

CHAPTER 10

VOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP

I. OVERVIEW OF VOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP RELATIONSHIP

Termination of the parent-child relationship is a judicial procedure to permanently sever the legal, social, and financial relationship and responsibility between child and parent. Termination legally frees a child to be adopted, although the termination procedure under the juvenile code does not itself include the adoption. This requires a separate procedure in probate court.

The procedure for voluntary termination of the parent-child relationship is initiated when a child placing agency or the office of family and children accepts the parents' consent to termination of the parent-child relationship and files the necessary petition with the court.

II. CONSENT TO TERMINATION OF THE PARENT-CHILD RELATIONSHIP

Voluntary termination of the parent-child relationship may occur when a parent consents to terminate parental rights. This can be a generous and loving act by a parent who recognizes that he or she can never adequately care for the child and that the child should have the opportunity to be adopted by those who can provide love and stability for the child. A consent to termination can, however, be an abdication of responsibility by the parents of an older CHINS who want to avoid further financial and social involvement with the child. The office of family and children should carefully scrutinize the motives of parents wishing to terminate the parent-child relationship and thoroughly consider the needs and best interest of the child before proceeding.

IC 31-35-1-4 indicates that both the parents of the child must consent to the termination of parental rights, including an alleged or adjudicated father if the child was born out of wedlock. However, there are situations in which the court may proceed to accept the voluntary termination of only one parent.

A. Advisement of Rights

IC 31-35-1-12 provides that the office of family and children can accept a consent to termination of the parent-child relationship only after advising the parents 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, visitation, or support pertaining to that 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 they fulfill 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 they 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 the child has been removed from their custody following the adjudication; or
 - (B) a parent has been convicted and imprisoned for an offense listed in IC 31-35-3-4 (or has been

convicted and imprisoned for an offense listed in IC 31-6-5-4.2(a) before its repeal), the child has been removed from that parent's custody under a dispositional decree, and the child has been removed from that parent's custody 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; and

(8) the parents will receive notice of the hearing 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.

B. Form for Consent to Termination

The written form to consent to termination of the parent child relationship used by the office of family and children is referred to as a "Voluntary Relinquishment of Parental Rights." The office of family and children may also have parents sign a written form entitled "Consent to Adoption."

C. Procedure for Taking Consent

A consent to termination of the parent-child relationship can be taken by a caseworker from the office of family or children or a licensed child placing agency. The consent should be notarized or given in writing before a person authorized to take acknowledgments. IC 31-35-1-6(1). Best practice requires that the person taking the consent be careful not to say or do anything to coerce the parent to consent. As noted in this Chapter above at II. A., the parents must be advised of their rights and the consequences of their actions. Efforts should be made to ensure that the parents fully understand their rights, and explanations and clarification of rights should be documented.

If the parent is represented by counsel, it is essential that counsel be provided a copy of the relinquishment and consent forms for review, and it is recommended as best practice that counsel be present for the signing of the consents. In *In Re A.M.H.*, 732 N.E. 2d 1284 (Ind. Ct. App. 2000), the office of family and children case manager provided mother with the forms for relinquishment of parental rights of her three children who were adjudicated CHINS, consent to adoption, and waiver of notice of hearing. Even though the caseworker was aware that mother had counsel in the CHINS proceeding and that mother was of limited intelligence and easily influenced, she did not notify counsel of her intention to seek mother's signature on these forms. The court dismissed the petition for voluntary termination and the Court of Appeals affirmed on its finding that mother was denied due process of law. The Court stated:

...in light of the general importance of notice to counsel for a represented party and the substantial due process implications of proceedings to terminate parental rights, we cannot say the trial court erred when it decided Hicks [mother] was denied due process of law when a caseworker who knew Hicks was represented by counsel, was of limited intelligence, and was easily influenced, nonetheless, without ensuring that Hick's counsel was notified, prepared and provided forms to Hicks whereby Hicks purported to voluntarily relinquish her rights to her children.

Id. at 1286.

When a parent is not represented by counsel, but is of limited intelligence, uses substances, or otherwise seems confused or uncertain about the significance of her acts, it is recommended that the parent be referred to counsel. The office of family and children could request appointment of counsel for a CHINS parent under the discretionary provision of IC 31-32-4-3. See *In Re M.M.*, 733 N.E. 2d 6 (Ind. Ct. App. 2000) (although fundamental fairness does not mandate appointment of counsel for parents in all CHINS proceedings, it may be abuse of discretion not to appoint under "unique facts and circumstances"). *Id.* at 11. Also, an indigent parent could seek counsel in the CHINS proceeding under IC 34-10-1-1 to give her legal assistance on the voluntary termination.

The parent must be given notice of the hearing, IC 31-35-1-5. The parents may sign a written waiver of notice of hearing, although the termination statutes make no specific provision for this waiver. If the parents' consent is given in open court, IC 31-35-1-8 provides that the court must advise the parents of their constitutional and other legal rights and of the consequences of their actions pursuant to IC 31-35-1-12.

D. Consent by Minor or Incompetent

A parent who is incompetent can give a consent to terminate the parent-child relationship only with approval of the court or the parent's guardian, but a parent under the age of eighteen can give consent without approval of the court or the parent's guardian if the parent is competent except for the parent's age. IC 31-35-1-9.

E. Consent of Alleged or Putative Father

IC 31-35-1-4 requires the consent of an alleged father to the voluntary termination. However, the consent of a father who was not married to the mother or presumed to be the father pursuant to IC 31-14-7-1, may not be required in specific circumstances. This man is referred to as a “putative father” under IC 31-9-2-100. IC 31-35-1-4.5 provides that a putative father’s consent to termination of his parental rights is irrevocably implied if he is given actual notice before the birth of the child under IC 31-19-3 of the mother’s intent to seek adoptive placement for the child, and the putative father either (1) does not file a paternity action within thirty days of receiving actual notice, or (2) files a paternity action, but fails to establish his paternity within a reasonable time. See Chapter 13 at VII. A. on implied consent and pre-birth notice of adoption. IC 31-35-1-6(b) provides that the consent to termination of the parent-child relationship of a putative father is not required if consent is implied under IC 31-35-1-4.5 as discussed in the sentence above. The same statute also provides that consent is not required if the putative father is convicted and incarcerated for one of the specified crimes against the child or the child’s mother, sibling, half sibling, or step-sibling under IC 31-19-9-9 or IC 31-19-9-10.

III. COURT PROCEEDINGS

A. Jurisdiction and Standing

The juvenile court and the probate court have concurrent original jurisdiction in all cases involving termination of the parent-child relationship. IC 31-30-1-5(2); IC 31-35-2-3.

IC 31-35-1-5 provides that the office of family and children or a licensed child placing agency can file a petition for the voluntary termination of the parent-child relationship at the request of the parents. This has been interpreted to mean that a parent does not have standing to initiate a voluntary petition. See Matter of Adoption of T.B., 622 N.E. 2d 921, 925 (Ind. 1993) (mother not proper person to file petition for voluntary or involuntary termination of parent-child relationship).

B. Petition and Required Elements

IC 31-35-1-4 provides that the office of family and children or a licensed child placing agency may sign and file a verified petition entitled “In the Matter of the Termination of the Parent-Child relationship of _____, a child, and _____, the child’s parent (or parents).” The required allegations of the petition are paraphrased below:

- The parents are the child’s natural or adoptive parents,
- The parents, including the alleged or adjudicated father if the child was born out of wedlock, knowingly and voluntarily consent to the termination of the parent-child relationship, unless the consent of an alleged father is irrevocably implied as discussed in this Chapter above at II. E.
- Termination is in the child’s best interest, and
- The petitioner has developed a satisfactory plan of care and treatment for the child.

Practitioners should note that, unlike involuntary proceedings, the child need not be adjudicated a CHINS or delinquent to initiate a voluntary termination petition.

C. Hearing

The proceedings of the termination hearing will vary depending upon whether the parent appears for the hearing. If the parent does not appear in court to give consent, IC 31-35-1-6 provides that the court must make findings that the consent was given before a person authorized by law to take acknowledgments (a notary public) and the parent was notified of his rights and of the consequences of the termination. IC 31-35-1-7 requires that the court “must” inquire about the reason for the absence of the parent, and the court “may” require an investigation to determine whether there is any evidence of fraud or duress and to establish that the parent was competent to give the consent. The person who conducts the court ordered investigation must enter the investigation on the record under oath. IC 31-35-1-7(b). The court shall dismiss the petition or continue the proceeding if there is any competent evidence of probative value of fraud, duress or parental incompetence. IC 31-35-1-7(c). The court may issue any appropriate order for the care of the child pending

the outcome of the case. IC 31-35-1-7(d). See In Re M.S., 551 N.E. 2d 881, (Ind. Ct. App. 1990), cert denied, 498 U.S. 1121, 111 S. Ct. 1075 (1991) (presence of parent's attorney in the courtroom is not the same as parent appearing in open court, and therefore court must make inquiry about reasons for parent's absence).

If the parent does appear for the hearing, the court may accept the parent's acknowledgment of the written consent or hear evidence on a request to withdraw the consent. See Matter of Parent-Child Rel. of Ellis, 681 N.E. 2d 1145 (Ind. Ct. App. 1997), trans. denied (purpose of consent hearing is to determine if consent was voluntarily given, not to provide opportunity for parent to withdraw earlier given consent on any grounds). If the parent has not signed a written consent at the time of the hearing, the court may take the consent in open court pursuant to IC 31-35-1-8 after advising the parent of his/her constitutional and legal rights and the consequences of the termination.

D. Standard of Proof

The petitioner must show that the parent's consent is knowing and voluntary. In In Re M.R., 728 N.E. 2d 204 (Ind. Ct. App. 2000), the mother signed and offered to the court a Voluntary Relinquishment of Parental Rights at a status hearing on a Petition for Involuntary Termination filed by the office of family and children. After a hearing in which the trial court heard evidence and accepted mother's voluntary relinquishment, mother appealed the judgment arguing that the office of family and children did not present clear and convincing evidence that termination was in the best interest of the child. Rejecting the argument, the Court of Appeals found that the mother's act of relinquishing her parental rights in court converted the involuntary termination proceeding into a voluntary termination proceeding under IC 31-35-1, and the Court stated:

We conclude that where the parent whose rights are being terminated voluntarily consents to the termination, the State is relieved of its burden to prove by clear and convincing evidence that the termination is in the best interest of the child and that the State has a satisfactory plan for the care and treatment of the child.

Id. at 209.

E. Withdrawal of Consent

In Matter of Parent-Child Rel. of Ellis, 681 N.E. 2d 1145 (Ind. Ct. App. 1997), dissent to denial of transfer at 685 N.E. 2d 476 (Ind. 1997), the trial court refused to allow the withdrawal of the mother's consent for voluntary termination of her parental rights. Affirmed on appeal, the Court stated that a parent's ability to withdraw her consent is extremely limited. Id. at 1148. A parent who executes a voluntary relinquishment of the parent-child relationship is bound by the consequences of such action, unless the relinquishment was procured by fraud, undue influence, or other consent-vitiating factors. The purpose of the consent hearing is to determine if the consent was voluntarily given, not to provide an opportunity for the parent to otherwise withdraw the consent. As to the mother's claim of fraud, the Court ruled that the adoption agency's pledge to assist the mother in attaining postadoption visitation was not a fraudulent inducement for her consent. The mother was aware that "open adoption" visitation agreements were not legal or enforceable in Indiana and that visitation was subject to the discretion of the adoptive parents. The Court also rejected the mother's claim of duress. The Court found that pressure resulting from the mother's pregnancy and attendant financial and family circumstances did not rise to the level of overcoming her volition, and therefore did not void her consent to voluntary termination of the parent-child relationship.

In In Re J.W.W.R., 712 N.E. 2d 1081 (Ind. Ct. App. 1999), the mother sought to revoke her signed voluntary relinquishment of parental rights at the termination hearing. The Court ruled that the parent does not have to ratify a previous consent in open court, and the Court found that the consent to termination and adoption was given voluntarily. The actions of the case manager did not rise to the level of coercion or duress to overcome the mother's volition, and there was no evidence that mother was using substances or mentally ill.

In In Re M.S., 551 N.E. 2d 881 (Ind. Ct. App. 1990), cert denied 498 U.S. 1121, 111 S. Ct. 1075 (1991), the Court rejected mother's argument that she was "emotionally upset" when she signed the consent and therefore she was under duress. Id. at 884. The Court found that "there is no evidence that at the time of her consent she was incoherent or distraught to such a degree that she could not control her faculties." Id.

Although technically the issue on appeal in In Re A.M.H., 732 N.E. 2d 1284 (Ind. Ct. App. 2000), was the propriety of the dismissal of the petition for voluntary termination of the parent-child relationship on due

process grounds, the case involved the mother's withdrawal of her written consent to the termination. The Court of Appeals affirmed the finding of the trial court that the office of family and children violated mother's due process rights by failing to notify her attorney in the CHINS case that she was signing a voluntary termination form. In an interesting footnote, the Court noted that the trial court had ruled, and was being affirmed, on due process grounds, but the Court suggested that the mother's following conditions could have constituted "consent-vitiating" factors for purposes of setting aside her consent: diminished mental capacity; history of psychological problems, drug and alcohol abuse and depression; quite easily influenced; may not have understood the words used in the consent form. *Id.* at 1285 n. 1. See this Chapter above Roman Numeral II. at C. for further discussion on A.M.H. case.

See also Chapter 13 at IV. F. on withdrawal of consent in the following adoption cases which may be analogous to withdrawals in termination cases: Bell v. Adoption of A.R.H., 654 N.E. 2d 29 (Ind. Ct. App. 1995) (consent to adoption was upheld against mother's argument that consent was involuntary due to her grief and stress and her alleged belief that she had grace period to revoke consent); Matter of Adoption of Johnson, 612 N.E. 2d 569, (Ind. Ct. App. 1993) (Court affirmed order allowing birth mother to withdraw consent because adoptive parents had been diagnosed with AIDS and birth mother feared adoptive parents' deaths would leave child without parents); Matter of Adoption of H.M.G., 606 N.E. 2d 874 (Ind. Ct. App. 1993) (Court found that sixteen year old birth mother's consent given twenty-seven days prior to child's birth was not void but voidable; voidable pre-birth consent could be ratified by post-birth act which sufficiently manifests present intention to give child up for adoption); Matter of Adoption of Topel, 571 N.E. 2d 1295 (Ind. Ct. App. 1991) (father's consent was allowed to be withdrawn because he did not understand that consenting to child's adoption meant he would have no right to see child again); Matter of Adoption of Konar, 454 N.E. 2d 886 (Ind. Ct. App. 1983) (adoption decree affirmed because dismissal of voluntary termination petition did not vitiate mother's separately signed adoption consent); Matter of Snyder, 418 N.E. 2d 1171 (Ind. Ct. App. 1981) (mother did not meet burden of proof that her facially valid adoption consents had been procured by undue influence; essence of undue influence is destruction of free agency of one who is subject to [it]); Matter of Adoption of Hewitt, 396 N.E. 2d 938 (Ind. Ct. App. 1979) (fact that eighteen-year-old mother's consent was given in hospital two days after child's birth was insufficient to void consent; emotions, tensions, and pressure are insufficient to void consent unless parent can show they rose to level of overcoming volition).

F. One Parent Consents and Other Parent Cannot be Located

If the court grants the voluntary termination petition as to one parent, but the location of the other parent is unknown, the court can enter a default judgment of termination as to the latter parent. Prior to 1999, IC 31-35-1-11 provided that the absent parent could be defaulted if the office of family and children could present evidence of the following to the court: the absent parent could not be located despite a good faith effort; the absent parent was served with notice of the proceedings in the most effective means under the circumstances, and an investigation was completed as outlined in IC 31-35-1-7 to determine if there was any evidence of fraud, duress, or incompetency to consent. The 1999 amendment added an additional requirement regarding the absent parent. IC 31-35-1-11 now requires proof that the absent parent "is required under this chapter to consent to the termination of the parent-child relationship." This language apparently refers to the following statutes on putative fathers in which consent to adoption is implied: IC 31-35-1-4.5 (consent of putative father is "irrevocably implied" if paternity proceeding not initiated or litigated within set period of time); IC 31-19-9-9 or 10 (consent not required if parent convicted and incarcerated for one of the listed crimes against child's other parent, child, or child's whole, half, or step sibling). The new language in IC 31-35-1-11 may have inadvertently limited the applicability of that default statute to putative fathers who have not initiated paternity proceedings or whose consent to voluntary termination is otherwise irrevocably implied.

G. One Parent Consents but Other Parent Contests Involuntary Termination

In Matter of J.T., N.E. 2d (Ind. Ct. App. 2001), the mother alleged it was error for the trial court to accept the consent of the father to voluntary termination of his parent-child relationship prior to the hearing and judgment on the petition for involuntary termination filed against her. The Court found the issue was moot since it had affirmed the termination judgment against the mother, but cautioned that trial courts should be wary of voluntarily terminating the parental rights of a non-custodial parent before adjudicating the parental rights of the custodial parent because it could materially affect the right of the child to receive support in the event the custodial parent's rights are not terminated. Arguably this concern can be avoided by the trial court withholding judgment on a parent's consent to voluntary termination, until the involuntary petition proceedings are completed as to the other parent.

IV. POSTADOPTION CONTACT WITH BIRTH PARENT OR SIBLINGS: NO “OPEN ADOPTION” IN INDIANA

An agreement for the birth parent to maintain contact with the child after adoption has sometimes been referred to as “open adoption.” Although case law is clear that Indiana does not recognize the term “open adoption,” see In Re J.W.W.R., 712 N.E. 2d 1081 (Ind. Ct. App. 1999); Matter of Parent-Child Rel. of Ellis, 681 N.E. 2d 1145, 1149 (Ind. Ct. App. 1997) trans. denied; Matter of Adoption of Topel, 571 N.E. 2d 1295, 1298 (Ind. Ct. App. 1991), Indiana statutory law contains specific procedures allowing limited postadoption contact between the birth parent and the child, and contact between an adopted child and his/her siblings.

A. Birth Parent Contact with Child Over Two Years of Age

IC 31-19-16-1 provides that at the time of the adoption the court may grant postadoption contact to a birth parent who has consented to the adoption of the child or voluntarily terminated the parent-child relationship. The statutes do not clarify or limit what constitutes postadoption “contact.”

IC 31-19-16-2 and 3 provide that the court may order the postadoption contact if it approves the contact agreement between the adoptive parents and the birth parent and finds that:

- The child is at least two years of age and there is a significant emotional attachment between the child and the birth parent.
- The desired contact between the birth parent and the child is in the best interest of the child.
- Each adoptive parent consents to the contact between the birth parent and the child.
- The adoptive parents and birth parent filed a postadoption contact agreement with the court which contains the following: (1) an acknowledgment by the birth parents that the adoption is irrevocable, even if the adoptive parent does not abide by the postadoption contract agreement and (2) an acknowledgment by the adoptive parents that the contact agreement grants the birth parent the right to enforce the postadoption privileges set out in the agreement.
- The agency sponsoring the adoption and the child’s guardian ad litem or CASA recommend the postadoption agreement, or the office of family and children was informed of the agreement and commented on the agreement in its report.
- The child consents to the agreement if the child is at least twelve years of age.

The contact agreement can be modified or vacated upon the motion of the adoptive parents, birth parents, or the court. IC 31-19-16-4 and 6. Any party can file a petition with the court to compel compliance with court ordered contact or to modify the agreement, IC 31-19-16-4, but failure or refusal of contact will not revoke the adoption, IC 31-19-6-8.

The office of family and children should not promise postadoption contact as an incentive to voluntary termination of the parent-child relationship, since the granting of such contact is within the discretion of the judge who hears the adoption and orders of contact may be violated by the adoptive parents or revoked by the trial court before or after the adoption is finalized. The office must be clear that postadoption contact is an option, but it is not guaranteed and it can be terminated. See Matter of Parent-Child Rel. of Ellis, 681 N.E. 2d 1145 (Ind. Ct. App. 1997) trans. denied.

Case law has clarified that compliance with the postadoption contact statutes is the only means to obtain a court order for visitation between the birth parent and the adopted child. In In Re the Visitation of A.R., 723 N.E. 2d 476 (Ind. Ct. App. 2000), the facts show that the mother gave consent to the adoption of her child by the child’s stepmother. The mother was subsequently denied visitation with the child, and filed a third party motion for visitation. The trial court’s denial of the petition was affirmed on appeal on the grounds that the postadoption visitation statutes at IC 31-19-16 provide the exclusive means for a biological parent to obtain postadoption visitation rights with the child. The mother did not comply with the postadoption statutes, and the Court ruled she could not remedy that failure by seeking visitation as a third party.

B. Birth Parent Contact with Child Under Two Years of Age

IC 31-19-16-9 allows the adoptive and birth parents to agree to postadoption contact privileges for a child less than two years of age without court approval. The agreement cannot include visitation. The agreement is not enforceable and does not affect the finality of the adoption.

C. Postadoption Sibling Contact

At the time of the adoption decree, the court may order the adoptive parents to provide specific postadoption contact for an adoptive child two years of age and older with his birth siblings, if the adoptive parents agree to the contact. The court must find that the contact is in the best interest of the child. A petition can be filed to modify, vacate or compel compliance with the postadoption contact order, but the adoption is irrevocable even if the adoptive parents do not abide by the postadoption sibling contact order. See IC 31-19-16.5-1 through 7 and Chapter 13 at XII. A. 2. for further discussion of postadoption birth sibling contact.

