

# Children's Law Center of Indiana



## Adoption

12/5/12

In **In Re Adoption of K.S.**, 980 N.E.2d 385 (Ind. Ct. App. 2012), Father and Stepmother appealed the trial court's denial of their Verified Petition for Adoption of Father's child by Stepmother. The Court reversed and remanded for further proceedings to determine whether the adoption will be in the child's best interests. The child was born during Father's previous marriage to the child's Mother. The marriage of Father and Mother was dissolved in 2006, when the child was one year old, with Father receiving physical custody. Mother and Father were granted joint legal custody, and Mother was granted visitation "as is agreed between the parties from time to time." The dissolution court did not enter a support order for the child, but the parties agreed that Mother "shall be responsible for assisting [Father] with the expenses related to the care and upbringing of the parties' minor child." On January 11, 2010, the court ordered Mother to pay child support of \$40 per week to Father. The court made the order retroactive to December 3, 2009, the date Father filed his verified petition for support. On October 11, 2010, Father married Stepmother.

Mother was employed either full-time or part-time from January 2010 to November 2010, when she was placed on bed rest due to complications related to pregnancy. In September 2011, Mother gained full-time employment but resigned from her position the following month because she claimed that her daycare expenses for her two younger children would exceed her wages. Mother never paid any child support, and testified during the adoption proceedings that she had never financially contributed to the child's support. On May 4, 2012, the trial court held Mother in contempt for failing to pay child support. The trial court determined Mother's arrears to be likely in excess of \$10,000 and also sanctioned her to pay \$500 towards Father's attorney fees. Mother visited the child sporadically, and in 2011 took the child to Halloween activities at the Zoo, bought holiday and birthday gifts for her, and bought souvenirs and candy for her on a family trip to the Indiana Dunes.

On December 19, 2011, Father and Stepmother filed a verified petition for adoption and affidavit and request to terminate Mother's parental rights to the child. In the petition, Father and Stepmother requested that the trial court waive Mother's consent to the adoption pursuant to IC 31-19-9-8. On March 19, 2012, after a hearing, the trial court held that Father and Stepmother

had failed to prove by clear, cogent, and indubitable evidence that Mother's consent was not required. Father and Stepmother appealed.

**The Court concluded that Mother's consent to the adoption of her child by Stepmother was not required due to Mother's failure to provide child support when able to do so.** *Id.* at 389-90. Father and Stepmother contended that the trial court erred in denying their petition for adoption when the trial court concluded that Mother's consent for the adoption was required pursuant to IC 31-19-9-8. Noting that the most protected status in any adoption proceeding is that of the natural parent, the Court said that the status of natural parent, though a material consideration, is not one which will void all other considerations. *Id.* at 387. The Court observed that, under carefully enumerated circumstances, the statute allows the trial court to dispense with parental consent and allow adoption of the child. *Id.* The Court cited IC 31-19-9-8(a)(2)(B), which states that consent to adoption is not required from a parent of a child in the custody of another person 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. *Id.* at 387-88. The Court, citing *In Re Adoption of T.W.*, 859 N.E.2d 1215, 1217 (Ind. Ct. App. 2006), noted that Father and Stepmother were required to prove by clear and convincing evidence that Mother's consent was not required. *K.S.* at 388. The Court also observed that the provisions of IC 31-19-9-8 are written in the disjunctive; therefore they each provide independent grounds for dispensing with parental consent. *Adoption of T.W.*, 859 N.E.2d at 1218. *K.S.* at 388. The Court further opined that: (1) a petitioner for adoption must show that the non-custodial parent had the ability to make the payments which he failed to make; (2) the mere showing that Mother had a regular income, standing alone, is not sufficient to indicate Mother's *ability* to provide support; (3) to determine that ability, it is necessary to consider the totality of the circumstances, including whether the income is steady or sporadic and the non-custodial parent's necessary and reasonable expenses during the period in question. (Emphasis in opinion; multiple citations omitted.) *Id.* at 388. The Court opined that, 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. *Id.* at 389. The Court said that, because the child support order was issued on January 11, 2010, and made retroactive to December 3, 2009, and the petition for adoption was filed on December 19, 2011, Mother willfully failed to pay support for more than one year. *Id.* The Court was not persuaded by Mother's argument that the decision in *In Re N.W.* 933 N.E.2d 909, 914 (Ind. Ct. App. 2010) adopted in *In Re N.W.*, 941 N.E.2d 1042 (Ind. 2011), which held that a parent's duty to support a child can be defined in nonmonetary terms applied to the instant case. *K.S.* at 389. The Court contrasted Mother's situation, where she was subject to and had been found in contempt of a monetary child support order, with that of the Mother in the *N.W.* case where the trial court had determined that the Mother's child support was negative. *K.S.* at 389.

The Court also 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. *Id.* The Court observed that, once the statutory requirements are met, the court may then look to the arrangement that will be in the best interest of the child. *Id.* On occasion the Court has found that the relationship between parent and child is a bundle of human rights of such fundamental importance that adoption

statutes, being in derogation of the common law, should be strictly construed in favor of a worthy parent and the preservation of such relationship. Id., citing In Re N.W., 933 N.E.2d at 914-15. The Court also said that, in evaluating the parent-child relationship, the best interest of the child is paramount and the Court's main concern should lie with the effect of the adoption on the reality of the minor child's life. Id.