

FOLEY COLLOQUY

NO CONTEST PLEA (ADMISSION) TO GROUNDS IN INVOLUNTARY TPR

NOTE: ASSUMES THE PARENT IS REPRESENTED BY COUNSEL—SECURE WAIVER OF RIGHT TO COUNSEL, IF NOT.

It is my understanding that after discussions with your lawyer, you have made a decision to plead no contest in the grounds phase of this proceeding—you are not agreeing that parental rights should be terminated, but keeping your right to fight against the termination of your parental rights only at the best interests/dispositional phase of these proceedings. Is this true?

I am going to ask you a bunch of questions. 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.

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 plead no contest in the grounds phase of these proceedings.

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 if the facts in the petition are true or substantially true.

By pleading no contest in the grounds phase, you give up your right to fight against TPR in the grounds phase and acknowledge the petitioner can prove a reason or basis to terminate your parental rights, 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 involuntary 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 and there is a basis to involuntarily terminate your rights. 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 pleading no contest.
- To force the state/petitioner to prove the facts in the petition 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 entering a no contest plea, 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.

By pleading no contest in the grounds phase, you are not agreeing that your parental rights should be terminated. However, you are keeping your right to fight against termination only at the dispositional/best interests phase of the proceedings.

If you plead no contest, if I accept your plea and if I hear testimony that satisfies me they can prove the grounds they allege (and you concede you are not contesting the truth of that testimony by pleading no contest), I am required to make a "parental unfitness" finding and we move to the best interests/dispositional phase of the proceedings.

At that phase, you have all the rights we talked about earlier, except the right to a jury determination (testify yourself, if you choose; call other witnesses; question through your lawyer the witness testifying in support of the petition in an effort to discredit their testimony; 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). If the judge decides it does serve your child's best interest, the petition will be granted and adoption will be pursued. If the judge decides it does not serve your child's best interest, the TPR petition will be dismissed and a different alternative would have to be pursued. Among the alternatives are:

- Immediate return of your child to your care without the involvement of child welfare authorities. If I thought that was safe and appropriate, I could do that.

- Leave your child in foster/relative care and ordering child welfare authorities to continue working with you to resolve the safety issues; anticipating a future return to your care when those issues are resolved.
- Transfer guardianship of your child to a relative or the current caregivers as an alternative to TPR. That puts the guardian in the shoes of a parent on a day-to-day basis and with all parental authority—but you would remain the legally recognized parent, presumably have a right to visit and communicate with your child, and have the option of returning to court at a future date to attempt to restore your guardianship rights.

But the one and only issue at that point of the proceedings is what is in the best interests of your child: termination and adoption or dismissal of the petition and pursuit of some other alternative.

Did anyone promise you anything or threaten you in any way to get you to plead no contest in the grounds phase?

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 plead no contest in the grounds phase of these proceedings?

Have lawyer acknowledge their belief it is a valid no contest plea.

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 NO CONTEST PLEA INTO A 3 DAY TRIAL IN A HEARTBEAT.]

Make finding that the no contest plea is “informed and voluntary.”

Walked about this earlier, even though you plead no contest, I still have to hear testimony that satisfies me (or conceivably does not satisfy me) they can prove the ground(s) alleged. We are going to hear testimony now to meet that requirement and by pleading no contest you are conceding they can prove these facts to a RC by CSC evidence.

Take the testimony. If it satisfies you, make the finding ground(s) have been proved to a RC by CSC evidence. Then make the finding of parental unfitness—s. 48.424(4).

Proceed to dispositional hearing.