

FOLEY COLLOQUY

VOLUNTARY CONSENT TO TPR

NOTE: CONVERTING INVOLUNTARY TO VOLUNTARY (PURE VOLUNTARY WOULD BE A BIT ABBREVIATED BUT SUBSTANTIALLY THE SAME)

It is my understanding that after discussions with your lawyer and perhaps others, you have made a decision to consent to the termination of parental rights and allow adoption??

I am going to ask you a bunch of questions. The number of questions borders on cruel but we are required to ask them. Some will sound like I am trying to talk you out of this or implying you should not do this. None of that is true. The sole purpose is to make sure you are doing this in an informed and voluntary fashion. Nothing I say to you should imply you should not do this.

I will try to do this in understandable terms, but sometimes I slip into the legal language. If I say something you do not understand, it is probably my fault, not yours. Just tell me and I will explain it better.

This is a very emotional decision, if you need a timeout just let me know that.

How old are you?

How far did you go in school?

Do you read and understand the English language?

Did you get the petition? Read it? Went over it with your lawyer? Felt you understood it?

Ever been diagnosed with a mental illness? [If so, what diagnosis? on medication? current with medications? comfortable and confident you understand what is happening in this court?]

On any type of medication that would interfere with your understanding what is happening in this court?

Under the influence of any controlled substance/alcohol?

Comfortable and confident you understand what is happening in this court?

[IF ICWA ISSUES HAVE NOT PREVIOUSLY BEEN RESOLVED—MAKE FULL INQUIRY IN THAT REGARD AND BE AWARE OF SPECIAL REQUIREMENTS IN THOSE CASES]

No one can force you to consent to TPR. You have an absolute right to have a trial and have a jury or the judge decide after a trial if the State/petitioner has or has not proved a reason to involuntarily terminate your parental rights.

By consenting to TPR, you give up your right to fight against TPR at a trial and that means you give up all the following rights:

- Testify yourself (if you choose to) and with help of lawyer call other witnesses to testify facts in petition are not true and there is no reason to involuntarily TPR.
- Right to have your lawyer ask questions of social worker, foster parents/relative caregivers, and any other witnesses who would come to court and testify the facts in the petition are true or

substantially true. By questioning them, s/he could try to show that they were lying, mistaken or fudging the facts. This won't happen because you are giving up the right to have it happen by consenting.

- To force the state/petitioner to prove the facts were true or substantially true to a reasonable certainty by clear satisfactory and convincing evidence. Not beyond reasonable doubt; but not just preponderance of evidence. Unless the jury was "quite sure" the facts in petition were substantially true because the petitioners evidence was so powerful and convincing, the petition would have to be dismissed. You are giving up the right to make them meet that burden of proof.
- Right to have jury decide whether they did or did not meet burden of proof. [have parent describe function of jury]. Describe: 12 people; no connection to the case; impartial; sit through trial; listen to testimony; view physical evidence; decide whether they did or did not prove grounds (facts in petition were substantially true); five-sixth verdict.
- Some parents want to have a trial but not have a jury decide. If that was your desire, it would be my responsibility to decide after a trial whether they did or did not prove a ground for involuntary TPR. By consenting you give up the right to have either a judge or jury decide if they proved a reason to...

IF THE RIGHT TO SUBSTITUTION OF JUDGE HAS NOT BEEN ADDRESSED IN A PREVIOUS HEARING, MAKE SURE YOU COVER THAT AT THIS POINT—OR EARLIER IF YOU THINK THEY MIGHT SO YOU DON'T WASTE THE TIME

AT THIS POINT GO THROUGH EACH OF THE ELEMENTS OF THE GROUNDS AND HAVE PARENT ACKNOWLEDGE THAT THEY ARE GIVING UP THE RIGHT TO FORCE PETITIONER TO PROVE EACH ELEMENT TO A RC BY CSC EVIDENCE.

If you had not decided to consent and went to trial, even if the jury (or judge) found grounds, that would not automatically mean you would lose your parental rights. These are two part proceedings. At the first part, the issue is whether a reason to TPR has or has not been proved. If one or more grounds is proved, **the judge is required to find the parent unfit**, and we move to the second part or phase which is called the dispositional or best interests phase.

At the dispositional phase you would have all the rights you have in the grounds phase—testify yourself, call other witnesses, "confront and cross examine" witnesses for petitioner; have the judge, not a jury, decide based on the evidence presented at the dispositional hearing whether it does or does not serve your child's best interest to terminate your parental rights.

But, the one and only issue is whether it is in your child's best interest to TPR and allow adoption or dismiss the petition and pursue another alternative---immediate return to you without involvement of the child welfare system if I thought that was safe (and you could get child support; WIC; or other forms of public assistance if eligible to help you support your child); leave your child in foster care and continue to work to resolve the safety issues that prevent safe parenting, anticipating future return to you when those issues are resolved; designate a relative as your child's guardian or any other alternative that you and your lawyer might argue for.

But by consenting, you give up your right to fight against termination at both the grounds phase and the best interests phase.

By consenting, you are permanently giving up the following parental rights:

- Custody—the right to have your child live with you and to provide for their daily needs (food, clothing, shelter...).

- Guardianship—the right and responsibility to make decisions that affect your child’s long term welfare (education, medical care, religious upbringing...).
- Visitation and communication—forever surrendering any **LEGALLY RECOGNIZED RIGHT** to visit with, communicate with, or force others to communicate with you about how your child is doing.

IF YOU HAVE AN AGREEMENT OR UNDERSTANDING WITH THE ADOPTIVE PARENT(S) THAT YOU WILL STILL HAVE SOME COMMUNICATION OR VISITATION WITH YOUR CHILD, I AM JUST FINE WITH THAT AS LONG AS YOU UNDERSTAND THAT IS NOT A LEGALLY ENFORCEABLE PROMISE OR AGREEMENT; THE AGREEMENT DEPENDS ON HOW YOU ARE MANAGING YOUR LIFE IN THE FUTURE AND HOW THAT CONTACT IS IMPACTING THAT PARENT’S CHILD AT THAT POINT. IF FOR GOOD REASON, BAD REASON, OR NO REASON AT ALL, THE ADOPTIVE PARENT DECIDES IN THE FUTURE THAT CONTINUING CONTACT IS NOT GOOD FOR THEIR CHILD/YOUR BIRTH CHILD, THAT IS THEIR DECISION TO MAKE AND THERE IS NOTHING YOU CAN DO ABOUT IT—YOU CAN’T COME BACK AND SAY I WANT TO WITHDRAW MY CONSENT; MAKE THEM DO WHAT THEY PROMISED THEY WOULD DO!!!

- All your economic interrelationships end—duty of future support (not past support); right to inherit from you (unless you specifically provide for them in a will; your right to inherit from him/her).

The foster parent(s) have been identified as the adoptive resource. I can’t promise that they will adopt. If a health crisis or tragedy occurred and they could not adopt, would not be a basis to withdraw consent. My responsibility through the agency would be to identify another loving family (probably working back through birth relatives first). 99% certain that foster parent/relative caregiver will adopt, but again can’t guarantee.

Did anyone promise you anything or threaten you in any way to get you to consent to TPR? [In private agency adoptions, make sure affidavit regarding s. 48.913 payments is filed and no impermissible payments made.]

If you can—and if it is too emotional, I understand—would you tell me why you have concluded this is best for your child? **[IF THE REASONS ARE CHILD-FOCUSED, I URGE YOU TO RECOGNIZE THE COURAGE AND SELFLESSNESS THEY DEMONSTRATE BY RECOGNIZING THAT SOMEONE ELSE NEEDS TO FULFILL RESPONSIBILITIES OF PARENTHOOD FOR CHILD---LOVING AND COURAGEOUS DECISION.]**

If you consent today and if I accept your consent and terminate your parental rights, even though you consented, you have a right to appeal. But to appeal, you have to file a document called a Notice of Intent to Pursue Post-Dispositional Relief within 30 days. If you don’t file within 30 days, absent very unusual circumstances, you have forever lost right to appeal. Understood?

This is not 30 days to change your mind; the decision is permanent and virtually irreversible. If you appealed after consenting, you would have changed your mind. But that is of no legal significance. You would have to change your mind, file the document within 30 days, pursue appeal and convince the appeals court that something significantly wrong occurred in these proceedings. Understood?

We are having you sign an acknowledgement of the 30-day time to file the notice of intent.

Had enough time to think about this decision? Spoken to people you needed to speak to in making the decision? Talked about all of this with your lawyer? He/She answered any questions you had? Are you were satisfied with the information they provided? Do you have any questions for them based on our discussion?

Are you still comfortable and confident you understand what is happening in this court? Any questions for me based upon our discussion?

Is it your decision to consent to TPR?

Have lawyer acknowledge their belief it is a valid consent.

Ask petitioner and GAL if any questions were missed or they have any questions. **[BE VERY CAREFUL WITH THIS. THE TONE OF QUESTIONING—RESPECTFUL AND UNDERSTANDING VS. DEMEANING AND CONDESCENDING—CAN TURN A CONSENT HEARING INTO A 3 DAY TRIAL IN A HEARTBEAT.]**

Make finding that consent is “informed and voluntary” pursuant to s 48.41 and enter order of TPR. [If another parent is opposing: advise that the appeal period will begin to run when and if that parent’s rights are terminated. They will get copy of order and order their counsel to keep them apprised.]

REMEMBER THAT IF THE PARENT IS A MINOR THEMSELVES, THEY MUST HAVE A GAL IN A VOLUNTARY CONSENT PROCEEDING. WHILE IT IS UNCLEAR IF THEY NEED BOTH ADVERSARY AND GAL WHEN CONVERTING AN INVOLUNTARY TO A VOLUNTARY (AND I DON’T BELIEVE THEY DO). UNTIL THE LAW IS CLARIFIED YOU ARE BEST ADVISED TO APPOINT ONE. See: ss. 48.235 (1) (b) and (5).