

Chapter 17 – Termination of Parental Rights

17.1 Overview

Termination of parental rights (TPR) stemming from child abuse and neglect is one of the most difficult proceedings over which a judge must preside. A TPR order divests the parents of any legal status with respect to the child, including all rights and privileges to have further contact and to be informed of the child's adoption and well-being. Simultaneously, it divests the child of any rights regarding or relationship with the biological parent. It has often been called the "death penalty" of dependency court, because of the seriousness and finality of a termination order severing all ties between a child and the biological parents. However, when parents are unable or unwilling to do what is necessary for a safe and timely reunification with their children, another permanency goal must be chosen. For the vast majority of dependent children, adoption is the preferred goal. Before a child can be adopted, parental rights must be terminated.

The federal Adoption and Safe Families Act (ASFA) and the Pennsylvania Juvenile Act require the child welfare agency to request a goal change and file a TPR petition when a child has been in foster care for 15 of the most recent 22 months.

In certain circumstances, these timeframes need not be strictly followed. These circumstances can include situations where a child is in the care of a relative who does not wish to adopt or the agency alleges, and the court approves, other compelling reasons that establish that termination of parental rights is not feasible or in the best interest of the child. Specific details as to the timeframes and exceptions are set forth in the Juvenile Act in 42 Pa.C.S. § 6351(f)(9). The Juvenile Act emphasizes the need for child permanency with the recognition that child development is enhanced in stable, permanent families and that delays in permanency are most often disadvantageous to the child.

Terminating parental rights can occur in three ways: through legal consent, voluntary relinquishment or involuntary termination. Both legal consent and voluntarily relinquishment may serve to preserve a parent's dignity while preventing a lengthy, contested hearing. However, the agency may sometimes oppose a consent or voluntary relinquishment and seek an involuntary termination in order to establish "aggravated circumstances" as to the parents' other children, present or future. (For more information on aggravated circumstances, see Chapter 20: General Issues, Section 20.2: Aggravated Circumstances)

A termination action can sever the rights of one or both parents, simultaneously or in separate proceedings. Regardless of the method used,

parents in TPR proceedings may experience a wide range of emotions that can be compounded with issues of mental illness, substance abuse or developmental disabilities, which may leave them confused about the process. Accordingly, it becomes incumbent on the court to ensure that all legal requirements under the Adoption Act and procedural due process requirements are strictly followed.

As is discussed more fully in Chapter 19: Adoption, when parental rights are terminated, the agency continues with legal custody of the child and becomes the intermediary. The agency has the responsibility to secure an adoptive family and the responsibility for finalizing the adoption within a reasonable timeframe. While having an identified adoptive resource is not a prerequisite for TPR, ideally there should be a strong likelihood of an eventual adoption.

Due to the constitutional issues, as well as the stresses naturally involved, termination of parental rights proceedings should be given high priority. Delaying or deferring termination often means missed opportunities in the life of a child. Moreover, when termination decisions are delayed, a child's emotional issues may deteriorate, negatively impacting timely permanence. A judge should make every effort to reduce delay in TPR hearings.

Best Practice — Active Judicial Oversight

The presiding judge should be actively involved in management of a TPR case and take steps to identify issues that may cause unnecessary delay (*Mission and Guiding Principles for Pennsylvania's Child Dependency System*, p. 14). The use of effective tools, such as pre-hearing conferences, mediation and other facilitation processes, can help identify any possible problems that may delay prompt disposition and can streamline the issues in dispute.

17.2 Jurisdiction of the Court

As is discussed more fully in Chapter 4: Jurisdiction, under 20 Pa.C.S. § 711, only judges with Orphans' Court authority are permitted to preside over TPR hearings in Pennsylvania. (The only exception is for Philadelphia, where 20 Pa.C.S. § 713 entrusts these matters to the Family Court Division.) However, in those judicial districts in which the jurisdiction of the Dependency Court and the Orphans' Court are separated by statute, the judge who hears the dependency matter may be permitted to have the authority of an Orphans' Court judge for the purpose of concluding the adoption of dependent children, including the TPR hearing, through a local order of the President Judge (42 Pa.C.S. § 6351(i)). (See also Chapter 4: Jurisdiction). Regardless of which judge is assigned to hear the case, all TPR proceedings are governed by Orphans' Court procedural rules and not the rules of juvenile court procedure.

17.3 TPR Petitions

Termination of parent rights proceedings begin with the filing of a petition to terminate parental rights (23 Pa.C.S. § 2512). While this petition is typically filed by the child welfare agency solicitor, it can also be filed by the child's guardian *ad litem*, by an individual with custody who intends to adopt the child or by one parent seeking to terminate the rights of the other. The petition must allege facts in sufficient detail to clarify the petitioner's legal and factual theory of the case and to give the parties notice of the issues.

Best Practice — Avoiding Delays

Courts can reduce delays by scheduling a pre-trial conference or utilizing alternative dispute resolution practices, such as mediation or facilitation, to resolve issues when possible.

Courts may also enhance efficiencies by scheduling practices that are based on time estimations provided by assigned counsel, by assigning the case to the judge who handled the juvenile proceedings and by assuring counsel is available to the parents prior to the hearing.

17.4 Scheduling of TPR Hearings

Given that a relatively high percentage of termination cases result in contested hearings, scheduling sufficient time for the proceeding is of utmost importance. Because issues are often complex and long-standing, and impact the constitutional rights of parents, sufficient time should be allowed for the parties to present evidence and testimony. If multiple days are needed, the court should make every effort to schedule the hearing on consecutive days.

17.5 Service and Notice

The court should ensure service was made in a proper and timely manner. The proof of service or the efforts attempted to provide service must be placed on the record.

Service of the TPR petition must be by personal service, by registered or certified mail return receipt requested or by means directed by the court (23 Pa.C.S. § 2513). Rule 15.6 of the Orphans' Court Rules (Pa.O.C. Rule) does not recognize first class mail as sufficient for notice of an *involuntary* TPR proceeding. The better practice is to require more than a first class mailing in every TPR case.

If whereabouts are unknown, or a parent's identity is unknown, service by publication may be required. The agency should recognize when to proceed with publication upon advice of its solicitor. The court may require it if not satisfied that proper service and notice has been made to any person.

If a petition seeks the *involuntary* termination of parental rights of any individual (including a putative parent), and service cannot be accomplished by personal delivery; or upon an adult member of the household; or by registered or certified mail to a last known address (returned as undelivered), Pa.O.C. Rule 15.4 and 15.6 provide for further notice by publication if required by general rule or special order of the local Orphans' Court. This additional step is not required under Pa.O.C. Rules 15.2 and 15.3 as to voluntary relinquishment petitions. Unknown persons, if a reasonable investigation was made, do not require notice under Pa.O.C. Rule 15.6.

Although not governing Orphans' Court proceedings, the note to Pa. R.C.P. No. 430 can provide some guidance as to good faith efforts to locate someone: "(1) inquires of postal authorities including inquiries pursuant to the Freedom of Information Act, (2) inquiries of relatives, neighbors, friends, and employers of defendant and (3) examinations of local telephone directories, voter registration records, local tax records and motor vehicle records." At a minimum the agency should indicate the steps taken under family finding and other resources available in the child welfare field.

Best Practice — Locating Absent Parents

Judges should insist on serious efforts to locate and notify parents when they are not present. Asking any parent or relative present at initial hearings on the record as to the whereabouts of missing parents should be encouraged.

The court should require the agency to develop standards to improve parent location early in the process, to utilize tools such as parent locator service, family finding strategies or to develop a set of form letters asking for information about missing persons and inquire of the local child support service agency (*Mission and Guiding Principles for Pennsylvania's Child Dependency System*, p. 10).

More information on locating absent parents can be found on the Locating Fathers & Establishing Paternity Bench Card (See Chapter 6: Entering the System)

The court should ensure that the record clearly reflects the efforts made to provide notice, whether they were reasonable and whether the court is satisfied that service and notice requirements have been met.

17.6 Appointment of Counsel

With respect to legal representation for both children and parents in TPR proceedings, 23 Pa.C.S. §2313 provides as follows:

Parent: The court must appoint counsel for a parent in an involuntary TPR proceeding if, upon petition of the parent, the court determines that the parent is unable to pay for counsel without substantial financial hardship (23 Pa.C.S. § 2313 (a.1)).

Child: The court must appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. The court *may* consider appointing the same attorney that served as the child’s guardian *ad litem* in the dependency proceedings as the child’s counsel in the TPR proceedings provided the attorney does not have a conflict of interest in representing the child as counsel. The former GAL would be familiar with the case and should have an established relationship with child. (*In re Adoption of L.B.M.*, 639 Pa. 428, 161 A.3d 172 (2017) and *In re T.S.*, 639 Pa. 428, 192 A.3d (2018)). No attorney or law firm is permitted to represent the child and the adopting parents simultaneously (23 Pa.C.S. § 2313 (a)).

Best Practice — Appointment of Counsel

While parents have a right to appointed counsel only if they petition the court and show that they are unable to afford their own without “substantial hardship”, it might benefit the court to devise a process whereby counsel are made available to all parents. This saves valuable court time, prevents possible reversals on appeal and promotes timely permanence for children (23 Pa.C.S. § 2313(a.1)).

17.7 Discovery

Discovery in Orphans’ Court matters is currently governed by local procedure. In the absence of a local rule, discovery matters are to be handled according to the Pennsylvania Rules of Civil Procedure.

In most counties discovery is handled on an informal basis. In a TPR proceeding, courts should require the agency to make the discoverable material in

their files available to counsel and establish timeframes to respond to discovery requests. All reports should be sent to counsel and the parents well in advance of trial and prior to submission to the judge, giving the parties an opportunity to prepare responses or present alternative evidence.

Finally, the court should ensure a full and adequate Orphans' Court record for appellate review by making the dependency record — including the original dependency petition and all orders that followed it — a part of the TPR record.

17.8 Continuances

Delays of any kind should be discouraged by the court. One of the most common causes of delay in TPR proceedings can be traced back to omissions in the early stages of the dependency process, such as failure to identify the father. When a non-custodial parent is identified and brought into the process as early as possible, it becomes more likely to achieve an earlier resolution. If the parent is not located early in the process, it will be difficult to meet this standard and may delay permanency for the child. (For more information about locating absent parents see Chapter 6: Entering the Child Welfare System.)

Efficient management and court oversight can eliminate many systemic sources of delay. This includes issues regarding notice, scheduling, appointment of counsel and continuity between the Dependency and Orphans' Court proceedings.

Best Practice — Limiting Continuances

Establishing strict criteria for granting continuances can reduce delays. The court should consider the welfare of the child in deciding any party's request for continuance.

17.9 TPR Methods

Parental rights can be terminated through three different processes: Alternative Procedure for Relinquishment (often referred to as Consent to Adoption), Voluntary Relinquishment of Parental Rights and Involuntary Termination of Parental Rights.

Best Practice — One Judge/One Family

Having a One Judge/One Family system is extremely beneficial in cases culminating in TPR proceedings. The judge presiding over the matter has become well-acquainted with the family's situation and the attempts made by the agency to bring together a better and stronger family. The judge benefits greatly from this knowledge and perspective when it becomes necessary to consider a TPR.

17.9.1 Relinquishment under the Alternative Procedure (Consent)

A parent or parents may choose to give up their parental rights through the consent procedure under 23 Pa.C.S. § 2504. Unlike a voluntary relinquishment, consent does not require the parent or parents' appearance at the court hearing.

The alternative procedure requires that the parent or parents each execute a Consent to Adoption. Once the consent is executed, counsel for the intermediary (the child welfare agency solicitor) must file a petition to confirm consent to adoption (with the consents attached) with the Clerk of the Orphans' Court. Upon receipt, a hearing for the purpose of confirming a consent to an adoption must be scheduled.

The statutory language for a consent is contained in 23 Pa.C.S. § 2711-12 of the Adoption Act. The consent requires two witnesses, and cannot be signed until 72 hours after the birth of the child. A written consent may be revoked by the consenting parent up to thirty days after signing. This revocation must be written and delivered to the adoption agency, the attorney handling the matter or the court scheduled to hear the matter. In regards to consents that are offered from a parent who resides outside of the Commonwealth, 23 Pa.C.S. § 2711(c) provides that the consent is valid if it was given in conformity to the law of the jurisdiction where it was signed.

The hearing on the Petition to Confirm Consent must be scheduled ten or more days after the petition is filed. Notice of the hearing must be given to the relinquishing parent(s) and other parent, to the putative parent whose rights could be terminated and to the parents or guardians of a consenting parent who is a minor. Notice must be provided by personal service or registered mail or by such other means as the court may require upon the consenter and shall be in the form provided in section 23 Pa.C.S. § 2513(b).

17.9.2 Voluntary Relinquishment

Parents may also petition the court to voluntarily relinquish their parental rights to the agency (or in some cases to an adult intending to adopt) under 23 Pa.C.S. § 2501-2502.

While the Adoption Act requires the filing of a petition prior to the court hearing a parent's voluntary relinquishment of parental rights, in dependency matters this may not be done routinely. Often a voluntary relinquishment occurs after the filing of a petition for involuntary termination of parental rights. In essence, the petition for involuntary termination is filed, but, prior to the TPR hearing, the parent decides to voluntarily relinquish. When this occurs, the court can adopt the involuntary relinquishment petition as the petition for voluntary relinquishment and in doing so can simultaneously meet all legal requirements and eliminate delay.

In accepting the voluntary relinquishment of the parent, the judge should take extraordinary steps to ensure the relinquishment is knowingly, intelligently and voluntarily made. The judge should make sure the parent understands the consequences of relinquishment and is fully aware of the right to have a trial to contest the matter. One method used by many courts is a colloquy that both informs and solicits responses as the basis for the court's determination. A sample colloquy is offered at the end of this chapter.

Best Practice — Making the Record

Often, in both voluntary and involuntary terminations, the parents will not appear at the hearing. In either instance it is important for the judge to make a proper record. The record should address that proper notice was provided to the parents and the specific reasons for the termination.

During the hearing, the judge should inquire about whether the parties have reached a voluntary agreement for continuing contact, commonly referred to as a post-adoption contact agreement or open adoption agreement, and whether anyone offered a post-adoption contact agreement in exchange for the voluntary termination of parental rights.

17.9.3 Post-Adoption Voluntary Contact Agreements

This agreement (found in 23 Pa.C.S. § 2731-2742), entered into by the birth family and the adoptive family, as well as a child age twelve and older, provides for contact between the adoptee or adoptive parents and the birth relatives. The agreement, set in writing and submitted to the court for approval, may include varying degrees of contact ranging from annual pictures provided to the birth family by the adoptive family to phone call, emails or visits between birth relatives and the adoptee.

Considerations for the court's approval, as outlined in 23 Pa.C.S. § 2735 (B), include:

1. Entered into by all parties in a knowing and voluntary manner as documented by an accompanying affidavit of such;
2. And it is in the best interest of the child to approve the agreement. Factors in this determination may include, but are not limited to:
 - i. Length of time the child has been in the care of someone other than the birth parent;
 - ii. Interaction and relationship of the child with birth relatives (defined by 23 Pa.C.S. § 2732 as parent, grandparent, stepparent, sibling, uncle or aunt by blood, marriage or adoption);
 - iii. The child's adjustment in the home, school and community;
 - iv. Willingness and ability of birth relatives to respect and appreciate the relationship of the child and the adoptive family;
 - v. Willingness and ability of the adoptive family to respect and appreciate the relationship of the child and the birth relatives;
 - vi. And any evidence of abuse or neglect of the child.

It should be noted that the child's siblings whose parental rights have also been terminated but are not being adopted by the adoptive family of the child, should be represented by a guardian *ad litem* during the development of the agreement. Agreements are enforceable upon the filing of an action in court by any party but failure to comply with the agreement shall not set aside the adoption decree. Requests for modification of the agreement can be brought only by the adoptive parent or a child twelve years of age or older. The court must find clear and convincing evidence that modification of the agreement is in the child's best interest and meets his/her needs and welfare (23 Pa.C.S. § 2737 (B)). The agreement ceases to be enforceable once the child turns eighteen.

17.9.4 Involuntary Termination

The "Involuntary Termination" section of the Adoption Code, 23 Pa.C.S. § 2511-13, applies to situations in which a parent refuses to relinquish parental rights. In this situation, the petitioner is typically the county child welfare agency.

An agency's initiation of an involuntary termination proceeding often comes at the end of months of substantial efforts by the agency to rehabilitate and reunite the family, efforts which ultimately proved unsuccessful. For this reason, it is important that the agency document the services given to the parents and their failure to make progress toward reunification.

While the law provides eleven distinct grounds for involuntary termination of parental rights, discussed in detail below, the most common grounds in cases where the agency is pursuing termination are abandonment, repeated and continued incapacity, services offered by the agency to rectify the situation that led to removal are not likely to remedy the condition within a reasonable time period,

and conditions that led to removal continue to exist twelve or more months after removal. In evaluating the petition for termination of parental rights, the positions of the parties and the testimonial evidence from the hearing, the judge must examine whether there is **clear and convincing evidence** of parental conduct meeting the statutory requirements for involuntary termination. If so, the judge must consider the effect of the proposed termination on the child and whether termination is in the child's best interests. In making this assessment, the court must consider the extent to which a bond exists between the child and parents and, if a bond exists, the impact that severing the bond will have on the child. The finding of a bond does not preclude termination of parental rights. Instead, the judge's approach must be two-pronged — first evaluating the existence of a bond, then the impact that severing the bond will have on the child.

When rendering a decision with regard to a pending Petition for Involuntary Termination of Parental Rights, it is essential that the statutory requirements of each section be met. It is also helpful to the court to set forth a history of the placement of the child. This should include a factual summary in addition to the grounds on which involuntary termination has been based. Including the date of initial referral to the agency, date of adjudication of dependency, history of placement(s) and copies of all court orders can assist in building the record for the judge's decision.

Best Practice — Combined Hearings

In many counties, the Permanency Hearing in which a goal change to adoption is being considered and the TPR Hearing are combined. Combining these proceedings results in one appeal, which can expedite the appellate process and enhance timely permanence for children.

17.10 Grounds for Involuntary Termination

Under 23 Pa.C.S. § 2511(a), an involuntary termination of parental rights may be granted under any of the following grounds:

- (1) The parent, by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.** In cases in which this ground is alleged, the court should pay attention to the amount and regularity of the parent's visits with the child, attendance at medical and educational appointments, ongoing contact between the parent and child, whether the parent evidenced a commitment to the child and the ultimate goal of reunification, utilized the opportunities offered by the agency,

provided gifts, cards, or letters and made contact with the child a more serious priority than personal needs. Similarly important is whether the agency made visitation and contact with the child workable, in light of the parent's family situation, work schedule and transportation requirements. Lastly, the court should consider, if anyone placed obstacles between the parent whose rights are to be terminated and the child, did the parent make reasonable efforts to overcome the obstacles to form/maintain the parent-child relationship. (*In re Burns*, 379 A.2d 535 (Pa. 1977)).

(2) The repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his or her physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent. When proceeding under this provision, the agency is not constrained by timeframes. At the same time, parental incapacity, such as substance abuse or involvement in the criminal justice system, does not automatically cause the child to be “without essential parental care, control, or subsistence necessary for his or her physical or mental well-being.”

The Pennsylvania Supreme Court reviewed its precedent regarding petitions for termination of parental rights filed against incarcerated parents in two cases. After considering the issue in *In re R.I.S.*, 36 A.3d 567, 574 n.4 (Pa. 2011), the court in *In re Adoption of S.P.*, 47 A.3d 817, 830 (Pa. 2012) held that “incarceration, while not a litmus test for termination, can be determinative of the question of whether a parent is incapable of providing ‘essential parental care, control or subsistence’ and the length of the remaining confinement can be considered as highly relevant to whether ‘the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.’” *Id.* (quoting 23 Pa.C.S. § 2511(a)(2)). The justices concluded that such determinations related to incarceration can provide sufficient grounds for termination under Section 2511(a)(2). The court also reasserted that appellate courts must apply an abuse of discretion standard in reviewing termination of parental rights decisions and must “defer to the trial judges so long as the factual findings are supported by the record and the court's legal conclusions are not the result of an error of law or an abuse of discretion.” *Id.* at 827.

Finally, parental rights may not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent.

(3) The parent is the presumptive but not the natural father of the child.

(4) The child is in the custody of an agency, having been found under such circumstances that the identity or whereabouts of the parent is unknown and cannot be ascertained by a diligent search for the parent which has been made and the parent does not claim the child within three months after the child is found.

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child. The court must determine on a case-by-case basis whether the parent has had sufficient time to correct the problems leading to the child's removal or placement, considering the number and severity of the problems to be corrected and the child's best interests. Also relevant is to what extent services offered were truly "available" to the parent financially and geographically and addressed the issues that necessitated placement. However, a parent's current vow to cooperate with services offered, after a long period of uncooperativeness regarding the necessity or availability of services, may be rejected by the court as untimely or disingenuous. (*In the Interest of K.Z.S.*, 946 A.2d 753 (Pa. Super. 2008)).

(6) In the case of a newborn child, the parent knows or has reason to know of the child's birth, does not reside with the child, has not married the child's other parent, has failed for a period of four months immediately preceding the filing of the petition to make reasonable efforts to maintain substantial and continuing contact with the child and has failed during the same four month period to provide substantial financial support for the child.

(7) The parent is the father of a child conceived as a result of rape or incest.

(8) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, twelve months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist and termination of parental rights would best serve the needs and welfare of the child.

(9) The parent has been convicted of one of the following in which the victim was a child of the parent:

- I. an offense under 18 Pa.C.S. Ch. 25 (relating to criminal homicide);**
- II. a felony under 18 Pa.C.S. § 2702 (relating to aggravated assault);**
- III. an offense in another jurisdiction equivalent to an offense in subparagraph (i) or (ii); or**
- IV. an attempt, solicitation or conspiracy to commit an offense in subparagraph (i), (ii) or (iii).**

(10) The parent has been found by a court of competent jurisdiction to have committed sexual abuse against the child or another child of the parent based on a judicial adjudication as set forth in paragraph (1)(i), (ii), (iii) or (iv) or (4) of the definition of “founded report” in section 6303(a) (relating to definitions) where the judicial adjudication is based on a finding of “sexual abuse or exploitation” as defined in section 6303(a).

(11) The parent is required to register as a sexual offender under 42 Pa.C.S. Ch. 97 Subch. H (relating to registration of sexual offenders) or I (relating to continued registration of sexual offenders) or to register with a sexual offender registry in another jurisdiction or foreign country.

As previously mentioned, sections (a)(1),(2),(5), and (8) are the provisions most commonly cited when the agency moves to terminate parental rights on an involuntary basis. With respect to any petition filed pursuant to subsections (a)(1), (6) or (8), the court **shall not** consider any efforts by the parent to remedy the conditions described in the petition if they are first initiated subsequent to the giving of notice of the filing of the petition (23 Pa.C.S. § 2511(b)).

While rare, there may be cases in which the court may refuse to terminate parental rights even if grounds to do so exist (*In re R.L.T.M.*, 860 A.2d 190 (Pa. Super. 2004)). The court must take into account the impact of severing close parental ties and the resulting pain this may cause the child when considering the “best interests of the child” standard (*In re Adoption of K.J.*, 936 A.2d 1128 (Pa. Super. 2007)).

17.11 Additional Considerations in Involuntary Termination Cases

17.11.1 Parent-Child Bond Issues

Once the court has reached a determination that grounds for involuntary termination have been met under 23 Pa.C.S. § 2511(a), consideration of the parent-child bond under 23 Pa.C.S. § 2511(b) is required.

Further, 23 Pa.C.S. § 2511(b) requires a court considering terminating the rights of a parent to “give primary consideration to the developmental, physical and emotional needs and welfare of the child.” This statutory provision does not use the term “bond” however, appellate case law has established that in every case the Orphans’ Court must evaluate the emotional bond, if any, between the parent and child, as a factor in the determination of the child’s developmental, physical and emotional needs (*In the Matter of K.K.R.-S.*, 958 A.2d 529 (Pa. Super. 2008)). Failure to make these findings is “reversible error.” Accordingly, the record should reflect that the parties have presented relevant evidence not just as to the grounds for termination, but also as to the effect a TPR would have on the child. Such evidence must be carefully evaluated by the judge, with specific findings under section 2511(b) set forth in the decision, as well as any opinion issued in support of TPR.

Best Practice — Bond Findings

The trial court should always make clear findings of fact as to the nature and strength of the bond and relationship of the child with the parents or guardians and with the foster parents. Even when not challenged on appeal, the appellate courts have made this a critical issue to be addressed in the trial court’s decision and this analysis should be included in the trial court’s opinion (*In Re. C.L.G.*, 956 A.2d 999 (Pa. Super. 2008) (en banc)).

The evidence typically proffered for this aspect of the TPR proceeding includes, in addition to any testimony by the parent and child:

- Observations of the caseworkers or others of the interactions between parent and child at visits or at other times they are in contact, such as at the courthouse for hearings;
- Testimony of kinship providers or foster parents as to the child’s behaviors before or after visits or telephone calls with a parent;
- The nature and amount of requests by a parent or child for more visits or contact between them;
- Efforts of a parent to maintain a close relationship with their child;
- The absence of contact or missed visits negatively affecting the child; and

- Expert testimony with respect to a bonding assessment, consisting of interviews and observations by the evaluator;

Practice varies with respect to formal bonding assessments in Pennsylvania; in some counties they are rare, in others they are routine. Neither the statute nor case law requires the Orphans' Court in a TPR proceeding to order that a formal bonding evaluation be performed by an expert (*In the Matter of K.K.R.-S.*, *supra*). There are certain cases where the judge may conclude that one should be done to aid in the final decision-making, as in *In the Interest of K.Z.S.*, 946 A.2d 753 (Pa. Super. 2008), calling this a "wise approach" but also recognizing it is not always needed and that the evaluation process itself in some instances may be detrimental to the child.

Whether a bond exists, however, is not the full extent of the inquiry; rather, it is whether the bond indicates a beneficial relationship that should be preserved (*In re C.L.G.*, 956 A.2d 999 (Pa. Super. 2008)) [bond stronger with foster parents]. The presence of some bond does not preclude a TPR, as even an abused child may harbor some emotional attachment to an abusive parent. If the court finds there is a bond between the parent and child, a second analysis must determine whether the bond is worth saving and whether it can be severed without irreparable harm to the child (*In the Interest of K.Z.S.*, *supra* at 764).

Addressing the issue of foster care drift, the Pennsylvania Supreme Court recognized "the challenges facing the foster care system when children have understandably strong, even if unhealthy, bonds to biological parents who have proven incapable of parenting." In *In re T.S.M.*, 71 A.3d 251, 253 (Pa. 2013) the court reversed the trial court's denial of termination and instead ordered the court to grant termination of mother's parental rights based upon "the substantial, possibly permanent, damage done to these children by the prolonged, unhealthy, pathological bond with [their m]other, especially as it affected the children's ability to form attachments to foster families who could have provided the necessary love, care and stability that these children have so needed for the past decade." *Id.* at 271. The court instructed that trial "courts must determine whether the trauma caused by breaking that bond is outweighed by the benefit of moving the child toward a permanent home." *Id.* at 253.

In the final analysis, the needs and welfare of the child are paramount. Thus, a TPR under section 2511(b) is appropriate to provide a child "with the permanence necessary for the 'fulfillment' of her potential in a permanent, healthy and safe environment" (*In re C.L.G.* at 1011).

17.11.2 Putative Fathers

Under 23 Pa. C.S.A. § 2503, the court may enter a decree terminating the parental rights of a putative father who (1) fails to appear at the TPR hearing for the purpose of objecting to termination of his parental rights, (2) fails to file a written

objection to such termination before the hearing and (3) has not filed an acknowledgment of paternity or claim of paternity.

Petitioner's counsel is tasked with meeting notice and service requirements in situations involving a putative or an unknown father, despite that parent's anonymity (Pa.R.C.P.No.107, 430, 1018, 1018.1). As noted earlier, with leave of court, and after a diligent search, the unknown parent may be notified by publication.

17.11.3 Incarcerated Parents

Incarcerated parents present particular issues for a judge's consideration. First, it is well established that incarceration alone is not sufficient to support termination under any subsection of 23 Pa. C.S. § 2511 (a) (*In re Adoption of C.L.G.*, 956 A.2d 999, 1006 (Pa. Super. 2008)). On the other hand, a parent's incarceration does not preclude termination of parental rights if the incarcerated parent fails to utilize given resources and to take affirmative steps to support a parent-child relationship (*In re D.J.S.*, 737 A.2d 283 (Pa. Super. 1999)). Incarceration is but one factor the judge must consider in analyzing a parent's performance. While incarcerated, a parent is expected to utilize whatever resources are available to him in order to foster a continuing close relationship with his children (*Adoption of Baby Boy A.* 517 A.2d 1244, 1246 (Pa. 1986)). Where the parent does not exercise reasonable firmness in "declining to yield to obstacles" his parental rights may be forfeited (*In re A.L.D.*, 797 A.2d 326 (Pa. Super 2002)).

Additionally an incarcerated parent's responsibilities are not tolled during incarceration. The judge must inquire whether the parent utilized available resources to maintain a close relationship with the child while he or she was in prison (*Id.* at 1006). A parent is expected to be steadfast in overcoming obstacles to maintaining the parent-child relationship (*In re Burns*, 379 A.2d 535 (Pa. 1977)).

Assessing the parent-child bond is also problematic and challenging when a parent is incarcerated. Often, the child has either had minimal contact or no contact with the incarcerated parent. In these circumstances, direct interaction between the parent and the child could be detrimental to the child. For example, where the children had no contact with the mother for two years because of her incarceration, the judge could consider a bonding assessment that was not based on observation of the children interacting with their mother because the expert testified that a brief reunion with the mother followed by no further contact, if termination occurred, could be harmful for the children (*In re K.C.F.*, 928 A.2d 1046, 1052 (Pa. Super. 2007)).

Clearly, each case of an incarcerated parent facing termination must be analyzed on its own facts, keeping in mind, with respect to terminations sought on the ground of "continued incapacity" under 23 Pa.C.S. § 2511 (a)(2), that the child's

need for consistent parental care and stability cannot be put on hold simply because the parent is doing what she is supposed to be doing in prison (*In re E.A.P.*, 944 A.2d 79, 84 (Pa. Super. 2008)). The court is not required to consider if the agency provided reasonable services to reunite the child and parent. (*In re D.C.D.*, 629 Pa. 325, 105 A.3d 662 (2014)).

In making its determination, the court should consider the following factual matters:

- Participation in prison parenting programs;
- Completion of required programs, such as sexual offender's counseling, drug and alcohol counseling, domestic violence counseling or anger management counseling;
- Period of incarceration, earliest release date. (Has the parent been, or will he/she be incarcerated much of the child's young life?);
- Whether the parent has written to the child during incarceration (*In re C.S.*, 761 A.2d 1197 (Pa. Super. 2000));
- Parent's ability to articulate a plan as to housing for the child and employment following release; and
- Whether the parent maintained communication with CYD to provide requested information or consents (*In re D.J.S.*, 737 A.2d 283 (Pa. Super. 1999));
- Rehabilitation from criminal activity (*In re C.S.*, 761 A.2d 1197 (Pa. Super. 2000));
- Disciplinary record while incarcerated;
- Parole or probation violations and revocations;
- Recidivism.

17.12 Decree of Termination of Parental Rights

After the TPR hearing, the court may enter a decree of termination of parental rights. As articulated in 23 Pa.C.S. § 2521, the effects of a decree of termination include:

Loss of right to object to adoption. The decree extinguishes all rights of the parent to object to or receive notice of adoption proceedings.

Award of custody. The decree gives custody of the child to the agency (or the petitioner, if the TPR was sought by a person seeking to adopt).

Authority of agency or person receiving custody. The recipient of custody stands *in loco parentis* to the child and may exercise whatever authority a natural parent has, including authority to consent to marriage, to enlistment in the armed forces and to major medical, psychiatric and surgical treatment.

At the time the transmittal of a decree of termination, the judge must advise terminated parents, in writing, of their continuing right to place and update personal and medical history information on file with the court and with the Department of Human Services (23 Pa.C.S. § 2503).

Best Practice — Findings and Orders

Making a good record from the beginning can make the writing of the Opinion easier in a case that is appealed. The court can bypass the need to write an Opinion by pointing to the place in the record where the reasons for its decision appear (Pa.R.A.P. 1925(a)). This procedure may aid in meeting the Children's Fast Track timelines in an appeal situation. (For more information, see Chapter 18: Appeals)

Sample Voluntary Relinquishment of Parental Rights Colloquy

The court has been informed that you want to enter a voluntary relinquishment of your parental rights to (child's name and date of birth). In order to accept your voluntary relinquishment of parental rights, the court must complete a colloquy. The colloquy is a series of questions that will help the court determine if you fully understand what voluntary relinquishment is and ensure the court that you are relinquishing your parental rights voluntarily, intelligently, and fully aware of what it means and what the possible consequences of your relinquishment are.

1. What is the highest grade you completed in school?
2. Do you read, write, and understand English?
3. Have you taken anything into your body today that would affect your ability to understand or participate in today's proceedings?
4. Have you received treatment for any mental illness or disability with the past six months?
5. The court was told that you want to enter a voluntary relinquishment of your parental rights to (child's name and date of birth) today. Is that correct?
6. Do you understand that you do not have to agree to have your parental rights terminated?
7. Do you understand you have the right to counsel?
8. Do you understand you have the right to require the agency to prove by clear and convincing evidence that your parental rights should be terminated?
9. Do you understand you have the right to have a trial where the agency could call witnesses?
10. Do you understand at that trial you could cross examine the agency's witnesses, call your own witnesses, and testify on your own behalf?
11. Do you understand if you testify on your own behalf, the agency and GAL could cross-examine you?
12. Do you understand that the GAL is here to represent your child's best interest, that he/she participates in the trial and ultimately makes a recommendation as to whether your rights should be terminated or not?
13. Do you understand that if you voluntarily relinquish your rights, you give up or waive all those things we just discussed?

14. Understanding this, do you wish to voluntarily relinquish your rights to (child's name and date of birth)?
15. Do you understand that if you voluntarily relinquish your parental rights your rights to (child name/age) are forever ended and your child will be placed for adoption?
16. Once the court finds that you entered this voluntary relinquishment your parental rights to (child name/age) are forever terminated. Do you understand that?
17. Have you had enough time to talk about this with your attorney?
18. Are you satisfied with your attorney's representation?
19. Do you have any questions about anything your attorney told you?
20. Do you have any questions about anything I just explained?
21. Has anybody made any promises or threats to get you to voluntarily relinquish your parental rights?
22. Do you believe it is in your best interest and your child's best interest to voluntarily relinquish your parental rights?
23. Is there anything you might want to put on this record right now that you may want your child someday to know?



TERMINATION OF PARENTAL RIGHTS HEARING BENCHCARD



Relevant Statutes and Rules	<p>23 Pa.C.S. § 2511(a)(1) – (9) (grounds) and 2511 (b) (emotional bond/needs and welfare);</p> <p>Pennsylvania Orphans’ Court Rules 15.2, 15.3, 15.4 and 15.6</p>
Purpose of Hearing	<p>Divests parents’ legal status and contact. This can be by a contested involuntary termination; a voluntary relinquishment, or a petition to confirm consent (see section 16.9 of this chapter).</p> <p>It is often referred to as a “death penalty” proceeding due to the finality of the TPR order which severs all ties between the child and parent.</p>
Time Frame	<p>The federal Adoption and Safe Families Act (ASFA) and the Pennsylvania Juvenile Act require the child welfare agency to file a TPR petition when a child has been in foster care 15 of the most recent 22 months.</p> <p>The Adoption Act does not bar bringing the petition sooner than the ASFA requirements, so long as one of the eleven grounds for TPR as set forth in 23 Pa.C.S. § 2511 are present.</p>
Rules of Evidence	<p>The formal rules of evidence in Orphans’ Court apply. The burden of proof on the petitioner is to establish at least one of the statutory grounds for TPR by “clear and convincing evidence”.</p>
Next Hearing	<p><u>Finalization of Adoption Hearing</u>: If an appeal is taken, file a statement of reasons or prepare an opinion as per the Fast Track Rules.</p> <p>Until such time that the appeal is resolved, the adoption is finalized and dependency is terminated, statute requires Permanency Hearings at a minimum of every six months.</p> <p>Best practice is to conduct review hearings a minimum of every 3 months.</p>



TERMINATION OF PARENTAL RIGHTS HEARING

SUMMARY OF KEY QUESTIONS/DETERMINATIONS



- Is each parent identified (paternity established)?
- What is the explanation as to any parent not present?
 - Was proper notice provided? (*The Court must put on the record that service or notice was delivered in a proper, timely manner.*)
- Does each parent have proper legal representation?
- If a consent (and parent is in attendance) or voluntary relinquishment by parent, has there been a complete colloquy with the parent(s) as to his or her understanding of the rights surrendered (*see sample colloquy at the end of this chapter*)?
- Has the agency met its burden as to one or more of the statutory grounds under 23 Pa.C.S. § 2511(a)? (*The court must identify on the record one or more specific grounds for termination (under 23 Pa.C.S. § 2511(a)).*)
- Has the agency incorporated into the record all of the prior determinations and proceedings of the Juvenile Court?
- Have the relevant exhibits been formally admitted into evidence and made a part of the record?
- Has there been adequate evidence presented as to the consideration under 23 Pa.C.S. § 2511(b) of any emotional bond between parent and child? (*The court must make a statement on the record regarding bond.*)
- What effect would an order of TPR have on the child? (*The court must make a finding that the needs and welfare of the child are met through the granting of TPR.*)
- Has an adoptive home been identified (only as a consideration for needs and welfare)?
- Is the attorney for the child present and prepared to provide a considered recommendation?

These questions are adapted from the text of this chapter, the *Mission and Guiding Principles for Pennsylvania's Dependency System* and the Termination of Parental Rights Hearing Benchcard provided in the *Enhanced Resource Guidelines* (NCJFCJ, 2016, pp. 363-377).