

LORMAN EDUCATION SERVICES

*SEMINAR NAME: ADOPTION PRACTICE,
PROCEDURE AND PITFALLS IN MICHIGAN*

*SEMINAR DATE: OCTOBER 8, 2003 IN
SOUTHFIELD, MICHIGAN*

*TERMINATION OF PARENTAL RIGHTS
IN VOLUNTARY ADOPTIONS*

*DYKEMA GOSSETT PLLC
JOANNE R. LAX
39577 WOODWARD AVENUE
SUITE 300
BLOOMFIELD HILLS, MICHIGAN 48304*

*TELEPHONE: (248) 203-0816
FACSIMILE: (248) 203-0763
EMAIL: JLAX@DYKEMA.COM*

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TERMINATION OF PARENTAL RIGHTS IN VOLUNTARY ADOPTIONS

- I. PLACEMENTS PRIOR TO TERMINATION OF PARENTAL RIGHTS.
 - A. After birth but before the entry of a court order terminating the rights of birth mother and birth father, Michigan law offers two alternative placements for the prospective adoptee.
 1. Licensed foster parents. MCLA 710.41(3). Sometimes, the licensed foster parents are the prospective adoptive parents; other times they are neutral third parties who are affiliated with an adoption agency.
 2. Temporary direct placement – MCLA 710.23a–f.
 - B. Temporary direct placement prerequisites.
 1. The birth mother, the birth mother’s legal guardian, or an adoption agency working with the birth mother that is authorized by the birth mother, or the birth father may temporarily place a prospective adoptee with the prospective adoptive parents immediately upon release from the hospital at which the adoptee is born, provided that all the prerequisites in the Adoption Code are followed.
 2. The prospective adoptive parents must have a valid and current (e.g. within the past 12 months) home study (a/k/a “preplacement assessment”). MCLA 710.23f.

3. The birth mother or other person making the temporary direct placement must have been given the opportunity to review the home study. MCLA 710.23d(1)(c)(iv).
4. The birth mother or other person making the temporary direct placement must be assisted by either an attorney or an adoption agency. MCLA 710.23d(1)(b).
5. The prospective adoptive parents must reside in Michigan. MCLA 710.23d(1)(a).
6. The birth mother or other person making the temporary direct placement must sign a written document evidencing the transfer of physical custody. MCLA 710.23d(1)(c). This form is PCA 330 (copy attached). If the birth mother or other person making the temporary placement is an unemancipated minor, the document must be co-signed by that person's own parent, guardian or guardian *ad litem*.
7. The prospective adoptive parents must sign a written document, PCA 332 (copy attached) evidencing their agreement to the terms of the temporary direct placement. MCLA 710.23d(1)(d).
8. The written documents must be filed with the court in the county where the prospective adoptive parents reside within two business days of the date of the placement. MCLA 710.23d(2). This

ensures that the court is aware of the whereabouts of the adoptee and can exercise jurisdiction over the adoptee, if necessary.

9. The adoption attorney or agency assisting with the temporary direct placement must file a report with the court within 30 days of filing the temporary direct placement papers, indicating that either an adoption petition has been filed or that the adoptee has been returned to the birth parent. MCLA 710.23d(3). If no report is filed, the court must investigate the disposition of the adoptee. If the court determines that neither an adoption petition nor return of the adoptee has occurred (e.g. the adoptee remains with the prospective adoptive parents without further action), the prosecuting attorney is authorized to file a petition under the Juvenile Code to assume jurisdiction over the adoptee as an abandoned child. MCLA 710.23d(4) and MCLA 710.23e.

C. Nature of the temporary direct placement.

1. The temporary direct placement is an “at risk” placement. The birth mother (or other person making the temporary direct placement) may revoke the placement at any time for any reason prior to the point that the birth mother’s parental rights are terminated by a court. MCLA 710.23d(5).
2. If the birth mother (or other person making the temporary placement) revokes the temporary direct placement, the

prospective adoptive parents are obligated to return the adoptee to the birth mother. The circuit court, family division, is empowered to enter an *ex-parte* order for the return of the adoptee within 24 hours. MCLA 710.23e(2).

D. Limitations of the temporary direct placement.

1. Because the prospective adoptive parents must reside in Michigan in order for a temporary direct placement to be valid, this mechanism is not helpful in interstate adoptions.
2. Michigan law is unclear about pre-termination placements with interstateparents.

II. TERMINATION OF THE PARENTAL RIGHTS OF BIRTH MOTHERS.

A. Termination of birth mothers' parental rights outside of the neglect/abuse system is a voluntary process.

B. The Adoption Code provides two mechanisms by which birth mothers may voluntarily relinquish parental rights:

1. *Release of the adoptee* – MCLA 710.23(s). "Release" means a document in which all parental rights over a specific child are voluntarily relinquished to FIA or to a child placing agency [adoption agency].
2. *Consent* -- MCLA 710.23(k) "Consent" means a document in which all parental rights over a specific child are voluntarily

relinquished to the court for placement with a specific adoptive parent.

C. The two relinquishment mechanisms roughly correlate to the two different types of adoptive placements in the Adoption Code.

1. *Agency placement* – MCLA 710.23(d). "Agency placement" means a placement in which a child placing agency, the department, or a court selects the adoptive parent for the adoptee and transfers physical custody of the adoptee to the prospective adoptive parent.

2. *Direct placement* – MCLA 710.23(n). "Direct placement" means a placement in which a parent or guardian selects an adoptive parent for an adoptee, other than a stepparent or an individual related to the adoptee within the fifth degree by marriage, blood, or adoption, and transfers physical custody of the adoptee to the prospective adoptive parent.

3. Placement means "selection of an adoptive parent for an adoptee and transfer of physical custody of the adoptee to a prospective adoptive parent" pursuant to the Adoption Code. MCLA 710.23(r).

D. A birth mother signs a release in an agency placement. A birth mother signs a consent in a direct placement (as well as in a step-parent or intrafamily adoption, discussed later).

E. The role of adoption agencies has expanded since the traditional days of making only agency placements. Many agencies now assist birth mothers to make a direct placement by allowing the birth mother to select prospective adoptive parents from amongst the agency's clientele, and by assisting the birth mother to transfer physical custody of the adoptee through a temporary direct placement. In this capacity, the birth mother still relinquishes parental rights using a consent rather than a release.

III. FORMALITIES OF EXECUTION OF RELEASES AND CONSENTS.

- A. With two exceptions, both releases and consents must be signed in court, after the judge or referee has informed the birth mother of the significance of the release or consent, and made independent inquiry of the birth mother regarding the voluntary nature of the birth mother's actions. MCLA 710.29(6) and MCLA 710.44(6).
- B. A verbatim record of the testimony at the release or consent hearing must be made. MCLA 710.29(1) and MCLA 710.44(1).
- C. The exceptions to holding a hearing for the giving of a release or consent are:
1. If the parent is on active duty in the military, the release or consent can be taken before a notary or other person authorized to administer oaths in the military branch. MCLA 710.29(2) and MCLA 710.44(2).

2. If the parent is incarcerated, the release or consent may be taken by a notary or other person authorized to administer oaths. *Id.*
- D. If the birth mother is an unemancipated minor, her signature alone on the release or consent is insufficient. The release or consent must be co-signed by the birth mother's own parent, guardian, or guardian *ad litem*. MCLA 710.28(4) and MCLA 710.43(4).
- E. A consent hearing must be scheduled within 7 days of request for it. MCLA 710.44(1). Note, in some counties the court does not adhere to this statutory requirement. Query whether the court has the discretion to ignore this timing mandate.
- F. Releases and consents must be accompanied by two documents executed by the birth mother:
1. A verified statement (MCLA 710.28(5) and MCLA 710.44(5) indicating that:
 - a. The parent has received a list of support groups and, if the release is to a child placing agency, a copy of the agency's brochure.
 - b. The parent has received counseling related to the adoption or waives the counseling.
 - c. The parent has not received or been promised any money or anything of value for the release of the adoptee, except for

lawful payments that are itemized on a schedule filed with the release or consent.

- d. The validity and finality of the release or consent is not affected by any collateral or separate agreement between the parent and the agency, or the parent and the prospective adoptive parent.
 - e. The parent understands that it serves the welfare of the adoptee for the parent to keep the child placing agency or FIA informed of any health problems that the parent develops that could affect the adoptee.
 - f. The parent understands that it serves the welfare of the adoptee for the parent to keep his or her address current with the adoptee placing agency or department in order to permit a response to any inquiry concerning medical or social history from an adoptive parent of a minor adoptee or from an adoptee who is 18 years of age or older.
2. A verified accounting of money spent on behalf of the birth mother, or promised to be spent, including receipts for all expenditures. MCLA 710.28(5) and MCLA 710.43(5).
- G. A release or consent can be executed in another state if the birth mother resides there. The Adoption Code authorizes the Michigan court to accept such a consent or release whether it is executed pursuant to the laws of the

other state or the laws of Michigan. MCLA 710.28(4) and MCLA 710.43(4). However, the judge or referee may not accept the release or consent without first assuring itself that the release or consent fully complies with the law of the jurisdiction that governs it, whether that is the other state's laws or Michigan law.

IV. WHAT CONDITIONS CAN AFFECT THE SUBSTANTIVE VALIDITY OF A RELEASE OR CONSENT?

- A. The Adoption Code analyzes the validity of consent and release analogously. *In re Neagos*, 176 Mich.App. 406, 408, 439 N.W.2d 357, 358 (1989).
- B. Has the birth mother freely, voluntarily, and understandingly given consent or executed the release?. *In re Burns*, 236 Mich.App. 291, 292, 599 N.W.2d 783, 784 (1999)?
 - 1. Intellectual capacity, including issues of developmental disability, brain damage, autism and the like.
 - 2. Influence of street drugs or prescription medications.
 - 3. Influence of alcohol.
 - 4. Lack of understanding of alternatives to release or consent.
 - 5. Pressure or coercion from family member in position of authority, or from other parent.
- C. Counseling prior to release or consent from a neutral advisor (social worker, psychologist) can dispel issues about the validity of the consent.

D. At the release or consent hearing, it is preferable for the prospective adoptive parents not to attend or be in the courthouse or immediate vicinity.

V. WHEN IS A RELEASE OR CONSENT IRREVOCABLE?

A. Because a release or consent is given before a judge or referee who has made a thorough investigation of the birth mother's state of mind and voluntary action, birth mothers should consider the release or consent to be irrevocable when it is executed. The judges and referees so advise the birth mother during the course of the hearing. The transcript of the hearing is often dispositive of the issue, regardless of events affecting the birth mother outside of the courtroom. The courtroom is the birth mother's "last clear chance" to be sure that she is acting freely, voluntarily and knowingly.

B. Nonetheless, a birth mother can seek a re-hearing or appeal of the order terminating parental rights that is based upon the release or consent within 21 days of the entry of the order. MCLA 710.64(1). Failure to file within this 21 day time period deprives the court of jurisdiction to entertain a request for re-hearing unless the child placing agency joins in or acquiesces in the petition. *In re Hole*, 102 Mich.App. 286, 290, 301 N.W.2d 507, 509 (1980); *In the Matter of Baby Girl Fletcher*, 76 Mich.App. 219, 223, 256 N.W.2d 444, 445 (1977). Even if the child placing agency joins the petition, if more than 21 days have passed and the

adoptee has already been placed for adoption the court is without jurisdiction. *In the Matter of Myers*, 131 Mich.App. 160, 163-164, 345 N.W.2d 663, 665 (1983). *In re Burns*, 236 Mich.App. 291, 599 N.W.2d 783 (1999).

- C. A court may grant a rehearing only for good cause shown. A rehearing is permitted if there is a genuine question as to whether a biological parent has freely, voluntarily, and understandingly given consent. *In re Burns*, 236 Mich.App. 291, 292, 599 N.W.2d 783, 784 (1999), *DeBoer*, 76 Mich.App. at 645, 257 N.W.2d at 203.
- D. It is clearly established within Michigan case law that a mere change of heart or mind is not significant enough to allow a biological parent to revoke a release or consent.
1. *In re Curran*, 196 Mich.App. 380, 383, 493 N.W.2d 454, 456 (1992).
 2. *In Matter of Koroly*, 145 Mich.App. 79, 377 N.W.2d 346 (1985), the putative father was originally told he was not the father. However, the birth mother later named him as the father when she put the adoptee up for adoption. When the adoption agency contacted the father and indicated that he was named the as the father, he denied paternity and released his rights to the adoptee. Subsequently, he decided he was the father and filed for a rehearing regarding his rights within the required 21 days. On

rehearing, the court found that the father's change of heart as to his status was not sufficient to set aside the previous order, noting that "[a] reasonable person...under all these circumstances would have done everything possible to find out whether he was or was not the father, if he had a genuine interest in the adoptee." *Id.* at 86. The court also held that on a rehearing sought "by one who has previously denied paternity" the best interest of the child analysis does not need to be applied. *Id.* at 86.

- E. In order for a revocation to be allowed it is commonly necessary that there be some element of fraud, duress, or undue influence. *In the Matter of Blankenship*, 165 Mich.App. 706, 711, 418 N.W.2d 919, 921 (1988). The presence of fraud, duress, or undue influence must be supported by evidence, and not just a general allegation. *In re Blankenship*, 165 Mich.App. at 711, 418 N.W.2d at 921.
- F. When the petitioner fails to make a motion to modify, rehear or set aside the termination proceeding within the required 21 days some courts have set aside an adoption where a significant case of fraud can be made out.
 - 1. *Neagos v. Welch*, 176 Mich.App. 406, 439 N.W.2d 357 (1989) (birth mother failed to make out a case of significant fraud where she claimed psychological stress, mental disability and a lack of legal awareness and the fraud claim was several years after the legal adoption was completed).

2. In *Matter of Kozak*, 92 Mich.App. 579, 285 N.W.2d 378 (1979), the birth mother terminated her parental rights stating that she was unable to determine the identity of the biological father. Accordingly, the biological father's rights were terminated under MCLA 710.37(2) and the adoptee was put in custody of prospective adoptive parents. Over three months later the biological father came forward and filed a petition to stay the adoption proceedings. The putative father claimed that the birth mother had given false testimony concerning his identity. The adoptive parents argued that the father could not object because the 21 day period to file a motion for rehearing had passed. The court held that when the time for appeal has passed relief may be granted to set aside the proceedings if a significant case of fraud can be made out. The fraud must be fraud in obtaining the order.

3. Michigan courts are extremely reluctant to set aside adoption unless a case of significant fraud is made out. *In re Neagos*, 176 Mich.App. at 412, 439 N.W.2d. at 360.

G. In addition to fraud, petitioners will also often argue that they were denied the right to counsel, as a basis to set aside a release or consent. Because adoption is a voluntary proceeding it is well established that there is no right to court appointed counsel. *In the Matter of Jackson*, 115 Mich.App. 40, 51, 320 N.W.2d 285, 289 (1982). The birth parent may elect to retain

private counsel, but there is no authority that requires the court to advise of the right to counsel. *In the Matter of Blankenship*, 165 Mich.App. at 713, 418 N.W.2d at 922. Therefore, allegations of either no representation or inadequate access to representation are not acceptable arguments to support a rehearing.

- H. Birth parents also argue that they have had a “change of circumstances” between the execution of the consent or release and the time for a rehearing. *In re Blankenship*, 165 Mich.App. at 710, 418 N.W.2d. at 921. *In re Jackson*, 115 Mich.App. at 46, 51, 320 N.W.2d at 287. In these cases, the court rejected changed financial circumstances (e.g. new job or more available child care) as a ground for revoking a release or consent. No reported Michigan case has substantiated a birth parent’s claim of changed circumstances as a basis to revoke a release or consent.
- I. The Supreme Court of Michigan has also ruled that among the factors to be considered at the rehearing is the best interest of the adoptee. *In the Matter of Baby Boy Barlow*, 404 Mich.App. 216, 227, 273 N.W.2d 35, 39 (1978). The court is authorized to determine in what situation, or with whom, the best interest of the child would be served. *Id.*
- J. In addition to a re-hearing, the birth parent has the option of filing an appeal with the court of appeals regarding the order terminating parental rights. In an appeal from a court’s order denying a petition for a hearing to revoke a release, the standard of review is abuse of discretion. *In the*

Matter of Nord, 149 Mich.App 817, 821, 386 N.W.2d 694, 696 (1986). Due to their analogous nature, abuse of discretion is also the standard for a case concerning consent to adoption. *Id.* The court reviews the record to determine if the court arbitrarily or capriciously reached its decision. *Id.* The supreme court has explained what constitutes abuse of discretion: “In order to have an ‘abuse’ in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but of perversity of will, not the exercise of judgment but of defiance thereof, not the exercise of reason but rather passion or bias.” *Spalding v. Spalding*, 355 Mich. 382, 384-385, 94 N.W.2d 810, 811-812 (1959). Unless such a miscarriage of justice is found the ruling of the court will not be upset.

VI. TERMINATION OF THE PARENTAL RIGHTS OF BIRTH FATHERS.

- A. Termination of the parental rights of fathers may be voluntary or involuntary, depending upon the circumstances.
- B. Legal fathers.
 - 1. A legal father is not a defined term in the Adoption Code. However, it refers to:
 - a. The husband of the birth mother; or
 - b. A man who is not the husband of the birth mother, but who signed an Acknowledgement of Parentage form with the mother declaring his paternity. MCLA 722.1004. These

forms are available at hospitals, and hospitals are obligated to offer them when a child is born to an unmarried woman.

- C. The parental rights of a legal father may only be terminated with consent or release, or involuntarily pursuant to the Juvenile Code. The rights of legal fathers are treated identically to the rights of birth mothers.
- D. Putative fathers – children born out of wedlock. Putative fathers have constitutional rights to their biological children (*Stanley v. Illinois*, 405 U.S. 645; 92 S. Ct. 1208; 31 L. Ed. 2d. 551 (1972)), but these rights may be terminated more easily than the rights of legal fathers.

VII. NOTICE TO PUTATIVE FATHERS REGARDING A PENDING ADOPTION.

- A. A putative father is the biological father of a child conceived and born in one of two situations:
 - 1. To a woman who was unmarried from the time of conception to the time of birth; or
 - 2. To a woman who was married to another man at any point from conception until birth, provided that a court has determined that although the adoptee was born during the marriage, the adoptee is not the issue of that marriage.
 - 3. The Adoption Code does not require DNA testing to determine the status of a putative father, but such testing is available.
- B. Putative fathers can always sign a voluntary consent or release of their parental rights, just like a birth mother or legal father. This is the most

secure method of terminating their parental rights. However, it is not practical in many cases.

- C. Absent a release or consent, the parental rights of a putative father can be terminated through several different mechanisms. The baseline of these termination mechanisms is to give the putative father notice and an opportunity to be heard at a court hearing set for the purpose of addressing the father's rights. *In the Matter of Baby Boy Barlow*, 404 Mich. 2169; 273 N.W. 2d 35 (1978), at 229.
- D. If the release or consent of the biological father of an adoptee born out of wedlock cannot be obtained, the circuit court, family division, handling the adoption petition must hold a hearing to determine the rights of the father. MCLA 710.36.
 - 1. At the hearing, the court will determine whether the adoptee is born out of wedlock, the identity of the father (or that the identity of the father cannot be determined) and whether the parental rights of the father can be terminated without further proceedings. MCLA 710.36(1).
 - 2. Generally, notice of the hearing must be served upon the putative father at least 14 days prior to the hearing by personal service. MCR 3.802.

3. In order for an adoption to be secure, it is necessary to ensure that all putative fathers receive notice of the hearing unless they have waived it, or are not otherwise entitled to it.
- E. The Adoption Code provides several mechanisms for a putative father to be notified of his rights regarding a child that the birth mother plans to place for adoption. Some are designed to ensure that the putative father receives notice of the court hearing at which father's rights are to be adjudicated, and some are pre-birth methods to alert the putative father so that his rights can be terminated at the hearing without additional notice of the hearing after the birth.
1. A putative father may file with the circuit court, family division, a Notice of Intent to Claim Paternity. MCLA 710.33.
 - a. This document is filed prior to the birth of an adoptee to be born out of wedlock, and evidences the putative father's assertion that he is the biological father of the adoptee.
 - b. A court receiving a Notice of Intent to Claim Paternity is obligated to transmit it immediately to the State Registrar of Vital Records. As part of the hearing mandated by MCLA 710.36, a court must check the State Registrar to determine if a Notice of Intent to Claim Paternity is filed.
 - c. Any man who has filed a Notice of Intent to Claim Paternity is entitled to actual written notice of all

proceedings to determine the biological father and address his rights.

- d. The Notice of Intent to Claim Paternity also creates a rebuttable presumption that the man so filing is the biological father of the adoptee.
 - e. A putative father wishing to protect his rights to an adoptee to be born out of wedlock is advised to file a Notice of Intent to Claim Paternity.
2. During her pregnancy, the birth mother may petition the circuit court, family division, for the issuance of a notice of intent to release or consent to the adoption of the unborn adoptee. MCLA 710.34.
- a. The petition is made under oath, and must identify the time and place of conception and must name the putative father or fathers.
 - b. The court receiving the petition must issue the notice of intent to release or consent, which informs the putative father of his right to file a Notice of Intent to Claim Paternity, and of the consequences of such a filing. The notice of intent to release or consent must further inform the putative father that his failure to file a Notice of Intent to Claim Paternity will serve as his denial of his interest in

custody of the adoptee, which denial shall result in the court's termination of his rights to the adoptee.

- c. If the notice of intent to release or consent is personally served upon the named putative father(s) at least 30 days before the mother's estimated due date, the parental rights of the man so served may be permanently terminated by the court so long as:
 - i. The man has not filed a Notice of Intent to Claim Paternity, or
 - ii. The man does not appear in court and assert an interest in custody of the adoptee.
- d. In this situation, the putative father does not have to affirmatively do anything in order for the court to terminate his rights and enable the adoption to proceed. It also clarifies the rights of the birth father prior to the birth of the adoptee, thereby eliminating birth mother doubt as to whether the adoption she plans will be able to go forward smoothly or at all.
- e. This is a useful but under used method to terminate the rights of a putative father, provided that personal service can be achieved (e.g. the birth mother has a valid address or phone number for the putative father) and so long as

sufficient time remains before the birth to satisfy the 30 day advance notice rule.

3. A putative father may at any time before or after the birth of the adoptee sign a written waiver of notice of hearing. MCLA 710.36.
 - a. This is accomplished via PCA 316, which also enables the putative father to deny paternity, acknowledge that he may be the father but deny interest in custody, or assert an interest in custody (copy attached).
 - b. The PCA 316 serves as evidence at a hearing to determine the putative father's parental rights.
 - c. If the putative father has denied interest in custody on a PCA 316, the court may terminate his parental rights without further notice to him and without any further affirmative steps from him. MCLA 710.37(1)(a).
4. If the identity of the putative father is unknown or his identity is known but his whereabouts are unknown, the court must determine if the facts support a finding that actual notice cannot be given. MCLA 710.37(2). The court may terminate the rights of the putative father if the court finds from the evidence that reasonable effort has been made to identify and locate the father and that any of the following circumstances exist:

- a. The putative father, whose identity is not known, has not made provision for the adoptee's care and did not provide support for the mother during her pregnancy or during her confinement.
- b. The putative father, whose identity is known but whose whereabouts are unknown, has not provided support for the mother, has not shown any interest in the adoptee, and has not made provision for the adoptee's care, during the 90 days preceding the hearing.

VIII. TERMINATION OF THE RIGHTS OF A PUTATIVE FATHER WHO HAS RECEIVED NOTICE AND ASSERTS AN INTEREST IN CUSTODY OF THE ADOPTEE.

- A. If a putative father who has received notice attends the court hearing and asserts an interest in custody, the resolution of his claim depends upon whether he is classified as a “do nothing” or “do something” putative father. MCLA 710.39, and *In the Matter of Baby Boy Barlow*, 404 Mich. 216, 229; 273 N.W. 2d 35 (1978).
- B. Putative fathers who have not established a custodial relationship with the adoptee and who have not supported the mother or the adoptee during the 90 days before notice of the hearing (e.g. “do nothing” fathers), may have their rights terminated if the court finds that it is not in the best interest of the adoptee to grant custody to the father. Those fathers who have established a custodial relationship or provided support to the mother or

adoptive at least 90 days prior to the hearing (e.g. “do something” fathers) may only have their rights terminated if the court finds that they are guilty of child abuse or neglect pursuant to the Juvenile Code (absent affirmative consent to the termination). Accordingly, “do something” putative fathers are granted significantly more deference in the termination process than “do nothing” putative fathers.

C. Michigan courts have applied a reasonableness test to determine whether a father has provided support or care to the mother or adoptee. *In re Brianna Marie Gaipa*, 219 Mich. App. 80; 555 N.W. 2d 867 (1996).

1. “It seems clear that, in demanding such an established relationship, the Legislature must have intended more than an incidental, fleeting, or inconsequential offer of support or care and therefore must have intended more than “any” contribution by the father.” *Id.* at 85.
2. The Legislature intended that the courts “determine case by case whether the father provided the kind of support and the amount of support that is reasonable under the circumstances of each particular case.” *Id.*
3. Relevant factors in determining the reasonableness of the putative father’s support are “the father’s ability to provide support or care, the needs of the mother, the kind of support or care provided, the duration of the support, whether the mother impeded the father’s

efforts to provide her with support, and any other significant factors.” *Id.* at 86.

4. The filing of a notice of intent to claim paternity does not constitute support or care. *In re Dawson*, 232 Mich. App. 690; 591 N.W. 2d 433 (1998) and *In re O.E.S.*, 246 Mich. App. 212; 631 N.W. 2d 353 (2001).

5. Support is sufficient to render a putative father a “do something” putative father even if the father only paid it because of a court order. *In the Matter of Krystal Leigh Schnell*, 214 Mich. App. 304; 543 N.W. 2d 11 (1995).

D. The reasonableness test is “equally applicable to the question of what constitutes a “custodial relationship” within the purview of subsection 39(2). *In the Matter of James Robert Lang*, 236 Mich. App. 129, 137; 600 N.W. 2d 646 (1999).

1. The court defined a custodial relationship as one that “suggests that an established relationship exists between the parent and the adoptee in which the parent exercises responsibility for the care, supervision, and upbringing of the adoptee.” *Id.* at 138. Where the father was incarcerated for eight years and had not made an attempt to contact his son for approximately four years before the hearing, the court found that the father had not provided care and support and that no custodial relationship existed. *Id.* at 139.

2. “An incarcerated parent may still retain the ability to comply with the support and contact requirements of the statute.” *Id.* at 140.

E. Where a father has been deceived by the mother about the pregnancy or birth and accordingly does not provide support or establish a custodial relationship, he will still be considered a “do-nothing” father, subject to §39(1) of the statute and be subject to termination of his parental rights under the “best interest” test, not the “neglect and abuse” test. *In the Matter of RFF*, 242 Mich. App. 188; 617 N.W. 2d 745 (2000).

1. “The amended statute provides that to come within subsection 39(2), a father must provide ‘*substantial and regular support or care in accordance with the putative father’s ability to provide such support or care.*’” *Id.* at 198.

2. The court stated that it “did not believe the Legislature intended to create a deceived father exception to the requirement that a father provide substantial and regular care and support.” *Id.* at 199.

3. The court expressed concern that putative fathers would be treated unfairly under this subsection. “[W]e feel compelled to express our concern that § 39 treats a putative father unfairly, where, as in the instant case, the mother’s actions prevent the putative father from providing support or care for the mother during the pregnancy or establishing a custodial relationship with the adoptee. In [a situation such as this] we do not believe that the putative

father should be placed in the category of putative fathers who fall within subsection 39(1). However, because § 39, as written, does not account for such a situation, we must conclude in the instant case that [the biological father] did not satisfy subsection 39(2).”

Id. at 696.

IX. APPLICATION OF THE “BEST INTEREST” FACTORS IN TERMINATING THE RIGHTS OF A “DO NOTHING” PUTATIVE FATHER.

A. Under §39(1), the court must determine whether the father has the ability to properly care for the adoptee, and whether, in general, it is in the adoptee’s best interests for the father to have custody of the adoptee. *In the Matter of Baby Boy Barlow*, 404 Mich. at 230. Even where a father has not established a custodial relationship with the adoptee and has not provided care or support for the mother or adoptee, a child may not be placed for purposes of adoption until the father’s rights are terminated by the court. *Id.* at 232.

1. “In the absence of evidence indicating that [the father’s] home would not be a good one for the adoptee, as to this one of the elements comprising the totality of the adoptee’s interest,” there is no basis to terminate a father’s rights. *Id.* at 234.

2. “A home is not rendered unsuitable merely because there is not a permanent mother or, for that matter father figure in residence throughout the day.” *Id.* at 232 citing *In re Mark T*, 8 Mich. App. 122 (1967).

3. “Youth and marital status are not evidence of either an incapacity or disinclination to assure that an adoptee will receive adequate care and supervision.” *Id.* at 231.
- B. The court need not make specific findings of fact regarding each best interests factor. *In the Matter of O.E.S.*, 246 Mich. App. 212; 631 N.W. 2d 353 (2001). The court may view the totality of evidence without individually addressing each of the best interests factors in order to determine whether the father has the ability to give the adoptee love, affection, guidance, permanence, and stability. *Id.* at 219.
- C. The “do nothing” putative father’s rights may be terminated under the “best interest” test if there is a lack of maturity and that the father must be fully supported by his parents, both financially and with making decisions. *In the Matter of RFF*, 242 Mich. App. 188; 617 N.W. 2d 745 (2000).
 1. In that case, the father, a seventeen year old high school student, planned to live with his parents and complete high school while raising his child. Putative father’s intention was to award custody to his parents until he was in a position to care for the child. “Viewed independently of his parents, the factors did not favor awarding him custody of the baby.” *Id.* at 204.
 2. The court may not properly compare the home of the adoptive parents to the home of the father’s in determining the best interest of the adoptee. “Subsection 39(1) clearly indicates that, when a

putative father does not fall within the provisions of subsection (2), the court must inquire into *his* fitness and *his* ability to properly care for the adoptee.” *In re Dawson*, 232 Mich. App. at 696.

3. “Where a putative father appears in court desiring custody of his child and is found to be fit and able to properly care for his child, he should not be required to compete with individuals who wish to adopt his child.” *Id.* at 699.
4. “If the court concludes that the father is fit and able to raise his child, the court should then determine, by considering the father’s situation alone, whether the best interests of the child are satisfied by placing the child with the father or by terminating the father’s parental rights and placing the child for adoption.” *Id.*