

# Children's Law Center of Indiana



## Adoption & Paternity

10/05/2009

In **In Re Adoption of E.L.**, 913 N.E.2d 1276 (Ind. Ct. App. 2009), the Court affirmed in part, reversed in part, and remanded the trial court's dismissal of the petition to establish paternity filed by Putative Father on his own behalf and on behalf of the child, as next friend. When the child was born, June 20, 2004, Mother was unmarried and no father was listed on the birth certificate. No paternity has been established in a paternity proceeding or by paternity affidavit. Based on a "paternity test" taken shortly after the child's birth, Mother and Putative Father believed Putative Father was the child's father. During the child's first year, Putative Father cared for the child two nights a week, but Putative Father did not reside with Mother or provide financial support. Putative Father's mother frequently purchased clothing for the child during the early months, but moved to Florida when the child was six months old. In 2006, Putative Father moved to Florida and ceased having regular contact with the child. Mother married another man in January 2006 and the child has resided with Mother and her husband (Stepfather) ever since. On May 7, 2007, Stepfather filed a petition to adopt the child with Mother's consent to the adoption attached. Putative Father, who had returned to Indianapolis, refused consent when requested by Mother. On May 21, 2007, Putative Father filed a paternity petition on his own behalf and on behalf of the child, naming himself and the child as "Co-Petitioners." The petition requested the trial court find Putative Father to be the child's father and determine his parenting time and child support obligation. The trial court consolidated the paternity matter with the adoption matter under the adoption case number. The GAL, appointed November 20, 2007, filed a report on April 18, 2008, recommending that Stepfather's adoption be denied and paternity established in Putative Father. On April 29, 2008, Stepfather orally moved the trial court to dismiss the paternity petition on the ground that Putative Father was barred by Indiana statute from petitioning for paternity. Following a hearing, submission of briefs, and Stepfather's filing of a Putative Father Registry Affidavit from the Indiana Department of Health showing that, as of October 16, 2008, no person had registered as the child's putative father with the Indiana Putative Father Registry, on February 18, 2009, the trial court entered an order dismissing the paternity cause, the caption of which listed the child, by next friend Putative Father and Putative Father as "Co-Petitioners." An amended order was issued April 22, 2009, to correct typographical errors in the original order but was identical in all other respects. Putative Father appealed.

**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;" because Putative Father's consent is implied, he "is not entitled to establish paternity" while the adoption is pending (IC 31-19-9-14); and, even if Putative Father had timely registered with the putative father registry, his instant petition for paternity is 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 are not applicable here.** *Id.* at 1280-81. The Court opined that (1) the trial court's dismissal of the paternity petition was based on IC 31-19-9-12(1); (2) the trial court interpreted IC 31-19-9-12(1) to mean consent to adoption is implied if the putative father fails in either respect, that is, fails to file either a paternity petition or a motion contesting adoption within 30 days' notice of the adoption petition; (3) after the trial court's dismissal of the paternity petition, the Indiana Supreme Court issued its decision in *In Re B.W.*, 908 N.E.2d 586 (Ind. 2009) authorizing a court to find implied consent to adoption under IC 31-19-9-12(1) only when a putative father "fails in *both* respects," that is, fails to timely file *both* a motion contesting adoption and a paternity petition, *Id.* at 592 (emphasis in original); and (4) because Putative Father timely filed a paternity petition, his failure to file a motion contesting adoption does not imply consent to adoption under IC 31-19-9-12(1) and therefore does not bar him from petitioning for paternity pursuant to IC 31-19-9-14. *E.L.* at 1279. The Court found, however, that (1) IC 31-19-5 governs Indiana's Putative Father Registry and imposes registration requirements for putative fathers who wish to contest their child's adoption or petition for paternity while the adoption is pending; (2) inasmuch as Putative Father meets the statutory definition of a putative father at IC 31-9-2-100, he is subject to the registration requirements of IC 31-19-5; (3) a putative father who fails to register with the Putative Father Registry within the time specified by IC 31-19-5-12 (the later of 30 days after the child's birth or the earlier of the date of the filing of a petition for the child's adoption or termination of the parental rights of the child's mother) "waives notice of an adoption proceeding" and "[t]he putative father's waiver under this section constitutes an irrevocably implied consent to the child's adoption," IC 31-19-5-18 and IC 31-19-9-12(4); (4) when consent to adoption is implied by failure to timely register, the putative father is precluded from establishing paternity, IC 31-19-9-14; and (5) it is undisputed, and the record shows, that Putative Father had not registered as the child's putative father when the adoption petition was filed, which is the relevant deadline under IC 31-19-5-12(a). 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." *Id.* at 1279-80.

**The trial court erred in dismissing the paternity petition with respect to the child because no Indiana statute sets forth applicable grounds for dismissing a paternity petition filed on behalf of a minor child by a next friend; and IC 31-19-9-14 does not limit Putative Father's ability to serve as the child's next friend, does not limit the child's rights to file a paternity petition, and does not say a putative father whose consent to adoption is implied may not be adjudicated the father in pre-adoption proceedings.** *Id.* at 1282. The Court opined that, (1) although Indiana has no statutory definition of "next friend," this court has held a putative father is a proper next friend for purposes of a paternity petition; (2) precedents indicate the fact that Putative Father is time-barred from petitioning in his own name does not preclude him from filing a petition as next friend on behalf of the child; (3) with respect to the acknowledged anomaly that a putative father barred by one statutory section from petitioning for paternity on his own behalf may nevertheless succeed in filing, under a different statutory section, substantially the same petition as next friend on behalf of the child, authority provides that where two statutes appear inconsistent in some respect, the court must give effect to both if possible;

(4) the general assembly, when revising the adoption and paternity statutes in 1997, did not alter the provision allowing a child to petition for paternity by next friend, but instead recodified it, notwithstanding the line of cases that since 1992 have permitted a parent barred from petitioning for paternity on his or her own behalf to file a paternity petition as next friend on behalf of the child. Id. at 1281-83 (citations omitted).

At footnote 5, the Court pointed out that the trial court also properly concluded that Putative Father impliedly consented to the adoption of the child by Stepfather, but reminded the parties that the trial court cannot approve the proposed adoption unless it first finds the adoption is in the child's best interests. The Court noted that 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. The Court emphasized 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 interest. Id. at 1281 n.5.