AVOIDING THE PITFALLS IN VOLUNTARY TERMINATION OF PARENTAL RIGHTS: A GUIDE FOR THE PRACTITIONER

With the passage of the Adoption and Safe Families Act in 1997 and the previous legislative emphasis on permanency planning on the federal and state level, the frequency of cases involving the termination of parental rights is expected to increase. Some believe that a growing proportion of those cases will result from a voluntary agreement by the parent to relinquish or terminate parental rights to a child. Although such a procedure may appear to be a simple process that can be completed in a brief perfunctory hearing, the reality is that this particular type of proceeding has a multitude of potential pitfalls for the practitioner. A voluntary relinquishment or termination of parental rights that is not completed correctly jeopardizes the stability of the child, the permanence of the adoptive family and closure for the birth parent. This article will briefly identify potential problem areas and issues for the practitioner to consider, and suggest strategies that might help expedite procedures and permanency for children.

Identification of Issues

The court is concerned with two issues when it conducts a hearing during which the parent voluntarily terminates or relinquishes parental rights. The first issue is whether the actions of the parent are truly voluntary. Implicit in this issue is a determination by the court that the decision of the parent is both freely and knowingly given. The second issue is whether such a termination of parental rights is in the best interests of the child. The practitioner should address both issues.

Initiating the Procedure

Procedurally, a voluntary termination or relinquishment proceeding is initiated through the legal process of filing a document, identified as a petition, with the court that has jurisdiction or authority to act in termination and adoption cases. In some jurisdictions this court is identified as the family court. In other states, such jurisdiction resides with the juvenile court. The contents of this petition are usually set forth in the applicable state statutes. Although the petition generally is not very detailed, it does require essential information identifying both parents and the child, their dates of birth, and the location of their legal residences. Other information includes the applicability of both the Indian Child Welfare Act (ICWA) and the Uniform Child Custody Jurisdiction Act (UCCJA) to these proceedings. The practitioner may not overlook the rules governing the applicability of ICWA, including providing notice to the tribe. In addition, if there have been prior custody proceedings, the court must determine whether all interested parties have been notified of the custody hearing as required under the UCCJA.

Notice of the Hearing

Notification of the hearing must also be provided to all other essential parties including the other birth parent and any agency with custody or placement responsibilities. Individual state statutes delineate the specific time requirements for providing adequate notice of the proceedings. The type of notice required also may vary among jurisdictions but usually includes notification through the mail or personal service via the sheriff or process server. Some jurisdictions also allow notice of the hearing to be provided through publication in the local newspaper. It is absolutely critical that the notice requirements are strictly followed. Failure to provide the correct notice will usually result in a reversal of the trial court decision by the appellate court.

Legal Rights of the Parties

Once the issue of notice has been addressed and resolved by the court, the next issue is the court's determination of whether the parent entering into a consent or relinquishment is aware of his or her rights in the particular proceeding. This usually begins with a discussion about legal representation. The requirement for the appointment of counsel in a voluntary relinquishment or termination of parental rights varies among jurisdictions. The courts will usually allow an adult parent to waive his or her right to be represented by a lawyer. However, when the parent is a minor, she or he should always be represented by a lawyer serving in the capacity of adversary counsel or as a guardian ad litem. The child who is the subject of the proceeding should always be represented by a legal advocate as defined by individual state statute.

In addition to the right to counsel, other rights identified by statute may include the following: right to substitution of a judge; right to a continuance of the proceedings; right to present witnesses. Each of these rights should be explained by the court to the parent followed by an inquiry whether the parent seeks to exercise or waive that right. Usually, in voluntary relinquishment proceedings, the only witnesses called are the parents and the agency worker. However, circumstances may dictate additional witnesses should other issues arise. In any case, it is important that the individual statute be followed to avoid any procedural error, which could serve as the basis for an appeal.

Reviewing and Documenting Parental Comprehension and Consent

The parent's ability to understand the consequences or significance of terminating their parental rights is a primary issue concerning the court during a relinquishment hearing. Consequently, the court should conduct a thorough examination of the parent regarding this issue. Frequently, a written consent outlining the rights of the parent and the significance of the relinquishment or termination of those rights is executed by the birth parent prior to or during the actual court hearing. This augments the "record," which is critical because an appellate court's review is limited to the transcript and exhibits received into evidence.

Once the rights have been outlined for the parent, the court is concerned with the birth parent's comprehension regarding the significance of the termination. Specifically, the court must find that the parent is acting in a knowing and voluntary manner and understands the finality and implications of his or her decision. The following factors, which may prevent the court from making such a determination, should be reviewed by the professionals and the court: age and level of comprehension; use of drugs or alcohol prior to the hearing; mental illness; understanding of finality and permanence of decision; enforceability of post-adoption agreements; "undue influences;" and potential conflict of interest.

Age and Level of Comprehension

The parent's comprehension level may be affected by several factors including: chronological age; level of education; use of drugs/alcohol; mental illness; level of maturity; language barriers; and susceptibility to undue influence. Any evidence of or suggestion that any of these factors may be an issue should be addressed and examined by the court. Failure to address these issues creates a potential for appeal or reconsideration by the court at a future point in time and could jeopardize the permanency of the child's adoptive placement.

The professional, therefore, should provide evidence concerning the level of education obtained by the birth parent, and whether the parent can read, write or understand English. Frequently, a document signed by the parent is presented to the court as evidence of the parent's desire to consent. This document should contain a statement regarding the parent's ability to read, write and comprehend English. An inability to communicate in English would dictate the use of an interpreter in any court proceeding. In addition, when a parent is not fluent in English, any documents should be translated into the parent's native language. Both documents containing the parent's native language and the English translation should be presented to the court and made part of the court record.

Drug or Alcohol Use

Any evidence that suggests the birth parent has ingested drugs or alcohol prior to the hearing should be investigated by the court during the hearing so the court can determine that the parent's decision is made freely and voluntarily. If the professional is aware of any factors that suggest the use of drugs or alcohol prior to the hearing, she or he should raise this issue with the court.

Mental illness

A parent's history of mental illness or use of medication for such condition may affect his or her ability to enter an unimpaired decision. Therefore, the court should inquire if there is any evidence suggesting the presence of mental illness, although this does not automatically prevent the parent from voluntarily relinquishing or terminating parental rights. Frequently, the court will order that the parent present evidence from his or her treating physician, or the court could order the parent to undergo a mental health examination to ascertain the parent's ability to enter a valid consent.

Understanding Finality and Permanence of Decision

It is important for the parent to understand that once the consent to relinquish rights is

entered, it is not a decision that can be reviewed or revisited in the future. Inquiry should be made in a way that allows the parent to express his or her understanding of the permanence of that decision on the day of the hearing. Uncertainty on the part of the parent should serve as warning to the parties not to proceed with the hearing until that uncertainty has been resolved. The parent should also demonstrate his or her understanding that a termination order would extinguish the parent's legal right to seek custody, visitation, or information concerning the child's condition and location, as well as the parent's responsibility to meet child support obligations. Sometimes a parent will mistakenly believe that he or she will be contacted if the child needs surgery. A thorough examination must include a review of these issues by both the professional and then the court. It is best to have the parent explain in his or her own words an understanding that all of these rights and obligations will be permanently severed and cannot be resurrected at a later date.

Undue Influences

Evidence of undue influence must be scrutinized by the professional prior to the hearing and by the court during the hearing. The court should elicit and examine any information regarding possible threats, promises or inducements. Frequently, the presence of other family members, friends and prospective adoptive parents during portions of the hearing will be prohibited by the court so that a thorough inquiry can be conducted. Many states require parties to disclose any financial arrangements between the birth parent and the prospective adoptive parents. This disclosure should include discussion of any expenses for delivery of the child, child care costs, living expenses for the birth parent, legal costs and any other related expenditures. If there is evidence of monies exchanged, the court will have to thoroughly examine such arrangements. It must be made clear that the relinquishment or consent may not be the result of a "quid pro quo" agreement using the child as barter.

Conflict of Interest

Another potential problem results from conflict of interest of the professional. To avoid the appearance of this, as well as actual conflicts, the same professional should not represent more than one party in the proceeding. Therefore, the parent, adoptive parent, child and agency should each have their own representative or it should be very clear whose interests the professional is primarily representing. A legal representative who represents more than one party in these proceedings acts at his or her own peril and will be inviting an ethics referral to the licensing board. A similar issue exists for social workers and other nonlegal professionals. Any time a professional works with more than one party whose potential legal interests may differ, there should be a disclosure in writing of those potential conflicts and an agreement of the parties to waive such conflicts. Any agreement should be made part of the court record and the court should also examine the potential conflict and its impact on the decision of the parent.

Best Interest of the Child

The court is also concerned whether voluntary termination of parental rights is in the best interests of the child. Many jurisdictions delineate specific factors that the court should consider in making this determination. Factors included in this determination could involve any or all of the following: whether the child is emotionally bonded to the parent or other family members and whether it would be harmful to the child to sever this relationship; the wishes of the child; the age and health of the child; the likelihood of adoption or some other permanent placement for the child; and any other factors that would support the conclusion that the child will benefit from the termination of parental rights.

These issues should be discussed between the agency worker and the parent, and the worker should be prepared to submit to the court a report in which these and other issues are addressed. In addition, the parent should be prepared to explain to the court how and why this termination of parental rights is in the best interests of the child. Preparing the parent for these types of court inquiries is very important. Providing this information to the court allows the court to make a sound decision and a thorough record that will withstand appellate scrutiny.

General Procedures

The practitioner's concern with the legal proceeding should be that all issues that may influence the birth parent's decision to voluntarily relinquish or terminate his or her parental rights have been examined by the court. The court must conclude that, based on all of the various factors, the parent is making a free, voluntary and informed decision and that this termina-

tion is in the best interest of the child. The court's conclusion will be based on the sworn testimony of the birth parent, as well as written documentation prepared by the worker concerning the parent's decision and understanding. Frequently a consent form is used to document this. In addition, other professionals who have worked with a parent should be prepared to present oral or written testimony concerning their contact with the parent and resolution of any issues that may affect the voluntary nature of the parent's decision.

During the court hearing, the parent should be asked to explain, in his or her own words, what the implications for a voluntary termination are and what his or her understanding is concerning further contact, visitation, and support with and for the child. The parent's explanation of how and why this decision is in the child's best interest can be very compelling. Therefore, the practitioner should inform the parent of the type of questions that might be asked during the hearing so the parent can be fully prepared to present his or her reasoning and understanding.

Although most voluntary relinquishments or terminations are not appealed, there is no way to accurately predict when and if this will happen. Occasionally, the parent or legal advocate for the child will file an appeal because the understanding of the parent or voluntary nature of their relinquishment is in question, or the impact of the termination might not be in the best interest of the child. Therefore, the practitioner must be sure that the court record sustains the voluntary consent, and the court should make specific findings concerning the consent of the parent.

Conclusion

The goal of the parties, including the court, is to ensure that, once a parent enters into a decision to sever rights to his or her child, this decision is followed and relied upon allowing the child to find permanence with a new family. By following and incorporating the suggestions above, the professional can have greater assurance that legal barriers have been addressed and such permanence for the child can be achieved.

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