CHAPTER 10
VOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP

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

Voluntary termination of the parent-child relationship is a judicial procedure which severs the legal, social, and financial relationship and responsibility between child and parent. Voluntary termination legally frees a child to be adopted, but the termination procedure under the juvenile code does not include the adoption, which must be granted by a court having probate jurisdiction. The procedure for voluntary termination of the parent-child relationship is initiated when a child placing agency or DCS accepts the parent's consent to termination of the parent-child relationship, files the necessary petition with the court, and the court holds a hearing, grants the petition, and enters a voluntary termination order.

II. CONSENT TO TERMINATION OF THE PARENT-CHILD RELATIONSHIP

Voluntary termination of the parent-child relationship occurs when a parent consents to voluntarily terminate his or her 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 parents who want to avoid further financial and social involvement with the child. IC 31-35-1-4 indicates that both parents of the child may consent to the termination of parental rights, including an alleged or adjudicated father if the child was born out of wedlock. In some situations, the court may accept the voluntary termination of only one parent. There are special requirements when there is "reason to know" the child is an Indian child, in which case the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq. and its rules, which became effective on December 12, 2016 apply. <u>See</u> this Chapter at II.F.

II. A. <u>Advisement of Rights</u>

IC 31-35-1-12 provides 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, visitation, 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 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 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 section 5(b) of this chapter, 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 this chapter terminating the parent-child relationship.

II. B. Form For Consent to Termination

The written form to consent to termination of the parent child relationship which DCS may use is referred to as a "Voluntary Relinquishment of Parental Rights."

Practice Note: Consenting to the child's adoption is not legally equivalent to voluntarily terminating the parent-child relationship. If the child's adoption is not completed, it is the author's view that the birth parents who consented to the child's adoption still retain parental rights and responsibilities. Note that IC 31-19-15-1(a) states that the parent-child relationship is terminated *after* the child's adoption unless the relationship was terminated by an earlier court action, operation of law, or otherwise (emphasis added). IC 31-19-15-1(b) states that the obligation to support the child continues until the entry of the adoption decree, and that the entry of the decree does not extinguish the obligation to pay past due child support owed for the child before the adoption decree was entered.

II. C. Procedure For Accepting Consent to Voluntary Termination and Right to Counsel

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 who accepts the consent be careful not to say or do anything to coerce the parent to consent. As noted in this Chapter at II.A., 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. When a parent is not represented by an attorney, it is recommended that an attorney be appointed by the court to represent the parent. DCS or a licensed child placing agency could request the appointment of an attorney for a parent in a CHINS case under IC 31-32-4-3(a). IC 31-32-4-3(a) states the court shall appoint counsel for a parent in proceedings to terminate the parent-child relationship and does not distinguish between voluntary and involuntary proceedings.

If the parent is represented by an attorney, it is essential that the parent's attorney be provided a copy of the relinquishment and consent forms for review, and it is recommended as best practice that the parent's attorney 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 an attorney in the CHINS proceeding and that Mother was of limited

intelligence and easily influenced, the case manager 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 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 Hicks' counsel was notified, prepared and provided forms to Hicks whereby Hicks purported to voluntarily relinquish her rights to her children.

Id. at 1286.

IC 31-35-1-5(a) states that the parent must be given notice of the voluntary termination hearing pursuant to IC 31-32-9. IC 31-35-1-5(b) provides that a parent who has made a valid consent to the termination of a parent-child relationship may waive this otherwise required notice 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.

II. D. Consent of Minor or Incompetent Parent

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

II. E. Consent of Putative Father or Expectant Mother

IC 31-35-1-4-4.5 states that a putative father's consent to termination of the parent-child relationship is irrevocably implied if he has received actual notice pursuant to IC 31-19-3 of the mother's intent to proceed with the child's adoption and fails to file a paternity action pursuant to IC 31-14 or in a court located in another state that is competent to obtain jurisdiction not more than thirty days after receiving actual notice regardless of whether the child is born before or after the expiration of the thirty day period or a petition for adoption or for termination of the parent-child relationship is filed. Consent is also irrevocably implied if a putative father files a paternity action and fails to establish paternity within a reasonable time period determined by IC 31-14-21-9 through IC 31-14-21-9.2 or the laws of another state with competent jurisdiction over the paternity action. See Chapter 13 at VII.A. on implied consent and pre-birth notice of adoption.

IC 31-35-1-6 provides:

(a) Except as provided in subsection (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 their consent in writing before a person authorized by law to take acknowledgments; and
(2) the parents were:
(A) advised in accordance with section 12 of this chapter; and
(B) advised that if they choose to appear in open court, the only issue before the court is whether their consent was voluntary.
(b) If:
(1) the court finds the conditions under subsection (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.
(c) The consent of a parent to the termination of the parent-child relationship under this chapter is not required if:
(1) consent to the termination of the parent-child relationship is implied under section 4.5 of this chapter, if the parent is the putative father;
(2) the parent's consent to the adoption of the child would not be required under:
(A) IC 31-19-9-8;
(B) IC 31-19-9-9; or
(C) IC 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 subdivision (3) or consents to the termination of the parent-child relationship under subdivision (4) may not challenge or contest the child's adoption or termination of the parent-child relationship.
(d) A child's mother may not consent to the termination of the parent-child relationship before the birth of the child.

The advisements required by IC 31-35-1-12 are set forth in this Chapter at II.A.

See Chapter 13 at IV. on parental consent in adoption.

II. F. Special Requirements When Child May Be an Indian Child

When beginning a voluntary termination of the parent-child relationship proceeding, adoption agencies, attorneys, and courts should ask parents and other participants in the case whether there is "reason to know" that the child is an Indian child. If the answer is affirmative, the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., may apply. "Indian child" is a child who is either: a member of a (federally recognized) Indian tribe; or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4). See Chapter 6 at I.E. for information on procedures outlined under the Bureau of Indian Affairs (BIA) Rules, issued on December 12, 2016, when there is "reason to know" that the child is an Indian child. The procedures require identifying and notifying the tribe or tribes to determine whether the child is a member of the tribe or the child is eligible to be a member of the tribe. If the child is an Indian child, the tribe may request the transfer of jurisdiction over the child to the tribal court. If the tribe does not decide to take jurisdiction over the Indian child, the tribe shall have the right to intervene in the state court proceeding. 25 U.S.C. § 1911(c). If the child is an Indian child and the tribal court declines jurisdiction, the state court must use the ICWA standards in making its determination about termination of the parent-child relationship. See **Matter of Adoption of T.R.M.**, 525 N.E.2d 298 (Ind. 1983), in which the Porter County Indiana Circuit Court applied the ICWA standards in a contested adoption case, and the Indiana Supreme Court affirmed the Circuit Court's order granting an adoption petition for the Indian child. In a termination case, 25 U.S.C. § 1912(b) requires the appointment of counsel for an Indian parent if the court determines indigency.

25 U.S.C. § 1915(a) provides that in any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C. § 1915(c) provides that tribes may establish different placement preferences, and the court or agency effecting the adoption shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c) also provides that when a consenting parent evidences a desire for anonymity, the court or agency effecting the placement shall give weight to the Indian parent's desire in applying the placement preferences. The response to the Frequently Asked Questions on the BIA website clarifies that the ICWA Rules: (1) do not require agencies to notify an Indian parent's extended family of a pending adoption; and (2) an Indian parent is not prevented from choosing adoptive parents as long as the Indian parent attests that he or she has reviewed the placement options that comply with the ICWA's order of preference.

25 U.S.C. § 1913(a) provides: (1) an Indian parent's consent to voluntary termination shall not be valid unless executed in writing and recorded before a judge; (2) the consent shall be accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the Indian parent; (3) the court shall also certify that the Indian parent fully understood the explanation in English or that it was interpreted in a language which the parent understood; (4) any consent given prior to or within ten days of the birth of the Indian child shall not be valid; (5) in any voluntary proceeding for termination of parental rights, or adoptive placement of, an Indian child, the consent of the Indian parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, and the child shall be returned to the Indian parent; (6) after the entry of a final decree of adoption of an Indian child in any State court, the Indian parent may withdraw consent on the grounds of fraud or duress and may petition the court to vacate the decree; (7) the court shall vacate the decree and return the child to the parent upon finding that the consent was obtained through fraud or duress; (8) no adoption which has been effective for at least two years may be invalidated under this section unless otherwise permitted under State law.

See www.bia.gov for detailed information and Chapter 3 at II.G.5. for information on 25 U.S.C.§ 1911, which describes the jurisdictional requirements when a child meets the definition of an "Indian child."

III. COURT PROCEEDINGS

III. A. Jurisdiction and Standing

IC 31-35-1-3 states that the juvenile court and the probate court have concurrent original jurisdiction in all cases involving termination of the parent-child relationship. IC 31-35-1-4 provides that a local office [of DCS] or a licensed child placing agency may 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). 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 under IC 31-35-1-12.

Practice Note: The word "may" denotes that it is within the discretion of DCS or the licensed child placing agency to file a petition for voluntary termination of the parent-child relationship. The statute does not mandate DCS or the licensed child placing agency to file a petition for voluntary termination solely on the parent's request that the petition be filed because the other statutory elements for filing the petition must also be met. The other elements that must be proven are that termination is in the child's best interest and that the petitioner has developed a satisfactory plan for the care and treatment of the child. IC 31-35-1-4(b)(2)(C) and (D). If the petitioner is a licensed child placing agency, IC 31-35-1-4(E) provides that the termination must be in furtherance of an adoption or other approved permanency plan.

In **In Re M.N.**, 27 N.E.3d 1116 (Ind. Ct. App. 2015), the Court reversed the trial court's order dismissing Heartland Adoption Agency's petition to terminate Father's parental rights to his child, who suffered from a disability. Id. at 1122. The child received SSI payments as a result of her disability, which were reduced due to Father's intermittent payment of his child support obligation, although Father had made just over one weekly payment for the past year at the time of the hearing. Mother's attorneys were the owners of Heartland Adoption Agency and, upon Mother's request, petitioned to terminate Father's parental rights to the child. Father then filed his voluntary relinquishment of his parent-child relationship. The trial court held a hearing at which Mother, Father, and the guardian ad litem testified that termination of Father's parental rights was in the child's best interests. The trial court dismissed the petition, concluding that, to file a voluntary termination petition, the licensed child placing agency must be acting within the scope of its statutorily enabling duties, and that Heartland Adoption Agency was not providing child welfare services to the child or the family. The trial court also noted that the attorneys who own Heartland were also Mother's attorneys, and that the interrelationship created a serious potential for a conflict of interest.

The Court held that Heartland Adoption Agency's petition to terminate Father's parental rights met the statutory requirements of IC 31-35-1-4, and that the trial court erred when it concluded that Heartland Adoption Agency acted outside the scope of its statutory authorization as a licensed child placing agency when it filed the petition to terminate Father's parental rights. Id. at 1121. The Court looked to IC 31-35-1-4, which states that "if requested by the parents… (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." Id. 1119. The Court also noted that Heartland Adoption Agency is a "child placing agency" as defined at IC 31-9-2-17.5. Id. at 1119-20. The Court said that this case presented a very unique set of circumstances in that Father occasionally paid child support payments, which negatively affected the amount of the child's SSI payment. Id. at 1120. The Court noted that Mother, as the child's only caregiver, would rather forego any child support from Father in order to facilitate and protect the child's SSI payment. Id. The Court noted that IC 31-26-3.5-2 states that one of the several purposes of a child welfare program is "[p]roviding services targeted to the assistance of children who are developmentally or physically disabled and their families, for the purposes of prevention of potential abuse, neglect, or abandonment of those children, and enabling the children to receive adequate family support and preparation to become self-supporting to the extent feasible[.]" Id. at 1121 n.4. The Court also held that the trial court erred when it dismissed Heartland Adoption Agency's petition to terminate Father's parental rights because of a significant risk of a conflict of interest. Id. at 1121. The Court looked to Rule 1.7 of the Indiana Rules of Professional Conduct, which provides that: "(1) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest" and "(2) a concurrent conflict of interest exists where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client[.]" Id. The Court said that Mother hired her attorneys and the adoption agency they owned to facilitate termination of Father's parental rights, and that Mother, Heartland Adoption Agency, the guardian ad litem, and Father all agreed that termination of Father's parental rights was in the child's best interests. Id. The Court noted that the trial court's general concerns were well-taken, but determined that no conflict existed under the facts of this case. Id.

III. B. Petition and Required Elements

IC 31-35-1-4 provides that DCS 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, or are not required to consent as provided in IC 31-35-1-6(c);

- Termination is in the child's best interest;

- The petitioner has developed a satisfactory plan of care and treatment for the child; and if the petitioner is a licensed child placing agency, that termination is in furtherance of an adoption or other approved permanency plan.

At the time the petition is filed, the petitioner shall also file a: (1) copy of the order approving the permanency plan under IC 31-34-21-7 for the child; or (2) permanency plan for the child as described by IC 31-34-21-7.5 [reunification with parent, guardian, or custodian or placement with noncustodial parent; placement for adoption; placement with a relative custodian; appointment of a legal guardian; or another planned, permanent living arrangement]. See Chapter 9 at II.D. and III. for further information on permanency plans.

Practice Note: Practitioners should note that, unlike involuntary proceedings, the child need not be adjudicated a CHINS or delinquent to initiate a voluntary termination proceeding. The licensed

child placement agency could prepare and file a permanency plan selected from one or more of the permanency options listed at IC 31-34-21-7.5.

III. C. Hearing

The issues for 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 make findings that the consent was given before a person authorized by law to take acknowledgments (such as a notary public); and the parent was notified of his rights and of the consequences of the termination pursuant to IC 31-35-1-12; and the parent was advised that if he or she chose to appear in court, the only issue before the court is whether the consent is voluntary. IC 31-35-1-7(a) requires that, if the parent does not appear in court, 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 court ordered investigation must be entered on the record under oath pursuant to 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). IC 31-35-1-8 states that, before consent can be given in open court, the court must advise the parents of their constitutional and other legal rights, and the consequences of their actions under IC 31-35-1-12. In addition to the court's determination that a parent's consent is voluntary, evidence must also be presented on the statutory elements that: (1) termination of the parent-child relationship is in the child's best interests and (2) the petitioner has developed a satisfactory plan for the child. IC 31-35-1-10(a) states that, if the court determines that the allegations in the voluntary termination petition are true and that the other statutory requirements have been met, the Court shall terminate the parent-child relationship. 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).

In **Neal v. DeKalb Cty. Div. of Fam. & Children**, 796 N.E.2d 280 (Ind. 2003), the Indiana Supreme Court reversed the trial court's judgment which ordered that Mother's parental rights were terminated with respect to her two children who were adjudicated CHINS and placed in foster care. Id. at 285. Mother signed voluntary relinquishment forms for both children while participating in a case review meeting with the case manager and the children's guardian ad litem at the DFC office. Later that day, Mother decided that she did not want to relinquish her parental rights voluntarily to either child. After apparently being so advised, DFC filed a petition for the involuntary termination of Mother's parental rights. Mother appeared at court for a Voluntariness Hearing, at which she "would confirm the voluntariness of her signing Voluntary Relinquishment of Parental Rights forms." After acknowledging that she had signed the forms, Mother requested a court appointed lawyer to give her advice. The court appointed a lawyer to represent Mother, and continued the hearing. Thereafter, the trial court conducted a hearing to determine whether Mother's prior written consent was voluntarily given. Mother, who was represented by counsel, testified that although she signed the consent forms, she had changed her mind and did not want to terminate her parental rights. Mother testified she felt pressured to sign the forms. The trial court determined that Mother's attempt to retract or revoke her prior consent to termination of her parental rights: (1) was not a valid retraction or valid revocation; and (2) did not affect the validity of her prior voluntary relinquishment of her parental rights. The trial court ordered that Mother's parental rights with respect to the children were terminated. Mother appealed.

The Court held that "[A] parent's written consent to the voluntary termination of her parental rights is invalid unless she appears in open court to acknowledge her consent to the termination, or unless all three of the exceptions set out in [IC] 31-35-1-6(a) are satisfied." Id. at 285. The Court held that the statutes on the scope of the hearing on the voluntary termination of parental rights, IC 31-35-1-6(a) and IC 31-35-1-12, could not be harmonized but were in irreconcilable conflict. Id. at 283. The Court found that, "[i]n essence, under the open court provision of Section 6, voluntariness is not an issue while at the same time voluntariness is the only relevant issue under Section 12." Id. at 284. Using "familiar tenets of statutory construction," the Court concluded "that the legislature intended that Section 6 should prevail over Section 12." Id. at 284-85. The Court also noted that "this view is consistent also with the principle that the parents' interest in the care, custody, and control of their children is 'perhaps the oldest of the fundamental liberty interests' recognized by the United States Supreme Court." Id. at 285. The Court acknowledged that "the State's interests are powerful," but, when faced with two statutes that are in irreconcilable conflict, "absent a clear legislative directive that the State's interests outweigh the interests of parents, we must conclude that the Legislature intended that Section 6 prevail over Section 12." Id. The Court concluded that, because Mother appeared in open court but did not consent to termination, the trial court erred in entering an order for the voluntary termination of her parental rights. Id.

Practice Note: Legislation enacted after the Supreme Court Neal decision reduced the three exceptions set out at IC 31-35-1-6(a) to two exceptions. The two exceptions are: (1) the parents gave their consent in writing before a person authorized by law to take acknowledgements; and (2) the parents were advised in accordance with IC 31-35-1-12; and advised that if they choose to appear in open court, the only issue before the court is whether their consent was voluntary.

III. 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), Mother, who was represented by counsel, signed and offered her voluntary termination to the court 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, she 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 Mother's argument, the Court found that her act of relinquishing her parental rights in court converted the involuntary termination proceeding into a voluntary termination proceeding under IC 31-35-1. Id. at 208. 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.

III. E. Withdrawal of Consent

In **In Re K.L.**, 922 N.E.2d 102 (Ind. Ct. App. 2010), the Indiana Supreme Court reversed and remanded the trial court's denial of Father's motion to set aside the trial court's voluntary termination order. Id. at 109. The child had been found to be a CHINS and had been placed by Tippecanoe County Department of Child Services (TCDCS) in the home of Father's sister and her husband (Aunt and Uncle). Prior to the placement, the family case manager completed a home study of Aunt and Uncle's home and comprehensive background checks, including criminal checks and DCS records checks, of both Aunt and Uncle. Father and Mother agreed to voluntarily terminate their rights so the child could be adopted by Aunt and Uncle. During the

voluntary termination hearing, the court: (1) told Father and Mother that the decision to voluntarily terminate was irreversible; (2) asked Father questions about his mental state, education, and possible intoxication or disabilities before deciding that Father was capable of rendering valid consent; (3) verified that Father had read the termination documents, had sufficient time to contemplate his decision, and that Father had the opportunity to consult with people he trusted before executing his consent; and (4) verified that Father had time to consult with an attorney if he had wished. The court also asked Father whether he was comfortable that the child could readily be adopted into a good, safe home if the expected adoptive home placement with Aunt and Uncle should for whatever reason go wrong, to which Father responded, "yes." During the hearing, all parties identified and agreed that the permanency plan for the child was adoption by Aunt and Uncle. At the end of the hearing the court ordered that Father's and Mother's parental rights be terminated. At the request of TCDCS, the court also authorized Aunt and Uncle to immediately move forward with filing and finalizing the adoption rather than waiting another sixty days for a review hearing.

Approximately six weeks after the termination of parental rights order was entered, TCDCS, without notice, removed the child from the home of Aunt and Uncle and withdrew its consent to adoption of the child by Aunt and Uncle. TCDCS showed Aunt a DCS report, substantiated eleven years previously, in which Uncle's then sixteen-year-old daughter stated that Uncle had sexually abused her when she was eight to ten years old. When the report was made, DCS did not interview Aunt or Uncle or any of the other children who resided with Uncle. The alleged abuse was "substantiated" solely on the daughter's statement, and neither Uncle nor Aunt knew of the report. No CHINS action or criminal charge was ever filed. Father, by counsel, sought to set aside the judgment terminating his parental rights. At the hearing on Father's motion, counsel for DCS stipulated that TCDCS had "institutional knowledge" of the prior substantiated abuse allegation against Uncle and admitted the case manager had made a mistake when she completed the initial home study and indicated there were no DCS records concerning Uncle. Father argued that, based on TCDCS representations that there were no DCS records against Uncle and that DCS supported adoption of the child by Aunt and Uncle, Father had no reason to suspect that the permanency plan for the child would not go through absent a drastic event such as the deaths of Aunt and Uncle. Father maintained that he never contemplated adoption by someone else, and if he had known that was a real possibility, he would not have voluntarily terminated his rights and would have continued with services. The trial court refused to set aside the judgment terminating Father's parental rights. Father appealed.

The Court agreed with Father's argument that public policy regarding parents' rights to establish a home and raise their children weighed in favor of setting aside the termination judgment. Id. at 107. The Court said it was true that Father was appropriately advised of his constitutional and legal rights and that the trial court carefully questioned Father about his consent to voluntarily terminate his parental rights. Id. at 108. The Court observed that all of the advisements and questions were clouded by the misrepresentation contained in the home study report and TCDCS's subsequent actions that served as the basis for the child's placement with Aunt and Uncle and TCDCS's approval of the child's adoption by Aunt and Uncle as the permanency plan. Id. The Court concluded that, under these circumstances, Father's consent to voluntarily terminate his parental rights was vitiated by the misrepresentation made by TCDCS through its case manager; therefore, Father's petition to set aside the judgment terminating his parental rights should have been granted. Id. at 109. The facts of K.L. also gave rise to a lawsuit initiated by Father, Aunt and Uncle, and Paternal Grandfather against DCS alleging negligence, fraud, intentional infliction of emotional distress, and violation of due process rights. See **D.L. v. Huck**, 978 N.E.2d 429 (Ind. Ct. App. 2012), affirmed and clarified on rehearing at 984 N.E.2d 223 (Ind. Ct. App. 2013), discussed in Chapter 2 at VII.D.

In **Youngblood v. Jefferson County DFC**, 838 N.E.2d 1164 (Ind. Ct. App. 2005), *trans. denied*, the Court affirmed the trial court's denial of Mother's motion to correct error in which she had petitioned to set aside her consent to the voluntary termination of her parental rights to her daughter. Id. at 1166. The Court held that Mother failed to show that her consent to terminate her parent-child relationship was executed under fraud or duress or while she was incompetent. Id. at 1170-71. DFC had petitioned to involuntarily terminate Mother's parental rights to the child. Mother appeared with counsel at the termination hearing and notified the trial court that she intended to consent to the termination of her parental rights "with the understanding that it be an open adoption and that … visitation remain open between now and the time of the adoption as well as afterwards." The trial court: (1) advised Mother of her rights and that her consent would be permanent and could not be revoked unless it was obtained by fraud or duress or unless she was incompetent; (2) noted that Mother had representation and the advice of counsel; and (3) asked Mother if she still intended to voluntarily consent to the termination. Mother responded that she did. Subsequently, Mother signed a "Consent to Termination of Parent-Child Relationship," in which she acknowledged that she had received a notice of rights form and knowingly and voluntarily consented to the termination of her parental-child relationship with the child. Mother's attorney reviewed the documents with Mother and notarized the consent by affirming that Mother personally appeared before her and stated that the representations therein contained were true. The trial court entered its order terminating Mother's parental rights to the child. One month later, Mother filed a motion to correct error in which she petitioned the trial court to set aside her consent to terminate her parental rights because the consent was "obtained as a result of fraud, duress or mental incompetence." Mother testified at the hearing that she had "check[ed] out" or "blanked out" and did not understand what she was doing when she consented to terminate her rights. After hearing other evidence, the trial court denied Mother's motion to correct error. Mother appealed.

The Court reviewed each of Mother's contentions. Regarding Mother's contention that her written consent was obtained by fraud because she believed that she would be able to see the child or get her back if she consented and because she was misled into believing a voluntary termination was something that it was not, the Court held it was clear no representations that would constitute fraud were made to induce Mother's consent. Id. at 1170. As to Mother's contention that her consent was obtained under duress because "she was pressured by the caseworker", the Court held that there was no evidence of any threatened violence or physical restraint to Mother and emotions, tensions, and pressure are insufficient to void a consent unless they rise to the level of overcoming one's volition. Id. at 1170-71. The Court noted Mother failed to show that her free will was overcome when she signed the consent and that she was represented by counsel who reviewed the consent documents with Mother. Id. at 1171. Mother also contended that at the time she signed the consent, she was incompetent because she had "problems in the past" with drug addiction, she had attempted suicide one year earlier, and she was "confused on the day she signed the consent form" and "unaware that she was signing her rights away to [the child]." The Court held that Mother had failed to show that her consent was obtained while she was incompetent. Id. at 1172. The Court noted that: (1) Mother had appeared with counsel at the hearing; (2) counsel had reviewed the consent documents with Mother; (3) the case worker who had worked with Mother for two years testified that, other than the fact that Mother was "visibly upset" on the day of the termination hearing, there was nothing about Mother's appearance that would lead her to believe that Mother did not understand what was happening; (4) Mother presented no argument that she was under the influence of drugs or suicidal at the time she consented to the termination; and (5) Mother's claimed "confusion" did not rise to the level of a showing of incompetence that would require the trial court to set aside her consent to terminate her parental rights. Id. at 1171-72.

In **In Re M.B.**, 921 N.E.2d 494 (Ind. 2009), a petition to involuntarily terminate Mother's rights to her two children was filed. Mother denied the allegations in the petition, and the petition was set for trial. On the day of the scheduled hearing, Mother, advised by her counsel, decided to execute a "Voluntary Relinquishment of Parental Rights" for each of the children. Attached to each voluntary termination form was an Addendum, drafted by Mother's counsel, captioned "Post Adoption Privileges." The Addenda contained a proviso stipulating that Mother's voluntary relinquishment of her parental rights and her consent to adoption were "subject to the Court granting post-adoption privileges and the adoptive parents consenting to post-adoption contact by and between themselves and [the children] pursuant to IC 31-19-16-2." The voluntary termination forms with the Addenda attached were submitted to the trial court at the commencement of the involuntary termination trial. The trial court reviewed the forms and advised Mother of the legal consequences of voluntary termination. The court clarified with Mother that she was giving up her rights subject to the reservation of post-adoption privileges and subject to the court's determination that it was in the children's best interests for the visitation to occur. Mother answered affirmatively. The DCS case manager confirmed that DCS believed it was still in the children's best interest to continue visitation with Mother. The trial court issued an order which "permanently terminated [ ]" all of Mother's "rights, powers, privileges, immunities, and obligations, including the right to consent to adoption" as they related to the children. After the termination hearing, the children were placed in a new home with prospective adoptive parents. DCS had not notified the prospective adoptive parents of Mother's visitation privileges before the placement of the children in their home. About a week after the adoptive placement, the DCS case manager notified the prospective adoptive parents that Mother's visitation would resume. Mother visited the children for two hours every two weeks until a three month CHINS periodic review hearing was held. Neither Mother nor her counsel was notified of the hearing. During the hearing, the attorney for DCS recommended that Mother's visitation rights be terminated based on letters presented by the children's therapists that visitation was no longer in the children's best interests because it was "impeding the bonding process with the adoptive family." The trial court ordered Mother's visitation privileges terminated. Two days later, when Mother appeared for her regularly scheduled visit, she was told it would be a "goodbye visit." Mother filed a motion to set aside the trial court's initial order for voluntary termination of the parent-child relationship pursuant to Ind. Trial Rule 60(B). The trial court held a hearing and denied Mother's motion.

Mother appealed, contending that her voluntary termination should be set aside. Mother argued: (1) her consent to termination was based on the State's and the trial court's fraudulent misrepresentation that she would have continuing visitation post termination; and (2) the state violated her due process rights when it failed to notify her of the three-month CHINS review hearing at which her visitation privileges were terminated in her absence. The Court of Appeals affirmed the trial court's denial of Mother's motion to set aside her voluntary termination at 896 N.E.2d 1 (Ind. Ct. App. 2008), but the Indiana Supreme Court vacated the Court of Appeals opinion. The Supreme Court held that, unless all of the provisions of Indiana's open adoption statutes (IC 31-19-16-1 and 2) are satisfied, the voluntary termination of parental rights may not be conditioned upon post-adoption contact privileges. Id. at 500. The Supreme Court agreed with the Court of Appeals that the visitation proviso was invalid as a matter of Indiana law. Id. The Court reviewed three factors: (1) the State voiced no objection to the visitation proviso and acknowledged and complied with it; (2) the trial court's colloquy with Mother expressly referenced the visitation proviso; and (3) the visitation proviso was not unconditional. Id. at 501. The Court held, on the facts of this case, that Mother's parental rights were terminated as provided in IC 31-35-1-12(A) and (B) except that she had the right to ongoing periodic visitation with the children unless and until a court determined that such visitation was no longer in the children's best interests. Id. Because Mother did maintain ongoing visitation rights, the Court

held that she was entitled to the relevant statutory protections. Id. The Court was unable to say that the failure to accord Mother those protections was harmless. Id. at 502. The Court stated:

> We hold that [Mother's] parental rights remain terminated and that she is entitled to no relief in that regard. She consented to the termination in a proceeding that appears to us to have accorded with all relevant law, save the visitation proviso. While she retains an enforceable right as to the visitation proviso, this does not create any basis for reopening the termination of parental rights proceeding.
>
> Having previously granted transfer, we affirm the trial court's acceptance of Mother's voluntary termination of her parental rights to the Children. We reverse the trial court's decision to terminate Mother's visitation rights at the three month CHINS review hearing and remand this case to the trial court with instructions that should the State continue to seek termination of Mother's visitation rights, the court consider the request at a hearing that accords with the requirements discussed in this opinion.

Id. at 502 (footnote omitted).

In **In Re A.M.H.**, 732 N.E.2d 1284 (Ind. Ct. App. 2000), the Court affirmed the dismissal of OFC's petition for voluntary termination of the parent-child relationship. Id. at 1285. The Court agreed with the trial court's finding that OFC violated Mother's due process rights by failing to notify her attorney in the CHINS case that she was signing a voluntary termination form. Id. at 1286. The Court noted that the trial court had ruled, and was being affirmed, on due process grounds, but the Court suggested that Mother's following conditions could have constituted "consent-vitiating" factors for purposes of setting aside her voluntary relinquishment: 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 form. Id. at 1285 n.1.

III. F. One Parent Consents and the Other Parent Cannot be Located

If the court grants the voluntary termination petition as to one parent, but the other parent whose consent to termination is required cannot be located after a good faith effort has been made to do so and has been served with notice of the hearing in the most effective means under the circumstances, IC 31-35-1-11(a) provides that the court can make findings of fact upon the record and enter a default judgment of termination as to the unavailable parent. IC 31-35-1-11(b) provides that a parent may waive the notice required by subsection (a) if the waiver (1) is in writing; (2) is signed by the parent in the presence of a notary public; and (3) contains an acknowledgment that the waiver is irrevocable and the parent will not receive notice of adoption or termination of parent-child relationship proceedings. IC 31-35-1-11(c) states that a parent who waives notice under subsection (b) may not challenge or contest the termination of the parent-child relationship or the child's adoption.

III. G. One Parent Consents but the Other Parent Contests Involuntary Termination

In **In Re D.J.**, 755 N.E.2d 679 (Ind. Ct. App. 2001), *trans. denied*, the Court affirmed the trial court's judgment involuntarily terminating Mother's parental rights to her two children. Id. at 681. Mother argued on appeal that the trial court had erred in accepting Father's voluntary consent to the termination of his parental rights immediately prior to conducting the hearing on the petition to involuntarily terminate Mother's rights. Mother contended that this procedure deprived her of a fair and impartial hearing. The allegations against Father and Mother were identical and were set forth in the same termination petitions. The Court found that (1) DFC was required to present sufficient evidence to support termination of each parent's rights; (2) the trial court's acceptance of Father's voluntary consent to termination did not constitute a "pre-

judgment" of the merits of the petitions as they related to Mother; and (3) Father's consent did not affect the outcome of the case against Mother. Id. at 684. The Court further stated:

> We recognize that this determination is made with the benefit of hindsight, a benefit which a trial court would not have at the time of accepting a voluntary consent to termination from one parent prior to a fact-finding hearing for the other, and therefore, we reiterate that we do not believe that this practice should be routinely used.

Id.

In **In Re J.T.**, 742 N.E.2d 509 (Ind. Ct. App. 2001), Mother alleged it was error for the trial court to accept Father's consent to voluntary termination of his parent-child relationship prior to the hearing and judgment on the petition to involuntarily terminate Mother's rights. The Court found the issue was moot since it had affirmed the termination judgment against 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. Id. at 514.

Practice Note: The trial court could alleviate this concern by withholding judgment on a parent's consent to voluntary termination until the involuntary petition proceedings are completed as to the other parent.

See also the following involuntary termination cases in which the facts show that one parent had voluntarily terminated parental rights prior to the trial court's involuntary termination judgment regarding the other parent: **In Re Q.M.**, 974 N.E.2d 1021, 1022 (Ind. Ct. App. 2012); **Hite v. Vanderburgh Cty Office Fam. & Chil.**, 845 N.E.2d 175, 177 (Ind. Ct. App. 2006); **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225, 1227 (Ind. Ct. App. 2002), *trans. denied*; and **In Re K.S.**, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001).

IV. POSTADOPTION CONTACT WITH BIRTH PARENT OR SIBLINGS

An agreement for the birth parent to maintain contact with the child after adoption has sometimes been referred to as "open adoption." Indiana statutory law contains specific procedures at IC 31-19-16 and IC 31-19-16.5 allowing limited court ordered postadoption contact between the birth parent and the child, and limited court ordered postadoption contact between an adopted child and his/her siblings.

IV. 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 court appointed special advocate 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. A petition may be filed with the court to compel compliance with court ordered contact or to modify the agreement pursuant to IC 31-19-16-4, but failure to comply with the agreement will not revoke the adoption. IC 31-19-16-8.

Practice Note: DCS or a licensed child placing agency 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. DCS or a licensed child placing agency must be clear that postadoption contact is an option, but it is not guaranteed and it can be terminated. See IC 31-35-1-12(9), discussed in this Chapter at II.A.

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), Mother gave consent to the adoption of her child by the child's stepmother. When Mother was denied visitation with the child, she 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. Id. at 479. Mother had not complied with the postadoption statutes, and the Court ruled she could not remedy that failure by seeking visitation as a third party. Id.

See also **In Re Marriage of J.S. and J.D.**, 941 N.E.2d 1007, 1108 (Ind. Ct. App. 2011) (Court reversed dissolution court's order granting Birth Father visitation with his child who had been adopted by Grandparents; Court concluded that postadoption visitation statute, IC 31-19-16-2, is exclusive means for asserting visitation rights and Birth Father had not followed procedures therein); **In Re M.B.**, 921 N.E.2d 494, 500 (Ind. 2009) (Court held that, unless all of the provisions of IC 31-19-16-1 and 2 are satisfied, voluntary termination of parental rights may not be conditioned upon postadoption contact privileges); **In Re Adoption of T.L.W.**, 835 N.E.2d 598, 602 (Ind. Ct. App. 2005) (Court found that trial court did not error in denying Birth Mother's Ind. Trial Rule 60(B) motion to enforce postadoption visitation agreement; motion was filed

fifteen months after adoption decree, which did not include the postadoption visitation agreement, was entered).

IV. 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 may include contact through photographs, written and verbal updates, and other forms of communication, and does not have to be in writing. The post adoption contact privileges under this section may not include visitation. The agreement is not enforceable and does not affect the finality of the adoption.

IV. 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. for further discussion of postadoption birth sibling contact.

See **In Re Adoption of T.J.F.**, 798 N.E.2d 867 (Ind. Ct. App. 2003), in which the Court reversed the trial court's order granting the post decree motion for post-adoption sibling visitation filed by the OFC and the guardian ad litem on behalf of the child's sibling who had not been adopted. Id. at 874. The adopted child's parents had agreed to sibling visitation before the adoption decree was entered almost five years prior to the motion filed by OFC and the guardian ad litem, but had not followed through with arranging visitation. The adopted child's parents filed a motion to dismiss the OFC's and guardian ad litem's sibling visitation motion. Although a post-adoption visitation agreement providing for sibling visitation had been recorded prior to the adoption, it was not incorporated into the adoption decree, which did not include any mention whatsoever of postadoption sibling visitation. The Court opined that any judicial authorization for visitation between the siblings ceased at the time the decree of adoption was entered. Id. at 873. The Court held that the trial court erred in ordering post-adoption visitation between the adopted child and her sibling. Id. The Court remanded with instructions to grant the adoptive parents' motion to dismiss the motion to permit biological sibling visitation. Id. at 874.