CHAPTER 9:
Termination of Parental Rights

9.1 PURPOSE OF TERMINATION OF PARENTAL RIGHTS

The policy of the Child Protective Act (CPA) is to preserve the unity of the family to the fullest extent.[1] Thus, prior to consideration of termination of parental rights (TPR), the Department 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.[2] After reunification, termination of parental rights and adoption is the next preferred permanency goal, because it ensures the child a permanent lifetime family.[3]

The voluntary or involuntary termination of the parent-child relationship severs all legal rights between a child and his or her parents and frees the child for adoption. After an order of termination, parents are no longer entitled to notice of court proceedings concerning the child, to have contact with the child, to be informed of matters concerning the child, or to be involved in decisions regarding the child. An order of termination of parental rights ends the duty of a parent to continue to support the child.[4]

9.2 TIMING OF TPR PROCEEDINGS WITHIN A CPA CASE

A. Generally

The court in a CPA case retains exclusive jurisdiction over the child until the permanency goal is achieved, or until the child turns 18 (whichever comes first).[5] When the permanency goal for the

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Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. § 16-1601(1) (2009)*; see also* § 16-2001(2).

[2] *See id.* § 16-1615(5)(b) (Supp. 2014) (requiring reasonable efforts to eliminate the need for shelter care); *id.* § 16-1619(6)(a) (requiring reasonable efforts to eliminate the need for foster care); *id.* § 16-1621(3) (requiring case plan to set forth reasonable efforts to make it possible for child to return home). Section 16-1602(5) defines aggravated circumstances. Pursuant to that provision, where a court makes the finding that a parent's maltreatment of a child constitutes aggravated circumstances, no efforts to reunify the parent and child are required. *See also* 45 C.F.R. § 1356.21(b)(3)(i) (2012). Requirements are different if the child is an Indian child. *See* Chapter 11 for more information about the requirements of the Indian Child Welfare Act (ICWA).

[3] 42 U.S.C. § 622(b)(8)(A)(iii) (2012); 42 U.S.C. § 675(5)(C).

[4] § 16-2011 (2009). ("An order terminating the parent and child relationship shall divest the parent and the child of all legal rights, privileges, duties, and obligations, including rights of inheritance, with respect to each other.")

[5] § 16-1603(1) (Supp. 2014), § 16-1604.

child is termination of parental rights and adoption, the CPA case remains open until the adoption is finalized. When termination of parental rights is sought with respect to a child who is the subject of a CPA proceeding, the petition to terminate parental rights must be filed in the CPA proceeding.[6]

One of the goals of the CPA is to achieve permanency for the child in a manner that takes into consideration the significance of time in a child's life. One of the ways the statute and court rules seek to achieve this goal is by setting overall time standards for finalizing the permanency goal for the child, and by setting time standards for significant events in the course of a CPA proceeding. One of those significant events is the filing of the TPR petition.

In cases where aggravated circumstances are not found, reasonable efforts to reunify are required, and the overall time standard for finalizing termination of parental rights and adoption is two years from the date of removal.[7] The time standard for filing the TPR petition varies, depending on the circumstances that brought the child into state custody, and whether efforts will be made to reunify the child with the birth parent(s), and the extent to which progress has been made toward reunification. In cases where aggravated circumstances are found, reasonable efforts to reunify are not required, and the overall time standard for finalizing termination of parental rights and adoption is one year from the date of removal.[8]

B. Child in State Custody for 15 of the Most Recent 22 Months

In cases where there is no judicial determination that the child was subjected to aggravated circumstances, a case plan is adopted that includes a reunification plan.[9] The federal Adoption and Safe Families Act and the CPA place a time standard on achieving reunification, by requiring the Department to file a petition for TPR if a child has been in the temporary or legal custody of the department for 15 of the most recent 22 months.[10] The CPA requires the petition to be filed prior to the last day of the 15th month, unless the court finds that:

1. The child is placed permanently with a relative.
2. There are compelling reasons why termination of parental rights is not in the best interests of the child, or
3. The Department has failed to provide reasonable efforts to reunify the child with his or her family.[11]

C. Court-Approved Permanency Plan with a Permanency Goal of TPR and Adoption

The court is required to hold permanency hearings annually.[12] The purpose of the permanency hearing is to determine the permanency goal for the child and the plan for achieving that goal,

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[6] § 16-1624(1); IDAHO JUV. R. 48(a).
[7] IDAHO JUV. R. 46(a). Case planning and permanency planning are discussed in detail in Chapters 6 and 7 of this manual. The permanency plan includes a schedule for achieving permanency within the time standard, and that schedule is included in an order of the court. Amendment to the plan to extend the time must be approved by the court. IDAHO JUV. R. 44(b)(2), (3); IDAHO JUV. R. 46.
[8] IDAHO JUV. R. 44(b)(2).
[9] § 16-1621(1).
[10] 42 U.S.C. § 675(5)(E) (2012); 45 C.F.R. § 1356.21(i)(i)(A) (2012); § 16-1622(2)(g).
[11] § 16-1622(2)(g).

including time guidelines. If the court approves a permanency plan with a permanency goal of TPR and adoption, the Department is required to file a TPR petition within 30 days of the order approving the permanency plan.[13]

Both the CPA and court rules specifically provide that a TPR petition can be filed at any time after entry of the adjudicatory decree finding the child within the purview of the CPA.[14] The court may hold a permanency hearing and approve a permanency plan with a permanency goal of TPR and adoption at any time.[15] In addition, the prosecutor has discretion to file a TPR petition at any time after entry of the adjudicatory decree when the prosecutor has determined that the state has sufficient evidence to meet its burden of proof.

D. Aggravated Circumstances

Reasonable efforts to reunify a child with a parent are not required where the parent has subjected the child to aggravated circumstances, and when the court finds aggravated circumstances, the CPA case proceeds to planning for permanent placement for the child.[16] The Department is required to file a TPR petition within 30 days of a judicial determination of aggravated circumstances, unless there are compelling reasons why TPR would not be in the best interest of the child.[17]

E. Abandoned Infant

The CPA requires the Department to file a TPR petition within 30 days of a judicial determination that an infant has been abandoned, unless there are compelling reasons why TPR is not in the best interest of the child.[18] If the infant was abandoned pursuant to the Idaho Safe Haven Act, the Department must file a TPR petition as soon as possible after the initial 30-day investigation period.[19]

9.3 PROCEDURAL ISSUES GOVERNING TPR PROCEEDINGS

When the child is subject to the court's jurisdiction under the CPA, a TPR petition must be filed *within* the CPA case.[20] The same guardian *ad litem*, assigned caseworker, and attorneys continue to participate in the case, reducing delays and improving representation and decision-making.[21]

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[12] § 16-1622(2)(b).
[13] IDAHO JUV. R. 46(b).
[14] § 16-1624(1), IDAHO JUV. R. 48(a).
[15] § 16-1622(2)(b), (c).
[16] 45 C.F.R. § 1356.21(b)(3) (2012); § 16-1619(6)(d) (Supp. 2014). Aggravated circumstances is discussed in detail in Chapter 3 of this manual.
[17] § 16-1624(3). A finding of aggravated circumstances is an interlocutory order that can be appealed at the time of entry of the order, but can also be appealed upon entry of the final decree terminating parental rights. Dep't of Health & Welfare v. Doe (*In re* Doe), 156 Idaho 103, 320 P.3d 1262 (2014).
[18] § 16-1624(3).
[19] § 39-8205(5) (2011). The Safe Haven Act is discussed further in Chapter 12 of this manual.
[20] § 16-1624(1) (Supp. 2014); IDAHO JUV. R. 48(a).
[21] IDAHO JUV. R. 48(b).

Court rules clarify that even though the TPR petition is filed in the CPA case, the petitioner must still serve process in accordance with the TPR statute, and the record in the CPA case is not part of the record on the TPR petition unless admitted pursuant to the rules of evidence.[22]

Although Idaho law specifically provides that TPR trials "may be conducted in an informal manner, the court must make its findings based on evidence admitted in accordance with the Idaho Rules of Evidence.[23] The petitioner has the burden of proving grounds for termination by clear and convincing evidence.[24]

9.4 VOLUNTARY TERMINATION OF PARENTAL RIGHTS

Prior to or after the filing of a TPR petition, parents' counsel should discuss with the parents the option of voluntary termination of parental rights. The form for consent to terminate parental rights is established by statute.[25] Voluntary termination of the parent/child relationship can serve a number of purposes. First, when reunification is not possible, voluntary consent can expedite the termination process and free the child for placement in a permanent home. Second, involuntary termination of parental rights to a child constitutes an aggravated circumstance, which can be grounds for relieving the Department of its obligation to make reasonable efforts to prevent removal and to reunify the family if another child is subsequently removed from the home.[26] Third, it allows both parents and children to move forward with their lives when the parent recognizes he/she is not in a position to raise the child.

Voluntary consents must be witnessed by a district judge, a magistrate judge, or an equivalent judicial officer in another state.[27] The effect of the consent is to relinquish all rights to the child, to consent to termination of parental rights, to waive hearing on the petition to terminate parental rights, and to request entry of a decree of termination.[28]

Idaho law requires the court to accept a termination or relinquishment from another state that has been ordered by a court of competent jurisdiction under like proceedings, or in any other manner authorized by the laws of another state.[29]

The judge witnessing the execution of the consent should question the parent to ensure that the parent's consent is knowing and voluntary. The following suggested questions can be asked by counsel and/or the court and answered by the parent:

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[22] *Id.*
[23] § 16-2009 (2009); IDAHO JUV. R. 51(c); IDAHO R. EVID. 101.
[24] § 16-2009.
[25] § 16-2005(4) (Supp. 2014).
[26] § 16-1602(5).
[27] § 16-2005(4). The ICWA imposes special requirements for execution of a consent to the termination of parental rights of an Indian child and has provisions for withdrawal of consent. 25 U.S.C. § 1913 (2012). *See* Chapter 11: ICWA.
[28] §§ 16-2005(4) (Supp. 2014), 16-2011 (2009). Another section of the termination statute also provides a procedure for waiver of notice and appearance on the petition to terminate parental rights, although presumably the waiver of the right to hearing includes waiver of the right to notice of the hearing. § 16-2007(3) (Supp. 2014). This separate section of the code may have been enacted because there may be circumstances in which a parent does not want to consent to termination, but is willing to waive notice and allow the termination to proceed.
[29] § 16-2005(4).

- Are you the [birth] parent of the child named in the consent form?
- When and where was the child born? (May be advisable to wait a reasonable period of time after birth, to establish that the parent was not rushed into courtroom while still under the emotional stress of childbirth.)
- How old are you? What is your educational background?
- Do you understand why you are here today? Can you tell me in your own words why you are here?
- Are you under the influence of any medicine, drug, alcohol, or any other substance that might affect your state of mind?
- Do you have any mental or physical illness that might affect your ability to decide what you want to do?
- Did you see the child after birth? [Or, have you seen the child recently?]
    - If not, did someone prevent you from seeing the child, or did you make your own decision not to see the child?
    - If so, did you have any concerns about your baby's health? Did seeing the child make you change your mind about consenting to terminate your parental rights to the child?
- When did you decide to sign the consent to termination? Have you had enough time to think about it?
- Has anyone in any way tried to pressure you into signing the consent to terminate?
- Has anyone made any promises to you to influence your decision?
- Have you talked to a lawyer to get legal advice about this? If not, do you want to?
- Do you have a friend or family member who you talk to when you need to make an important decision? Did you talk to them? Is there someone you want to talk to before you do this?
- Do you understand that you will be giving up all your rights concerning this child? You will not have the right to contact the child, to be notified of anything concerning the child, or to be involved in any decisions concerning the child.
- Do you understand that you will be giving up all your rights to your child forever? Once you sign this document, if you later change your mind, it will be extremely difficult, and maybe impossible, to undo your decision to terminate your parental rights.
- Do you understand that by terminating your rights as a parent, you are opening the door for someone else to adopt the child?
- Do you believe that agreeing to terminate your parental rights is in the child's best interests? Why?
- Do you think that agreeing to terminate your parental rights is in your best interests? Why?
- Are you a member of an Indian tribe, or are you eligible for membership in an Indian tribe? If so, what tribe? If it is possible that the child might be of Indian heritage, is there anyone who might have more information about the child's Indian heritage? How can that person be contacted?
- Have you seen and carefully read the consent form? Would you read it again now? Take as much time as you need to read it carefully.
- Is there anything in the form that you don't understand or with which you do not agree?
- Do you still want to terminate your parental rights?

Usually the parent in a termination proceeding arising in a CPA case executes the consent when appearing in the CPA proceeding, in which case the original of the consent is retained in the court file, and a copy is provided to the parent executing the consent. Sometimes the parent who wants to execute a consent simply schedules an appearance before an available local judge. In such cases, the court keeps a copy of the consent and returns the original to the parent for filing in the proceeding on the termination petition. Once the original of the consent is filed with the court in the CPA proceeding, the prosecutor can then prepare a decree terminating parental rights for the judge's signature, which the court can enter without further hearing. The decree should notify the parents that the case is sealed and that they may register with the voluntary adoption registry through the State Registrar of the Bureau of Vital Statistics.[30] Although the parents who have consented to termination have waived notice, best practice is to provide parents and their attorney(s) with a conformed copy of the decree terminating their parental rights.

9.5 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

A. Content of the Petition

Idaho law sets forth requirements for the petition in a TPR proceeding.[31] It must specifically state the statutory grounds that are the basis for the petition.[32] If the child is an Indian or Alaska Native child, the petition must include allegations that meet the requirements of the ICWA.[33] The petition must be filed with the court and served on all parties.

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

- The name and place of residence of the petitioner.
- The name, sex, date and place of birth, and residence of the child.
- The basis for the court's jurisdiction.
- The relationship of the petitioner to the child or the fact that no relationship exists.
- 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.
- 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 kinship.
- 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.
- The grounds on which termination of the parental relationship is sought.
- 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.
- A list of the assets of the child together with a statement of the value of the assets.[34]

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[30] § 39-259A (2011).
[31] § 16-2006 (2009).
[32] The grounds for parental termination are discussed in detail in the next section of this chapter.
[33] The ICWA imposes additional, different requirements for the termination of parental rights of an Indian child. The ICWA is discussed in detail in Chapter 11 of this manual.
[34] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 149 Idaho 653, 239 P.3d 451 (Ct. App. 2010). While effective pleading of the petition in a termination case will help adequately guide the proof and findings in the case,

B. *Grounds for Involuntary Termination (Best Interest must be Shown)*

Idaho Code section 16-2005 sets forth the grounds for termination. Grounds for termination of parental rights must be shown by clear and convincing evidence, because each parent has a fundamental liberty interest in maintaining a relationship with his or her child.[35] The statutory grounds for termination are independent, and termination may be granted if any one of the grounds is found.[36]

1. Abandonment

The court may terminate parental rights if it finds that such termination is in the best interests of the child and that the parent has abandoned the child.[37] 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 . . .[38]

The evidence and argument in contested cases focuses largely on whether the failure to maintain a relationship was willful and without just cause. Once the petitioner establishes a *prima facie* case (failure to maintain a relationship for one year), the respondent has the burden of producing evidence that the failure was not willful or that the parent had just cause. The petitioner retains the ultimate burden of persuasion that the failure to maintain a relationship was willful and without just cause.[39] Appellate court decisions focus on whether the trial court gave due consideration to the difficulties associated with maintaining a relationship. Trial court decisions have been vacated and/or reversed where the appellate court found that the trial court failed to give adequate consideration to the difficulties associated with disability,[40] military service and parental animosity,[41] incarceration,[42] mental illness,[43] geographic distance,[44] immigration status,[45] and concealment and parental hostility.[46] Other appellate decisions have affirmed trial court decisions finding a variety of explanations insufficient, including lack of knowledge of the child's whereabouts,[47] geographic distance,[48] the existence of a no contact

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the Idaho Court of Appeals has found that the pleading is adequate as long as the language used essentially follows the statutory requirements.

[35] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 152 Idaho 263, 270 P.3d 1048 (2012).
[36] § 16-2005 (Supp. 2014); Doe v. Dep't of Health & Welfare, 123 Idaho 502, 849 P.2d 963 (Ct. App. 1993).
[37] § 16-2005(1)(a).
[38] § 16-2002(5).
[39] *In re* Matthews, 97 Idaho 99, 540 P.2d 284 (1975).
[40] Clayton v. Jones, 91 Idaho 87, 416 P.2d 34 (1966).
[41] *In re Matthews*, 97 Idaho 99; Doe v. Doe (*In re* Doe), 150 Idaho 46, 244 P.3d 190 (2010).
[42] Doe v. Dep't of Health & Welfare, 137 Idaho 758, 53 P.3d 341 (2002).
[43] Doe v. Doe (*In re* Doe), 138 Idaho 893, 71 P.3d 1040 (2003).
[44] Roe v. Doe (*In re* Doe), 143 Idaho 188, 141 P.3d 1057 (2006).
[45] *In re* Doe, 153 Idaho 258, 281 P.3d 95 (2012).
[46] Doe v. Doe (*In re* Doe), 156 Idaho 532, 328 P.3d 512 (2014).
[47] Clark v. Jelinek, 90 Idaho 592, 414 P.2d 892 (1966).
[48] In Interest of Crum, 111 Idaho 407, 725 P.2d 112 (1986).

order,[49] financial difficulties,[50] incarceration,[51] and the existence of a guardianship.[52] One recent decision affirmed a trial court decision that found grounds for termination based on abandonment, but found that termination was not in the best interest of the child.[53]

The appellate decisions are highly fact-dependent, so there is no clear rule on what constitutes *willful* failure to maintain a relationship or *just cause* for failure to maintain relationship. There are, however, some discernible patterns. First, it is important that the court consider all the evidence, giving due consideration to the obstacles to maintaining a relationship, in detailed findings and conclusions. In addition, the less effort the parent has made, and the greater the length of time in the child's life, the less likely the reasons for the lack of contact will be found persuasive.

For example, in *Doe (2002)*, the appellate court reversed a trial court decision finding that an incarcerated parent had abandoned the child. The appellate court ruled that, where the child was born while the parent was incarcerated, the parent attempted to maintain contact with the child through cards, gifts and phone calls, the parent contacted the case worker a number of times, and the father contacted the court in the termination proceeding, the father's failure to complete the rider program and get out of prison early was not substantial competent evidence to support a finding of abandonment.[54] In *Doe (2009),* the appellate court affirmed a trial court decision finding abandonment with respect to both incarcerated parents, where the parents made no effort to contact the child, even by mail or telephone, and did not participate in the CPA proceeding in any way.[55] And in *Doe (2013)*, the appellate court affirmed a trial court decision finding abandonment with respect to a father who had been in prison when his child was born, had made no contact with the child in several years, and who had been released from prison and continued to commit new offenses resulting in further incarceration.[56]

Similarly, in *Doe (2006)*, the appellate court reversed a trial court decision finding abandonment where the father had made sporadic contact and was in arrears on child support, concluding that the trial court failed to take into consideration the distance between the parties (father lived in Arizona), and the fact that the father had missed work due to injuries and was

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[49] Doe v. Doe, 149 Idaho 392, 234 P.3d 716 (2010). *But see* Doe I v. Doe II (*In re* Doe), 148 Idaho 713, 228 P.3d 980 (2010) (affirming a decision of the trial court finding that the father had not willfully abandoned the child where the father was on probation for felony injury to a child, the terms of the sexual abuse treatment program required that he have no contact with minor child, and the mother refused to consent to contact with their children).
[50] Doe v. Doe, 152 Idaho 77, 266 P.3d 1182 (Ct. App. 2011).
[51] Doe v. Dep't of Health & Welfare (*In re* Doe), 146 Idaho 759, 203 P.3d 689 (2009); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 154 Idaho 175, 296 P.3d 381 (2013).
[52] Doe v. Doe (*In re* Doe), 157 Idaho 59, 333 P.3d 874 (Ct. App. 2014).
[53] *In re* Doe, 157 Idaho 14, 333 P.3d 125 (2014). In that case, mother and stepfather sought to terminate the parental rights of father. The trial court concluded that the evidence and argument focused primarily on showing that stepfather had been a better father than the biological father had been, which went to issues of custody, rather than termination of parental rights. The magistrate concluded that there was no evidence that the children would be harmed by allowing the father to reestablish a relationship with the children, and that the children would lose nothing by having the father continue as the legal parent while the stepfather continued to serve as the daily father figure. The Idaho Supreme Court affirmed, stating that the court's finding was supported by substantial and competent evidence and the appellate court would not reweigh the evidence.
[54] Doe v. Dep't of Health & Welfare, 137 Idaho 758, 53 P.3d 341 (2002).
[55] *In re* Doe, 146 Idaho 759.
[56] *In re* Doe, 154 Idaho 175.

heavily in debt.[57] In contrast, in *Crum*, the appellate court affirmed a trial court decision finding that a father in Texas had abandoned his children, where he had had no contact with them, failed to pay child support, and did not contact IDHW when he knew his children were in foster care.[58]

Recent appellate cases indicate that the fundamental questions are: What effort did the parent make, and what more could the parent have reasonably done to maintain the parent-child relationship in light of the circumstances? Thus, in *Doe (2002)*, discussed above, the court looked at the incarcerated father's contacts with the child, the Department, and the court, and found that the failure to complete the rider program was not sufficient to show willfulness.[59] In *Doe (2011)*, the court affirmed a trial court decision finding a father had abandoned the child, examining a litany of reasons before finding that they were not persuasive in explaining why a father who lived 30 miles away had only one or two contacts with his children (father was on probation and couldn't travel out-of-county, but could have asked probation officer for permission to travel out-of-county; father didn't have a driver's license for a period of time but could have asked family or friends to give him or children a ride; father had financial difficulties, but that didn't explain the lack of phone contact or letters).[60]

In *Doe (2014)*,[61] the court clarified the distinction between "willful" failure to maintain a relationship, and "just cause" for failing to maintain the relationship (finding willfulness and no just cause on the facts in that case). The court stated that the key issue regarding willfulness is whether the parent is capable of maintaining a normal relationship, because for a person to willfully fail to do something, he or she had to have had the ability to do it. The court said that financial and logistical difficulties were evidence of just cause that should be adequately considered.

2. Neglect

Idaho law permits the termination of the parent-child relationship where the parent has neglected the child and termination is in the best interests of the child.[62] The termination statute provides two independent bases upon which a child can be determined to be neglected. [63]

a. *Failure, Refusal, or Inability to Provide Necessary Care*

The first basis for neglect is the definition set forth in the CPA: "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 through spiritual means alone in lieu of medical treatment

[57] Roe v. Doe (*In re* Doe), 143 Idaho 188, 141 P.3d 1057 (2006).
[58] In Interest of Crum, 111 Idaho 407, 725 P.2d 112 (1986).
[59] Doe, 137 Idaho 758.
[60] Doe v. Doe, 152 Idaho 77, 266 P.3d 1182 (Ct. App. 2011).
[61] Doe v. Doe (*In re* Doe), 155 Idaho 505, 314 P.3d 187 (2013).
[62] § 16-2005(1)(b) (Supp. 2014).
[63] § 16-2002(3)(a).

> 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 well-being; or,
> c. Who has been placed for care or adoption in violation of law; or,
> d. Who is without proper education because of the failure to comply with section 33-202, Idaho Code.[64]

In many of the appellate decisions, the court found demonstrable harm to the child(ren) over an extended period of time.[65] The court has held, however, that demonstrable harm is not required; the burden of proof is met by long-term lack of contact and support, which is necessary for the child's well-being.[66]

The court has found that evidence that was insufficient to support a finding of abandonment was sufficient to show neglect.[67] In abandonment cases, inability to parent has been the basis of a finding that the lack of a parental relationship was not willful;

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[64] § 16-1602(28). Section 16-1627, cross-referenced in the definition of neglect, provides a process by which a court may order emergency medical treatment for a child. Section 33-202, cross-referenced in subsection (d) of the definition, requires parents to provide for the educational instruction of children between the ages of seven and sixteen.

[65] Rhodes v. Dep't of Health & Welfare, 107 Idaho 1120, 695 P.2d 1259 (1985) (physical abuse, developmental delays); Tanner v. Dep't of Health & Welfare (*In re* Aragon), 120 Idaho 606, 818 P.2d 310 (1991) (physical abuse, lack of bonding/fear by children); Doe v. Dep't of Health & Welfare (In Interest of Doe), 122 Idaho 644, 837 P.2d 319 (Ct. App. 1992) (unstable, unnurturing, dangerous environment, poor physical condition of children); Doe v. Dep't of Health & Welfare, 141 Idaho 511, 112 P.3d 799 (2005) (reactive attachment disorder, developmental delays); State v. Doe (*In re* Doe), 143 Idaho 343, 144 P.3d 597 (2006) (neglect, abuse, domestic violence); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 149 Idaho 474, 235 P.3d 1195 (2010) (child positive for methamphetamine, behavioral disorders).

[66] Dep't. of Health & Welfare v. Cheatwood, 108 Idaho 218, 697 P.2d 1232 (Ct. App. 1985) (long-term neglect and substance abuse). *See also* Hofmeister v. Bauer, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986) (same standard of proof applies in TPR filed by family members who are raising the child as in TPR proceedings brought by the state private TPR as one brought by state; evidence included long-term substance abuse and leaving children in care of others); Casi Found., Inc. v. Doe (*In re* Doe), 142 Idaho 397, 128 P.3d 934 (2006) (long-term substance abuse, criminal record, unstable home and employment, rudimentary parenting skills, and encouraging mother to use drugs while pregnant); Bush v. Phillips (In Interest of Bush), 113 Idaho 873 749 P.2d 492 (1988). TPR was sought by grandparents who were raising a toddler. The trial court found grounds for termination based on neglect, but found termination was not in the child's best interest if the parents submitted to testing for alcohol and drugs, maintained sobriety, and submitted to supervision, direction and training from the Department to improve their parenting. The parents agreed. Some months later, the grandparents sought TPR because the parents were not complying with the agreement. The trial court granted TPR, and the appellate court affirmed.

[67] Dayley v. Dep't of Health and Welfare (In Interest of Dayley), 112 Idaho 522, 733 P.2d 743 (1987). *See also* Roe v. Doe (*In re* Doe), 142 Idaho 174, 125 P.3d 530 (2005) (sporadic contact, minimal support, unstable housing and employment, in private TPR). *But see* Dep't of Health & Welfare v. Roe (*In re* Interest of Doe), 139 Idaho 18, 72 P.3d 858 (2003) (affirming trial court decision dismissing TPR; mother attempted to contact children many times while in foster care, paid child support though garnishment, minor children allowed to refuse gifts and visits, parent was allowed such minimal contact with the children that she was unable to establish a good relationship with them).

where the inability to parent is so significant that the child was left without necessary parental care, the court has upheld a finding of neglect.[68]

The court has rejected the argument that a child who is in the custody of the Department is not neglected, stating that the parent is not relieved of the responsibility to parent when the child comes into state custody by virtue of the parent's neglect.[69]

b. *Failure to Comply with the Case Plan*

The second basis upon which a child can be determined to be neglected is the parent's failure to comply with the case plan in a CPA proceeding. The termination statute provides that neglected means:

> The parent has failed to comply with the court's orders in a child protective act case and:
> (i) The department has had temporary or legal custody of the child for fifteen (15) of the most recent twenty-two (22) months; and
> (ii) Reunification has not been accomplished by the last day of the fifteenth month in which the child has been in the temporary or legal custody of the department. [70]

In CPA cases where there is no judicial determination that a parent subjected the child to aggravated circumstances, a case plan is adopted that includes a reunification and a concurrent plan.[71] The reunification portion of the case plan identifies the issues that need to be addressed before the child can safely be returned home, the tasks to be completed by each parent and the Department to resolve each issue, and the services to be provided by the Department to assist the parent and in which the parent is required to participate. It is often referred to as the road map to reunification. The CPA seeks to recognize the significance of time in a child's life by placing a time standard on achieving reunification, and does so by making failure to achieve reunification within the time standards a basis for termination of parental rights.[72]

Failure to comply with the case plan as a basis for termination of parental rights is a fairly recent addition to the termination statute, but there have been a number of appellate

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[68] Doe v. Dep't of Health & Welfare, 123 Idaho 502, 849 P.2d 963 (Ct. App. 1993) (inability due to mental illness); Brown v. State (In Interest of Brown), 112 Idaho 901, 736 P.2d 1355 (Ct. App. 1987) (inability due to mental disability). *See also* Idaho Dep't of Health & Welfare v. Doe (*In re* Child I), 149 Idaho 165, 233 P.3d 96 (2010) (inability to parent except for short visits despite extensive private and public assistance; mother had been reported for failure to supervise and leaving children with others.) Recent amendments to the child protective act require the state to provide adaptive equipment and assistance to parents as part of the case planning process. Those requirements may impact the persuasiveness of these arguments in later cases. *See infra* part 9.5(B)(e) of this chapter.

[69] Dep't of Health & Welfare v. Doe (*In re* Doe), 133 Idaho 826, 829, 992 P.2d 1226, 1229 (Ct. App. 1999) (citing Thompson v. Thompson, 110 Idaho 93, 97, 714 P.2d 62, 66 (Ct. App. 1986), for proposition that parent is not relieved of responsibility to parent by informally placing child in care of family or friend), *implicitly overruled on other grounds*.

[70] § 16-2002(3)(b) (Supp. 2014).

[71] § 16-1621.

[72] 42 U.S.C. § 675(5)(E) (2012); 45 C.F.R. § 1356.21(i)(i) (2012); § 16-1622(2)(g) (Supp. 2014).

cases decided pursuant to it. Most of the cases have affirmed trial court decisions terminating parental rights, and the cases are difficult to summarize because they are very fact-dependent. The cases do show, however, that in every case, the failure to comply was substantial, and that the issues that brought the child into care had not been sufficiently resolved to allow the child to safely return home.[73]

In one case, the appellate court affirmed a trial court decision terminating parental rights, where the trial court found that the father had complied with the case plan, but nonetheless granted termination on the first statutory definition of neglect, discussed above.[74] Although the father had made recent progress with sobriety, employment, and probation, the court based its decision on the father's long-term failure to parent, substance abuse, criminality, and particularly, the father's inability to care for the child's special needs.[75] The often-quoted characterization of the father's progress on the case plan was that it was "too little, too late."[76]

In two other cases, the appellate court reversed trial court decisions terminating parental rights on the basis of failure to comply with the case plan. In both cases, the court found that grounds for termination – that the parent had failed to comply with the case plan – had been established by clear and convincing evidence. But in both cases, the appellate court found that the trial court's finding that termination was in the best interest of the child was not supported by substantial evidence. In *Roe (2006)*, the appellate court concluded that the trial court erred in focusing too much on the mother's past criminal behavior while dismissing evidence such as the social worker's testimony that reunification was possible and was occurring.[77] In *Doe (2011)*, the appellate court concluded that the trial court placed excessive emphasis on the father's "admittedly abhorrent behavior" prior to removal of the children, and minor noncompliance with reporting requirements, while disregarding or giving minimal weight to the compelling evidence of father's success in overcoming alcoholism, complying with treatment

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[73] *See* Dep't of Health & Welfare v. Doe (*In re* Doe), 145 Idaho 662, 182 P.3d 1196 (2008); Dep't of Health & Welfare v. Doe (*In re* Doe), 148 Idaho 124, 219 P.3d 448 (2009); Idaho Dep't of Health & Welfare v. Doe (In Interest of Doe), 149 Idaho 401, 234 P.3d 725 (2010); Dep't of Health & Welfare v. Doe, 149 Idaho 409, 234 P.3d 733 (2010); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 149 Idaho 564, 237 P.3d 661 (Ct. App. 2010); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 149 Idaho 627, 238 P.3d 724 (Ct. App. 2010); Idaho Dep't of Health & Welfare v. Doe, 150 Idaho 36, 244 P.3d 180 (2010); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 151 Idaho 356, 256 P.3d 764 (2011); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 151 Idaho 846, 264 P.3d 953 (2011); *In re* Doe, 152 Idaho 910, 277 P.3d 357 (2012); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 152 Idaho 953, 277 P.3d 400 (Ct. App. 2012); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 154 Idaho 175, 296 P.3d 381 (2013); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 155 Idaho 145, 306 P.3d 230 (Ct. App. 2013).

[74] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 152 Idaho 644, 273 P.3d 685 (2012).

[75] Perhaps what this case best demonstrates is the necessity for a case plan that is specific both to tasks and to desired results, such as, for example: 1) the parent will submit to random drug testing, *and* have no failed tests, 2) the parent will attend, participate in, and complete drug treatment, *and* maintain sobriety as shown through drug testing for a specified period of time, or 3) the parent will take a (specified) parent education class or program, *and* demonstrate (specified) skills learned during supervised visits. Case plans are discussed in detail, in Chapter 6 of this manual.

[76] *Id.* at 647.

[77] State v. Roe (*In re* Doe), 142 Idaho 594, 130 P.3d 1132 (2006).

requirements, maintaining employment, and becoming a nurturing parent with whom the child had developed a strong bond.[78]

These decisions emphasize that the bottom line in CPA and TPR cases is the best interest of the child. Termination is in the child's best interest when a parent has substantially failed to comply with the case plan because the parent has not resolved the safety issues that prevent the child from returning home. The child protection and termination statutes place a deadline on the parents' efforts to achieve reunification. This deadline does not compel the termination of parental rights when the parent has made such substantial progress that termination is no longer in the child's best interest.

In *Doe (2014)*,[79] a parent appealed a trial court decision granting termination on grounds of neglect, asserting that the Department had failed to make reasonable efforts to reunify, thereby violating his due process rights. The appellate court declined to address the issue because the issue had not been raised before the trial court. The court noted, however, that whether the Department has made reasonable efforts at reunification is not part of the magistrate court's analysis when terminating parental rights on grounds of neglect, and that where the Department's efforts are substandard, this should be addressed during the CPA proceeding by motion or argument to the court, citing Idaho Code section16-1622(2)(g)(iii). The appellate court in that case further ruled that the magistrate court did not abuse its discretion in denying a motion by the parent to finding compelling circumstances to delay termination.

3. Abuse

Idaho law permits the termination of the parent-child relationship when the parent has abused the child and termination is in the best interests of the child.[80] The parental termination statute defines abuse through a cross-reference to the CPA.[81] The CPA provides:

"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 justifiably 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.[82]

There have been two cases where the appellate courts affirmed trial court decisions granting termination of parental rights, in both cases the mother physically abused the children, and the

[78] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 150 Idaho 752, 250 P.3d 803 (Ct. App. 2011).
[79] *In re* Doe, 156 Idaho 682, 330 P.3d 1040 (2014).
[80] § 16-2005(1)(b) (Supp. 2014).
[81] *Id.* § 16-2002(4) (cross-referencing § 16-1602(1)).
[82] § 16-1602(1).

father's rights were also terminated on the basis that the father knew of the abuse and failed to protect the children.[83]

4. The Presumptive Parent is Not the Biological Parent of the Child

The Idaho termination of parental rights statute provides that parental rights may be terminated where the court finds that the "presumptive parent" is not the biological parent of the child and finds that termination would be in the child's best interests.[84] The termination of parental rights statute defines "presumptive father" 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."[85]

This ground for termination of parental rights has not been directly interpreted by the Idaho Courts. Recently, however, the court declined to consider a man claiming "equitable parental rights" who did not fit the statutory definition of "presumptive parent", or any other definition of parent, a proper party to a parental termination action.[86]

5. Parent is Unable to Discharge Parental Responsibilities

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."[87] Pursuant to this provision, it also must be shown that termination of parental rights is in the child's best interests.

Parental rights might be terminated under this subsection for many different reasons. One in particular, specifically addressed in the statute, regards parents with disabilities.[88] First, the parental termination statute establishes the over-arching policy that the statute is not to be "construed to allow discrimination in favor of, or against, on the basis of disability."[89] Second, the parental termination statute provides that a parent with a disability "has the right to provide evidence to the court regarding the manner in which the use of adaptive equipment or supportive

[83] Castro v. Idaho Dep't of Health & Welfare (In Interest of Castro), 102 Idaho 218, 628 P. 2d 1052 (1981); Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 149 Idaho 653, 239 P.3d 451 (Ct. App. 2010).
[84] § 16-2005(1)(c).
[85] § 16-2002(12).
[86] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 150 Idaho 195, 245 P.3d 506 (Ct. App. 2010). *See also* Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 150 Idaho 140, 244 P.3d 1226 (2010). In that case, the appellate court concluded that the trial court erred in entering judgment terminating parental rights, where it had not been established that the appellant was a father. In such circumstances, the court can only enter an order stating that the person has no parental rights.
[87] § 16-2005(1)(d).
[88] "Disability" means, with respect to an individual, any mental or physical impairment which substantially limits one (1) or more major life activities of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning, or working, or a record of such an impairment, or being regarded as having such an impairment. Disability shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, or substance use disorders, compulsive gambling, kleptomania, or pyromania. Sexual preference or orientation is not considered an impairment or disability. Whether an impairment substantially limits a major life activity shall be determined without consideration of the effect of corrective or mitigating measures used to reduce the effects of the impairment. § 16-2002(17).
[89] § 16-2001(2) (2009).

services will enable the parent to carry out the responsibilities of parenting the child."[90] While these provisions regarding parents with disabilities apply in all termination actions, they are particularly relevant when the ground for termination is the parent's capacity to discharge parental responsibilities.

In *Doe (2010)*,[91] 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.

6. Parent is Incarcerated

Idaho law permits termination of parental rights where a "parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority" and where such termination is in the child's best interests.[92] In *Doe (2009)*,[93] the court affirmed TPR where the children were two and six years old, the children had little relationship with their father, and the father had been sentenced to serve a minimum of 25 years in prison. In *Doe (2011)*,[94] the court affirmed TPR where the child was 20 months old at the time of termination, father had been incarcerated since the child's birth, the child would be three years old at the time of father's earliest release, upon release the father would have to work a case plan to achieve reunification, and reunification would likely take a considerable amount of time due to father's substance abuse, criminal history, and failure to comply with probation.

A significant procedural issue arises with the conduct of trial in cases where a parent is incarcerated. If a parent is incarcerated in Idaho, the court can enter a transport order so that the respondent can appear at trial. Occasionally, the Department of Corrections will ask the court to vacate an order to transport a high-risk inmate, or occasionally simply decline to transport. Sometimes the parent does not want to be transported, because time away from educational and treatment programs at the correctional facility will delay the parent's release from prison. If the parent is incarcerated in another state, an Idaho court does not have jurisdiction to order the correctional facility in the other state to transport the inmate. In cases where the parent cannot or doesn't want to be transported, arrangements can be made for the parent to appear in court by telephone. The court has denied a due process objection by a parent incarcerated in Texas, where the parent had the opportunity to appear through counsel and by deposition.[95]

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[90] § 16-2005(6) (Supp. 2014).
[91] Dep't of Health & Welfare v. Doe, 149 Idaho 207, 233 P. 3d 138 (2010). *See also* Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 153 Idaho 700, 291 P.3d 39 (2012).
[92] § 16-2005(1)(e).
[93] Doe v. Doe (*In re* Doe), 148 Idaho 243, 220 P.3d 1062 (2009).
[94] Idaho Dep't of Health & Welfare v. Doe (*In re* Doe), 151 Idaho 605, 261 P.3d 882 (Ct. App. 2011).
[95] Dep't of Health & Welfare v. Doe (In Interest of Baby Doe), 130 Idaho 47, 936 P.2d 690 (Ct. App. 1997).

7. Best Interests of Parent and Child

The final ground for involuntary termination in Idaho law is where the court finds that termination of parental rights is in the best interests of both the parent and the child.[96] In *State v. Doe*,[97] 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 interests 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 interests of the child, despite her attachment to her father and her 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.

C. Grounds for Termination Where TPR is Rebuttably Presumed to be in the Child's Best Interest

With respect to the grounds for termination discussed above, the burden of proof is on the petitioner to establish first, that there are grounds for termination, and second, that termination is in the best interest of the child. There is another category of grounds for termination, discussed in this subsection, where the court may rebuttably presume that termination of parental rights is in the best interest of the child (grounds must still be shown by clear and convincing evidence).[98]

1. Child Conceived as a Result of Sexual Misconduct

The statute provides that there are grounds for TPR where the parent caused the child to be conceived as a result of sexual misconduct. Sexual misconduct is defined by the statute to include "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 sixteen (16) years, as defined in sections 18-6101, 18-1508, 18-1506 and 18-6602, Idaho Code."[99]

2. Aggravated circumstances

The statute provides that there are grounds for termination where the following circumstances are present:

> (i) Abandonment, chronic abuse or chronic neglect of the child. Chronic neglect or chronic abuse of a child shall consist of abuse or neglect that is so extreme or repetitious as to indicate continuing the relationship would result in unacceptable risk to the health and welfare of the child;
> (ii) Sexual abuse against a child of the parent. Sexual abuse, for the purposes of this section, includes any conduct described in section 18-1506, 18-1506A, 18-1507, 18-1508, 18-1508A, 18-6101, 18-6108 or 18-6608, Idaho Code;
> (iii) Torture of a child; any conduct described in the code sections listed in section 18-8303(1), Idaho Code; battery or an injury to a child that results in serious or great bodily

[96] § 16-2005(3).
[97] State v. Doe, 143 Idaho 383, 146 P.3d 649 (2006).
[98] § 16-2005(2).
[99] § 16-2005(2)(a).

> injury to a child; voluntary manslaughter of a child, or aiding or abetting such voluntary manslaughter, soliciting such voluntary manslaughter or attempting or conspiring to commit such voluntary manslaughter;
> (iv) The parent has committed murder, aided or abetted a murder, solicited a murder or attempted or conspired to commit murder….[100]

Each of these grounds for termination is also a basis for a finding of aggravated circumstances in the CPA proceeding.[101] Where the court has found aggravated circumstances and, as a result, no efforts at reunification were required, the CPA proceeding moves directly to termination of parental rights.[102]

3. Abandoned Infant

The statute provides that abandonment of an infant is grounds for termination.[103] This ground is not available in cases where one parent seeks the termination of the other parent's rights.[104] The Idaho Safe Haven Act[105] has special provisions regarding an infant abandoned to a "safe haven."

4. The Rebuttable Presumption

As noted above, with respect to these grounds for termination, the statute provides that the court "may rebuttably presume" that termination of parental rights is in the best interests of the child. Idaho Rule of Evidence 301 defines the effect of a rebuttable presumption, which is often referred to as the "bursting bubble" rule. The presumption imposes on the responding parent the burden of producing evidence that TPR is not in the best interests of the child. The burden of production means to introduce sufficient evidence to permit reasonable minds to conclude that termination is not in the best interests of the child. The burden of proof remains with the petitioner, which is the state in a CPA/TPR proceeding. If the respondent parent meets the burden of production, the court determines whether TPR is in the best interests of the child based on the admitted evidence, without reference to the presumption.

9.6 NOTICE AND HEARING

Once a petition has been filed, the court must set a time and place for the hearing, and the petitioner must notify the appropriate individuals of the hearing.[106]

A. Persons Entitled to Notice

The answer to the question of who is entitled to notice of a parental termination action is complex. Idaho Code section 16-2007 establishes the notice requirements for parental

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[100] § 16-2005(2)(b).
[101] § 16-1602(5)(a), (b). In *Doe v. Dep't of Health & Welfare*, 144 Idaho 420, 422, 163 P.3d 209, 211 (2007), the court found that long-term deprivation of food so that the child was seriously malnourished and grossly underweight constituted chronic abuse.
[102] The determination of aggravated circumstances is governed by § 16-1620. It is discussed in detail in Chapter 3 of this manual.
[103] § 16-2005(2)(c).
[104] *Id.*
[105] §§ 39-8201 – 8207 (2011). The Safe Haven Act is discussed in Chapter 12 of this manual.
[106] § 16-2007(1).

termination actions. In addition to specifying notice to certain specified persons and entities, section 16-2007 requires that notice be provided to any person who would be entitled to notice of an adoption proceeding.[107] The adoption notice provision, in turn, requires that notice of an adoption proceeding be provided to certain specified individuals, but also to any person or agency whose consent to an adoption proceeding would be required and to "[a]ny person who has registered notice of the commencement of paternity proceedings pursuant to section 16-1513 . . .."[108] 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.[109]

When the overlapping notice provisions of the adoption and parental termination statutes are considered together, notice must be provided to:[110]

- The child, if he or she is over age 12.[111]
- Both parents or the surviving parent of an adoptee who was conceived or born within a marriage.[112]
- The mother of the child if the parents are unmarried.[113]
- The father or putative father of the child[114] who has not signed a consent to termination[115] or a waiver of notice and appearance[116] whose rights have not been previously terminated, if he:
  - is currently married to the mother or was married to the mother at the time she executed a consent to termination of parental rights or otherwise relinquished the child,[117]
  - has been adjudicated the father of the child prior to the execution of a consent to termination by the mother,[118]
  - has registered notice of the commencement of a paternity action pursuant to the Idaho putative father registry statute,[119]
  - is recorded on the birth certificate as the child's father with the knowledge and consent of the mother,[120]
  - is openly living in the same household with the child and holding himself out as the child's father at the time the mother executes a consent or relinquishment,[121]

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[107] § 16-2007(1), referring to § 16-1505 (2009).
[108] § 16-1505 referring to § 16-1513 (Supp. 2014).
[109] §§ 16-2007, 16-1505 (2009), 16-1504 (Supp. 2014), 16-1513.
[110] In addition to the individuals discussed below, notice also must be provided to the adoptee's spouse, section 16-1504(1)(h), and to the guardian or conservator of an incapacitated adult, section 16-1504(1)(g). These provisions are unlikely to apply in a CPA-connected adoption.
[111] § 16-1504(1)(a).
[112] § 16-1504(1)(b).
[113] §§ 16-1504(1)(c), 16-2007(1) (separately requiring notice to any "parent").
[114] The question of who is entitled to be treated as the father in a CPA proceeding and in an action to terminate parental rights is subject to ambiguity under Idaho law and has constitutional implications. The current state of Idaho and federal law in this area is discussed in Chapter 12 of this manual.
[115] § 16-2005(4).
[116] § 16-2007(3).
[117] §§ 16-1505(1)(c), (f) (2009), 16-1504(1)(b) (Supp. 2014).
[118] § 16-1504(1)(d).
[119] §§ 16-2007(3), 16-1505(1)(b) (2009),16-1513 (Supp. 2014).
[120] § 16-1505(1)(d) (2009).

  - has filed a voluntary acknowledgment of paternity,[122]
  - has developed a substantial relationship with the child who is more than 6 months old and has taken responsibility for the child's future and financial support,[123] or
  - has developed a substantial relationship with a child under the age of 6 months and has commenced paternity proceedings and complied with Idaho Code § 16-1504(2)(b).[124]
- The legally-appointed guardian of the person or custodian of the child.[125]
- The guardian *ad litem* for the child and/or for the parent.[126]
- IDHW, if it is not the petitioner.[127]

The Idaho putative father registry statute, Idaho Code section 16-1513, is cross-referenced in the notice requirements of the termination statute quoted above. Section 16-1513 provides that notice of adoption need not be given to putative fathers who have not complied with the registration or other provisions of the statute. Through the cross-reference, the TPR statute relieves parties of the responsibility to notify putative fathers who have failed to timely file a paternity action and/or to timely file notice of the filing of a paternity action.

The putative father statute was amended in 2013. The constitutionality of the revised statute has not been reviewed by a court. Federal law requires that putative father notice provisions must be 1) likely to notify most interested fathers, and must 2) provide a mechanism by which an unwed father can assert parental rights without the consent or support of the mother.[128]

To ensure permanency for the child, as well as due process to the parents, it is strongly recommended that diligent efforts be made to identify, locate, and serve process on putative fathers (including paternity testing, until the biological father is identified) resulting in either a decree terminating that individual's rights or a decree establishing non-paternity (or, in appropriate cases, reunification with a father).

B. Manner of Notice

The statute also contains provisions as to the manner in which service of process will be made.[129] Notice to the parents or guardians must be by personal service. If all reasonable efforts have been made to notify the parents, and these efforts have been unsuccessful, the petitioner should file a motion requesting service of process by publication and registered or certified mail to the person's last known address. Notice must be published for three successive weeks in the newspaper designated by the court as most likely to give notice to the person to be served. The

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[121] § 16-1505(1)(e).
[122] § 7-1106 (2010).
[123] § 16-1504(2)(a) (Supp. 2014).
[124] This basis for notice, in particular, is discussed in more detail in Chapter 12 of this manual.
[125] § 16-1504(f).
[126] § 16-2007(1).
[127] *Id.*
[128] Lehr v. Robinson, 463 U.S. 248, 263-264 (1983).
[129] § 16-2007(2).

hearing should take place no sooner than 10 days after service of the notice and 10 days after the last date of publication.[130]

Reasonable efforts to notify by personal service should include a search of all of IDHW's available databases (particularly the child support database), Idaho's court record repository, as well as other state databases (particularly prison databases). It is strongly recommended that the affidavit in support of the motion for notice by publication fully document the efforts at personal service and the available information as to the person's known address. This minimizes the potential for a parent to seek to invalidate a TPR decree based on lack of service and promotes permanency for the child.

In cases where a parent has properly executed and the court has accepted a consent to terminate parental rights, notice has been waived by that parent.[131]

9.7 PRE-TRIAL ISSUES

A. Appointment of Counsel

Idaho law provides for appointment of counsel for indigent parents or guardians in termination proceedings.[132]

As noted above, the TPR petition must be filed in the CPA case, and appointments of attorneys and guardians *ad litem* remain in effect for proceedings on the TPR petition, unless otherwise ordered by the court.[133] If for some reason these appointments cannot be continued, or if a parent is newly located and identified, the court must expeditiously appoint new counsel for any indigent parties[134] and/or a new guardian *ad litem* for the child.[135] Because the court may have reviewed these issues at the most recent permanency hearing, another hearing may not always be necessary to make these determinations. Immediately upon the filing of the motion and petition, the court should review the need for appointment of counsel and/or a guardian *ad litem* so that each can be present at the first pretrial hearing.

B. Pretrial Conference

In some cases, particularly those where all necessary parties are already joined and participating in the CPA case, the state files its petition to terminate, and the court schedules further proceedings. In some cases, particularly those where some necessary parties have not already been located and joined, or are not participating in the CPA case, the state files its petition to terminate, along with a summons and notice of hearing, and serves process of the petition, summons, and notice of hearing.[136] (In some counties, the prosecutor does this in all cases.) If a

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[130] *Id.*
[131] § 16-2005(4). The process for consent to termination of parental rights is discussed earlier in this chapter.
[132] § 16-2009.
[133] IDAHO JUV. R. 48(b).
[134] § 16-2009.
[135] § 16-1614(1).
[136] The summons must include notice that the parent or guardian is entitled to a lawyer, and if they cannot afford one, they can have one appointed for them. § 16-2009. The summons should include information for contacting the court to ask for a court-appointed lawyer, similar to the summons in a CPA proceeding. *See* IDAHO JUV. R. 33.

party fails to appear and contest the proceeding, the matter may proceed to default.[137] If the party appears, the court can make the necessary appointments and schedule further proceedings.

As a matter of best practice, the court should immediately set a pretrial conference, for a date within 30 days of the filing of the petition to terminate parental rights or the parent's first appearance. The American Bar Association recommends that the pretrial and subsequent hearings be heard by the same judge who heard the CPA case.[138] At the pretrial, the court should establish all of the following:

- Whether the parents will contest or will consent to terminate their parental rights.
- That discovery will be completed in sufficient time to allow all parties to review the material prior to a settlement conference.
- The date for pretrial or settlement conference. This date should be far enough in advance of the trial date so that if significant progress is made but another conference is needed, there is adequate time for the second conference. The recommended timeframe for the first conference is four weeks prior to the trial date. Counsel must notify the court immediately following a conference as to whether agreement was reached.
- A trial date.
- Whether transport orders[139] will be needed for incarcerated parents or telephonic hearing for parents incarcerated in another state who cannot be transported.

Best practice is to schedule a firm trial date that allows sufficient time to prepare for trial. Bifurcating termination trials is strongly discouraged because of the resulting delay in permanency for the child(ren). The court should enter a scheduling order with the objective of finalizing proceedings on the TPR petition within six months of the date of the permanency hearing approving a permanency goal of termination of parental rights and adoption and 18 months from the date the child was removed from the home.[140] Best practice is to schedule trial dates within 90 days of the filing of the petition.[141]

Finally, if a petition for adoption is not filed in conjunction with the parental termination action, the statute provides that the court shall order IDHW Bureau of Child Support Enforcement to submit a written financial analysis report within 30 days detailing the un-reimbursed public assistance monies paid by the State of Idaho on behalf of the child. The

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[137] *See* IDAHO R. CIV. P. 55.

[138] COMMITTEE ON JUDICIAL EXCELLENCE FOR CHILD ABUSE AND NEGLECT PROCEEDINGS, AMERICAN BAR ASSOCIATION, JUDICIAL EXCELLENCE IN CHILD ABUSE AND NEGLECT PROCEEDINGS STANDARD A.8 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/child_law/Judicial%20Excellence%20Standards%20Abuse-Neglect%20ABA%20Approved%20(3).authcheckdam.pdf (last visited on April 29, 2015).

[139] To ensure adequate notice to the agency responsible for transporting an incarcerated parent, transport orders should be obtained 30 days prior to the hearing or trial.

[140] IDAHO JUV. R. 44(b). If the court found aggravated circumstances in the CPA proceeding, then the court must enter a scheduling order with the objective of finalizing the petition to terminate within six months from the approval of the permanency plan.

[141] IDAHO JUV. R. 46(a), (b).

report, if ordered, should contain recommendations for repayment and provisions for the future support of the child. [142]

9.8 CONDUCTING THE HEARING

At this point in the court process, one of two circumstances will exist – either the parents will have voluntarily relinquished their parental rights or the case will move to trial. When pretrial negotiations result in an agreement that the parents will voluntarily relinquish parental rights, counsel should notify the court immediately. The court can then use the beginning portion of the dates previously set (either for the final pretrial or the trial for the final hearing on the petition to terminate parental rights) to take the parents' voluntary consent. Remaining trial dates and time can be freed for other court business.

Idaho law provides that a termination of parental rights trial is heard by the court without a jury, is closed to the public, and must be on the record. The court's findings must be based on clear and convincing evidence.[143]

The following persons should be present for trial, although some may be excluded when not testifying:

- The judge
- County Prosecutor or Deputy Attorney General[144]
- The child, if counsel has been appointed and in other appropriate circumstances[145]
- Attorney for the child, if appointed[146]
- The parent(s)
- Attorney(s) for the parent(s) (separate attorneys if conflict warrants)
- A representative of the Department of Juvenile Corrections, if the child is placed in its custody
- Guardian *ad litem* for the child
- Attorney for the guardian *ad litem*
- Indian Custodian, the child's Tribe, and attorney, if applicable[147]

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[142] § 16-2008(1) (Supp. 2014). In termination proceedings arising from a CPA proceeding, the permanency goal is termination of parental rights *and* adoption (see Chapter 7 of this manual regarding permanency planning). So, even though the adoption proceedings are not filed until after the termination is finalized, the court generally does not order the financial report.

[143] § 16-2009.

[144] Section 16-2009 provides that the prosecuting attorney shall represent the Department at all stages of the hearing. In some counties, the prosecutor and the attorney general have entered into agreements for the attorney general to appear on behalf of the state in some or all proceedings on TPR petitions.

[145] IDAHO JUV. R. 40(b). The rule provides that children eight years of age or older have the right to be heard in all post-adjudicatory hearings. Rule 48(b) provides that the petition to terminate parental rights will be filed in the same case as the proceeding under the Child Protective Act. It is unclear whether these two rules create a right for children eight years of age or older to be heard in hearings on the petition to terminate parental rights.

[146] The termination statute does not provide for appointment of counsel for children who are the subject of the TPR petition. The CPA statute provides that the court shall appoint counsel for a child 12 years of age or older, and may appoint counsel for a younger child. § 16-1614 (2014). Court rules provide that those appointments will continue in the proceedings on the TPR petition unless otherwise ordered by the court. IDAHO JUV. R. 48(b).

[147] See Chapter 11 of this manual for further information regarding Indian children and the Indian Child Welfare Act (ICWA).

- IDHW personnel with knowledge of the facts and authority to enter into agreements
- Court reporter, security personnel, and interpreter(s), as needed.

Other children, foster parent(s), pre-adoptive parent(s), or a relative providing care for a child may be present for specific purposes, such as testifying as witnesses or as a resource in reaching a voluntary settlement.[148]

9.9 FINDINGS AND CONCLUSIONS

As noted above, it is important for the court to make detailed findings and conclusions regarding grounds for termination and whether termination is in the best interest of the child.

At the conclusion of the termination case, the court must issue both findings of fact and conclusions of law, and a separate decree terminating parental rights. Best practice is for the court to issue its findings and conclusions and decree as soon as practicable after the close of the trial (and any post-trial briefing). The issuance of a separate decree is required by the Idaho Rules of Civil Procedure.[149] The ICWA imposes significantly different standards for the termination of the parent-child relationship and the state proceeding must comply with this federal law. Failure to comply with this law could result in decree of termination and adoption invalidated at a later date.[150] After the entry of the decree, the court clerk serves copies on the parties.

9.10 APPEALS

Court rules provide for expedited appeals directly to the Idaho Supreme Court from final decisions on TPR petitions. Appeals of TPR decrees are governed by Idaho Appellate Rules 11.1, 12.1 and 12.2.[151] An appeal from any decree granting or denying a TPR petition must be made by physically filing a notice of appeal with the clerk of the district court within fourteen days from the issuance of the order. Such filing is jurisdictional and can result in dismissal if the filing deadline is not met. The clerk's record and transcript must be prepared within twenty-one days of the filing of the notice of appeal. The appellant's brief is due within twenty-one days of the clerk's record being filed, and the respondent's brief is due within twenty-one days of service of the appellant's brief. If there is no cross-respondents' brief, the reply brief from the appellant is then due seven days from service of the respondent's brief. No extensions will be granted except upon a verified showing of "the most unusual and compelling circumstances."[152] Oral argument, if requested, must be held within 120 days of the filing of the appeal.[153] The filing of

[148] IDAHO JUV. R. 40. The rule provides that foster parents have the right to be heard in all post-adjudicatory hearings. Rule 48(b) provides that the petition to terminate parental rights will be filed in the same case as the proceeding under the Child Protective Act. It is unclear whether these two rules create a right for foster parents to be heard in hearings on the petition to terminate parental rights.
[149] IDAHO R. CIV. P. 54(a).
[150] 25 U.S.C. § 1914 (2012); *see also* Chapter 11 of this Manual.
[151] IDAHO APP. R. 11.1 (providing for appeal as a matter of right to the Supreme Court in the expedited manner provided in Rule 12.2), 12.1 (providing for permissive appeals to the Supreme Court when such an appeal serves the best interest of a child), and 12.2 (establishing procedures for expediting appeals under either Rule 11.1 or 12.1).
[152] IDAHO APP. R. 12.2(e).
[153] IDAHO APP. R. 12.2(f).

an appeal does not stay the termination decree without further action of the appellant, and permanency planning for the child may continue.[154]

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. [155]

[154] § 16-2014 (Supp. 2014).
[155] *See e.g.*, Dep't. of Health & Welfare v. Doe (In Interest of Doe), 150 Idaho 88, 90, 244 P.3d 232, 234 (2010).