

# TERMINATION OF PARENTAL RIGHTS

## *Bench Card*

*Bench Cards have been created by the Administrative Office of the Court as a resource for judges. Bench Cards do not represent statements of law by the Idaho Supreme Court and do not constitute legal advice.*

*\*For consents to terminate parental rights see the Consent to Termination of Parental Rights Bench Card.*

### **PURPOSE**

1. Provide for severance of the parent and child relationship.<sup>1</sup>
2. Provide permanency for the child where the court has found the existence of aggravated circumstances or that reasonable efforts to return the child to the child's home have failed.<sup>2</sup>

### **WHEN**

1. A petition may be filed at any time after the entry of a decree finding that the child is within the jurisdiction of the court under the Child Protective Act (CPA).<sup>3</sup>
2. A petition to terminate parental rights must be filed:
  - a. within 30 days of a judicial determination that an infant has been abandoned or reasonable efforts are not required because aggravated circumstances were present, unless there are compelling reasons why it would not be in the best interests of the child;<sup>4</sup>
  - b. within 30 days of an order approving a permanency plan with a permanency goal of termination of parental rights and adoption;<sup>5</sup>
  - c. thirty days after a child is delivered to a safe haven, or as soon as practicable thereafter;<sup>6</sup> or,
  - d. if the child has been in the temporary and/or legal custody of the Department for 12 of the most recent 22 months, the Department shall file, prior to the last day of the 12<sup>th</sup> month, a petition to terminate parental rights, unless the court finds that:
    - i. the child is placed permanently with a relative;
    - ii. there are compelling reasons why termination of parental rights is not in the best interests of the child; or
    - iii. the Department has failed to provide reasonable efforts to reunify the child with her family.<sup>7</sup>

### **WHO MAY BE PRESENT**

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>8</sup>
2. IJR 40 provides that the Department will provide notice of all hearings after the adjudicatory hearing to the following persons, and that the following persons have the right to be heard at all hearings following the adjudicatory hearing:
  - e. A child age 8 years and older who is the subject of the hearing;
  - a. The foster parent of the child who is the subject of the hearing;
  - b. The pre-adoptive parent; and
  - c. A relative who is providing care while the child is in the custody of the Department.Note: It is unclear whether this rule applies to proceedings on the petition to terminate.
3. The child may be excluded from hearings at any time at the discretion of the court.

### **EVIDENCE**

1. The Rules of Evidence apply.<sup>9</sup>

2. Standard is clear and convincing evidence.<sup>10</sup> (*But see the ICWA Bench Card*)
3. No part of the court's record in the CPA proceeding may be used for purposes of meeting the petitioner's burden of proof, unless the part offered is admissible under the Idaho Rules of Evidence, or unless the parties stipulate to its admission.<sup>11</sup>
4. If the child testifies, a counselor, friend, or other person shall be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>12</sup>
5. Privileges in effect at the termination of parental rights hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.<sup>13</sup>

## REQUIRED FINDINGS

Any order terminating parental rights must be in writing and must recite the findings upon which the order is based.<sup>14</sup>

2. The court has jurisdiction.<sup>15</sup>
3. Grounds:
  - a. In the best interests of the child and any one or more of the following:<sup>16</sup>
    - i. The parent has abandoned the child;<sup>17</sup>
    - ii. The parent has neglected the child: (1) as defined in I.C. § 16-1602 (31), or (2) the parent(s) has failed to comply with the court's orders or the case plan in a CPA case and: (i) the Department has had temporary or legal custody of the child for 12 of the most recent 22 months; and (ii) reunification has not been accomplished by the last day of the 12<sup>th</sup> month in which the child has been in the temporary or legal custody of the Department;<sup>18</sup>
    - iii. The parent has abused the child;<sup>19</sup>
    - iv. The presumptive parent is not the biological parent;<sup>20</sup>
    - v. The parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period of time and will be injurious to the child's health, morals, or well-being;<sup>21</sup> or
    - vi. The parent is incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority.<sup>22</sup>
    - vii. The parent is incarcerated at the time of the termination hearing and has been or likely will remain incarcerated for a substantial portion of the child's minority, and termination is initiated by the Department for such child who is in the legal custody of the Department.<sup>23</sup>
  - b. The court may grant an order terminating the relationship and may rebuttably presume that such termination of parental rights is in the best interests of the child where:<sup>24</sup>
    - i. The parent caused the child to be conceived as a result of rape, incest, lewd conduct with a minor under the age of 16, or sexual abuse of a minor under the age of 16;
    - ii. The following circumstances are present: (a) abandonment, chronic abuse or chronic neglect of the child; (b) sexual abuse against a child of the parent; (c) torture of a child; any conduct described in the Idaho Code § 18-8303(1); battery or an injury to a child that results in serious or great bodily injury to a child; voluntary manslaughter of a child, or aiding or abetting such voluntary manslaughter, soliciting such voluntary manslaughter or attempting or conspiring to commit such voluntary manslaughter; or (d) the parent has committed murder, aided or abetted a murder, solicited a murder or attempted or conspired to commit murder;

- iii. The child is an abandoned infant except in a parental termination action brought by one (1) parent against another parent.
  - c. The court may grant termination of parental rights where it finds that termination is in the best interests of the parent and the child.<sup>25</sup>
- 4. After grounds for termination of parental rights have been found, the court must next look at the best interests of the child. A non-exclusive list of factors has been provided by statute and case law. Examples are:<sup>26</sup>
  - a. Stability and permanency of the home;
  - b. Unemployment of the parent;
  - c. Improvement of the child while in foster care;
  - d. The parent's efforts to improve his or her situation;
  - e. The parent's continuing problems with the law;
  - f. Testimony from IDHW social workers and Guardians ad Litem;
  - g. The parent's history with substance abuse;
  - h. Whether the parent has provided financial support;
  - i. The child's relationship with those currently caring for him or her;
  - j. The child's need for stability and certainty;
  - k. Failure of a parent to seek appropriate long-term mental health treatment;
  - l. If the parents have been given sufficient time to demonstrate they take parenting duties seriously, whether they complied with the case plan;
  - m. The parent's efforts to improve the parent's capacity to safely reunify with the child;
  - n. The parent's demonstrated ability to live a law-abiding life, excepting infraction violations; and
  - o. When the child has formed a strong and positive bond with the child's substitute caretaker, the strong and positive bond has existed for a substantial portion of the child's life, the removal of the child from the substitute caretaker would likely cause serious psychological harm to the child, and the parent lacks the capacity to meet the needs of the child upon removal.
- 5. Appoint an authorized agency as a guardian and vest legal custody in such agency.<sup>27</sup>
- 6. Fix responsibility for child support as appropriate.<sup>28</sup>
- 7. Set the review hearing at 6 months and every 2 months thereafter, and permanency every 12 months until adoption or final placement.<sup>29</sup>
- 8. In an ICWA case: (*See the ICWA Bench Card*)
  - Findings must include:
    - a. That continued custody of the child by the parent or Indian custodian is, beyond a reasonable doubt, including testimony by a qualified expert, likely to result in serious emotional or physical damage to the child<sup>30</sup>; and
    - b. That the Department has made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful.<sup>31</sup>

## WRITTEN OPINION

**Given the gravity of parental right termination cases, the Court has expressed their disapproval of the practice of having attorneys prepare the written findings of fact and conclusions of law.<sup>32</sup>**

Orders submitted by attorneys should be carefully reviewed and edited.

## ENDNOTES

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<sup>1</sup> I.C. § 16-2001(1)(a), § 16-2005(4), § 16-2007(3). *See also Idaho Dept. of Health and Welfare v. Doe*, (2019-22). Consent to terminate parental rights can only be filed in conjunction with a petition for adoption initiated by the person(s) proposing to adopt a child, or where the consent to terminate has been filed by a licensed adoption agency. In a termination of parental rights case not filed in conjunction with an adoption, a parent may sign a waiver of notice and appearance.

<sup>2</sup> I.C. § 16-2001(1)(b).

<sup>3</sup> I.J.R. 48(a).

<sup>4</sup> I.C. § 16-1624(3), § 16-1602(6).

<sup>5</sup> I.C. § 16-1624(2); I.J.R. 46(b).

<sup>6</sup> I.C. § 39-8205(5).

<sup>7</sup> I.C. § 16-1622(2)(g); 42 U.S.C. § 675(5)(E).

<sup>8</sup> I.C. § 16-2009; I.J.R. 52(a).

<sup>9</sup> I.R.E. 101(e)(6); I.C. § 16-2009; I.J.R. 51(c).

<sup>10</sup> I.C. § 16-2009.

<sup>11</sup> I.J.R. 48.

<sup>12</sup> I.C. § 16-1613(1); I.J.R. 52(a).

<sup>13</sup> I.R.E. 502, I.R.E. 505 *See also* I.R.E. 503(d)(4), I.R.E. 504(d)(1), I.R.E. 516(d)(3), I.R.E. 517(d)(3), I.R.E. 518(d)(5).

<sup>14</sup> I.C. § 16-2010(1).

<sup>15</sup> I.C. § 16-2010(1), § 16-2003.

<sup>16</sup> I.C. § 16-2005(1).

<sup>17</sup> I.C. § 16-2002(5), § 16-2005(1)(a).

<sup>18</sup> I.C. § 16-2002(3), § 16-2005(1)(b).

<sup>19</sup> I.C. § 16-2002(4), § 16-1602(1), § 16-2005(1)(b).

<sup>20</sup> I.C. § 16-2005(1)(c).

<sup>21</sup> I.C. § 16-2005(1)(d).

<sup>22</sup> I.C. § 16-2005(1)(e).

<sup>23</sup> I.C. § 16-2005(1)(a)(vi).

<sup>24</sup> I.C. § 16-2005(2).

<sup>25</sup> I.C. § 16-2005(3).

<sup>26</sup> I.C. § 16-2005(1)(b).

<sup>27</sup> I.C. § 16-2010(2)(a)(iii), § 16-2002(9).

<sup>28</sup> I.C. § 16-2010(2)(b).

<sup>29</sup> I.C. § 16-2010(4), § 16-1622(1)(a) and (2)(b).

<sup>30</sup> 25 U.S.C. § 1912(f).

<sup>31</sup> 25 U.S.C. § 1912(d).

<sup>32</sup> *See Idaho Dept. of Health & Welfare v. Doe*, 161 Idaho 745, 750 fn 2, 390 P.3d 866, 871 (Ct. App. 20174).