

CHAPTER THIRTEEN

VOLUNTARY TERMINATION OF PARENTAL RIGHTS

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I. LAW GOVERNING VOLUNTARY TPR PROCEEDINGS

Pursuant to Ind. Code § 31-35-1-2, proceedings under Ind. Code § 31-35-1 are governed by the procedures prescribed by: (1) Ind. Code § 31-32-1, Ind. Code § 31-32-4 through Ind. Code § 31-32-10, and Ind. Code § 31-32-12 through Ind. Code § 31-32-15; (2) Ind. Code § 31-34; and (3) Ind. Code § 31-37; but are distinct from proceedings under Ind. Code § 31-34 and Ind. Code § 31-37.

II. JURISDICTION

The probate court has concurrent original jurisdiction with the juvenile court in proceedings on a petition filed under Ind. Code § 31-35-1 for the voluntary termination of the parent-child relationship. Ind. Code § 31-35-1-3.

Jurisdiction for TPR does not fall under the Uniform Child Custody Jurisdiction Act. In re Johnson, 415 N.E.2d 108, 110 (Ind. Ct. App. 1981). The UCCJA provides guidelines in determining a court's jurisdiction to make a custody determination. Id. A TPR action does not establish or modify a custody decree. Id. Jurisdiction of any court over an adoption proceeding or TPR is predicated upon the filing of a petition with the court. Sanders v. Sanders, 310 N.E.2d 905, 908 (Ind. Ct. App. 1974).

Holderness v. Holderness, 471 N.E.2d 1157, 1160 (Ind. Ct. App. 1984) (Subject matter jurisdiction for TPR is not granted to divorce court simply because ex-husband and wife had an understanding concerning the termination of the natural father's rights).

III. PETITION FOR VOLUNTARY TPR

A. WHO MAY FILE PETITION

Pursuant to Ind. Code § 31-35-1-4(a), if requested by the parents: (1) The local office; or (2) A licensed child-placing agency; may sign and file a verified petition with the juvenile or probate court for the voluntary termination of the parent-child relationship.

B. PETITION MAY NOT BE FILED FOR CHILD VOLUNTARILY PLACED OUT OF HOME FOR TREATMENT

Pursuant to Ind. Code § 31-34-1-16(a), the department may not: (1) Initiate a court proceeding to: (A) Terminate the parental rights concerning; or (B) Transfer legal custody of; or (2) Require a parent, guardian, or custodian to consent to: (A) The termination of parental rights; or (B) Transfer of legal custody of: a child with an emotional, a behavioral, or a mental disorder or a developmental or physical disability who is voluntarily placed out of the home for the purpose of obtaining special treatment or care, solely because the parent, guardian, or custodian is unable to provide the treatment or care. Relinquishment of custody of a child described in this subsection may not be made a condition for receipt of services or care delivered or funded by the department or local office.

Collins ex rel. Collins v. Hamilton, 231 F.Supp. 2d 840, 851 (S.D. Ind. 2002), *opinion corrected* 231 F.Supp 2d 851, affirmed 349 F.3d 371 (State did not violate parents' rights to family association under the Fourteenth Amendment by requiring that Medicaid-eligible children be declared a CHINS to receive funding for residential mental health treatment.).

Runkel v. Miami County Dep't of Child Servs. (In re B.M.), 875 N.E.2d 369, 374-75 (Ind. Ct. App. 2007) (Out-of-home placement was not solely to provide necessary care to child, but because of mother's inability to control child, the child needed more care than the mother could provide, and placement was also appropriate because of safety concerns for the other children. DCS could pursue termination after a failed reunification attempt.).

C. PETITION CONTENTS

Pursuant to Ind. Code § 31-35-1-4(b), the petition must:

- (1) Be entitled "In the Matter of the Termination of the Parent-Child Relationship of _____, a child, and _____, the child's parent (or parents)"; and
- (2) Allege that:
 - (A) The parents are the child's natural or adoptive parents;
 - (B) The parents, including the alleged or adjudicated father if the child was born out of wedlock: (i) Knowingly and voluntarily consent to the termination of the parent-child relationship; or (ii) Are not required to consent to the termination of the parent-child relationship under Ind. Code § 31-35-1-6(c).
 - (C) Termination is in the child's best interest; and
 - (D) The petitioner has developed a satisfactory plan of care and treatment for the child.

IV. APPOINTMENT OF GUARDIAN AD LITEM/CASA

Appointment of a Guardian ad Litem or CASA is required in a termination proceeding only if a parent objects to the termination. Although it is not mandatory, a court may appoint a GAL or CASA when the termination is voluntary.

Pursuant to Ind. Code § 31-35-2-7,

- (a) If a parent objects to the termination of the parent-child relationship, the court shall appoint:
 - (1) a guardian ad litem; (2) a court appointed special advocate; or (3) both; for the child.
- (b) If a guardian ad litem or court appointed special advocate has been appointed for the child under Ind. Code § 31-34-10, the court may reappoint the guardian ad litem or court appointed special advocate to represent and protect the best interests of the child in the termination proceedings.

V. CONSENT TO TERMINATION

Pursuant to Ind. Code § 31-35-1-6(a), except as provided in Ind. Code § 31-35-1-6(c), the parents must give their consent in open court unless the court makes findings of fact upon the record that: (1) The parents gave consent in writing before a person authorized by law to take acknowledgments; and (2) The parents were: (A) advised in accordance with Ind. Code § 31-35-1-12; and (B) advised that if they choose to appear in open court, the only issue before the court is whether their consent was voluntary.

Neal v. DeKalb County Div. of Family & Children, 796 N.E.2d 280, 282 (Ind. 2003) (Court could not enter order of voluntary termination where mother appeared in open court and did not consent or failed to appear for court, despite signing written termination consent forms before termination petition filed.).

L.N. & Heartland Agency v. M.C., 27 N.E.3d 1116 (Ind. Ct. App. 2015) (trial court erred in dismissing Heartland's petition to terminate parental rights of Father, to which Father had consented, because the trial court erroneously concluded Heartland acted outside the scope of its authority under Ind. Code § 31-35-1-4, by seeking, on behalf of Mother, to terminate Father's parental rights while leaving her rights intact without also raising issues related to the child's placement, supervision, or adoption).

A. WHEN CONSENT IS NOT REQUIRED

Pursuant to Ind. Code § 31-35-1-6(c), the consent of a parent to the termination of the parent-child relationship under Ind. Code § 31-35-1 is not required if:

- (1) Consent to the termination of the parent-child relationship is implied under Ind. Code § 31-35-1-4.5, if the parent is the putative father;
- (2) The parent's consent to the adoption of the child would not be required under: (A) Ind. Code § 31-19-9-8; (B) Ind. Code § 31-19-9-9; or (C) Ind. Code § 31-19-9-10;
- (3) The child's biological father denies paternity of the child before or after the birth of the child if the denial of paternity: (A) Is in writing; (B) Is signed by the child's father in the presence of a notary public; and (C) Contains an acknowledgment that: (i) the denial of paternity is irrevocable; and (ii) the child's father will not receive notice of adoption or termination of parent-child relationship proceedings; or
- (4) The child's biological father consents to the termination of the parent-child relationship before the birth of the child if the consent:
 - (A) Is in writing;
 - (B) Is signed by the child's father in the presence of a notary public; and
 - (C) Contains an acknowledgment that: (i) the consent to the termination of the parent-child relationship is irrevocable; and (ii) the child's father will not receive notice of adoption or termination of parent-child relationship proceedings.

A child's father who denies paternity of the child under Ind. Code § 31-35-1-6(c)(3) or consents to the termination of the parent-child relationship under Ind. Code § 31-35-1-6(c)(4) may not challenge or contest the child's adoption or termination of the parent-child relationship.

B. MOTHER MAY NOT CONSENT BEFORE BIRTH OF CHILD

A child's mother may not consent to the termination of the parent-child relationship before the birth of the child. Ind. Code § 31-35-1-6(d).

C. PUTATIVE FATHER'S CONSENT IRREVOCABLY IMPLIED

Pursuant to Ind. Code § 31-35-1-4.5, the putative father's consent to the termination of the parent-child relationship is irrevocably implied without further court action if the father:

- (1) Fails to file a paternity action under Ind. Code § 31-14 or in a court located in another state that is competent to obtain jurisdiction over the paternity action, not more than thirty (30) days after receiving actual notice under Ind. Code § 31-19-3 of the mother's intent to proceed with an adoptive placement of the child, regardless of whether: (A) The child is born before or after the expiration of the thirty (30) day period; or (B) A petition for adoption or for the termination of the parent-child relationship is filed; or
- (2) Files a paternity action: (A) Under Ind. Code § 31-14; or (B) In a court located in another state that is competent to obtain jurisdiction over the paternity action;

during the thirty (30) day period prescribed by Ind. Code 31-35-1-4.5(1) and fails to establish paternity in the paternity proceeding within a reasonable period determined under Ind. Code 31-14-21-9 through Ind. Code 31-14-21-9.2 or the laws applicable to a court of another state when the court obtains jurisdiction over the paternity action.

In re Laney, 489 N.E.2d 551, 554 (Ind. Ct. App. 1986) (Putative father who appeared after receiving notice of hearing for voluntary TPR was improperly denied standing during TPR hearing and denied adequate opportunity to establish his paternity.).

Motion to contest the adoption need not be in writing and may be made orally upon the court. J.R.O. v. A.T., 87 N.E.3d 37 (Ind. Ct. App. 2017).

D. CONSENT BY INCOMPETENT OR MINOR PARENT

1. Incompetent Parent May Only Consent With Approval of Court or Guardian

Except as provided in Ind. Code § 31-35-1-9(b), a parent who is incompetent may give consent to termination only with the approval of the court or of the parent's guardian. Ind. Code § 31-35-1-9(a).

2. Minor Child/Parent Alone May Give Consent

A person who is less than eighteen (18) years of age and who is a parent may give the person's consent without the approval of the court or of the parent's guardian if the person is competent except for the person's age. Ind. Code § 31-35-1-9(b).

VI. HEARING PROCEDURES TO DETERMINE VOLUNTARY CONSENT

Pursuant to Ind. Code § 31-35-1-6(b), if: (1) The court finds the conditions under Ind. Code § 31-35-1-6(a)(1) and (a)(2) have been met; and (2) A parent appears in open court; a court may consider only the issue of whether the parent's consent was voluntary.

A. NOTICE OF HEARING

For additional information on notice requirements, see Ch. 4 – Constitutional and Statutory Rights, Right to Due Process.

1. Notice to Parent

Except as provided in Ind. Code § 31-35-1-5(b), the parents shall be notified of the hearing in accordance with Ind. Code § 31-32-9 [Service of Summons]. Ind. Code § 31-35-1-5(a).

In re Petition of Gray, 425 N.E.2d 728, 729 (Ind. Ct. App. 1981) (Juvenile court did not have jurisdiction for adoption. Where the court failed to comply with the required procedures, including inadequate notice to natural mother of hearing on adoption petition and person seeking to adopt failed to show that the natural mother violated her natural and legal obligations to care for her child, the court improperly granted the adoption.).

Abell v. Clark County Dep't of Public Welfare, 407 N.E.2d 1209, 1210 (Ind. Ct. App. 1980) (Where Department of Public Welfare had knowledge of mother's address at time of filing TPR petition, service of process by publication was not constitutionally sufficient.).

a. Waiver of Notice

Pursuant to Ind. Code § 31-35-1-5(b) and Ind. Code § 31-35-1-11(b), a parent who has made a valid consent to the termination of a parent-child relationship may waive the notice required by Ind. Code § 31-35-1-5(a) if the waiver:

- (1) Is in writing either: (A) in the parent's consent to terminate the parent-child relationship; or (B) in a separate document;
- (2) Is signed by the parent in the presence of a notary public; and
- (3) Contains an acknowledgment that: (A) the waiver is irrevocable; and (B) the parent will not receive notice of: (i) adoption; or (ii) termination of parent-child relationship; proceedings.

Neal v. DeKalb County Division of Family & Children, 796 N.E.2d 280 (Ind. 2003) (Parents written consent to voluntary TPR is invalid unless she appears in open court to acknowledge the consent or the trial court makes findings that the parent gave consent in writing before a person authorized to take acknowledgements, that the parent was notified of the constitutional and other rights, and that the parent failed to appear.).

b. If Parent Waives Notice, Cannot Contest Termination or Adoption

Pursuant to Ind. Code § 31-35-1-11(c), a parent who waives notice under Ind. Code § 31-35-1-11(b) may not challenge or contest: (1) The termination of the parent-child relationship; or (2) The child's adoption.

2. Notice to Parent's Counsel

If DCS knows parent is represented by counsel but prepares voluntary TPR forms and provides them to parent to sign without advising their attorney is a denial of parent's due process rights. In re A.M.H., 732 N.E.2d 1284, 1286 (Ind. Ct. App. 2000).

PRACTICE POINTER: If appointed as counsel, DCS must be notified that no DCS employee may have any paperwork signed by the parent without the parent's counsel being present. Typically, the forms do not have a place for the parent's attorney's signature, but counsel should sign the document to show that the attorney was present when the form was reviewed and signed.

B. INVESTIGATION INTO ABSENCE, COMPETENCE, DURESS, OR FRAUD

Pursuant to Ind. Code § 31-35-1-7(a), before the court may enter a termination order, the court: (1) Must inquire about the reasons for the parents' absence; and (2) May require an investigation by a probation officer to: (A) Determine whether there is any evidence of fraud or duress; and (B) Establish that the parents were competent to give their consent.

In re M.S., 551 N.E.2d 881, 883 (Ind. Ct. App. 1990) (Although mother did not appear in court, she was in the courthouse during hearing and the consent to terminate was upheld. Mother had notice of the hearing and had been advised in the written consent to terminate form that she could appear in court to challenge the voluntariness of her consent.).

1. Investigator Must Testify Under Oath

An investigation conducted under Ind. Code § 31-35-1-7(a) must be entered on the record under oath by the person responsible for making the investigation. Ind. Code § 31-35-1-7(b).

2. Burden Shift if Claiming Affirmative Defense

An allegation of invalid consent to termination may be raised in a petition to withdraw consent and the petitioner has the burden of proof. Ellis v. Catholic Charities (In re Ellis), 681 N.E.2d 1145, 1149 (Ind. Ct. App. 1997).

3. Petition Dismissed or Continuance, If Fraud, Duress, or Incompetence

Pursuant to Ind. Code § 31-35-1-7(c), if there is any competent evidence of probative value that: (1) Fraud or duress was present when the written consent was given; or (2) A parent was incompetent; the court shall dismiss the petition or continue the proceeding.

Voluntary TPR may only be set aside if consent was obtained under fraud or duress or the parent is incompetent. In re J.W.W.R., 712 N.E.2d 1081, 1084-85 (Ind. Ct. App. 1999). Parent is not required to object to admission of written consent and it does not constitute a waiver. In re Snyder, 418 N.E.2d 1171, 1178 (Ind. Ct. App. 1981).

Ellis v. Catholic Charities (In re Ellis), 681 N.E.2d 1145, 1149-50 (Ind. Ct. App. 1997) (Private adoption organization allegedly made misrepresentations as to visitation and threats to withdraw financial support; however, evidence showed that natural mother's written consent to TPR was knowing and voluntary and not procured by misrepresentation or duress.).

Youngblood v. Jefferson County Div. of Family & Children, 838 N.E.2d 1164, 1171-72 (Ind. Ct. App. 2005) (No evidence of duress, threatened violence or physical restraint when signing voluntary consent where mother was represented by counsel who reviewed the consent document with mother and notarized the consent.).

K.L. v. Tippecanoe County Dep't of Child Servs., 922 N.E.2d 102, 107-09 (Ind. Ct. App. 2010) (Consent was obtained through misrepresentation by DCS that there were no reports preventing father's sister from adoption, when in fact there was a prior report of sexual abuse, which resulted in DCS withdrawing the approval for the adoption; father would not have consented unless his sister could adopt the child and he could maintain a relationship.).

4. Post-Adoption Contact May Not Be Part of Voluntary TPR

Conditioning the voluntary TPR on continuing post-adoption visitation irreconcilably conflicts with Indiana adoption law and is not permitted. T.B. v. Indiana Dep't of Child Servs. (In re M.B.), 921 N.E.2d 494, 499 (Ind. 2009).

C. ADVISE TO PARENTS

Pursuant to Ind. Code § 31-35-1-8, before consent may be given in court, the court must advise the parents of: (1) Their constitutional and other legal rights; and (2) The consequences of their actions under Ind. Code § 31-35-1-12.

Pursuant to Ind. Code § 31-35-1-12, for purposes of Ind. Code § 31-35-1-6 and Ind. Code § 31-35-1-8, the parents must be advised that:

- (1) Their consent is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress or unless the parent is incompetent;
- (2) When the court terminates the parent-child relationship: (A) All rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, parenting time, or support pertaining to the relationship, are permanently terminated; and (B) Their consent to the child's adoption is not required;
- (3) The parents have a right to the: (A) care; (B) custody; and (C) control; of their child as long as the parents fulfilled their parental obligations;
- (4) The parents have a right to a judicial determination of any alleged failure to fulfill their parental obligations in a proceeding to adjudicate their child a delinquent child or a child in need of services;
- (5) The parents have a right to assistance in fulfilling their parental obligations after a court has determined that the parents are not doing so;
- (6) Proceedings to terminate the parent-child relationship against the will of the parents can be initiated only after: (A) The child has been adjudicated a delinquent child or a child in need of services and removed from their custody following the adjudication; or (B) A parent has been convicted and imprisoned for an offense listed in Ind. Code § 31-35-3-4 (or has been convicted and imprisoned for an offense listed in Ind. Code § 31-6-5-4.2(a) before its appeal), the child has been removed from the custody of the parents under a dispositional decree, and the child has been removed from the custody of the parents for six (6) months under a court order;

- (7) The parents are entitled to representation by counsel, provided by the state if necessary, throughout any proceedings to terminate the parent-child relationship against the will of the parents;
- (8) The parents will receive notice of the hearing, unless notice is waived under Ind. Code § 31-35-1-5(b), at which the court will decide if their consent was voluntary, and the parents may appear at the hearing and allege that the consent was not voluntary; and
- (9) The parents' consent cannot be based upon a promise regarding the child's adoption or contact of any type with the child after the parents voluntarily relinquish their parental rights of the child after entry of an order under Ind. Code § 31-35-1 terminating the parent-child relationship.

D. WITHDRAWAL OF WRITTEN CONSENT MIGHT NOT BE ALLOWED

Objecting to TPR at a hearing to repudiate written consent does not prevent TPR in absence of a showing of fraud, duress, or incompetence. In re J.W.W.R., 712 N.E.2d 1081, 1084 (Ind. Ct. App. 1999). See also Ellis v. Catholic Charities (In re Ellis), 681 N.E.2d 1145, 1148 (Ind. Ct. App. 1997).

E. DCS NOT REQUIRED TO PROVE PETITION ELEMENTS

Where a parent has freely and voluntarily executed a relinquishment of parental rights, the State is relieved of the clear and convincing standard of proof. In re M.R., 728 N.E.2d 204, 208 (Ind. Ct. App. 2000).

VII.COURT ORDERS/FINDINGS

A. CARE OF CHILD PENDING OUTCOME

The court may issue any appropriate order for the care of the child pending the outcome of the case. Ind. Code § 31-35-1-7(d).

B. DEFAULT JUDGMENT

Pursuant to Ind. Code § 31-35-1-11(a), if the court makes findings of fact upon the record that:

- (1) One (1) parent has made a valid consent to the termination of the parent-child relationship;
- (2) The other parent: (A) Is required under Ind. Code § 31-35-1 to consent to the termination of the parent-child relationship; (B) Cannot be located, after a good faith effort has been made to do so, or has been located but fails to appear at the termination hearing; and (C) Has been served with notice of the hearing in the most effective means under the circumstances; and
- (3) The investigation that may be required by Ind. Code § 31-35-1-7 has been completed and entered on the record;

the court may enter a default judgment against the unavailable parent and terminate as to both parents.

C. DETERMINATION

Pursuant to Ind. Code § 31-35-1-10(a), if: (1) The court determines that the allegations in the petition described in Ind. Code § 31-35-1-4 are true; and (2) The other requirements of this article are met; the court shall terminate the parent- child relationship.

D. COURT MAY NOT ORDER VISITATION AS CONDITION OF TERMINATION

A court may grant post-adoption contact privileges to a parent who voluntarily relinquishes parental rights at the time of the adoption, but the juvenile court may not grant visitation rights as a condition precedent to voluntary TPR. T.B. v. Ind. Dep't of Child Servs. (In re M.B.), 921 N.E.2d 494, 499 (Ind. 2009).

E. DISMISSAL

Except as provided in Ind. Code § 31-35-1-11[default judgment], if the requirements of Ind. Code § 31-35-1-10(a)(1) or (a)(2) are not met, the court shall dismiss the petition. Ind. Code § 31-35-1-10(b).