

Notre Dame Law School

NDLScholarship

Indiana Continuing Legal Education Forum
2020

Indiana Continuing Legal Education Forum

2020

Mistakes you don't want to make in handling an adoption

Indiana Continuing Legal Education Forum (ICLEF)

Follow this and additional works at: https://scholarship.law.nd.edu/iclef_2020

Recommended Citation

Indiana Continuing Legal Education Forum (ICLEF), "Mistakes you don't want to make in handling an adoption" (2020). *Indiana Continuing Legal Education Forum 2020*. 49.
https://scholarship.law.nd.edu/iclef_2020/49

This Article is brought to you for free and open access by the Indiana Continuing Legal Education Forum at NDLScholarship. It has been accepted for inclusion in Indiana Continuing Legal Education Forum 2020 by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.



MISTAKES YOU DON'T WANT TO MAKE IN HANDLING AN ADOPTION

June 29, 2020

www.ICLEF.ORG

Copyright 2020 by Indiana Continuing Legal Education Forum

DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

The Indiana Continuing Legal Education Forum and contributing authors hereby disclaim any and all responsibility or liability, which may be asserted or claimed arising from or claimed to have arisen from reliance upon the procedures and information or utilization of the forms set forth in this manual, by the attorney or non-attorney.

Attendance of ICLEF presentations does not qualify a registrant as an expert or specialist in any discipline of the practice of law. The ICLEF logo is a registered trademark and use of the trademark without ICLEF's express written permission is prohibited. ICLEF does not certify its registrants as specialists or expert practitioners of law. ICLEF is an equal opportunity provider of continuing legal education that does not discriminate on the basis of gender, race, age, creed, handicap, color or national origin. ICLEF reserves the right to refuse to admit any person or to eject any person, whose conduct is perceived to be physically or emotionally threatening, disruptive or disrespectful of ICLEF registrants, faculty or staff.

INDIANA CONTINUING LEGAL EDUCATION FORUM

OFFICERS

JEFFREY P. SMITH

President

TERESA L. TODD

Vice President

LYNNETTE GRAY

Secretary

RICHARD S. PITTS

Treasurer

ALAN M. HUX

Appointed Member

LINDA K. MEIER

Appointed Member

DIRECTORS

James H. Austen
Sarah L. Blake
Hon. Andrew R. Bloch
Melanie M. Dunajeski
Mark A. Foster
Lynnette Gray
Alan M. Hux

Dean Jonna Kane MacDougall
Thomas A. Massey
Linda K. Meier
Richard S. Pitts
Jeffrey P. Smith
Teresa L. Todd
Inge Van der Cruysse

ICLEF

SCOTT E. KING

Executive Director

James R. Whitesell
Senior Program Director

Jeffrey A. Lawson
Program Director

MISTAKES YOU DON'T WANT TO MAKE IN HANDLING AN ADOPTION



Agenda

- 1:10 P.M. Welcome & Introduction
- 1:15 P.M. Mistakes to Avoid in Handling a Newborn Adoption
 - Steven M. Kirsh
- 2:15 P.M. Mistakes to Avoid in Stepparent Adoptions
 - Joel D. Kirsh
- 2:45 P.M. Refreshment Break
- 3:00 P.M. Mistakes to Avoid in DCS Adoptions
 - Grant M. Kirsh
- 3:30 P.M. Mistakes to Avoid in Contested Adoptions with Faculty Panel
 - Charles P. Rice
 - Hon. Jonathan M. Brown
 - Hon. David K. Najjar
- 4:30 P.M. Adjourn

June 29, 2020

www.ICLEF.ORG

**MISTAKES YOU DON'T WANT TO
MAKE IN HANDLING AN ADOPTION**

Faculty



Mr. Steven M. Kirsh - Chair

Kirsh & Kirsh, P.C.
2930 East 96th Street
Indianapolis, IN 46240-3716
ph: (317) 575-5555
fax: (317) 575-5631
e-mail: steve@kirsh.com

Hon. Jonathan M. Brown

Hamilton Superior Court 2
One Hamilton County Square, Suite 384
Noblesville, IN 46060
ph: (317) 776-9647
e-mail: jon.brown@hamiltoncounty.in.gov

Hon. David K. Najjar

Hamilton Superior Court 5
One Hamilton County Square, Suite 297
Noblesville, IN 46060
ph: (317) 776-8260
fax: (317) 776-8469
e-mail:
david.najjar@hamiltoncounty.in.gov

Mr. Grant M. Kirsh

Kirsh & Kirsh, P.C.
2930 East 96th Street
Indianapolis, IN 46240-3716
ph: (317) 575-5555
fax: (317) 575-5631
e-mail: grant@kirsh.com

Mr. Joel D. Kirsh

Kirsh & Kirsh, P.C.
2930 East 96th Street
Indianapolis, IN 46240-3716
ph: (317) 575-5555
fax: (317) 575-5631
e-mail: joel@kirsh.com

Mr. Charles P. Rice

Murphy Rice, LLP
400 Plaza Building
210 South Michigan Street
South Bend, IN 46601
ph: (574) 232-0300
fax: (574) 232-0400
e-mail: crice@murphyrice.com

June 29, 2020

www.ICLEF.ORG

Steven M. Kirsh

Kirsh & Kirsh, PC, Indianapolis



For over 30 years, the law office of Kirsh & Kirsh, P.C. has endeavored to set the standard of excellence regarding adoptions in Indiana and throughout the country.

Awarded the Congressional "Angels in Adoption" Award in 2005, attorney *Steve Kirsh*, along with his brother, Joel Kirsh, and his son, Grant Kirsh, have built their law practice around the human needs of the prospective birth mothers with whom they work and not simply the "transactional" nature of filing papers and providing documentation.

Visit the firm at <http://www.indianaadoption.com/>

Kirsh & Kirsh, P.C.
2930 East 96th Street
Indianapolis, IN 46240
ph: (317) 575-5555
fax: (317) 575-5631
email: steve@kirsh.com

Hon. Jonathan M. Brown

Judge



Hon. Jonathan M. Brown
Hamilton Superior Court 2
One Hamilton County Square, Suite 384
Noblesville, IN 46060
ph: (317) 776-9647
e-mail: jon.brown@hamiltoncounty.in.gov

Hon. David K. Najjar

Judge



Hon. David K. Najjar
Hamilton Superior Court 5
One Hamilton County Square, Suite 297
Noblesville, IN 46060
ph: (317) 776-8260
fax: (317) 776-8469
e-mail: david.najjar@hamiltoncounty.in.gov

Grant M. Kirsh

Partner, Kirsh & Kirsh, P.C., Indianapolis



Growing up as the son of an adoption attorney, *Grant Kirsh* has been surrounded by adoption his entire life. As a second generation adoption attorney, he enjoys continuing his family's legacy in Indiana.

Grant focuses his work on private newborn adoptions, foster care adoption, gestational surrogacies, stepparent adoptions, family adoptions and adult adoptions.

Grant grew up in Carmel, Indiana, graduating from Carmel High School, Indiana University for his Bachelor's Degree, and Indiana University School of Law for law school. He is married to Emley, whom he has known since high school, and they have a daughter, Anna, and a son, Brogan.

Grant loves his family very much and enjoys spending the weekends with them on the lake, walking on the Monon and playing in the yard. Grant, Emley, Anna and Brogan have 3 dogs – Daisy, India and Jake.

Visit the firm at <http://www.indianaadoption.com/>

Kirsh & Kirsh, P.C.
2930 East 96th Street
Indianapolis, IN 46240
ph: (317) 575-5555
fax: (317) 575-5631

Joel D. Kirsh

Kirsh & Kirsh, P.C., Indianapolis



Joel Kirsh has been practicing adoption law, along with his brother Steve, for over 30 years and loves the emotional satisfaction of helping everyone involved in the adoption process. In addition to newborn adoptions, he assists with step-parent, grandparent, adult, and other relative adoptions as well as formalization of international adoptions.

Joel also assists with Assisted Reproductive Technology Law including Gestational Carrier arrangements and other Surrogacy related matters.

Joel met his wonderful wife, Holly, at a fitness facility and they have been married over 28 years. They have three great children: Trevor, Olivia and Harrison and two "energetic" Golden Doodles: Jack and Zoey.

Joel loves hanging out with his family and friends and enjoys playing many sports including basketball, golf, tennis and working out. He is a huge fan of IU Basketball and Football as well as the Colts and Pacers.

Visit the firm at <http://www.indianaadoption.com/>

Kirsh & Kirsh, P.C.
2930 East 96th Street
Indianapolis, IN 46240
ph: (317) 575-5555
fax: (317) 575-5631
e-mail: jkirsh@kirsh.com

Charles P. Rice

Murphy Rice, LLP, South Bend



Charles P. Rice was born on Long Island, New York. One of ten children, Charlie attended grade school and high school in the South Bend area. In 1985, he was awarded a B.A. in government from the University of Notre Dame. Charlie graduated from Notre Dame Law School in 1988.

After working for several years as a trial attorney for an insurance defense firm, Charlie established a successful solo practice in South Bend in 1992. In 2001, Charlie joined with other trial attorneys to form Boveri Murphy Rice, LLP, a firm that received national recognition for its strong plaintiff's litigation practice. Charlie and Pat Murphy founded Murphy Rice, LLP, in 2014 to continue and build upon that successful litigation practice.

Charlie's practice is devoted to civil litigation. His strong litigation skills and sound judgment have repeatedly earned him recognition from professional organizations. For example, Charlie has been selected by his peers for inclusion in The Best Lawyers in America© (2013 to 2015) in the field of Personal Injury Litigation—Plaintiffs. Even more significantly, individuals, corporations, and other law firms throughout the United States regularly turn to Charlie for his trusted legal advice and personal and professional skill in handling highly sensitive or complex civil litigation.

Charlie served in the United States Army Reserve for eight years and was honorably discharged in 1992. Charlie is an avid hockey player and enjoys playing competitively and for charity events. He and his wife, Rachel, have three children and reside in Mishawaka, Indiana.

Table of Contents

Section One

Mistakes You Don't Want to Make when Handling a Newborn Adoption..... Steven M. Kirsh

I.	Failure to Comply with the <i>Indian Child Welfare Act of 1978</i> , 25 USCS § 1901, <i>et. seq.</i> ("ICWA")	1
II.	Having an Expectant Mother Sign a Consent to Adoption Prior to Giving Birth.....	3
III.	Confusing the Rights of Putative and Legal Fathers	4
IV.	Failure to Address the Birth Father's Rights before the Baby is Born	6
V.	Unnecessarily Publishing Notice of the Adoption.....	8
VI.	Failing to Publish Notice to an Unnamed Father for a Child Conceived Outside of Indiana, When the Birth Mother has Named the Putative Father.....	9
VII.	Using the Wrong Form of Notice	9
VIII.	Not having a Birth Parent Confirm Their Consent to Adoption for the Court	10
IX.	Failing to Promptly File a Petition for Adoption After the Birth of a Child.....	10
X.	Falling Into the Visitation Trap.....	11
	Appendix – Forms List	13
	Form No. 1 – Affidavit Regarding Indian Ancestry (No) – Birth Mother	14
	Form No. 2 – Affidavit Regarding Indian Ancestry (?) – Birth Mother.....	16
	Form No. 3 - Affidavit Regarding Indian Ancestry (No) – Birth Father.....	19
	Form No. 4 - Affidavit Regarding Indian Ancestry (?) – Birth father	21
	Form No. 5 – Motion and Order for Judicial Finding Regarding ICWA.....	23
	Form No. 6 – Judicial Finding Regarding ICWA.....	26
	Form No. 7 – Motion for Judicial Acknowledgment Regarding Consent to Adoption	29
	Form No. 8 – Judicial Acknowledgment of Consent to Adoption – Birth Mother	31

Form No. 9 - Judicial Acknowledgment of Consent to Adoption – Birth Father	33
Form No. 10 – Script for Judge for Judicial Acknowledgment Hearing	35
Form No. 11 – Relinquishment of Parental Rights and Consent to Adoption....	42
Form No. 12 – Sample Memorandum of Understanding	45

Section Two

Mistakes You Don't Want to Make when Handling a Step Parent Adoption..... Joel D. Kirsh

I.	Failing to Remember the Two "Cs": Competence and Compassion	1
II.	Not Asking the Correct Preliminary Questions Before Agreeing to Representation.....	2
III.	Advising the Client to Contact the Non-Custodial Parent About the Adoption Prematurely.....	2
IV.	Stating that the Consent of the Other Parent is Required in Order for the Adoption to Proceed.....	3
V.	Failing to Utilize the Putative Father Registry Correctly	6
VI.	Not Giving Notice of the Adoption to Grandparents	9
	Conclusion	12

Section Three

Mistakes You Don't want to Make when Handling a DCS Adoption..... Grant M. Kirsh

1. Finalizing an adoption **BEFORE** you have a fully executed Subsidy Agreement 2
2. Not informing DCS when you file your petition for adoption 2
3. Serving notice of the adoption on the parents or DCS 2
4. Delaying the completion of the Payment Request Information (PRI) form 3
5. Failing to manage client expectations for subsidy negotiations..... 3
6. If it is a Marion County DCS case, setting a final hearing date **PRIOR TO** DCS filing their adoption summary and DCS consent into the adoption case... 3
7. Directly communicating with the Family Case Managers (FCM) 4
8. Failing to inform the DCS attorney that your client withdrew a petition for Adoption..... 4
9. Failing to immediately provide DCS with the final decree of adoption..... 5

Section Four

Mistakes You Don't Want to Make

**When Handling a Contested Adoption.....Hon. David K. Najjar
Hon. Jonathan M. Brown
Charles Rice**

Mistake #1 – Stay in your lane.....	2
Mistake #2 – Only thing worse than Bad News.....	3
Mistake #3 – Not having a plan.....	5
Mistake #4 – Not using the entire toolbox.....	6
Mistake #5 – Ignoring Jurisdiction.....	7
Mistake #6 – Winning the battle but losing the war.....	15
Mistake #7 – Not advocating for the child when presenting best interests evidence ...	18

Section One

Mistakes You Don't Want to Make when Handling a Newborn Adoption

Steven M. Kirsh
Kirsh & Kirsh, P.C.
Indianapolis, Indiana

Section One

Mistakes You Don't Want to Make when Handling a Newborn Adoption..... Steven M. Kirsh

I.	Failure to Comply with the <i>Indian Child Welfare Act of 1978</i> , 25 USCS § 1901, <i>et. seq.</i> ("ICWA").....	1
II.	Having an Expectant Mother Sign a Consent to Adoption Prior to Giving Birth	3
III.	Confusing the Rights of Putative and Legal Fathers.....	4
IV.	Failure to Address the Birth Father's Rights before the Baby is Born.....	6
V.	Unnecessarily Publishing Notice of the Adoption	8
VI.	Failing to Publish Notice to an Unnamed Father for a Child Conceived Outside of Indiana, When the Birth Mother has Named the Putative Father	9
VII.	Using the Wrong Form of Notice	9
VIII.	Not having a Birth Parent Confirm Their Consent to Adoption for the Court.....	10
IX.	Failing to Promptly File a Petition for Adoption After the Birth of a Child	10
X.	Falling Into the Visitation Trap	11
	Appendix – Forms List.....	13
	Form No. 1 – Affidavit Regarding Indian Ancestry (No) – Birth Mother	14
	Form No. 2 – Affidavit Regarding Indian Ancestry (?) – Birth Mother	16
	Form No. 3 - Affidavit Regarding Indian Ancestry (No) – Birth Father	19
	Form No. 4 - Affidavit Regarding Indian Ancestry (?) – Birth father.....	21
	Form No. 5 – Motion and Order for Judicial Finding Regarding ICWA	23
	Form No. 6 – Judicial Finding Regarding ICWA	26
	Form No. 7 – Motion for Judicial Acknowledgment Regarding Consent to Adoption	29
	Form No. 8 – Judicial Acknowledgment of Consent to Adoption – Birth Mother	31

Form No. 9 - Judicial Acknowledgment of Consent to Adoption – Birth Father.....	33
Form No. 10 – Script for Judge for Judicial Acknowledgment Hearing	35
Form No. 11 – Relinquishment of Parental Rights and Consent to Adoption	42
Form No. 12 – Sample Memorandum of Understanding	45

Mistakes You Don't Want to Make when Handling a Newborn Adoption

(June 2020)

By Steven M. Kirsh, Attorney

Kirsh & Kirsh, P.C.

2930 E. 96th Street

Indianapolis, IN 26240

www.IndianaAdoption.com

steve@kirsh.com

317-575-5555

As lawyers, we all try to avoid making mistakes, especially in our litigious society. Bad things never just happen – someone must be at fault, or so it seems. Additionally, adoptions, particularly adoptions of newborns, carry with them the potential for devastating emotional trauma if a mistake results in a family losing custody of a child. The video of “Baby Jessica,” crying hysterically as she is put in a van and taken from the only family she had ever known for the two and half (2 ½) years of her life should cause all attorneys pause as they consider whether they have the requisite knowledge and experience to correctly handle a newborn adoption.

The Rules of Professional Conduct require lawyers to only practice in those areas in which they are competent. Rule 1.1 provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

One should not assume that avoiding the mistakes outlined in this article will assure a lawyer that their representation of their client(s) will conform with all applicable laws, regulations, and procedures. It will **NOT**; however, often inexperienced practitioners will commit one or more of the following errors, potentially leading to devastating outcomes.

I. Failure to Comply with the *Indian Child Welfare Act of 1978*, 25 USCS § 1901, et. seq. (“ICWA”)

- A. Most attorneys who represent prospective adoptive parents know that if the child who is the subject of the adoption meets the definition of an “Indian child,”¹ the attorney must comply with ICWA.
- B. Three common errors relating to ICWA:
 - 1. Failure to comply with 25 ***CFR*** 23.107 in **EVERY** adoption proceeding – **not just ICWA proceedings**.

¹ 25 ***USC*** 1903 provides: ““Indian child” means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe”

- a. This section² requires the court to make an inquiry if the child is an Indian child in **EVERY** “child custody proceeding”³ – again, not just ICWA proceedings.
- b. At Kirsh & Kirsh, P.C. (“Kirsh & Kirsh”), we
 - (1) Have all birth mothers and birth fathers (who consent to the adoption after birth) sign an affidavit regarding Indiana Ancestry Affidavit of Birth:
 - (i) Mother Denying Indian Ancestry -- See Appendix, Form 1
 - (ii) Affidavit of Birth Mother “Maybe” Indian Ancestry -- See Appendix, Form 2
 - (iii) Affidavit of Birth Father Denying Indian Ancestry -- See Appendix, Form 3
 - (iv) Affidavit of Birth Father “Maybe” Indian Ancestry -- See Appendix, Form 4
 - (2) Ask the court to make a judicial finding at the commencement of the proceedings that the child is not an Indian child, or we comply with ICWA – See Appendix, Forms 5 and 6
 - (3) Include in the final decree of adoption either of the following findings. We do this to protect the petitioner(s) for adoption from a future challenge by an Indian tribe or a birth parent, who subsequently enrolls in a tribe for the purpose of having their consent to adoption invalidated due to lack of ICWA compliance⁴:

² 25 CFR 23.107: “State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.”

³ 25 USCS § 1903(1): “‘child custody proceeding’ shall mean and include—

(i) “foster care placement” which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship;

(iii) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.”

⁴ But see, *In Meaghan H. v. Mark J. (In re Kenten H.)*, 272 Neb. 846,855 (Neb. 2007), the Nebraska Supreme Court held that courts may only apply ICWA prospectively. See, also, *Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011) (cert. denied *Nielson v. Ketchum*, 566 U.S. 1009 (U.S. 2012)). Also of note in *Ketchum*, the Federal Court of Appeals considered the Cherokee Nation Citizenship Act, which purported to make any newborn who is a Direct Descendant of the Cherokee Nation an automatically admitted member of the tribe, and held: “We are interpreting the ICWA, a federal statute, and conclude only that the Citizenship Act does not bring C.D.K. within

- (i) If the court has made a finding that the child is not an Indian child: “The Court further finds that the Child is not an “Indian Child” under the Indian Child Welfare Act, 25 U.S.C. § 1901 (“ICWA”), and, therefore, ICWA is not applicable to these proceedings.”
 - (ii) If we have complied with ICWA: “The Court further finds that the requirements of the Indian Child Welfare Act, 25 U.S.C. § 1901 (“ICWA”) have been satisfied in all respects.”
2. ICWA also applies if the father of the child is an enrolled member of an Indian Tribe, **even if the mother of the child does not identify the father.** In other words, if the unknown father is an enrolled member of a recognized, federal tribe, the attorney must comply with ICWA – reread the definition of Indian Child in Footnote 1.
 3. Misplaced reliance on the “Existing Indian Family Exception” to ICWA. The Indiana Supreme Court held that ICWA only applied to existing Indian families.⁵ However, the Federal Regulations promulgated in 2016, emasculate the basis for the “existing Indian family exception.”⁶

II. **Having an Expectant Mother Sign a Consent to Adoption Prior to Giving Birth**

- A. Prior to July 1, 2005, **Indiana Code** § 31-19-9-2 provided: The consent to adoption **may be executed any time after the birth.**⁷ For most practitioners, the statute made clear that a consent must be signed after birth. However, in a couple of cases, attorneys, either unaware of the statute or simply overly daring, had birth mothers execute consents prior to the birth of the children, and the Indiana Court of Appeals found a way to uphold the validity of the consents by ruling a pre-birth consent was voidable rather than void.⁸

the definition of “Indian child” under the ICWA. The tribe cannot expand the reach of a federal statute by a tribal provision that extends automatic citizenship to the child of a nonmember of the tribe. Based on the definition of “Indian child” provided in the ICWA, we conclude that C.D.K. was not an “Indian child” at the time of the adoption proceedings for ICWA purposes, and so the procedural safeguards provided for in the ICWA did not apply to the relinquishment hearing and adoption proceedings. The district court’s conclusion that those proceedings had to comply with the ICWA was in error.” *Id.* at 1124-25

⁵ **Adoption of T.R.M.**, 525 N.E.2d 298 (Ind. 1988)

⁶ 25 **CFR** 23.103(c): “If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of “Indian child,” then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.”

⁷ Prior to the July 1, 2005 amendment, **Indiana Code** § 31-19-9-2(a) read: “The consent to adoption may be executed at any time after the birth of the child either in the presence of [named individuals].” (bracketed shorthand added)

⁸ See **H.M.G. v. Goforth**, 606 N.E.2d 874 (Ind. App 1993) and **Robbins v. Baxter (in Re Baxter)**, 799 N.E.2d 417 (Ind. 2003). Charlie Rice argued **Baxter** and won.

- B. As of July 1, 2005, the General Assembly amended the statute to provide that a birth mother ***may not*** execute a consent before the birth of the child.⁹ Interpreting the new statute, the Indiana Court of Appeals has held that a birth mother's pre-birth consent is void, in spite of subsequent statements she made that may have ratified her pre-birth consent.¹⁰
- C. **DO NOT HAVE THE MOTHER EXECUTE A CONSENT PRIOR TO THE BIRTH OF THE CHILD.**

III. **Confusing the Rights of Putative and Legal Fathers**

- A. The Indiana Adoption Code¹¹ treats putative and legal fathers differently.
- B. At most, attorneys must give putative fathers notice of the adoption.
- C. Attorneys must obtain a legal father's consent to the adoption¹² or prove one of the consent vitiating factors under ***Indiana Code*** § 31-19-9-8, such as abandonment, failure to support, failure to communicate, unfitness, and etc.
- D. An attorney can give a putative father notice of an adoption and, in essence, default him if he does not respond to the notice in a timely manner.¹³
- E. But, in order to default a legal father, the notice must specify grounds to dispense with his consent¹⁴, such as the consent vitiating factors specified in Indiana Code §

⁹ ***Indiana Code*** § 31-19-9-2(b): "The child's mother may not execute a consent to adoption before the birth of the child."

¹⁰ ***Gillis v. Jackson (In re N.J.G.)***, 891 N.E.2d 60, 65 (Ind. App. 2008). The courts in the previously cited cases upheld the consents as voidable because in each case the birth mother took actions after the birth of the child to ratify her pre-birth consent. The court in ***Gillis*** did not take that approach given the unambiguous statutory language.

¹¹ Indiana Adoption Code refers to statutes found at ***Indiana Code*** § 31-19 and the definitions applicable to those statutes found at ***Indiana Code*** § 31-9.

¹² ***Indiana Code*** § 31-19-9-1: "(a) Except as otherwise provided in this chapter, a petition to adopt a child who is less than eighteen (18) years of age may be granted only if written consent to adoption has been executed by the following:

(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 of a child whose paternity has been established*** by:

(A) a court proceeding other than the adoption proceeding, except as provided in IC 31-14-20-2; or

(B) a paternity affidavit executed under IC 16-37-2-2.1;

unless the putative father gives implied consent to the adoption under section 15 [IC 31-19-9-15] of this chapter.

(3) Each person, agency, or local office having lawful custody of the child whose adoption is being sought.

(4) The court having jurisdiction of the custody of the child if the legal guardian or custodian of the person of the child is not empowered to consent to the adoption.

(5) The child to be adopted if the child is more than fourteen (14) years of age.

(6) The spouse of the child to be adopted if the child is married.

(b) A parent who is less than eighteen (18) years of age may consent to an adoption without the concurrence of:

(1) the individual's parent or parents; or

(2) the guardian of the individual's person;

unless the court, in the court's discretion, determines that it is in the best interest of the child to be adopted to require the concurrence." (emphasis added)

¹³ See ***Indiana Code*** § 31-19-9-12 and ***Indiana Code*** § 15 to -17

¹⁴ ***Indiana Code*** § 31-19-4.5-2

31-19-9-8 or, in the case of the husband of the birth mother, allege that he is not a biological parent.¹⁵ In other words, the attorney has to give the legal father notice which specifies the reason(s) his consent is not required.¹⁶

- F. But an attorney does not need to give notice of the adoption to a putative father who has consented to the adoption.¹⁷
- G. Of course, having a putative father consent to an adoption reduces the risk that he will contest the adoption.
- H. If the mother provides the name and address of the putative father, notice must be attempted at that address.¹⁸
- I. If the mother does not provide his name or address, the putative father must register with the Putative Father Registry, under **Indiana Code** § 31-19-5, to receive notice of the adoption. Failure to register results in
 - 1. An irrevocably implied consent to the adoption¹⁹
 - 2. A bar to challenging the adoption²⁰
 - 3. A bar to establishing paternity²¹
- J. An attorney is not obligated to inquire of the putative father's address.²² However, if the attorney asks or the birth mother volunteers the information, the attorney's obligations change, and the adoptive parents cannot rely upon the father's failure to register. Only undisclosed fathers must register.²³

¹⁵ **Indiana Code** § 31-19-9-1(a)(1) only requires a husband's consent if he is the biological father.

¹⁶ But, see, **Indiana Code** § 31-19-4.5-5: "The description in the notice under section 3 [IC 31-19-4.5-3] of this chapter of the reasons consent to adoption is not required need only include enough information to put a reasonable person on notice that a petition for adoption that alleges the person's consent to adoption is unnecessary is pending. The description does not require an exhaustive description of the reasons the person's consent to adoption is not required."

¹⁷ **Indiana Code** § 31-19-2.5-4

¹⁸ **Indiana Code** § 31-19-4-1

¹⁹ **Indiana Code** §§ 31-19-9-5-18 and 31-19-9-12

²⁰ **Indiana Code** § 31-19-9-13

²¹ **Indiana Code** § 31-19-9-14

²² The Indiana Court of Appeals held: "Thus, under the Indiana adoption statutes and corresponding case law, Hunter [Putative Father] was not entitled to notice of the adoption proceedings because Colaric [Birth Mother] did not disclose his address to the adoption agency and he failed to preserve his rights by registering in the putative father's registry. **An inquiry of his whereabouts was not required due to this failure to register.** (bracketed information and emphasis added) *Hunter v. Doe (In re J. D. C.)*, 751 N.E.2d 747, 751 (Ind. App. 2001)

²³ **Indiana Code** § 31-19-5-1. Applicability of chapter.

"(a) This chapter applies to a putative father whenever:

(1) an adoption under IC 31-19-2 has been or may be filed regarding a child who may have been conceived by the putative father; and

(2) on or before the date the child's mother executes a consent to the child's adoption, the child's mother has not disclosed the name or address, or both, of the putative father to the attorney or agency that is arranging the child's adoption.

(b) This chapter does not apply if, on or before the date the child's mother executes a consent to the child's adoption, the child's mother discloses the name and address of the putative father to the attorney or agency that is arranging the child's adoption." (highlighting added)

IV. **Failure to Address the Birth Father's Rights before the Baby is Born.** The Indiana Adoption Code offers two options for addressing the rights of the birth father before the baby is born.

- A. Pre-birth Notice to a Putative Father whom the Expectant Mother has Identified Prior to the Birth of the Child. This option is only available for putative fathers.
 - 1. **Indiana Code** § 31-19-3-1 permits, but does not require, adoption agencies and attorneys to give notice to a putative father prior to the birth of a child.
 - 2. **Indiana Code** § 31-19-4-1 requires that notice be given to certain putative fathers after the child is born, but does not require notice to those men, if the attorney gave pre-birth notice under **Indiana Code** § 31-19-3.²⁴
 - 3. If the expectant mother identifies and provides the address of the putative father, the attorney should give notice to putative father prior to the birth, and, preferably more than thirty (30) days prior the mother's due date even though such notice is **NOT** required.
 - 4. Giving pre-birth notice enables the birth mother and prospective adoptive to accurately assess the risk of a birth father challenge. It is certainly better for everyone to know if the putative father intends to challenge the adoption before the adoptive parents assume custody of the child from the hospital.
 - 5. An attorney may give pre-birth notice to a father living outside of Indiana if either the birth mother conceived the child in Indiana or the putative father live the state in which the father lives allows a man to initiate a paternity action prior to the birth of the baby.²⁵
- B. Signing a Consent to Adoption before the baby is born.

²⁴ Indiana Code § 31-19-4-9:

"The notice required by this chapter is not necessary:

(1) if actual notice has been given to a putative father under IC 31-19-3; or

(2) if:

(A) a person has attempted to give notice to a putative father at a particular address under IC 31-19-3; and

(B) the putative father could not be located at that address;

unless the putative father registers that address with the putative father registry under IC 31-19-5.

²⁵ **Indiana Code** § 31-19-3-9:

"(a) A notice served in accordance with this chapter on a putative father who is a resident of Indiana is valid regardless of whether the notice is served within or outside Indiana.

(b) A notice served in accordance with this chapter outside Indiana on a putative father who is not a resident of Indiana is valid if the child was conceived:

(1) in Indiana; or

(2) outside Indiana, if the laws of the state in which the:

(A) father:

(i) is served notice; or

(ii) resides; or

(B) child was conceived;

allow a paternity or similar action to be filed before the birth of a child."

1. Although birth mothers may not sign a consent to adoption prior to the birth of the child, as previously discussed, putative and legal fathers may sign an irrevocable consent prior to the birth so long as the consent to adoption and execution comply with **Indiana Code** § 31-19-9-2(c).²⁶
2. Additionally, **Indiana Code** § 31-19-9-2(d) prevents the father, who has signed a pre-birth consent, from challenging or contesting the adoption.²⁷
3. Include in the Consent to Adoption a provision which makes clear that the Consent is not an acknowledgment of paternity under ICWA.
 - (i) ICWA imposes on “parents”²⁸ the obligation of giving a consent to adoption in accordance with ICWA.²⁹ **A child could fall within the definition of an “Indian child” by virtue of the child being the biological child of the father of the child, a tribal member, but the father of the child may not qualify as a “parent” under ICWA.**³⁰
 - (ii) Recommended language: “In the event it is determined that the **Indian Child Welfare Act** (“ICWA”), 25 **USC** § 1901, **et seq.**, or the placement preferences under ICWA, a copy of which is attached to this document, become applicable to the adoption of the child, this document shall NOT be construed as an acknowledgment of paternity for the purposes of ICWA.”
- C. Of course, a birth father may sign a consent to adoption **after** the birth.
 1. But a pre-birth consent is irrevocable³¹ and eliminates the risk that the birth will not consent after the birth.
 2. The attorney should attempt to have the birth father, who signs a post-birth consent, confirm his consent to adoption for the court.³²

²⁶ **Indiana Code** § 31-19-9-2(c): “The child’s father may execute a consent to adoption before the birth of the child if the consent to adoption:

- (1) is in writing;
- (2) is signed by the child’s father in the presence of a notary public; and
- (3) contains an acknowledgment that:
 - (A) the consent to adoption is irrevocable; and
 - (B) the child’s father will not receive notice of the adoption proceedings.”

²⁷ **Indiana Code** § 31-19-9-2(d): “A child’s father who consents to the adoption of the child under subsection (c) may not challenge or contest the child’s adoption.”

²⁸ 25 **USC** § 1903(9): “‘parent’ means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. **It does not include the unwed father where paternity has not been acknowledged or established**”(emphasis added)

²⁹ 25 **USC** § 1913

³⁰ See footnote 28 for definition of “parent.”

³¹ See footnotes 26 and 27

³² See **Section VIII**, below

V. Unnecessarily Publishing Notice of the Adoption

- A. Attorneys not familiar with adoptions assume that if a putative father's whereabouts are not known, they must
 - 1. Attempt to force the expectant/birth mother to identify and locate the putative father.
 - 2. If they find the putative father, do a DNA test to determine his biological link to the child before having him sign a consent or give him notice of the adoption.
 - 3. Publish notice to the unknown or unlocatable putative father.

These assumptions are WRONG!

- B. As previously discussed, neither the Indiana Adoption Code nor case law requires the mother to identify a putative father or provide his whereabouts.³³
- C. By definition, a putative father has not established paternity. Therefore, establishing paternity or even biology is not a prerequisite to having a putative father sign a consent to adoption or waiver of notice or providing a putative father pre- or post-birth notice of an adoption.
- D. The Indiana Adoption Code clearly provides that an attorney only needs to publish notice to an unnamed putative father for children **conceived outside of Indiana**.³⁴
- E. When speaking with an expectant or birth mother, best practice dictates asking her in what state she conceived the child before explaining the significance of the answer.
- F. Some attorneys might think that suspenders with a belt is better than a belt alone and conclude that publishing notice to putative father of a child conceived in Indiana affords the prospective adoptive parents greater protection. **IT DOES NOT!**
 - 1. The Indiana Adoption Code and case law have designated the Putative Father Registry as the appropriate means for a putative father to grasp the opportunity of parenthood.³⁵

³³ Remember that the Indiana Adoption Code treats legal fathers differently.

³⁴ **Indiana Code** § 31-19-4-3: (a) If:

“(1) the mother of a child:

(A) informs an attorney or agency arranging the child's adoption, on or before the date the child's mother executes a consent to the child's adoption, that the child was conceived outside Indiana; and

(B) does not disclose to the attorney or agency the name or address, or both, of the putative father of the child; and

(2) the putative father of the child has:

(A) failed or refused to consent to the adoption of the child or has not had the parent-child relationship terminated under IC 31-35 (or IC 31-6-5 before its repeal); and

(B) not registered with the putative father registry under IC 31-19-5 within the period under IC 31-19-5-12;

the attorney or agency shall serve notice of the adoption proceedings on the putative father by publication in the same manner as a summons is served by publication under Rule 4.13(C) of the Indiana Rules of Trial Procedure.

(b) 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 subsection (a).” (highlighting added)

³⁵ **K.G.B. v. T.B.**, 18 N.E.3d 292 (Ind. App. 2014); But, see **L.G.K. J.K. v. G.C.**, 113 N.E.3d 767 (Ind. App. 2018)

2. Publishing notice once a week for three consecutive weeks and allowing 30 days to pass gives the putative father nearly twice the amount of time to contest the adoption as the Putative Father Registry.
3. Publication of notice unnecessarily increases the adoptive parents' cost of adopting.

VI. Failing to Publish Notice to an Unnamed Father for a Child Conceived Outside of Indiana, When the Birth Mother has Named the Putative Father

- A. As previously discussed, the Indiana Adoption Code only requires publication of notice to a putative father for a child conceived outside of Indiana.
- B. Even many experienced, adoption attorneys would not think to publish notice to an "unnamed" father when the birth mother identified a man as the father because **Indiana Code** § 31-19-4-3 provides that publication is only required if the mother does not identify and furnish the address of the putative father. Thinking that she did name the father, many attorneys wrongly believe they have complied with the statute.
 1. Those attorneys are correct if the named father is the biological father. But what if he is not the biological father? Under that circumstance, they have NOT given notice to the father, albeit an "unnamed" father.
 2. This approach leaves the prospective adoptive parents exposed if the named father is not the biological father of the child.
 3. Best practice would be to publish notice to an unnamed father even if the named father has consented.
 4. Likewise, if the mother identifies the putative father but does not provide his address, the attorney should publish notice to "[Insert name of "named" father] and any unnamed father is notified that" using a combination of the statutorily prescribed forms.³⁶
- C. Note this problem only applies to publication of notice for a child conceived outside of Indiana. The Putative Father Registry³⁷ affords the prospective adoptive parents protection from a mis-identified father of child conceived in Indiana.

VII. Using the Wrong Form of Notice

- A. **DO NOT GET CREATIVE!** The various statutes include the form of notice to use in different circumstances. Do not interchange the forms. They are not the same.
- B. **Indiana Code** § 31-19-2.5 provides an overview of the general notice requirements.
- C. Three statutes address notice requirement for various individuals.

³⁶ **Indiana Code** §§ 31-19-4 and 5

³⁷ **Indiana Code** § 31-19-5

1. **Indiana Code** § 31-19-3 sets forth the procedure for giving pre-birth notice to a putative father and the contents of the notice.³⁸ This is only available for putative fathers.
2. **Indiana Code** § 31-19-4 sets forth the procedure for giving post-birth notice to a putative father and the contents of the notice.³⁹ This is only available for putative fathers.
3. **Indiana Code** § 31-19-4.5 sets forth the procedure for giving notice to other individuals including birth mothers and legal fathers and the contents of the notice.⁴⁰

VIII. **Not having a Birth Parent Confirm Their Consent to Adoption for the Court.** **Indiana Code** § 31-19-10-3 gives a birth parent executing a post-birth consent thirty (30) days after signing the consent to petition the court to withdraw their consent under certain circumstances.

- A. But provides that if the person appears in court to confirm their consent following the statutory requirements, the person does not have the thirty (30) days to attempt to withdraw their consent.⁴¹ The same subsection allows for telephonic and video conferencing. Therefore, a birth mother could confirm her consent from her hospital bed.
 1. Petition for judicial acknowledgment of consent to adoption, see Appendix, Form 7
 2. Judicial acknowledgment of a birth mother's consent to adoption, see Appendix, Form Judicial acknowledgment of a birth mother's consent to adoption see Appendix, Form 8
 3. Judicial acknowledgment of a birth father's consent to adoption, see Appendix, Form 9
 4. Judicial Acknowledgment Script for Judge, see Appendix, Form 10
- B. Of course, an attorney cannot force a birth mother to confirm her consent, but best practices dictates at least asking her to confirm her consent. If a birth mother attempts to withdraw her consent and the attorney had not asked her to confirm her consent, the prospective, adoptive parents could have a viable claim for malpractice.

IX. **Failing to Promptly File a Petition for Adoption After the Birth of a Child.** When handling the adoption of a newborn or even an older child, the attorney for the prospective adoptive parents should file a petition for adoption as soon as possible after, or, at least, within thirty (30) days of, the consent signing by the birth mother.

³⁸**Indiana Code** § 31-19-3-4

³⁹**Indiana Code** § 31-19-4-4

⁴⁰**Indiana Code** § 31-19-4.5-3

⁴¹**Indiana Code** § 31-19-10-3(b)

- A. A putative father of a child conceived in Indiana has the later of the filing of a petition for adoption and thirty (30) days from birth to register with the Putative Father Registry.⁴²
 - B. Delaying filing a petition for adoption beyond these time frames leaves open the opportunity for putative father to register.
 - C. As previously discussed, failure to timely register creates significant safeguards for the prospective adoptive parents.
 - D. Failure to afford prospective adoptive parents that protection leaves the attorney open to a malpractice claim.
- X. **Falling Into the Visitation Trap.** Over the years, adoptions have become more open, sometimes including post-placement visits between the birth mother or parents and the child.
- A. This created a problem for, at least, one Indiana family, who entered into a visitation agreement with the birth parents. When the visitation arrangement did not work out as planned, the birth parents, who had signed a “Visitation Agreement” with the adoptive parents, challenged the adoption. The Indiana Court of Appeals held: “[W]e hold the “Visitation Agreement” in favor of Terry [birth father] executed contemporaneously with his consent to the adoption and the termination of his parental rights constitutes a consent-vitiating factor which renders his consent invalid.” (bracketed clarification added)⁴³
 - B. The Nebraska Supreme Court invalidated a consent to adoption in which the prospective adoptive parents agreed to provide updates, by means of letters and photographs to the birth parents: “In this case, the record is clear, and the parties do not dispute, that an open adoption was planned. But this retention of parental rights, however slight, is sufficient to invalidate Teresa's and Monty's [birth parents] relinquishments.” (bracketed clarification added)⁴⁴
 - C. At Kirsh & Kirsh, we utilize one or more following to protect against these types of challenges:
 - 1. In every adoption, in addition to having the birth mother execute a Waiver of Notice and Consent to Adoption (and father, if he signs a post-birth consent), we

⁴² **Indiana Code** § 31-19-5-12: (a) 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 under section 5 [IC 31-19-5-5] of this chapter not later than:

(1) thirty (30) 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 child's mother; whichever occurs later.

(b) A putative father may register under subsection (a) before the child's birth.

⁴³ **Adoption of Topel**, 571 N.E.2d 1295, 1299 (Ind. App. 1991)

⁴⁴ **Monty S. v. Jason W.**, 290 Neb. 1048, 1055, 863 N.W.2d 484, (Neb. 2015)

have them execute a “Relinquishment and Consent to Adoption,” which includes provisions relating to “open adoption.” See paragraphs 16 and 17 in Appendix, Form 11.

2. When the parties contemplate post-placement visitation, we have them execute a memorandum of understanding in which the birth mother (parents) confirm that they have unconditionally consented to adoption. See Appendix, Form 12
3. Have the parties enter into a Post Adoption Contact Agreement (“PACA”) pursuant to **Indiana Code** § 31-19-16.
 - a. A PACA may only include a visitation provision if the child is two (2) years of age or older.⁴⁵
 - b. The parties may enter into a PACA for a child less than two (2) years of age, if it does not include visits.⁴⁶
4. In general, Kirsh & Kirsh only recommends utilizing the statutory procedure for PACAs when the child is two (2) or older and the parties contemplate visits.

⁴⁵ **Indiana Code** § 31-19-16-2(2)

⁴⁶ **Indiana Code** § 31-19-16-9

Appendix

Form No.	Description
1	Affidavit Regarding Indian Ancestry (No) – Birth Mother
2	Affidavit Regarding Indian Ancestry (?) – Birth Mother
3	Affidavit Regarding Indian Ancestry (No) – Birth Father
4	Affidavit Regarding Indian Ancestry (?) – Birth Father
5	Motion and Order for Judicial Finding regarding ICWA
6	Judicial Finding Regarding ICWA
7	Motion for Judicial Acknowledgment regarding Consent to Adoption
8	Judicial Acknowledgment of Consent to Adoption – Birth Mother
9	Judicial Acknowledgment of Consent to Adoption – Birth Father
10	Script for Judge for Judicial Acknowledgment Hearing
11	Relinquishment of Parental Rights and Consent to Adoption
12	Sample Memorandum of Understanding

FORM NO. 1

TOUPPER(FIELD(105))
 TOUPPER(FIELD(116))
 CAUSE NO. FIELD(115)FIELD(41)

STATE OF INDIANA)
) SS:
 COUNTY OF TOUPPER(FIELD(110)))
 IN THE MATTER OF THE ADOPTION OF)
)
 INFANT TOUPPER(FIELD(26) FIELD(59)))

AFFIDAVIT REGARDING INDIAN ANCESTRY
(FIELD(119))

that: FIELD(119), upon being duly sworn upon her oath, states under the penalty of perjury,

1. She has personal knowledge of the matters contained in this Affidavit.
2. She gave birth to a child on FIELD(25)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM) (the "Child").
3. Neither she, her parents, her known relatives, nor the Child receive benefits from any Indian tribe nor an Alaskan village nor has she or they ever lived on an Indian reservation or in an Alaskan village.
4. Neither she, her parents, known relatives, nor the Child have ever lived as part of an Indian family nor an Alaskan village nor has she or they ever lived in an Indian or Alaskan village culture.
5. Neither she, her parents, known relatives, nor the Child is an enrolled member of an Indian tribe nor an Alaskan village, and to the best of her knowledge, neither she nor they is eligible for membership in an Indian tribe or an Alaskan village.
6. To the best of her knowledge and belief, neither the Child's father, his parents, nor any of his relatives receives benefits from any Indian tribe nor has he or they ever lived on an Indian reservation.
7. To the best of her knowledge and belief, neither the Child's father, his parents, nor any of his relatives has ever lived as part of Indian family nor has he or they ever

lived in an Indian culture.

8. To the best of her knowledge and belief, neither the Child's father, his parents, nor any of his relatives is an enrolled member of an Indian tribe nor an Alaskan village nor are they eligible for membership in an Indian tribe or an Alaskan village.
9. She ***has no reason*** to know that the Child is an Indian child under the provisions of the Indian Child Welfare Act, 25 U.S.C. § 1903(4), which provides: "Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"

Dated: **FIELD(27)NESTMACRO(**
O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM)

FIELD(119)

STATE OF INDIANA)
) SS:
 COUNTY OF **TOUPPER(FIELD(28))**)

Before me, a Notary Public in and for said County and State, personally appeared **FIELD(119)**, who acknowledged the execution of the foregoing Affidavit, and who, having been duly sworn, under the penalties of perjury, stated that the facts and matters therein set forth are true and correct.

WITNESS my hand and Notarial Seal on **FIELD(27)NESTMACRO(**
O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM).

FIELD(53) FIELD(54) FIELD(55), Notary Public

My Commission Expires: **FIELD(51)**

My County of Residence: **FIELD(52)**

FORM NO. 2

TOUPPER(FIELD(105))

TOUPPER(FIELD(116))

CAUSE NO. FIELD(115)FIELD(41)

STATE OF INDIANA)

) SS:

COUNTY OF TOUPPER(FIELD(110)))

IN THE MATTER OF THE ADOPTION OF)

INFANT TOUPPER(FIELD(26) FIELD(59)))

AFFIDAVIT REGARDING INDIAN ANCESTRY
(FIELD(119))

FIELD(119), upon being duly sworn upon her oath, states under the penalty of perjury, that:

1. She has personal knowledge of the matters contained in this Affidavit.
2. She gave birth to a child on FIELD(25)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM) (the "Child").
3. It has been said in her family that her family ancestry includes American Indian.
4. She asked a number of her family members if they could actually name a family member who is an enrolled member of a particular Indian tribe or if they even knew the specific tribe to which her ancestors alleged belonged.
5. She was unable to identify any relative of hers who was actually an enrolled member of a particular Indian tribe nor the specific tribe to which her ancestors alleged belonged.
6. Neither she, her parents, her known relatives, nor the Child receive benefits from any Indian tribe nor has she or they ever lived on an Indian reservation.
7. Neither she, her parents, her known relatives, nor the Child have ever lived as part of Indian family nor has she or they ever lived in an Indian culture.
8. Neither she, her parents, her known relatives, nor the Child is an enrolled member of an Indian tribe nor an Alaskan village, and to the best of her knowledge, neither

she nor they is eligible for membership in an Indian tribe or an Alaskan village.

9. To the best of her knowledge and belief, neither the Child's father, his parents, nor any of his relatives receives benefits from any Indian tribe nor has he or they ever lived on an Indian reservation.
10. To the best of her knowledge and belief, neither the Child's father, his parents, nor any of his relatives has ever lived as part of Indian family nor has he or they ever lived in an Indian culture.
11. To the best of her knowledge and belief, neither the Child's father, his parents, nor any of his relatives is an enrolled member of an Indian tribe nor an Alaskan village nor are they eligible for membership in an Indian tribe or an Alaskan village.
12. If she were not making an adoption plan for the Child, she would not raise the Child as part of an Indian family, she would not live on an Indian reservation with the Child, nor would she raise the Child in an Indian culture.
13. She ***has no reason*** to know that the Child is an Indian child under the provisions of the Indian Child Welfare Act, 25 U.S.C. § 1903(4), which provides: "Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"

Dated: **FIELD(27)NESTMACRO(**
O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM)

FIELD(119)

STATE OF INDIANA)
) SS:
 COUNTY OF **TOUPPER(FIELD(28))**)

Before me, a Notary Public in and for said County and State, personally appeared **FIELD(119)**, who acknowledged the execution of the foregoing Affidavit, and who, having been duly sworn, under the penalties of perjury, stated that the facts and matters therein set forth are true and correct.

WITNESS my hand and Notarial Seal on **FIELD(27)NESTMACRO(**
O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM).

FIELD(53) FIELD(54) FIELD(55), Notary Public

My Commission Expires: FIELD(51)

My County of Residence: FIELD(52)

FORM NO. 3

TOUPPER(FIELD(105))
 TOUPPER(FIELD(116))
 CAUSE NO. FIELD(115)FIELD(41)

STATE OF INDIANA)
) SS:
 COUNTY OF TOUPPER(FIELD(110)))
 IN THE MATTER OF THE ADOPTION OF)
)
 INFANT TOUPPER(FIELD(26) FIELD(59)))

AFFIDAVIT REGARDING INDIAN ANCESTRY
(FIELD(32))

that: FIELD(32), upon being duly sworn upon his oath, states under the penalty of perjury,

1. He has personal knowledge of the matters contained in this Affidavit.
2. He is the father of the child born to FIELD(119) on FIELD(25)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM) (the "Child").
3. Neither he, his parents, his known relatives, nor the Child receive benefits from any Indian tribe nor an Alaskan village nor has she or they ever lived on an Indian reservation or in an Alaskan village.
4. Neither he, his parents, his known relatives, nor the Child have ever lived as part of Indian family nor Alaskan village nor has he or they ever lived in an Indian or Alaskan village culture.
5. Neither he, his parents, his known relatives, nor the Child is an enrolled member of an Indian tribe nor an Alaskan village, and to the best of his knowledge, neither he nor they is eligible for membership in an Indian tribe or an Alaskan village.
6. To the best of his knowledge and belief, neither the Child's mother, her parents, nor any of her relatives receives benefits from any Indian tribe nor has she or they ever lived on an Indian reservation.
7. To the best of his knowledge and belief, neither the Child's mother, her parents, nor any of her relatives has ever lived as part of Indian family nor has she or they

ever lived in an Indian culture.

8. To the best of his knowledge and belief, neither the Child's mother, her parents, nor any of her relatives is an enrolled member of an Indian tribe nor an Alaskan village nor are they eligible for membership in an Indian tribe or an Alaskan village.
9. He ***has no reason*** to know that the Child is an Indian child under the provisions of the Indian Child Welfare Act, 25 U.S.C. § 1903(4), which provides: "Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"

Dated: **FIELD(27)NESTMACRO(**
O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM)

FIELD(32)

STATE OF INDIANA)
) SS:
 COUNTY OF **TOUPPER(FIELD(28))**)

Before me, a Notary Public in and for said County and State, personally appeared **FIELD(32)**, who acknowledged the execution of the foregoing Affidavit, and who, having been duly sworn, under the penalties of perjury, stated that the facts and matters thisein set forth are true and correct.

WITNESS my hand and Notarial Seal on **FIELD(27)NESTMACRO(**
O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM).

FIELD(53) FIELD(54) FIELD(55), Notary Public

My Commission Expires: **FIELD(51)**

My County of Residence: **FIELD(52)**

FORM NO. 4

TOUPPER(FIELD(105))

TOUPPER(FIELD(116))

CAUSE NO. FIELD(115)FIELD(41)

STATE OF INDIANA)

) SS:

COUNTY OF TOUPPER(FIELD(110)))

IN THE MATTER OF THE ADOPTION OF)

)

INFANT TOUPPER(FIELD(26) FIELD(59)))

AFFIDAVIT REGARDING INDIAN ANCESTRY
(FIELD(32))

that: FIELD(32), upon being duly sworn upon his oath, states under the penalty of perjury,

1. He has personal knowledge of the matters contained in this Affidavit.
2. He is the father of the child born to FIELD(119) on FIELD(25) (the "Child").
3. It has been said in his family that his family ancestry includes American Indian.
4. He asked a number of his family members if they could actually name a family member who is an enrolled member of a particular Indian tribe or if they even knew the specific tribe to which her ancestors alleged belonged.
5. He was unable to identify any relative of his who was actually an enrolled member of a particular Indian tribe nor the specific tribe to which her ancestors alleged belonged.
6. Neither he, his parents, his known relatives, nor the Child receive benefits from any Indian tribe nor has she or they ever lived on an Indian reservation.
7. Neither he, his parents, his known relatives, nor the Child have ever lived as part of Indian family nor has he or they ever lived in an Indian culture.
8. Neither he, his parents, his known relatives, nor the Child is an enrolled member of an Indian tribe nor an Alaskan village, and to the best of his knowledge, neither he nor they is eligible for membership in an Indian tribe or an Alaskan village.

9. If he were not making an adoption plan for the Child, he would not raise the Child as part of an Indian family, he would not live on an Indian reservation with the Child, nor would he raise the Child in an Indian culture.
10. He ***has no reason*** to know that the Child is an Indian child under the provisions of the Indian Child Welfare Act, 25 U.S.C. § 1903(4), which provides: "Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"

Dated: FIELD(27)NESTMACRO(
O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM)

FIELD(32)

STATE OF INDIANA)
) SS:
COUNTY OF TOUPPER(FIELD(110)))

Before me, a Notary Public in and for said County and State, personally appeared FIELD(32), who acknowledged the execution of the foregoing Affidavit, and who, having been duly sworn, under the penalties of perjury, stated that the facts and matters thisein set forth are true and correct.

WITNESS my hand and Notarial Seal on FIELD(27)NESTMACRO(
O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM).

FIELD(53) FIELD(54) FIELD(55), Notary Public

My Commission Expires: FIELD(51)

My County of Residence: FIELD(52)

FORM NO. 5

IN THE **TOUPPER(FIELD(105))**
TOUPPER(FIELD(116))
 CAUSE NO. **FIELD(115) FIELD(41)**

STATE OF INDIANA)
) SS:
 COUNTY OF **TOUPPER(FIELD(110))**)

IN THE MATTER OF THE ADOPTION OF)
)
 INFANT **TOUPPER(FIELD(26) FIELD(59))**)

Motion for Judicial Finding Regarding
Inapplicability of the Indian Child Welfare Act

Come now, Petitioners, **FIELD(9)** and **FIELD(10)**, by counsel, and respectfully move the Court for a Judicial Finding that the Indian Child Welfare Act, 25 U.S.C. §1901 (“ICWA”), does not apply in the captioned proceedings. In support of the Motion, Petitioners, by Counsel, would respectfully show the Court as follows:

*****Use the following paragraph when Agency is petitioner--all other paragraphs are the same*****

[Comes now, Petitioner, **FIELD(122)**, by counsel, and respectfully moves the Court for a Judicial Finding that the Indian Child Welfare Act, 25 U.S.C. §1901 (“ICWA”), does not apply in the captioned proceedings. In support of the Motion, Petitioner, by Counsel, would respectfully show the Court as follows:]

1. ICWA was enacted by the United States Congress to provide minimum federal standards for the “removal of Indian children from their families . . .” 25 U.S.C. §1902.
2. In this case, **FIELD(136)**, gave birth to a child on **FIELD(25)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM)**, in **FIELD(88)** of **FIELD(90), FIELD(93)** County, Indiana (the “Child”).

3. As evidenced by the affidavit, attached hereto and made a part hereof as Exhibit “A”, neither **FIELD(136)**, her parents, the birth father to the best of **FIELD(136)**’s knowledge, nor the Child:
 - a. are enrolled members of any Indian Tribe or Alaskan Village;
 - b. have ever lived on an Indian reservation or have they ever lived in an Indian culture; nor
 - c. have ever lived as part of an existing Indian family.
4. **FIELD(136)** has no reason to know that the Child is an Indian child under the provisions of the Indian Child Welfare Act, 25 U.S.C. § 1903(4), which provides:

“Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe”
5. The adoption of the Child will not result in the Child being removed from an existing Indian family.
6. The Child is not an Indian child under ICWA.
7. ICWA does not apply in this case.
8. Compliance with 25 C.F.R. § 23 et seq., the federal regulations governing ICWA are not applicable to these proceedings.

WHEREFORE, Petitioners, by counsel, respectfully move the court for a judicial finding that the ICWA does not apply to this adoption.

Steven M. Kirsh
KIRSH & KIRSH, P.C.

2930 E. 96th Street
Indianapolis, IN 46240
(317)575-5555
Attorney No.: 5223-49
Attorney for Petitioners

Grant M. Kirsh
KIRSH & KIRSH, P.C.
2930 East 96th Street
Indianapolis, IN 46240
(317)575-5555
Attorney No.: 32033-29
Attorney for Petitioner, **FIELD**(122)

Joel D. Kirsh
KIRSH & KIRSH, P.C.
2930 East 96th Street
Indianapolis, IN 46240
(317)575-5555
Attorney No.: 5545-49
Attorney for Petitioner, **FIELD**(122)

Robert B. Kirsh
KIRSH & KIRSH, P.C.
2930 East 96th Street
Indianapolis, IN 46240
(317)575-5555
Attorney No.: 18737-49
Attorney for Petitioner, **FIELD**(122)

FORM NO. 6

IN THE TOUPPER(FIELD(105))
TOUPPER(FIELD(116))
CAUSE NO. FIELD(115) FIELD(41)

STATE OF INDIANA)
) SS:
COUNTY OF TOUPPER(FIELD(110)))
IN THE MATTER OF THE ADOPTION OF)
))
INFANT TOUPPER(FIELD(26) FIELD(59)))

**JUDICIAL FINDING THAT THE INDIAN CHILD
WELFARE ACT IS NOT APPLICABLE**

Come now Petitioners, FIELD(9) and FIELD(10), [Petitioner, FIELD(122),] by counsel,
who having filed a Motion For Judicial Finding Regarding Inapplicability of the Indian Child
Welfare Act and the Court being duly advised in the premises now finds:

1. The Indian Child Welfare Act, 25 U.S.C. §1901 (“ICWA”) was enacted by the Congress to provide minimum federal standards for the “removal of Indian children from their families” 25 U.S.C. §1902.
2. In this case, FIELD(136) , gave birth to a child on FIELD(25)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM), in FIELD(88) of FIELD(90), FIELD(93) County, Indiana (the “Child”).
3. Neither FIELD(136), her parents, nor the Child:
 - a. are enrolled members of any Indian Tribe or Alaskan Village;
 - b. have ever lived on an Indian reservation nor have they ever lived in an Indian culture; nor
 - c. have ever lived as part of an existing Indian family.
4. FIELD(136) ***has no reason*** to know that the Child is an Indian child under the provisions of the Indian Child Welfare Act, 25 U.S.C. § 1903(4), which provides:

"Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"

5. The adoption of the Child will not result in the Child being removed from an existing Indian family.
6. The Child is not an Indian child under ICWA.
7. ICWA does not apply in this case.
8. Compliance with 25 C.F.R. § 23 *et seq.*, the federal regulations governing ICWA are not applicable to these proceedings.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED THAT

1. The Child is not an Indian child under ICWA;
2. ICWA does not apply to these proceedings;
3. Compliance with 25 C.F.R. § 23 *et seq.* is not required; and
4. The consent(s) to adoption executed as part of these proceedings is(are) valid and not subject to challenge for failure to comply with the requirements of ICWA.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as required by 25 C.F.R. § 23.107(a), the parties shall inform this Court if they subsequently receive information that provides reason to know the Child is an Indian child under ICWA.

IT IS ALSO FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to Trial Rule 54(B), the Court makes an express determination that there is no just reason for delay and expressly directs entry of final and appealable judgment as to this Judicial Finding.

Dated: FIELD(40)NESTMACRO(

O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM)

JUDGE, HAMILTON SUPERIOR COURT
TOUPPER(FIELD(116))

DISTRIBUTION:

Steven M. Kirsh
KIRSH & KIRSH, P.C.
2930 E. 96th Street
Indianapolis, IN 46240
Attorney No. 5223-49
Attorney for Petitioners

Grant M. Kirsh
KIRSH & KIRSH, P.C.
2930 East 96th Street
Indianapolis, IN 46240
(317)575-5555
Attorney No.: 32033-29
Attorney for Petitioner, FIELD(122)

Joel D. Kirsh
KIRSH & KIRSH, P.C.
2930 East 96th Street
Indianapolis, IN 46240
(317)575-5555
Attorney No.: 5545-49
Attorney for Petitioner, FIELD(122)

Robert B. Kirsh
KIRSH & KIRSH, P.C.
2930 East 96th Street
Indianapolis, IN 46240
(317)575-5555
Attorney No.: 18737-49
Attorney for Petitioner, FIELD(122)

FORM NO. 7

IN THE TOUPPER(FIELD(105))
TOUPPER(FIELD(116))
CAUSE NO. FIELD(115) FIELD(41)

STATE OF INDIANA)
) SS:
COUNTY OF TOUPPER(FIELD(110)))
IN THE MATTER OF THE ADOPTION OF)
))
INFANT TOUPPER(FIELD(26) FIELD(59)))

Petition to Set Hearing on Judicial Acknowledgment of Consent to Adoption

COME NOW Petitioners, FIELD(9) and FIELD(10), by counsel and respectfully petition the Court to set a hearing on a judicial acknowledgment pursuant to Indiana Code 31-19-10-3. In support of this petition, Petitioners would show the Court as follows:

1. On FIELD(25)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM), FIELD(136) gave birth to a FIELD(26) child (the "Child") in FIELD(88) of FIELD(90), FIELD(93) County, Indiana.
2. On FIELD(27)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM), FIELD(136), the biological mother of the Child, executed the [Waiver of Notice and Consent by Biological Mother for the Guardianship and Adoption of her Minor Child] Waiver of Notice and Consent by Biological Mother to Adoption of her Minor Child, an Affidavit, and a Relinquishment of Parental Rights, copies of which are attached hereto as Exhibit "A" and collectively referred to as the "consent to adoption".
3. On FIELD(27)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM), FIELD(32), the biological father of the Child, executed the [Waiver of Notice and Consent by Biological Father for the Guardianship and Adoption of his Minor Child] Waiver of Notice and Consent by Biological Father to Adoption of his Minor Child, an Affidavit, and a Relinquishment of Parental Rights, copies of which are attached

hereto as Exhibit “A” and collectively referred to as the “consent to adoption”.

4. The purpose of the hearing is for a judicial acknowledgment of the consent to adoption pursuant to Indiana Code 31-19-10-3.

WHEREFORE Petitioner(s), by counsel, respectfully request that the Court set a hearing on the judicial acknowledgment and for all other proper relief in the premises.

Steven M. Kirsh
KIRSH & KIRSH, P.C.
2930 E. 96th Street
Indianapolis, IN 46240
(317)575-5555
Attorney No.: 5223-49
Attorney for Petitioners

FORM NO. 8

IN THE **TOUPPER(FIELD(105))**
TOUPPER(FIELD(116))
 CAUSE NO. **FIELD(115) FIELD(41)**

STATE OF INDIANA)
) SS:
 COUNTY OF **TOUPPER(FIELD(110))**)
 IN THE MATTER OF THE ADOPTION OF)
)
 INFANT **TOUPPER(FIELD(26) FIELD(59))**)

JUDICIAL ACKNOWLEDGMENT
(FIELD(136))

The Court does now find, based on the testimony presented and upon review of the Petition to Set Hearing on Judicial Acknowledgment of Consent to Adoption and its attached documents, being the **[Waiver of Notice and Consent by Biological Mother for the Guardianship and Adoption of her Minor Child]** Waiver of Notice and Consent by Biological Mother to Adoption of her Minor Child, Affidavit, and Relinquishment of Parental Rights and Consent for Adoption (collectively referred to as the “Consent to Adoption”), the following:

- 1) That **FIELD(136)**, the biological mother of an infant **FIELD(26)** child born on **FIELD(25)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM)** (the “Child”), has appeared before me on this date;
- 2) That there has been no showing of duress or force concerning either the signing of the Consent to Adoption or to proceed this date;
- 3) That the signature and initials on the Consent to Adoption are authentic and genuine;

- 4) That **FIELD(136)** has manifested her present intention to proceed with the adoption of the Child and has expressed her desire to proceed this date with the hearing;
- 5) That **FIELD(136)** has acknowledged that:
 - a) She understands the consequences of the signing of her Consent to Adoption;
 - b) She has freely and voluntarily signed her Consent to Adoption; and
 - c) She believes that adoption is in the best interests of the Child ;
- 6) The Consent to Adoption conforms with the applicable statutes and is a valid consent to adoption under Indiana Law.
- 7) That such Judicial Acknowledgment has been received and should be accepted by this Court.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Judicial Acknowledgment of **FIELD(136)** is hereby accepted by the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to Trial Rule 54(B), the Court makes an express determination that there is no just reason for delay and expressly directs entry of final and appealable judgment as to this Judicial Acknowledgment.

SO ORDERED: **FIELD(40)NESTMACRO(**

O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM).

JUDGE, **TOUPPER(FIELD(105))**
TOUPPER(FIELD(116))

FORM NO. 9

IN THE TOUPPER(FIELD(105))
TOUPPER(FIELD(116))
CAUSE NO. FIELD(115) FIELD(41)

STATE OF INDIANA)
) SS:
COUNTY OF TOUPPER(FIELD(110)))
IN THE MATTER OF THE ADOPTION OF)
))
INFANT TOUPPER(FIELD(26) FIELD(59)))

JUDICIAL ACKNOWLEDGMENT
(FIELD(32))

The Court does now find, based on the testimony presented and upon review of the Petition to Set Hearing on Judicial Acknowledgment of Consent to Adoption and its attached documents, being the [Waiver of Notice and Consent by Biological Father for the Guardianship and Adoption of his Minor Child] Waiver of Notice and Consent of Biological Father for the Adoption of his Minor Child, Affidavit, and Relinquishment of Parental Rights and Consent for Adoption (collectively referred to as the “Consent to Adoption”), the following:

- 1) That FIELD(32), the father of an infant FIELD(26) child born to FIELD(136) on FIELD(25)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WC M) (the “Child”), has appeared before me on this date;
- 2) That there has been no showing of duress or force concerning either the signing of the Consent to Adoption or to proceed this date;
- 3) That the signature and initials on the Consent to Adoption are authentic and genuine;
- 4) That FIELD(32) has manifested his present intention to proceed with the adoption of the Child and has expressed his desire to proceed this date with the hearing; and

- 5) That **FIELD(32)** has acknowledged that:
 - a) He understands the consequences of the signing of her Consent to Adoption;
 - b) He has freely and voluntarily signed his Consent to Adoption; and
 - c) He believes that adoption is in the best interests of the Child
- 6) The Consent to Adoption conforms with the applicable statutes and is a valid consent to adoption under Indiana Law.
- 7) That such Judicial Acknowledgment has been received and should be accepted by this Court.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Judicial Acknowledgment of **FIELD(32)** is hereby accepted by the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to Trial Rule 54(B), the Court makes an express determination that there is no just reason for delay and expressly directs entry of final and appealable judgment as to this Judicial Acknowledgment.

SO ORDERED: **FIELD(40)NESTMACRO(O:\APPS\ADCPP2\PERFPRAC\BIN\DATETEXT.WCM)**.

JUDGE, **TOUPPER(FIELD(105))**
TOUPPER(FIELD(116))

FORM NO. 10

JUDICIAL ACKNOWLEDGMENT

FOR CONSENT OF BIOLOGICAL MOTHER FOR ADOPTION

THE COURT: Let the record show we are here under 29D0__-AD-_____ concerning a Judicial Acknowledgment pursuant to I.C. 31-19-10-3. Is everyone ready to proceed?

(Response)

For the purposes of this hearing, various individuals are appearing (in the courtroom) and/or (by telephone). Could those individuals identify themselves, and if they are attorneys, identify which party you are representing.

THE COURT: (Addresses birth mother): Let me advise you how this matter will proceed today. First, I will set forth on the record what documents have been presented to me for review in this hearing. Next, I will administer an oath to you. Next, I will ask you some questions, counsel for the Adoptive Parents will ask you some questions, and your counsel may ask some questions. Next, I will ask some final questions. Next, there may be some final questions from counsel for the Adoptive Parents or your counsel, and then the Court will make a ruling. Do you have any questions on how this hearing will proceed today?

WITNESS: _____

The Court does now proceed with a hearing pursuant to the PETITION TO SET HEARING ON JUDICIAL ACKNOWLEDGMENT OF CONSENT TO ADOPTION and its attached documents, being the WAIVER OF NOTICE AND CONSENT OF BIOLOGICAL MOTHER FOR ADOPTION OF HER MINOR CHILD, AFFIDAVIT, and RELINQUISHMENT OF PARENTAL RIGHTS AND CONSENT FOR ADOPTION, which documents I will collectively refer to as CONSENT TO ADOPTION.

At this point I will administer an oath to you. Do you solemnly swear concerning the

testimony you are about to give that you will tell the truth, the whole truth, and nothing but the truth, so help you, God?

WITNESS: I do.

THE COURT: Would please state and spell each of your names for the record?

WITNESS: _____

THE COURT: Do you request to personally appear before me, or do you request to appear before me by phone?

WITNESS: _____

THE COURT: Do you understand that appearing by phone is the same as if you would have personally appeared in this Court?

WITNESS: _____

THE COURT: Do you understand that by appearing by phone you are subject to the laws of the State of Indiana the same as if you would have personally appeared in this courtroom?

WITNESS: _____

THE COURT: Will you promise me that if at any time you do not understand the questions, the words that are being used, or anything about this proceeding, that you will stop the proceedings and advise me that you do not understand?

WITNESS: _____

THE COURT: Will you also promise me that if at any time you wish to ask any questions that you will stop these proceedings and ask your questions?

WITNESS: _____

THE COURT [When birth parent is represented by an attorney]: Finally, will you

promise me if at any time you wish to speak privately to your attorney that you will stop these proceedings and advise me that you wish to privately speak to your attorney.

WITNESS: _____

THE COURT: Counsel for the Adoptive Parents, please proceed.

ATTORNEY FOR ADOPTIVE PARENTS: Yes, Your Honor. Just as a brief introduction, Your Honor. This is a Judicial Acknowledgment of a consent to adoption pursuant to Statute. (NOTE: Identify the child for the record and that the Witness is the biological mother of such child.)

THE COURT: Please proceed.

ATTORNEY FOR ADOPTIVE PARENTS: Outline Summary

- A. Identify Witness (DOB, SSN, etc.)
- B. Describe her location and if there are any persons with her at the time of the hearing.
- C. Describe her location and if there were any other persons (social workers at the hospital) who were with her at the time she signed the consent.
- D. Describe the process of going over the forms and explaining the procedure.
- E. Describe that she read and understood the documents.
- F. Describe that she understands the implications of signing the documents.
- G. Describe that her consent was free and voluntary, that there

was no force or duress.

H. Describe that there is no force or duress being placed upon the witness to proceed with hearing this date.

I. Describe that she understands the purpose of this hearing and that if the Court accepts this judicial acknowledgment she would have no period of time to withdraw such consent.

J. Have witness confirm that the witness understands;

1. _____ represents her
2. _____ fees are being paid by the adoptive parents
3. Witness is satisfied with _____ representation
4. Attorney for adoptive parents has not provided legal advice to witness

THE COURT: (ATTORNEY FOR BIRTH PARENT(S), Do you have any questions?

THE COURT: I have heard your answers, and now I have a few final questions to ask you myself.

1. Are you now under the influence of any alcohol or any drugs?
2. Were you under the influence of any alcohol or any drug when you signed any of the documents which we have referred to as
CONSENT TO ADOPTION?
3. Have you ever been treated for any mental illness?

4. To your knowledge do you now suffer from any mental or emotional disability?

5. Do you feel that you were under any duress or that you were forced in any way to sign any of the documents which we have referred to as CONSENT TO ADOPTION?

6. Do you feel that you are under any duress or that you were forced in any way to proceed with this hearing today?

7. Do you have any questions whatsoever concerning the documents which you signed and which we have referred to as CONSENT TO ADOPTION?

8. Do you have any questions whatsoever for the Court concerning your rights or this proceeding?

9. Do you feel that this is in the best interest of the child?

10. Do you wish to have more time to consider your decision?

11. Do you wish the Court to proceed today?

12. Do you have any statements you would like to make to the Court concerning this matter?

13. Would you like to speak with your attorney in private concerning any questions you may have about your rights or this proceeding?

14. Is it still your intention to proceed with your Judicial Acknowledgment?

THE COURT: Does the attorney for the Adoptive Parents have any final questions?

THE COURT: Does the attorney for the Birth Parents have any final questions?

ATTORNEY FOR BIRTH PARENT(S):

A. General questions:

1. Do you have any questions concerning the questions asked by the Court or by the attorney for the Adoptive Parents?
2. Do you have any questions about your rights or these proceedings?
3. Do you wish to talk with me in private concerning any of these matters?

A. Questions regarding withdrawal of representation

1. Was I hired to answer your questions about adoption, your rights with respect to the adoption, the documents referred to as Consent to Adoption, and these proceedings?
2. Have I answered your questions and provided explanations to your satisfaction?
3. Do you understand that my representation of you was to end after you confirmed your consent to adoption for the Court?
4. Do you believe that I have fulfilled the terms of my representation of you?
5. Do I have your permission to withdraw my appearance in these proceedings?

THE COURT: The Court does now find, based on the testimony presented and upon review of the PETITION and the attached documents, that the Judicial Acknowledgment is accepted, and the Proposed Order which was submitted by counsel is proper.

THE COURT: Is there anything else we need to set forth on the record today?

ATTORNEY FOR BIRTH PARENTS: I move to withdraw my appearance from these proceedings.

ATTORNEY FOR ADOPTIVE PARENTS: I have no objection to the motion to withdraw and nothing further, Your Honor.

WITNESS: _____

THE COURT: The motion to withdraw is granted and the Court does now sign the proposed Order this _____ day of _____, 20_____. That's all for the record.

FORM NO. 11**RELINQUISHMENT OF PARENTAL RIGHTS
AND CONSENT FOR ADOPTION**

Revised July 31, 2017

Read the following statements carefully. Initial your response to the right of each statement. Sign below only when you fully understand each statement. If you have any questions, please discuss them before you sign below. The birth parent has a right, if so desired, to be given a copy of this document. Copies of this document are retained in the file.

	Correct	Incorrect
1. I am not under any undue influence, duress, or improper pressure in the consent to adoption procedure by anyone, including parents, friends, relatives, doctors, the prospective adoptive parent(s), or other acquaintances.		
2. I am not under the influence of any drug, medication, or any substance which might affect my reasoning or judgment.		
3. I have carefully considered my reasons for deciding to make an adoption plan for the child.		
4. I understand that because I am the birth parent of this child, I have the primary right to parent this child if I so choose, even if I am a minor, and that by signing a consent to adoption, I am giving up this right.		
5. I understand that there may be services and sources of financial assistance in the community which may be available to me if I choose to parent the child. I do not wish to take advantage of these services and resources.		
6. I understand that I may be able to place the child in a foster home for a period of time and then later reclaim the child rather than making an adoptive placement for the child at this time. I do not wish to take advantage of foster care.		
7. I understand that I can delay proceeding with an adoption at this time in order to give my decision more thought.		
8. I understand that I am not under any obligation to proceed with an adoption at this time.		
9. I understand that I could take the child home with me for a few days, weeks, or months before proceeding with an adoption.		

		<u>Correct</u>	<u>Incorrect</u>
10.	I understand that once I release my right to the child, I have no legal claim to the child.		
11.	I understand that I have a right to consult with others, such as an attorney, a physician, clergy person or counselor.		
12.	I understand that neither Steven M. Kirsh, Joel D. Kirsh, Grant M. Kirsh, Robert B. Kirsh (collectively, the "Kirsh Attorneys"), nor anyone in their office represents me in the adoption, and that they represent the adoptive parent(s). I have chosen to be represented by _____. I understand that my attorney's fees for representing me are being paid by the adoptive parents. I am satisfied with my attorney's representation of me. Furthermore, none of the Kirsh Attorneys, nor anyone in their office has provided legal advice to me, even though they may have read and explained this document and other adoption-related documents to me. [If K&K was not present at the consent signing, use the following after the words, "even though": I have been in contact with them throughout my pregnancy.]		
13.	I understand that, for peace of mind in knowing the child is well, the adoptive parent(s) have/has offered to provide updates to me about the child by way of letters, or photographs, or both, soon after returning home with the baby, and at 1, 2, 3, 6, 9, 12, 18, 24 months, and annually until the child reaches the age of 18 years. I further understand that the adoptive parent(s) are/is not legally obligated to provide these updates, but I would appreciate having them, upon my request. I acknowledge that my consent to adoption is not contingent upon receiving these updates.		
14.	I understand that I may provide updates about me by way of letters, or photographs, or both, for the adoptive parent(s) or child, or both, and that my consent to the adoption is not contingent on my being able to send such updates.		
15.	I agree that I will not post, nor allow another person to post, any such updates received from the adoptive parent(s) on Facebook, Instagram, Twitter, Snapchat, Pinterest or any other Social Media or Internet site, except ChildConnect or a similar update site used by the adoptive parent(s) and me to provide updates to each other, and that a breach of this provision may cause the adoptive parent(s) not to provide further updates.		

	<u>Correct</u>	<u>Incorrect</u>
16. Additionally, I understand that any discussion between the adoptive parent(s) and me or assumptions I have made about this being an “open adoption”, however “open adoption” may be defined, including receiving updates, always being part of the child’s life, having visits with the child, and similar statements and contacts are not enforceable statements, agreements, or promises and that the adoptive parent(s)’ failure to abide by them does not invalidate my consent to adoption or the adoption itself. To the extent that the adoptive parent(s) and I have discussed open adoption or I have assumed that it would be part of the adoption, I understand that my consent to adoption is not contingent upon having that relationship with the child or them. In other words, my consent to the adoption is valid and legally binding on me.		
17. In spite of any discussion about updates or discussion or assumption about open adoption, I consent unconditionally to the adoption of the child without reservation of any parental rights, no matter how slight.		
18. Kirsh & Kirsh, P.C., provided an explanation of the following: (A) The availability of adoption history information under IC 31-19-17 through IC 31-19-25.5. (B) My option to file a contact preference (non-release) form with the state registrar; and (C) That my identifying information may be released unless I file the contact preference (non-release) form with the state registrar, indicating my lack of consent to the release of identifying information.		
19. Kirsh & Kirsh, P.C., provided me the contact preference (non-release) form prescribed by the state registrar under IC 31-19-25-4.6.		

I understand all of the above statements. After careful consideration and of my own free will, I have decided on an adoption plan for the child. I am ready to sign the forms making adoption possible for the child. I understand that when I sign the consent to adoption and once the court enters a final decree of adoption, all my rights and responsibilities for this child will end, and that my consent is final and legally binding.

Signature of Parent _____

Dated: **FIELD(27)**

Signature of Witness _____

Dated: **FIELD(27)**

FORM NO. 12**MEMORANDUM OF UNDERSTANDING**

This Memorandum of Understanding is intended to memorialize the understanding of [Adoptive Mother's First Name] and [Adoptive Father's First Name] ("Adoptive Parents") and [Birth Mother's First Name] ("Birth Parent"). This **Memorandum of Understanding** is not intended to be a binding nor legally enforceable agreement between the parties, but rather a memorialization of their hopes and expectations regarding the relationship which they will have after the birth of the baby who was born to the Birth Parent on _____, 20__ (the "Child").

1. The parties believe that it is in their own best interests and the best interest of the Child that they maintain a relationship after the Child is born throughout the Child's life.
2. The parties recognize that their understanding of that relationship as of the signing of this **Memorandum of Understanding** may change from time to time and that the parties will always strive to do what is in the best interests of the Child.
3. It is important to the Birth Parent to receive updates on how the Child is developing and maturing. In order to satisfy herself in that regard, she would like to receive from the Adoptive Parents letters and photographs and have a chance to visit with the Child from time to time.
 - a. The update schedule for letters and photographs will be as follows: The Adoptive Parents will send written and photographic updates to the Birth Parent shortly after birth of the Child, and then at 1, 2, 3, 6, 9, 12 months, and quarterly from age 1 year to 5 years, and semiannually from age 6 years to age 18 years. The Adoptive Parents will provide the updates directly to the Birth Mother as opposed to by means of Child Connect.
 - b. The visitation arrangement will be as follows: the Adoptive Parents will permit visitation between the Birth Parent and the Child a total of 3 times a year through 5 age years of age and 2 times per year between ages 6 years and 18 years, on dates, times and places mutually convenient and reasonable to the parties.
4. The parties acknowledge and confirm that in signing this Memorandum of Understanding, they understand:
 - a. That this is not a legally enforceable agreement.
 - b. That the consent to the consent to the adoption signed by [Birth Mother's First Name] is unconditionally and irrevocably given and the Adoptive Parents' failure to honor the terms of this **Memorandum of Understanding** will have no effect whatsoever on the validity of the consent nor upon the validity of any order terminating parental rights or upon a final adoption decree entered by the court.
 - c. That the parties will always strive to do what is in the best interests of the Child regardless of how that may impact the terms of this **Memorandum of Understanding**.
 - d. That the Birth Parent's decision to place the Child with the Adoptive Parents

is the Birth Parent's free, voluntary, and unconditional act, and is in no way contingent upon any understandings or promises made by the Adoptive Parents, or anyone acting on their behalf, as regards contact before or after placement of the Child with the Adoptive Parents.

- e. The Birth Parent will not divulge information about the adoption in any public way or via social media, including, but not limited to, Facebook. She will see that neither her families nor friends do so either. A breach of this provision may cause the Adoptive Parents and Child not to provide further updates or participate in future visits.
- f. The parties agree that each party shares an equal responsibility in complying with this **Memorandum of Understanding**. This **Memorandum of Understanding** sets forth the parties' minimum expectations with regard to their continuing relationship. The parties agree, however, that from time to time, these minimum expectations may be exceeded or may not be met. Nevertheless, because this **Memorandum of Understanding** is set forth as an initial framework upon which the parties intend to build a long-term relationship, the parties agree to extend whatever grace is necessary if any party is unable to comply with any aspect of this **Memorandum of Understanding**.
- g. Waiver of any of the provisions of this **Memorandum of Understanding** does not constitute waiver of any other provision.
- h. Modifications of this **Memorandum of Understanding** must be made in writing and signed by the parties.
- i. That this **Memorandum of Understanding** is being signed contemporaneously with the signing of the consent to adoption by [Birth Mother's First Name].

DATED: _____, 20__

[Adoptive Father's First Name]

[Adoptive Mother's First Name]

"Adoptive Parents"

[Birth Mother's First Name]

"Birth Parent"

Section Two

Mistakes You Don't Want to Make when Handling a Step Parent Adoption

Joel D. Kirsh
Kirsh & Kirsh, P.C.
Indianapolis, Indiana

Section Two

Mistakes You Don't Want to Make when Handling a Step Parent Adoption..... Joel D. Kirsh

I.	Failing to Remember the Two "Cs": Competence and Compassion.....	1
II.	Not Asking the Correct Preliminary Questions Before Agreeing to Representation	2
III.	Advising the Client to Contact the Non-Custodial Parent About the Adoption Prematurely	2
IV.	Stating that the Consent of the Other Parent is Required in Order for the Adoption to Proceed	3
V.	Failing to Utilize the Putative Father Registry Correctly.....	6
VI.	Not Giving Notice of the Adoption to Grandparents.....	9
	Conclusion	12

Mistakes You Don't Want to Make when Handling a Step Parent Adoption

(June 2020)

By Joel D. Kirsh, Attorney

Kirsh & Kirsh, P.C.

2930 E. 96th Street

Indianapolis, IN 46240

www.IndianaAdoption.com

joel@kirsh.com

317-575-5555

Adoptions, unlike most areas of law in which an attorney may practice, are some of the most emotionally rewarding types of cases to handle. As a result, many attorneys are attracted to handling adoptions. Family or relative adoptions are a very common type of adoptions. Specifically, step parent adoption is likely the most common form of adoption. While handling adoptions is emotionally rewarding, they are equally emotionally charged for all parties involved. Accordingly, it is essential for attorneys to have requisite practical and legal knowledge prior to venturing into the area of adoption law. Based upon my experience of assisting with adoptions for over 30 years, I have learned, and seen, a number of mistakes made by practitioners in handling step parent adoptions. ***The information contained in these materials should be a starting point for attorneys and should not be construed as a comprehensive education of the area of adoption law.*** These are only a few of the common mistakes.

I. Failing to Remember the Two “Cs”: Competence and Compassion.

The Rules of Professional Conduct require lawyers to only practice in those areas in which they are competent. **Rule 1.1 provides:** *“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”*

Despite the attraction of handling an adoption, the practitioner must be competent. The possibilities for error are numerous and the consequences for making a mistake are severe. In fact, there are not many other areas of law where a family may be so adversely affected by a mistake made by the practitioner. Competence is learned through education and experience.

Compassion is also vital when assisting with an adoption. Attorneys are taught during their years of law school to be adversarial. While it is possible that an adoption may be adversarial, many adoptions are not, including those adoptions where a non-custodial parent consents to the adoption by a step parent. It is important for the practitioner to keep in mind the emotions involved even if a non-custodial parent is willingly consenting. It is for that reason that when assisting with an adoption, while it is important to be competent, it is equally important to remove your “attorney hat” and replace it with your “real person” hat. Although you may be representing the petitioner (i.e. the step parent) do not always and automatically treat the other party as an adversary. Instead, treat them

with respect that each of them deserve during this very decision of their lives.

II. Not Asking the Correct Preliminary Questions Before Agreeing to Representation

One of the responsibilities of an attorney is to first determine whether or not a prospective client has a valid and meritorious cause of action. In order to make that initial determination, and more particularly with adoptions, it is essential to gather enough pertinent information in order to provide an opinion as to whether or not the prospective client, has valid grounds and meets the requirements to achieve a successful adoption. If not, the attorney has an ethical obligation to decline representation.

In a step parent adoption, the most important initial question to ask is “What is the relationship, if any, between the child and the non-custodial, biological parent?” (For purposes of these materials, the adoption example is one in which a step dad is seeking to adopt his wife’s child and she has custody of the child) Once asked, let the prospective client, answer the question without direction by the attorney. The client’s answer will help the attorney ask more and better questions. For example, if the client says, *"The biological father is not really involved with the child"*, the attorney will need to ask better questions such as:

- Were the biological parents married or was paternity was established?
- Is the father’s name on the child’s birth certificate?
- What level of interaction has the father had with the child?
- Was the father ordered to pay child support?
- Does the father pay the child support in a timely manner?
- Does the father have any criminal history or other significant personal problems that may affect the welfare of the child?
- Does the prospective client have ANY criminal history or other personal problems that may affect the welfare of the child?

- Do you believe the father would agree or consent to the adoption?

By asking better questions, the attorney may ascertain, whether or not, based upon the attorney’s experience and competence, a court would likely grant the adoption.

III. Advising the Client to Contact the Non-Custodial Parent About the Adoption Prematurely.

There is an old adage:

“If the facts are against you, pound the law. If the law is against you, pound the facts. If the law and the facts are against you, pound the table”

Accordingly, the best position for a client is a case in which the client has the law

and the facts in its favor. When handling a step parent adoption, by asking the correct preliminary questions, the attorney can make a determination whether or not to accept representation and upon what grounds the adoption may proceed. IF based upon the answers, it is determined that the prospective client has both the law and the facts on their side, the attorney must NOT encourage the prospective client to take any actions that would or could disrupt that advantage.

For example, prospective client says to attorney, *“I know the biological father will consent to the adoption. He told me in a text message 3 months ago.”* The natural inclination is to have the client reach out to the biological father to obtain his consent. Instead the attorney should first consider whether or not there are other facts to support the adoption in case the biological father either wasn’t willing to consent in the first place or has changed his mind. If the attorney has asked the right questions preliminarily, and been able to ascertain if there are grounds to proceed with the adoption without his consent, it will serve the client’s best interests to file the adoption first before contacting the non-custodial father about the adoption.

IV. Stating that the Consent of the Other Parent Is Required In Order for the Adoption to Proceed.

Indiana Code 31-19-9-1 provides:

Sec. 1. (a) Except as otherwise provided in this chapter, a petition to adopt a child who is less than eighteen (18) years of age may be granted only if written consent to adoption has been executed by the following (*only pertinent provisions for this CLE, as examples, included*):

(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 of a child whose paternity has been established by:

(A) a court proceeding other than the adoption proceeding, except as provided in IC 31-14-20-2; or

(B) a paternity affidavit executed under IC 16-37-2-2.1;

unless the putative father gives implied consent to the adoption under section 15 of this chapter.

Upon an initial reading of the statute, it may appear that, in order to proceed with the adoption, the consent of each living parent must be obtained. However, it is important, by asking the correct preliminary questions, to determine who actually is a legal parent. For illustration purposes of this CLE, if the biological mother has custody of the child and it is her spouse who is the petitioner (a step father

adoption), it must be determined the legal status of the father of the child. A father of a child does not rise to the level of being a “legal parent” unless he meets certain requirements (paternity established or marriage). Thus, it is possible the his consent is not required because it has not been established that he is a “living parent” of the child. Asking important questions, as mentioned previously, such as: “*Was your wife married to the biological father?*”; “*Was paternity established?*”; “*Is his name on the child’s birth certificate?*” will help clarify the issue.

Many step parent adoptions do involve a father who is a “living parent” and thus, application of the Indiana Code 31-19-9-1 which requires his consent. **However**, the attorney must read Indiana Code 31-19-9-8, 9 & 10 before advising the client that the consent of the other parent is required. It may not be.

Indiana Code 31-19-9-8 (presenter’s most commonly used sections referenced here)

Sec. 8. (a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:

(1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.

(2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent:

(A) fails without justifiable cause to communicate significantly with the child when able to do so; or

(B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

.....

(11) 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.

It is vital to establish, through correct preliminary questions to the client, to determine whether or not there are grounds to proceed with a step parent adoption without the need to obtain the consent of the other parent. Likewise, it is important to note that the provisions contained in Indiana Code 31-19-9-8 are independent of one another and do not all collectively have to be established. With regard to the portions of the statute referred to in these materials, it is only necessary to prove only one of those 4 provisions and not all four. Also, the attorney should be careful in interpreting 31-19-9-8 (a)(1) and should be aware that it differs from (a)(2)(A) and (B). Those sections contain the following language: “...A parent of a child **in the custody of another person** if for a period

of at least one (1) year the parent...” Therefore, in a stepparent adoption, it is not very common, in the presenter’s practice, that (a)(1) will be applicable unless the other biological parent had legal custody of the child.

It should be further noted, that even though the facts of the case may meet the statutory requirements of the consent to adoption not being required, notice of the adoption must still be given to the other parent. The attorney should pay particular attention to the applicable notice required by Indiana Code 31-19-4.5-2 as follows:

IC 31-19-4.5-2 Notice when consent not required

Sec. 2. Except as provided in IC 31-19-2.5-4, if a petition for adoption alleges that consent to adoption is not required under IC 31-19-9-8, notice of the adoption must be given to the person from whom consent is allegedly not required under IC 31-19-9-8. Notice shall be given:

- (1) 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; or
 - (2) in the same manner as a summons is served by publication under Rule 4.13 of the Indiana Rules of Trial Procedure if the name or address of the person is not known;
- to a petitioner for adoption.

IC 31-19-4.5-3 Form of adoption notice

Sec. 3. Notice of the adoption proceeding shall be given to a person entitled to notice under section 2 of this chapter in substantially the following form:

"NOTICE OF ADOPTION

_____ (person's name) is notified that a petition for adoption of a child, named _____ (child's name, if named), born to _____ (mother's name) on _____ (date) was filed in the office of the clerk of _____ court, _____ (address of the court). The petition for adoption alleges that the consent to adoption of _____ (person's name) is not required because _____ (provide a brief description of the reason(s) the consent is not required).

If _____ (person's name) seeks to contest the adoption of the child, _____ (person's name) must file a motion to contest the adoption in accordance with IC 31-19-10-1 in the above named court not later than thirty (30) days after the date of service of this notice.

If _____ (person's name) does not file a motion to contest the adoption within thirty (30) days after service of this notice the above named court will hear and determine the petition for adoption. The consent to adoption of _____ (person's name) will be irrevocably implied and _____ (person's name) will lose the right to contest either the adoption or the validity of _____'s (person's name) implied consent to the adoption.

No statement made to _____ (person's name) relieves _____ (person's name) of _____'s (person's name) obligations under this notice.

This notice complies with IC 31-19-4.5-3 but does not exhaustively set forth a person's legal obligations under the Indiana adoption statutes. A person being served with this notice should consult the Indiana adoption statutes."

V. Failing to Utilize the Putative Father Registry Correctly

One of the biggest mistakes an attorney can make when handling a step parent adoption is failing to understand and utilize the Indiana Putative Father Registry thereby exposing the client to unnecessary risks that could have been avoided. Therefore, when asking the client preliminary questions, it is paramount to determine the true status of the father of the child. As stated previously, it is essential to determine whether or not he is a legal father or simply an alleged (putative) father.

For example, client says "*I do not know the name of the father, it was only a one time thing and I never knew his last name.*" The attorney should first confirm that she does not know the name of the father, that he has never been involved with the child, the paternity has not been established and that he is not listed on the child's birth certificate. If those things are true, the attorney **must** ask client in what state was the child conceived? Historically, in cases where an alleged father was not identified or was unknown, notice was still required through the best possible means. In other words, notice of the adoption to an unnamed father would be published in a newspaper of general circulation. In the early 1990s, that requirement changed with the passage of the Indiana Putative Father Registry.

IC 31-19-5-1 Application of chapter

Sec. 1. (a) This chapter applies to a putative father whenever:

(1) an adoption under IC 31-19-2 has been or may be filed regarding a child who may have been conceived by the putative father; and

(2) on or before the date the child's mother executes a consent to the child's adoption, the child's mother has not disclosed the name or address, or both, of the putative father to the attorney or agency that is arranging the child's adoption.

(b) This chapter does not apply if, on or before the date the child's mother executes a consent to the child's adoption, the child's mother discloses the name and address of the putative father to the attorney or agency that is arranging the child's adoption.

IC 31-19-5-3 Purpose of registry

Sec. 3. The registry's purpose is to determine the name and address of a father:

(1) whose name and address have not been disclosed by the mother of the child, on or before the date the mother executes a consent to the child's adoption, to:

(A) an attorney; or

(B) an agency;

that is arranging the adoption of the child; and
(2) who may have conceived a child for whom a petition for adoption has been or may be filed; so that notice of the adoption may be provided to the putative father.

IC 31-19-5-4 Notice rights of registered persons

Sec. 4. A putative father of a child who registers in accordance with this chapter (or IC 31-3-1.5 before its repeal) is entitled to notice of the child's adoption under Rule 4.1 of the Indiana Rules of Trial Procedure.

IC 31-19-5-5 Necessity of registration as requisite to notice rights

Sec. 5. If, on or before the date the mother of a child executes a consent to the child's adoption, the mother does not disclose to an attorney or agency that:

(1) is arranging; or

(2) may arrange;

an adoption of the child the name or address, or both, of the putative father of the child, the putative father must register under this chapter to entitle the putative father to notice of the child's adoption.

IC 31-19-5-12 Time of registration

Sec. 12. (a) **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 under section 5 of this chapter not later than:

(1) thirty (30) 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 child's mother;

whichever occurs later. (Emphasis Added)

(b) A putative father may register under subsection (a) before the child's birth.

*******Why is this so important and why is the correct use of the putative father registry in a step parent adoption so vital?***

IC 31-19-5-18 Waiver of notice rights of unregistered putative fathers; irrevocably implied consent to adoption

Sec. 18. A putative father who fails to register within the period specified by section 12 of this chapter **waives notice of an adoption proceeding**. The putative father's waiver under this section **constitutes an irrevocably implied consent to the child's adoption**.

Thus, in the example cited above, if, by the date of the filing of the petition for adoption, the putative father has not properly registered AND the child was conceived in the State of Indiana, his consent to the adoption is irrevocably implied and no further notice of the adoption is required. The attorney is required to provide the adoption court with a Putative Father Registry Affidavit from the Indiana State Department of Health indicating that no man has registered by the

date of filing of the petition for adoption. Therefore, the request for the affidavit must be AFTER the date of the filing of the petition for adoption. When properly utilized in this manner in a step parent adoption, the Putative Father Registry offers the attorney and client a huge legal advantage to alleviate the need and cost of providing notice.

However, there is an exception to reliance upon the Indiana Putative Father Registry and is the reason the attorney must ascertain the state in which the child was conceived.

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

Sec. 3. (a) If:

(1) the mother of a child:

(A) informs an attorney or agency arranging the child's adoption, on or before the date the child's mother executes a consent to the child's adoption, that the child was conceived outside Indiana; and

(B) does not disclose to the attorney or agency the name or address, or both, of the putative father of the child; and

(2) the putative father of the child has:

(A) failed or refused to consent to the adoption of the child or has not had the parent-child relationship terminated under IC 31-35 (or IC 31-6-5 before its repeal); and

(B) not registered with the putative father registry under IC 31-19-5 within the period under IC 31-19-5-12;

the attorney or agency shall serve notice of the adoption proceedings on the putative father by publication in the same manner as a summons is served by publication under Rule 4.13(C) of the Indiana Rules of Trial Procedure.

(b) 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 subsection (a).

If the child was conceived in the State of Indiana, reliance may be made on the Indiana Putative Father Registry and no further notice is required. However, if the father is not identified by the mother of the child AND the child was conceived outside of Indiana, publication in the state of conception is required under Indiana Code 31-19-4-4.

IC 31-19-4-4 Notice to unnamed putative father; form

Sec. 4. Notice of the adoption proceeding required under section 3 of this chapter shall be given to an unnamed putative father in substantially the following form:

NOTICE TO UNNAMED FATHER

The unnamed putative father of the child born to _____ (mother's name) on _____ (date), or the person who claims to be the father of the child born to _____ (mother's name) on _____ (date), is notified that a petition for adoption of the child was filed in the office of the clerk of _____ court, _____ (address of court). If the unnamed putative father seeks to contest the adoption of the child, the unnamed putative father must file a motion to contest the adoption in accordance with IC 31-19-10-1 in the above named court within thirty (30) days after the date of service of this notice. This notice may be served by publication.

If the unnamed putative father does not file a motion to contest the adoption within thirty (30) days after service of this notice, the above named court shall hear and determine the petition for adoption. The unnamed putative father's consent is irrevocably implied and the unnamed putative father loses the right to contest the adoption or the validity of the unnamed putative father's implied consent to the adoption. The unnamed putative father loses the right to establish paternity of the child, by affidavit or otherwise, in Indiana or any other jurisdiction.

Nothing _____ (mother's name) or any one else says to the unnamed putative father of the child relieves the unnamed putative father of his obligations under this notice.

Under Indiana law, a putative father is a person who is named as or claims that he may be the father of a child born out of wedlock but who has not yet been legally proven to be the child's father.

This notice complies with IC 31-19-4-4 but does not exhaustively set forth the unnamed putative father's legal obligations under the Indiana adoption statutes. A person being served with this notice should consult the Indiana adoption statutes."

VI. Not Giving Notice of the Adoption to Grandparents

Most attorneys are not aware that notice of adoption is now required to be given to grandparents of the child. The notice required to grandparents is applicable to a step parent adoption as a result of Indiana Code 31-17-5-9, the Grandparent Visitation statute, which provides that visitation rights granted to a grandparent survive the adoption of the child by a step parent, among others.

IC 31-17-5-9 Adoption; effect on visitation rights

Sec. 9. Visitation rights provided for in section 1 or 10 of this chapter survive the adoption of the child by any of the following:

(1) A stepparent.

(2) A person who is biologically related to the child as:

- (A) a grandparent;
- (B) a sibling;
- (C) an aunt;
- (D) an uncle;
- (E) a niece; or
- (F) a nephew

A grandparent has a right to seek/establish visitation rights pursuant to Indiana Code 31-17-5-1:

IC 31-17-5-1 Right to seek visitation (Emphasis Added)

Sec. 1. (a) A child's grandparent may seek visitation rights if:

- (1) the child's parent is deceased;
 - (2) the marriage of the child's parents has been dissolved in Indiana; **OR**
 - (3) subject to subsection (b), the child was born out of wedlock.
- (b) A court may not grant visitation rights to a paternal grandparent of a child who is born out of wedlock under subsection (a)(3) if the child's father has not established paternity in relation to the child. (Emphasis added)

When assisting with a step parent adoption, the attorney must take into account, by asking correct preliminary questions about the grandparents of the child, to determine whether or not notice must be given to the grandparents.

IC 31-19-2.5-3 Required notice

Sec. 3. (a) Except as provided in section 4 of this chapter, **notice must be given to a:**

- (1) person whose consent to adoption is required under IC 31-19-9-1;
 - (2) putative father who is entitled to notice under IC 31-19-4; and
 - (3) grandparent described in IC 31-19-4.5-1(3) of a child sought to be adopted.**
- (b) If the parent-child relationship has been terminated under IC 31-35 (or IC 31-6-5 before its repeal), notice of the pendency of the adoption proceedings shall be given to the:
- (1) licensed child placing agency; or
 - (2) local office;
- of which the child is a ward.

Indiana Code 31-19-4.5-1(3) provides as follows:

IC 31-19-4.5-1 Application

Sec. 1. **This chapter:**

- (1) shall not be construed to affect notice of an adoption provided to a putative father under IC 31-19-4;
 - (2) applies to a father who has abandoned, failed to support, or failed to communicate with a child; and
 - (3) except for section 3 of this chapter, applies to a grandparent who:**
 - (A) is the grandparent of a child sought to be adopted; and**
 - (B) has:**
 - (i) an existing right to petition for visitation under IC 31-17-5; and**
 - (ii) a right to visitation that will not be terminated after the adoption under IC 31-17-5-9;**
- at a time prior to the date of the filing of the petition for adoption.**

Once it has been established there exists grandparents that fit within the statutory

definition and thus, entitled to notice of the adoption, the statute does not provide much guidance on what are the next steps. It does not provide a statutory form of the notice as found in other portions of the statute. However, given that there is no statutory example, the presenter has developed the following form (**Example only**):

NOTICE OF ADOPTION
(Grandparents)

Notice is hereby given to *** (spelling uncertain) that a petition for adoption has been filed in the _____ Court, Room No. ___, regarding *** (the "Child") by the spouse of the biological mother of the Child. This notice is required by Indiana Code ("IC") 31-19-2.5-3(a)(3).

You are receiving this notice because you may be grandparents of the Child. As grandparents, you may have the right to file a petition in court to establish or protect grandparent visitation rights. However, IC 31-17-5-3(b) provides that such a petition must be filed prior to the date a decree of adoption is entered. It is for that reason that you are receiving this notice.

In order to protect any rights of grandparent visitation, which you may have, you should contact your own attorney without delay. Failure to act on your part could cause you to lose your right of grandparent visitation, if such a right exists.

This notice applies to you even if the parent(s) of the Child have voluntarily allowed you to visit. Only court ordered visitation is protected, if at all.

Pursuant to IC 31-19-4.5-1.5, a notice required under IC 31-19-2.5-3 (a)(3) is limited to the issue of visitation and may not be used to contest the adoption.

This notice complies with the Indiana Code but does not exhaustively set forth a person's legal obligations under the Indiana adoption statutes. A person being served with this notice should consult the Indiana adoption statutes and their own legal counsel.

Clerk, _____ Court

Unfortunately, the Indiana Code does not provide much additional guidance on the manner of service or the time period in which a grandparent must respond to the notice. However, the Indiana Code does provide as follows:

IC 31-19-4.5-1.5 Notice to grandparent limited to issue of visitation; notice not required if child placed with department

Sec. 1.5. A notice to a grandparent required under IC 31-19-2.5-3(a)(3) is:

(1) limited to the issue of visitation and may not be used to contest an adoption; and

(2) not required if the child to be adopted has been placed in the care, custody, or control of the department."

As stated, giving notice to grandparents, although required by statute, only gives

them the opportunity to seek/establish visitation rights with the child which survive the adoption by a step parent but does not permit the grandparents to contest or challenge the adoption.

Furthermore, it is the opinion of the presenter that the legislature was well intentioned when considering the statute requiring notice to grandparents in order to protect and preserve the relationship of grandparents and grandchildren especially when that relationship actually exists. Unfortunately, the legislature failed to take into account the unintended consequences of requiring such notice such as:

- What if, for example, the child is 10 years old and has never met the grandparents?
- What if the grandparents are convicted felons?
- What if the grandparents are divorced and now married to someone else? Does that now impose the requirement of providing notice to additional grandparents?
- What if the grandparents cannot be found?
- What if the names of the grandparents are not known? Does there have to be a publication of notice to an “unknown grandparent”?
- The cost of publication or service of notice to a grandparent can be exorbitant (Examples: Hamilton County: \$70; Marion County: \$150; Vanderburgh County: \$600; Newport News, VA: \$1300)

These are simply a few of the things that should be addressed to refine the current grandparent notice statute. The legislature should provide better guidance on how the notice is to be executed, the time periods within which grandparents must respond, and the consequences of failing to respond. A better alternative may be for the legislature to remove the notice statute and simply state that grandparents have a right to seek/establish visitations rights at anytime even if its after the adoption has been completed and retain the current language that if those rights have already been established, they survive the adoption of the child.

Nevertheless, the attorney must be aware of and comply with the current notice requirements to grandparents and must advise the client accordingly.

Conclusion

Adoptions, unlike most other areas of law, are and can be emotionally rewarding for attorneys. The satisfaction of helping a family start, expand or solidify and stabilize their relationship is undeniable. Likewise, adoptions, especially step parent adoptions since they are the most common type of adoptions, illustrate the height of emotions for clients. For parents, there is nothing more important than protecting the lives and welfare of their children. As a result of the importance and emotions involved, it is essential for the attorney to not only be extraordinarily competent and well versed in handling adoptions but also to never lose sight of the compassion

necessary to deal with the range of emotions facing their client. It is best to listen and learn from others and make the adoption journey enjoyable for the client just as it will be for you.

Mistakes You DON'T Want to Make When Handling a Step Parent Adoption

Joel D. Kirsh, Attorney

Kirsh & Kirsh, P.C.

2930 E. 96th Street

Indianapolis, IN 46240

www.IndianaAdoption.com

joel@kirsh.com

317-575-5555

My Background

- Married 32 years to Holly. 3 Kids: Trevor, Olivia and Harrison
- 1981 Graduate from Indiana University
- 1984 Graduate from IU School of Law-Indianapolis (Now McKinney)
- Practicing law since January, 1985
- Assisting with adoptions for nearly 35 years
- Law practiced is limited to adoption law
- Thousands and thousands of all types of adoptions

Disclaimer:
These materials are a starting
point only. NOT a
comprehensive list

Common Mistakes and Practical Pointers (Step Parent Adoptions)

Failing to Remember the 2 “C’s”

- Competence
- Compassion

Not Asking Correct Preliminary Questions

- What is the situation, if any, with the biological father?
- In what State was the child conceived?
- Were the biological parents married or was paternity was established?
- Is the father's name on the child's birth certificate?
- What level of interaction has the father had with the child?
- Was the father ordered to pay child support?
- Does the father pay the child support in a timely manner?
- Does the father have any criminal history or other significant personal problems that may affect the welfare of the child?
- Does the prospective client have ANY criminal history or other personal problems that may affect the welfare of the child?
- Do you believe the father would agree or consent to the adoption?

Advising the Client to Contact Non-Custodial Parent Prematurely

“If the facts are against you, pound the law. If the law is against you, pound the facts. If the law and the facts are against you, pound the table”

- Do not ruin a potential legal advantage
- “BF told me he will consent in a text message 3 months ago”
- By asking correct preliminary questions, determine if better to file adoption first

Stating Consent of Other Parent is REQUIRED

- NOT necessarily true
- Ask correct preliminary questions
- For example, only need consent of each living parent (born in wedlock) or if not in wedlock, mother and father (if paternity established)
- However, Consent may NOT be required Ind. Code 31-19-9-8
- Notice is still required even if consent is not required

Failing to Utilize the Putative Father Registry Correctly

- May be the biggest mistake attorney can make
- *"I do not know the name of the father, it was only a one time thing and I never knew his last name."*
- Ask correct preliminary questions INCLUDING (most important): *"In what state was the child conceived?"*
- Why?
- If Indiana, reliance can be placed upon the PFR
- Registration by "unknown" or "unnamed" father must be made by date of filing of petition for adoption if child is over 30 days old
- No publication of notice necessary unless child conceived outside of Indiana

Not Giving Notice of Adoption to Grandparents

- Indiana Code 31-19-2.5-3 requires notice to grandparents of a child sought to be adopted
- **IC 31-17-5-1 Right to seek visitation** (Emphasis Added)
 - Sec. 1. (a) A child's grandparent may seek visitation rights if:
 - (1) the child's parent is deceased;
 - (2) the marriage of the child's parents has been dissolved in Indiana;
 - OR** (3) subject to subsection (b), the child was born out of wedlock.
 - (b) A court may not grant visitation rights to a paternal grandparent of a child who is born out of wedlock under subsection (a)(3) if the child's father has not established paternity in relation to the child. (Emphasis added)
- Notice is LIMITED to issue of visitation NOT contesting adoption
- Grandparent visitation rights IF established survive adoption by step parent

Grandparent Notice

- Good Intentions by Legislature
- Very poorly written statute
- Not enough direction given
- Did not consider unintended consequences
- Could simply eliminate need for notice by stating grandparent visitation rights survive the adoption of the child by, among others, a step parent

Closing Thoughts

- Adoptions can be fun to handle and emotionally rewarding
- Do not agree to handle unless you have the competence and expertise to handle
- Call and ask for help but don't expect them to handle
- Remember if handled correctly, everyone is smiling at the end INCLUDING the Judge 😊

Section Three

Mistakes You Don't want to Make when Handling a DCS Adoption

Grant M. Kirsh
Kirsh & Kirsh, P.C.
Indianapolis, Indiana

Section Three

Mistakes You Don't want to Make when Handling a DCS Adoption..... Grant M. Kirsh

1. Finalizing an adoption **BEFORE** you have a fully executed Subsidy Agreement 2
2. Not informing DCS when you file your petition for adoption 2
3. Serving notice of the adoption on the parents or DCS..... 2
4. Delaying the completion of the Payment Request Information (PRI) form..... 3
5. Failing to manage client expectations for subsidy negotiations 3
6. If it is a Marion County DCS case, setting a final hearing date **PRIOR TO** DCS filing their adoption summary and DCS consent into the adoption case ... 3
7. Directly communicating with the Family Case Managers (FCM) 4
8. Failing to inform the DCS attorney that your client withdrew a petition for Adoption 4
9. Failing to immediately provide DCS with the final decree of adoption 5

Mistakes You Don't Want to Make when Handling a DCS Adoption

(June 2020)

By Grant M. Kirsh, Attorney

Kirsh & Kirsh, P.C.

2930 E 96th Street

Indianapolis, IN 46240

www.IndianaAdoption.com

grant@kirsh.com

317-575-5555

Adoptions of wards of the State of Indiana Department of Child Services (DCS) are referred to as “DCS adoptions,” foster care adoptions,” and “kinship adoptions” to name a few. Typically, in a DCS adoption, DCS handles either involuntarily terminating parental rights or securing parents’ consents to an adoption. The scope of the adoption attorney’s work tends to be limited to filings/finalizing the adoption and subsidy negotiations. Certainly, the scope can be greater than this, but usually does not involve many of the things that are involved with a private or stepparent adoption.

The Rules of Professional Conduct require lawyers to only practice in those areas in which they are competent. Rule 1.1 provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

One should not assume that avoiding the mistakes outlined in this article will assure a lawyer that their representation of their client(s) will conform with all applicable laws, regulations, and procedures. It will **NOT**; however, often inexperienced practitioners will commit one or more of the following errors, potentially leading to devastating outcomes.

1. Finalizing an adoption **BEFORE** you have a fully executed subsidy agreement.

DCS's policy on Negotiations for Adoption Assistance clearly states: "*The (subsidy) agreement must be signed by both DCS and the prospective adoptive parents(s) before entry of the Final Decree of Adoption. If the Decree is entered before the agreement has been signed by both DCS and the prospective adoptive parent(s), the child is not eligible for adoption assistance under the Indiana Adoption Assistance Program.*"

2. Not informing DCS when you file your petition for adoption.

If you do not inform DCS of the filed petition, then DCS cannot inform the CHINS court that the petition for adoption has been filed. Additionally, sometimes providing DCS with a copy of the petition for adoption is the only way for the DCS attorney to even know that a certain child is headed toward adoption.

3. Serving notice of the adoption on the parents or DCS.

A. With few exceptions, it is not necessary to serve adoption notices on the biological parents or DCS. If DCS is handling the litigation in the termination case, then you might be better off waiting for the court to enter an order terminating parental rights to occur rather than serve notice on those individuals.

B. In Marion County, for example, DCS will file its adoption summary and consent directly in the adoption proceedings. Since in those situations, DCS

has already consented to the adoption, giving notice of the adoption case is unnecessary.

4. Delaying the completion of the Payment Request Information (PRI) form.

It is important to have your client fill out the PRI form for subsidies right after the eligibility determination for subsidies has been made by the central eligibility unit. Keep in mind though that the PRI form must be dated within sixty (60) days of the receipt of the PRI form by DCS.

5. Failing to manage client expectations for subsidy negotiations.

Subsidy negotiations can become a very emotional part of the process for clients. Some clients will tell you they will only settle for 100% of the per diem rate. Other clients will tell you they fear countering DCS's original offer because DCS might counter back at a lower figure than their original offer. Do not go into subsidy negotiations without first having a lengthy conversation with your clients about how the subsidy negotiation process works. Explain to them what they might expect, as the process unfolds. This will help manage their expectations of what they may receive in recurring subsidies. Also, do not forget to tell your clients that they can request a subsidy modification every twelve (12) months after they finalize the adoption.

6. If it is a Marion County DCS case, setting a final hearing date **PRIOR TO** DCS filing their adoption summary and DCS consent into the adoption case.

- A. Marion County DCS has one attorney who manages their adoption email inbox. This attorney is very organized in how these adoptions are processed. When it is time to finalize the adoption, this attorney will file the DCS adoption summary and DCS consent to the adoption directly into the adoption case. After you receive the e-file notification, you can then set a final hearing date with the adoption court.
- B. Other DCS counties around the state will request that you set a final hearing before they provide their DCS consent to the adoption. Make sure you are familiar with how the DCS county in which you are working handles giving its consent to adoption. Your client will not be pleased to know that their adoption was delayed any period of time because their attorney did not know they were supposed to set a final hearing date.

7. Directly communicating with the Family Case Managers (FCM).

FCM's are represented parties. **Rule 4.2 Communication with Person Represented by Counsel** states "*In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.*" Make sure to only communicate with the DCS attorney handling the child's case.

8. Failing to inform the DCS attorney that your client withdrew a petition for adoption.

Sometimes adoptions do not work out. Children are moved to a new home because the foster parents ask that the child be moved, or sometimes because DCS requests the move. Regardless of why a child is moved, make sure to inform DCS if you withdraw a petition for adoption for a ward of the state.

9. Failing to immediately provide DCS with the final decree of adoption.

For DCS to close their CHINS case, DCS must provide the CHINS court with a copy of the Final Decree of Adoption. Make sure to email this to the DCS attorney with whom you have been working on the case, so DCS will know the adoption has been finalized. The FCM may request a copy of the decree at the final hearing. Do not assume that the FCM will provide a copy of the decree to the DCS attorney.

Section Four

MISTAKES YOU DON'T WANT TO MAKE WHEN HANDLING A CONTESTED ADOPTION

A PANEL DISCUSSION

June 29, 2020

Hon. David K. Najjar
Hamilton Superior Court 5

Hon. Jonathan M. Brown
Hamilton Superior Court 2

Charlie Rice, Esq. ¹
Murphy Rice, LLP
400 Plaza Building
210 South Michigan Street
South Bend, Indiana 46601
Office: (574) 232-0300
Direct: (574) 288-2169
crice@murphyrice.com
www.murphyrice.com

¹ These written materials were prepared by Charlie Rice. Any opinions, bad advice, grammatical errors or lousy citations contained in these materials are solely those of Charlie Rice.

Section Four

Mistakes You Don't Want to Make

When Handling a Contested Adoption.....
Hon. David K. Najjar
Hon. Jonathan M. Brown
Charles Rice

Mistake #1 – Stay in your lane	2
Mistake #2 – Only thing worse than Bad News..	3
Mistake #3 – Not having a plan	5
Mistake #4 – Not using the entire toolbox	6
Mistake #5 – Ignoring Jurisdiction	7
Mistake #6 – Winning the battle but losing the war	15
Mistake #7 – Not advocating for the child when presenting best interests evidence....	18

MISTAKE #1 Stay in your lane.

An adoption is a lawsuit. A contested adoption is an adversary proceeding which almost always results in a trial. Aside from a death penalty case, it involves the highest stakes imaginable. The judgment in a contested adoption will irreversibly alter the lives of one child and two families. Unlike a custody issue, the result in a contested adoption is permanent and will forever separate a child from the losing party.

A contested adoption cannot be decided without substantial discovery, testimony, and mastery of:

- The Adoption Code;
- The Rules of Trial Procedure; and,
- The Indiana Rules of Evidence.

Just as Criminal Rule 24 has minimum qualifications for counsel allowed to handle death penalty cases, you should not be handling a contested adoption unless you are an experienced trial attorney with a comprehensive understanding of adoption law. There is simply no learning curve in a contested adoption.

Additionally, any attorney in a contested adoption situation must initially determine if they are qualified to continue as counsel in the case and determine if they are likely to be a necessary witness at trial. Rule 3.7 of the Rules of Professional Conduct is clear that a lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness. The attorney must also determine if there is a potential claim against the attorney for malpractice and if the attorney has a potential conflict of interest in continuing to represent his clients. There may also be a need to notify a malpractice carrier about the potential for a claim.

MISTAKE #2 Only thing worse than Bad News...

Don't give your clients false expectations. It is your professional and moral obligation to level with the clients all the way through the process. Rule 2.1 of the Rules of Professional Conduct is clear:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

The Comments to this Rule are even more direct:

Scope of Advice

[1] A client is entitled to **straightforward advice** expressing the lawyer's **honest assessment**. **Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront**. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, **a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client**.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. **Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice**. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[4] **Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve**

problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. **At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.**

One of the most important aspects of this Rule is to level with the clients not only regarding their chances on the merits, but also the financial and emotional aspects of a contested adoption. Contested adoptions can be expensive. Typically, contested adoptions are only decided after evidentiary hearings requiring significant discovery and the presentation of substantial factual evidence. The gathering and presentation of this evidence can be expensive.

Obviously, there may be cases where the client, aware of the chances of success and potential expense, feels morally obligated, because of the best interests of the child, to litigate the case until its conclusion. These are special considerations which require counsel to be mindful not only of their professional responsibility, but also to the potential harm that could be caused to the other litigants, especially the child.

Finally, contested adoptions are not for the faint of heart. Because contested adoptions are fraught with life-altering implications for clients, it is especially important for attorneys to avoid excessive emotional attachment such that it interferes with objective professional judgment and advice.

MISTAKE #3 Not having a plan.

By law, every adoption requires a consent to the adoption of the child from certain persons. Depending on the circumstances and the person's relationship with the child, this consent may be actual written consent, or it may be implied by law if a statutory basis exists for dispensing with the consent. Moreover, it is also required to prove that the adoption is in the best interests of the child. The burden of proof in a contested adoption generally rests with the adopted parents and requires proof by clear and convincing evidence. IC 31-19-10-1.2

Proper analysis of every potential litigated case requires a reverse chronological analysis. For instance, the best practice when analyzing a potential personal injury case, is to begin drafting jury instructions. This exercise forces a critical look at how you would try the case. Similarly, in a contested adoption matter, your first order of business would be to draft proposed findings of fact and conclusions of law. Obviously – as you begin analyzing a case and without the benefit of discovery – you will not be able to complete your findings of fact, but if you know the conclusions of law that you need, you can better prepare discovery and narrow your focus of the essential facts. Most importantly, this exercise will force you to develop a plan for how you plan on winning the case. If you are unable to formulate a plan, it is time to execute the first Rule of Holes: Stop digging and see Mistake #2.

Additionally, a subset of this Mistake is **Having the Wrong Plan**. It is important that, as new information is gathered through discovery and investigation, the Plan is updated and re-evaluated.

MISTAKE #4 Not using the entire toolbox.

As mentioned above, a contested adoption cannot be decided without substantial discovery, testimony, and mastery of:

- The Adoption Code;
- The Rules of Trial Procedure; and,
- The Indiana Rules of Evidence.

These three elements are essential components of the trial lawyer's toolbox. Every attorney knows that adoption is a legal process in which a child's legal rights and duties toward his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted. The process is entirely statutory and has no historical basis in common law. HOWEVER, do not assume that the only applicable provisions for your contested adoption can be found in the Adoption Code.

The Indiana General Assembly has put together a comprehensive and consistent statutory scheme regarding adoption that is not limited to the sections of the Adoption Code. Equally important are a host of other provisions in the Indiana Code which relate to and compliment IC 31-19-1 et seq. ranging from the obvious, (IC 31-14-21-1 et seq. [outlining a number of interrelationships between paternity cases and adoption]) to the obscure (IC 16-37-2-2.1(d): "(d) A paternity affidavit is not valid if it is executed after the mother of the child has executed a consent to adoption of the child and a petition to adopt the child has been filed.").

More importantly, you may wish to consider, prior to a hearing, winnowing away parts of the opponent's case through appropriate motions. While it is exceedingly rare for a contested adoption involving a best interests determination to be decided under Trial Rule 56, there may be unique questions of law which could be decided prior to an evidentiary hearing.

MISTAKE #5 Ignoring Jurisdiction.

I. What Court has jurisdiction when there are pending Paternity and Adoption matters?

Answer: The Adoption Court has exclusive jurisdiction.

Often in contested adoptions there are contemporaneously pending paternity proceedings at the same time as the pending adoption petition. IC 31-19-2-14 requires the consolidation of the paternity proceedings with this pending adoption proceeding and mandates that the adoption proceeding has exclusive jurisdiction over the Child:

If a petition for adoption and a petition to establish paternity are pending at the same time for a child sought to be adopted, 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 (Underline added.) As the Paternity involves common issues of law and fact, specifically the best interests of the Child, consolidation of the Paternity and Adoption cases is appropriate under Trial Rule 42. Specifically, as the Petition for Adoption and the Paternity will require a determination of the best interests of the Child, and because the current procedural posture could give rise to differing adjudications and conflicting orders, the Adoption Court must consolidate the proceedings.

Moreover, the prospective adoptive parents would have the absolute unqualified right to intervene in the paternity proceedings pursuant to both IC 31-14-21-8 and IC 31-19-3-6. If there is a custody order that was granted in the adoption case, the adoptive parents, as the lawful custodians of the Child, have a right to intervene in these proceedings pursuant to Trial

Rule 24(A). Nevertheless, in the event that the Court does not find that the adoptive parents have an unqualified right to intervene under IC 31-14-21-8, IC 31-19-3-6, and Trial Rule 24(A), the adoptive parents should request permissive intervention under Trial Rule 24(B) as determination of both proceedings will involve common issues of law and fact, specifically the best interests of the Child.

II. Can an adoption case be filed and proceed while a CHINS case is pending?

Answer: Yes.

In *H.L.W.*, the Indiana Court of Appeals held that a trial court may “consider simultaneously” both a CHINS action and an adoption petition. *In re Adoption of H.L.W.*, 931 N.E.2d 400, 410 (Ind. App. 2010) (“We conclude that the trial court had the ability to consider simultaneously both the CHINS action and the Foster Parents’ petition to adopt Child.”) After summarizing the conflicting Indiana precedents on this issue, the *H.L.W.* court concluded that a trial court could simultaneously adjudicate both a CHINS action and an adoption proceeding, even if the goals of the two proceedings were not the same (*i.e.*, the goal of the CHINS action is reunification and not adoption):

Here, we are again tasked with harmonizing the statutes and appellate opinions regarding simultaneous CHINS and adoption proceedings. Although our supreme court held in [T.B.](#) that courts may simultaneously consider CHINS and adoption revocation proceedings, *E.B.* holds that courts cannot simultaneously consider CHINS and adoption proceedings. Some of *T.B.* and *E.B.*’s progeny hold that CHINS proceedings and adoption proceedings may be considered simultaneously if the goals of the proceedings are the same. Here, the goal of the CHINS action was reunification of Child with Father while the goal of the adoption proceeding was adoption of Child by Foster Parents. Thus, the

goals of the proceedings were not the same. However, we conclude that the statutory analysis found in *Infant Girl W.* is more persuasive and compatible with our supreme court's opinion in *T.B.* As in *Infant Girl W.*, we are persuaded that the consent statutes, found at Indiana Code Chapter 31–19–9, enabled the trial court to consider the adoption proceeding despite the pending CHINS action.

H.L.W., 931 N.E.2d at 407-408.

Likewise, in *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. App. 2006), the Indiana Court of Appeals concluded that a pending CHINS proceeding did **not** “divest” the probate court of jurisdiction over a related adoption case. *Id.* at 241 (“In sum, we conclude that comity did not prevent the Probate Court from exercising its jurisdiction over M.A.H.’s adoption. Moreover, the mere fact that there were pending CHINS and TPR [Termination of Parental Rights] proceedings did not in any way divest the Probate Court of its exclusive jurisdiction over the Adoption Case, inasmuch as the consent statute enabled OFC, as M.A.H.’s legal guardian and as petitioner in the TPR Case, to voice its concerns and opinions about the Parents’ petition to adopt. Thus, we conclude that the Probate Court properly exercised jurisdiction over the Parents’ joint petition to adopt M.A.H.”).¹

1

The above quote from *Infant Girl W.* references the probate court’s “exclusive jurisdiction over the Adoption Case.” *Infant Girl W.*, 845 N.E.2d at 241. The Indiana Supreme Court has since clarified that a court with probate jurisdiction has “exclusive jurisdiction” in all probate matters – but only in those Indiana counties with “a separate probate court” (such as St. Joseph County), not in those counties where a “division” of the Superior Court handles probate matters (such as Lake County). *In re Adoption of J.T.D.*, 21 N.E.3d 824, 827-28 (Ind. 2014); *see also* Ind. Code § 31-19-1-2 (“(a) This section applies to each Indiana county that has a separate probate court. (b)

Likewise, the Indiana Supreme Court concluded in *In the Matter of Adoption of T.B.*, 622 N.E.2d 921 (Ind. 1993), that a pending CHINS action did **not** divest a court with probate jurisdiction of the power to “adjudicate an adoption matter simultaneously with the juvenile court’s adjudication of a CHINS proceeding”:

Because a CHINS proceeding was brought on behalf of T.B., the question is raised as to whether the trial court had the authority to act on the petition to revoke adoption while the CHINS proceeding was pending. The juvenile court, pursuant to [*Ind. Code Ann. § 31-6-2-1.1*](#)(a)(2) (West Supp. 1992), has exclusive original jurisdiction over a CHINS proceeding. FCS argues that as a result of the commencement of the CHINS proceeding, a court with probate jurisdiction does not have jurisdiction to adjudicate the adoption matter.

An action for adoption and a CHINS proceeding, however, are separate actions which affect different rights. The CHINS proceeding is directed at helping the child directly by assuring that the child receives necessary assistance. Adoption, on the other hand, establishes a family unit. An adoption severs the child entirely from its own family tree and engrafts it upon that of another. As a result of the adoption, the adopted child becomes the legal child of the adoptive parent.

The legislature established the jurisdiction of juvenile courts and probate courts. The juvenile court was expressly given jurisdiction

The probate court has exclusive jurisdiction in all adoption matters.”). In Marion County (as in Lake County), the Superior Court is comprised of four “divisions” (namely, Civil, Criminal, Probate, and Juvenile). Ind. Code § 33-33-49-14(c). Thus, no one division of the Marion Superior Court has “exclusive jurisdiction” of probate matters. *J.T.D.*, 21 N.E.3d at 828. However, by local rule, a Superior Court may assign probate matters to a particular division as a matter of *venue*, not jurisdiction. *Id.* at 828 (“So the Divisions’ Caseloads Are a Matter of Venue, Not Jurisdiction.”), p. 829 (“We therefore conclude that the Lake Superior Court’s four divisions are merely *descriptive* of venue, not *prescriptive* of rigid jurisdictional boundaries.”) (italics in original).

over CHINS proceedings and, similarly, a court with probate jurisdiction was expressly given jurisdiction over adoption matters. **The power to adjudicate either matter does not divest the other court of its respective jurisdiction. Consequently, a court with probate jurisdiction may adjudicate an adoption matter simultaneously with the juvenile court's adjudication of a CHINS proceeding.**

T.B., 622 N.E.2d at 923-24 (bold added; citations and internal quotations omitted).

Like the Supreme Court's decision in *T.B.* and the Court of Appeals' decisions in *H.L.W.* and *Infant Girl W.*, the following Indiana cases also support the proposition that an adoption case may proceed while a simultaneous CHINS action is pending:

- *In re Adoption of W.M.*, 55 N.E.3d 386 (Ind. App. 2016) (concluding that no jurisdictional obstacle was presented by competing adoption petitions filed in two different courts after a CHINS case was filed and, instead, the issue became which of the two courts had preferred venue).
- *In re Adoption of H.N.P.G.*, 878 N.E.2d 900, 908 (Ind. App. 2008) ("The Boone Superior Court properly adjudicated the Foster Parents' petition to adopt H.N.P.G. while CHINS proceedings were pending in Boone Circuit Court."). The *H.N.P.G.* court rejected the biological father's argument "that the Boone Superior Court lacked jurisdiction to adjudicate the Foster Parents' petition to adopt H.N.P.G. because CHINS proceedings were pending in Boone Circuit Court." *Id.* at 904.

However, the court limited its holding to situations where the goal of the CHINS proceeding is adoption and thus consistent with the goal of the adoption proceeding. *Id.* at 905 ("Although the petition to terminate [biological father] Blake's rights was denied, the BCDCS does not support the unification of Blake and H.N.P.G. Moreover, the BCDCS recommended that the court grant the Foster Parents' petition to adopt H.N.P.G. The goal of

the adoption proceeding is to create a new family unit for H.N.P.G. and this is entirely consistent with the goal of the pending CHINS proceedings. Consequently, we conclude that this is a case in which a court with probate jurisdiction may adjudicate an adoption matter simultaneously with the juvenile court's adjudication of a CHINS proceeding.") (citations and internal quotations omitted).

- *In re Adoption of J.D.B.*, 867 N.E.2d 252 (Ind. App. 2007). The *J.D.B.* court rejected the biological father's argument "that because a CHINS proceeding and a TPR proceeding were pending in juvenile court, the probate court did not have jurisdiction to rule on C.F.K.'s adoption petition." *Id.* at 255.

However, in affirming the trial court's judgment granting the adoption, the *J.D.B.* court noted that the goal of the CHINS proceeding also was adoption and thus consistent with the goal of the adoption proceeding. *Id.* at 257 ("In sum, there are simply no circumstances present that carry this case outside the ambit of *T.B.* The CHINS proceeding is directed at helping J.D.B., and through this process DCS has determined that adoption is in J.D.B.'s best interest. To bring this plan to fruition, DCS filed a petition to terminate Lucas's parental rights. The purpose of the adoption proceeding is to establish a new family unit for J.D.B., which, under these circumstances, is entirely consistent with the CHINS and TPR proceedings. Thus, this is a case in which a court with probate jurisdiction may adjudicate an adoption matter simultaneously with the juvenile court's adjudication of a CHINS proceeding.") (internal quotations omitted).

In an older case, *In re Adoption of E.B.*, 733 N.E.2d 4 (Ind. App. 2000), a panel of the Court of Appeals concluded that the probate court lacked "jurisdiction" to grant an adoption petition while a CHINS action was pending. *Id.* at 5 ("Here, because the CHINS action was pending in juvenile court when the Bonds filed their petition to adopt in the Saint Joseph Probate Court, the probate court did not have jurisdiction to grant it."). However, no Indiana

case has followed *E.B.* in concluding that a trial court with probate jurisdiction lacks “jurisdiction” to grant an adoption while a CHINS action is pending.

After *E.B.* was decided in 1990, subsequent Indiana cases at first distinguished *E.B.* on its facts by limiting its application to those cases where the DCS’s goal in the CHINS action was reunification, not adoption. *See, e.g., H.N.P.G.*, 878 N.E.2d at 904 (stating that “where the Department of Child Services does not pursue reunification, our court has concluded that our holding *E.B.* does not control”); and *J.D.B.*, 867 N.E.2d at 256 (“The two proceedings [i.e., the CHINS and adoption proceedings] in this case are *not* at odds with each other. Consequently, *E.B.* does not control.”). In doing so, these courts rejected the notion that a pending CHINS action somehow deprives a probate court of “jurisdiction” to grant an adoption. *Id.*

More recently, the Court of Appeals has made clear that a trial court may simultaneously consider CHINS and adoption proceedings even where the goal of the CHINS action is reunification and not adoption. *H.L.W.*, 931 N.E.2d at 407-408 (“Here, we are again tasked with harmonizing the statutes and appellate opinions regarding simultaneous CHINS and adoption proceedings. . . . Here, the goal of the CHINS action was reunification of Child with Father while the goal of the adoption proceeding was adoption of Child by Foster Parents. Thus, the goals of the proceedings were not the same. However, we conclude that the statutory analysis found in *Infant Girl W.* is more persuasive and compatible with our supreme court’s opinion in *T.B.* As in *Infant Girl W.*, we are persuaded that the consent statutes, found at Indiana Code Chapter 31–19–9, enabled the trial court to consider the adoption proceeding

despite the pending CHINS action.”). Thus, *E.B.* has been called into serious doubt by *H.L.W.*, which is the Court of Appeals’ most recent decision explicitly addressing the issue.²

The Court of Appeals’ more recent decisions in *H.L.W.* and *Infant Girl W.* are also more consistent than *E.B.* with the Supreme Court’s decision in *T.B.*, which stated: “The juvenile court was expressly given jurisdiction over CHINS proceedings and, similarly, a court with probate jurisdiction was expressly given jurisdiction over adoption matters. The power to adjudicate either matter does not divest the other court of its respective jurisdiction. Consequently, a court with probate jurisdiction may adjudicate an adoption matter simultaneously with the juvenile court’s adjudication of a CHINS proceeding.” *T.B.*, 622 N.E.2d at 924. For all of these reasons, Indiana law is now settled that an adoption case may proceed while a CHINS action is pending.

² See also 15A Ind. Prac., Family Law—Children In Need of Services § 18:5 (2017-2018 ed.) (“The Court of Appeals [in *H.L.W.*] has aptly noted confusion on whether a probate court may entertain an adoption over a CHINS As the above passage [from *H.L.W.*] makes clear, parties can cite various un-overruled cases for opposite answers to the question. However, the court’s thoughtful opinion in *In re H.L.W.* points out that ‘jurisdiction’ is a largely inapposite term when dealing with the adoptions of CHINS, as the same parties should be before each court. Because the Department of Child Services must be heard in an adoption when it is the child’s ‘lawful custodian,’ whether it consents to the adoption or not, it is unlikely (but not impossible, as the facts in *In re H.L.W.* make clear) that a juvenile court and probate order will conflict. Likewise, the Court of Appeals has held that a probate court may, and probably should, transfer an adoption case over a CHINS to the juvenile court, even if both have jurisdiction.”).

MISTAKE #6 Winning the battle but losing the war.

An attorney litigating a contested adoption should always anticipate that there will be an appeal taken from whatever the outcome is at the trial court level. In part, this is because of the “death penalty” nature of contested adoptions that necessarily terminates, permanently, one party’s relationship with a child. Moreover, as biological parents are often represented by public defenders, the economic disincentive for an appeal may be absent for these parties.

The Indiana Supreme Court has stated the standard of review of adoption proceedings is as follows:

In family law matters, we generally give considerable deference to the trial court’s decision because we recognize that the trial judge is in the best position to judge the facts, determine witness credibility, “get a feel for the family dynamics,” and “get a sense of the parents and their relationship with their children.” [*MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940 \(Ind. 2005\)](#). Accordingly, when reviewing an adoption case, we presume that the trial court’s decision is correct, and the appellant bears the burden of rebutting this presumption. [*In re Adoption of O.R.*, 16 N.E.3d 965, 972–73 \(Ind. 2014\)](#).

The trial court’s findings and judgment will be set aside only if they are clearly erroneous. [*In re Paternity of K.I.*, 903 N.E.2d 453, 457 \(Ind. 2009\)](#). “A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment.” [*Id.*](#) We will not reweigh evidence or assess the credibility of witnesses. [*In re Adoption of O.R.*, 16 N.E.3d at 973](#). Rather, we examine the evidence in the light most favorable to the trial court’s decision. [*Id.*](#)

In re Adoption of E.B.F. v. D.F., 93 N.E.3d 759, 762 (Ind. 2018); see also *In re Adoption of T.L.*, 4 N.E.3d 658, 662 (Ind. 2014) (“When 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

judge reached an opposite conclusion. We presume the trial court's decision is correct, and we consider the evidence in the light most favorable to the decision.") (citations omitted).

In addition to this standard of review, because contested adoptions involve the termination of parental rights, Indiana Courts have long acknowledged that "[t]he United States Constitution recognizes a fundamental right to family integrity." *See In re Paternity of M.G.S.*, 756 N.E.2d 990, 1000 (Ind. Ct. App. 2001). "The U.S. Supreme Court has recognized that the Fourteenth Amendment 'protects the sanctity of family ... because the institution of family is deeply rooted in this Nation's history and tradition.'" *Id.*, quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944). "Moreover, the courts of this state have long and consistently held that the right to raise one's children is essential, basic, and more precious than property rights, and within the protection of the Fourteenth Amendment to the United States Constitution." *In re Paternity of M.G.S.* at 1001. "Our supreme court has stated that the parent-child relationship is a sacred and precious privilege." *Id.*

"A fundamental right to family integrity means that our federal constitution, as a matter of substantive due process, protects the private ordering of interpersonal relationships from state intrusion." *Pence v. Pence*, 667 N.E.2d 798, 800 (Ind. Ct. App. 1996). "State interference may be justified only by a compelling state interest." *Id.*

Accordingly, any strategy employed at the trial court level must consider not only the standard of review at the appellate level, but also the nature of the respective rights of the parties. Accordingly, there are that many land mines that can arise in a contested adoption matter. The most clear-cut example of a Pyrrhic victory in a contested adoption involves a challenge to a motion by a biological parent for the appointment of pauper counsel. In *Petition of McClure* (1990), Ind.App., 549 N.E.2d 392, the adoptive parents were successful at the trial court in challenging the appointment of counsel, but understandably, the Court of Appeals reversed. Accordingly, counsel for adoptive parents must make appropriate efforts to make sure that the record shows that procedures below provide the appropriate safeguards for the constitutional rights of biological parents.

MISTAKE #7 Not advocating for the child when presenting best interests evidence.

Often before jury trials, attorneys will conduct mock trials to understand the best arguments and most effective way to present evidence to convince jurors to the desired outcome. A case theme is often an essential part of this process. The information gathered from focus groups can then determine how the jury reacts to different information and whether that information advances the particular theme(s) of a case. Jury consultants will often challenge attorneys to capture the theme of a case in a single sentence, such as (in a personal injury case): “This case is about a child who lost his parents because a corporation focused on profits and ignored safety warnings.” Similarly, every contested adoption must have a theme, and that theme must always focus on the best interests of the child.

In contested adoptions, although representing the adoptive parents or biological parents, counsel for the parties have a unique responsibility in that advocacy for a client demands advocacy for the child’s interests. The law dictates that “the best interest of the child is paramount,” “the purpose of Indiana’s adoption statutes is to protect and promote the welfare of children by providing them with stable family units,” and that a court’s “main concern should lie with the effect of the adoption on the reality of the minor child’s life.” *In re Adoption of K.F.*, 935 N.E.2d 282, 289 (Ind. Ct. App. 2010) (affirming adoption without mother’s consent). Moreover, “the responsibility for making the determination as to whether adoption is in the best interests of the child rests solely with the trial court” under Indiana’s adoption statute. *In re Adoption of Subzda*, 562 N.E.2d 745, 750 (Ind. Ct. App. 1990); *see also* Ind. Code § 31-19-11-1(a).

Often in bench trials, attorneys overlook that judges are just like jurors, as both receive and process information with a desire to do the right thing in each case. In contested adoptions, all information presented to the fact-finder must aid the ultimate issue: the best interests of the child. Moreover, IC 31-19-10-1.4 makes clear that:

A court, in making a determination under section 1.2(e) of this chapter, shall consider all relevant evidence, but may not base its determination solely on a finding that a:

- (1) petitioner for adoption would be a better parent for a child than the parent who filed the motion to contest the adoption; or
- (2) parent has a biological link to the child sought to be adopted.

IC 31-19-10-1.4 requires that counsel, in presenting evidence to the court, use persuasive evidence and language beyond the obvious and answer the question: “Why is adoption in the best interests of the child?”² The answer to this question requires evidence that focuses solely on the child and allows the fact-finder to determine that answer from the child’s perspective. Often, clients want to provide information to the court which inappropriately places the focus on the parent, and not the child. Testimony such as “I love my child” or “I’ve waited so long to adopt a child” do little to aid the fact-finder’s decision. Rather testimony should always meet the requirements of your pre-drafted Findings of Fact and Conclusions of Law *while simultaneously developing the themes of your case*. It is the responsibility of counsel to prepare witnesses and provide the court with evidence that correctly places the focus on the child.

² Or “Why is adoption not in the best interests of the child?”