

# IDAHO FAMILY LAW HANDBOOK

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WITH SPECIAL THANKS TO MARY SHEA, CAROLE WESEBERG, AND THEIR  
STUDENTS AT THE IDAHO STATE UNIVERSITY PARALEGAL STUDIES  
PROGRAM

## Preface to 2017 Supplement

This Supplement to the 2015 Sixth Edition of the Family Law Handbook contains three (3) substantive editions. Nathan Palmer has kindly contributed a new article entitled, “Spouse Maintenance In Lieu of Property Division”. Mary Shea has updated her article from 2011 entitled, “Trying to Fit a Square Peg Into a Round Hole? Applying Idaho Rules of Evidence and Procedure to Child Custody Evaluation,” and Fred Zundel has updated his 2013 article entitled, “Domestic Violence.”

Mary Shea, Carole Wesenberg, and students in the Paralegal Studies Program at Idaho State University continue to monitor and improve the electronic edition of the Family Law Handbook. We would once more give our thanks to Mary, Carole, and the ISU paralegal students for their essential work.

Since the 2015 edition of the Handbook, there have been a number of case law, statutory, and rule developments. The most significant case law development was the United States Supreme Court decision in *Obergefell v. Hodges*, 135 St. Ct. 2584. In a 5-4 decision, the Supreme Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteen Amendment to the United States Constitution. States are now required to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage is lawfully licensed and performed out-of-state. Some significant changes were made to the guardianship statutes at Idaho Code § 15-5-207 (two co-guardians can now be appointed in a minor guardianship proceeding, and criteria and procedure for appointment of a temporary guardian of a minor are provided); § 15-5-304 (two co-guardians may be appointed in guardianship for an incapacitated person); § 15-5-308 along with new Idaho Court Administrative Rule 54.4 (provides for the qualifications and responsibilities of a Visitor in an adult guardianship case); and § 15-5-310 (criteria for temporary guardianship over an incapacitated person). There is also a new Idaho Court Administrative Rule 54.5 providing the responsibilities and content of the report by the Health and Welfare Evaluation Committee in developmental disability guardianships. Practitioners should also be aware of new additions to the Idaho Rules of Family Law Procedure at Rule 720 (Brief Focused Assessment); 201.D (commencement of action to obtain a money judgment); 204.C (summons allows 21 days to respond); 908.A (attorney fees pursuant to Idaho Code § 12-121 allowed only when case pursued or defended frivolously, unreasonably, or without foundation).

Fred G. Zundel  
I.S.B. Family Law Publications Editor

# TERMINATION OF PARENTAL RIGHTS FROM THE AGENCY PERSPECTIVE

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This article is an edited, shorter version of Termination of Parental Rights chapter from the Idaho Supreme Court Child Protection Handbook, authored by Elizabeth Brandt and Tom Baird. Used with Permission. The Full Child Protection Handbook is available at <http://www.isc.idaho.gov/child-protection/law>.

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## 1. INTRODUCTION

Idaho Code (I.C.) §§ 16-2001 *et seq.* provide the statutory framework for the permanency option of termination of parental rights (TPR) for children who are under the jurisdiction of the court though the Child Protection Act (CPA). The first priority established the CPA is to preserve the unity of the family whenever possible. I.C. §16-1601 (1). Therefore, prior to consideration of TPR for a child under the jurisdiction of a CPA court, the Idaho Department of Health and Welfare (DHW) 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. I.C. §16-2001 (b)

## **2. TIMING OF TPR PROCEEDINGS**

A petition seeking termination of parental rights must be filed within a CPA proceeding. § 16-1624, IJR 48(a). The Federal Adoption and Safe Families Act (ASFA) and Idaho law, impose a rebuttable presumption that DHW must move for termination of parental rights if a child has been I DHW's custody for fifteen (15) of the last twenty-two (22) months. 48 U.S.C. § 675(5)(E); Idaho Code § 16-1629(9). There is no prohibition on filing a TPR petition prior to fifteen (15) months into a CPA case. The TPR petition may be filed at any time in a case when it is clear that reunification cannot occur.

## **3. CONTENT OF THE TPR PETITION**

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

- 1) The name and place of residence of the petitioner;
- 2) The name, sex, date and place of birth, and residence of the child;
- 3) The basis for the court's jurisdiction;
- 4) The relationship of the petitioner to the child or the fact that no relationship exists;
- 5) 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;
- 6) 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;"

- 7) 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;
- 8) The grounds on which termination of the parental relationship is sought;
- 9) 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,
- 10) A list of the assets of the child together with a statement of the value of the assets.

If the child is an Indian child, the petition must include allegations that meet the requirements of the Indian Child Welfare Act.

When DHW petitions for TPR, the agency must conduct an investigation and submit a written report with the petition. *I.C.* § 16-2008(b). The report 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, other relevant facts and recommendations with supporting reasons as to why the parent-child relationship should be terminated. *Id.*

#### **4. NOTICE AND HEARING**

Once a TPR petition has been filed, the court must set a time and place for hearing and the petitioner must notify the appropriate individuals. 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. *I.C.* §§16-1504, 16-1505 and 16-2007.

Idaho Code § 16-2007 establishes the notice requirements for parental termination actions. In addition to specifying notice to certain specified persons and entities, I.C. § 16-2007 requires that notice be provided to any person who would be entitled to notice of an adoption proceeding. See *Id. referring to I.C. § 16-1505*. The adoption notice provision requires that notice of an adoption proceeding be provided to certain specified individuals, but also provides that any person or agency whose consent to an adoption proceeding would be required. See *I.C. § 16-1505 referring to I.C. § 16-1604*. 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. *I.C. §§ 16-2007, 16-1505, 15-1504*. Taken all together, notice must be provided to:

- 1) The adoptee is older than 12.
- 2) Both parents if adoptee was born or conceived within a marriage.
- 3) The mother of an adoptee born outside of marriage.
- 4) Any biological parent who has been adjudicated to be the biological father by a court.
- 5) An unmarried biological father only if he has strictly complied with the requirements of I.C. § 16-1504 (2) (a) & (b).
- 6) The legally appointed guardian of adoptee.
- 7) An unmarried biological father who has filed a voluntary acknowledgment of paternity with the Vital Statistics unit of DHW pursuant to § 7-1106.
- 8) The father of an illegitimate child who has adopted the child by acknowledgment.
- 9) Any person who has registered notice of the commencement of paternity proceedings pursuant to § 16-1513.

- 10) The petitioner's spouse (if applicable).
- 11) Any person who is recorded on the birth certificate with the knowledge and consent of the mother.
- 12) Any person who is openly living in the same household as the mother and holds themselves out to be the child's father.
- 13) Any person who is married to the child's mother at the time she executes her consent.
- 14) The authorized agency having legal custody of the child.
- 15) The guardian *ad litem* of the child.
- 16) The guardian *ad litem* of the parent.

The court can 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 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. *I.C.* § 16-2007 (2).

In case where a parent has properly executed and the court has accepted a consent to TPR, notice has been waived by the parent. *I.C.* 16-2005(4)

## **5. VOLUNTARY TERMINATION OF PARENTAL RIGHTS**

Prior to, or after the filing of a petition to terminate parental rights, a parent has the option to voluntarily consent to TPR. The form for consent to TPR is established by statute. *I.C.* 16-2005(4). Voluntary

consents must be witnessed by a district judge or a magistrate, or an equivalent judicial officer in another state. *Id.* The effect of a voluntary consent is to completely and absolutely terminated the rights of the parent to the child. The right to a hearing on the TPR petition may be waived by the parents. *Id.* Upon completion of the voluntary consent to TPR, the parent(s) is no longer entitled to notice of any proceeding regarding the child.

## **6. GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS**

While effective pleading of the complaint 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. *In the Matter of Doe*, 239 P 3<sup>rd</sup> 451,455 (Idaho App. 2010).

Idaho Code § 16-2005 states that a court may grant an order of TPR if is in the best interest of the child and one (1) or more the following conditions exist:

### **1) ABANDONMENT, I.C. § 16-2005(1)(a)**

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...*I.C.* §16-2002(5)

**2) Neglect, I.C. §16-2005(1) (b)**

“Neglected” is defined in two ways in the termination of parental rights statute in *I.C. §§16-2002(3)(a)* and (b). The statute cross-references the definition of “neglected” in the CPA: *I.C. §16-1602(25)* 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 though 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 will-being; or,
- c. Who has been placed for care or adoption in violation of the law; or,
- d. Who is without proper education because of the failure to comply with section 33-202, Idaho Code.

In addition, *I.C. § 16-2002 (3) (b)* defines “neglected” to include:

“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.”

Idaho Code § 16-1629(9) provides:

There shall be a rebuttable presumption that if a child is placed in the custody of the department and was also placed in out of the home care for a period not less the fifteen (15) out of the last twenty-two (22) months from the date the child entered shelter care, the department shall initiate a petition for termination of parental rights. *Id.*

Taken together, I.C. § 16-2002 (3) (b) means that failure by the parents to work their court ordered case plan within fifteen (15) months amounts to neglect.

**2) Abused, I.C. § 16-2005(1) (b)**

“Abused” in defined in the TPR statute through a cross reference to definition in the CPA, I.C. § 16-1602(1) which 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 justifiable 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.

**4) The presumptive parent is not the biological parent of the child. I.C. § 16-2005(1) (c)**

A "presumptive parent" is defined 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." I.C. 16-2002(12)

**5) The Parent is Unable to Discharge Parental Responsibilities. I.C. § 16-2005 (1) (d)**

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." I.C. § 16-2005 (d)

In *Department of Health & Welfare v. Doe*, 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. *Id.* 233 P.3d 138(2010) (not contained in Idaho Reports).

**6) Parent is Incarcerated, I.C. § 16-2005 (1) (e)**

Parental rights may be terminated where a “parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child’s minority.” I.C. § 16-2005(e). In *Doe v. Doe* 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 minority. *Id.* 148 Idaho 243, 220 P. 3d 1062 (2009).

**7) Child Conceived as a Result of Rape or Other Sexual Misconduct, I.C. § 16-2005(2)**

**(a)**

Parental rights may be terminated 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....” I.C. § 16-2005(2) (a) *cross-referencing* I.C. §§ 18-6101, 18-1508, 18-1506 and 18-6602. When this ground is established, the court “may refutably presume” that termination of parental rights is in the best interest of the child. I.C. § 16-2005(2)

**8) Parents has Subjected Child to Torture, Chronic Abuse, or Murder, I.C. § 16-2005**

**(20) (b)**

Parental rights may be terminated where “the parent has subjected the child to torture, chronic abuse 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.” I.C. § 16-2005(2) (b). Under these circumstances, a court “may refutably presume” that such termination of parental rights is in the child’s best interests. *Id.*

**9) Abandoned Infant, I.C. § 16-2005 (2) (c)**

If the court finds that a child is an abandoned infant the child’s parents’ rights may be terminated. If this is proven, the court “may refutably presume” that termination is in the child’s best interests.

**10) Best Interests of Parent and Child, I.C. § 16-2005(3)**

The final ground for 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. In *State v. Doe* 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 interest 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 interest of the child, despite her attachment to the 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. *Id.* 143 Idaho 383, 146 P.3d

649 (2006)

7. **PROCEDURAL ISSUES GOVERNEING TPR PROCEEDINGS**

Idaho law specifically provides that TPR cases “may be conducted in an informal manner” the court must insure procedural due process for children and their parents including the right to notice, the appointment of counsel and the right to be heard. I.C. § 16-2009. A court must find that termination is supported by clear and convincing evidence after a hearing in which the Idaho Rule of Civil Procedure and the Idaho Rule of Evidence applicable to civil cases apply. *Id.*

8. **FINDINGS AND CONCLUSIONS AND APPEALS.**

At the conclusion of the termination case, the court must issue both “Findings of Fact and Conclusions of Law”, and a Decree. The issuance of a separated decree is important in order to trigger appellate jurisdiction.

Appeals of Decrees of TPR cases are governed by Idaho I.A.R. 12.2., 11.1, and 12.2. A Notice of Appeals from any decree granting or denying a Petition of TPR 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 fourteen (14) days of appellant brief being filed. The reply brief from the appellant is then due seven (7) days after filing of the respondent’s brief. No extensions will be granted except upon “the most unusual and compelling circumstances.” *Id. Appellant Rule 12.2.e.* Oral argument, if requested, has to

be held within 120 days of the filing of the appeal. *Id. Appellate Rule 12.2.f* 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. *Id. App. R. 12.2* 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. See e.g.: *Dep't of Health & Welfare v. Doe*, 244 P.3d 232, 234 (2010).

## 9. Case Law

The number of appeals from TPR cases initiated by DHW has increased greatly in the past several years. The Idaho Court of Appeals has issued ten (10) opinions regarding DHW-generated TPR cases in the period of July 2006 to March 2011. The Idaho Supreme Court has issued twenty-one (21) opinions regarding DHW-generated TPR cases in the period of November 2006 (?) to March 2011. (?) To view the latest opinions, visit the Idaho Supreme Court's website at [www.isc.idaho.gov/appeals-court/coa\\_civil](http://www.isc.idaho.gov/appeals-court/coa_civil).

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NOT FULL PUBLICATION

Private Party Termination of  
Parental Rights & Adoption

A. STATUTORY PROVISIONS GOVERNING TERMINATION OF PARENTAL RIGHTS

1. Basic Provisions. Idaho Code (I.C) §§16-2001 *et. seq.* contain the provisions enacted to provide for the voluntary and involuntary severance of the parent and child relationship for substitution of parental care and supervision by judicial process. This chapter expressly adopts the philosophy that wherever possible family life should be strengthened and preserved. It should be noted that the provision governing termination of the parent and child relationship are separate and distinct from the provisions governing adoption. Termination may take place whether or not there is subsequent adoption of the child.
2. Definitions. I.C. §16-2002 contains the definition of terms used in conjunction with both termination and adoption proceedings, including the definition of “abused” and “abandoned.” Additional definitions, such as “neglected” are set forth in I.C. § 16-1602 under the Child Protective Act.
3. Who May File? Standing to file a petition for termination of parental rights is governed by I.C. § 16-2004 governing both the State of Idaho, Department of Health and Welfare acting under the Child Protective Act, and a private party; and, provides that a petition may be filed by:
  - a) Either parent when termination is sought with respect to the other parent;
  - b) The guardian of the person or the legal custodian of the child or person standing in loco parentis to the child;
  - c) An authorized agency;
  - d) Any other person possessing a legitimate interest in the matter.

4. Grounds for Termination. The statutory grounds permitting a court to grant an order termination the parent and child relationship are set forth in I.C. § 16-2005. Those grounds set forth in I.C. § 16-2005(1) require a finding that termination of parental rights is in the best interest of the child **and** that one (1) or more of the following conditions exist:

- a) The parent has abandoned the child.
- b) The parent has neglected or abused the child.
- c) The presumptive parent is not the biological parent of the child.
- d) 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 or well-being of the child.
- e) The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority.

I.C. §16-2005(2) set fourth additional rebuttable presumptions that termination **is** in the best interest of the child where the parent caused the child to be conceived as a result of rape or incest or has subjected the child to torture, chronic abuse or sexual abuse, ect. I.C. §16-2005(3) also provides for termination when found to be in the best interest of the child **and** the parent, without having to establish one of the conditions set forth above i.e. the best interest of the parent must be considered **in addition to** the best interest of the child to permit termination under this provision. Finally, termination may be granted under I.C. § 16-2005(4) based on consent of the parent(s) when in conjunction with a petition for adoption i.e. it is

important to note that the consent of a parent is **not** sufficient grounds for adoption **unless** in conjunction with an adoption.

5. Notice Requirements. Notice requirements are set forth in I.C. §16-2007 and reference notice to any person entitled to notice under I.C. §16-1504 and §16-1505.

The due process provisions of the Fourteenth Amendment to the U.S. Constitution do not apply if a person is not entitled to notice as defined under these sections of the Idaho Code.

## **B. STATUTORY PROVISIONS GOVERNING ADOPTION**

1. Basic Provisions. I.C. §§ 15-1501 *et. seq.* contain the provisions governing adoption of both minors and adults. The basic provision is that any minor child may be adopted by an adult person who is a resident and residing in Idaho, subject to the rules in Chapter 15. A resident adult may also adopt a person not a minor if it is determined the person adopting has sustained the relation of parent to the adopted person for a period in excess of one (1) year while the person was a minor; or, the court finds that a substantial family relationship has been created. I.C. §16-1501.

2. Relevant Rules and Restrictions. Among the rules and restrictions considered relevant in most adoption proceeding are the following:

a) Age Restrictions. The person adopting a child must be at least fifteen (15) years older than the person adopted or twenty-five (25) years of age or older, unless the adopting parent is the spouse of a natural parent or the court finds that a substantial relationship as a parent has been established in excess of one (1) years. I.C. §16-1502.

b) Consent of Husband and Wife. Unless a married couple is lawfully separated, neither husband nor wife can adopt without the consent of the other spouse. I.C. §16-1503.

c) Other Consent Requirements. I.C. §16-1504 outlines in detail the person(s) who must give consent to an adoption, unless the right to consent has been lost as a matter of law or terminated pursuant to I.C. §§16-2001 et. seq. Of particular interest is the requirement that an adoptee more than twelve (12) years of age must give his or her consent, unless the adoptee does not have the mental capacity to consent, I.C. §16-1504(1)(a); and, the strict requirements that must be met before the consent of an unmarried biological father is necessary as set forth in I.C. §16-1504(2).

d) Notice Requirements. I.C. §16-1505 identifies those persons to whom notice of an adoption proceeding must be given, essentially incorporating those persons whose consent is required as set forth above, but should be reviewed closely for additional notice requirements. Failure to give notice when required may be grounds to set the adoption aside under due process provisions.

e) Adoption Proceedings. The procedural requirements governing a proceeding to adopt are set forth in I.C. §16-1506, including where the action must be filed; what must be contained in the petition for adoption; six (6) months residency requirements for the petitioners; and, when social investigations are required. Proceedings for termination may be consolidated with the proceedings for an adoption and determined at one hearing. §16-1506(4).

f) Dissolution of Adoption. I.C. §16-1509A permits an adoption to be dissolved with the agreement of both the adoptee and the adopting parent, when the adopting parent was the spouse of the natural parent and the marriage of the natural and adopting parent was terminated. This section also permits the adoptee to commence a petition to dissolve the adoption after the adoptee reaches age twenty-one (21) years of age.

### **C. APPEAL PROVISIONS**