31- 19-9-18, and declined to read a requirement for a hearing into the statute. The plain language of IC 31-19-9-18 makes it a nonclaim statute, a statute with a condition precedent that must be met before the enforcement of a right; as such, Mother was not entitled to equitable deviation from the thirty day time limit. A nonclaim statute is not subject to equitable tolling of a time limit, since a nonclaim statute creates a right of action only if the action is taken within the prescribed time period.

See this Chapter at VII.B.3 for discussion this statute as it pertains to notice and consent.

V. I. 4. Time Limitations For Establishing Paternity in Adoption Situations

Except as otherwise provided, if a court presiding over a paternity action knows of a pending adoption for the same child, and the court in which the adoption is pending, the paternity court must establish paternity of the child within the time period set forth by IC 31-14-21. IC 31-14-21-9(a). The exception to this statute is IC 31-14-21-13, which provides that if an adoption court assumes jurisdiction of a paternity action pursuant to IC 31-19-2-14, the paternity court must stay all its own paternity proceedings under further order from the adoption court.

Except as otherwise provided, the paternity court must conduct an initial hearing within thirty days of the filing of the paternity petition or the birth of the child, whichever occurs later. IC 31-14-21-9(b). Again, this is subject to IC 31-14-21-13, which provides that if an adoption court assumes jurisdiction of a paternity action pursuant to IC 31-19-2-14, the paternity court must stay all its own paternity proceedings under further order from the adoption court.

The paternity court must order all the parties to a paternity action to under blood or genetic testing at an initial hearing, except as otherwise provided at IC 31-14-21-13 (when an adoption court assumes jurisdiction of a paternity action; proceedings stayed). IC 31-14-21-9.1(a). If the alleged father is unable to pay for such testing, the court must order the tests be paid by the state department of health, who may in turn recover costs from the person found to be the biological father of the child. IC 31-14-21-9.1(b).

Within ninety days of the initial hearing (IC 31-14-21-9), the court must conduct a final hearing to determine paternity, subject to IC 31-14-21-13 (when an adoption court assumes jurisdiction of a paternity action; proceedings stayed). IC 31-14-21-9.2. The paternity court must issue its ruling within fourteen days of the final hearing. IC 31-14-21-9.2.

A putative father whose consent to an adoption is irrevocably implied under IC 31-19-9 or IC 31-19-5-18 (failing to timely register with putative father registry) is not permitted to establish paternity, by affidavit or otherwise, in Indiana or any other jurisdiction, unless he fits into one of the exceptions noted at IC 31-19-9-17(b) and (c). IC 31-19-9-14. The first of these exceptions is found at IC 31-19-9-17(b). If neither a petition for adoption nor placement of the child in a proposed adoptive home is pending, a putative father who received actual pre-birth notice may establish paternity in Indiana or any other jurisdiction. To do so, the putative father must submit an affidavit prepared by the licensed child placing agency or attorney that served him with the pre-birth notice. IC 31-19-9-17(b)(1). The affidavit must state that neither a petition for adoption nor placement of the child in an adoptive home is pending. IC 31-19-9-17(b)(1). The affidavit must be submitted with the putative father's paternity petition. IC 31-19-9-17(b)(1). Paternity may then be established if the court finds on the record that neither a petition for adoption nor a prospective adoptive placement is pending. IC 31-19-9-17(b)(2).

This potential ability to establish paternity as set forth by IC 31-19-917(b) is very limited; the "requirements of this subsection are jurisdictional and must be strictly adhered to by the putative father and the court." IC 31-19-9-17(b).

IC 31-19-9-17(c) does further provide for other situations beyond actual pre-birth notice. It states that a person, not just a putative father, who is otherwise barred from establishing paternity under IC 31-19 may be able to establish paternity of a child if an adoption for the child is not pending or contemplated. However, a "petition for adoption that is not filed or a

petition for adoption that is dismissed is not a basis for enabling an individual to establish paternity under this section unless the requirements of subsection (b) are satisfied." IC 31-19-9-17(c). See this Chapter at V.I.2. for more discussion.

The putative father who receives actual pre-birth notice may also have his consent irrevocably implied if he fails to establish paternity in the paternity proceeding under IC 31-14 after filing the action. IC 31-19-9-15(a)(2). See this Chapter at V.I.1 and V.I.2. for more discussion.

Practice Note: IC 31-14-21-13 clarifies that the paternity court should not act when an adoption petition is pending in another court. IC 31-19-2-14 requires the consolidation of the paternity proceeding with the adoption in the court which is hearing the petition for adoption. If paternity is being established as part of the consolidated proceeding, it appears that the time limits imposed by IC 31-14-21-9, 9.1, and 9.2 should be followed by the court hearing the consolidated cases.

V. J. Parental Unfitness and Child's Best Interests

IC 31-19-9-8(a)(11) provides 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.

The adoption petitioner has the burden of proving, by clear and convincing evidence, that the requirements of IC 31-19-9-8(a)(11) are satisfied and that the best interests of the child are served if the court dispenses with the parent's consent to adoption. IC 31-19-10-1.2(e). IC 31-19-10-1.4 clarifies standards for the court's determination in adoption when parental unfitness is alleged. It provides that a court must consider all relevant evidence, but cannot base its determination solely on a finding that the adoption petition would be a better parent to the child than the person contesting the adoption, or that a parent has a biological link to the child.

In **In Re Adoption of J.M.**, 10 N.E.3d 16, 21-2 (Ind. Ct. App. 2014), the Court affirmed the trial court and held, among other things, that the trial court was not required to reevaluate parental fitness at the time of the adoption hearing. Since the trial court concluded that Mother and Father were unfit at the time of the consent hearing, this terminated Mother's and Father's parental rights; the trial court did not need to reconsider Mother's and Father's fitness again at the adoption hearing. Mother and Father argued that the trial court erred because it failed to consider their fitness at the time of the consent hearing and again at the adoption hearing. The Court noted previous case law, which held that evidence of a historical pattern of serious drug abuse was sufficient to show that a parent was unfit. Given the evidence and the trial court's findings on Mother's and Father's historical difficulty with alcohol, drug use, and domestic violence, the Court could not say that the trial court erred when it determined that Mother and Father were unfit parents at the time of the consent hearing. Mother's and Father's "argument that the trial court should have reevaluated their fitness at [the time of the adoption hearing] is merely a request for a second bite at the proverbial apple. Once the trial court concluded that the Natural Parents were unfit at the consent hearing…the effect was the termination of their parental rights."

In **In Re Adoption of M.L.**, 973 N.E.2d 1216, 122-4 (Ind. Ct. App. 2012), the Court affirmed the trial court's order which granted Adoptive Parents' petition to adopt the child without Father's consent. There was sufficient evidence to support the trial court's conclusions that Father was not a fit parent and that the adoption is in the child's best interests. The Court noted: (1) Adoptive

Parents had the burden of proving by clear and convincing evidence that consent was not required; (2) regardless of which provision of IC 31-19-9-8 adoption petitioners allege, an adoption is granted only if it is in the best interests of the child. The Court looked to Black's Law Dictionary and termination of the parent-child relationship cases to provide guidance as to what makes a parent "unfit." 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. The Court noted many of these factors present in this case. Regarding best interests, the Court noted several pieces of evidence supporting the trial court's conclusion that the adoption was in the child's best interests, including evidence on a stable, nurturing environment, a strong bond with Adoptive Parents and others in the house, the child's lack of bonding with Father, and the child's special needs.

In **In Re Adoption of K.F.**, 935 N.E.2d 282, 288-9 (Ind. Ct. App. 2010), *trans. denied*, the Court affirmed the trial court's ordering granting the adoption and holding that the evidence was sufficient to prove that Mother was unfit. The Court noted the following evidence in support of the trial court's unfitness conclusion: (1) Mother's long history of substance abuse; (2) Mother's recent positive test for illicit substances; (3) Mother was arrested to dealing heroin and had a pending case; (4) Mother has had only supervised visitation with the children; (5) the children were stressed by visits with Mother. The Court noted that Mother's struggle with drug addiction has persisted for most of the children's lives, and the children are thriving in the loving and caring home provided by Father and Stepmother.

In **In Re Adoption of H.N.P.G.**, 878 N.E.2d 900, 906-08 (Ind. Ct. App. 2008), *trans. denied*, the Court found that Foster Parents proved that Father was unfit to be a parent and that the adoption was in the child's best interests. In arriving at its holding, the Court noted: (1) Father had never met or communicated with the child; (2) Father's substantial history of illegal drug use; (3) Father's current incarceration; (4) Father's release date would be when the child would be thirteen years old; (5) Father was habitually unemployed; (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) the child's needs were too important to force her to wait until a determination can be made that Father will be able to be a fit parent to her; (8) ample evidence supported the trial court's conclusion that the child's best interests were served by granting Foster Parents' adoption petition.

In **In Re Adoption of T.W.**, 859 N.E.2d 1215, 1218-19 (Ind. Ct. App. 2006), the Court opined that Adoptive Parents had presented clear and convincing evidence that 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 Court noted the following evidence in support: (1) Father admitted he was unable to care for the children because of his drug use and criminal cases; (2) Father was on house arrest; (3) Father did not provide financial support for the children; (4) Father could barely provide for himself; (6) 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 Adoptive Parents had consistently provided for the children's needs, and the children had thrived in their care.

V. K. Written Denial of Paternity by Biological Father

IC 31-19-9-8(a)(12) provides that consent to adoption is not needed from the child's biological father who denies paternity of the child before or after the child's birth, if the denial of paternity is in writing, is signed by the child's father in the presence of a notary public, and the documents contains and acknowledgement that the denial of paternity is irrevocable and he will not receive

notice of adoption proceedings. A child's father who denies paternity of the child under this subdivision may not challenge or contest the child's adoption.

Practice Note: Practitioners could consider using this statute in CHINS proceedings when the biological father denies paternity and does not want to be involved in the CHINS case, especially when it appears that termination and adoption will be the permanency plan. This statute should not be used if paternity has been established by affidavit or court proceeding or if the father was married to the child's mother.

VI. PUTATIVE FATHER REGISTRY

VI. A. Purpose

The purpose of the putative father registry is to determine the name and address of a father, who may have conceived a child for whom an adoption petition has been or will be filed, who also was not identified by the mother in a specific manner before or at the time she signed an adoption consent. IC 31-19-5-3. This helps ensure that he gets notice of the adoption. IC 31-19-5-3.

The registry allows a putative father to receive adoption notice through records of his name and address maintained by the state department of health. IC 31-19-5-2; IC 31-19-5-4; IC 31-19-5-5. The registry allows the putative father to take action on his own to receive notice of a pending adoption, instead of relying on the biological mother to provide his name or address or both on or before the date she gives her consent to an adoption to the adoption agency or attorney arranging the adoption. IC 31-19-5-5. Registration is a necessary prerequisite to entitle the putative father to notice of an adoption petition unless the mother provides his name or address by the date she consents. The putative father who fails to timely register waives notice of adoption and his consent to his child's adoption is irrevocably implied by operation of law. IC 31-19-5-18.

The registry also allows prospective adoptive parents, an attorney or licensed child placing agency that represents prospective adoptive parents, a court presiding over an adoption, as well as other parties to an adoption to learn the identity and address of a putative father so that his consent to adoption may be requested or notice can be sent to him. IC 31-19-5-21. The attorney or agency could contact the registered father prior to the filing of the adoption petition to ascertain whether he objects to the adoption; requirements for who may obtain the records and in what manner are set forth at IC 31-19-5-21(b) and (c). If the putative father objects, the mother or adoptive petitioners may make a decision from there as to whether to proceed with the adoption.

If a putative father wants to assure that he receives notice of an adoption, he must be certain to keep his address current with the registry by submitting necessary amendments, pursuant to IC 31-19-5-11. 31-19-4-9 underscores the importance of an accurate registry address for the putative father to receive pre-birth notice of an adoption; it provides that if a person has attempted to give notice to a putative father at a particular address under IC 31-19-3 (the pre-birth notice statute) and the putative father could not be located at that address, notice is not required under IC 31-19-4 unless the putative father registers that address with the putative father registry.

VI. B. Who Must Register

A putative father is a male of any age who is alleged to be or claims that he may be a child's father but who has not established paternity and who is not a presumed father under IC 31-14-7-1(1) or IC 31-14-7-1(2) due to his marriage or attempted marriage to the child's mother. IC 31-9-2-100.

Presumed fathers under IC 31-14-7-2 are not exempt from needing to register with the putative father registry. IC 31-19-5-6(b). A putative father's filing of a paternity action does not relieve the putative father from the obligation of or consequences from failing to register with the putative father registry, unless paternity has been established before the filing of the petition for adoption of the child. IC 31-19-5-6(b). IC 31-14-7-2 deals with fathers who are presumed to be biological fathers of a child under the following circumstances: (1) there is not an already presumed biological father; (2) with the consent of the mother, the man receives the child into his home; (3) with the consent of the mother, the man holds the child out as his own biological child. This is a rebuttable presumption, and does not legally establish paternity. IC 31-14-7-2.

Legally established fathers do not need to register with the putative father registry, as they are not included within the definition of putative father found at IC 31-9-2-100. They are entitled to notice to an adoption and the chance to contest it as a result of their legal status, unless otherwise provided. IC 31-14-7-3 provides that paternity affidavits do legally establish paternity, so long as they have been executed in accordance with IC 16-37-2-2.1 and not been rescinded or set aside under IC 16-37-2-2.1. See Chapter 12 at IV. and VI. for detailed discussion of establishing paternity.

To register with the Indiana Putative Father Registry, please call (317) 233-7589 or email Evelyn Riley at eriley@isdh.in.gov. To request a search of the registry, please complete and submit Form 54808, found at http://www.in.gov/isdh/26802.htm. along with appropriate identification. A search of the registry costs $16.00.

VI. C. Form of Registration

A putative father registry form is available through the state department of health, each clerk of a circuit court, and each local health department. IC 31-19-5-13. The form is provided by the state department of health, and must include the father's name, address for legal notice, Social Security number, and date of birth and must be signed by the putative father and notarized. IC 31-19-5-10; IC 31-19-5-7(a)(1). The following information must be included if known: mother's name including aliases, mother's address, Social Security number and birth date; and child's name and place of birth, if known. IC 31-19-5-7(a)(2) and (3).

An amended registration form shall be submitted by the putative father each time the information he must supply changes. IC 31-19-5-11. The putative father may revoke his registration at any time by submitting a signed notarized statement. IC 31-19-5-19.

He may register in person, by mail, by facsimile, or by private courier. IC 31-19-5-20. The putative father may designate an agent for service of notice if he does not have an address where he may receive notice. IC 31-19-5-7(b); see also Form 46750, Indiana Putative Father Registration. Service on the agent under Ind. Trial Rule 4.1 constitutes service of notice on the putative father. IC 31-19-5-7(b). If the agent cannot be served according to T.R. 4.1 further notice to the agent or putative father is not necessary. IC 31-19-5-7(b).

VI. D. Time For Registration

The putative father may register before the child's birth. IC 31-19-5-12(b).

To be entitled to notice of an adoption under IC 31-19-3 or IC 31-19-4, a putative father must register with the state department of health within (1) thirty days of the child's birth; or (2) the date of the filing of a petition for the child's adoption or the termination of the parent-child relationship between the child and the mother, whichever of these petitions comes first. IC 31-19-

5-12(a). Of the thirty days of the child's birth and the petition dates, the later of these two options is the controlling date by which the putative father must register. IC 31-19-5-12(a).

Practice Note: IC 31-19-5-12 contains several time provisions, necessitating careful reading of the statute. A putative father has the choice between the later dates provided in subsection(a)(1) and (a)(2), but must adhere to the earlier of the two dates in subsection (a)(2). A putative father generally has at least thirty days after the child's birth to register, but depending on the facts of the case, may have more time to register, as specified in (a)(2).

See this Chapter, V.I.3.b. for case law on this topic.

VI. E. Request For Search of Putative Father Registry

An attorney or agency that arranges or may arrange an adoption may make a verified written request for a putative father registry search or a search for paternity determinations or notices of filing paternity petitions from the state department of health at any time. IC 31-19-5-15; IC 31-19-6-1.

The state department of health shall respond to putative father registry search requests by furnishing a certified copy of a putative father's registration form and a copy of any notice of a filing of a petition to establish paternity prepared under IC 31-14-9-0.5. IC 31-19-5-21(a). The state department of health must immediately respond to requests in writing. IC 31-19-5-22(a). The state department of health must submit an affidavit to the attorney or agency within five days, verifying whether a putative father: (1) is registered within the proper time period in relation to a mother whose child is the subject of the adoption that the attorney or agency is arranging; or (2) has filed a petition to establish paternity. IC 31-19-5-16(a). A fee may be charged for searches under this section. IC 31-19-5-22.

The state department of health shall respond to paternity determination and paternity filing search requests made under IC 31-19-6-1 within five days, and must: (1) submit an affidavit to the attorney or agency verifying whether a record of a proper paternity determination has been filed concerning the child; and (2) search the putative father registry established by IC 31-19-5 and notify the attorney or agency, in compliance with IC 31-19-5-16 as to whether a putative father has: (A) registered concerning the child; or (B) filed a petition to establish paternity in relation to the child. IC 31-19-6-2.

If the state health department finds that one or more putative fathers have registered or have filed a petition to establish paternity, the state health department must (1) submit a copy of each registration form or notice with the state department's affidavit; and (2) include in the affidavit the date that the attorney or agency submits the request for a search that relates to the affidavit. IC 31-19-5-16(b) and (c); IC 31-19-5-21(a).

DCS may request a putative father or paternity petition filing search request as the legal custodian of the child and a party to an adoption case when adoption becomes the plan for the child. IC 31-19-5-21(a)(4). IC 31-19-5-15 may also allow for DCS to search the putative father registry if they are the agency that is arranging the adoption. Note, however, that the putative father may still make a timely registration until the date the adoption petition is filed. IC 31-19-5-12.

A court may not grant an adoption unless the state department's affidavit under this section is filed with the court as provided under IC 31-19-11-1(a)(4). IC 31-19-5-16(d).

VI. F. Case Law on Putative Father Registry

In **In Re I.J.**, 39 N.E.3d 1184, 1187-8 (Ind. Ct. App. 2015), the Court reversed the trial court's orders which: (1) denied Putative Father's motions to intervene in the child's adoption; (2) denied Putative Father's motion for genetic paternity testing; and (3) granted the child's adoption. 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 looked to IC 31-19-5-12 for the timeline under which a putative father must register with the putative father registry. The Court observed that, pursuant to the statute, 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." 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 Father registered before the child was thirty days old, his registration was timely, he was entitled to notice of the adoption, and he should have been permitted to contest it. The Court also held that Putative Father's timely registration gave him standing to challenge the adoption petition in the trial court and in the appellate court.

In **In Re Adoption of K.G.B.**, 18 N.E.3d 292, 294-5, 297-9, 303-4 (Ind. Ct. App. 2014), the Court affirmed the trial court's orders dismissing Putative Father's petition to establish paternity, and striking Putative Father's motion to contest the child's adoption. Because Putative Father failed to timely register with the Registry, he had irrevocably waived his right to notice of the child's adoption, had impliedly consented to the adoption, and was barred from contesting the adoption. A putative father who fails to register within the period specified by IC 31-19-5-12 waives notice of an adoption proceeding, which constitutes an irrevocably implied consent to the child's adoption (IC 31- 19-5-18), and a putative father whose consent has been implied may not challenge the adoption or establish paternity (IC 31-19-9-13 and -14). The Court disregarded Putative Father's unsupported arguments that the putative father registry did not apply to him because of his allegations 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 Putative Father's implied consent also meant he was barred from establishing paternity (IC 31-19-9-14). Putative Father argued that his amended paternity petition, styled as being filed on behalf of the child, endured; but this argument ignored IC 31-14-5-9, which explicitly states that "[a] man who is barred under [Indiana Code article] 31-19 from establishing paternity may not establish paternity by: (1) filing a paternity action as next friend of the child." The Court also held that Putative Father failed to meet his burden of proving that the challenged statutes were unconstitutional as applied to him.

In **In Re Paternity of G.W.**, 983 N.E.2d 1193, 1194, 1197 (Ind. Ct. App. 2013), the Court concluded that Birth Father, who had not married Mother, signed the paternity affidavit, or registered with Putative Father Registry by the date of the filing of Stepfather's petition to adopt Mother's one-year-old child, was not entitled to notice of the adoption proceeding. The Court concluded that Birth Father had irrevocably and implicitly consented to the child's adoption by Stepfather. The Court reversed the trial court's order denying Mother's motions to dismiss Birth Father's paternity action which was filed in the consolidated adoption and paternity case.

In **In Re Adoption of E.L.**, 913 N.E.2d 1276, 1279-80 (Ind. Ct. App. 2009), the Court held, among other things, that, by operation of statute (IC 31-19-5-18), Putative Father's failure to register as a putative father "constitutes an irrevocably implied consent to the [child's] adoption;" and because Putative Father's consent is implied, he "is not entitled to establish paternity" while the adoption is pending (IC 31-19-9-14). Contrary to Putative Father's arguments, his timely

filing of the paternity petition did not render moot the issues concerning the requirement that he file with the Putative Father Registry, in that IC 31-14-20-1(b) provides that a man who files a paternity action "shall register with the putative father registry ... within the period provided under IC 31-19-5-12," and IC 31-19-5-6(b) provides that "[t]he filing of a paternity action by a putative father does not relieve the putative father from the: (1) obligation of registering; or (2) consequences of failing to register ... unless paternity has been established before the filing of the petition for adoption of the child."

See also **Mathews v. Hansen**, 797 N.E.2d 1168 (Ind. Ct. App. 2003) (putative father's failure to register timely with putative father registry precluded him from challenging adoption decree), *trans. denied*; **In Re Adoption of J.D.C.**, 751 N.E.2d 747 (Ind. Ct. App. 2001) (putative father was not entitled to notice of adoption because mother did not disclose his address to adoption agency and he failed to preserve his rights by registering with the putative father registry); **In Re Paternity of Baby Doe**, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000) (putative father's failure to register timely (within thirty days of the child's birth or thirty days of the filing of the petition for adoption, whichever occurs later) precluded him from establishing paternity, challenging his irrevocably implied consent to adoption or contesting the adoption).

VII. NOTICE

VII.A. Pre-Birth Notice Requirements to Putative Fathers and Implied Consent

A pregnant woman may serve the putative father of her unborn child with actual notice that she is considering an adoptive placement for the child. IC 31-19-3-1. Actual notice of the 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. Providing notice to the putative father does not obligate the mother to proceed with adoptive placement. IC 31-19-3-2.

The form of the actual notice, prescribed at IC 31-19-3-4, states that the putative father must file a paternity action to establish his paternity of the unborn child within thirty days of receipt of the notice. This time period may expire before the child's birth. See also IC 31-14-4-1(2)(B) which allows an expectant father of an unborn child to file a paternity action. The actual pre-birth notice form also states that if the putative father fails to file a paternity action timely or is unable to establish paternity in Indiana or any other jurisdiction, 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. IC 31-19-3-4. If the putative father fails to file the paternity action timely 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. IC 31-19-3-4. He also loses his ability to establish paternity by affidavit or any other manner, in Indiana or any other jurisdiction, except as provided by IC 31–19–9–17(b). See this Chapter at V.I.1. and V.I.3 for further discussion of implied consent after service of pre-birth notice.

The person who provides actual notice to the putative father shall submit an affidavit to the court having jurisdiction over the adoption petition 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. The Indiana Rules of Trial Procedure do not apply to the giving of pre-birth notice. IC 31-19-3-8.

To use this statute effectively, it is very important that the correct pre-birth statutory notice be served on the putative father. See **Matter of Paternity of Baby Girl, Born 6/7/94**, 661N.E.2d

873 (Ind. Ct. App. 1996) (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). DCS attorneys could use this statute 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.

The 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 files a paternity action. IC 31-19-3-5. 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. IC 31-19-3-5(1), (2). If the putative father fails to 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.

Actual pre-birth notices may be validly served on putative fathers who are Indiana residents, even if they are served outside of Indiana. IC 31-19-3-9(a).

Actual pre-birth notices may be validly served on putative fathers who are not Indiana residents if the child was conceived in Indiana. IC 31-19-3-9(b)(1). Actual pre-birth notices may also be validly served on putative fathers who are not Indiana residents if the child was conceived outside of Indiana if the laws of the state in which the (A) father is served notice or resides, or (B) child was conceived allow a paternity or similar action to be filed before the birth of a child. IC 31-19-3-9(b)(2).

In each recent case that address 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 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. The Court found that 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", therefore, Putative Father was alerted that any statements made in the letter that were inconsistent with the terms of the notice should not have been considered. The letter also provided fair notice that the attorney represented interests adverse to those of Putative Father. The statute does not require that the notice be signed by Adoptive Parents' attorney, and does not require that the notice advise Putative Father of his right to counsel.

In **In Re Paternity of M.G.S.**, 756 N.E.2d 990, 1001-03, n.5 (Ind. Ct. App. 2001), *trans. denied*, the Court addressed eight issues relating to the alleged defectiveness of the notice raised by Putative Father, who claimed that the notice was confusing, misleading, and improperly served. 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. The notice explicitly said that Putative Father may not rely on any

representations by Mother to avoid his responsibilities under the statute. The notice statute does not require reference to IC 31-19-9-17(b) (ability to establish paternity if neither a petition for adoption nor a placement in a proposed adoptive home is pending). It was irrelevant to the notice that the attorney named on the notice was not the attorney handling the adoption, because Adoptive Parents had retained the first attorney to prepare the notice. The Court opined that IC 31-19-3-1 provides that a licensed child placing agency or an attorney may serve or cause Putative Father to be served with actual notice, and the statute does not preclude the attorney from fulfilling the responsibility of service through another individual or entity. The statute does not specify a required mode of service, contains no prohibition against personal service, and actual service by Mother's brother did not make the notice defective. The Court also rejected several other of Putative Father's claims.

VII.B. After Birth Notice Requirements and Exemption From Notice

If a parent or other person has not consented to adoption or had parental rights voluntarily or involuntarily terminated under IC 31-35, the parent may be entitled to receive notice of the adoption petition. IC 31-19-4-1; IC 31-19-4.5-2; IC 31-19-9-1. Those who are entitled to notice and possible exemptions are discussed below in this section.

VII.B. 1. General Requirements

General notice requirements are addressed at IC 31-19-2.5-1 through 4. The general notice requirements of IC 31-19-2.5 address: (1) to whom the chapter applies; (2) when notice is required; (3) when notice is not required; and (4) notice validity.

Generally, IC 31-19-2.5 applies to both a putative under IC 31-19-4, and a person under IC 31-19-4.5, including a grandparent described at IC 31-19-4.5-1(3). IC 31-19-4 addresses notice requirements for putative fathers. 31-19-4.5-1 through 5 establish notice requirements for "Other Persons Entitled to Notice of Adoption." Although an amendment removed putative fathers from the list of people to whom this chapter applies, IC 31-19-2.5-2(b) provides that IC 31-19-4.5 does include putative fathers under limited circumstances. Those circumstances are when an adoption petition alleges that the putative father's consent was not obtained and is not needed under IC 31-19-9-8(a)(1) [abandonment]; IC 31-19-9-8(a)(2) [failure to communicate or support]; IC 31-19-9-8(a)(4)(B) [child molesting]; IC 31-19-9-8(a)(4)(C) [sexual misconduct with a minor]; IC 31-19-9-8(a)(9) [judicially declared incompetent]; and IC 31-19-9-8(a)(11) [unfitness].

Except as otherwise provided, notice must be given to a person whose consent to adoption is required under IC 31-19-9-1, a putative father who is entitled to notice under IC 31-19-4, and a grandparent described in IC 31-19-4.5-1(3) of a child sought to be adopted. IC 31-19-2.5-3(a). If the parent-child relationship has been terminated, notice must be given to licensed child placing agency or local office of which the child is a ward. IC 31-19-2.5-3(b). For more detailed discussion, see this Chapter at VII.E.

Practice Note: 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 caseworker. The affidavit should include the following information: (1) upon review of the records, 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 caseworker 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).

VII.B. 2. Who Must Be Given After Birth Notice

Only a person who is entitled to notice of an adoption under IC 31-19-4 or IC 31-19-4.5 may contest an adoption. IC 31-19-10-1.

Except as otherwise provided, notice must be given to a person whose consent to adoption is required under IC 31-19-9-1, a putative father who is entitled to notice under IC 31-19-4, and a grandparent described in IC 31-19-4.5-1(3) of a child sought to be adopted. IC 31-19-2.5-3(a). For those exceptions, see this Chapter at VII.B.3. and VII.C. for a discussion of what notice to which putative father may or may not be entitled. These persons listed at IC 31-19-9-1 who must be given notice 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 county office of family and children 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.

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.

A grandparent of a child sought to be adopted may be entitled to notice. IC 31-19-2.5-3(a)(3). The notice chapter of IC 31-19-4.5 applies to a grandparent of a child sought to be adopted, and the grandparent has an existing right to petition for visitation under IC 31-17-5, and that right to visitation will not be terminated after the adoption, pursuant to IC 31-17-5-9. IC 31-19-4.5-1(3). The grandparent must fit this category and have this right prior to the filing of the adoption petition. IC 31-19-4.5-1(3). If a grandparent is entitled to notice of an adoption under this statute, the notice is only limited to issue of visitation and may not be used to contest the adoption. IC 31-19-4.5-1.5(1). Notice of an adoption to a grandparent who may be entitled to visitation is not required if the child to be adopted is placed in the care, custody, or control of DCS. IC 31-19-4.5-1.5(2).

Notice of the adoption must be sent to the putative father or a parent, even 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 has 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); (6) IC 31-19-9-8(a)(11) (parent proven unfit and adoption in child's best interests).

A licensed child placing agency or local DCS office of which the child is a ward must be given notice of pending adoption proceedings if the parent-child relationship has been terminated under IC 31-35. IC 31-19-2.5-3(b).

For a discussion on benefits of giving notice to individuals even when statutes provide that notice is not necessary; see this Chapter at VII.B.3; see also In Re Adoption of C.B.M., 992 N.E.2d 687 (Ind. 2013), discussed below and in this Chapter at VII.B.3.

In **In Re Adoption of C.B.M.**, 992 N.E.2d 687, 694-6 (Ind. 2013), the Indiana Supreme Court reversed and remanded the adoption court's denial of Natural Mother's petition to set aside the adoption decree and motion for summary judgment. The Court found that the children's adoption was "based upon" the termination judgment; therefore, Natural Mother became entitled to relief from the adoption when the termination order was "reversed or otherwise vacated" on appeal. 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." 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. 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).

Practice Note regarding In Re Adoption of C.B.M., 992 N.E.2d 687, 694-6 (Ind. 2013): Practitioners should 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." This precludes the C.B.M. Court's suggestion of including a parent whose rights have been terminated in an adoption in order to proceed with an adoption while an appeal is pending. The statute makes it impossible for adoptions to be granted until such windows of opportunity for appeal have passed. While IC 31-19-2.5-4, which was cited in Adoption of C.B.M. (above), still provides that notice does not have to be given to parents whose rights have been terminated, IC 31-19-11-6 adds additional limits and requirements on IC 31-19-2.5-4.

VII.B. 3. Who Does Not Need to Be Given After Birth Notice

A person whose consent to the adoption was filed with the adoption petition does not have to be given notice of the adoption proceeding. IC 31-19-2.5-4(1). Likewise, a person who has waived notice of adoption proceedings under IC 31-19-4-8 (putative fathers waiving notice) or IC 31-19-4.5-4 (other persons waiving notice) do not need to be given notice of the adoption proceedings. IC 31-19-2.5-4(5).

IC 31-19-2.5-4(2) provides that notice of adoption proceedings also does not need to be given to the following categories of people whose consent is not required by:

(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 31-19-9-8(a)(7) [parent who relinquished parental right to consent to adoption as provided by IC 31-19-9-9 et seq.]. *Practice Note*: This statute 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 [chapter 9]." However, several statutes in IC 31-19-9 specifically require that notice be given and even a hearing be held before consent may be dispensed with. When 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 those situations. For example, IC-31-19-9-9, specifically provides that a court must determine "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." (emphasis added). It would be best practice to give notice in this situation, since the more specific statute requires notice.
(6) IC 31-19-9-8(a)(8) [parent whose parent-child relationship was terminated voluntarily or involuntarily under the juvenile code termination statutes]. *Practice Note*: 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, IC 31-19-11-6 provides that adoptions *may not be granted* if there is a pending appeal of a termination of parental rights, or the window of opportunity for other appeal has not yet passed (emphasis added). See also **In Re Adoption of C.B.M.**, 992 N.E.2d 687 (Ind. 2013).
(7) IC 31-19-9-9 [parent convicted of and incarcerated at time of adoption petition for murder, causing suicide, voluntary manslaughter, an attempt to commit one of these crimes, or substantially similar crime in another state; victim of the crime is the child's other parent]. *Practice Note*: Although this category of parent is listed as not deserving of notice, IC 31-19-9-9(3) specifically 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. Giving notice in such situations may be best practice.
(8) IC 31-19-9-10 [parent is convicted of and incarcerated at time of adoption petition for murder, causing suicide, voluntary manslaughter, rape, criminal deviate conduct, child molesting, incest, neglect of a dependent, battery of a child, battery, or an attempt under IC 35-41-5-1 to commit one of these crimes; victim is child or child's sibling, half-blood sibling, or step-sibling of the parent's current marriage]. *Practice Note*: Although this category of parent is listed as not deserving of notice, IC 31-19-9-10(3) specifically 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. Giving notice in such situations may be best practice.
(9) 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].
(10) IC 31-19-9-15 [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]. *Practice Note*: This is the same as the above referenced IC 31-19-9-8(a)(5).
(11) IC 31-19-9-18 [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]. *Practice Note*: although persons falling into the category of IC 31-19-9-18 are not entitled to notice according to IC 31-19-2.5-4, IC 31-19-9-18 specifically 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, and it may be best practice in this situation to proceed with notice. *Practice Note*: It is important to note that IC 31-19-9-18 does not apply to the consent of an agency or DCS local office that is served with notice of an adoption petition under IC 31-19-4.5 and has lawful custody of a child whose adoption is being sought. IC 31-19-9-18(a).

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(3).

Even if a grandparent is entitled to notice of an adoption under IC 31-19-4.5-1(3) (existing right to continuing visitation), notice is not required to be given to that grandparent if the child sought to be adopted has been placed in the care, custody, or control of DCS. IC 31-19-4.5-1.5.

IC 31-19-2.5-4(4) provides that notice need not be given to a person whose parental rights have been terminated before the entry of a final decree of adoption. However, attorneys should be cautious in interpreting IC 31-19-2.5-4 as not requiring notice because of due process concerns. 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, IC 31-19-11-6 provides that adoptions *may not be granted* if there is a pending appeal of a termination of parental rights, or the window of opportunity for other appeal has not yet passed (emphasis added). See also **In Re Adoption of C.B.M.**, 992 N.E.2d 687 (Ind. 2013) (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." Natural Mother became entitled to relief from the adoption when the termination judgment was "reversed or otherwise vacated" on appeal).

VII.B. 4. 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"; and it does apply to a father who has abandoned, failed to support, or failed to communicate with the child. The notice form provided at IC 31-19-4.5-3 shall be given to persons other than putative fathers who are entitled to notice. This notice (IC 31-19-4.5-3) should only be given to putative fathers when an adoption petition alleges that the putative father's consent was not obtained and is not needed under IC 31-19-9-8(a)(1) [abandonment]; IC 31-19-9-8(a)(2) [failure to communicate or support]; IC 31-19-9-8(a)(4)(B) [child molesting]; IC 31-19-9-8(a)(4)(C) [sexual

misconduct with a minor]; IC 31-19-9-8(a)(9) [judicially declared incompetent]; and IC 31-19-9-8(a)(11) [unfitness]. IC 31-19-2.5-2(b).

In order to comply with the Indiana Rules of Trial Procedure, the word Summons has been added to the title of the notice form for IC 31-19-4.5-3. The notice at IC 31-19-4.5-3 requires "a brief description of the reason(s) the consent is not required." The description of the reasons the consent to adoption is not required only needs to include enough information to put a reasonable person on notice that the petition alleging the person's consent is unnecessary is pending. IC 31-19-4.5-5. The description "does not require an exhaustive description of the reasons" that consent is not required. Service of notice may be waived by a person in writing before or after the child's birth. IC 31-19-4.5-4(a). 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. IC 31-19-4.5-4(b). A person who waives notice of an adoption may not challenge or contest the adoption. IC 31-19-4.5-4.

VII.C. Notice to Putative Fathers

Notice to putative fathers is governed by IC 31-19-4. In some circumstances, notice must be given to a putative father according to IC 31-19-4.5. See IC 31-19-2.5-2(b) (IC 31-19-2.5-2(b) provides that IC 31-19-4.5 does include putative fathers under limited circumstances: when an adoption petition alleges that the putative father's consent was not obtained and is not needed under IC 31-19-9-8(a)(1) [abandonment]; IC 31-19-9-8(a)(2) [failure to communicate or support]; IC 31-19-9-8(a)(4)(B) [child molesting]; IC 31-19-9-8(a)(4)(C) [sexual misconduct with a minor]; IC 31-19-9-8(a)(9) [judicially declared incompetent]; and IC 31-19-9-8(a)(11) [unfitness]).

When a birth mothers makes known the name and address of a putative father to an attorney to an adoption agency arranging he adoption, the putative father is likely entitled to notice. Except as otherwise provided, a putative father shall be given notice of an adoption proceeding under Ind. Trial Procedure Rule 4.1 if: (1) on or before the date the mother executes an adoption consent, she has provided an attorney or agency arranging the adoption with the name and address of the putative father, and (2) the putative father of the child has not consented to the adoption of the child, or has not had the parent-child relationship terminated. IC 31-19-4-1.

When birth mothers do not make known the name or address or both of a putative father, he may still be entitled to notice if he timely registers with the putative father registry. Except as otherwise provided (IC 31-19-2.5-4) a putative father must be given notice of an adoption proceeding under Ind. Trial Procedure Rule 4.1 if: (1) on or before the date the mother executes an adoption consent, she has not provided an attorney or agency arranging the adoption with the name or address, or both, of the putative father of the child; and (2) the putative father of the child has not consented to the adoption of the child, or has not had the parent-child relationship terminated, and has timely registered with the putative father registry. IC 31-19-4-2.

The exceptions to both of these notice provision regarding putative fathers are delineated at IC 31-19-2.5-4, which provides for multiple categories of people to whom notice of an adoption does not need to be given. For more detailed discussion on these exceptions, see this Chapter at VII.B.3.

Situations where a putative father is not registered with the putative father registry, his name and address are undisclosed by the mother, and the child was conceived outside of Indiana are covered by IC 31-19-4-3. An attorney or agency arranging an adoption shall serve the putative

father with notice by publication under Indiana Trial Procedure Rule 4.13(C) if (1) the mother informs the attorney or agency that the child was conceived outside Indiana, and does not disclose the name, address, or both of the putative father, and (2) the putative father of the child has not consented to the adoption of the child, or has not had the parent-child relationship terminated, and has timely registered with the putative father registry.

The only circumstance under which notice to the putative father must be given by publication under Rule 4.13(C) of the Indiana Rules of Trial Procedure is when the child was conceived outside of Indiana as described in IC 31-19-4-3(a). IC 31-19-4-3(b).

The form for notice to an unnamed father may be found at IC 31-19-4-4, and the form for notice to a named father may be found at IC 31-19-4-5. Both notices inform the putative father that he must file a timely motion to contest the adoption in accordance with IC 31-19-10-1, or have his consent possibly deemed irrevocably implied and lose the ability to establish paternity. Both notices also state that the notice does not exhaustively list all of a putative father's legal duties in order to be able to contest an adoption.

Practice Note: Instructions given to putative fathers in IC 31-19-4-4 and -5 differ from what Indiana law sets forth in IC 31-19-9-12. IC 31-19-9-12 provides that a putative father's consent to adoption is irrevocably implied if he: (1) fails to timely file a proper motion to contest the adoption; (2) filed the motion to contest the adoption, but fails to appear at the hearing; (3) filed a paternity action in Indiana or any other jurisdiction but fails to establish paternity; or (4) is required to but fails to timely register with the putative father registry. The notice statutes of IC 31-19-4-4 and -5 only mention the putative father's filing a motion to contest the adoption. Both statutes require that the notice be given in "substantially the following form," which does not prevent practitioners from adding in additional language from IC 31-19-9-12, in order to address all due process concerns. See **Matter of Paternity of Baby Girl, Born 6/7/94**, 661 N.E.2d 873 (Ind. Ct. App. 1996) (Court found that the putative father had been affirmatively misled by the post birth notice form he received, when a pre-birth notice was required); see also this Chapter at VIII.G. for further discussion on how putative fathers may prevent adoption.

If a putative father is entitled to notice under IC 31-19-4-1 through -3, actual notice of the adoption proceedings may not be necessary. If service is accomplished pursuant to Indiana Trial Procedure Rule 4.1 for IC 31-19-4-1 and -2, or Indiana Trial Procedure Rule 4.13 for IC 31-19-4-3, then no further efforts of service on the putative father are necessary, regardless of whether he receives actual notice. IC 31-19-4-7.

If a putative father has not properly and timely registered with the putative father registry, and on or before the mother executes an adoption consent, she has not disclosed the identity, address, or both of the putative father to an attorney or agency arranging the adoption, then the putative father is not entitled to notice of the adoption. IC 31-19-4-6. The exception to this is found at IC 31-19-4-3 (Notice to putative father not registered with putative father registry; name or address undisclosed by mother; child conceived outside Indiana).

A putative father may waive his right to notice of adoption proceedings, in writing, either before or after the birth of the child. IC 31-19-4-8(a). Such a waiver must be in writing and signed in the presence of a notary public, and acknowledge that the waiver is irrevocable and the person signing the waiver will not receive notice of the adoption proceedings. IC 31-194-8(b). A person who so waives notice may not subsequently challenge or contest an adoption of the child. IC 31-19-4-8.

If actual notice has been given pursuant to the pre-birth notice statutes, no additional notice is required. IC 31-9-4-9(1). Lastly, notice to a putative father under IC 31-19-4 is not necessary if a person attempted to give pre-birth notice to a putative father at a particular address, and he could not be located at that address, unless he registered that address with the putative father registry; then, notice is required. IC 31-19-4-9(2).

In **In Re Paternity of G.W.**, 983 N.E.2d 1193, 1197 (Ind. Ct. App. 2013), the Court opined that, because Putative Father never registered with the putative father registry, he was not entitled to notice of the adoption proceeding, and had irrevocably and implicitly consented to the adoption of his child by the child's stepfather.

In **In Re B.W.**, 908 N.E.2d 586, 591, 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. *Please note that since this opinion was issued, the statute has been amended.* In reaching this holding, the Court noted, among other things, that the notice 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." (emphasis provided by the Court). See this Chapter at V.I.3.b. for a more detailed discussion of this case.

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 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 Mother to disclose the identity or address of Putative Father.

VII.D. Service of Notice

Only the specified rules in IC 31-19-4 of the Indiana Rules of Trial Procedure apply to the giving of notice under I 31-19-4. IC 31-19-4-13.

If a putative father is entitled to notice under IC 31-19-4-1 or -2, and if service is done in the same manner as a summons or complaint under Indiana Trial Procedure Rule 4.1, then no further efforts to give notice to the putative father are necessary, regardless of whether he receives actual notice. IC 31-19-4-7(1). If a putative father is entitled to notice under IC 31-19-4-3, and if publication is accomplished in the same manner as a summons is served by publication under Indiana Trial Procedure Rule 4.13, then no further efforts to give notice to the putative father are necessary, regardless of whether he receives actual notice. IC 31-19-4-7(2). See also IC 31-19-4-3. *Practice Note*: This statute only applies to putative fathers under IC 31-19-4-1 through -3, and not to other persons who must receive notice.

In **In Re Adoption of J.T.A.**, 988 N.E.2d 1250 (Ind. Ct. App. 2013), *trans. denied*, the Court affirmed the trial court's denial of the petition of Father's Fiancée to adopt Father's child. The Court opined that the purpose of statute outlining adoption notice requirements is to advise biological parent of his or her rights so that they may be protected.

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); **In Re Adoption of A.K.S.**, 713 N.E.2d 896 (Ind. Ct. App. 1999) (paternity affiant father was entitled to notice).

VII.E. Notice to Persons Other Than Putative Father

VII.E. 1. Statutes

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. 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 known. IC 31-19-4.5-2(1). 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 if the person's name or address are not known. IC 31-19-4.5-2(2).

Notice pursuant to IC 31-19-4.5 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, 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 county office of family and children having lawful custody of the child whose adoption is sought, which includes DCS or a licensed child placing agency which may have wardship over a child;
(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.

These persons are all noted IC 31-19-9-1 and IC 31-19-2.5-3. Note that IC 31-19-4.5-2 states that notice must be given "except as provided in IC 31-19-2.5-4". For the exceptions of who must be given notice in IC 31-19-2.5-4, see this Chapter at VII.B.3.

A grandparent of a child sought to be adopted may be entitled to notice. IC 31-19-2.5-3(a)(3). The notice chapter of IC 31-19-4.5 applies to a grandparent of a child sought to be adopted, and the grandparent has an existing right to petition for visitation under IC 31-17-5, and that right to visitation will not be terminated after the adoption, pursuant to IC 31-17-5-9. IC 31-19-4.5-1(3). The grandparent must fit this category and have this right prior to the filing of the adoption petition. IC 31-19-4.5-1(3). If a grandparent is entitled to notice of an adoption under this statute, the notice is only limited to issue of visitation and may not be used to contest the adoption. IC 31-19-4.5-1.5(1). Notice of an adoption to a grandparent who may be entitled to visitation is not required if the child to be adopted is placed in the care, custody, or control of DCS. IC 31-19-4.5-1.5(2).

The form of the notice is prescribed at IC 31-19-4.5-3. The description in the notice under IC 31-19-4.5-3 concerning the reasons consent to adoption is not required 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. IC 31-19-4.5-5. An exhaustive description of the reasons the person's consent is not required does not need to be included in the notice. IC 31-19-4.5-5.

A person entitled to notice under IC 31-19-4.5 may waive his or her right to notice of an adoption, either before or after the birth of the child. IC 31-19-4.5-4. Such a waiver of notice must be in writing and signed in the presence of a notary public, and it must acknowledge that the waiver of notice is irrevocable, and the person signing the waiver will not receive notice of the adoption proceedings. IC 31-19-4.5-4(b). A person who waives notice of an adoption may not challenge or contest an adoption of the child. IC 31-19-4.5-4.

VII.E. 2. Case Law

In **In Re Adoption of J.T.A.**, 988 N.E.2d 1250, 1256-7 (Ind. Ct. App. 2013), *trans. denied*, 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. It was not the 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. 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.

In **In Re Adoption of M.P.S., Jr.**, 963 N.E.2d 625, 631-2 (Ind. Ct. App. 2012), the Court held, *inter alia*, that the circumstances surrounding notice of the adoption hearing indicated that Mother's consent was not consensual. The Court noted the discrepancy between Mother's testimony and Father's testimony on whether Mother received notice of the adoption hearing and the fact that the court order setting the hearing listed for distribution only Grandparents' attorney. The Court did not make a factual finding as to whether Mother received a notice, and observed that 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 observed that: (1) the circumstances and timing of Mother's trip to Virginia with Father seemed potentially calculated; and (2) parents' absence at the hearing allowed Grandparents' misrepresentations that parents had never independently cared for the child and that Grandparents had cared for him continuously since his birth to go unchallenged.

In **In Re Adoption of L.D.**, 938 N.E.2d. 666, 669, 671 (Ind. 2010), the Court concluded that because Paternal Grandparents and their counsel failed to perform the diligent search for Mother required by the Due Process Clause, notice and service by publication was insufficient to confer personal jurisdiction over Mother. The dispositive issue in this appeal is whether Mother received the notice required by law that a case had been filed in court seeking the adoption of the child; if the notice was not adequate, then 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. 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. Notice and service of process that may technically comply with a state statute or the Trial Rules does not necessarily comport with due process. 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. Case law makes clear that service by publication is inadequate when a diligent effort has not been made to ascertain a party's whereabouts.

In **In Re Adoption of D.C.**, 887 N.E.2d 950, 955-58 (Ind. Ct. App. 2008), the Court held that, service of process on Mother in the adoption proceedings was ineffective, and the adoption proceedings terminating her parental rights were therefore void. Whether service of 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. 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) it was undisputed that Adoptive Mother's attempt at service by certified mail was returned as undelivered; and (3) unclaimed service at a former residence is not sufficient establish a reasonable probability that a party received notice or to confer personal jurisdiction. 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 Court concluded that, given the trial court's factual findings, Adoptive Mother's efforts at service were not reasonably calculated to apprise Mother of the adoption proceedings and therefore did not comport with due process.

See also **Matter of C.W.**, 723 N.E.2d 956, 960 n.6, 7 (Ind. Ct. App. 2000) (Court opined in a footnote that in order for an adoption court to fulfill its duties to notify all appropriate parties, it has an affirmative duty to inquire as to whether or not all interested parties have been given proper notice; Court criticized DCS for failure to inform grandparents of the adoption proceedings); **In Re Adoption of I.K.E.W**., 724 N.E.2d 245, 250 (Ind. Ct. App. 2000) (Grandparents were not given notice of Foster Parents' adoption petition, and the Court concluded that IC 31-19-4-10 [now repealed] 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).

VIII. CONTESTING AN ADOPTION

VIII.A. Motion and Prosecution of Motion Required

Except as otherwise provided in subsection (c), 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 31-19-10-1(a). IC 31-19-10-1(c) provides that persons seeking to withdraw consent to an adoption must file a motion to withdraw consent. This applies to DCS as well; DCS should file a motion to contest an adoption petition when agency consent to the adoption will not be given. An agency which has custody or wardship of the prospective adoptive child and is contesting the adoption should formally intervene in the adoption by motion pursuant to Ind. Trial Rule 24. A person who moves to contest an adoption shall give notice of the intention to contest the adoption to all parties to the adoption and to all persons whose consent is required. IC 31-19-10-2.

A person who seeks to contest an adoption must file a motion to contest an adoption with the court within thirty days after being served with notice of the pending adoption. IC 31-19-10-1(b).

IC 31-19-10-1.2 establishes the burden of proof in contested adoptions. See this Chapter at V.B. for further discussion. The party bearing the burden of proof in a motion to contest an adoption must prove the party's case by clear and convincing evidence. IC 31-19-10-0.5.

If a court finds that the person who filed the motion to contest the adoption is failing to prosecute the motion without undue delay, the court shall dismiss the motion with prejudice, and the person's consent shall be irrevocably implied. IC 31-19-10-1.2(g).

IC 31-19-9-18 makes similar provisions for deeming consent to be irrevocably implied due to failure to prosecute a motion to contest an adoption. It provides:

> (b) The consent of a person who is served with notice under IC 31-19-4.5 to adoption is irrevocably implied without further court action if the person:
>
> (1) fails to file a motion to contest the adoption as required under IC 31-19-10 not later than thirty (30) days after service of notice under IC 31-19-4.5; or
>
> (2) files a motion to contest the adoption as required under IC 31-19-10 but fails to:
>
> (A) appear at the hearing to contest the adoption; and
>
> (B) prosecute the motion to contest without unreasonable delay.
>
> (c) A court shall dismiss a motion to contest an adoption filed under subsection (a)(2) with prejudice and the person's consent to the adoption shall be irrevocably implied if the court finds that the person who filed the motion to contest is failing to prosecute the motion without unreasonable delay.

It is important to note that IC 31-19-9-18 does not apply to the consent of an agency or DCS local office that is served with notice of an adoption petition under IC 31-19-4.5 and has lawful custody of a child whose adoption is being sought. IC 31-19-9-18(a).

If a putative father's motion to contest an adoption is denied, he is barred from establishing paternity by affidavit or otherwise, in Indiana or any other jurisdiction. IC 31-19-10-8.

In **L.G. v. S.L.**, 76 N.E.3d 157 (Ind. Ct. App. 2017), the Court held that the trial court erred when it dismissed Father's motion to contest the adoption in part because of his failure to appear in person at a hearing. The trial court concluded that IC 31-19-9-12(2) provided that a putative father's consent could be irrevocably implied if, having filed a motion to contest the adoption, the putative father then failed to appear at the hearing set to contest the adoption, and that Father had failed to appear without justifiable cause. The Court noted that the record showed, unequivocally, that the hearing at which Father failed to appear was not the hearing set to contest the adoption, and instead, was a motions hearing on other matters. Father's motion to contest the adoption was set for hearing on a different date. Therefore, IC 31-19-9-12(2) was inapplicable.

In **In Re Adoption of K.M.**, 31 N.E.3d 533, 536-8 (Ind. 2015), the Court affirmed the trial court's order granting the adoption petition, and held that: (1) Mother's procedural due process rights were not violated by having her consent irrevocably implied pursuant to IC 31-10-1 and IC 31-19-9-18; and (2) because IC 31-19-9-18 is a nonclaim statute, Mother was not entitled to equitable deviation from the statutory thirty-day time limit to file a motion to contest the adoption. Both IC 31-19-10-1 and IC 31-19-9-18 provided Mother with procedural due process; it was Mother's failure to timely file a motion to contest the adoption, not any State action, that prevented Mother from further opposing Stepmother's adoption petition. Mother received proper notice and failed to file her motion to contest the adoption in the thirty-day time period. However, Mother argued that it was unconstitutional for IC 31-19-9-18 to allow her consent to be irrevocably implied without a hearing, in essence arguing that a hearing on consent must be held in all adoption cases. The Court noted that there was nothing in the statutory language that

required a hearing before deeming a person's consent to be irrevocably implied under IC 31- 19-9-18, and declined to read a requirement for a hearing into the statute. The plain language of IC 31-19-9-18 makes it a nonclaim statute, a statute with a condition precedent that must be met before the enforcement of a right; as such, Mother was not entitled to equitable deviation from the thirty-day time limit. A nonclaim statute is not subject to equitable tolling of a time limit, since a nonclaim statute creates a right of action only if the action is taken within the prescribed time period.

See this Chapter at V.I.3.c. for further discussion of irrevocably implied consent due to failure to prosecute a motion to contest an adoption.

VIII.B. Counsel For Parents in Contested Adoptions

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). A parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship. IC 31-32-2-5. 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 31-32-4-3(a). IC 31-35-1-12, 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." See also **Matter of Laney**, 489 N.E.2d 551 (Ind. Ct. App. 1986) (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); **Petition of McClure**, 549 N.E.2d 392 (Ind. Ct. App. 1990) (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. See also Chapter 2 at III.C.

Case law on a trial court's failure to appoint counsel for a parent in an adoption proceeding includes:

In The Matter of The Adoption of C.J., 71 N.E.3d 436, 443-4 (Ind. 2017), where the Court held that Mother did not knowingly and voluntarily waive her right to counsel at the adoption hearing. Mother requested an attorney because she could not afford one; the trial court determined that she was not indigent and proceeded without appointing Mother an attorney. After completing Stepmother's case in chief, the trial court continued the hearing and appointed Mother an attorney. Mother argued that if she had an attorney throughout the entire case, she would have been better able to defend against Stepmother's case and evidence. The Court determined that it was clear that the proceedings concerning Mother's consent, including the time that Mother was not represented, "flowed directly" into the trial court's ultimate decision to grant the adoption. The Court disagreed that Mother's decision to proceed without counsel was voluntarily; Mother made it clear she preferred that to proceeding without a lawyer. Even though the trial court found that Mother could afford an attorney, it proceeded with the hearing instead of continuing the hearing so that Mother could

get a private attorney, reasoning that mother had waived her right to counsel. Any waiver of counsel must be made "knowingly and voluntarily." IC 31-32-5-5. The Court opined that the trial court did nothing to impress upon Mother the serious consequences of proceeding without a lawyer. Because Mother was deprived of an essential right in violation of due process, the Court reversed the adoption decree and remanded the case for a new hearing, where Mother would be given the chance to obtain or be appointed counsel, absent a knowing and voluntarily waiver of her right to do so.

Taylor v. Scott, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991), where the trial court allowed Father's third attorney to withdraw on the morning of the hearing, and proceeded with the hearing without judicial advisement to Father about the right to counsel. After the trial court heard much of the evidence, Father requested a continuance to allow himself more time to organize his presentation of his case. The request for continuance was denied, and the adoption petition was granted. The Court held that 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 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.

In Re Adoption of G.W.B., 776 N.E.2d 952, 954-55 (Ind. Ct. App. 2002), where 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 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.

In Re Adoption of K.W., 21 N.E.3d 96, 97-9 (Ind. Ct. App. 2014), where 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 discounted Grandparent's arguments that Father waived his right to counsel by filing documents pro se, by failing to ask for a hearing on his motion to appoint counsel, and by failing to repeat his request for counsel at the hearing; 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.'"

In Re Adoption of J.D.C., 751 N.E.2d 747, 752 (Ind. Ct. App. 2001), where the trial court's 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.

For case law on opposing counsel not being required to inform a parent about their right to counsel see **In Re Adoption of Baby W.**, 796 N.E.2d 364, 375-6 (Ind. Ct. App. 2003), where the putative father argued that he was denied due process because the adoptive parents' attorney never informed him of his right to counsel. The Court affirmed the adoption and noted: (1) the letter sent to putative father by adoptive parents' attorney was notice that the attorney represented interests contrary to that of putative father; (2) it was the duty of the adoption court 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.

A parent does not necessarily have to be indigent in order for a court to appoint counsel for a parent who wishes to contest an adoption. Since the **Taylor v. Scott**, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991) opinion and the **Petition of McClure**, 549 N.E.2d 392 (Ind. Ct. App. 1990) opinion 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. 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. 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.

Joint representation may be feasible in some circumstances. 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. The Indiana Supreme Court addressed the issue of joint representation in a termination case in **Baker v. County Office of Family & Children**, 810 N.E.2d 1035, 1042 (Ind. 2004). The parents 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. 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.

VIII.C. Discovery in Contested Adoptions

In **L.G. v. S.L.**, 76 N.E.3d 157 (Ind. Ct. App. 2017), the Court held Father's failure to appear at his first scheduled deposition was unjust and did not warrant dismissal, and that Father's delay in producing mental health records pursuant to a discovery order did not warrant dismissal, especially since the delay was at least in part attributable to Adoptive Parents. Regarding failure to appear at the deposition, the Court held that dismissal of Father's motion to contest the adoption based on his failure to appear for his first scheduled deposition, despite his offer to be deposed later that same day, was unwarranted and unjust, especially given the fundamental rights at stake. Father encountered last minute transportation issues and made repeated requests through his attorney to reschedule the deposition for later in the same day or the next day. Adoptive Parents refused, and the Court deemed their refusal unreasonable.

Regarding the mental health records, the L.G. Court noted that discovery of mental health records is covered by IC 16-39-2 and -3. IC 16-39-2-3 provides that a patient's mental health records are confidential and can only be disclosed with the consent of the patient unless otherwise provided by IC 16-39-2 and -3. Since Father objected to the release of his mental health records, Adoptive Parents were required to file a petition for their release pursuant to IC 16-39-3-3(2) and follow all other proper procedures. Since they did not do so, and since no proper procedures were followed to obtain the mental health records, and the trial court never made the required findings nor had the required hearing, Father's delay in complying with the discovery order was entirely attributable to Adoptive Parents, and not to Father. Consequently, dismissal of Father's motion to contest the adoption on these grounds was inappropriate as a sanction.

VIII.D. Guardian ad Litem or Court Appointed Special Advocate in Contested Adoptions

VIII.D. 1. Statutes

Courts frequently appoint a guardian ad litem or court appointed special advocate for a child in a contested adoption. No statute or case law requires the appointment of a guardian ad litem or court appointed special advocate for a child in a contested adoption. A guardian ad litem or court appointed special advocate may be appointed in postadoption visitation proceedings when a motion to modify or void an agreement is at issue. See IC 31-19-16-6, and see this Chapter at XII.A.2 and 3 for a further discussion of guardian ad litem and court appointed special advocate in postadoption visitation situations.

VIII.D. 2. Case Law

In **In Re Adoption of M.S.**, 10 N.E.3d 1272, 1281-2 (Ind. Ct. App. 2014), the Court held that the trial court did not err in concluding that Mother's consent was not needed because of Mother's knowing failure, for a period of a year, to support the child when able to do so, and in concluding that the adoption was in the child's best interests. The Court noted that a Guardian ad Litem's recommendations can be a relevant factor in supporting a finding that a child's best interests are served by adoption. In language addressing what factors were relevant to a child's best interests in an adoption case, the Court noted that adoption statutes do not provide such guidance, but adoption statutes and termination of parental rights statutes share strong similarities. One of the relevant factors is the recommendations of the child's case worker or guardian ad litem. The Court stated "As we note above, a guardian ad litem's recommendation is relevant to support a finding that adoption is in a child's best interest."

In **In Re Adoption of E.L.**,913 N.E.2d 1276, 1280-81 (Ind. Ct. App. 2009), when Stepfather filed a petition to adopt the child, Putative Father filed a paternity petition on his own behalf and on behalf of the child, naming himself and the child as "Co-Petitioners," and the cases were consolidated. The Court held that because Putative Father timely filed a paternity petition, his failure to file a motion contesting adoption did not imply consent to adoption under IC 31-19-9-12(1); however, Putative Father's failure to register as a putative father constituted an irrevocably implied consent to the child's adoption. Despite this, the Court further held that the trial court erred in dismissing the paternity petition with respect to the child. The GAL, appointed by the trial court had recommended that Stepfather's adoption be denied and paternity established in Putative Father. In its decision, the Court reminded the parties that the trial court could not approve the proposed adoption unless it first found the adoption was in the child's best interest, and stated:

> The GAL appointed to represent [the child's] interests has objected to such a finding, meaning the adoption is by no means a foregone conclusion, and whether paternity can be established in [Putative Father] is a live controversy between the parties. We emphasize that the GAL has a continuing responsibility, on remand, to advocate [the child's] best interest and to continue to object to any proposed adoption that the GAL finds to be not in [the child's] best interests. E.L. at 1281 n.5.

In **In Re Adoption of B.C.S.**, 793 N.E.2d 1054, 1060 (Ind. Ct. App. 2003), the Court affirmed the trial court's order granting an adoption petition of deceased Mother's former companion and denying the adoption petition of Aunt and Uncle. The Court was unpersuaded by Aunt's and Uncle's argument that the trial court was required to appoint a guardian ad litem in the adoption case. The Court opined that the trial court had discretion to determine whether a minor was adequately represented in the proceedings such that no guardian ad litem was necessary.

See **In Re Paternity of Baby W.**, 774 N.E.2d 570, 579 n.6 (Ind. Ct. App. 2002) and **In Re Paternity of M.G.S.**, 756 N.E.2d 990, 1007 (Ind. Ct. App. 2001), *trans. denied*, in which the Court opined that appointment of a guardian ad litem for the child would be appropriate. In both cases the putative fathers had received pre-birth notice but had failed to file paternity petitions within 30 days so their consents to adoption were irrevocably implied by statute.

See also **Matter of Adoption of L.C.**, 650 N.E.2d 726, 732 (Ind. Ct. App. 1995), the Court looked to guardianship law at IC 29-3-2-3 and Ind. Trial Rule 17(c) to ascertain whether the trial court had erred in failing to appoint a guardian ad litem for a child in a contested adoption proceeding. The Court opined that under these rules, a trial court need appoint a guardian ad litem only if the court believes the minor is not otherwise adequately represented. The Court found no necessity for such an appointment and held that the trial court had not abused its discretion by not appointing a guardian ad litem for the child.

VIII.D. 3. Practical Considerations For Guardians Ad Litem and Court Appointed Special Advocates

As in guardianship and grandparent's visitation cases, there is no statutory provision for guardian ad litem or court appointed special advocate appointment, reports, or fees in adoptions. Regarding fees, the GAL attorney may argue by analogy that a fee is appropriate because of similar provisions in dissolution and guardianship case law.

The Court may or may not desire a report depending on whether the adoption is contested. Case law provides that the child-placing agency report may not be considered by the Court in contested adoptions. See **Matter of Adoption of T.R.M.**, 525 N.E.2d 298 (Ind. Ct. App. 1988); **Matter of Adoption of L.C.**, 650 N.E.2d 726 (Ind. Ct. App. 1995); **Matter of Adoption of Thomas**, 431 N.E.2d 506 (Ind. Ct. App. 1982). If the court appointed special advocate or guardian ad litem report is considered analogous to a licensed child placing agency report, then the Court may not wish to have a formal written report filed by the guardian ad litem or court appointed special advocate. The guardian ad litem or court appointed special advocate should ask the Court whether a report should be filed. Even if the Court does not desire a report to be filed, an informal report should be prepared and shared with counsel for the guardian ad litem or court appointed special advocate to help the guardian ad litem or court appointed special advocate prepare for his oral testimony in court.

Practitioners should review **In Re Guardianship of Hickman**, 805 N.E.2d 808, 823 (Ind. Ct. App. 2004), *trans. denied*, an adult guardianship case in which the Court noted that guardianship statutes, unlike the dissolution of marriage statute at IC 31-17-2-12, contain no provisions regarding the admissibility of the guardian ad litem's recommendations. The Court did not decide the issue, because it found that any error in admitting the guardian ad litem's testimony was harmless. Adoption cases are similar to guardianship cases in that there is no statute that specifically provides for the admissibility of a guardian ad litem report in an adoption proceeding.

Practitioners should also check the court's file to ascertain whether the court has entered an order pursuant to IC 31-19-10-7 protecting the anonymity of adoption petitioners. If an anonymity order has been entered, any guardian ad litem reports which are filed must comply with this order and identifying information should be excluded from the report. See this Chapter at VIII.D. for more discussion of this statute.

See also **In Re Adoption of J.L.S.**, 908 N.E.2d 1245 (Ind. Ct. App. 2009) (GAL filed report recommending adoption and appealed trial court's denial of adoption petition).

VIII.E. Hearing on Contested Adoption

The court must set a hearing on a motion to contest the adoption. IC 31-19-10-5. The court may bifurcate the hearing, send out all notice to preserve confidentiality, and issue an order protecting the anonymity of the adoption petitioner. IC 31-19-10-7(a). If a court order is issued requiring nondisclosure of information, practitioners must exercise extreme caution in conducting depositions and eliciting testimony in court. Examples include using only first names for the parties and witnesses and not allowing parties access to the addresses, employment information, and other identifying information of the other parties.

After the hearing on the motion to contest the adoption, the court, after hearing evidence, may deny the motion to contest the adoption. IC 31-19-10-6(2). If the court finds that a required consent has not been obtained or implied, and the consent cannot be dispensed with, or permits a necessary consent to be withdrawn, or finds that it is in the best interests of the child to grant the motion to contest adoption, the court shall dismiss the petition for adoption. IC 31-19-1-6(1).

Practitioners should note that IC 31-19-10-4.5 requires a person who is served with notice under IC 31-19-4 and who wishes to contest the adoption to do so under IC 31-19-10. *Practice Note*: this statute used to pertain only to putative fathers; it now only states "person".

In **In Re Adoption of K.M.**, 31 N.E.3d 533, 536-7 (Ind. 2015), the Court held (1) Mother's procedural due process rights were not violated by having her consent irrevocably implied pursuant to IC 31-19-9-10 and IC 31-19-9- 18; and (2) because IC 31-19-9-18 is a nonclaim statute, Mother was not entitled to equitable deviation from the statutory thirty-day time limit to file a motion to contest the adoption. The Court opined that IC 31-19-10-1 and IC 31-19-9-18 provided Mother with procedural due process; it was Mother's failure to timely file a motion to contest the adoption, not any State action, that prevented Mother from further opposing Stepmother's adoption petition. Mother argued that the fundamental importance of the parent-child relationship necessitated a hearing, rather than allowing "a court to 'default' a person based 'upon a technicality'", such as a missed deadline to file a motion to contest an adoption. However, Mother had received proper notice, and simply failed to file her motion to contest the adoption in a timely manner. The Court noted that there was nothing in the statutory language that required a hearing before deeming a person's consent to be irrevocably implied under IC 31-19-9-18 and declined to read such a requirement into the statute.

See also **In Re Adoption of I.K.E.W.**, 724 N.E.2d 245, 251 (Ind. Ct. App. 2000) (Court held that the trial court did not error by failing to consolidate two adoption causes due to lack of jurisdiction over the grandparents' adoption petition by virtue of the pending change of judge. The Court opined that conscientious and diligent following of Indiana Trial Rules and adoption statutes provides ample procedural guidance for competing adoption petitions to be decided justly and expeditiously at the discretion of the trial court and in the best interests of the child).

VIII.E. 1. Hearings on Competing Adoption Petitions in Contested Adoptions

In **In Re Adoption I.B.**, 32 N.E.3d 1164 (Ind. 2015), the trial court considered two adoption petitions concerning the same two children. One of the petitions was filed by Maternal Grandmother and Fiancé and the other petition was filed by Paternal Grandmother. The trial court granted the adoption petition filed by Maternal Grandmother and Fiancé and denied Paternal Grandmother's adoption petition. The Indiana Supreme Court reversed the trial court's orders. The case was decided on grounds relating to IC 31-19-11-1 and Maternal Grandmother and Fiancée's disqualifying criminal convictions.

In **In Re Adoption of M.H.**, 15 N.E.3d 612, 625-8 (Ind. Ct. App. 2014), the Court affirmed the trial court's order which granted Foster Parents' petition for adoption, denied Relatives' petition for adoption, and ordered Relatives to part with the child. After reviewing the evidence, the Court could not conclude that the trial court's order granting Foster Parents' petition for adoption was clearly erroneous. Relatives challenged a number of the trial court's findings; however, the trial court had entered specific findings on all of the issues raised by Relatives. The Court observed that, "[w]hen reviewing the trial court's ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial court reached an opposite conclusion." Court said that Relatives had the burden of overcoming the presumption that the trial court's decision was correct, and the crux of Relatives' argument was that they would provide a better home for the child. The Court said that it would not reweight the evidence as Relatives asked. The Court acknowledge that it was beyond the scope of its authority to mandate visitation between Relatives and the child, but echoed the trial court's words of encouragement that Foster Parents allow some degree of contact between them.

In **In Re Adoption of J.M.**, 10 N.E.3d 16, 20-1 (Ind. Ct. App. 2014), the Court affirmed the trial court and held: (1) the trial court did not err when it conducted a consent hearing; (2) after finding that Mother's and Father's consents were not necessary, the trial court was not required to determine whether Mother's and Father's prior consents were in the child's best interests, and (3) the trial court was not required to reevaluate parental fitness at the time of the adoption hearing. Foster Parents did not object to the Relative's guardianships over the three older children, but did object to Grandparents' guardianship over the child, and filed a petition to adopt the child. Grandparents filed a competing petition to adopt the child, and Mother and Father filed consents to Grandparents adopting the child, but not Foster Parents. DCS consented to both Relatives and Foster Parents adopting the child. The trial court ordered a consent hearing to determine whether parental consent was necessary before proceeding to the contested adoption hearing. Grandparents and their attorney were not permitted to be at the consent hearing, and following the consent hearing, the trial court concluded that Mother's and Father's consent was unnecessary due to their unfitness. The trial court permitted Mother and Father to intervene and participate in the adoption hearing over Foster Parents' objections. The trial court granted Foster Parents' petition to adopt the child.

The J.M. Court determined that a consent hearing was necessary before the trial court could procedurally address the competing adoption petitions, and after the consent hearing, the trial court was not required to determine whether Mother's and Father's prior consents were in the child's best interests, because the trial court determined that Mother's and Father's consent was not necessary. Mother and Father argued that the trial court erred in conducting a consent hearing, because they had already consented to Grandparents adopting the child. When Foster Parents filed their petition for adoption of the child, Mother's and Father's rights had not yet been terminated, and Mother and Father had not consented to Foster Parents adopting the child. Consequently, parental consent was an issue that the trial court was required to address in a consent hearing. The Court noted that IC 31-19-9-8(a)(11)(B) provides that the trial court can determine whether "the best interests of the child sought to be adopted would be served if the court dispensed with the parent's consent." The trial court was not required to determine whether Mother's and Father's prior consents were in the child's best interests.

The J.M. Court also held that since the trial court concluded that Mother and Father were unfit at the time of the consent hearing, this terminated Mother's and Father's parental rights;

the trial court did not need to reconsider Mother's and Father's fitness again at the adoption hearing. The Court opined that, given the evidence and the trial court's findings on Mother's and Father's historical difficulty with alcohol, drug use, and domestic violence, it could not say that the trial court erred when it determined that Mother and Father were unfit parents at the time of the consent hearing. The Court determined that Mother's and Father's "argument that the trial court should have reevaluated their fitness at [the time of the adoption hearing] is merely a request for a second bite at the proverbial apple. Once the trial court concluded that the Natural Parents were unfit at the consent hearing…the effect was the termination of their parental rights."

In Re Adoption of A.S., 912 N.E.2d 840, 846-50 (Ind. Ct. App. 2009) concluded that (1) parties whose consents are required for an adoption to be granted may execute subsequent consents, and (2) here, the biological parents and Marion County DCS (MCDCS) executed subsequent consents allowing the Second Foster Mother and her adult daughter to adopt the children, which resulted in their petitions being supported by the necessary consents. First Foster Mother argued that, since she received the initial consents to adopt the Children and they were not withdrawn, only she may adopt the Children. However, the Court found (1) no basis for holding that all subsequent consents are void; (2) nothing indicates a limitation on the ability to file additional consents, although Indiana Code limits the ability to withdraw a consent or to substitute a petitioner; and (3) public policy does not dictate a contrary result, in that allowing competing petitions and subsequent consents gives a probate court a choice between two families to determine if placement with one of them is in the best interest of the child, avoids a "race" to obtain a parental consent, and allows biological parents whose rights have not yet been terminated and a county DCS to address changing circumstances.

In Re Adoption of I.K.E.W., 724 N.E.2d 245, 251 (Ind. Ct. App. 2000), the Court held that the trial court did not error by failing to consolidate two adoption causes due to lack of jurisdiction over the grandparents' adoption petition by virtue of the pending change of judge. The Court opined that conscientious and diligent following of Indiana Trial Rules and adoption statutes provides ample procedural guidance for competing adoption petitions to be decided justly and expeditiously at the discretion of the trial court and in the best interests of the child.

For more discussion on competing proceedings and other jurisdiction issues, see this Chapter at II.A and II.B; see also Chapter 3, II.G.1 for further discussion on the resolution of the jurisdictional conflict between CHINS, TPR, and adoption cases involving the same child or children.

VIII.F. Dismissal of Petition and Custody Determination

If the court dismisses the petition for adoption, the court must determine custody of the child. IC 31-19-11-5(a). If the child is a ward of a guardian, an agency, or DCS, the court must provide for the custody of the child in an adoption decree. IC 31-19-11-2.

If the court determines that it is necessary to change the child's custody, regardless of a person's right to immediate custody, the court may order a plan for a gradual change of custody to ease the child's transition, unless a gradual transition would endanger the child's physical health or significantly impair the child's emotional development. IC 31-19-11-5(b). The court may order counseling and consult with counselors to develop and implement a plan for a gradual custody change. IC 31-19-11-5(c). See **In Re Adoption of Dzurovcak**, 600 N.E.2d 143 (Ind. Ct. App. 1992) (adoption court erred in failing to conduct an evidentiary hearing considering the best

interests of the child in making a custody determination; prospective adoptive parents, who had actual physical custody of the child, were proper parties to the custody proceeding).

A newer statute, IC 31-19-2-14, requires consolidation of pending adoption and paternity proceedings regarding the same child in the adoption court. The adoption court has exclusive jurisdiction over the child. IC 31-19-2-14(a). 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.

VIII.G. How Putative Fathers May Prevent Adoption

VIII.G. 1. Statutory Compliance

If a putative father is entitled to notice of adoption under Indiana Law and the facts do not support a determination that his consent is not required or may be judicially dispensed with, he can successfully prevent his child's adoption.

IC 31-19-9-12 provides that a putative father could irrevocably imply his consent to an adoption without further court action if he:

(1) fails to properly file a motion to contest an adoption in the adoption court within thirty days of service notice of the adoption; or
(2) properly files a motion to contest the adoption, but fails to appear at the hearing to contest the adoption; or
(3) properly filed an action to establish paternity, but then failed to establish paternity; or
(4) is required to register with the putative father registry, but fails to do so within the time frame specified under IC 31-19-5-12.

Putative fathers may also have their consent irrevocably implied as IC 31-19-9-15 outlines. If a putative father receives actual pre-birth notice under IC 31-19-9-3 and fails to properly file a petition to establish paternity within thirty days or having filed such a petition, fails to establish paternity within thirty days of receiving the actual notice, his consent can be irrevocably implied, regardless of whether or not the child is born before the thirty-day time frame lapses. IC 31-19-9-15(a). This statute does note that it is not intended to prohibit a putative father who meets the requirements of IC 31-19-9-17(b) of this chapter from establishing paternity of the child.

These requirements of a putative father are very time sensitive and require strict adherence. Failure to do one or more of these things can result in a putative father's consent to an adoption being irrevocably implied. A putative father whose consent has been deemed irrevocably implied under IC 31-19-9 or under IC 31-19-5-18 cannot challenge the adoption or the validity of his implied consent. IC 31-19-9-13; IC 31-19-9-16.

Failure to take appropriate action can also result in a putative father being barred from establishing paternity of a child. A putative father whose consent to adoption of a child is deemed irrevocably implied under IC 31-19-9 or IC 31-19-5-18 is not entitled to establish paternity by affidavit or otherwise, in Indiana or any other jurisdiction. IC 31-19-9-14; IC 31-19-9-17(a). If a putative father's motion to contest an adoption is denied, he is barred from

establishing paternity by affidavit or otherwise, in Indiana or any other jurisdiction. IC 31-19-10-8.

There may be some exceptions available to putative fathers in establishing paternity, but these exceptions are extremely limited once a putative father's consent has been deemed irrevocably implied. IC 31-19-9-17(b) provides that a putative father who was barred from establishing paternity under IC 31-19-9-15 (relating to actual pre-birth notice) may establish paternity in Indiana or any other jurisdiction if there is no petition for adoption pending or if there is no placement with a proposed adoptive family. There are several other strict requirements that a putative father must meet in order to obtain the ability to establish paternity under this section, and strict adherence is specifically stated as required in the statute. These requirements pertain to documentation, affidavits, and hearings and findings by the court. IC 31-19-9-17(b).

Lastly, IC 31-19-9-117(c) provides that an individual, not just a putative father, who is otherwise barred from establishing paternity under IC 31-19-9 may establish paternity of a child if an adoption for the child is not pending or contemplated. However, a petition for adoption that is not filed or a petition for adoption that is dismissed cannot be a basis for enabling an individual to establish paternity under this statute unless the requirements of IC 31-19-9-17(b) are satisfied.

For more discussion on the timelines to which putative fathers must adhere when registering with the putative father registry, see this Chapter at VI.D. For more discussion of the various timelines putative fathers must understand in order to avoid having their consent to an adoption deemed irrevocably implied and losing their ability to establish paternity, see this Chapter at V.I.

VIII.G. 2. Case Law

For cases where a putative father was permitted to contest an adoption, see:

In Re I.J., 39 N.E.3d 1184, 1187-8 (Ind. Ct. App. 2015), the Court held (1) that because Putative Father registered before the child was thirty days old, he registered timely as required by IC 31-19-5-12; (2) because Putative Father's timely registration gave him standing to challenge the adoption petition in the trial court, he had standing to challenge the adoption proceedings on appeal; and (3) Putative Father's timely registration with the putative father registry entitled him to an opportunity to challenge the presumption that Husband is the child's father. Putative Father therefore was entitled to notice of the adoption and should have been permitted to contest the adoption. The Court looked to IC 31-19-5-12, which provides that 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." 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.

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. See this Chapter at V.I.3.b. for a more detailed discussion of this case, and *note* that IC 31-19-9-12 has been amended since the issuance of this case.

In Re Adoption of A.N.S., 741 N.E.2d 780 (Ind. Ct. App. 2001), where the adoptive petitioner was bound by putative father's paternity adjudication resulting from paternity petition filed thirty-eight days after receipt of pre-birth notice.

For cases where a putative father was not permitted to contest an adoption, see:

In **In Re Adoption of K.G.B.**, 18 N.E.3d 292, 294-5, 297-9, 303-4 (Ind. Ct. App. 2014), the Court affirmed the trial court's orders dismissing Putative Father's petition to establish paternity, and striking Putative Father's motion to contest the child's adoption. Because Putative Father failed to timely register with the Registry, he had irrevocably waived his right to notice of the child's adoption, had impliedly consented to the adoption, and was barred from contesting the adoption. A putative father who fails to register within the period specified by IC 31-19-5-12 waives notice of an adoption proceeding, which constitutes an irrevocably implied consent to the child's adoption (IC 31- 19-5-18), and a putative father whose consent has been implied may not challenge the adoption or establish paternity (IC 31-19-9-13 and -14). The Court concluded that Putative Father's implied consent also meant he was barred from establishing paternity (IC 31-19-9-14). Putative Father argued that his amended paternity petition, styled as being filed on behalf of the child, endured; but this argument ignored IC 31-14-5-9, which explicitly states that "[a] man who is barred under [Indiana Code article] 31-19 from establishing paternity may not establish paternity by: (1) filing a paternity action as next friend of the child." The Court also held that Putative Father failed to meet his burden of proving that the challenged statutes were unconstitutional as applied to him.

In Re Adoption of E.L., 913 N.E.2d 1276, 1280-1 (Ind. Ct. App. 2009) holding that by operation IC 31-19-5-18, Putative Father's failure to register as a putative father constituted irrevocably implied consent to the adoption, he was not permitted to establish paternity while the adoption was pending (IC 31-19-9-14); and, even if he had timely registered with the putative father registry, his petition for paternity was likely time-barred by IC 31-14-5-3(b) which sets forth time limits for the filing of a paternity petition by "a man alleging to be the child's father" as "not later than two (2) years after the child is born," subject to six exceptions which were not applicable.

Mathews v. Hansen, 797 N.E.2d 1168 (Ind. Ct. App. 2003), *trans. denied*, where Alleged Father's challenge to an adoption decree was time-barred IC 31-19-14-2 and IC 31-19-14-4, which are statutes of limitation. IC 31-19-14-2 states that if a person whose parental rights are terminated by entry of an adoption decree challenges the adoption decree not more than the later of six months after the entry of the decree or one year after the adoptive parents obtain custody of the child, the court shall sustain the adoption decree unless the person establishes, by clear and convincing evidence, that modifying or setting aside the adoption decree is in the child's best interests. A companion statute, IC 31-19-14-4, states that after the six (6) month or one (1) year time limit outlined at IC 31-19-14-2, a person whose parental rights were 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. The Court construed IC 31-19-14-4 as precluding the alleged father from contesting the adoption decree, even if he had not been given notice. *Practice Note*: IC 31-19-4-4 was amended to provide that neither a person whose parental rights were terminated by the entry of an adoption decree, nor any other person, may challenge an adoption decree, even if notice of the adoption was not given, or the adoption proceedings were in any other manner defective.

In Re Adoption of J.D.C., 751 N.E.2d 747, 751-2 (Ind. Ct. App. 2001), where the Court held that no notice of the adoption was required for Putative Father, who had failed to register and had thus impliedly consented to adoption. The Court also determined that no inquiry as to his whereabouts was required, also due to his failure to register. Putative Father could not resurrect his rights by claiming status as an "interested party" pursuant to I.C. 31-19-4-10.

IX. LEGAL ROLE OF ADOPTION AGENCY

IX. A. Prior Written Approval of Placement

A child may not be placed in a proposed adoptive home without the prior written approval of a licensed child placing agency or the local DCS office approved for that purpose. IC 31-19-7-1(a). Although previously this statute allowed for some exemptions to this requirement, those exemptions have been eliminated. The written approval for placement shall be filed with the adoption petition. IC 31-19-7-3. The consent of DCS is needed only for its wards. IC 31-19-7-2. See this Chapter at IV.E. for further discussion on dispensing with DCS's consent.

The licensed child placing agency or DCS must conduct a criminal history check (as defined in IC 31-9-2-22.5) concerning the proposed adoptive parent and any other person who is currently residing in the proposed adoptive home before giving prior written approval for placement of a child in the proposed adoptive home. IC 31-19-7-1(b). The prospective adoptive parent must pay the fees and other costs of the criminal history check. IC 31-19-7-1(c). However, if the adoptive parent provides the agency or DCS with the results of a criminal history check conducted within one year before the written approval of placement, an additional criminal history check is not needed. IC 31-19-1-7-1(d).

In **In Re Adoption of S.O.**, 56 N.E.3d 77, 82-3 (Ind. Ct. App. 2016), the Court reversed the trial court's order granting Stepmother's petition to adopt the three children. The Court remanded with instructions to order a statutorily compliant background check. The Court held that a background check that complies with IC 31-9-2-22.5 is an essential particular of the adoption process, and its absence renders an adoption petition fatally deficient. Stepmother's Johnson County and CPS checks complied with only two of the five requirements of a criminal history check under IC 31-9-2-22.5. Stepmother's criminal history check did not comply with the statute because there was no check of state and national records using fingerprints, there was no check of the national registry containing reports of child abuse and neglect, and there was no check of the national sex offender registry. The Court observed that IC 31-19-2-7.3 provides that no part of a criminal history check can be waived.

The Supreme Court in **In Re Adoption of Infants H.**, 904 N.E.2d 203, 206-07 (Ind. 2009), *reh'g denied*, held that the adoption court erred by dispensing with DCS' statutory role before DCS even knew of the adoption, based solely on Petitioner's request. The Court noted that IC 31-19-7-1(a) requires that, before a child may be placed in a proposed adoptive home, DCS or a child placing agency licensed by DCS must give prior written approval; and that this legislative directive obviously is designed to protect children, certainly including infants like those who are the subject of this case.

IX. B. Preparation of Adoption History

A person, a licensed child placing agency, or a local office of family and children placing a child for adoption must ensure a report is prepared which summarizes the available medical, psychological, and educational records of the person or agency concerning the birth parents. IC 31-19-17-2. Identifying information about the birth parents must be excluded unless the prospective adoptive parents know the identity of the birth parents. IC 31-19-17-2. The person, agency, or local office must give the report to (1) the prospective adoptive parents at the beginning of the home study or evaluation about the suitability of the proposed home, or as soon as practical after the prospective adoptive parents are matched with the birth mother, or within thirty days of the child being placed with the prospective adoptive parents, if the adoptive parents so consent. IC 31-19-17-2(1). Upon request and without information that would identify the birth

parents unless an adoptee already knows the identity of the birth parents, the person, agency, or local office shall give the report an adoptee who is at least twenty-one years old. IC 31-19-17-2-(2). The adoptee must provide identification. IC 31-19-17-2(2).

All available non-identifying social, medical, psychological, and educational records of the adoptive child shall be provided to the adoptive parents and the adoptee under certain circumstances. IC 31-19-17-3. The person, licensed child placing agency, or local office must exclude all identifying information about the birth parents from the records, unless the adoptive parents or adoptee know their identity. IC 31-19-17-3(1). Such records may then be released to either the prospective adoptive parents, adoptive parents, or an adoptee who is at least twenty-one years old and provides identification. IC 31-19-17(2).

If the person, licensed child placing agency, or local office has knowledge of other existing social, medical, psychological, and educational records concerning the child, but does not have the records in their possession, they must provide certain individuals with a summary of those records. I 31-19-17-4. The included individuals are the prospective adoptive parents, adoptive parents, or an adoptee who is at least twenty-one years old and provides identification. IC 31-19-17-4(1) and (2). If one of these individuals requests it, the person, agency, or local office must attempt to provide copies of the records, after identifying information is removed. IC 31-19-17-4.

Adoptees who were adopted before July 1, 1993 may receive available information of social, medical, psychological, and educational reports concerning the adoptee from the person, agency or county office, with the exclusion of information that would identify the birth parents unless an adoptee already knows the identity of the birth parents. IC 31-19-17-5. They must be at least twenty-one years old and provide proof of identification. IC 31-19-17-5.

IC 31-19-12-3.5 is a new statute and requires that before a birth certificate can be processed with respect to an adoption record, the following must first happen: (1) the adoption history fee and the putative father registry fee have been paid as required by IC 31-19-2-8; and (2) the report required to be prepared under IC 31-19-17-2 has been submitted to the state health department.

IC 31-19-12-5 provides for transferring adoption records. The statute defines “record” broadly, and includes court documents, medical records, social or medical histories, photographs, and correspondence held for the benefit of a birth parent, a person who was adopted, an adoptive parent, or a sibling of the person who was adopted. A child placing agency, governmental entity, or licensed attorney who arranges an adoption may, after entry of the adoption decree, transfer an adoption record to the state registrar for inclusion in the adoption history program, or, after giving notice to the state registrar, to a transferee agency that assumes responsibility for the preservation of records maintained as part of the adoption history program. IC 31-19-12-5(b). An attorney who complies with this section does not violate attorney-client privilege, and records maintained and transferred are this statute are still confidential. IC 31-19-12-5(c) and (d).

Indiana law at IC 31-19-19-5 provides for a class A misdemeanor charge and discharge from public employment for recklessly, knowingly, or intentionally disclosing any confidential information relating to any adoption except as provided by law. See this Chapter at IX.F. for further discussion of confidentiality.

Practice Note: Practitioners should retain adoption records to comply with the above statutes and designate a person within the agency or county office to respond to adoptees’ requests. Practitioners should also note IC 31-19-12-5, which allows for transfer of records for inclusion in the adoption history program.

IX. C. Supervision Period

A period of supervision of the child's placement in the adoptive home is required before an adoption can be finalized, and must be done by a licensed child placing agency or DCS if the child is the subject of an open CHINS matter. IC 31-19-8-1. The court hearing the petition for adoption may waive the period of supervision if one of the petitioners is a stepparent or grandparent of the child, and the court waives the report under IC 31-19-8-5(c).

The length of the period of supervision is within the sole discretion of the court and may take place either before or after the filing of the adoption petition. IC 31-19-8-2(b). The required period of supervision may be before or after the filing of a petition for adoption, or both. IC 31-19-8-2(a).

In **In Re Adoption of S.O.**, 56 N.E.3d 77, 80-81, 84 (Ind. Ct. App. 2016), the Court reversed the trial court's order granting Stepmother's petition to adopt the three children. The Court remanded with instructions, and found that it was error for the adoption to occur without any involvement from either a child placing agency or DCS. Both IC 31-19-18-1 and IC 31-19-8-5 require the involvement of either a licensed child placing agency for children who are not adjudicated as CHINS or DCS for children who are adjudicated as CHINS in any adoption. The Court held that the adoption court erred by instructing Stepmother that, by filing a self-produced report, she could waive the involvement of either the licensed child placing agency or DCS.

IX. D. Agency Report For Finalization of Adoption

Within sixty days of an adoption petition being referred to an agency, the agency must submit to the court a written report of the investigation and recommendation as to the advisability of the adoption. IC 31-19-8-5(a). The appropriate agency for a child who is not the subject of a pending CHINS proceeding is a licensed child placing agency; the appropriate agency for a child who is the subject of a pending CHINS proceeding is DCS. IC 31-19-8-5(a). The report and its contents must be filed in the adoption proceedings, and become a part of those proceedings. IC 31-19-8-5(b).

The report required by IC 31-19-8-5 must provide the following information, to the extent that it is possible: (1) the former environment and antecedents of the child; (2) the fitness of the child for adoption; and (3) the suitability of the proposed home for the child. IC 31-19-8-6(a). The report should not contain information concerning the financial situation of the adoptive parents, or a recommendation that a request for a subsidy be denied in whole or in part based on the prospective adoptive parents' financial circumstances. IC 31-19-8-6(b). The report must be accompanied by the criminal history information that is required by IC 31-19-2-7.5. IC 31-19-8-6(c). See III.E. of this Chapter regarding the criminal history check requirement.

Once the report required by IC 31-19-8-5 is submitted, the court must summarily consider it. IC 31-19-8-7. The court can continue the hearing to a later date if it decides that further investigation or supervision is necessary. IC 31-19-8-7. The report is not binding on the court, and is advisory only. IC 31-19-8-8. As soon as possible after the requirements of IC 31-19-7 and 8 are met, the court should proceed to hearing and final determination. IC 31-19-8-9.

A court may potentially waive the required report under IC 31-19-8-5. A court may waive this required report if one the petitioners is a stepparent or grandparent of the child, and the court orders the report waived. IC 31-19-8-5(c). If the court waives this report, the court must still require the licensed child placing agency or local office to ensure a criminal history check (IC 31-

19-2-7.5) is completed, and require the agency or local office to report the results of the criminal history check to the court. IC 31-19-8-5(d).

Practitioners, depending on the timeline of the particular case and what has or has not been previously filed with the court, should consider including the following in the report: (1) any original notarized consent forms signed by birth parents or court orders terminating the parent-child relationship which are in the agency's possession; (2) the agency's consent to the adoption of the children by the adoptive petitioners (if the agency is consenting to the adoption); (3) a completed copy of the child's adoption medical history form required by IC 31-19-2-7; (4) an original signed postadoption contact agreement, if one has been made.

When the proper procedures regarding the IC 31-19-8-5 report are not followed, an adoption may not be permitted to move forward or may be reversed upon appeal. See:

In **In Re Adoption of S.O.**, 56 N.E.3d 77, 80-81, 84 (Ind. Ct. App. 2016), the Court reversed the trial court's order granting Stepmother's petition to adopt the three children. The Court remanded with instructions, and found that it was error for the adoption to occur without any involvement from either a child placing agency or DCS. Both IC 31-19-18-1 and IC 31-19-8-5 require the involvement of either a licensed child placing agency for children who are not adjudicated as CHINS or DCS for children who are adjudicated as CHINS in any adoption. The Court held that the adoption court erred by instructing Stepmother that, by filing a self-produced report, she could waive the involvement of either the licensed child placing agency or DCS.

In **In Re Adoption of M.P.S, Jr.**, 963 N.E.2d 625, 631-2 (Ind. Ct. App. 2012), the Court 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. The Court noted: (1) 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. The Court also found that it was unclear whether a comprehensive criminal background check was performed in accordance with IC 31-9-2-22.5. The Court reversed the trial court's judgment, which denied Mother's request to set aside the child's adoption.

Preparers of such report should be extremely cautious and diligent in their duties. In **Moore v. State**, 845 N.E.2d 225, 229 (Ind. Ct. App. 2006), *trans. denied*, the Court reversed the OFC case manager's criminal conviction for obstruction of justice, finding that the charges had been filed outside the statute of limitations and that, even if the charges had been filed in a timely fashion, the evidence was insufficient for conviction of obstruction of justice. The adoptive home study and adoption summary filed with the trial court did not include information about the adoptive father's felony theft and misdemeanor battery convictions and OFC's previous substantiation of abuse in the adoptive petitioners' household. See Chapter 2 at VIII. for further discussion.

Other adoption cases discussing the agency report concerning recommendations for adoption include:

In Re Adoption of J.B.S., 843 N.E.2d 975, 979 (Ind. Ct. App. 2006) (private agency report prepared for Tippecanoe County OFC child welfare supervisor and filed with trial court provided credible evidence that maternal aunt's visitation with child was ongoing);

In Re Adoption of M.A.S., 815 N.E.2d 216, 223 (Ind. Ct. App. 2004) (trial court could consider DeKalb County OFC home study report in determining whether adoption was in

child's best interests because Father's consent was not required; Father failed to demonstrate prejudice and any error was harmless);
In Re Adoption of K.S.P., 804 N.E.2d 1253, 1254 (Ind. Ct. App. 2004) (Newton County OFC report filed with trial court endorsed second parent adoption);
In Re Adoption of B.C.S., 793 N.E.2d 1054, 1061-62 (Ind. Ct. App. 2003) (adoption petitioners' failure to object to Cass County DFC home study report and petitioners' offer of Madison County court appointed special advocate report and Michigan agency report into evidence waived any error that might have occurred when trial court considered hearsay documents in deciding contested adoption);
In Re Adoption of M.M.G.C., 785 N.E.2d 267, 268 (Ind. Ct. App. 2003) (Lake County DFC submitted report which endorsed second parent adoption);

IX. E. Case Law on Liability Issues

In **Kramer v. Catholic Charities**, 32 N.E.3d 227, 231-5 (Ind. 2015), the Court affirmed summary judgment in favor of Catholic Charities, and held Kramers failed to demonstrate that Catholic Charites had any duties with respect to putative fathers and the putative father registry beyond its statutory duty. While compliance with statutory standards is not per se conclusive as to the lack of negligence, it is evidence of lack of negligence. The parties agreed that Catholic Charities complied with IC 31-19-5-15 by checking the putative father registry on the thirty-first day after the child's birth, which is the minimum statutory standard for adoption agencies. Kramers claimed that Catholic Charites had a further duty to check the putative father registry before placing the baby with them, as was consistent with Catholic Charities internal and informal practice; however, informal practices, standing alone, do not show the degree of care that is the standard of ordinary care. The Kramers argued that since they were in a fiduciary relationship with Catholic Charities, it should have disclosed its failure to check the putative father registry before placing the child with them. However, the Court found that Catholic Charities assumed no such duty or role in relationship to the Kramers. Although the injury due to Catholic Charities conduct was foreseeable, which weighed in favor of imposing additional duties of care, the other factors weighed against such an imposition. The Court opined that the three-factor test for imposition of a duty under these circumstances was equally split, but observed that the Kramers bore the burden of persuasion.

Moore v. State, 845 N.E.2d 225 (Ind. Ct. App. 2006), *trans. denied*, where an OFC case manager's criminal conviction regarding failure to include information on criminal convictions and substantiated abuse by adoptive petitioners was reversed. Three years after the adoption, one of the adopted twins died from dehydration and the surviving twin was diagnosed with severe failure to thrive and malnutrition, and demonstrated evidence of physical abuse and neglect. Adoptive Parents were convicted of child neglect. The OFC case manager was acquitted of the neglect charge by the jury and her conviction for class D felony obstruction of justice was reversed by the Court of Appeals. See Chapter 2 at VIII. for additional information.

Newman v. Deiter, 702 N.E.2d 1093, 1101 (Ind. Ct. App. 1998), the Court found that no attorney client relationship (with its resultant fiduciary duty) had ever existed between the adoptive parents and the agency attorney. By the time the contested adoption proceedings had begun and an order seeking removal of the child was sought, the relationship between the prospective adoptive parents and the adoption agency had become adversarial and the adoptive parents had retained their own counsel. None of the adoptive family's allegations concerning the attorney's conduct supported their claims of interfering with contractual rights or violation of privacy or defamation, and that Indiana law does not provide for an independent cause of civil conspiracy. The same suit against the probate judge and county sheriff was dismissed due to judicial immunity.

Keep v. Noble Cty. Dept. of Public Welfare, 696 N.E.2d 422, 425 (Ind. Ct. App. 1998), the Court of Appeals affirmed the summary judgment granted in favor of DCS because the adoptive mother's complaint for negligence and deceitful withholding of information regarding a child placed with her for adoption in 1958 was time barred. The two-year statute of limitations and 180 day tort claim notice requirement began to run when the adoptive mother knew she had been injured and had a cause of action for alleged misrepresentation regarding the child's adoption.

T.S.B. by Dant v. Clinard, 553 N.E.2d 1253, 1256 (Ind. Ct. App.1990), the Court affirmed the summary judgment granted in favor of a private adoption agency because the private agency did not obtain custody of the child or place her in the home where the child allegedly suffered physical and emotional abuse. In determining whether a legal duty arises, consideration must be given to the nature of the relationship between the parties and whether the party being charged with negligence had knowledge of the situation or circumstances surrounding that relationship. The Court found there was no duty on the part of an adoption agency to a child when the agency was not engaged in placing the child for adoption. The opinion did not attempt to answer the question of the duty of an adoption agency toward a child when the agency is engaged in the child's adoptive placement.

IX. F. Confidentiality

The following items in court files are confidential: (1) a petition for adoption; (2) reports and recommendations of the licensed child placing agency (IC 31-19-8-5); (3) all other papers filed in connection with a petition for adoption; (4) record of evidence at the hearing; (5) decree made by the court, including decrees in foreign adoptions filed under IC 31-19-28. IC 31-19-19-1(a).

All files and records pertaining to adoption proceedings in a local office, in DCS, or in any licensed child placing agency are confidential; they are open to inspection only as provided in IC 31-19-13-2(2), IC 31-19-17, IC 31-19-19, or IC 31-19-20 through IC 31-19-25.5. IC 31-19-19-2(a). These files and records are also open to inspection by the adoption court, and upon order of the court, may be introduced into evidence and made a part of the record in the adoption proceeding. IC 31-19-19-2(b). See this Chapter at IX.B for other discussion of release and transfer of records.

All papers, records, and information relating to an adoption, no matter whether they are part of the permanent court record or a file in DCS, a local office, a licensed child placing agency, a professional heath care provider, or the division of vital records, and confidential and can only be disclosed according to IC 31-19-17, IC 31-19-19, or IC 31-19-20 through 25.5.

The information located in the adoption history cannot be disclosed under (1) IC 5-14-3, or (2) any freedom of information legislation, rule, or practice. IC 31-19-19-3.

Storage and maintenance of these types of records is addressed in IC 31-19-19-0.5. Except as otherwise provided, a person required to store, maintain, or release adoption records or other adoption information must store and maintain the adoption records or other adoption information for at least ninety-nine years after the date the adoption was filed. IC 31-19-19-0.5(b). The information or records can be stored and maintained in electronic or other format, unless otherwise provided. IC 31-19-19-0.5(b). However, a person who transfers adoption records or information to the state registrar or a transferee agency (IC 31-19-12-5) is not required to comply with the storage or maintenance requirements. IC 31-19-19-0.5(c). A person, including a court, who has custody of or jurisdiction over adoption records or information following the "dissolution, sale, transfer, closure, relocation, or death of a person" must transfer the records as

provided in IC 31-19-12-5, unless the person wishes to store the records according to IC 31-19-19-0.5(b). IC 31-19-19-0.5(d).

Disclosing confidential information can have serious consequences. An employer or any person administering adoption records who recklessly, knowingly, or intentionally, (1) discloses any confidential information relating to any adoption except as otherwise provided, or (2) allows an employee to disclose any confidential information relating to any adoption except as otherwise provided, commits a Class A misdemeanor. IC 31-19-19-5(a). If the person committing this violation is a public employee, the violation may result in his or her discharge. IC 31-19-19-5(b).

X. ADOPTION HEARING

X. A. Required Documents

To complete the adoption, the attorney for the adoptive petitioners must be sure that the following documents have been completed and filed with the court:

(1) The report of the investigation and recommendation under IC 31-19-8-5 [IC 31-19-11-1(a)(3)]

- This report must contain: the criminal history information required under IC 31-19-2-7.5. IC 31-19-8-6(c)
- This report must contain, to the extent possible: The former environment and antecedents of the child; the fitness of the child for adoption; and the suitability of the proposed home for the child. IC 31-19-8-6(a)
- This report cannot contain: Information concerning the financial condition of the prospective adoptive parents; or recommendation that a request for a subsidy be denied in whole or in part due to the financial condition of the prospective adoptive parents. IC 31-19-8-6(b)

(2) The affidavit prepared by the state department of health under IC 31-19-5-16 indicating whether a man is entitled to notice of the adoption because the man has registered with the putative father registry in accordance with IC 31-19-5 [IC 31-19-11-1(a)(4)]

(3) The affidavit prepared by the state department of health under IC 31-19-6 indicating whether a record of a paternity determination, or IC 16-37-2-2(g) indicating whether a paternity affidavit executed under IC 16-37-2-2.1, has been filed in relation to the child [IC 31-19-11-1(a)(6)]

(4) All necessary and proper consents, if any have been given; [IC 31-19-11-1(a)(7)]

(5) Copies of all properly and timely served notices to all individuals who are entitled to notice of the adoption petition and proceedings [IC 31-19-11-1(a)(5)]

(6) A request for financial assistance, if eligible and desired, under the Indiana Adoption Program, so that the court may refer the adoption petitions to DCS for negotiation and completion of the Adoption Subsidy Agreement [IC 31-19-11-3]

(7) The petition for adoption specified all proper and required information [IC 31-19-2-6]

(8) A medical report of the health status and medical history of the child sought to be adopted and the child's birth parents [IC 31-19-2-7]

(9) If a petitioner for adoption is charged with a felony or a misdemeanor relating to the health and safety of children during the pendency of the adoption, the petitioner shall notify the court of the criminal charge in writing [IC 31-19-2-7.6]

(10) Any other documents that may be necessary, as alleged in the adoption petition or otherwise; for example, copies of applicable order granting termination of the parent-child relationship and documents showing that all opportunity of appeal and gran of transfer or certiorari has passed

The following documents should be brought to the adoption hearing:

(1) A copy of the fee receipt to show that all necessary fees were paid to the county clerk and state department of health, unless the court previously ordered the fees to be waived
(2) The typed state department of health form which is needed to locate the child's birth certificate and establish a new birth certificate [IC 31-19-12-1]
(3) The original and four copies of the proposed decree of adoption containing the new name which the child shall be given [IC 31-19-11-4; IC 31-19-12-2]
(4) Copies of any signed and completed adoption assistance agreements, for reference if necessary
(5) Original documents of any postadoption privileges agreements (IC 31-19-16-1, 2) or postadoption sibling contact agreements (IC 31-19-16.5-1, 2)

Practice Note: IC 31-19-12-3.5 is a new statute and requires that before a birth certificate can be processed with respect to an adoption record, the following must first happen: (1) the adoption history fee and the putative father registry fee have been paid as required by IC 31-19-2-8; and (2) the report required to be prepared under IC 31-19-17-2 has been submitted to the state health department.

Adoption assistance agreements are not presented to the court or ordered by the court which hears the adoption; however, counsel for the adoptive parents should be certain that the child's eligibility has been determined before the adoption hearing. If the child is eligible for adoption assistance, the agreement must be negotiated and signed by both adoptive parents and DCS before the adoption petition is granted. Failure to complete the necessary procedures will usually result in denial of adoption assistance and necessitate an administrative appeal by the adoptive petitioners to secure postadoption financial assistance for the child. See this Chapter at XIII. for further discussion of available postadoption financial assistance available to adoptive children and families.

X. B. Legal Requirements For Granting Adoptions

X. B. 1. Statutes Regarding Legal Requirements For Granting Adoptions

To complete the adoption the court must hear evidence from each of the petitioners and make the following findings (IC 31-19-11-1):

(1) the adoption is in the best interest of the child;
(2) the petitioner(s) for adoption are of sufficient ability to rear the child and furnish suitable support and education;
(3) the report of the investigation and recommendation under IC 31-19-8-5 has been filed;
(4) the attorney or agency arranging an adoption has filed with the court an affidavit prepared by the state department of health under IC 31-19-5-16 indicating whether a man is entitled to notice of the adoption because he registered with the putative father registry;
(5) proper notice arising under subdivision (4), if notice is necessary, of the adoption has been given;
(6) the attorney or agency has filed with the court an affidavit prepared by the state department of health under IC 31-19-6 indicating whether a record of a paternity determination, or under IC 16-37-2-2(g) indicating whether an executed paternity affidavit, has been filed in relation to the child;
(7) all proper and necessary consents to the adoption has been given;
(8) the petitioner for adoption is not prohibited from adopting the child as the result of an inappropriate criminal history described in IC 31-19-11-1(c) or (d); and

(9) the person, licensed child placing agency, or local office that placed the child for adoption has provided the documents and other information required under IC 31-19-17 to the prospective adoptive parents.

For a list of criminal convictions that do or may disqualify a person from successfully adopting a child, see III.E. of this Chapter; see also IC 31-19-11-1(c) and (d). See this Chapter at III.E.2. for the statutory definition of a sex or violent offender.

A court may not grant an adoption unless the state department of health's affidavit under IC 31-19-5-16 is filed with the court, as provided under IC 31-19-11-1(a)(4).

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." IC 31-19-11-6. (emphasis added). Previously, this statute allowed for adoptions even if an appeal was pending. See also In Re Adoption of C.B.M., 992 N.E.2d 687 (Ind. 2013).

The court shall provide for custody of the child in the adoption decree if the child is a ward of a guardian, an agency, or a county office of family and children. IC 31-19-11-2.

X. B. 2. Case Law Regarding Legal Requirements For Granting Adoptions

In **In Re Adoption of S.O.**, 56 N.E.3d 77, 80-81, 84 (Ind. Ct. App. 2016), the Court reversed the trial court's order granting Stepmother's petition to adopt the three children. The Court remanded with instructions, and found that it was error for the adoption to occur without any involvement from either a child placing agency or DCS. Both IC 31-19-18-1 and IC 31-19-8-5 require the involvement of either a licensed child placing agency for children who are not adjudicated as CHINS or DCS for children who are adjudicated as CHINS in any adoption. The Court held that the adoption court erred by instructing Stepmother that, by filing a self-produced report, she could waive the involvement of either the licensed child placing agency or DCS.

In **In Re Adoption I.B.**, 32 N.E.3d 1164, 1169-71 (Ind. 2015), the Supreme Court found that IC 31-19-11-1 is constitutional because its prohibitions are rationally related to the classifications they draw. Maternal Grandmother and Fiancé were barred from adopting the children because of their disqualifying felony convictions. IC 31-19- 11(c) states that a court may not grant an adoption if a petitioner has been convicted of neglect of a dependent (IC 35-46-1-4(a)(1) and IC 35-46-1-4(a)(2)) or if a petitioner has a felony conviction involving a weapon unless the conviction did not occur within the past five years. The Court found there was no constitutional defect in barring adoptions by petitioners with felony child-neglect convictions. The Court noted that "there is no fundamental right to adopt" because the adoption process depends on so many variables, and that convicted felons are not a protected class. The Court opined that distinguishing between child-neglect felons and non-felons was rationally related to the legitimate legislative goal of ensuring that children will not be adopted into a neglectful home.

In **In Re Adoption of C.B.M.**, 992 N.E.2d 687, 695-7 (Ind. 2013), the Indiana Supreme Court concluded that the trial court abused its discretion by failing to set aside the children's adoption as Natural Mother had requested. The children were adopted by their foster parents before the Court of Appeals issued its decision reversing the trial court's termination order. The Indiana Supreme Court remanded the adoption case to the trial court with instructions to

vacate the children's adoption. The Court opined that granting an adoption pending a termination appeal is a *discretionary* decision of the trial court (emphasis in opinion). The Court said that our Legislature has authorized the practice (IC 31-19-11-6. Note: This statute has been amended so that this practice is no longer authorized, see this Chapter at VII.B.2 and 3, X.B.1, and XI.C).

In **In Re Adoption of M.P.S, Jr.**, 963 N.E.2d 625, 631-2 (Ind. Ct. App. 2012), the Court 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. The Court noted: (1) 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. The Court also found that it was unclear whether a comprehensive criminal background check was performed in accordance with IC 31-9-2-22.5. The Court reversed the trial court's judgment, which denied Mother's request to set aside the child's adoption.

In **In Re Adoption of K.S.**, 980 N.E.2d 385, 389-90 (Ind. Ct. App. 2012*),* where the Court concluded that Mother's consent to the adoption was not required due to Mother's failure to provide child support. The Court said 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. The Court observed that, once the statutory requirements are met, the trial court may then look to the arrangement that will be in the best interest of the child.

In **In Re Adoption of N.W.**, 933 N.E.2d 909, 914-5 (Ind. Ct. App. 2010), *opinion adopted* at 941 N.E.2d 1042 (Ind. 2011), the Court opined, *inter alia*, that there was no evidence indicating that the adoption was in the child's best interest. The Court said 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.

The Supreme Court in **In Re Adoption of Infants H.**, 904 N.E.2d 203, 206-07 (Ind. 2009), *reh'g denied*, held that the adoption court erred by dispensing with DCS' statutory role before DCS even knew of the adoption, based solely on Petitioner's request. The Court noted that IC 31-19-7-1(a) requires that, before a child may be placed in a proposed adoptive home, DCS or a child placing agency licensed by DCS must give prior written approval; and that this legislative directive obviously is designed to protect children, certainly including infants like those who are the subject of this case.

In **In Re Adoption of S.A.**, 918 N.E.2d 736, 746 (Ind. Ct. App. 2009), the Court said that there was sufficient evidence for the trial court to properly determine that granting Adoptive Mother's petition was in the child's best interest. The Court opined that Foster Parents' request to set aside the adoption order in Adoptive Mother's favor and enter judgment for Foster Parents amounted to a request for the Court to reweigh the evidence, which the Court will not do.

In **In Re Adoption of J.L.S.**, 908 N.E.2d 1245, 1250 (Ind. Ct. App. 2009), the Court determined that, although a jury had found Prospective Adoptive Father guilty of aggravated battery, he was sentenced only for, and judgment of conviction was entered only for attempted murder. IC 31-19-11-1(c) [which has since been amended to provide for attempts and conspiracies to commit certain felonies as prohibiting adoptions] does not list as

conviction prohibiting a court from granting an adoption. Therefore, because his conviction "does not appear to impede the prospective parents' adoption petition as the law now stands," Court reversed and remanded case to determine whether adoption was still in best interests of child and whether prospective parents were of sufficient ability to rear the child and furnish suitable support and education pursuant to IC 31-19-11-1(a)(1) and (2).

X. C. Effect of Adoption Decree

X. C. 1. New Birth Certificate

When an adoption petition is granted, the adoptive petitioners become the legal parents of the child. The state department of health shall establish a new birth certificate for the Indiana-born child unless the court, the adoptive parents, or the adoptive child request that a new birth certificate not be established. IC 31-19-13-1(a) and (b). The new birth certificate must show the child's actual place and date of birth. IC 31-19-13-1(c).

The new birth certificate replaces the child's original birth certificate; the original is filed with the evidence of adoption and withheld from inspection except for a child adopted by a stepparent, or as provided in IC 31-19-17 through IC 31-19-25.5. IC 31-19-13-2. The child's original birth certificate shall be sealed from inspection or surrendered to the state department of health by the local health department. IC 31-19-13-4. If a child is born outside Indiana, the state department of health shall forward the information for a new birth certificate to the appropriate out of state registration authority. IC 31-19-12-4(a). If the out of state authority fails to supply an adoptive birth certificate after ninety days, the Indiana state department of health shall create a delayed registration of birth upon request. IC 31-19-12-4(b).

Practice Note: IC 31-19-12-3.5 is a new statute and requires that before a birth certificate can be processed with respect to an adoption record, the following must first happen: (1) the adoption history fee and the putative father registry fee have been paid as required by IC 31-19-2-8; and (2) the report required to be prepared under IC 31-19-17-2 has been submitted to the state health department.

X. C. 2. Effect on Birth Parent-Child Relationship

Except for stepparent adoptions and postadoption privileges situations pursuant to IC 31-19-16-1, the effect of the child's adoption is to relieve the birth parents of all legal duties, obligations and rights to the child. IC 31-19-15-1. IC 31-19-15-1(a) also explicitly states that the parent-child relationship is terminated after the adoption unless it was terminated by "an earlier court action, operation of law, or otherwise." However, the obligation to support the adopted person continues until the entry of the adoption decree and that the decree does not extinguish the obligation to pay past due child support owed before the entry of the decree. IC 31-19-15-1(b).

In stepparent adoptions, the parent-child relationship of the biological parent or previous adoptive parent is not affected by the adoption. IC 31-19-15-2(b). After the adoption, the adoptive father or mother, or both, occupy the same position toward the child that the adoptive father or the adoptive mother, or both, would occupy if the adoptive father or adoptive mother, or both, were the biological father or mother, and are jointly and severally liable for the maintenance and education of the person. IC 31-19-15-2(c).

In **In Re Infant Girl W.**, 845 N.E.2d 229, 246 (Ind. Ct. App. 2006), *trans. denied sub nom.* In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006) (Dickson, J. dissenting), the Court addressed the termination of the parents' rights because the Morgan Juvenile Court initially

terminated the birth mother's rights, but then rescinded its termination and refused to rule on the matter. The Court noted that, in granting the unmarried couple's petition for adoption of their foster child, the Marion Probate Court terminated the parental rights of both birth parents. The Court found that the birth mother had consistently maintained her desire to terminate parental rights and agreed to the unmarried couple's adoption of the child. Putative Father's failure to register with Putative Father registry operated as an irrevocably implied consent. The Court summarily affirmed Marion Probate Court's termination of the rights of both parents.

In **In Re Adoption of K.S.P.**, 804 N.E.2d 1253, 1257 (Ind. Ct. App. 2003), the Court determined that Indiana law did not require the "destructive and absurd" result of divesting Mother's rights to her children by granting the domestic partner's adoption petition.

In **In Re Adoption of R.L.R.**, 784 N.E.2d 964, 971 (Ind. Ct. App. 2003), the Court reversed and remanded with instructions to grant Stepmother's petition for adoption. The Court noted that this ruling did not, in and of itself, foreclose the possibility of Mother reestablishing a relationship with the child in that granting the adoption decree was not tantamount to establishing a no-contact order with respect to the child and birth mother.

X. D. Recusal of Judge

In **L.G. v. S.L.**, 76 N.E.3d 157 (Ind. Ct. App. 2017), the Court held that the trial court should have granted Father's first motion for recusal, and while it was not basing its ruling on this, it concluded that the trial court judge should recuse himself from further proceedings in this matter. Father first requested the judge recuse himself when opposing counsel wrote a letter of recommendation for the judge in support of his application to be placed on the Indiana Supreme Court while these proceedings were pending. The trial court judge specifically named the opposing counsel as a reference, and shortly after opposing counsel wrote his letter, the trial court judge granted Adoptive Parents' motion to compel regarding Father's mental health records.

The L.G. Court noted it was not assigning any improper motive to opposing counsel or the trial court judge, and that it recognized the trial court judge as a respected jurist. However, Judicial Conduct R. 1.2 requires a judge to act at all times in a manner that promotes public confidence in independence, integrity, and impartiality of the judiciary, and must avoid even the appearance of impropriety. Judicial Conduct R. 2.11 provides that a judge must disqualify him or herself in any proceeding in which the judge's impartiality might reasonably be questioned. The issue was not whether the judge was biased, but whether an objective person would rationally doubt the judge's impartiality, given that the opposing counsel wrote the letter of recommendation that the judge had expressly requested while the proceedings were pending. Based on this, the trial court judge should have granted Father's first motion to recuse.

The L.G. Court also opined that it was concerned that any trial court judge would have difficulty in setting aside its strongly worded and firm findings and conclusions regarding a party's character and credibility. The Court noted the harsh tenor of the findings against Father, and concluded that since Father's fundamental rights were at stake, it could not take this concern lightly. In a footnote, the Court noted that it was not going to address Father's second motion to recuse, which was based on the judge's response to a question regarding Brown v. Board of Education during the interview for the Indiana Supreme Court vacancy.

In **In Re Adoption of M.H.**, 15 N.E.3d 612, 622-3, 625 (Ind. Ct. App. 2014), the Court affirmed the trial court's order which granted Foster Parents' petition for adoption, denied Relatives' petition for adoption, and ordered Relatives to part with the child. The Court concluded that the

trial court did not abuse its discretion when it denied Relatives' Motion to Recuse. A ruling upon a motion to recuse rests within the sound discretion of the trial judge and will be reversed only upon a showing of abuse of that discretion. "In order to overcome that presumption, the appellant must demonstrate actual personal bias." Relatives argued that the denial of the Motion to Recuse was contrary to Rules 1.2, 2.4, 2.9, and 2.11 of the Code of Judicial Conduct, and it created the appearance of impropriety, and failed to promote public confidence in the independence, integrity, and impartiality of the judiciary. Foster Parents contended that the unsolicited appeal from an acquaintance of thirty years ago had no bearing upon the court's decision, and that no objective person understanding all of the circumstances would have a basis for doubting the judge's impartiality.

The M.H. Court noted Ind. Judicial Code Rule 2.9(B) states that "if a judge receives an unauthorized ex parte communication bearing upon the substance of a matter the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." The trial judge had fully complied with this Rule in that after receiving the email, immediately upon reconvening, the judge noted the substance of the communication and provided the parties with an opportunity to respond. The Court also found particularly relevant the judge's statements that he did not know the fraternity brother any more, that anything the fraternity brother says had no meaning to the judge, and that the judge had no doubt that he could be fair. The Court concluded that Relatives had not overcome the presumption that the trial court judge acted impartially. The Court found that the judge's decision recited in the order reflected a thorough, unbiased consideration of all the evidence before him.

X. E. Dismissal of Petition

X. E. 1. Statutes

IC 31-19-11-5(a) 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. IC 31-19-11-5(c) allows the court to: (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 requires consolidation of pending adoption and paternity proceedings regarding the same child in the adoption court. The adoption court has exclusive jurisdiction over the child. IC 31-19-2-14(a). 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.

X. E. 2. Case Law

In **In Re Adoption of S.O.**, 56 N.E.3d 77, 83-4 (Ind. Ct. App. 2016), the Court reversed the trial court's order granting Stepmother's petition to adopt the three children. The Court

remanded with instructions to consolidate the paternity action with the adoption case and to order a statutorily compliant background check, holding that the paternity action should have been consolidated with the adoption proceeding prior to the adoption court's issuance of the adoption decree. The Court did not opine on the merits of Mother's challenge to the original paternity court order, but observed that the trial court violated IC 31-19-2-14(a) by not consolidating the paternity action with the adoption proceeding.

In **In Re B.C.**, 9 N.E.3d 745, 754-5 (Ind. Ct. App. 2014), the Court held that, because the petition for adoption and the paternity action were pending at the same time, the court in which the petition for adoption had been filed, had exclusive jurisdiction over the child's custody. The Court looked to IC 31-19-2-14(a) and found it controlling. The Court opined that IC 31-19-2-14 does not limit its applicability to situations in which an adoption petition is filed prior to the filing of the paternity action. The Court noted that, although paternity had already been established at the time Guardians filed their petition for adoption, the paternity action remained alive. The Court held that, accordingly, the Montgomery Circuit Court could not properly exercise jurisdiction to enter order as the Marion Superior Court, Probate Division, had exclusive jurisdiction over the custody of the child. The Court also held that the Marion Superior Court, Probate Division, erred when it dismissed the guardianship and adoption proceedings.

In **In Re Adoption of S.A.**, 918 N.E.2d 736, 742 (Ind. Ct. App. 2009), the Court held that the trial court was not required to include the specific findings of fact and conclusions of law with regard to IC 31-19-11-1 in denying Foster Parents' adoption petition. The Court was not persuaded by the claim of Foster Parents and DCS that the adoption decree must be set aside because the trial court's order was devoid of the statutory findings required at IC 31-19-11-1 when an adoption is granted.

In **In Re Adoption of B.W.**, 908 N.E.2d 586, 592-93 (Ind. 2009), in which the Indiana Supreme Court addressed IC 31-19-2-14(a), stating that where a putative father opts under 31-19-9-12(1) to file a paternity petition, the statute anticipates situations where an adoption petition is concurrently pending. In that circumstance, "the court in which the petition for adoption has been filed has exclusive jurisdiction over the child, and the paternity proceeding must be consolidated with the adoption proceeding." Ind. Code 31-19-2-14(a).

In **In Re Adoption of Dzurovcak**, 600 N.E.2d 143, 147-8 (Ind. Ct. App. 1992), the Court discussed 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. 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.

XI. ADOPTION APPEALS

XI. A. Persons Prevented From Challenging an Adoption Decree

The following persons are excluded from challenging an adoption decree: (1) a person who has not contested the adoption nor established paternity more than thirty days after service of notice; (2) a person who receives actual pre-birth notice who does not contest the adoption nor establish paternity within thirty days after the date of receiving actual notice; (3) a person who has consented to adoption and whose consent has not been withdrawn prior to the entry of the adoption decree. IC 31-19-14-3.

If a person does not fall into one of the categories listed at IC 31-19-14-3, the person whose parental rights are terminated by the entry of the adoption decree must challenge the decree either within six months after the entry of the decree or within one year after the adoptive parents obtain custody of the child, whichever is later. IC 31-19-14-2. The person challenging the decree must establish, by clear and convincing evidence, that modifying or setting aside the decree is in the child's best interests. IC 31-19-14-2.

XI. B. Time Frame for Appeals from Adoption Decrees

All adoption appeals shall be decided on an expedited basis. IC 31-19-14-1.

IC 31-19-4-4 provides that no challenges to the decree are permitted after the time period outlined at IC 31-19-14-2. See In **Mathews v. Hansen**, 797 N.E.2d 1168, 1171-73 (Ind. Ct. App. 2003), *trans. denied*, where the Court concluded in part 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 31-19-14-2 and -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. But see **In Re Adoption of D.C.**, 887 N.E.2d 950, 958-60 (Ind. Ct. App. 2008), where the Court reversed and remanded the trial court's denial of Mother's motion to set aside the adoption decree. The trial court had denied 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 Court concluded that IC 31-19-14-4, which specifies the permissible time period for challenging adoption decrees, created an unconstitutional due process violation in this particular case. The Court opined that (1) 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.

IC 31-19-4-4 was recently amended to provide that neither a person whose parental rights were terminated by the entry of an adoption decree, nor any other person, may challenge an adoption decree, even if notice of the adoption was not given, or the adoption proceedings were in any other manner defective.

XI. C. Final Judgment Required Before Appeal

An adoption case reach a final judgment before it becomes appealable. In **In Re the Adoption of S.J.**, 967 N.E.2d 1063, 1065-6 (Ind. Ct. App. 2012), the Court, without addressing the merits of Father's appeal, concluded that the trial court's order that Father's consent to the child's adoption

was not required 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. Father appealed the order from the trial court finding that his consent was not needed, although the best interests portion of the case had not yet been heard. This did not dispose of all of the issues as to all parties or put an end to the case, and that the trial court's order was not an appealable interlocutory order; because of this, the Court did not have jurisdiction to hear Father's appeal. The Court also concluded that 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. The Court determined that none of the grounds for an interlocutory appeal as a matter of right as provided by Appellate Rule 14(A) were present in the instant case; consequently, Father was not entitled to an interlocutory appeal as a matter of right. The Court noted that Appellate Rule 14(B) provided that interlocutory orders could be appealed if the trial court certifies its order and the Court of Appeals accepts jurisdiction of the appeal; however, there was no certification of the order or acceptance of the appeal in the instant case. Consequently, the trial court's order was not appealable under Appellate Rule 14(B).

A court may not make a final order granting 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." IC 31-19-11-6. Previously, this statute allowed for an adoption petition to be granted if an appeal was pending. See **In Re Adoption of C.B.M.**, 992 N.E.2d 687, 691, 694-7 (Ind. 2013), which was issued prior to the amendment of this statute. Natural Mother's parental rights to her two children were involuntarily terminated subsequent to a CHINS adjudication. Natural Mother appealed the termination judgment, but the children were adopted by their foster parents before the termination appeal was completed. The termination was reversed and Natural Mother petitioned to set aside the adoption. The Indiana Supreme Court held that Natural Mother's right to set aside the adoption did not depend on staying the termination judgment. The Court opined that the adoption must be set aside pursuant 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".

XI. D. Appellate Counsel in Appeals From Adoption Decrees

Although a parent, including a putative father, has the right to counsel in a contested adoption at the trial level, Indiana statutes and case law are silent as to whether there is a right to appellate counsel in the context of adoption appeals. However, in **Parent-Child Rel. [I.B.] v. Indiana Child Services**, 933 N.E.2d 1264 (Ind. 2010), the Court affirmed the trial court's judgment refusing to appoint appellate counsel for Mother's appeal of termination of parental rights, and opined Indiana statutes dictate that the parents' right to counsel continues through all stages of the proceeding to terminate the parent-child relationship, including appeal. A parent's right to counsel in termination of parental rights cases is granted by statute and case law. For the purposes of the statutes implicated in this case, a proceeding does not limit the appointment of counsel to the trial proceeding but rather applies to the entire process, including through the direct appeal proceeding. Mother failed to properly request or pursue appellate counsel or her appeal. Despite the I.B. opinion, it is arguable that IC 34-10-2-1 for indigent parents could apply to appellate counsel for parents seeking an adoption appeal as well.

For other case law implicating appellate counsel being appointed to a parent who seeks to appeal an adoption decree, see **In The Matter of The Adoption of C.J.**, 71 N.E.3d 436 (Ind. 2017), where the Court held that Mother did not knowingly and voluntarily waive her right to counsel at the adoption hearing. The Court cited several termination statutes regarding a parent's right to be

represented by an attorney at a trial which ends their parental rights; by extension, it is possible that termination case law, which provides for the appointment of appellate counsel in termination of the parent-child relationship cases, may apply. See also **In Re Adoption of T.L.**, 4 N.E.3d 658 (Ind. 2014), where an incarcerated father asked for appellate counsel exactly thirty days after the adoption judgment had been rendered. 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.

Practice Note: Given the similar nature of adoption proceedings, which terminate a parent's parental rights to a child, and termination of the parent-child relationship proceedings, it would be wise for courts and practitioners to construe the body of law together on issues such as the appointment of counsel. Since termination law does allow, and in fact, often requires, for the appointment of counsel at both the trial and appellate level, it would be advisable to seek the same in adoption appeals.

An indigent parent who seeks a free transcript and record of proceedings for an adoption appeal will probably succeed in this request due to the United States Supreme Court decision **M.L.B. v. M.L.J.**, 117 S. Ct. 555, 570 (1996), where the United States Supreme Court held that the State of Mississippi may not withhold from the mother a "record of sufficient completeness to permit proper appellate consideration of her claims."

XI. E. Ability of Appellate Court to Overlook Appeal's Procedural Defects

Appellate courts may over look an appeal's procedural defects, based largely on the importance of a parent's constitutional right to parent his or her child.

In **In Re Adoption of T.L.**, 4 N.E.3d 658, 661 n.2 (Ind. 2014), 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. However, the Court then 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. The Court had agreed with Father that his case should be heard on the merits, because the case involved his constitutional right to parent his children. 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." 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.

In **In Re Adoption of O.R.**, 16 N.E.3d 965, 971-2, 975 (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. The Court affirmed the trial court's order granting the adoption. The untimely filing of a Notice of Appeal is not a jurisdictional deflect depriving appellate courts of the ability to hear an appeal. Consistent throughout the various iterations of the Appellate Rules is the notion that forfeiture of an appeal is the price one pays for the untimely filing of the necessary papers to further an appeal, and the Indiana Supreme Court has so held as well. 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.

The O.R. Court 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. Even though the right to appeal had been forfeited, there were extraordinary compelling reasons why this forfeited right should be restored. The Court looked to In Re Adoption of T.L., 4 N.E.3d 658, 661 (Ind. 2014), and observed that 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. 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." 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) the Fourteenth Amendment to the United States Constitution protects the right of parents to establish a home and raise their children.

XII. POSTADOPTION CONTACT

Although Indiana does not provide for "open adoptions", per se, there are forms of postadoption contact available to adopted children, which are entirely statutorily created. Birth parents may have court enforceable postadoption contact privileges pursuant to IC 31-19-16-1 through -8. Non-court enforceable postadoption contact privileges are outlined at IC 31-19-16-9. Enforceable postadoption contact for siblings is governed by IC 31-19-16.5-1 through -7.

XII.A. Statutes

Birth parents may have court enforceable postadoption contact privileges pursuant to IC 31-19-16-1 through -8. Non-court enforceable postadoption contact privileges are outlined at IC 31-19-16-9. Enforceable postadoption contact for siblings is governed by IC 31-19-16.5-1 through -7.

XII.A. 1. Non-enforceable Postadoption Contact With Birth Parents

IC 31-19-16-9 provides for postadoption contact privileges without court approval in the adoption of a child who is less than two years old. This may only occur with the agreement of both the adoptive parents and the birth parent.

This type of postadoption contact between an adopted child and a birth parent may not include visitation and are not enforceable. IC 31-19-16-9 and -9(1). It may include contact through photographs, written and verbal updates, and other forms of communication. IC 31-19-16-9(2). The agreement does not have to be in writing. IC 31-19-16-9(3).

A postadoption contact agreement under this section does not affect the validity of a consent to an adoption, a waiver of notice, or the finality of the adoption. IC 31-19-16-9(4).

The authors of this Deskbook are unaware of any published case law regarding this statute.

XII.A. 2. Enforceable Postadoption Contact With Birth Parents

If a birth parent has consented to an adoption or has voluntarily terminated the parent-child relationship, an adoption court may grant postadoption contact privileges, subject to the requirements of IC 31-19-16-2. IC 31-19-16-1. The requirements of IC 31-19-16-2 involve the court finding that:

(1) the best interests of the child are served by granting postadoption contact privileges;

(2) the child is at least two years old, and there is a significant emotional attachment between the child and the birth parent;
(3) each adoptive parent consents to the granting of postadoption contact privileges;
(4) the adoptive parents and the birth parent(s) execute a postadoption contact agreement and file that agreement with the court;
(5) the licensed child placing agency sponsoring the adoption and the child's guardian ad litem or court appointed special advocate recommends the postadoption contact agreement. If there is no licensed child placing agency, DCS or other agency that prepared an adoption report is informed of the contents of the postadoption contact agreement and comments on the agreement in the agency's report to the court;
(6) the child consents to the postadoption contact, if the child is at least twelve years old; and
(7) the postadoption contact agreement is approved by the court.

The postadoption contact agreement itself must contain the two provisions outlined at IC 31-19-16-3: (1) the birth parent acknowledges that the adoption is irrevocable even if the adoptive parents do not abide by the agreement; (2) the adoptive parents acknowledge that the birth parents have the right to seek to enforce the agreed postadoption privileges.

Enforcement or modification of the court-approved postadoption contact agreement is accomplished through IC 31-19-16-4. Either a birth parent or an adoptive parent may file a petition with the adoption court to modify the postadoption contact agreement, or to compel a birth parent or an adoptive parent to comply with the postadoption contact agreement. IC 31-19-16-4. However, monetary damages are not permitted as an award for this type of petition. IC 31-19-16-4.

Courts may void or modify a postadoption contact agreement. A court may void or modify a postadoption contact agreement at any time before or after the adoption, as long as the court determines, after a hearing, that the best interest of the child requires the voiding or modifying of the agreement. IC 31-19-16-6(a).

A guardian ad litem or a court appointed special advocate may be appointed by the court, before the court voids a postadoption contact agreement or hears a motion to compel compliance with an approved postadoption contact agreement. IC 31-19-16-6(b). If a guardian ad litem or a court appointed special advocate is appointed pursuant to this statute, the provisions of IC 31-32-3 concerning the (1) representation, (2) duties, (3) liabilities, and (4) appointment of a guardian ad litem or court appointed special advocate apply to the proceedings. IC 31-19-16-7.

An adoption may not be revoked because a birth parent or an adoptive parent fails to comply with a court-approved postadoption contact agreement. IC 31-19-16-8.

XII.A. 3. Postadoption Birth Sibling Contact

IC 31-19-16.5-1 provides that the court entering an adoption decree may order the adoptive parents to provide specified postadoption contact for their adoptive child who is at least two years of age with a pre-adoptive sibling if each adoptive parent consents to the court's order for contact and the contact would serve the best interests of the adopted child.

When a court is making its determination regarding ordering postadoption sibling contact, the court must consider (IC 31-19-16.5-2):

(1) A recommendation made by a licensed child placing agency sponsoring the adoption;

(2) A recommendation made by the child's court appointed special advocate or guardian ad litem;
(3) A recommendation made by DCS or other agency that prepared a report of its investigation and its recommendation as to the advisability of the adoption; and
(4) Any wishes expressed by the adopted child or adoptive parents.

Postadoption sibling contact orders may be modified or vacated, and motions may be filed to compel an adoptive parent to comply with the postadoption sibling contact order, pursuant to IC 31-19-16.5-4. A pre-adoptive sibling, by next friend or by guardian ad litem or court appointed special advocate, may file such a petition. IC 31-19-16.5-4(1). The adopted child may also file such a petition, also by next friend or by guardian ad litem or court appointed special advocate. IC 31-19-16.5-4(2). Lastly, an adoptive parent can file a petition to modify or vacate a postadoption sibling contact order. IC 31-19-16.5-4(3).

If a court is going to grant a motion to vacate or modify a postadoption sibling contact order, the court must have a hearing and determine that doing so is in the best interest of the child. IC 31-19-16.5-5.

A guardian ad litem or a court appointed special advocate may be appointed to represent and protect the child's best interests before the court hears the petition to vacate, modify, or compel compliance with the postadoption sibling contact order. IC 31-19-16.5-5. However, a court may only appoint a guardian ad litem or a court appointed special advocate for these petitions if the interests of an adoptive parent differ from the child's interests to the extent that the court determines that the appointment is necessary to protect the best interests of the child. IC 31-19-16.5-5.

An adoption is irrevocable, even if the adoptive parents do not comply with the postadoption sibling contact order. IC 31-19-16.5-3. If a postadoption sibling contact order is violated, the court may not award monetary damages or revoke an adoption decree as a penalty. IC 31-19-16.5-7.

XII.B. Case Law

In **In Re Adoption of P.A.H.**, 992 N.E.2d 774, 776 (Ind. Ct. App. 2013), the Court reversed the adoption court's order which granted post-adoption visitation to the child's uncle. The child had been born with drugs in her system and was placed with Foster Parents. After the parental rights of the child's parents were terminated, both Foster Parents and Uncle petitioned for adoption of the child. The adoption court granted Foster Parents' adoption petition and ordered visitation with the child for Uncle. The Court opined that the adoption court lacked authority to grant post-adoption visitation rights to Uncle, as he is not within any statutory categories of persons entitled to visitation rights, and found that the portion of the adoption court's order granting post-adoption visitation to Uncle with the child was void *ab initio*.

In **In Re Marriage of J.S. and J.D.**, 941 N.E.2d 1107, 1108, 1110-11 (Ind. Ct. App. 2011) (Crone, J. concurring in result), the Court reversed the dissolution court's order granting Birth Father visitation with his child who had been adopted by Adoptive Parents. The Court remanded the case with instructions to vacate the visitation order. Birth Father filed a petition to establish visitation with the child in the dissolution proceeding and joined Adoptive Parents as necessary parties to his visitation petition. The trial court held a hearing on the merits of the visitation petition, issued a judgment granting Birth Father's visitation petition on the grounds that Birth Father qualified as a third-party nonparent custodian whose court-ordered visitation with the child was in her best interests. The Court concluded that IC 31-19-16-2 is the exclusive means for

asserting visitation rights and Birth Father did not follow the procedures listed therein. The Court quoted IC 31-19-16-2, which provides the means for a birth parent to obtain postadoption visitation privileges and In Re Visitation of A.R. 723 N.E.2d 476, 479 (Ind. Ct. App. 2000). The A.R. Court specifically rejected the argument that the birth parent should be permitted to petition for visitation as a nonparent third party.

In **In Re M.B.**, 921 N.E.2d 494, 495, 498 (Ind. 2009), the Indiana Supreme Court held that conditioning the voluntary termination of parental rights on continuing post-adoption visitation irreconcilably conflicts with Indiana adoption law and is not permitted. Mother contended that she had voluntarily agreed to the termination subject to continued and ongoing visitation with her children, only to have that visitation right terminated at a hearing of which she received no notice and no opportunity to be heard. The Court stated:

> We hold that [Mother's] parental rights remain terminated and that she is entitled to no relief in that regard. She consented to the termination in a proceeding that appears to us to have accorded with all relevant law, save the visitation proviso. While she retains an enforceable right as to the visitation proviso, this does not create any basis for reopening the termination of parental rights proceeding.
>
> Having previously granted transfer, we affirm the trial court's acceptance of Mother's voluntary termination of her parental rights to the Children. We reverse the trial court's decision to terminate Mother's visitation rights at the three month CHINS review hearing and remand this case to the trial court with instructions that should the State continue to seek termination of Mother's visitation rights, the court consider the request at a hearing that accords with the requirements discussed in this opinion. Id. at 502 (footnote omitted).

See the following cases which discuss postadoption birth parent visitation, postadoption sibling visitation, and grandparent visitation: **Youngblood v. Jefferson County Div. of Family and Children**, 838 N.E.2d 1164, FN.4 (Ind. Ct. App. 2005) (Court noted that the term "open adoption" is "one in which the natural parent has visitation rights with her child" and "is not recognized in Indiana." Despite this, there are provisions by which a birth parent may receive postadoption contact privileges); **In Re Adoption of T.L.W.**, 835 N.E.2d 598, 602 (Ind. Ct. App. 2005) (trial court did not err in denying birth mother's Ind. Trial Rule 60(B) motion to enforce postadoption visitation filed fifteen months after adoption decree; decree did not include post adoption visitation agreement); **In Re Adoption of T.J.F.**, 798 N.E.2d 867, 874 (Ind. Ct. App. 2003) (Court reversed and remanded because trial court's findings were inadequate to support order entered in 2002 requiring visitation between birth sibling and adopted sibling; adoption decree entered in 1997 was silent on issue of postadoption sibling visitation); **In Re Adoption of J.D.G.**, 756 N.E.2d 509, 512 (Ind. Ct. App. 2001) (visitation rights awarded to maternal grandparents in guardianship did not survive adoption of child by deceased mother's live-in male companion who was not a step-parent or biological relative); **In Re Visitation of A.R.**, 723 N.E.2d 476, 479 (Ind. Ct. App. 2000) (Court held that IC 31-19-16-2 provides "the exclusive means" for a birth parent to acquire postadoption visitation rights; the legislature did not intend that a birth parent's failure to comply with the statute should subsequently act as a means for the birth parent, under the guise of a non-parent third party, to circumvent the statute's requirements).

XIII. POSTADOPTION FINANCIAL ASSISTANCE FOR ADOPTIVE FAMILIES

XIII.A. Overview

Statutes, codes, regulations, and policies regarding postadoption financial assistance for adoptive children and families can be found at the following locations: IC 31-19-26.5; 465 IAC 4-1; 42 U.S.C. 673; 45 CFR 1356.41, and the DCS Policy Manual, Chapter 10 [Adoption]. The DCS

Policy Manual can be found at http://www.in.gov/dcs/. Select "DCS Policies", then select "Child Welfare Policies". Click on "Chapter 10 – Adoption".

DCS and its Central Eligibility Unit (CEU) is responsible for the administration and determination of initial and ongoing eligibility for the Indiana Adoption Program. IC 31-19-26.5-3; DCS Policy Manual, Chapter 10, Section 14. Adoption assistance under the Indiana Adoption Program includes Title IV-E adoption assistance program, a state adoption subsidy, Medicaid, and nonrecurring adoption expenses. 465 IAC 4-1-21. If a petition for adoption contains a request for financial assistance, the court must refer the adoptive petitioners to DCS to complete and submit an Indiana Adoption Program application for a determination of eligibility for federal Adoption Assistance or adoption subsidy. IC 31-19-11-3(a). Only DCS can determine the child's eligibility for financial assistance; the court cannot order payment of either federal or state adoption assistance. IC 31-19-11-3(b) and (c).

The amount of periodic payments under an adoption assistance agreement may not exceed the amount that would be payable by DCS for the monthly care of a child in a foster family home (1) at the time the subsidy agreement is made; or (2) the subsidy is payable; whichever is greater. IC 31-18-26.5-5. Priority for funding is set forth at IC 31-19-26.5-4, IC 31-19-26.5-11, 465 IAC 4-1-26.

XIII.B. Definitions

State adoption subsidy ("SAS") is the payment that is or may be made by DCS pursuant to IC 31-19- 26.5 to an adoptive parent of a child who is: (1) a special needs child; (2) a hard to place child; and (3) not eligible for Title IV-E adoption assistance. 465 IAC 4-1-17. State adoption subsidy agreements ("SAS agreements") are adoption assistance agreements that may include any of the following: (1) periodic payments of a state adoption subsidy on behalf of the child; (2) eligibility for Medicaid; (3) payment of nonrecurring adoption expenses. 465 IAC 4-1-18.

A Title IV-E adoption assistance agreement is an adoption assistance agreement entered into by the adoptive parents and DCS that may include any of the following: (1) periodic payment of Title IV-E adoption assistance on behalf of the child; (2) eligibility for Medicaid; (3) payment of nonrecurring adoption expenses. 465 IAC 4-1-19.

Adoption subsidies are payments by DCS to an adoptive parent of a child with special needs after the adoption decree has been entered and during the time the child is residing with and supported by an adoptive parent. IC 31-19-26.5-1. Adoption assistance is defined as payments made or benefits provided by DCS to an adoptive parent pursuant to an adoption assistance agreement. 465 IAC 4-1-3.

Adoption assistance agreement is defined as a written agreement between DCS and an adoptive parent regarding adoption assistance, including Title IV-E adoption assistance agreements, state adoption subsidy agreements, and any agreements or court orders entered in compliance with IC 31-19-26 before its repeal. These agreements (1) include the amount of any payments that DCS will make; (2) state that the agreement remains in effect regardless of where the adoptive parents reside; and (3) includes any applicable terms and conditions relating to continuation, termination, suspension, or future changes in the terms or amount of any payments. 465 IAC 4-1-5.

Adoption assistance periodic payment amount means the payment amount specified in an adoption assistance agreement, other than nonrecurring adoption expenses. 465 IAC 4-1-6. Nonrecurring adoption expense agreement means an adoption assistance agreement, or portion of an adoption assistance agreement, that provides for payment or reimbursement for reasonable and

necessary adoption fees, court costs, attorney fees, and other expenses that are directly related to the adoption of a special needs child. 465 IAC 4-1-12.

A sibling group is defined as a group of two or more children who are children of the same parent; are or will be adopted by the same adoptive parent; and are residing or will reside in the same home. 465 IAC 4-1-14.

A "child with special needs" is a child who (1) is a hard-to-place child; and (2) meets the requirements of a special needs child, as specified in 42 U.S.C. 673(c) and DCS rules. IC 31-19-26.5-2. For purposes of the Indiana Administrative Code, the qualifying characteristics of a special needs child are described in 465 IAC 4-1-22(b).

"Hard to place child" is defined as a child who is "disadvantaged because of ethnic background; race; color; language; physical, mental, or medical disability; or age; or because the child is a member of a sibling group that should be placed in the same home." IC 31-9-2-51. DCS "shall consider a child who is two (2) years of age or older a hard to place child for determining eligibility for state adoption subsidies." IC 31-19-27-1.5. For purposes of the Indiana Administrative Code, "hard to place child" means a child as defined in IC 31-9-2-51 who is: (1) eligible for the special needs adoption program (IC 31-19-27); and (2) disadvantaged because the child is a ward who is either at least two years old, or is a member of a sibling group in which at least one child is at least two years old. 465 IAC 4-1-11.

XIII.C. Eligibility

DCS and its Central Eligibility Unit (CEU) is responsible for the administration and determination of eligibility for the Indiana Adoption Program. IC 31-19-26.5-3; DCS Policy Manual, Chapter 10, Section 14. Adoption assistance includes Title IV-E adoption assistance program, a state adoption subsidy, Medicaid, and nonrecurring adoption expenses. 465 IAC 4-1-21.

In order to be eligible for any adoption assistance, the agreement for the particular kind of adoption assistance must be negotiated and signed before or at the time the court enters a final decree of adoption. IC 31-19-26.5-3; 465 IAC 4-1-22(b) through (e); 465 IAC 4-1-23(3); 465 IAC 4-1-12.

The Title IV-E adoption assistance program is a periodic payment to an adoptive parent on behalf of an eligible child, pursuant to 42 U.S.C. 673 and 465 IAC 4-1. 465 IAC 4-1-21(1). The state adoption subsidy is a periodic payment to an adoptive parent on behalf of a child eligible for a state adoption subsidy pursuant to IC 31-19-26.5 and 465 IAC 4-1. 465 IAC 4-1-21(2). Medicaid as an adoption assistance program means participation in Indiana's Title XIX Medicaid program under IC 12-15 and all applicable provisions of 405 IAC. 465 IAC 4-1-21(3). Nonrecurring adoption expenses are payments or reimbursements for reasonable and necessary adoption fees, court costs, attorney fees, and other expenses that are actually incurred and directly related to the adoption of a special needs child; this is subject to limitations under 465 IAC 4-1-24(5) and excludes expenses that were incurred or paid in violation of any federal or state law or were reimbursed to the adoptive parent from another source of funds. 465 IAC 4-1-21(4).

In order to qualify for any type of adoption assistance program, the adoptive child and the adoptive parents must meet general eligibility requirements. 465 IAC 4-1-22(a). There are also specific eligibility requirements, which will be discussed in the various applicable sections below. DCS will prepare the agreement using its own forms. 465 IAC 4-1-22(a). The adoptive child must meet the following general eligibility requirements (465 IAC 4-1-22(a)):

(1) Is a ward of DCS when the petition for adoption is filed, or otherwise meets the requirements in 42 U.S.C. 673.
(2) Is a special needs child.
(3) Is either a United States citizen, is a qualified alien who is not ineligible for a federal public benefit under 8 U.S.C. 1613.
(4) DCS has completed the required criminal history check.
(5) A Title IV-E adoption assistance agreement or state adoption subsidy agreement has been signed by the adoptive parent and DCS before the final decree of adoption.

One of the requirements for any type of adoption assistance is that the child is a special needs child. An adoptive child qualifies as a special needs child if the child meets all of the following conditions (465 IAC 4-1-22(b)):

(1) DCS has determined, as to each identified parent of the child, that the child cannot or should not be returned to, or placed in, the home of the child's parent and:
  (A) parental rights of the child's parent have been terminated; or
  (B) DCS filed a petition to terminate the parental rights of the child's parent; or
  (C) the child's parent has signed a consent to the adoption; or
  (D) consent of the child's parent is not required under IC 31-19-9-8.
(2) One of the following conditions exists:
  (A) The child is at least two years of age; or
  (B) The child is a member of a sibling group in which one child is at least two years of age; or
  (C) The child has a medical condition or a physical, mental, or emotional disability that is expected to require continuous or long term medical treatment, as determined by a physician licensed in Indiana or another state or territory.
(3) Except as provided in subsection (c), reasonable but unsuccessful efforts have been made to place the child in an adoptive home without providing adoption assistance, including, but not limited to:
  (A) Internet posting of non-identifying information about the child;
  (B) photo listing of the child in a picture book published and distributed by DCS (or any similar program) for a minimum of six months; or
  (C) other unsuccessful efforts by DCS or a licensed child placing agency to find adoptive parents who can meet the child's needs without adoption assistance.

The “reasonable efforts” to place the child for adoption without adoption assistance is not required if doing so would be against the child’s best interest because of the existence of significant emotional ties with a prospective adoptive parent while in the care of such adoptive parent as a foster child, or other special factors or circumstances documented in the child's case file, including placement with a relative. 465 IAC 4-1-22(c).

The adoptive parent must meet the general eligibility requirements as well, which begin at 465 IAC 4-1-22(d). Each adoptive parent, and every person in the adoptive parent’s household who is fourteen years old or older, must successfully complete a criminal history check, and must successfully complete a check of all applicable sex or violent offender registries. 465 IAC 4-1-22(d). DCS specifies the time and manner of these checks. 465 IAC 4-1-22(d).

Adoption assistance is not available if the criminal history check reveals that an adoptive parent or household member (465 IAC 4-1-22(e)):

(1) has ever been convicted of a felony listed in 42 U.S.C. 671(a)(20)(A) involving:
  (A) child abuse or neglect;
  (B) spousal abuse (domestic battery);

(C) a crime against a child (including child pornography); or
(D) a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery;
(2) has been convicted, within five years before the date of the check, of a felony based on physical assault or battery against an adult or a drug related or alcohol related offense;
(3) has been convicted of a felony that would prohibit the court from granting a petition for adoption by the adoptive parent or household member (IC 31-19-11-1(c));
(4) is a sex or violent offender, or a sexually violent predator, for whom the court is prohibited from granting a petition for adoption (C 31-19-11-1(d));
(5) has ever been convicted of a misdemeanor relating to the health and safety of a child; or
(6) has a record of any of the following, unless DCS approves a waiver request:
(A) Any felony conviction.
(B) Four or more misdemeanor convictions.
(C) A juvenile adjudication for an act that, if committed by an adult, would be a felony described in IC 31-19-11-1(c).
(D) A substantiated determination of child abuse or neglect, under IC 31-33-8-12, or comparable law in any state.

The waiver that is available under 465 IAC 4-1-22(e)(6) is clarified at 465 IAC 4-1-22(f). An adoptive parent may request a waiver of any record falling under 465 IAC 4-1-22(e)(6). The waiver request may be considered and granted or denied under the procedure and criteria of DCS policies relating to evaluating background checks for adoptions. 465 IAC 4-1-22(f). If the waiver is granted, DCS cannot deny adoption assistance eligibility based solely on the existence of a record described in 465 IAC 4-1-22(e)(6). 465 IAC 4-1-22(f).

XIII.C. 1 Eligibility for Title IV-E Adoption Assistance Program

In order for an adoptive child to be eligible for the Title IV-E adoption assistance program, DCS must determine that the child meets all of the Title IV-E adoption assistance program eligibility requirements, which are detailed at 42 U.S.C. 673. 465 IAC 4-1-23(1).

The adoptive child must also meet the general eligibility requirements discussed above, meaning that the child must be a ward of DCS when the petition for adoption is filed, or otherwise meets the requirements in 42 U.S.C. 673, and must be a special needs child, must be a United States citizen or a qualified alien who is not ineligible for a federal public benefit. Furthermore, DCS must have completed the required criminal history check, the adoptive family must meet all the background check requirements, and the Title IV-E adoption assistance agreement must be signed by the adoptive parent and DCS before the final decree of adoption. For more detailed discussion, see this Chapter at XIII.C.; see also 465 IAC 4-1-22(b) through (e).

If the child is eligible for the Title IV-E adoption assistance program, the child or adoptive parent may receive the negotiated adoption assistance periodic payment (which cannot exceed the foster care per diem amount the child would receive if the child were in foster care), nonrecurring adoption expenses, and Medicaid. 465 IAC 4-1-19; IC 31-18-26.5-5.

XIII.C. 2 Eligibility for State Adoption Subsidy

Even if a child is not eligible for the Title IV-E Adoption Assistance Program, the child may still be eligible for the state adoption subsidy. In order for a child to be eligible for the state adoption subsidy periodic payments, DCS must determine that the child is not eligible for the Title IV-E adoption assistance program, and that the child is a hard to place child. 465 IAC 4-

1-23(2); IC 31-19-26.5-3. For a discussion of the definition of "hard to place child", see this Chapter at XIII.B.

The adoptive child must also meet the general eligibility requirements discussed above, meaning that the child must be a ward of DCS when the petition for adoption is filed, or otherwise meets the requirements in 42 U.S.C. 673, and must be a special needs child, must be a United States citizen or a qualified alien who is not ineligible for a federal public benefit. Furthermore, DCS must have completed the required criminal history check, the adoptive family must meet all the background check requirements, and the state adoption subsidy agreement must be signed by the adoptive parent and DCS before the final decree of adoption. For more detailed discussion, see this Chapter at XIII.C.; see also 465 IAC 4-1-22(b) through (e).

If the child is deemed eligible for the state adoption subsidy, the child or their adoptive parent may receive the negotiated adoption assistance periodic payment (which cannot exceed the foster care per diem amount the child would receive if the child were in foster care), and nonrecurring adoption expenses. 465 IAC 4-1-18; IC 31-18-26.5-5. The child may also receive Medicaid if the child is also determined to have a medical, physical, mental, or emotional condition that either exists or to which the child has a genetic predisposition prior to the adoption finalization. 465 IAC 4-1-18.

XIII.C. 3 Eligibility for Medicaid

A child is automatically eligible for Medicaid if the child has been determined to be eligible for the Title IV-E adoption assistance program, and that agreement has been signed. 465 IAC 4-1-23(3).

If a child has been determined to be eligible for the State Adoption Subsidy and that agreement has been signed, the child may be eligible for Medicaid if the child has, or is likely to have due to a family history, prenatal exposure or other factors, a medical condition or disability, that existed before the filing of the adoption petition. 465 IAC 4-1-23(3); IC 31-19-26.5-6

Both pathways for a child to be eligible for Medicaid require that the child is also either eligible for the Title IV-E adoption assistance program or the state adoption subsidy, which in turn, means the child and the adoptive household must meet those general and specific eligibility requirements. See this Chapter at XIII.C. for more detailed discussion of those requirements.

XIII.C. 4 Eligibility For Nonrecurring Adoption Expenses

A nonrecurring adoption expense agreement means an adoption assistance agreement, or portion of an adoption assistance agreement, that provides for payment or reimbursement for reasonable and necessary adoption fees, court costs, attorney fees, and other expenses that are directly related to the adoption of a special needs child, as provided in 42 U.S.C. 673(a)(6)(A), 45 CFR 1356.41, and 465 IAC 4-1-21(4). 465 IAC 4-1-12.

In order for an adoptive parent to be eligible to receive payment for nonrecurring adoption expenses, DCS must determine that the child is a special needs child and meets all of the federal eligibility requirements for nonrecurring adoption expenses as set forth in 42 U.S.C. 673 and 45 CFR 1356.41. 465 IAC 4-1-23(4).

Nonrecurring adoption expenses which an adoptive parent is entitled to receive cannot exceed the amount allowable by state or federal law per eligible child. 465 IAC 4-1-24(5). A request for payment of nonrecurring adoption expenses pursuant to a signed NRAE agreement must be submitted to DCS within two years of the entry of a final decree of adoption, or if there is no final decree, the earlier of the notice to DCS that adoption will not be pursued, or the filing of a motion to dismiss a petition for adoption. 465 IAC 4-1-24(6).

If the child is eligible to receive a nonrecurring adoption expense payment, the adoptive family may receive a one-time expenses payment of up to $1,500.00, which is the amount set in the DCS policy manual. See DCS Policy annual, Chapter 10, Section 16.

XIII.D. Duties and Responsibilities of Adoptive Parents

Adoptive parents or their attorneys must negotiate the amount of the Title IV-E adoption assistance agreement or state adoption subsidy agreement with DCS. 465 IAC 4-1-24(1)(a). Before any payment can be made under any adoption assistance agreement, and before Medicaid coverage can begin, adoptive parents must submit the final decree of adoption and the signed adoption assistance agreement to DCS. 465 IAC 4-1-24(1)(E) and 465 IAC 4-1-24(2). Adoptive parents or their attorneys must submit any requests for nonrecurring adoption expenses pursuant to a signed agreement to DCS within two years of the entry of an adoption decree, or if there is no final decree of adoption, the earlier of notice to the DCS of a decision not to proceed with the adoption, or the filing of a motion to dismiss a petition for adoption. 465 IAC 4-1-24(5).

Adoptive parents must submit a completed Indiana adoption program application to the adoptive child's family case manager, or to DCS within ten days after a petition for adoption is filed, and supply additional information if DCS so requests. 465 IAC 4-1-25(b). When DCS makes a final offer, the adoptive parents may either sign and return the adoption assistance agreement to DCS, or submit a timely and proper request for administrative review of the periodic payment amount. 465 IAC 4-1-25(f).

Adoptive parents who have adoption assistance agreements with DCS must submit complete adoption program status reports. 465 IAC 4-1-27(a); IC 31-19-26.5-8. The forms of these reports and the times of these reports are determined by DCS. 465 IAC 4-1-27(a). If the adoptive parents either fails to submit a report on time, or submits a report DCS believes is inaccurate, DCS can perform an assessment to determine whether a reportable event or other change in circumstances has occurred that may require modification or suspension of periodic payments, or termination of the agreement. 465 IAC 4-1-27(b).

Reportable events are covered by 465 IAC 4-1-28. Adoptive parents who have adoption assistance agreements with DCS must notify DCS in writing within ten days of any event that is a change in circumstances that could affect the continuing eligibility or the amount of periodic payments. 465 IAC 4-1-28(a). If the adoptive parent is unavailable to or otherwise fails to provide this notice, a person acting on their behalf may do so. 465 IAC 4-1-28(b). Reportable events include, but are not limited to (465 IAC 4-1-28(c)):

(1) an adoptive parent moves to a new residence;
(2) the adoptive child:
    (A) moves out of the home of the adoptive parent;
    (B) is placed outside the adoptive parent's home in another home or residential facility;
    (C) is married;
    (D) is no longer attending school;
    (E) receives notice of a call to active duty in the United States armed services or the national guard, as specified in IC 5-9-4-1(a)(2); or

(F) has new health insurance coverage;
(3) the adoptive parent is no longer legally responsible for care, supervision, or support of the child;
(4) another person or agency is supporting the adoptive child in whole or in part;
(5) the adoptive child or an adoptive parent dies; or
(6) if the adoption decree was entered after the adoptive child's sixteenth birthday, and periodic payments are being made after the adoptive child's eighteenth birthday, the adoptive child is:
(A) not employed for at least eighty hours per month;
(B) not attending school or a vocational or educational certification or degree program;
(C) not participating in a program or activity designed to promote or remove barriers to employment; or
(D) no longer incapable of performing any of the activities in clauses (A) through (C) due to a documented medical condition.

Adoptive parents have the ability to submit a request for modification of the periodic payment amount. 465 IAC 4-1-31. For more information on this, see this Chapter at XIII.G. If an adoption assistance agreement was terminated, adoptive parents may be required to repay money in certain circumstances. See this Chapter at XIII.J.

XIII.E. Duties and Responsibilities of DCS

Forms for the Indiana adoption assistance program must be available on DCS's website and through local DCS offices. 465 IAC 4-1-25(a). Once a completed adoption program application is submitted, DCS may ask for additional information for purposes of determining eligibility, and may set a time deadline for the submission of this information. 465 IAC 4-1-25(b). DCS must review the application, determine eligibility, and issue a final eligibility determination within forty-five days of receiving a complete application. 465 IAC 4-1-25(c).

A DCS attorney must negotiate the amount of the Title IV-E adoption assistance agreement or state adoption subsidy agreement with adoptive parents or their attorneys, and this should take into consideration the circumstances of the adoptive parent and the needs of the adoptive child. 465 IAC 4-1-24(1)(A); 465 IAC 4-1-25(d). DCS must determine the intervals at which the periodic payment will be made, and then so make the payments. 465 IAC 4-1-24(1)(C). DCS must begin the adoption assistance agreement after receiving a copy of the final decree of adoption and the signed adoption assistance agreement, and the periodic payment is effective as of the date of entry of the final decree of adoption. 465 IAC 4-1-24(1)(E) and (F).

If DCS determines that negotiations have not resulted in an agreement, DCS must send a final offer letter to the adoptive parents or their attorneys. 465 IAC 4-1-25(e). Once DCS receives either a signed adoption assistance agreement or a timely request for administrative review, and a final decree of adoption, DCS must begin payment of the periodic payment amount stated in the signed agreement or amendment. 465 IAC 4-1-25(g). DCS must retroactively pay the revised periodic payment amount, if such a revision is made after administrative review or hearing. 465 IAC 4-1-25(h).

DCS can unilaterally and without the consent of adoptive parents, institute an across-the-board reduction of the state adoption subsidy payment amount specified in the adoption assistance agreement under certain circumstances which relate to the insufficiency of funds. 465 IAC 4-1-24(2). If DCS is going to make such a reduction, DCS must send notice to the adoptive parent. 465 IAC 4-1-24(2). The notice must be sent at least thirty days before the reduction, and must

state the effective date and amount of the reduced periodic payment, the reasons for the reduction, and the estimated time and conditions for expiration of the reduction. 465 IAC 4-1-24(2).

If an adoptive parent requests a modification of an adoption assistance agreement, DCS may request additional information from the adoptive parent. See this Chapter at XIII.H. DCS may suspend periodic payment under a state adoption subsidy agreement under certain circumstances. See this Chapter at XIII.I. DCS may also terminate adoption assistance agreements under certain circumstances. See this Chapter at XIII.J.

XIII.F. Payment Under Adoption Assistance Agreements

Nonrecurring adoption expenses, pursuant to a signed agreement, cannot exceed the amount allowable by state or federal law per eligible child. 465 IAC 4-1-24(5). The periodic payment amount under a Title IV-E adoption assistance agreement, or state adoption subsidy agreement, cannot exceed the foster care maintenance payment rate that would have been paid on behalf of the child in foster care. 465 IAC 4-1-24(1)(B). The periodic payment amount must be paid at regular intervals, and is subject to increase or decrease, either by agreement between DCS and the adoptive parents or in DCS's discretion. 465 IAC 4-1-24(1)(C) and (D). DCS can unilaterally and without the consent of adoptive parents, institute an across-the-board reduction of the state adoption subsidy payment amount specified in the adoption assistance agreement under certain circumstances which relate to the insufficiency of funds. 465 IAC 4-1-24(2). For more information, see this Chapter at XIII.E.

DCS must begin the adoption assistance agreement after receiving a copy of the final decree of adoption and the signed adoption assistance agreement, and the periodic payment is effective as of the date of entry of the final decree of adoption. 465 IAC 4-1-24(1)(E) and (F).

Once DCS receives either a signed adoption assistance agreement or a timely request for administrative review, and a final decree of adoption, DCS must begin payment of the periodic payment amount stated in the signed agreement or amendment. 465 IAC 4-1-25(g). DCS must retroactively pay the revised periodic payment amount, if such a revision is made after administrative review or hearing. 465 IAC 4-1-25(h).

Funding for the various adoption assistance programs is covered at 465 IAC 4-1-26. The money available to DCS to fund these programs must be determined periodically on the basis of amounts appropriated by statute for adoption assistance payments, or placed in the adoption assistance account. 465 IAC 4-1-26(a). Subsections (b) and (c) provide for the priority of adoption assistance programs.

XIII.G. Continuation of Adoption Assistance Past Age Eighteen

Generally, adoption assistance agreements terminate when the adoptive child turns eighteen years old, unless the agreement is continued under certain conditions. 465 IAC 4-1-30(a); IC 31-19-26.5-9(b). In order for adoption assistance to continue past age eighteen, the continuance must have been approved by DCS, or ordered by a court based on an agreement entered into before January 1, 2009, for payment of a subsidy under IC 31-19-26 (repealed). 465 IAC 4-1-32(a); IC 31-19-26.5-9(b). A completed continuation application must be received by DCS between ninety days prior and thirty days prior to the child's eighteenth birthday. 465 IAC 4-1-32(f). Unless otherwise provided in subsection (h), continued adoption assistance will terminate by the adoptive child's twenty-first birthday. 465 IAC 4-1-32(g).

Adoption assistance may continue past age eighteen if DCS determines, based on its own policy and guidelines, that the child has a mental or physical disability that warrants the continuation of

assistance. 465 IAC 4-1-32(b). In order for adoption assistance to continue for this reason, there must be documentation from a medical doctor, psychiatrist, or psychologist licensed in Indiana or in the state in which the child lives, and the documentation must show a mental or physical disability that is expected to require continuous or long term treatment and limits the child's ability to be self-supporting. 465 IAC 4-1-32(b).

DCS may also continue adoption assistance past age eighteen if DCS determines, based on its own policy and guidelines, that the child is or will be enrolling in and attending an accredited secondary school for purposes of completing graduation requirements of the school, a postsecondary educational institution described in IC 21-17-6-1, or a course of career or technical education leading to gainful employment. 465 IAC 4-1-32(c). The adoptive parent must also meet the requirements of IC 31-19-26.5-9(b)(2), which relates to the child's financial support and dependent status. 465 IAC 4-1-32(c). If adoption subsidies are going to continue past the age of eighteen for these reasons, the amount of the periodic payment must be determined by agreement between DCS, the adoptive child, and the adoptive parent. 465 IAC 4-1-32(d).

If an adoptive child is the subject of an adoption decree entered after the child's sixteenth birthday, the child will be approved for continuation of Title IV-E adoption assistance after age eighteen if there is documentation that the child is or will be: (1) employed for at least eighty hours per month; (2) attending school or a vocational or educational certification or degree program; (3) participating in a program or activity designed to promote or remove barriers to employment; or (4) incapable of performing any of these activities due to a documented medical condition. 465 IAC 4-1-32(e). Adoption assistance continued for these reasons will terminate by the child's twentieth birthday. 465 IAC 4-1-32(h).

XIII.H. Modification of Adoption Assistance Agreements

Adoptive parents may request a modification of the amount of the periodic payment received under an adoption assistance agreement. 465 IAC 4-1-31(a). No more than one such request can be made in a twelve ninth time frame. 465 IAC 4-1-31(b).

If an adoptive parent makes such a request, DCS can request information relevant to the consideration of the modification request from the adoptive parent or any other source. 465 IAC 4-1-31(c). DCS must notify the adoptive parent of its decision within sixty days of receiving the information DCS requested. 465 IAC 4-1-31(c). The periodic payment still cannot exceed he foster care maintenance payment rate that the child would have received if the child were in foster care. 465 IAC 4-1-31(d).

Modifications may be limited to a certain period of time, and once that timeframe has expired, the periodic payment amount will return to its prior level. 465 IAC 4-1-31(e). A temporary modification under this subsection may be extended by request of the adoptive parent and agreement of DCS. 465 IAC 4-1-31(e).

Any modifications made to an adoption assistance agreement must be written amendments to the agreement itself. 465 IAC 4-1-31(f).

XIII.I. Suspension of Adoption Assistance Agreements

It is possible for DCS to suspend payments, and thus, make no periodic payments, under a state adoption subsidy agreement. 465 IAC 4-1-29(e); IC 31-19-26.5-8(c). This may occur if either (1) DCS has not received the required status report within ten days after its due date, or (2) the status report as submitted to the department does not substantially comply with the required DCS form

and instructions. 465 IAC 4-1-29(a). This suspension can continue until the required status report has been submitted, reviewed, and approved by DCS. 465 IAC 4-1-29(a).

DCS may also suspend payments under a state adoption subsidy agreement if the adoptive child has become a ward of DCS, and DCS is paying foster care maintenance payments for out-of-home care and supervision of the child. 465 IAC 4-1-29(b).

If an adoptive parent is no longer providing financial support to the child, DCS can suspend payments. 465 IAC 4-1-29(c). However, DCS cannot automatically suspend payment in this circumstance only because the adoptive child is temporarily residing in a home or facility other than the home of the adoptive parent, and is being supported in that out-of-home placement by a person or agency other than the adoptive parent. 465 IAC 4-1-29(d). In the case where a child is residing out of the home in this circumstance, DCS must determine by a preponderance of evidence that the adoptive parent is not providing financial support for the child while the child is residing in another home or facility before DCS may suspend payments. 465 IAC 4-1-29(d). DCS can reinstate these suspended payments with any necessary and appropriate modifications agreed to between DCS and the adoptive parent, if at any time the adoptive parent resumes regular financial support of the child. 465 IAC 4-1-29(c).

If the adoptive child is the subject of a pending CHINS case or a pending delinquency case, DCS request the adoptive parent to agree to a modification of the periodic payment amount provided in the adoption assistance agreement. 465 IAC 4-1-29(f). If such an agreement fails, DCS must request the court to determine the obligation of the adoptive parent to provide financial support for the child while the child is residing in an out-of-home placement approved or ordered by the court. 465 IAC 4-1-29(f).

If the adoptive child is living out of the home and the child is not the subject of a pending CHINS or delinquency case, DCS can request the adoptive parent to agree to a modification of the periodic payment amount. 465 IAC 4-1-29(g). If the adoptive parent and DCS cannot agree, DCS can administratively suspend the parent's periodic payment amount, in whole or part. 465 IAC 4-1-29(g).

DCS must suspend payments under an adoption assistance agreement if the child no longer meets the requirements of 465 IAC 4-1-32(c) or (e) [addressing continuation of adoption assistance agreements beyond age 18]. 465 IAC 4-1-29(h). DCS can reinstate payments under this subsection if the child subsequently meets the eligibility requirements, with any necessary, appropriate, and agreed to modifications. 465 IAC 4-1-29(h).

XIII.J. Termination of Adoption Assistance Agreements

Generally, adoption assistance agreements terminate when the adoptive child turns eighteen years old, unless the agreement is continued under certain conditions. 465 IAC 4-1-30(a). For terminations of adoptive assistance for this reason, DCS must provide notice of termination of the adoption assistance agreement to the adoptive parent at least ninety days before the effective date. 465 IAC 4-1-30(c). The notice must include information and instructions about continuing eligibility past age eighteen and procedures under 465 IAC 4-1-32. 465 IAC 4-1-30(c). For more information on continuing adoption assistance past age eighteen, see this Chapter at XIII.G.

An adoption assistance agreement must terminate if any of the following events happen (465 IAC 4-1-30(b); IC 31-19-26.5-8(c); IC 31-19-26.5-9(a)):

(1) The adoptive child becomes emancipated.

(2) The adoptive child starts active duty in the United States armed services or the national guard.
(3) The adoptive parent is no longer legally responsible for the care, supervision, or support of the adoptive child.
(4) The adoptive child dies.
(5) Each adoptive parent of the child has died.
(6) The adoptive child's adoption is terminated.
(7) The parent-child relationship between the adoptive child and each adoptive parent is terminated, or comparable law in another state.

If an adoption assistance agreement will terminate for any of these reasons, DCS must provide notice of termination to the adoptive parent within ten days after DCS receives notice of the occurrence. 465 IAC 4-1-30(d). The notice must include a statement of the reason or reasons for termination as determined by DCS. 465 IAC 4-1-30(d).

The effective date of termination of an adoption assistance agreement is the date of the occurrence of an applicable event. 465 IAC 4-1-30(e). If the adoptive parent received a payment after the date of the applicable event, which is the effective date of termination, the adoptive parent must repay that payment to DCS. 465 IAC 4-1-30(f).

XIV. REVOCATION OF ADOPTION

Indiana statutes do not directly address the revocation of an adoption; however, IC 31-19-13-3 does provide that the original birth certificate shall be restored upon notice of annulment or revocation of an adoption. Other statutes make similar provisions in the event of the revocation of an adoption decree. See IC 31-19-12-1 through -4.

In **Mariga v. Flint**, 822 N.E.2d 620, 626-29, 632 (Ind. Ct. App. 2005), the Court affirmed the Tippecanoe Circuit Court's denial of Adoptive Mother's petition to vacate her adoption of her former domestic partner's biological children. The Court was unpersuaded by the argument that a same-sex partner of a biological parent cannot be a stepparent pursuant to the stepparent adoption statute, and cited its decision in In Re Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004) that a same-sex partner may adopt the biological children of her partner without divesting the parental rights of the biological parent. The Court also stated that K.S.P. applies retroactively. There was no evidence that the adoption was procured by fraud, nor any evidence that Mother made any knowing or reckless material misrepresentations of a past or existing fact to Adoptive Mother or the Court at the time that the adoption was sought.

In **Matter of Adoption of T.B.**, 622 N.E.2d 921, 924-5 (Ind. 1993), the Indiana Supreme Court stated that public policy disfavors a revocation of an adoption, because an adoption is intended to bring a parent and child together in a permanent relationship, to bring stability to the child's life, and to allow laws of interstate succession to apply with certainty to adopted children. The Court went on to state that an order of adoption is a judgment and may be set aside pursuant to Ind. Trial Rule 60B. Adoptive Mother sought to set aside her adoption based on dual theories of fraud by DCS and the best interests of the child. The Supreme Court reversed the trial court's revocation of adoption, stating that the record might support a finding that DCS was negligent in failing to discover that the child was a victim of sexual abuse, but fraud had not been proven. The Court also held that Adoptive Mother was not a proper party to bring an action to terminate the parent-child relationship on her best interest assertion; therefore, the trial court should enter judgment against Adoptive Mother on her petition for revocation.

In **County Department of Pub. Welfare v. Morningstar**, 151 N.E.2d 150, 155 (Ind. Ct. App.1958), the Court affirmed the trial court's finding that DCS had perpetrated a fraud on the adoptive parents by misrepresenting the child's background. The adoption was set aside and the child was made a ward of the county welfare board, the legal predecessor to DCS.