

# Representing Parents in Child Welfare Cases



## The Role of Counsel

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# Representing Parents in Child Welfare Cases



- Parents have a constitutionally protected right to the care, custody, and control of their children.
- The parent's attorney must
  - ✦ Utilize the law to protect these critically important rights
  - ✦ Work with the parent to establish the goals of the representation
  - ✦ Zealously advocate for the parent
  - ✦ Counsel client based on a comprehensive knowledge of the law and detailed understanding of the particular case
  - ✦ Investigate the case at every stage
  - ✦ Advise client regarding all options at each stage

# The Role of Counsel

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- SHELTER HEARING
  - OUT-OF-COURT ADVOCACY
  - ADJUDICATION
  - DISPOSITION
  - REVIEW
  - PERMANENCY
  - TERMINATION OF PARENTAL RIGHTS

# The Shelter Hearing Timeline



- Hearing has to occur within 48 hours of removal
- Includes right to
  - Present evidence
  - Examine and call witnesses
  - Have client testify

# The Shelter Hearing



- Outcome may dictate what happens for many months to come
  - Studies indicate:
    - A natural bias toward preserving the custodial status quo
    - Makes courts reluctant to quickly return children to parents once the court has ordered removal
- Thus, strong, zealous advocacy by parent's attorneys is essential from the outset

# The Shelter Hearing



- BUILDING TRUST
- ELICITING INFORMATION
- CLIENT COUNSELING AND  
DEFINING CLIENT GOALS
- NEGOTIATING
- COURTROOM ADVOCACY

# Building Trust



- First meeting may be hurried
- Develop trust by
  - Listening carefully, patiently to client's full story
  - Treating client with respect
  - Being fair and empathetic
  - Endeavoring to take some visible action for client
- Reassure client about confidentiality

# Eliciting Information



- Knowledge of the case empowers attorney to represent client effectively
- Attorney should obtain client's personal info
  - Membership or eligibility for membership in an Indian tribe or Alaskan Native
  - Client's version of how family became involved w/ CPS
  - Any previous family involvement with the courts or CPS
  - Whether the family currently receives services
  - Whether the child has special needs
  - Nature of support available to the family
    - Including alternative placement options

# Client Counseling



- Inform client the court makes 2 main decisions at shelter hearing:
  - Whether to authorize the petition so case may come within court's jurisdiction
  - Child's placement pending adjudication
    - Court should be open to strategies that **“remove the danger and not the child”**
- The court will look at proposed caregiver's history, involvement with child, willingness and ability to comply with court orders

# Decide Focus/Goals: Past or Future

## Past:

- About veracity of the CPS's allegations against the parent
- Attorney acts like defense counsel with a more adversarial approach
- Tries to exonerate the client in the hope of obtaining a dismissal
- Emphasis: Formal discovery, depositions, and trial

## Future:

- About parent's improvement
- Attorney tries to show court/CPS the parent has made progress, can now care for the child
- Litigation strategy:
  - Acknowledge court's jurisdiction
  - Shift to cooperative problem-solving, parents' participation in services

# Negotiating



- Before the shelter hearing, negotiate with caseworker, GAL and other attorneys
  - Resolve differences
  - Identify areas of agreement
  - Try to reach a consensus on how the case should proceed

# Courtroom Advocacy



- Typical major issues addressed at the shelter hearing are
  - Whether to authorize the petition
  - Placement
  - Visitation
  - Services for the family
- Ensure parents can address these issues and that court considers each fully and separately
- Client's goals guide attorney's advocacy at preliminary (and every) hearing
  - ***NEVER*** attempt to advocate on behalf of the client without first knowing client's position on issues

# Courtroom Advocacy



- Remember: the law requires CPS make “**reasonable efforts**” to prevent removal of the child from the home except in extreme circumstances
  - CPS should assess community resources that might avoid the need to place child in foster care
  - CPS’s failure to make “**reasonable efforts**” prior to seeking court authorization for a child’s removal constitutes a valid argument against removal
    - In the right case, attorney should advance that argument at the Shelter Hearing

# Courtroom Advocacy



- If court orders an out-of-home placement, advocate for frequent and family-friendly visitation
  - Having CPS supervise visitation may not be necessary
    - Push for unsupervised visits when visits do not pose danger to child
  - Always advocate for as much visitation as possible
  - Consider visitation schedule orders
- Parents should begin participating in services immediately
  - That maximizes services provided within the first 12 months
    - Thus amplifying parents' chance to regain custody

# Out-of-Court Advocacy



- Focus on client's immediate needs
  - Issues such as placement, visitation, and services
    - ✦ Focus then shifts to resolving allegations in the petition and trial preparation, given that the parties cannot resolve the case without a trial
- Help to preserve parents' involvement
  - Parent should stay involved in child's life, attend scheduled visits
  - Agency must ensure transportation difficulties do not impede parents' efforts to visit child
  - Parents retain the right to
    - ✦ Make major educational decisions for child
    - ✦ Decide whether child will receive special education (SPED) services

# Adjudication



- PLEA OR TRIAL
- USE TRADITIONAL TRIAL PRACTICE TECHNIQUES
- THEORY OF THE CASE
- PRESERVING ISSUES FOR APPEAL

# Adjudication Timeline



- If a child is in state custody, the adjudication hearing must take place within 30 days of child coming into state care
- If a child is temporarily placed with relatives or fictive kin, the adjudication hearing should take place within 90 days
  - As a matter of practice, counsel should request court dates as soon as possible to prevent any unnecessary delays

# Adjudication: Plea



- Advise parent of negative consequences
  - Parent waives, among other things, right to trial
  - Court's power over family increases significantly
    - All future decisions regarding placement, visitation, or closure of case rests with court
- Parent must decide whether to agree to court's jurisdiction or proceed to trial
  - Under no circumstance should anyone, including attorney, try to force parent to enter plea
- Negotiate details of plea with CPS and other attorneys
- Parent can either
  - Admit to all or some of the allegations in petition or
  - Plead "no contest" to the allegations in petition
- Review these options with client
- Propose to court plea language client finds acceptable

# Adjudication: Trial



- If proceeding to trial, pretrial phase involves trial preparation
  - Thoroughly investigate the matter by interviewing potential witnesses and reviewing relevant documents
  - Construct alternate explanations for the alleged abuse or neglect
  - Potential witnesses: medical or psychological experts, teachers, neighbors, police officers, and family members
  - Use your subpoena power
  - Obtain copy of the court and CPS case files
    - Request a court order compelling disclosure

# Preparing for Trial



- Use formal discovery procedures to uncover details of case
  - May include
    - Interrogatories
    - Depositions
    - Requests for production of documents and admissions
    - Subpoenaing witnesses
    - Making requests for discovery
    - Filing motions and/or answers to petitions
- Interview all witnesses testifying and the GAL

# Use Traditional Trial Practice Techniques



- Call witnesses, cross-examine other witnesses, and introduce exhibits that support the client's position
- If the client is going to testify, prepare client to present the testimony as sympathetically as possible
- If could be a parallel criminal trial, coordinate any decision to testify with the criminal defense attorney
- In all trials, the parent's attorney has 2 overarching tasks in addition to other responsibilities:
  - (1) Develop and present a coherent theory of the case, and
  - (2) Preserve trial errors for later appellate review

# Theory of the Case



- Formulate a solid case theory only after conducting a thorough investigation that has uncovered both the good and bad facts of the case
- Develop a coherent theory of the case that adapts the client's story to the case's legal issues
  - A successful theory should
    - ✦ Be logical, simple, and easy to believe
    - ✦ Guide tactical decisions at trial
    - ✦ Ideally, be expressed in a single paragraph

# Preserving Issues for Appeal



- Attorney must preserve appellate issues during trial to have any significant chance of prevailing on appeal
  - Raise the issue with a timely objection
- Consider filing a written motion *in limine* before the issue actually arises or a written motion for reconsideration if the court has already ruled

# Disposition



- DISPOSITION TIMELINE
- DISPOSITION HEARING
- OUT-OF-COURT ADVOCACY

# Disposition Timeline



- If child has been adjudicated as abused or neglect in accordance with MS Code Annotated 43-21-561
  - Youth Court will proceed with a disposition hearing to determine the continued placement of the children
    - ✦ While client works to establish and complete the service plan
- Hearing may take place immediately following adjudication hearing
- If a child is in state custody, disposition hearing must be held within 14 days of the adjudication hearing

# Disposition Hearing



- At the disposition hearing, the court typically decides
  - Continued placement of the child
  - Services to be provided
  - Steps to resolve issues that led to adjudication of abuse or neglect
- Often, the subsequent termination of parent's rights is based on the failure to comply with Service Agreement
  - Ensure it is narrowly tailored to address the specific issues that led to adjudication
- CPS Service Agreements and treatment plans should detail both service provided or planned for parent and behavioral changes CPS expects as a result of parental participation in those services

# Preparing for a Disposition Hearing



- Ascertain CPS's goals
  - CPS required to submit a detailed, written disposition report or service plan for the court
  - Federal law requires this be developed within 60 days of child's removal
- If possible, obtain all CPS reports well in advance of each hearing
  - Consider requesting a short adjournment of the proceeding if copy of the report not available prior to the hearing
  - Read carefully and review reports and Service Agreement with client

# Preparing for a Disposition Hearing



- Conduct an independent investigation of client's circumstances and use to assess appropriateness of CPS recommendations
  - Regularly discuss case with client
  - Ask client to sign releases for additional information directly from service providers
- Obtain service providers' written documentation of client's progress
- Communicate regularly with anyone who may possess information that will help advocate for client
  - Include, at a minimum, CPS caseworker, GAL, and Prosecutor

# Disposition Hearing



- Counsel client before and after the disposition hearing regarding alternative disposition options that could resolve the case to include pros and cons
- Post hearing, carefully review disposition order
- Provide the client a copy of the order and ensure he/she understands

# Disposition Hearing



- Advocate for the service that best suits client's individual needs
- If reunification is the goal, CPS has statutory duty to make **reasonable efforts** to provide services that address parent's deficits, regardless of capacity to parent
- Americans with Disabilities Act: CPS must provide services that go beyond the general "reasonable efforts" requirement
  - ADA requires CPS make **reasonable accommodations** to address parent's disability
- Visitation aims to maintain and strengthen the parent-child attachment
  - Visitation schedule should be tailored to child's individual needs
  - For infants and young children, weekly, supervised one-hour visits at CPS is insufficient
- Advocate for maximum visitation

# Out-of-Court Advocacy



- Ensure CPS complies with all court orders, statutes, and departmental policies
  - Helps keep parents invested in process
  - Any delay in providing services to parents jeopardizes reunification
- Encourage client to call immediately if any problems arise
- Parents' attorneys can dramatically improve case outcomes by advocating for the client between court hearings

# Out-of-Court Advocacy



- CPS may convene family team meetings and foster care reviews that include the parent, caseworkers, the GAL, and other family members
  - Encourage parent to attend and work cooperatively with team members to ensure parent's voice is heard
  - Parent's attorney should try to attend and ensure the parent has additional support people in attendance
  - Many issues are discussed, including modifications to the Service Agreement for additional family services, selection of treatment service professionals, and changes to visitation
    - View this as opportunity to solve problems prior to heading to court

# Review/Permanency Hearings



- REVIEW HEARING
- PERMANENCY HEARING

# Review Hearing Timeline



- After disposition hearing, review hearing will occur 3 to 6 months later
  - During the interval, CPS personnel often make critically important decisions

# Review Hearing



- These are post-disposition proceedings at which judge assesses case progress and evaluates Service Agreement for needed changes
  - Issues addressed are placement, services, visitation, and parent's compliance
- Court determines whether
  - CPS has met its obligations to provide services and facilitate visitation under the statute
  - Parent has made progress towards remedying the factors that led to the adjudication
  - Grounds for dependency continue to exist

# Parent Attorney Should



- Consider requesting review hearing prior to annual review/permanency hearings to apprise court of client's progress or change in circumstances since entry of the adjudication order
- Request modifications to the service plan and court orders that the client requests
- Advocate for return of the child to the parent's custody when
  - Risk to the child is eliminated
  - Child is no longer vulnerable to risk, or
  - Parent has sufficient protective capacities to manage or control the threats of danger to child
- Ensure court focuses on the parent's strengths and successes, not just shortcomings

# Parent Attorney Should



- Request immediate closure of the case if the grounds for dependency no longer exist
  - **As a matter of strategy include completion of Service Agreement, rectification of issues which caused court's initial involvement**
- Utilize motions advocate for increases in visitation, etc.
- File any necessary motions reflecting client's wishes as to the permanency of the child and any progress or completion the client has achieved regarding the service plan

# Permanency Hearing Timeline



- Federal law requires the court hold a Permanency Planning Hearing within
  - 12 months after the child's removal from the home or
  - 30 days after a determination that no reunification efforts are necessary
- This requirement is intended to make courts expedite a permanent placement for the child, which may include reunification, adoption, legal guardianship, etc.

# Permanency Hearing



- If parent non-compliant, then court may direct CPS to file termination of parental rights package
- When counseling client about complying with Service Agreement, discuss the permanency plan
  - Parents failure to comply with Service Agreement is considered evidence child will be at risk if returned to the parent's custody
  - Conversely, where parent has substantially complied with service plan, be prepared to argue that risk has been reduced and child should be returned home
  - Informally lobby caseworker to recommend a return home or at least allow more time for the parent to complete the court-ordered services
- Consider permitting the GAL to meet with the parent so the GAL can independently assess the parent's progress
  - Counsel may want to be present

# Permanency Hearing



- **Counsel the client about all possible options**
  - In cases in which reunification appears unlikely, consider discussing with client possibility of consenting to durable legal custody, guardianship, adoption, or of relinquishing parental rights
    - ✦ Pursuing one of these options may enable client to avoid involuntary termination of her rights
- **Advocate to achieve the client's objectives**
  - Argue that TPR is premature
  - Federal law requires that TPR be filed if child's been in foster care for 15 of the most recent 22 months
    - ✦ Exceptions: place child with relative or state's failure to provide appropriate services to family Be prepared to argue that one of these exceptions applies or that compelling reasons demonstrate why filing the petition would be contrary to the best interests of the child
  - Consider having the parent testify, if he/she can persuasively testify to steps taken to address welfare issues

# Termination of Parental Rights



- INVESTIGATION AND ANALYSIS
- PRETRIAL MOTIONS
- THEORY OF THE CASE

# Investigation and Analysis



- Termination cases require the parent's attorney to confront a new series of difficult legal and strategic challenges
  - Carefully identify the issues presented in the individual case and address each issue in turn
- When CPS files termination package, meet with client to review each factual allegation and corresponding legal basis for termination

# Investigation and Analysis



- Work with client to develop list of potential witnesses
- Decide which witnesses' testimony will bolster parent's theory of the case
  - Subpoena those witnesses and develop direct-examination questions to elicit information that court needs to understand the parent's theory of the case
  - Interview potential adverse witnesses and obtain copies of all documents to be introduced into evidence
- Gather documentary evidence that supports the parent's case
  - Request (and subpoena if necessary) the caseworkers' file and TPR package
  - Review the file's contents and make copies of important document
- When reviewing the history of the case
  - Identify original basis for court's jurisdiction over child and services ordered by the court
  - Assess CPS's efforts
  - File a discovery motion seeking access to the information as permitted under state law

# Pretrial Motions



- Evaluate whether any pre-trial motions are required
  - Expert evaluations may be necessary to assess the relationships between the child, foster parent, and birth parents, or to determine the parent's capacity to take care of the child
  - The court or CPS may be required to pay for such evaluations where the parent is indigent
  - Whether attorney wants to take the risk inherent in requesting an evaluation of the parent may depend on the strength of the case

# Theory of the Case



- Develop a coherent theory of the parent's case
  - An ideal theory distills both the client's story and applicable law
  - Other theories may involve the feasibility of other, less drastic, permanency options such as
    - Guardianship and durable legal custody, etc.
    - Or the theory may involve the CPS's failure to comply with services or a parent's substantial compliance with services

# Conclusion



## **Crucial Role of the Parents' Attorney:**

- Protecting Parent's Fundamental Liberty Interests
- Define the scope of representation
- Define and clarify goals: focus on past and future
- Client counseling: explain process, options, what is at stake, consequences of decisions, manage expectations
- Remember to advocate BETWEEN hearings – when the agency is making important decisions about the case
- Always be mindful of where you are in the process and the time limits that impact the case