

CHAPTER 9: Termination of Parental Rights

9.1 PURPOSE OF TERMINATION OF PARENTAL RIGHTS

The first priority established by the Child Protective Act (CPA) is to preserve the unity of the family whenever possible.¹ Thus, prior to consideration of termination of parental rights (TPR), the Department must make reasonable efforts to reunify children with their parents, unless the court has found that the parents' conduct rises to the level of aggravated circumstances.²

The voluntary or involuntary termination of parental rights severs all legal rights between a child and his or her parents and frees the child for adoption. After an order of termination, parents are no longer entitled to notice of court proceedings concerning the child. An order of termination of parental rights ends the duty of a parent to continue to support the child and the legal right to visit with or have contact with the child.³

9.2 TIMING OF TPR PROCEEDINGS WITHIN A CPA CASE

A. Generally

A petition seeking termination of parental rights may be filed within a CPA proceeding.⁴ The Federal Adoption and Safe Families Act (ASFA) requires and Idaho law imposes a rebuttable presumption that the Department must move for termination of parental rights if a child has been in custody for 15 of the last 22 months.⁵ The Idaho Supreme Court has held that Idaho law "creates a presumption in favor of the department initiating a termination petition when a child

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

¹ IDAHO CODE ANN. § 16-1601(1) (2010). *See also* § 16-2001(2).

² See § 16-1615(b) (reasonable efforts to eliminate the need for shelter care required); § 16-1619(6)(a) (reasonable efforts to prevent the need for foster care); § 16-1621(3) (case plan must include reasonable efforts to make it possible for child to return home). Section 16-1619(6)(d) defines aggravated circumstances. Pursuant to that provision, where a court makes the finding that a parent's maltreatment of a child constitutes aggravated circumstances, no efforts to reunify the parent and child are required. *See also* 45 C.F.R. § 1356.21(b)(3)(i). Requirements are different if the child is an Indian child. See Chapter 11 for more information.

³ § 16-2011 (2010) ("An order terminating the parent and child relationship shall divest the parent and the child of all legal rights, privileges, duties, and obligations, including rights of inheritance, with respect to each other.")

⁴ § 16-1624, IDAHO JUV. R. 48(a).

⁵ 42 U.S.C. § 675(5)(E) (2010); 45 C.F.R. § 1356.21(c)(1)(i) § 16-1629(9).

has been in the state's custody and not in the parent's care for fifteen out of twenty-two months. It does not create a presumption that it is in the best interests of the child to terminate parental rights.”⁶

The requirements for filing a TPR after 15 months of state custody do not limit early filing. The TPR petition may be filed at any time in a case when it is clear that reunification cannot occur.⁷ Best practice is to file the TPR petition as soon as it is documented that termination of parental rights is the appropriate permanency goal in the CPA proceeding.

B. Exceptions to Time Standards

There are four exceptions to the general rules regarding the timing of a TPR petition:

1. The Department is required to seek termination within sixty days of a judicial determination that an infant has been abandoned.⁸
2. The Department must seek termination within sixty days of a judicial determination that “reasonable efforts are not required because the parent has subjected the child to aggravated circumstances . . .”⁹
3. The Department must file a petition to terminate parental rights in a case under the Idaho Safe Haven Act as soon as possible after the initial thirty (30) day investigation period.¹⁰
4. The Department need not file a petition to terminate if:
 - a. Filing is not in the best interests of the child. If the Department decides not to file pursuant to section 16-1629(9), Idaho Juvenile Rule 45(d) requires that the Department move the court requesting relief from the duty imposed on the Department to file for termination when the child has been in out-of-home care for 15 out of the last 22 months. The court may grant the Department’s motion if it appears, based on compelling reasons in the record, that the presumption has been rebutted.”¹¹
 - b. Reasonable efforts have not been made to reunite the child with his/her family¹²; or
 - c. The child has been placed permanently with a relative.¹³

9.3 PROCEDURAL ISSUES GOVERNING TPR PROCEEDINGS

The filing of a TPR petition does not initiate a new case. For data management purposes, a different case number may be assigned to the termination process. When the child is subject to the court’s jurisdiction under the CPA, a TPR petition must be filed *within* the CPA case.¹⁴ This

⁶ State v. Doe. 144 Idaho 534, 536, 164 P.3d 814, 816 (2007).

⁷ IDAHO JUV. R. 41(j); IDAHO JUV. R. 48(a).

⁸ § 16-1624; 42 U.S.C. § 475(5)(E).

⁹ *Id.* The determination of aggravated circumstances is governed by Idaho Code section 16-1619(6)(d). It is discussed in detail in Chapter 3 of this manual.

¹⁰ §39-8205(5). The Safe Haven Act is discussed in detail in Chapter 12 of this manual.

¹¹ §16-1622(7), IDAHO JUV. R. 45(d).

¹² IDAHO JUV. R. 45(d).

¹³ §16-1624; IDAHO JUV. R. 45(d).

¹⁴ *Id.*

practice is supported by the *ABA Standards for Judicial Excellence for Judges Hearing Abuse and Neglect Proceedings*.¹⁵ The rationale for this approach is that the CPA judge is familiar with the family and the case and can more easily come to an informed decision on the TPR issues, thus avoiding delays for the child. The practice of having a single judge hear both the CPA and termination of parental rights cases is common in many Idaho counties.

Although Idaho law specifically provides that TPR cases “may be conducted in an informal manner,” the court must ensure procedural due process for children and their parents, including the right to notice, the appointment of counsel, and the right to be heard.¹⁶ A court must find that termination is supported by clear and convincing evidence after a hearing in which the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence applicable to civil cases apply.¹⁷

9.4 VOLUNTARY TERMINATION OF PARENTAL RIGHTS

Prior to, or after the filing of a petition to terminate parental rights, the Department and the parents’ counsel should discuss with the parents the option of voluntary termination of parental rights by consent. The form for consent to terminate parental rights is established by statute.¹⁸ Voluntary consent to the termination of the parent/child relationship can serve a number of purposes: first, consent can expedite the termination process and free the child for placement in a permanent home. Second, involuntary termination of parental rights to a child constitutes an aggravated circumstance, which can be grounds for relieving the Department of its obligation to make reasonable efforts to prevent removal and to reunify the family.¹⁹ It can also expedite the permanency hearing. However, best practice is to consider whether the termination case can be fully developed in the 30 days prior to the expedited permanency hearing. Timing of the hearing on aggravated circumstances may be critical.

Voluntary consents must be witnessed by a district judge, a magistrate, or an equivalent judicial officer in another state.²⁰ The effect of a voluntary consent is to completely and absolutely terminate the rights of the parent to the child. The right to a hearing on the TPR petition may be waived by the parents.²¹ Upon completion of the voluntary consent to terminate parental rights, the parent(s) is no longer entitled to notice of any proceeding regarding the child. Best practice is to create a record of the consent and to also provide notice of the completion of the termination to the consenting parent.

Idaho law requires the court to accept a termination or relinquishment from another state that has been ordered by a court of competent jurisdiction under like proceedings, or in any other

¹⁵ AMERICAN BAR ASSOCIATION, *JUDICIAL EXCELLENCE IN CHILD ABUSE AND NEGLECT PROCEEDINGS: PRINCIPLES AND STANDARDS FOR COURT ORGANIZATION, JUDICIAL SELECTION AND ASSIGNMENT, JUDICIAL ADMINISTRATION AND JUDICIAL EDUCATION* (2010), available at <http://www.isc.idaho.gov/childprotection/PDFs/JudicialExcellenceStandardsAbuse-Neglect-ABA%20Approved-Aug-10.pdf> (last visited April 25, 2011).

¹⁶ §16-2009.

¹⁷ *Id.*; IDAHO JUV. R. 51(c); IDAHO R. EVID. 101.

¹⁸ §16-2005(4).

¹⁹ §§16-1619(6)(d).

²⁰ §16-2005(4).

²¹ *Id.*

manner authorized by the laws of another state. In addition, where the law of the sister state would presume abandonment by a putative father and would not require a separate termination, an Idaho court may rely upon the law of the sister state.²²

The following suggested questions can be asked by counsel and/or the court and answered by the parent:

- Are you the [birth] parent of the child named in the consent form?
- When and where was the child born? (May be advisable to wait a reasonable period of time after birth, to establish that the parent was not rushed into courtroom while still under the emotional stress of childbirth.)
- How old are you? What is your educational background?
- Do you understand why you are here today? Can you tell me in your own words why you are here?
- Are you under the influence of any medicine, drug, alcohol, or any other substance that might affect your state of mind?
- Do you have any mental or physical illness that might affect your ability to decide what you want to do?
- Did you see the child after birth? [Or, have you seen the child recently?]
- If not, did someone prevent you from seeing the child, or did you make your own decision not to see the child?
- If so, did you have any concerns about your baby's health? Did seeing the child make you change your mind about consenting to terminate your parental rights to the child?
- When did you decide to sign the consent to termination? Have you had enough time to think about it?
- Has anyone in any way tried to pressure you into signing the consent to terminate?
- Have you talked to a lawyer to get legal advice about this? If not, do you want to?
- Do you have a friend or family member who you talk to when you need to make an important decision? Did you talk to them? Is there someone you want to talk to before you do this?
- Do you understand that you will be giving up all your rights concerning this child? You will not have the right to contact the child, to be notified of anything concerning the child, or to be involved in any decisions concerning the child.
- Do you understand that you will be giving up all your rights to your child forever? Once you sign this document, if you later change your mind, it will be extremely difficult, and maybe impossible, to undo your decision to terminate your parental rights.
- Do you understand that by terminating your rights as a parent, you are opening the door for someone else to adopt the child?
- Do you believe that agreeing to terminate your parental rights is in the child's best interests? Why?
- Do you think that agreeing to terminate your parental rights is in your best interests? Why?

²² §16-2005(4)(3). For more on putative fathers under Idaho law, see Chapter 12 of this manual.

- Are you a member of an Indian tribe, or are you eligible for membership in an Indian tribe? If so, what tribe? If it is possible that the child might be of Indian heritage, is there anyone who might have more information about the child's Indian heritage? How can that person be contacted?
- Have you seen and carefully read the consent form? Would you read it again now? Take as much time as you need to read it carefully.
- Is there anything in the form that you don't understand or with which you do not agree?
- Do you still want to terminate your parental rights?

The court should provide copies of the consent to IDHW and to counsel. The prosecutor can then prepare the Findings of Fact, Conclusions of Law, and Decree for the judge's signature. The Findings of Fact, Conclusions of Law, and Decree should notify the parents that the case is sealed and that they may register with the voluntary adoption registry through the State Registrar of the Bureau of Vital Statistics.²³ The parents and their attorney should be provided with a copy of the Findings of Fact, Conclusions of Law and Decree in all termination actions.

9.5 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

A. *Content of the Petition*

Idaho law sets forth specific requirements for the petition in a TPR proceeding.²⁴ It should refer specifically to the statutory grounds relied upon and should provide a summary of facts in support of each statutory ground.²⁵ If the child is an Indian child, the petition must include allegations that meet the requirements of ICWA.²⁶ The petition must be filed with the court and served on all parties.

Idaho Code section 16-2006 requires the petition to contain the following information:

- The name and place of residence of the petitioner;
- The name, sex, date and place of birth, and residence of the child;
- The basis for the court's jurisdiction;
- The relationship of the petitioner to the child or the fact that no relationship exists;
- The names, addresses, dates of birth of the parents; and, where the child is illegitimate, the names, addresses, and dates of birth of both parents if known to the petitioner;
- Where the child's parent is a minor, the names and addresses of the minor's parents or guardian; and where the child has no parent or guardian, the relatives of the child to and including the second degree of kindred;
- The name and address of the person having legal custody or guardianship of the person or acting in loco parentis to the child or the authorized agency having legal custody or providing care for the child;

²³ §39-259A.

²⁴ §16-2006.

²⁵ The grounds for parental termination are discussed in detail in the next section of this chapter.

²⁶ ICWA imposes additional, different requirements for the termination of parental rights of an Indian child. ICWA is discussed in detail in Chapter 10 of this manual.

- The grounds on which termination of the parental relationship is sought;
- The names and addresses of the persons and authorized agency or officer thereof to whom or to which legal custody or guardianship of the person of the child might be transferred; and
- A list of the assets of the child together with a statement of the value of the assets.

The court may direct the Department to conduct an investigation/“social study” prior to the termination hearing.²⁷ The “social study” shall include the circumstances giving rise to the petition, results of the investigation and the present condition of the child and parents, proposed plans for the child, and other relevant facts. The report shall include recommendations with supporting reasons as to why the parent-child relationship should be terminated. Where the parent is a minor, the report shall contain an explanation of the minor parent’s contact with his/her parents or the reasons that such information is not or cannot be provided.²⁸

9.6 GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

While effective pleading of the petition in a termination case will help adequately guide the proof and findings in the case, the Idaho Court of Appeals has found that the pleading is adequate as long as the language used essentially follows the statutory requirements.²⁹

A. *Abandonment*

The court may terminate parental rights if it finds that such termination is in the best interests of the child and that the parent has abandoned the child.³⁰ The termination of parental rights statute defines “abandoned” as follows:

[T]he parent has willfully failed to maintain a normal parental relationship including, but not limited to, reasonable support or regular personal contact. Failure of the parent to maintain this relationship without just cause for a period of one (1) year shall constitute prima facie evidence of abandonment under this section . . .³¹

In *Doe v. Department of Health & Welfare*,³² the Idaho Supreme Court upheld an order terminating parental rights on the ground of abandonment. The parents had been incarcerated during a substantial period of the time the child was in the legal custody of IDHW and subject to the CPA. The parents sought to rely on an earlier Supreme Court decision, *Doe v. State*,³³ in which the court reversed a trial court order terminating parental rights of an incarcerated parent based on abandonment. In *Doe v. State*, the court found that the parent had not abandoned the child because the parent attempted contact with the child through cards, gifts, attempts to

²⁷ §16-2008(a) and (b).

²⁸ §16-2008(b).

²⁹ In the Matter of Doe, ___ Idaho ___, 239 P 3d 451,455 (Ct. App. 2010).

³⁰ § 16-2005(1)(a).

³¹ § 16-2002(5).

³² 146 Idaho 759, 203 P. 3d 689 (2009). See also *Crum v. Dep’t of Health & Welfare*, 111 Idaho 407, 725 P. 2d 112 (1986).

³³ 137 Idaho 758, 53 P. 3d 341 (2002)

telephone and through consenting to medical treatment for the child. In *Doe v. Department*, the court rejected the comparison of the two cases reasoning that both parents had abandoned the child because they did not make any efforts to contact the child, even by mail or telephone, nor did they participate in the CPA proceeding in any way.

B. Neglected

Idaho law permits the termination of the parent-child relationship where the parent has neglected the child and where termination is in the best interests of the child.³⁴ “Neglected” is defined in two ways in the termination of parental rights statute. The statute cross-references the definition of “neglected” in the CPA.³⁵ The CPA definition provides:

"Neglected" means a child:

- a. Who is without proper parental care and control, or subsistence, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them; however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being, but this subsection shall not prevent the court from acting pursuant to section 16-1627, Idaho Code; or,
- b. Whose parents, guardian or other custodian are unable to discharge their responsibilities to and for the child and, as a result of such inability, the child lacks the parental care necessary for his health, safety or well-being; or,
- c. Who has been placed for care or adoption in violation of law; or,
- d. Who is without proper education because of the failure to comply with section 33-202, Idaho Code.³⁶

In *State v. Doe*,³⁷ the Idaho Supreme Court upheld the magistrate’s order terminating a father’s parental rights based on neglect. There, while the father was incarcerated for significant periods of time during the CPA proceeding, he did not attempt to maintain contact with the children. During times he was released from jail, he also did not attempt to maintain contact. He was in prison because he punched the mother in the stomach while she was pregnant with one of the children. Prior to his incarceration, the evidence established that he was often violent and drunk in the home, while the children were present. On appeal the court reasoned that the trial court’s conclusion that the father had neglected the children was supported by substantial and competent evidence.

³⁴ § 16-2005(1)(b).

³⁵ § 16-2002(3)(a).

³⁶ § 16-1602(25). Section 16-1627, cross-referenced in the above statute, provides a process by which a court may order emergency medical treatment for a child. Section 33-202, cross-referenced in subsection (d) of the above definition, requires parents to provide for the educational instruction of children between the ages of seven and sixteen.

³⁷ ___ Idaho ___, 144 P. 3d 597 (2006).

In addition, the termination of parental rights statute provides that “‘Neglected’ means . . . (b) The parent(s) has failed to comply with the court’s orders in a child protective act case and the reunification of the child with his or her parent(s) has not occurred within the time standards set forth in section 16-1629(9), Idaho Code.”³⁸ This ground for termination of parental rights was considered in *Idaho Department of Health and Welfare v. Doe*.³⁹ There the father had not completed his case plan and substantial and competent evidence indicated that termination was in the child’s best interests.

C. Abused

Idaho law permits the termination of the parent-child relationship where the parent has abused the child and where termination is in the best interests of the child.⁴⁰ The parental termination statute defines abuse through a cross-reference to the CPA.⁴¹ The CPA provides:

- (1) "Abused" means any case in which a child has been the victim of:
 - a. Conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of an accidental occurrence; or
 - b. Sexual conduct, including rape, molestation, incest, prostitution, obscene or pornographic photographing, filming or depiction for commercial purposes, or other similar forms of sexual exploitation harming or threatening the child's health or welfare or mental injury to the child.⁴²

D. The Presumptive Parent is Not the Biological Parent of the Child

The Idaho termination of parental rights statute provides that parental rights may be terminated where the court finds that the “presumptive parent” is not the biological parent of the child and finds that termination would be in the child’s best interests.⁴³ The termination of parental rights statute defines “presumptive father” as a “man who is or was married to the birth mother and the child is born during the marriage or within three hundred days after the marriage is terminated.”⁴⁴

³⁸ § 16-2002(3)(b). Section 16-1629(9) is discussed in this chapter and imposes a responsibility on IDHW to seek termination of parental rights if a child is in out of home care for 15 out of 22 months.

³⁹ ___ Idaho ___, 234 P. 3d 725 (2010). *See also* In the Matter of Doe, ___ Idaho ___, 237 P. 3d 661 (Ct. App. 2010)(reasoning that although mother and father had made some progress on case plan, failure to complete the plan over a two year period supported the termination of parental rights).

⁴⁰ § 16-2005(1)(b).

⁴¹ § 16-2002(4) cross-referencing § 16-1602(1).

⁴² § 16-1602(1). *See* Castro v. Idaho Dep’t of Health & Welfare, 102 Idaho 218, 628 P. 2d 1052 (1981)(failure to intervene in other parent’s long-term physical abuse of a child constitutes grounds for termination of parental right on the grounds of abuse).

⁴³ § 16-2005(1)(c).

⁴⁴ § 16-2002(12).

This ground for termination of parental rights has not been directly interpreted by the Idaho Courts. Recently, however, the court declined to consider a man who did not fit the statutory definition of “presumptive parent”, or any other definition of parent, a proper party to a parental termination action.⁴⁵

E. Parent is Unable to Discharge Parental Responsibilities

Parental rights may be terminated where “the parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals and well-being of the child.”⁴⁶ Pursuant to this provision, it also must be shown that termination of parental rights is in the child’s best interests.

Parental rights might be terminated under this subsection for many different reasons. One in particular, specifically addressed in the statute, regards parents with disabilities.⁴⁷ First, the parental termination statute establishes the over-arching policy that the statute is not to be “construed to allow discrimination in favor of, or against, on the basis of disability.”⁴⁸ Second, the parental termination statute provides that a parent with a disability “has the right to provide evidence to the court regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child.”⁴⁹ While these provisions regarding parents with disabilities apply in all termination actions, they are particularly relevant when the ground for termination is the parent’s capacity to discharge parental responsibilities, as opposed to acts or omissions of the parents.

In *Department of Health & Welfare v. Doe*,⁵⁰ the court terminated parental rights based on this provision of the statute. It reasoned that the parents’ emotional, psychological and behavioral impairments, coupled with their inability to participate in and implement aspects of the case plan over an eighteen month period, provided clear and convincing evidence that they were unable to discharge parental responsibilities and would be unable to do so for a prolonged indeterminate period of time. In addition, the court reasoned that supportive services would not enable the parents to discharge their parental responsibilities.

⁴⁵ *In the Matter of Doe*, 2010 Idaho App LEXIS 108 (Ct. App., Dec. 20, 2010).

⁴⁶ § 16-2005(1)(d).

⁴⁷ Disability is defined in the statute as follows:

"Disability" means, with respect to an individual, any mental or physical impairment which substantially limits one (1) or more major life activities of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning, or working, or a record of such an impairment, or being regarded as having such an impairment. Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual preference or orientation is not considered an impairment or disability. Whether an impairment substantially limits a major life activity shall be determined without consideration of the effect of corrective or mitigating measures used to reduce the effects of the impairment.

§ 16-2002(17).

⁴⁸ § 16-2001(2).

⁴⁹ § 16-2005(6).

⁵⁰ ___ Idaho ___, 233 P. 3d 138 (2010).

F. Parent is Incarcerated

Idaho law permits termination of parental rights where a “parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child’s minority” and where such termination is in the child’s best interests.⁵¹ In *Doe v. Doe*⁵² the Idaho Supreme Court upheld a termination under this provision. There, the children had little relationship with their incarcerated father, and he had been sentenced to 30 years in prison with 25 years determinate, and thus was likely to remain incarcerated during the remainder of his children's minorities.

G. Child Conceived as a Result of Rape or Other Sexual Misconduct

Idaho law permits the termination of parental rights where a “parent has caused the child to be conceived as a result of rape, incest, lewd conduct with a minor child under the age of sixteen (16) years, or sexual abuse of a child under the age of (16) years . . .”⁵³ When this ground is established, the court “may rebuttably presume” that termination of parental rights is in the best interests of the child.

H. Torture, Chronic Abuse, Murder, et. al.

Idaho law provides that parental rights may be terminated where “the parent has subjected the child to torture, chronic abuse⁵⁴ or sexual abuse, has committed murder or intentionally killed the other parent of the child, has committed murder or voluntary manslaughter of another child or has aided, abetted, conspired or solicited to commit such murder or voluntary manslaughter, and/or has committed battery which resulted in serious bodily injury to a child.”⁵⁵ Under these circumstances, a court “may rebuttably presume” that such termination of parental rights is in the child’s best interests.

I. Abandoned Infant

If the court finds that a child is an “abandoned infant”, parental rights may be terminated, and the court “may rebuttably presume” that termination is in the child’s best interests.⁵⁶ This ground is not available in cases where one parent seeks the termination of the other parent’s rights.

J. Best Interests of Parent and Child

The final ground for involuntary termination in Idaho law is available where the court finds that termination of parental rights is in the best interests of both the parent and the child.⁵⁷ In *State*

⁵¹ § 16-2005(1)(e).

⁵² 148 Idaho 243, 220 P.3d 1062 (2009).

⁵³ § 16-2005(2) (a), cross-referencing sections 18-6101, 18-1508, 18-1506 and 18-6602.

⁵⁴ In *Doe v. State*, 144 Id. 420, 421, 163 P 3rd 209, 210 (2007), a CPA proceeding relying upon the same definition, the court found that long-term deprivation of food so that the child was serious malnourished and grossly underweight constituted chronic abuse.

⁵⁵ § 16-2005(2)(b).

⁵⁶ § 2005(2)(c).

⁵⁷ § 16-2005(3).

*v. Doe*⁵⁸, the court relied on this provision to terminate the parental rights of a father who had abused one child but not the second child. The court reasoned that termination was in the best interests of the father because he was an “untreated child molester in denial” and would likely commit further abuse if reunified with his child. It reasoned that termination was in the best interests of the child, despite her attachment to her father and wish that her relationship with him not be terminated, because it would ensure the safety of the child and enable the child to be placed in a safe and supportive family.

9.7 NOTICE AND HEARING

Once a petition has been filed, the court must set a time and place for the hearing, and the petitioner must notify the appropriate individuals of the hearing (see below)⁵⁹. If all reasonable efforts have been made to notify the parents, and these efforts have been unsuccessful, the petitioner should move the court for service by registered or certified mail and/or by publication.⁶⁰ Reasonable efforts should include a search of all IDHW’s own available databases and attempts to contact family of the parents. The hearing must take place no earlier than ten days after service of notice, or where service is by registered or certified mail and/or by publication, the hearing must take place no earlier than ten days after the date of last publication.⁶¹

The question of who is entitled to notice of a parental termination action is complex. Idaho Code section 16-2007 establishes the notice requirements for parental termination actions. In addition to specifying notice to certain specified persons and entities, section 16-2007 requires that notice be provided to any person who would be entitled to notice of an adoption proceeding.⁶² The adoption notice provision, in turn, requires that notice of an adoption proceeding be provided to certain specified individuals, but also to any person or agency whose consent to an adoption proceeding would be required and to “[a]ny person who has registered notice of the commencement of paternity proceedings pursuant to section 16-1513 . . .”.⁶³ The upshot of this web of notice requirements is that any person or entity named in the parental termination notice provision, the adoption notice provision, or the adoption consent provision is entitled to notice of a parental termination action.⁶⁴

When the overlapping notice provisions of the adoption and parental termination statutes are considered together, notice must be provided to:⁶⁵

- The child, if he or she is over age 12;⁶⁶

⁵⁸ 143 Idaho 383, 146 P.3d 649 (2006).

⁵⁹ § 16-2007(1).

⁶⁰ § 16-2007(2).

⁶¹ *Id.*

⁶² *See* § 16-2007(1), referring to § 16-1505.

⁶³ *See* 16-1505 referring to § 16-1604.

⁶⁴ §§16-2007, 16-1505, 16-1504, 16-1513.

⁶⁵ In addition to the individuals discussed below, notice also must be provided to the adoptee’s spouse, section 16-1504(1)(h), and to the guardian or conservator of an incapacitated adult, section 16-1504(1)(g). These provisions are unlikely to apply in a CPA-connected adoption.

⁶⁶ § 16-1504(1)(a)

- Both parents or the surviving parent of an adoptee who was conceived or born within a marriage;⁶⁷
- The mother of the child if the parents are unmarried;⁶⁸
- The father or putative father of the child⁶⁹ who has not signed a consent to termination⁷⁰ or a Waiver of Notice and Appearance⁷¹ whose rights have not been previously terminated, if he:
 - is currently married to the mother or was married to the mother at the time she executed a Consent to Termination of Parental Rights or otherwise relinquished the child;⁷²
 - has been adjudicated the father of the child prior to the execution of a Consent to Termination by the mother;⁷³
 - has registered notice of the commencement of a paternity action pursuant to the Idaho Putative Father Registry Statute;⁷⁴
 - is recorded on the birth certificate as the child's father with the knowledge and consent of the mother;⁷⁵
 - is openly living in the same household with the child and holding himself out as the child's father at the time the mother executes a consent or relinquishment;⁷⁶
 - has filed a voluntary acknowledgment of paternity;⁷⁷
 - has developed a substantial relationship with the child who is more than 6 months old and has taken responsibility for the child's future and financial support;⁷⁸ or
 - has developed a substantial relationship with a child under the age of 6 months and has commenced paternity proceedings and complied with Idaho Code section 16-1504(2)(b).⁷⁹
- The legally-appointed guardian of the person or custodian of the child;⁸⁰
- The guardian *ad litem* for the child and/or for the parent;⁸¹
- IDHW, if it is not the petitioner.⁸²

Notice to the parents or guardians must be by personal service. If personal service is unsuccessful, the court should order service by registered or certified mail to the last known address of the person and/or by publication once a week for three consecutive weeks in a

⁶⁷ § 16-1504(1)(b).

⁶⁸ § 16-1504(1)(c); 16-2007(1) (separately requiring notice to any "parent").

⁶⁹ The question of who is entitled to be treated as the father in a CPA proceeding and in an action to terminate parental rights is subject to ambiguity under Idaho law and has constitutional implications. The current state of Idaho and federal law in this area is discussed in Chapter 12 of this manual.

⁷⁰ See § 16-2005(4).

⁷¹ See § 16-1007(3).

⁷² §§ 16-1505(1)(c) & (f); § 16-1504(1)(b).

⁷³ § 16-1504(1)(d)

⁷⁴ See §§ 16-2007(3) 16-1505(1)(b) and 16-1513.

⁷⁵ § 16-1505(1)(d).

⁷⁶ § 16-1505(1)(e).

⁷⁷ See § 7-1106.

⁷⁸ § 16-1504(2)(a).

⁷⁹ This basis for notice, in particular, is discussed in more detail in Chapter 12 of this manual.

⁸⁰ § 16-1504(f).

⁸¹ § 16-2007(1).

⁸² § 16-2007(1).

newspaper of general circulation in the area of the court's jurisdiction. The hearing should take place no sooner than 10 days after service of the notice or 10 days after the last date of publication.⁸³

In cases where a parent has property executed and the court has accepted a consent to termination of parental rights, notice has been waived by that parent.⁸⁴

9.8 POST-PETITION DUTIES

A. *Appointment of Counsel*

Idaho law provides for appointment of counsel for indigent parents or guardians in termination proceedings.⁸⁵

Idaho law confers exclusive jurisdiction over the parental termination action upon the court that heard the connected Child Protective Act case⁸⁶. As noted earlier, the TPR petition must be filed in the child protection proceeding. Appointments of attorneys and guardians *ad litem* in the CPA case shall remain in effect for the termination proceeding, unless otherwise ordered by the court.⁸⁷ If for some reason these appointments are not continued, the court must expeditiously appoint new counsel for any indigent parties⁸⁸ and/or a new guardian *ad litem* for the child.⁸⁹ Because the court may have reviewed these issues at the most recent permanency hearing, another hearing may not always be necessary to make these determinations. Immediately upon the filing of the motion and petition, the court should review the need for appointment of counsel and/or a guardian *ad litem* so that each can be present at the first pretrial hearing.

B. *Pretrial*

As a matter of best practice, the court should immediately set a pretrial date within thirty (30) days of the filing of the petition to terminate parental rights. It is also best practice to schedule the pretrial and all of the subsequent hearings before the same judge who has handled the CPA case.⁹⁰ At the pretrial, the court should establish all of the following:

- Whether the parents will contest termination of their parental rights.
- The date for discovery to be completed in sufficient time to allow all parties to review the material prior to possible mediation or to a settlement conference.
- The date for pretrial or settlement conference. This date should be far enough in advance of the trial date so that if significant progress is made but another meeting is

⁸³ § 16-2007(2).

⁸⁴ § 16-2005(4). The process for consent to termination of parental rights is discussed earlier in this chapter.

⁸⁵ §16-2009. This provision of the Idaho Code is very ambiguous. The first sentence of the paragraph provides for notice to parents and guardians *ad litem*, while the second sentence of the paragraph provides for the appointment of counsel for parents and guardians. The best practice is to appoint counsel for the parents, any legal guardian, and for the guardian *ad litem*.

⁸⁶ §16-1603; §16-2003.

⁸⁷ IDAHO JUV. R. 48(b).

⁸⁸ § 16-2009.

⁸⁹ § 16-1614(1).

⁹⁰ ABA Judicial Standards, *supra* note 13.

required to reach full agreement, there is adequate time for a second meeting. The recommended time frame for this meeting is two to four weeks prior to the trial date. Counsel must notify the court immediately following the meeting as to whether agreement was reached or whether the trial will proceed as scheduled.

- A final pretrial date, if necessary.

Best practice is to schedule trial dates with sufficient amount of time to complete the termination process. Bifurcating termination trials is strongly discouraged because of the resulting delay in permanency for the child(ren). Best practice is to schedule trial dates within 90 days of the filing of the petition.

Finally, if a petition for adoption is not filed in conjunction with the parental termination action, the court may order IDHW Bureau of Child Support Enforcement to submit a written financial analysis report within 30 days detailing the un-reimbursed public assistance monies paid by the State of Idaho on behalf of the child. The report, if ordered, should contain recommendations for repayment and provisions for the future support of the child.⁹¹

9.9 CONDUCTING THE HEARING

At this point in the court process, one of two circumstances will exist – either the parents will have voluntarily relinquished their parental rights or the case will move to trial. In each instance, the court should address the question of whether parental rights should be terminated, and whether such termination is in the child’s best interests.

When pretrial negotiations result in an agreement that the parents will voluntarily relinquish parental rights, counsel should notify the court immediately. The court can then use the beginning portion of the dates previously set (either for the final pretrial or the trial for the final hearing on the petition to terminate parental rights) to take the parents’ voluntary consent. Remaining trial dates and time can be freed for other court business.

Idaho law provides that the termination of parental rights case should be a bench trial, that it must be closed to the general public, and that it should be on the record. Furthermore, the court’s findings must be based on clear and convincing evidence.⁹² However, Idaho law also provides that “relevant and material information of any sort,” including reports, studies, and examinations, may be relied on to the extent of its probative value.⁹³

The following list of persons should be present for trial, although they may be excluded when not testifying:

- The judge;
- The child, in appropriate circumstances, if over eight years of age;⁹⁴

⁹¹ § 16-2008.

⁹² § 16-2009.

⁹³ § 16-2009.

⁹⁴ IDAHO JUV. R. 40(b).

- The parent(s);
- Attorney(s) for the parent(s);
- If an Indian child, the child's tribe, the attorney for the child's tribe, if any, and the Indian custodian;
- Assigned IDHW caseworker(s);
- Prosecuting Attorney or Deputy Attorney General;⁹⁵
- Guardian *ad litem* for the child and attorney for the Guardian;
- Attorney for the child, if applicable; and when appropriate,
- Foster parent(s), pre-adoptive parent(s), or a relative providing care for a child.⁹⁶

9.10 FINDINGS AND CONCLUSIONS

Because of the complexity of findings and conclusions in a termination of parental rights case, it is normally not possible to write and distribute the findings to parties in the courtroom at the end of the hearing.

At the conclusion of the termination case, the court must issue both “Findings of Fact and Conclusions of Law” and a Decree. Best practice is for the court to issue the Findings of Fact and Judgment and Decree as soon as practicable after the close of the trial. The issuance of a separate decree is important in order to trigger appellate jurisdiction.⁹⁷ The Findings of Fact and Conclusions of Law in termination of parental rights cases should include:

- Persons present and how absent parties were provided with appropriate notice, paying particular attention to any biological parent, tribal representative, or Indian custodian not present;
- If there was a voluntary relinquishment of parental rights, efforts made by the court to ensure that the relinquishment was voluntary and informed;⁹⁸ and
- If the case went to trial, whether termination of parental rights is granted. If so, under what statutory grounds, best interests findings, and the specific reasons why the statute applies in this case. For Indian children, findings must include the special requirements of ICWA.

After the presiding judge has signed them, the counsel of prepared the Findings of Fact and Judgment and Decree should, as a matter of best practice, provide a copy of both to the parents and their attorney(s).

⁹⁵ § 16-2009 states that: “[t]he Prosecuting Attorney shall represent the Department at all stages of the hearing”. Appearances by the Deputy Attorney General in a termination proceeding are with the consent of the Prosecutor’s office.

⁹⁶ IDAHO JUV. R. 40.

⁹⁷ IDAHO APP. R. 12.1. *See* Dep’t. of Health & Welfare v. Doe, 147 Idaho 314, 208 P. 3d 296 (2009)(Magistrate court lacked jurisdiction to direct a permissive appeal to the supreme court under Rule 12.1 *after* the District Court has exercised appellate jurisdiction).

⁹⁸ For Indian children, this must include the special requirements of ICWA described in Chapter 11 of this manual.

9.11 APPEALS

Appeals of Decrees of Termination of Parental Rights cases are governed by Idaho Appellate Rules 11.1, 12.1 and 12.2.⁹⁹ A Notice of Appeal from any decree granting or denying a Petition of Termination of Parental Rights must be made by filing an appeal with the Clerk of the District Court within fourteen (14) days from the issuance of the order. Such filing is jurisdictional and can result in dismissal if times periods are not met. The clerk's record will be prepared within twenty-one (21) days of the filing of the notice of appeal. The transcript is also required to be prepared within twenty-one (21) days of the filing of the appeal. The appellant's brief is due within twenty-one (21) days of the clerk's record being filed, and the respondent's brief is due within twenty-one (21) days of service of the appellant's brief. If there is no cross-respondents' brief, the reply brief from the appellant is then due seven (7) days from service of the respondent's brief. No extensions will be granted except upon a verified showing of "the most unusual and compelling circumstances."¹⁰⁰ Oral argument, if requested, has to be held within 120 days of the filing of the appeal.¹⁰¹ The filing of an appeal does not stay the termination decree without further action of the appellant, and permanent planning for the child may continue.¹⁰²

On appeal, the standard of review applied to the trial court's factual findings on the grounds for termination is whether the findings are supported by substantial and competent evidence.¹⁰³

⁹⁹ IDAHO APP. R. 11.1 (providing for appeal as a matter of right to the Supreme Court in the expedited manner provided in Rule 12.2) and 12.1 (providing for permissive appeals to the Supreme Court when such an appeal serves the best interest of a child) and 12.2 (establishing procedures for expediting appeals under either Rule 11.1 or 12.1).

¹⁰⁰ IDAHO APP. R. 12.2.e.

¹⁰¹ IDAHO APP. R. 12.2.f.

¹⁰² § 16-2014.

¹⁰³ See *e.g.*: Dept. of Health & Welfare v. Doe, ___ Idaho ___, 244 P 3d 232, 234 (2010).