

*Achieving termination of parental rights
to accomplish an adoption*

ADOPTIONS

Involving Putative Fathers

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Few lawyers in Michigan make a living practicing exclusively in the adoption area. As a result, many attorneys feel comfortable accepting adoption cases every so often when they come along. This article is designed to assist the practitioner who is attempting to accomplish an adoption involving a putative father.

To the extent logical, Michigan treats birth moms and legal dads with similar situations, similarly. Michigan refers to birth fathers whose legal status has not been established by marriage, court order, or an affidavit of paternity, which is often followed by an order of filiation, as putative fathers. As a result of their different role, one that lends itself to uncertainty concerning their biological relationship to the child, the termination of putative fathers' rights are subject to different standards for termination than legal fathers.

Uncontested Terminations

Unlike legal fathers, putative fathers can authorize a court to terminate their parental rights without going to court. There are two consensual methods by which their parental rights can be terminated without a court appearance.

The simplest method of termination involves three steps. First, the birth mom completes and files with the court a Petition to Issue Notice of Intent to Release or Consent and Notice of Intent to Release or Consent (PCA 313 and 314 respectively). Second, the putative father must be personally served with a Notice of Intent to Release or Consent (PCA 314) after it has been filed with the court and signed by the Probate Register. Third, file with the court the proof of service demonstrating that the putative father was served more than 30 days before the estimated date of confinement, which is disclosed on the face of PCA 314. The failure of the putative father to file an objection and request for custody prior to the birth of the child authorizes the court to terminate his parental rights. In other words, after the completion of the three above-described steps, the putative father's inaction provides the court with authorization to presume his consent to the termination of his parental rights without any further efforts to notify him or seek his actual consent.

The other method of terminating parental rights of putative fathers without a court appearance allows the putative father to sign

a form called Notice to Putative Father and Custody Statement (PCA 316). It notifies the court that he does not object to the termination of his parental rights. This form must be signed in front of a witness, whose name and address is also listed on the form. After the putative father signs the form, the witness must also sign the form. Once the putative father has completed this form and it has been filed with the clerk's office, the court is authorized to terminate his rights without him ever having to appear in court.

PCA 316 affords a lot of flexibility to a putative father. It contains three options for identifying his status. Option one allows him to unequivocally acknowledge paternity and simultaneously deny "any interest in the custody of the child." Option two allows him to equivocate. It states that he "may be the father of the child" and that he denies any interest in the custody of the child. Option three allows him to simply deny that he is the father of the child. Regardless of the option he selects, after the court receives his executed form and any other evidence it deems appropriate, it is authorized to terminate his parental rights, so the adoption can proceed.

When dealing with multiple putative fathers, one troubling issue can be identifying the actual biological father. One method, that involves some financial cost and time delay (but may provide a definitive answer), is of course DNA testing. Alternatively, either of the two methods described above for the consensual termination of a putative father can be used for the consensual termination of multiple potential putative fathers. This method lacks the scientific certainty of DNA identification of the actual father, but also avoids the potential disadvantages of the costs associated with testing multiple potential fathers. One might argue that terminating multiple fathers (without DNA testing) involves some risk that none of the men identified are the biological father, who may some day show up and disrupt the adoption. However, the adoption attorney should discuss this potential issue with his or her client[s] and the parties select the option that makes the most sense in their set of facts.

Contested Terminations

MCL 710.39 articulates the process for contested actions to terminate the parental rights of putative fathers. It first classifies them into two separate categories with two separate termination procedures.

A review of the Michigan appellate case law reveals that putative fathers contesting the trial court's termination of their parental rights have usually been told that they are classified in subsection (1) of § 39 of the Adoption Code (subsection (1)). Being classified as a subsection (1) putative father does not mean that his rights are automatically terminated. It means that if he appears at the termination hearing and requests custody, the court will engage in a two-pronged analysis as described in subsection (1): "inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him."

Subsection (1)

Although intuitively one might assume that the best interest analysis involves some type of comparison between the putative father and the prospective adoptive parents,

Michigan does not allow such a comparison. Interpreting the 1994 Amendments to the Adoption Code, the Michigan Court of Appeals has said:

The amendment's addition of the language "or, in the case of a hearing under § 39 of this chapter," clarified the apparent legislative intent, that the putative father's circumstances be examined alone, without comparison to the prospective adoptive parents' circumstances, when determining the best interests of the child under § 39.

Although the analysis undertaken by the court under subsection (1) is less rigorous than under subsection (2) of the Adoption Code (subsection (2)), it is not impossible for a putative father to prevail. The Michigan Supreme Court established this principle in 1978 when it reversed the trial court and court of appeals' decision terminating his parental rights because it "was not supported by the record." It seems that trial courts and adoption attorneys learned a great deal from that case about developing the record, because I have not located a subsequent § 39

court of appeals decision that found an insufficient record to support the trial court's determination that the best interest analysis permitted the termination of the putative father's rights.

In fact, the Michigan Court of Appeals has affirmed cases where the best interest analysis was not expressly stated. The court noted the distinction between the best interest analysis prescribed by two different statutes when it stated: "A separate finding under each section of 22(f) (the Adoption Code) is not required as is under 722.23 (the Child Custody Act)." Despite the success of this case, adoption practitioners would be well advised to make a record that individually delineates each of the best interest factors from the Adoption Code relevant to a client's interests.

Subsection (2)

Putative fathers seeking subsection (2) treatment despite the fact that they have no custodial relationship with the child and have not supported the child or mother have offered a variety of excuses. These excuses are usually rejected. Some putative fathers have attempted to earn a subsection (2) classification by arguing that the birth mother did not accept his financial support, so he did not give it, but should still be classified as a subsection (2) putative father because of his unrequited efforts. This argument has not met with success at the appellate level. In fact one court faced with those facts rejected the putative father's request to obtain the application of subsection (2) termination standards when it stated that the putative father:

had the ability to provide financial support to the mother during pregnancy, but failed to do so. Neither the mother's outright refusal to accept baby items from respondent's family nor her failure to answer respondent's two offers of support constituted impeding respondent (putative father) from providing support or care.

In 1999 the court of appeals established that Section 39 does not contain an incarcerated parent exception. It noted:

While incarceration effectively prohibits a parent from establishing a custodial relationship with his child, it does not necessarily preclude him from providing support for the

FAST FACTS

- Michigan refers to birth fathers whose legal status has not been established by marriage, court order, or an affidavit of paternity as putative fathers.
- Putative fathers can authorize a court to terminate their parental rights without going to court.
- Once a putative father has been informed of the pregnancy and his alleged relationship to the child, he becomes responsible for staying in communication with the birth mom and providing her and her child financial support if he wants subsection (2) treatment at a termination hearing.

child. The regular provision of support payments within the parent's means could establish the provision of support or care required under subsection 39(2).

Appellate courts reviewing a termination of a putative father's rights will give deference to the trial court's "assessment of credibility and assignment of weight to be accorded the evidence." Appellate cases in Michigan offer a substantial amount of guidance as to how to identify a subsection (2) putative father. In 1996 the court of appeals stated:

In determining whether a putative father has provided the kind of support and the amount of support that is reasonable under the circumstances of a particular case, the probate court may properly consider such factors as the amount of money provided, the amount of money provided relative to the maintenance needs of the mother or child, the timing of the payments, the nature of any commitments to such payments, and other related circumstances.

Once a putative father qualifies to have his termination trial reviewed under the standards identified in subsection (2), he does not necessarily win the termination trial. He simply earns the right to have the pending termination request reviewed by a standard that is more difficult for the opposing party to prove. The next step is for the court to schedule a full trial on the neglect issues in a non-stepparent adoption or a full trial on the financial and communication issues in a stepparent adoption. After the trial court hears the evidence, it will then decide whether the subsection (2) putative father's parental rights are to be terminated.

Notification of the Birth

Some putative fathers have attempted to argue that they cannot be treated as a subsection (2) putative father because the birth mother did not notify them of the birth of the child. This argument has not met with success. In a case where putative father convinced the trial court that his parental rights should not be terminated because the birth mother had not notified him of the birth of the child, the court of appeals declared that the trial court erred in not terminating the parental rights of the putative father and abused its discretion by not granting the adoption petition. Therefore, once the puta-

tive father has been informed of the pregnancy and his alleged relationship to the child, he becomes responsible for staying in communication with the birth mom and providing her and her child financial support if he wants subsection (2) treatment at a termination hearing.

Fraud

Few students have graduated from law school without hearing the phrase "courts abhor fraud." This phrase has cross-disciplinary application in torts, contracts, property, and probate, among many others. In the area of adoption, one of the most famous cases in Michigan was one involving fraud by the birth mom lying about the identity of the putative father. The Michigan Supreme Court concluded it lacked jurisdiction to assist the adoptive parents who had custody of the adoptee for approximately two and a half years (*In re Clausen*) and ordered the trial court to adhere to the orders of the Iowa courts to transfer custody of the child back to the biological mother and former putative father, who had now married.

Similarly, another court of appeals remanded a case back to the trial court to complete a best interest analysis in a case where the birth mother had lied about the identity of a putative father. It stated:

Public policy does favor the certainty and permanence of probate court adoption orders. However, public policy does not favor the securing of such orders by fraud on the petitioner or upon the court. Since fraud upon both the petitioner and the court is alleged by the petitioner, it would appear that the court should at least hear the basis for these claims and inquire into their validity at an appropriate hearing.

Every adoption comes with the inherent risk that the birth mother may not correctly identify the birth father. In my experience, the vast majority of birth moms, even those who initially express great reluctance, will eventually disclose the identity of the correct birth father once the requisite assurances of confidentiality are given.

The mere allegation of fraud will not avoid a termination. In a case where the trial court acknowledged that the birth mother "may have thwarted [putative father's] participa-

tion in the pregnancy and that the adoption agency could have given him better counseling" the court determined (after an evidentiary hearing) that it was not in the best interest of the child to award custody to the putative father. This case illustrates that unsupported allegations of fraud will not prevail.

Child Support

One of the factors that can influence a putative father's decision to terminate his parental right is child support. Due to the limited financial resources available, some putative fathers find the termination of their parental rights and financial obligation appealing.

Note that Friend of the Court (FOC) practices differ from county to county as far as the timing of the termination of future child support payment is concerned. Some FOC offices terminate the support obligation as soon as they receive notice of the putative father's rights being terminated. Other FOC offices, recognizing that the putative father's appeal period has not run and that if the adoption is not granted, MCL authorizes trial courts to reinstate his parental rights, do not discontinue child support until the order of adoption is entered.

Michigan law expressly permits the termination of future child support obligations so that none are incurred after the adoption.

However, the Consent form expressly prohibits promising putative fathers “any money or anything of value for the consent to adopt [their] child, except for charges and fees approved by the court.” Many courts will not approve an agreement by the parents to dismiss putative father’s arrearages in exchange for his consent.

I offer the following final thoughts to an attorney attempting to accomplish an adoption involving a putative dad:

- First try to properly notify the putative father of the birth mom’s intent to place the child for adoption at least 30 days before estimated date of confinement.
- If you miss that date, you can still obtain voluntary consent by obtaining his written consent that is witnessed by another.
- Notice to putative father is required in advance of a hearing to terminate his parental rights against his will. He must receive personal service of the Notice of Hearing to Terminate Parental Rights (PCA 303). This may be a challenge if one is missing his address information but try filing a Declaration of Inability to Identify/Locate Father (PCA 315), which may convince the court to give you permission to serve the putative father with the Notice of Hearing by publication or regular mail.
- Abuse or neglect under 712A in any type of adoption (and evidence of failure to financially support and communicate in a stepparent adoption) will allow termination of a subsection (2) putative father’s parental rights and a showing that it is not in the best interest of the child to be placed in the custody of the putative father will allow the termination of a subsection (1) putative father.
- Lastly, in case you receive a favorable ruling, bring to your termination hearing the necessary orders for the court’s signature and notices for the parties. ◆

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