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## Adoption

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In **In Re Adoption of M.A.S.**, 815 N.E.2d 216 (Ind. Ct. App. 2004), the Court affirmed the trial court's grant of the Stepfather's petition to adopt the child. In 1999, the Father and Mother lived together with the Mother's daughter from a previous relationship. In November 1999, the daughter died, and the State filed criminal charges against the Father as a result of the daughter's death. Shortly after the child was born to Father and Mother on July 13, 2000, the State filed a child in need of services (CHINS) action, and the trial court ordered the Father to have supervised visitation and pay \$50 per week in child support for the child. The Father paid the child support on January 2 and 30, 2001, but paid no further support thereafter. In March 2002, a jury found the Father not guilty of the criminal charges related to the daughter's death. The trial court's child support order terminated when the CHINS action was dismissed in May 2002. In November 2002, the Father filed an action to establish paternity of the child. On January 8, 2003, the Stepfather filed a petition to adopt the child, to which the Father objected. The trial court granted Stepfather's petition for adoption based on its findings that, inasmuch as the Father had failed to pay any child support from January 30, 2001 through January 8, 2003, a period of over twenty-three months, his consent to the adoption was not required, and that it was in the child's best interests that he be adopted by the Stepfather. The Father appealed.

**When reviewing a trial court's ruling in an adoption proceeding, the Court will not disturb that ruling unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion.** Rust v. Lawson, 714 N.E.2d 769, 771 (Ind. Ct. App. 1999), *trans denied*. M.A.S. at 218.

**Stepfather is required to prove by clear and convincing evidence that Father's consent was not required under IC 31-19-9-8(a)(2), in that the Father "knowingly fail[ed] to provide for the care and support of the child when able to do so as required by law or judicial decree."** The Court discussed the parties' different positions on what burden of proof the Stepfather had to meet. It relied on the language of several statutes and cases to support the "clear and convincing" standard. Id. at 219-20.

**Indiana law imposes a duty upon a parent to support his children. This duty exists apart from any court order or statute.** Irvin v. Hood, 712 N.E.2d 1012, 1014 (Ind. Ct. App. 1999). The Court held that despite the lack of any outstanding court order directing the Father to pay child support for the child, the Father still had a duty to

support him. Id. at 220-21. The Court also pointed out that it was undisputed that the Father had failed to pay child support for the child from January 30, 2001 through January 8, 2003, and that, contrary to the Father's assertions, the evidence implied that the Father was aware that the child support the Father resumed paying in April 2002, was solely for the support of two other children of the Father's, and not the support of the child herein. Id. at 221.

**A petitioner for adoption must show that the noncustodial parent had the ability to make the payments that he failed to make. That ability cannot be adequately shown by proof of income standing alone. To determine that ability, it is necessary to consider the totality of the circumstances.** In re Augustyniak, 508 N.E.2d 1307, 1308 (Ind. Ct. App. 1987). The Father argued that he was not able to pay child support because he was "mired in a legal morass" as a result of the criminal charges, the CHINS actions, a court order requiring him to move out of his house, a bankruptcy, and his loss of jobs due to the criminal prosecution. Father was employed during the time in question and the only evidence of his expenses during the time were payments of \$30 an hour for supervised visitations with his other children; the Father was not required to pay for supervised visits with the child herein. The Father also testified that he paid \$1,000 for bail. The trial court found that the Father had sufficient income to "pay something on the support order for the child and then to pay something for support to meet his legal duty to pay support for the child." The Court opined that it could not say that the evidence leads to but one conclusion and the trial judge reached an opposite conclusion. The Court held that, under the totality of the circumstances, the Stepfather proved by clear and convincing evidence that the Father was able to provide support for the child but failed to do so for "a period of at least one year." Thus, the trial court did not err by finding that the Father's consent to the adoption was not required. M.A.S. at 221.

**The Court found that the trial court could consider the home study report in determining whether it was in the child's best interests to be adopted by Stepfather.** Id. at 223. The Father argued that the trial court's grant of the adoption petition was not in the child's best interests, a requirement under IC 31-19-11-1(a). The Father objected to the consideration of the home study report based on hearsay grounds. The Father relied on, and the Court distinguished, In Re E.T., 808 N.E.2d 639, 645 (Ind. 2004), where the supreme court held in an involuntary termination of parental rights case that reports compiled by a social services agency describing home visits and supervised visitations did not qualify as business records and, thus, were not admissible under an exception to the hearsay rule. The Court here distinguished E.T. because the statute here specifically provides that the report "shall be filed with the adoption proceedings" and "become part of the proceedings," I.C. 31-19-8-5, but there was no such statute in the E.T. case. The Court went on to acknowledge that such reports are "not admissible over objection in a contested case, i.e., a case in which a party whose consent is required refuses to do so." Krieg v. Glassburn, 419 N.E.2d 1015, 1021 n. 5 (Ind. Ct. App. 1981). Inasmuch as the Father's consent is not required in this case; however, the trial court could consider the home study report in determining whether it was in the child's best interests to be adopted by the Stepfather. M.A.S. at 223. The Court further held that, even if the trial court abused its discretion by considering the home study report, the

“improper admission of evidence is harmless error when,” as here, “the judgment is supported by substantial independent evidence to satisfy the reviewing court that there is not substantial likelihood that the questioned evidence contributed to the judgment.” E.T. at 645-646. M.A.S. at 223.

The Father also argued that the trial court should not have limited his presentation of evidence regarding the child’s best interests. The Court held that, even if the trial court had abused its discretion by excluding the evidence the Father argued should have been admitted, the excluded evidence was merely cumulative of the other evidence, and any error in its exclusion was harmless. Id. at 222. The trial court had excluded the evidence because: (1) the Father would not have standing to present evidence of the child’s best interests if the Father’s consent was not required because he failed to pay support for one year; and (2) the events occurred after the petition for adoption was filed. In this regard the Court noted that, on appeal, neither party cited authority regarding the admissibility of evidence related to events occurring after the petition for adoption was filed, and that the Court could not say, as a general proposition, that evidence related to events occurring after a petition is filed is inadmissible. Id.