Family Law: Not Just For Lawyers[1]

By: Katherine Meger Kelsey, J.D.
Derelle Watson-Duvall, J.D.
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This handout contains some basic information about various areas of family and juvenile law. It is not intended to be comprehensive, but rather, addresses the basics of each topic, as well as common misconceptions.

Termination of Parental Rights

People often say that a parent has "signed away his/her rights" or "had his/her rights taken away." However, this language is imprecise and often inaccurate, due to the complicated nature of custody, parenting time, and termination of parental rights laws. Unless a parent has given written consent to another person's adoption of the child, it is unlikely that a person has actually given his or her consent to termination his or her parental rights. Often, what people mean is that a court has ordered that the parent no longer has custody, or that the parent has been ordered to have supervised or even no parenting time with the child unless certain conditions are met. This does not mean the parent's rights to the child have been terminated. It is best in inquire further if a person uses either of these phrases in order to determine what the actual custody and parental rights of a person may be.

A parent cannot voluntarily terminate his or her parental rights on the parent's request. If another person (including a stepparent) wants to adopt a parent's child, the parent can consent to the other person's adoption. The consenting parent's rights to the child are terminated when the adoption petition is granted. The consenting parent will not be legally required to pay child support after the adoption, but must pay any child support ordered until the adoption is granted.

Only the Department of Child Services or the child's Guardian ad Litem/Court Appointed Special Advocate can file a petition to involuntarily terminate parental rights. The petition can

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be filed only if the child is a Child in Need of Services (CHINS) or a delinquent child and the CHINS or delinquency case is still open.

The law grants parents free court appointed attorneys on petitions to involuntarily terminate parental rights, and the petitioner (DCS or GAL/ Court Appointed Special Advocate) must prove the case by clear and convincing evidence. Parents also have the right to a free appeal if the trial court terminates their parental rights if parents appear at court hearings and cooperate with their court appointed attorneys at the trial and in working on the appeal.

Paternity

A paternity affidavit signed by Mother and Birth Father establishes Birth Father as the child's legal father if the affidavit was signed after July 1, 2001. No DNA testing is needed to establish paternity by affidavit. A paternity affidavit signed by Mother and Birth Father after July 1, 2006, gives the Birth Father the right to "reasonable parenting time (visitation)" unless another determination is made by a court. "Reasonable parenting time" means parenting time according to the Indiana Parenting Time Guidelines. The only way a paternity affidavit can be set aside after 60 days is if the court finds that fraud, duress, or material mistake of fact existed when the affidavit was signed and the court, at the request of the man who signed the affidavit, orders a genetic test which indicates that the man is not the child's birth father. Mail-in DNA test kits cannot be used as a reason to set aside a paternity affidavit.

Paternity can be established through a court action, as provided in IC 31-14-2-1(1). Indiana law provides that the following people may file to establish paternity in court:

(1) the mother or expectant mother, alone or jointly with the alleged father;
(2) a man alleging he is the biological father of a child or of an unborn child, alone or jointly with the mother;
(3) a child;
(4) the department of child services (DCS) or county office of family and children (OFC), under certain circumstances; or
(5) the prosecuting attorney, under certain circumstances.

There are also time limits on when a person may file to establish paternity, so it is best to take action as soon as is possible. For example, a paternity petition must be filed within five months of the father's death, even if the child has not yet been born. IC 31-14-5-5.

Any party can ask the court the court to order genetic or blood testing to determine paternity. After the court establishes paternity, it must conduct a hearing to determine the issues of support, custody and parenting time, unless the parties reached an agreement on their own and filed it with the court. A noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time might endanger the child's physical health and wellbeing or significantly impair the child's emotional development.

Guardianship/Third Party Custody

There is a difference of jurisdiction between guardianship and third party custody.

Guardianship is when a third person seeks to gain custody of a child, and the parents are still married, one parent is deceased, or paternity has never been established. Guardianship generally must be requested in the probate division of the court. Guardianship is a court proceeding, requiring a petition, notice to parents or their written notarized consent, court appearance (at a formal hearing or in judge's office), court order appointing guardian, letters of guardianship, and a bond or an order by the court which states that a bond is not needed. A parent's signature on a "Standby Guardianship" form, a power of attorney form, or a will is not the equivalent of the third person being appointed as the guardian of a child. A document written and signed by a parent that states the parent is giving guardianship of the child to a third person is also not sufficient to give the third person guardianship of the child.

A guardian cannot be appointed by the probate court if paternity case file has been established for a court case or a divorce has been granted (and both parents are living) because the paternity or divorce court has ongoing jurisdiction over the child until the child becomes an adult. If a non-parent wants to have court ordered third party custody of a child, the non-parent must seek a custody order in the paternity or divorce court which has jurisdiction over the child.

Third party custody is when a third person seeks to gain custody of a child, and the parents have filed for divorce or are divorced, or there is a paternity action, meaning that paternity has been established through the court. The request for third party custodianship must be filed in the divorce case or in the paternity case. In order to obtain third party custody, the person must file to intervene in the case, file to request custody, and provide notice to the parents, as well as anyone else who may have intervened in the case. There will be a hearing, after which the court will issue an order, either granting or denying the person's request.

If a non-parent wants custody or guardianship of a child and the parents do not consent to the non-parent's request, the court will presume that the child should live with one or both of the parents. To overcome the parental presumption, the non-parent must prove by clear and convincing evidence to the court at a hearing that the parents are unfit; or parents have long acquiesced to the child living with the non-parent; or parents have voluntarily relinquished the child to the non-parent so that the affection of the child and non-parent are so interwoven that severing them would seriously mar and endanger the child's future happiness. The non-parent must also prove, by clear and convincing evidence, that placing the child with the non-parent is a substantial and significant advantage to the child.

Custody and Parenting Time

Child custody decisions in divorce and paternity cases are made based on the child's best interests, with no presumption in favor of Mothers or Fathers.

Factors which the court must consider in making child custody determinations are: (1) child's age and sex; (2) wishes of parents; (3) wishes of child, with more consideration given if child is at least 14 years old; (4) interaction and interrelationship of child with parents, siblings, and others who may significantly affect child's best interests; (5) child's adjustment to home, school, and community; (6) mental and physical health of all persons involved; (7) evidence of domestic violence by either parent; (8) evidence that child is being cared for by non-parent de facto custodian.

To modify custody after the court has issued its final custody order (paternity) or its final decree (divorce), the parent must show that: (1) modification is in the child's best interests; and (2) there is a substantial change in one or more of the above factors.

If a parent is relocating, relocating parent must prove that child's proposed move is made in good faith and for legitimate reason. If relocating parent proves good faith and legitimate reason for move, the other (non-relocating) parent must prove that proposed move is not in child's best interest to prevent child's move. Court shall consider the following in modifying custody, parenting time, or child support when relocating notice has been filed and a parent requests hearing:

(1) distance involved in proposed move;
(2) hardship and expense for the other (non-relocating) parent to have parenting time;
(3) feasibility of preserving relationship between non-relocating parent and child;
(4) any established pattern by relocating parent to promote or thwart non-relocating parent's contact with child;
(5) reasons for seeking to move child and opposing child's move;
(6) other factors affecting best interest of child.

Parenting time rights are not affected by the payment of or failure to pay child support. Parents may not give up parenting time in exchange for not having child support ordered by a court.

Grandparent Visitation

Indiana law does not give grandparents any specific visitation rights just because they are grandparents.

To obtain court-ordered grandparent visitation rights when the child's parent objects to visitation, grandparents must file a petition in court, give legal notice to parents, and prove the following at a hearing: (1) that the presumption that a fit parent should be allowed to make decisions to deny or limit grandparent's visitation with the child has been overcome; (2) that grandparent visitation is in the child's best interests; (3) that grandparents have had or attempted to have meaningful contact with the child.

If paternity has not been established, the child's paternal grandparents cannot file a petition for grandparent visitation.

Grandparent visitation petitions can be filed only if: (1) the child's parents have been divorced in Indiana, or if parents divorced in another state, that an Indiana court now has jurisdiction over the child's case; or (2) the child's parents were not married when the child was born.

Evidence Common to Family Law Cases

There are certain pieces of evidence that are common to most, if not all, cases involving custody, parenting time, and general care of a child.

Photographs may be admissible as long as the proper evidentiary foundation has been laid. Photographs may be of a child's or another person's injuries or condition, an incident or situation that is relevant to court case, the conditions of a home in which a child lives, etc. A photograph must be a true and accurate representation of the scene or image which the photograph is supposed to represent. There must be evidence of the date the photograph was taken and who took the photograph.

A child's statements may be admissible in several ways. Generally, a child's statement is frequently considered to be hearsay, since the child will not be testifying in court. Often, this is because the child is too young or scared to testify, or a court has decided not to permit a child to testify. Hearsay is generally not permitted to be introduced as evidence; however, there are several exceptions to this rule which apply to children's statements.

(1) A child's statement of a then existing mental, emotional, or physical condition (Ind. Evid. R. 803(3))
(2) A child's excited utterance (Ind. Evid. R. 803(2))
(3) A child's statements for the purposes of medical diagnosis and treatment (Ind. Evid. R. 803(4))

A parent's own statements are not considered to be hearsay. The statements of a "party opponent", meaning a person who is a party in the case, which includes parents, are deemed to be not hearsay. Ind. Evid. R. 801(d)(2). The only requirement is that the statement be offered against the party who made it.

Your own statements could potentially be evidence, and may fit under one of the same hearsay exceptions as a child's. However, if a parent wants to use something you said as evidence, it is more likely that you will be required to appear in court and testify.

Business and school records can be admissible as evidence. To be a business record, it must be a record of an act, event, condition, opinion, or diagnosis if:

(1) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
(2) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(3) making the record was a regular practice of that activity;
(4) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(9) or (10) or with a statute permitting certification; and
(5) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

There is case law on the topic of school records qualifying as business records. Generally, if these requirements are met, they may be admitted as evidence. Examples of problems with school records being admitted as evidence are as follows: (1) the records affidavit did not specify the number of pages in the record; (2) the business records were not made by a person with personal knowledge of the events; (3) the sponsoring witness for the records was not qualified to be a sponsoring witness.

Medical records, if they are certified and are regularly maintained by a hospital, are admissible as business records. The foundation requirements for a business record must be met. Ind. Evid. R. 803(6).

Criminal records may be admissible as evidence, depending on what they are. Judgments of conviction are an exception to hearsay under Ind. Evid. R. 803(22). These records can be very relevant to supervised parenting time, and in fact some convictions create a rebuttable presumption in favor of a parent having supervised parenting time. However, records such as police incident reports are not admissible as evidence. Ind. Evid. R. 803(8) specifically excludes investigative reports by police and other law enforcement personnel unless the reports are offered by the accused in a criminal case.

Social service reports, such as the notes of a supervised parenting time provider, may be admissible as evidence, but will have to meet the requirements of a business record (Ind. Evid. R. 803(6)) as well as relevant case law on the topic.

The testimony and records of a DCS caseworker may be admissible as evidence. IC 25-23.6-4-6 states that a social worker licensed under this article may provide factual testimony but not expert testimony; however, recent case law [B.H. v. Indiana Dept. of Child Services, 989 N.E.2d 355, 360-2 (Ind. Ct. App. 2013)] holds that that the trial court did not abuse its discretion in qualifying the social worker as an expert witness under Ind. Evid. R. 702. Regarding DCS records, IC 31-34-18-2(9) requires the court to first conduct an in camera review of DCS records to determine whether public disclosure of the information is necessary for the resolution of an issue then pending before the court. Juvenile court records are confidential, and the provisions of Administrative Rule 9 should be followed.

Electronic records, text messages, and other social media records are generally admissible, as long as certain foundation requirements are met. If the record is of something found on a computer, for example, a screen shot of a file on a computer, then testimony before court must be sufficient to establish authenticity of exhibits as depicting images contained in defendant's

computer. Cell phone records must be accompanied by a certification from cell phone companies that attached records were true and accurate created reasonable probability that records were what they purported to be.

Text messages must be separately authenticated from the telephones in which they are stored before being admitted into evidence. A person trying to offer text messages into evidence can offer the substance of text message for evidentiary purposes unique from purpose served by phone itself.

Social media records are admissible electronic evidence, as long as proper steps are taken to ensure authentication. For example, this means that the person offering a printout of a Facebook account of "Person B" with a certain posting on it by Person B must be able to show that it is in fact Person B's account.