

## CHAPTER 28: REPRESENTING PARENTS IN CHILD WELFARE CASES<sup>1</sup>

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### §28.1 Introduction

A parent's constitutional right to raise his or her child is one of the most venerated liberty interests safeguarded by the Constitution and the courts.<sup>2</sup> The law presumes parents to be fit, and it establishes that they do not need to be model parents to retain custody of their children.<sup>3</sup> If the state seeks to interfere with the parent-child relationship, the Constitution mandates: (1) that the state prove parental unfitness, a standard defined by state laws, and (2) that the state follow certain procedures protecting the due process rights of parents. The constitutional framework for child welfare cases is premised upon the belief that the interests of children are best served when children are in their parents' custody. For that reason, the state's evidence of parental unfitness must satisfy a high burden before the state may interfere with or permanently sever the parent-child relationship.

Attorneys who represent parents in child protective proceedings play a crucial role in safeguarding these liberty interests. This role manifests itself in many ways. Similar to criminal defense attorneys, parents' attorneys protect their clients from unjust accusations, ensure that their clients receive due process protections and help to ensure that the entire judicial process affords their clients a fair opportunity to take advantage of its protections. In situations where temporary removal occurs, advocacy by parents' counsel can expedite the safe reunification of the family by ensuring the prompt delivery of appropriate services to the family and by counseling parents about the ramifications of the choices they must make. If the parent is unable

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<sup>1</sup> I based a large part of this chapter on a guidebook for parents' attorneys I co-wrote with Professor Frank Vandervort for the Michigan State Court Administrative Office. In addition to Professor Vandervort, I'd like to thank David Meyers, Rich Cozzola and Professor Chris Gottlieb for reviewing drafts of this chapter and providing invaluable feedback.

<sup>2</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *Michael H. v. Gerald D.*, 491 U.S. 110, 123–124 (1989) (“[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>3</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”).

to care for the child, a parent’s lawyer can serve the client by arranging for another temporary or permanent legal placement, such as a guardianship or an adoption, which will advance the parent’s interests. In these and other situations, strong advocacy on behalf of parents furthers the best interests of children and improves outcomes for both children and their families.<sup>4</sup>

The challenges confronting parents’ attorneys are daunting. Parents involved in child welfare cases often confront a host of seemingly insurmountable issues which transcend child welfare, including poverty, substance abuse, mental illness, and domestic violence. Those problems can make it difficult for an attorney to earn the client’s trust and develop a successful litigation strategy. The attorney must master complex federal and state child welfare laws and become familiar with related laws in areas such as adoption, guardianship, and special education. The attorney must also engage in cooperative, problem-solving with a number of stakeholders, which can include the child protection authorities, the child’s attorney or guardian *ad litem* (GAL), tribal representatives, CASA, and the court. But the attorney must always hold the client’s interests paramount, which may necessitate formal and assertive courtroom advocacy. Too often, parents’ attorneys must do all of this while receiving low compensation, handling high caseloads, and enduring criticism that their advocacy for their clients somehow harms their clients’ children.<sup>5</sup> These and other challenges make representing parents among the most difficult and important areas in which to practice law.

## **§28.2 The Role of Parent’s Counsel**

In many ways, the role of the parent’s attorney is no different than that of any attorney representing a client. Rules of professional conduct adopted in each state establish the basic parameters of the attorney-client relationship.<sup>6</sup> An attorney must zealously advocate on behalf of his or her client and maintain an undivided loyalty to the client’s interests, regardless of the

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<sup>4</sup> See, e.g., Bobbe J. Bridge & Joanne I. Moore, *Implementing Equal Justice for Parents in Washington: A Dual Approach*, 53 JUV. & FAM. CT. J. 31 (2002) (finding that strengthening parents’ counsel increased family reunifications by fifty percent and stating that “the enhancement of parents’ representation has the potential to save . . . millions in state funding on an annualized basis.”).

<sup>5</sup> See, e.g., AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: A PERFORMANCE-BASED ANALYSIS OF MICHIGAN PRACTICE (2009) (describing problems in Michigan’s system of parent representation).

<sup>6</sup> Attorneys representing parents should also consult the AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (2006), available at <http://www.abanet.org/child/clp/ParentStds.pdf>.

attorney's personal beliefs.<sup>7</sup> The attorney must act with "reasonable diligence and promptness in representing a client"<sup>8</sup> and must not knowingly reveal a confidence or secret of a client except in narrowly defined circumstances.<sup>9</sup> Most rules of professional conduct require joint decision-making by the attorney and the client. While the client has the ultimate authority to determine the goals of the representation, the attorney typically decides how best to accomplish those goals after consulting with the client.<sup>10</sup> Since a clear distinction between the client's objectives and the tactical means to accomplish them frequently cannot be drawn, in many cases the client-lawyer relationship partakes of a joint undertaking."<sup>11</sup>

These and other requirements define the relationship between a parent's attorney and the parent. The requirements remain the same regardless of whether the attorney is appointed by the court or retained, and regardless of how much the attorney is paid. The interests and wishes of the client always remain paramount. Any attorney engaging in this work must read and understand the applicable rules of professional conduct adopted in his or her jurisdiction.

While having the same ethical obligations as all other lawyers, parents' attorneys confront unique challenges when representing their clients.<sup>12</sup> These challenges are discussed in the next several sections.

### **§28.2.1 Trust**

Establishing mutual trust is crucial in forming any good attorney-client relationship. Trust allows clients to honestly discuss the facts of their cases, and it enables attorneys to render candid advice. Yet parents' attorneys often find it difficult to develop a trusting relationship with their clients. Forming such a relationship takes time and can rarely be achieved in the initial meeting.

Most of the parents come from traditionally disadvantaged populations.<sup>13</sup> Additionally, parents accused of child maltreatment may be frightened and may appear hostile and

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<sup>7</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (1983) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

<sup>8</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983).

<sup>9</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

<sup>10</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983).

<sup>11</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1983).

<sup>12</sup> See generally, JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES (2004).

<sup>13</sup> Statistics reveal that most families affected by the child welfare system are poor. According to the Third National Incidence Study of Child Abuse and Neglect (NIS-3), poor children were over 20 times more likely to be maltreated and over 40 times more likely to be neglected. ANDREA J. SEDLAK & DIANE D. BROADHURST, UNITED STATES

confrontational. In responding to the petition and, in many cases, the actual removal of their children by Children's Protective Services, parents may distrust the child welfare system's authority figures, including their own attorneys.

Parents typically meet their attorneys for the first time in the courthouse immediately prior to or just following their initial removal hearing. In all likelihood, the attorney who claims to represent them was appointed (and will be paid) by the same court that authorized the children's removal. In the parent's mind, the attorney may appear as just another member of the establishment responsible for the child's removal from the home. The parent's attorney must recognize the barriers created by this, and other factors may make it difficult to earn the client's trust.

To remove those barriers, the attorney must, immediately upon appointment, clearly explain to the parent that the attorney's job is to represent the parent's interests, and that the attorney's loyalty lies completely with the parent, not with the court or the agency. Words alone will not engender trust, however. The attorney must be mindful of how the client perceives the attorney's actions. Taking some visible action on behalf of the client very early in the representation—for example, making positive statements about the parent to the caseworker or the court—may help to establish a trusting relationship. In court, the attorney must never make any disparaging comments about the client; in addition to being unethical, it will undermine the client's still-tentative confidence in counsel. Even counsel's casual conversations outside the courtroom with caseworkers, opposing counsel, or court staff may be interpreted by parents as signs that the attorney is working against their interests, even if those conversations are unrelated to their case. Acknowledging that these relationships exist and can be beneficial to the parent can often help mitigate these fears. In the early stages of the relationship, even the appearance of divided loyalties may irreparably impair the client's trust.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 4-5 (1996). Additionally, African-American children are disproportionately affected by the foster care system even though no evidence exists that African-American parents are any more likely to abuse or neglect their children. Despite only comprising 12 percent of the population, according to the 2000 Adoption and Foster Care Analysis and Reporting System (AFCARS) report, African-American children constituted 29 percent of children who had open cases and 40 percent of children in foster care. CHILDREN'S BUREAU, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE AFCARS REPORT: INTERIM FY 2000 ESTIMATES AS OF AUGUST 2002 2 (2002). A recent report in Michigan confirmed these findings. THE CENTER FOR THE STUDY OF SOCIAL POLICY, RACE EQUITY REVIEW: FINDINGS FROM A QUALITATIVE ANALYSIS OF RACIAL DISPROPORTIONALITY AND DISPARITY FOR AFRICAN AMERICAN CHILDREN AND FAMILIES IN MICHIGAN'S CHILD WELFARE SYSTEM (2009).

At the outset of the relationship, the attorney must listen patiently to the client's full story and avoid prejudging the parent based on the agency's allegations. Instead, the attorney should empathize with the client and, if appropriate, validate the client's emotional reaction to the situation. This will help to establish rapport with the client, which is a primary goal of the initial interview. Counsel should then use broad, open-ended questions to elicit information from the parent, reserving more specific questions about the case until after the client has had a full opportunity to tell his or her story.

Counsel must seek information about the parent's family and should consider constructing a chart or genogram<sup>14</sup> to obtain a clear understanding of the extended family. Even though a parent may not be willing to disclose relatives or extended family, early engagement of this support network can be the most effective tool a parent's attorney can employ to support the parent through this process and ensure a continued connection to the child should reunification fail.

The attorney should close the first interview by demonstrating an understanding of the client's goals and priorities, reviewing the next steps to be taken by both the client and counsel, and ensuring that the client knows how to reach the attorney. Throughout this process, counsel must reassure the client that, subject only to a few very limited disclosure exceptions, all conversations with the attorney are confidential.<sup>15</sup>

Meeting with the client on multiple occasions, especially at locations away from the courthouse, can be crucial to the trust-building process. In addition to meeting in the attorney's office, attorneys should meet with clients in places that are comfortable to the client such as the client's home, or public buildings with private rooms, such as a library. Letting the client choose the meeting location will help empower the client and reduce tension early in the relationship.

Once earned, the parent's trust must be maintained. The attorney must stay in close contact with the client, which requires making and returning phone calls, scheduling regular meetings outside of court, and sending the client letters and copies of court orders. During each conversation, the attorney must carefully listen to the client's concerns before recommending the course of action that will best serve the client's interests. Providing information will also help to build and maintain trust. Sharing documents such as petitions, agency reports, motions, and

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<sup>14</sup> A genogram is a graphic representation of the family tree with space for additional information related to a family. A program called GenoPro permits a lawyer to diagram the family tree, keep track of different individuals in the family and update it as relationships change. Genealogy Software: GenoPro, <http://www.genopro.com> (last visited Oct. 25, 2009).

<sup>15</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983). For example, under the the Model Rules, an attorney may disclose information to "prevent reasonably certain death or substantial bodily harm."

court orders not only provides the client information she should have, but takes away some of the mystery of the court process and demonstrates that the attorney is working for her. Explaining as fully as possible what the client should expect at each stage of the proceeding may make the situation less intimidating and avoid surprises. Letting the client know the attorney's strategy at various points also encourages the client to see the work as a collaborative effort and to see that her position is being represented vigorously.

By taking these steps, the attorney will show that the parent's wishes and needs are paramount, and that open and honest communication will enhance the quality of the attorney's representation.

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### **§28.2.2 Defining the Client's Goals**

Soon after the case begins, parents' attorneys must help their clients define and clarify their goals. The typical overarching goal—reunifying the family—may be obvious, but the attorney must also identify the client's numerous short and long-term goals on issues such as placement, visitation, and services. Even if the client denies the allegations in the petition, will the client agree to participate in services such as a parenting class? If the children cannot be returned home immediately, where should they live while the case proceeds? What type of visitation should occur? Is anyone else available to supervise those initial visits? What frequency of sibling visits does the parent prefer?

The parent's attorney must help the client establish realistic goals for the representation. To that end, the attorney should provide objective feedback about the client's stated goals, and guide the client toward goals that can be achieved. For example, where the evidence clearly shows that the parent seriously abused the child, the parent should not expect immediate reunification. Most parents want their attorney to analyze the likelihood of achieving their short- and long-term goals. Therefore, parents' attorneys must provide objective, carefully considered advice.

The attorney must also ascertain the extent to which the client wants the case to focus on the past or the future. This decision will significantly affect how the attorney handles the case. If the case is about the past—that is, about the veracity of the agency's allegations against the parent—then the pre-jurisdictional stage of the child protective case may resemble a criminal proceeding. The parent's attorney will act like defense counsel, trying to exonerate the client with the hope of obtaining a dismissal or at least a finding that the court does not have jurisdiction. In that situation, an attorney may take a more adversarial approach to the case, focusing on the traditional aspects of civil litigation such as formal discovery, depositions, and the trial.

On the other hand, many clients will decide that they do not want to focus on the past, preferring instead that the case be about the future. If so, then the parent's improvement becomes the goal and the attorney will try at every opportunity to demonstrate to the court and the agency that the parent has made progress and now can care for the child. Rather than pursuing the more adversarial techniques discussed above, this litigation strategy may acknowledge the court's jurisdiction and move on immediately to cooperative problem-solving and the parent's participation in services.

In other words, exonerating a parent may entail a different legal strategy than addressing the deficits identified by the court and the agency. For both, the goal is to reunify the family, but the attorney's strategy and tactics will differ markedly. In the abstract, one cannot determine

which approach will be best for a client. A parent will likely elect to incorporate elements of both. But the one indispensable step is for the attorney to meet with the client to establish the parent's individualized goals and priorities.

Regardless of the client's specific litigation strategy, the parent's attorney should try to foster a healthy relationship between the client and the caseworker. That will benefit even those parents who disagree with the agency's actions and decide to challenge the factual and legal bases for the court taking jurisdiction over the child. A strong, working relationship with the caseworker will make it easier to resolve disputes regarding placement, visitation, and services to the family, which the courts often cannot resolve quickly unless the parties have already agreed on how to resolve them. The attorney must explain that it is often in the parent's interests to cooperate with the caseworker despite their disagreements on some specific issues. The attorney should express understanding of the challenges of working with the caseworker, but help the parent consider whether to risk the consequences of having a confrontational dynamic with a person who may greatly influence the direction of the case. The attorney should offer to intervene if the parent is having trouble working with the caseworker and encourage the parent to voice concerns to the attorney first if it is difficult to do so constructively with the caseworker.

### **§28.2.3 Defining the Scope of Representation**

Defining the scope of the legal representation presents another challenge for parents' attorneys. Typically, parent's attorneys become involved in the case after receiving an appointment from the court. The appointment order will likely authorize legal advocacy both inside and outside the courtroom provided that the advocacy relates directly to the child welfare case. Yet, attorneys who do this work recognize that resolving collateral legal disputes and related issues can significantly affect the child welfare case. For example, a parent may need an attorney to file for custody or establish paternity, to provide criminal defense consultation, to expunge the parent's name from the central registry of child abuse and neglect, or to advocate for both the child and the parent in special education hearings. Without legal assistance on these collateral issues, the parent may not be able to take the necessary steps to move the child welfare case forward. Unfortunately, in many jurisdictions, court-appointed parents' attorneys do not get paid for assisting clients in these separate-but-related matters. Consequently, court-appointed parents' attorneys often confront the question, "How much more should I do for my client?"

Beyond representing the parent in the child welfare proceeding, which the appointment order typically mandates, each attorney must determine the scope of the representation and explain to the client exactly which other activities the attorney can and will undertake. This determination should be reflected in writing. Sometimes just a little work by counsel can make a huge difference in the child welfare case. Some examples include helping the client fill out

standard court forms or merely advising a client on how to proceed in a related matter. If the attorney cannot directly assist the parent in the collateral matter, then the attorney should attempt to locate another lawyer, perhaps at a legal aid organization, to help the client. At a minimum, the attorney must try to provide the client with sufficient direction to enable the client to address the collateral legal issue without an attorney's assistance. Parents' attorneys must think broadly about their client's goals and act creatively to achieve those goals, even if that entails advising the client to pursue other legal avenues such as custody, adoption, or guardianship. These small counseling steps, taken when the attorney cannot do more, may help resolve the child welfare case.

#### **§28.2.4 Institutional Pressures**

Parents' attorneys often face enormous institutional pressures to undermine their own clients' interests. For example, low compensation and high case loads discourages active advocacy. Due to a court's docket backlog, parents' attorneys may face pressures to convince their clients to enter a plea giving the court jurisdiction rather than take a case to trial. This pressure may be compounded by a perceived need to please the judge, who may control the attorney's appointments in future cases. Even worse, parents' attorneys who press their clients' arguments aggressively may be chastised by other parties or outside observers who believe that the parent's goals conflict with they deem is the child's best interests.

Regardless of these pressures, parents' attorneys must remember that their paramount obligation, under the rules of professional conduct, is to zealously advocate on behalf of their client. This responsibility remains despite external constraints such as low fees or pressure from third parties. If an attorney feels unable to fulfill his or her ethical responsibilities to the client, the attorney must immediately request permission to withdraw from the case. Under no circumstances do the rules of professional conduct permit an attorney to deviate from the basic requirements set forth in those rules.

#### **§28.2.5 Representing Nonresident Fathers**

For the most part, this chapter is geared towards attorneys representing custodial parents who stand accused of abusing or neglecting their children. But attorneys who practice child-welfare law sometimes will represent "the other parent." This parent may be one who has done nothing wrong—or perhaps done nothing worse than failing to report the abusive parent to the authorities or not participating in the child's life. Because many of these parents are nonresident fathers, this section will focus on the unique challenges attorneys face when representing these individuals. Keep in mind, however, that much of the information presented elsewhere in the chapter will apply to these situations too.

The Supreme Court has stated that nonresident fathers have rights protected by the Constitution when they maintain a sufficient involvement in their children's lives. "When a father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause."<sup>16</sup> For example, in *Caban v. Mohammed*, the Court struck down a New York law that denied a father the right to object to an adoption to which the biological mother had already consented.<sup>17</sup> The Court held that since the father was as involved in the children's upbringing as their mother, both parties had to be treated equally.<sup>18</sup> But, in *Lehr v. Robertson*, the Supreme Court upheld a New York law that did not require a father to be notified of his child's impending adoption because the father did not take meaningful steps to establish a parental relationship with his child.<sup>19</sup> In *Lehr* and other similar cases, the Supreme Court has prevented fathers who failed to make efforts to establish a relationship with their children from using the Constitution to disrupt the child's permanent placement.<sup>20</sup>

Although the Supreme Court has never listed the specific actions a nonresident father must take to establish his constitutionally-protected interest in his child, its rulings clarify that the rights of fathers who have established relationships with their children are constitutionally protected from state interference absent proof of unfitness. Courts often consider a number of factors to determine if a father has established a relationship with the child, including whether he: paid child support or provided other assistance to the mother, visited or lived with the child, sent the child card or gifts, attended school meetings or took the child to doctor appointments, or listed his name on the birth certificate.<sup>21</sup>

In addition to providing guidance as to when relationships between fathers and their children are constitutionally protected, the Supreme Court has said that states must give all fathers the opportunity to establish parental relationships by allowing them to claim their interest

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<sup>16</sup> *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

<sup>17</sup> 441 U.S. 380 (1979).

<sup>18</sup> *Id.* at 389.

<sup>19</sup> 463 U.S. at 248.

<sup>20</sup> *See, e.g.*, 463 U.S. at 248; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1977).

<sup>21</sup> *See, e.g.*, *In re A.A.T.*, 196 N.W.2d 1180 (Kan. 2008) (noting that "to determine if a natural father of a newborn child has taken diligent, affirmative action, courts measure the putative father's efforts to make a financial commitment to the upbringing of the child, to legally substantiate his relationship with the child, and to provide emotional, financial, and other support to the mother during the pregnancy."). In the decision, the Kansas Supreme Court details case law from other jurisdictions on this issue.

in the child soon after the child's birth.<sup>22</sup> States have created several ways for fathers to assert parentage. In some states, fathers have to file an affidavit of paternity jointly with the child's mother<sup>23</sup> or institute a paternity suit.<sup>24</sup> Others use putative father registries to let fathers assert their interests.<sup>25</sup> State practices vary on this issue, and attorneys representing nonresident fathers must know the options available to fathers in their state. Many courts have found that a father's failure to comply with state procedures constitutes a permanent waiver of the father's rights to his child.<sup>26</sup>

As the discussion above suggests, the extent of fathers' parental rights are often less clear under the law than mothers' rights and the attorney must advise clients accordingly and help fathers take steps to solidify and protect their rights. The manner in which state laws protect the rights of nonresident fathers in child welfare cases varies considerably. Many states provide non-resident fathers the right to notice of proceedings and the opportunity to participate in hearings, visitation with children and court-appointed counsel if indigent. States practices diverge, however, on a number of issues including whether putative fathers have standing to appear in the case, whether the child must be placed with the nonresident father absent proof of unfitness, and whether the court can order a fit nonresident father to comply with services it deems are in the child's best interests.<sup>27</sup> The first step an attorney must take is to acquire a comprehensive understanding of state laws and practices that address the rights of nonresident fathers. The attorney must determine if his client has standing to participate in the child welfare proceeding under state law and, if not, what steps must be taken to gain standing.

When representing the nonresident father in these situations, counsel should consider both constitutional and practice-based arguments. If the state seeks to deprive the nonresident father of custody and place the child in foster care, counsel should argue that the Constitution requires a finding of unfitness against the father before the custody deprivation can occur,

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<sup>22</sup> Lehr, 463 U.S. at 262–263

<sup>23</sup> See, e.g., Mich. Comp. Law 722.1003.

<sup>24</sup> See, e.g., Mich. Comp. Law 722.714

<sup>25</sup> See, e.g., Ohio Rev. Code Ann. 3107.062; Fla Stat. 63.054. .

<sup>26</sup> See, e.g., Marco C. v. Sean C., 181 P.3d 1137 (Az. Ct. App. 2008) (refusing to permit fathers to assert parental rights where they did not comply with statutory requirements); Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002) (same); Hylland v. Doe, 867 P.2d 551 (Or. Ct. App. 1994) (same); Sanchez v. L.D.S. Social Services, 680 P.2d 753 (Utah 1984) (same).

<sup>27</sup> See Vivek S. Sankaran, *Parens Patriae Run Amok: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 101 (Spring 2009).

assuming that he maintained a sufficiently close relationship with the child prior to the case.<sup>28</sup> Any attempt to strip an involved parent of his parental rights without such a finding of unfitness contravenes the Due Process Clause. Attorneys raising this argument should file a written motion and stand ready to appeal immediately if the trial court denies the parent the right to an evidentiary hearing or refuses to return custody to the nonresident father.

In addition to framing arguments around the father's constitutional rights, attorneys must also put forward practical arguments to move their client's case forward. They must ensure that the court and the agency identify and locate their client early in the case and provide him with notice of all child welfare proceedings.<sup>29</sup> They must make sure that the agency moves expeditiously to complete home studies when required prior to a determination on custody or visitation.<sup>30</sup> The attorneys must also work with the agency to protect the father's right to be involved in case planning and creating the family's service plan which will outline the services the father must complete. They may also consider filing a separate custody complaint or a motion to modify custody in a family law case, which may then be consolidated with the child welfare case. Finally, if the nonresident father cannot receive custody immediately, the attorney should request liberal visitation between the client and his child. Counsel should frame all these arguments in terms of the interests of children—that it serves the best interests of children to maintain relationships with their fathers and the extended paternal side of the family. These are some of the basic considerations that attorneys must think about when representing nonresident fathers.<sup>31</sup>

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<sup>28</sup> See *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (“[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him.”).

<sup>29</sup> See *In re Rood*, 763 N.W.2d 587 (Mich. 2009) (reversing termination of parental rights decision where trial court failed to involve non-resident father in the child welfare case).

<sup>30</sup> Practitioners may confront situations in which their parent client lives in a different state than one in which the juvenile case is based. In such cases, child welfare agencies and courts often seek to apply the requirements of the Interstate Compact on the Placement of Children (ICPC). For arguments that the ICPC does not apply to placements with non-offending birth parents, see Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. AND POL'Y REV. 63 (2006). For additional resources on advocating within the ICPC, see ICPC Advocacy, <http://www.law.umich.edu/centersandprograms/ccl/specialprojects/Pages/ICPCAdvocacy.aspx> (last visited Oct. 25, 2009).

<sup>31</sup> For a more comprehensive analysis on representing non-resident fathers, see Andrew Cohen, *Representing Nonresident Fathers in Dependency Cases*, in *ADVOCATING FOR NONRESIDENT FATHERS IN CHILD WELFARE COURT CASES* (2009). Additionally, the federal government has created a Quality Improvement Center on non-resident

Although child welfare practice and terminology varies considerably pursuant to state laws, the essential stages of the case are similar across jurisdictions. The next sections aim to discuss strategic considerations for parents' attorneys at each stage.

### **§28.3 The Preliminary Hearing**

In most jurisdictions, at the preliminary or emergency removal hearing, the court decides whether to authorize the agency's petition and whether to approve the child's temporary removal from the family home, if the agency has requested removal. This hearing bears some similarity to the arraignment and preliminary examination stages of a criminal case, but can be the most critical determinant of the case's ultimate outcome. If the court finds probable cause to believe the allegations of abuse or neglect in the petition, then the court will authorize the petition, which may result in a subsequent full-scale proceeding to determine whether the court has jurisdiction over the child.

In most jurisdictions, parents' attorneys will meet their clients for the first time just before the preliminary hearing. This is hardly ideal and if counsel is able to meet the client and prepare for the first hearing in advance, she should do so. Typically, however, this meeting will take place in the hallway outside the courtroom. The attorney will have very little time before the hearing to discuss the case with the new client, but many decisions of great consequence are made during the hearing. Studies reveal that a natural bias toward preserving the custodial status quo makes courts reluctant to quickly return children to their parents once the court has ordered the child's removal.<sup>32</sup> After a removal, the barriers to reunification increase and courts may be unwilling to reunify the family until every element of a service plan has been met. In many cases, due to a perceived emergency need for protection, the child will have been removed from the parent's home even before the preliminary hearing. If so, the preliminary hearing represents the first opportunity to remedy an erroneous removal decision. Regardless of a particular case's initiating events, what happens during the preliminary hearing may dictate where the child lives for many months. Therefore, strong, zealous advocacy by parents' attorneys is essential from the outset.

#### **§28.3.1 Eliciting information**

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fathers and the child welfare system. More information about the Center is available at <http://www.abanet.org/child/fathers/>.

<sup>32</sup> See Peggy Cooper Davis & Guatam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U CHI L. SCH. ROUNDTABLE 139, 139–155 (1995) (observing a “sequentiality effect” in child protective decisions where decision-makers tend to favor the status quo once a child is removed from his or her home).

Knowledge about the case empowers an attorney to represent a client effectively. Therefore, a parent's attorney must either meet the parent in advance or make the most out of the brief initial interview with a new client. Counsel should acquire basic factual information about the case and advise the client on the decisions that the client must make immediately. The attorney should also obtain the client's personal information (e.g., date of birth, address, phone number, or membership or eligibility for membership in an Indian tribe or Alaskan Native Village<sup>33</sup>), the client's version of how the family became involved with protective services, any previous family involvement with the courts or the agency, whether the family currently receives services, whether the child has special needs, and the nature of outside resources available to the family, including alternative placement options if the court orders removal. To elicit this information, the attorney should use open-ended questions calling for narrative answers. More focused, clarifying questions should follow. At the end of the interview, the attorney should retell the story in the attorney's own words to verify an understanding of the client's version of the facts.

Also during the limited time available before the preliminary hearing, the attorney must obtain information from other people who are present for the hearing. These may include the Children's Protective Services worker, family members, and attorneys representing other parties. At a minimum, the attorney must obtain and review a copy of the petition, which usually will have been prepared and filed by an agency worker. A thorough reading of the petition will help the parent's attorney avoid surprises during the hearing. It also will allow the attorney to negotiate with the other parties to see if any agreements can be reached before the preliminary hearing.

### **§28.3.2 Client counseling**

In addition to gathering information, the parent's attorney should use the initial client interview to explain the two main decisions that the court will make at the preliminary hearing. First, the court will decide whether to authorize the petition, which is a finding that the petitioner has shown cause to believe that the facts in the petition may be true such that the case may come within the court's statutorily defined jurisdiction. Second, if the court does authorize the petition, the jurist then will decide where the child will live while the case proceeds to the adjudication phase. The parent must decide whether to contest the petition's authorization. Unless the parent waives all objections, the court must determine whether the agency has shown

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<sup>33</sup> If the client is a member or is eligible to be a member of an Indian tribe or an Alaskan Native Village, counsel should carefully review the provisions of the Indian Child Welfare Act to determine whether special procedures must be applied in the case. *See* 25 U.S.C. § 1901 (2006).

probable cause to believe that one or more of the allegations in the petition are true and are among the grounds for jurisdiction listed in the statute. To help the parent-client decide whether to contest the petition's authorization, the attorney must explain that the preliminary hearing is not a full-fledged trial. Even if the parent waives all objections to authorization, the parent will still have the right to contest the petition's allegations later, during a trial before a referee, judge, or jury, depending on state law. Authorizing the petition only allows the case to go forward; it does not confirm the allegations against the parent.

Challenging the authorization, however, may have negative consequences for the client. The evidentiary showing required of the petitioner at the preliminary hearing is a very low standard of proof. Further, at a preliminary hearing, the petitioner can typically use hearsay evidence to satisfy that burden of proof. Typically, the rules of evidence do not apply at an emergency removal hearing and the testimony of the Children's Protective Services worker may suffice to meet the probable cause standard. Only rarely will a parent be able to convince the court that a petition should not be authorized.

Furthermore, if a parent does contest the authorization decision, that parent may later have difficulty convincing the court or the agency to side with the parent on issues involving placement and visitation. Much of the testimony and argument at a contested preliminary hearing will be devoted to the petition's factual allegations. That will keep the court focused on the alleged abusive or neglectful acts by the parent, which the agency will recount using hearsay evidence that may not be admissible at a later trial. If the court hears that evidence during a preliminary hearing, the court may think less favorably of the parent at all subsequent stages.

Given the possible adverse consequences and the low likelihood of success, contesting probable cause may not be worth the risk. If, however, the allegations in the petition, even if true, seemingly fail to set forth a prima facie case of abuse or neglect, it may make sense for the parent to contest the petition's authorization for that reason. The argument then will hinge on the petition's legal sufficiency, not its factual accuracy. Framing the challenge in legal terms avoids prematurely exposing the court to all the factual details. To determine whether the alleged facts, if proven, are sufficient for the court to assert jurisdiction, the parent's attorney must know the legal standards for the court taking jurisdiction over a child.<sup>34</sup>

The child's placement pending trial is the second main decision that the court makes during the preliminary hearing. The client must understand the distinction between a court's decision to authorize the petition and the separate decision about where to place the child. Even

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<sup>34</sup> If the case involves a party from a different state, counsel should determine where jurisdiction is appropriate under the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA). See Chapter 17 for more information about the UCCJEA.

if the court finds probable cause and authorizes the petition, it may also decide that the child should remain in the parent's home. Ideally when it comes to the placement decision, the court will be looking to assess the risk to the child and the parent's ability to control that risk. The court should be open to strategies that would "remove the danger and not the child." (See Chapter 14, "Child Safety Risk Assessment").

Therefore, before the hearing, the attorney must ascertain whether the parent wants the child back in the home and, if so, whether the parent is willing to accept conditions on the placement. For example, in order to keep the child at home, will the parent agree to random drug testing or accept agency services such as in-home reunification assistance or parenting classes? If the client-parent is not the alleged abuser, will he or she help enforce a court order requiring the alleged abuser to leave the home? Is the parent willing to take the children to services such as counseling and medical appointments? The attorney must convey to the client that flexibility when it comes to conditions like those listed above will increase the likelihood that the court will let the child return home. The attorney must convey to the client that accepting agency services does not indicate that the parent admits the allegations in the petition. Regardless of whether the client accepts services, he or she will have a right to a full evidentiary hearing if the case proceeds as far as an adjudication trial. All courts are required at this hearing to make the federal finding that "reasonable efforts were made to prevent or eliminate the need for removal." This can be a useful tool for parent's attorneys to employ when attempting to secure placement at this phase.

The attorney and parent-client should also discuss the parent's options if the court does not immediately return the child to the parent's custody. They should explore other placement possibilities that the parent considers more acceptable than foster care. For example, federal law requires that the court and agency consider placing the child with relatives,<sup>35</sup> which may allow the parent to see the child more frequently and in a more relaxed setting. The attorney and parent should identify relatives, friends, and others who could care for the child temporarily. When considering this type of placement, the court will look at factors such as the proposed caregiver's prior criminal or child protective history, the family's resources, the proposed caregiver's previous involvement in the child's life, and the proposed caregiver's willingness and ability to comply with any restrictions placed on the child's contact with the parent. The attorney and parent should discuss those factors before the preliminary hearing in order to assess the feasibility of these alternative placement options.

In addition to possible placements, the attorney should discuss visitation issues with the client. What type of visitation would the client like? Where should the visits take place? How

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<sup>35</sup> 42 U.S.C. § 671(a)(19) (2006).

frequently should they occur? If visitation time must be supervised, does the client know someone who is willing to supervise the visits that can pass the agency's background checks and follow the agency's rules? When evaluating all of these possibilities, the attorney should view the client as a valuable collaborator who can help develop creative solutions to the various issues.

Initial visitation will not occur often enough, and at first it will likely occur only at the offices of the agency that is supervising the child's court-ordered placement. If visitation must be supervised, the attorney should at least try to arrange more frequent parenting time in a more family-friendly setting. Several jurisdictions have standing court orders which dictate the minimum amount of visitation a parent should receive in any case, but given that the frequency of visitation is a direct tie to successful reunification, attorneys must always advocate for as much visitation as possible.

### **§28.3.3 Negotiating**

Before the preliminary hearing, in addition to information gathering and client counseling, the parent's attorney should begin negotiating with the other parties and their attorneys.<sup>36</sup> The Children's Protective Services worker and the child's attorney will, in all likelihood, attend the preliminary hearing. In some jurisdictions, attorneys representing the caseworker, child, and the child's other parent may also appear. After ascertaining the client's goals, the parent's attorney should work with the other attorneys and the caseworker to resolve differences, identify agreements, and try to reach a consensus on how the case should proceed. Stipulations on issues such as authorization, placement, visitation, and services will give the client a greater sense of control over the process. If agreements cannot be reached, having conversations with opposing parties will at least reveal essential information about each party's position and reasoning. This knowledge will help the parent's attorney decide what strategy to use at the preliminary hearing.

To summarize the last several sections, the attorney's three primary tasks before the preliminary hearing are: information gathering, client counseling, and negotiating. Although the time for these activities may be limited, even brief conversations can help the attorney achieve the client's objectives. The next section focuses on advocacy during the preliminary hearing.

### **§28.3.4 Courtroom Advocacy**

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<sup>36</sup> In some jurisdictions, attorneys may be able to participate in mediation programs or family group conferencing before the preliminary hearing.

The goals articulated by the parent during the first attorney-client meeting will guide the attorney's advocacy at the preliminary hearing. Under no circumstances should the attorney attempt to advocate on behalf of the client without first having discussed the case with the client and ascertained the client's position on the major issues. If there has not yet been sufficient time to consult with the client, the attorney should request that the case be "passed" until later that day (to preserve the possibility of the child's immediate return home) or until a later date (but only if a longer adjournment will allow time for proper preparation).

The preliminary hearing is the attorney's first chance to introduce the parent and the parent's story to the court. The court, the child's attorney, and the agency caseworker will watch the parent's courtroom actions closely to determine whether the parent seems inclined to respond positively to the judicial intervention and whether the parent will prioritize the children's interests. The attorney must caution the parent that the parent's behavior and attitude will be scrutinized closely during the hearing. Behaviors such as hostility toward the caseworker or the judge may delay reunification. The parent's instinctively hostile or distraught reactions may be understandable or even justifiable, but they will rarely further the parent's goal of having the children returned. Thoroughly explaining beforehand what will occur during the preliminary hearing will help to prepare and potentially calm the client. The parent's attorney then should model appropriate courtroom etiquette for the client by maintaining a professional demeanor while asserting the client's rights. Additionally, the attorney can provide the client with appropriate opportunities to participate in the court hearing. For example, having a client write down objections to statements made by other parties may minimize the possibility of vocal outbursts when disagreements arise.

Generally speaking, the major issues addressed at the preliminary hearing are: (1) whether to authorize the petition, (2) the child's placement, (3) visitation, and (4) services for the family. Despite long-standing recommendations to the contrary<sup>37</sup>, due to busy dockets, the preliminary hearing may last for only a few minutes. but the decisions made will lay the foundation for the rest of the case. Parents' attorneys must ensure that they have opportunities to address each of those major issues, and that the court considers each issue fully and separately.

The attorney may need to slow the pace of the hearing to ensure that everyone hears the client's full story. Judges try to use their bench time efficiently, and that may cause them to conflate the discussion of whether to authorize the petition with what should be the completely separate discussion of where to place the child if they do authorize the petition. Many judges

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<sup>37</sup> See National Center for Juvenile and Family Court Judges, Resource Guidelines: Improving Practice in Child Abuse and Neglect Cases 42 (1995) (recommending that preliminary hearings last at least 60 minutes to cover basic issues).

assume that if they authorize the petition, they almost certainly will place the child in foster care. As explained above, that assumption is incorrect. After authorizing the petition, the court, in most jurisdictions, must then make a separate determination about where the child will be placed pending trial, which can include returning the child to one or both parents. If the parent wants the child to remain at home or to live with a relative, the parent's attorney must ensure that the court considers the placement issue fully, separately, and in its proper sequence. Evidence such as report cards, medical records, and statements from teachers, therapists, religious leaders, friends, neighbors, and family members may help the court make those decisions.

Additionally, to assuage the court's concerns about the child returning to a parent's home, the parent's attorney may want to suggest reasonable terms and conditions for a home placement. For example, courts may permit a child to remain in the home if the parents are willing to accept services such as intensive in-home reunification programs, parenting classes, and counseling. Each jurisdiction has different service programs that may assist a family in danger of being separated. Parents' attorneys should become familiar with the local community's various programs for in-home and preventive services. They should consider all the programs available in the county—not just those typically utilized by the agency. Knowledge of these programs will enable the attorney to expand the court's placement options at the preliminary hearing.

Parent's attorneys should always keep in mind that the law requires the agency to make "reasonable efforts" to prevent the removal of the child from the home except in the most extreme circumstances.<sup>38</sup> This obligation requires accessing community resources that might avoid the need to place the child in foster care. The agency'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 cases, parents' attorneys should advance that argument at the preliminary hearing.

The attorney also should explore placement alternatives to the typical foster care placement. For example, the court may order a home placement if a trusted family member offers to move into the parent's home or to allow the client and the client's children to move into that relative's home. If the parent-client was not the wrongdoer, the attorney may request that the court order the actual abuser to leave the home.

The attorney must explain to the client that accepting community services or agreeing to special living arrangements does not represent an admission of wrongdoing or waive the right to a trial. At the same time, the attorney must emphasize the importance of complying with the

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<sup>38</sup> 42 U.S.C. § 671(a)(15)(B).

court's orders because, in many situations, the only way to keep the child at home will be to identify the court's concerns and address those concerns by making some concessions.

If the court does order an out-of-home placement, then counsel should advocate for frequent and family-friendly visitation. As with placement issues, the attorney's role regarding visitation is to expand the court's options. In many child welfare cases, the standard protocol is to allow parents an hour of supervised visitation per week, with the visits occurring at the agency's office. This standard practice, in all likelihood, may not suit a particular family's needs. Having the agency supervise visitation may not be necessary. Attorneys should push for unsupervised visits when they can argue that such visits do not pose a danger to the child. For example, many child protective proceedings arise out of poverty-based neglect; in those cases, the issues that led to the child's removal may be related to the condition of the home. In such situations, day visits, with restrictions on where the parent may take the child, may suffice to protect the child.

Even if visitation must be supervised, the attorney should advocate for options that are more family-friendly and less restrictive than the common arrangement under which the parent and child see each other only at the agency office. For example, relatives, friends, clergy, community members, or foster parents may be willing to supervise the visits. Visits can also take place at nonagency sites such as a library, church, school, or even the client's home.

The court must also determine the frequency of visitation. Studies have shown that frequent visitation significantly increases the likelihood that reunification will occur.<sup>39</sup> Parents afforded the opportunity to see their children regularly have an added incentive to comply with the service plan. They receive reassurance that their children are doing well in foster care. Regular visitation also preserves the parent-child bond, which, especially for younger children, has important developmental consequences.<sup>40</sup>

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<sup>39</sup> See DAVID FANSHEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION (1978) (finding that more frequent visitation increased the emotional well-being and developmental progress of foster children and resulted in a higher likelihood that children were reunified with their parents). Research has also shown that frequent visitation prior to reunification increases the likelihood that the reunification will succeed. See Elaine Farmer, *Family Reunification with High Risk Children: Lessons From Research*, 18 CHILD & YOUTH SERVICES REV. 287 (1996).

<sup>40</sup> John Bowlby, a developmental psychologist and a leader in the field of attachment, described the effect of separating a young child from his or her parent. He wrote, "Whenever a young child who has had an opportunity to develop an attachment to a mother-figure is separated from her unwillingly, he shows distress; and should he also be placed in a strange environment and cared for by a succession of strange people, such distress is likely to be intense." John Bowlby, 2 ATTACHMENT AND LOSS: SEPARATION: ANXIETY AND ANGER 26 (1973). From the child's

Services for the family are the fourth main issue (after authorization, placement, and visitation) that may be discussed at the preliminary hearing. If the parent will accept services immediately, the attorney should request that the court order the agency to begin providing those services by a specified date. Because the first permanency planning hearing must be held within 12 months of a child's removal,<sup>41</sup> parents should try to begin their participation in services immediately. That will maximize the services provided within the first 12 months, and thus maximize the parents' opportunity to regain custody of the child. Some clients may hesitate to accept services prior to the jurisdiction trial because they fear that information revealed during services such as a parenting class or a counseling session could be used against them at trial. If this concern exists, counsel should consider requesting a protective order that limits the disclosure of that sensitive information until the dispositional stage of the case—if the case proceeds that far. Such an order will encourage the client to begin participating in services immediately.

In practice, the court may make all of the decisions described above in a matter of minutes, but their import for the future course of the child protective case and the child's life cannot be overstated. Although parents' attorneys often request a summary dismissal at the preliminary hearing, courts seldom dismiss cases outright at that point. More often, the case next enters the pretrial phase. The next section discusses the strategic issues that arise during that phase.

## **§28.4 Pre-Adjudication Proceedings**

### **§28.4.1 Pre-Adjudication Counseling**

During the pre-adjudication phase, the attorney should focus first on the client's immediate needs—on issues such as placement, visitation, and services. After that, the focus will shift to resolving the allegations in the petition and preparing for a trial on jurisdiction if the parties cannot resolve the case without a trial.

If the court authorizes the child's removal at the preliminary hearing, then the period immediately following that hearing is crucial. The parent may feel alienated, disempowered, and frustrated. The loss of control often makes parents want to disengage from the process completely. The parent's attorney can counter these understandable but self-defeating tendencies by ensuring that the agency keeps the parent involved in the child's life. As a first step, the attorney must explain the importance of the client attending each scheduled visit with the child.

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perspective, placement in foster care is typically an unwilling separation from a person to whom a child is attached. Visitation is one way to ameliorate the child's distress.

<sup>41</sup> 42 U.S.C. § 675(5)(C) (2006).

If the parent has to miss a visit, the parent must notify the caseworker as soon as possible so the child will not be transported to the visitation site and then be disappointed when the parent fails to appear. If scheduling difficulties arise frequently, then the attorney and the parent must discuss those issues with the agency supervising the case. For its part, the agency has an obligation to ensure that transportation difficulties do not impede a parent's efforts to visit the child. The agency should offer transportation assistance when necessary.

The attorney can help to preserve the parent's involvement in other ways. Even after a child is removed from a parent's home, the parent still retains important parental decision-making rights. For example, parental consent is typically necessary for some types of medical care.<sup>42</sup> Similarly, parents retain the right to make major educational decisions for a child. They may attend educational planning meetings. In addition, they retain the right to decide whether the child will receive special education services.<sup>43</sup> The parent's attorney should encourage the parent to attend school meetings, doctor's appointments, and therapy sessions, unless the court order prohibits such involvement. At a minimum, the attorney should make sure that the parent continues to receive updated information about the child from the service providers. Keeping the parent involved in the child's life will show the court that the parent remains concerned about the child's well-being and wants the child to return home even though the child has been temporarily placed elsewhere.

#### **§28.4.2 Maximizing the Parent's Opportunity to Receive Agency Services**

Making sure that the agency complies with all court orders, statutes, and departmental policies will help keep the parent invested in the process. Therefore, the parent's attorney must actively monitor and enforce the court's orders related to placement, visitation, and services. The attorney should encourage the client to call immediately if any problems arise. If the agency fails to implement court orders in a timely manner despite requests from the parent and attorney, then the attorney should file a motion requesting that the court hold the agency in contempt of court. Depending on the date of the next scheduled court hearing, the attorney may ask the court to hear the contempt motion even earlier, at a specially scheduled hearing.

In all cases, federal law requires that the agency do certain things within specified intervals after the child's removal or the preliminary hearing. Within 60 days of removal, the agency must prepare an initial service plan specifying the services that the agency will

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<sup>42</sup> See, e.g., Mich. Comp. Law 722.124a(1) (requiring parental consent for nonroutine or elective medical treatment of the foster child).

<sup>43</sup> See, 34 CFR 300.519 (stating that a surrogate parent is needed only when a foster child is made a "ward of the State.").

recommend that the parent complete before the child can be returned home.<sup>44</sup> The service plan must specify measurable objectives the parent is expected to achieve. Additionally, the agency must encourage the parent to actively participate in developing the service plan which includes the ability to suggest and challenge requirements. If the parents do not participate, the plan that the agency submits must document the reasons for a parent's nonparticipation. Any delay in providing services to parents jeopardizes reunification. Therefore, if the agency does not prepare the plan within the time allowed, or if the parent is not sufficiently involved in the planning process, the parent's attorney should follow up with the appropriate persons. If necessary, the attorney should request that the court review a placement order or the initial services plan and modify those orders and plan if modification is in the client's interests.

#### **§28.4.3 Exploring Settlement Possibilities**

Attempting an informal resolution of the petition's allegations constitutes the attorney's second major task during the pretrial phase. The attorney should first consider whether some resolution short of the court assuming jurisdiction is possible and appropriate. The alternatives include dismissing the case with a voluntary agreement that the parent will participate in services, holding the petition in abeyance while the parent complies with services, or asking the parent whether he or she will consider ceding custodial rights to another caregiver, either temporarily or permanently. If so, then the attorney should consider arrangements like a guardianship, a direct placement adoption, or a voluntary relinquishment of parental rights. But those options can have major collateral consequences that the parent must consider. For example, in some states, if the parent agrees to voluntarily relinquish parental rights to one child, that act can be grounds for the court later terminating that parent's rights to a future child.<sup>45</sup> Also, ceding custodial rights to another caregiver may make it very difficult for the parent to regain custody of the child in the future. Regardless, all options must be explored and the attorney must review the consequences of the decision with the client. Then, if a settlement possibility exists, the attorney must negotiate with the other parties to ascertain whether a mutually agreeable resolution can be reached without a jurisdiction trial.

The attorney and client should also discuss the possibility of entering a limited plea or stipulation that allows the court to take jurisdiction over the child. The attorney should first assess the strength of the agency's case and estimate the parent's chances of prevailing at trial on the jurisdictional issue. A plea that allows the court to take jurisdiction may be appropriate when the facts alleged in the petition are undisputed and clearly establish a statutory basis for jurisdiction. In addition the client may prefer that the child remain out of the home temporarily

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<sup>44</sup> 45 C.F.R. § 1356.21(g) (2008).

<sup>45</sup> *See, e.g.*, MICH. COMP. LAWS 712A.19b(3)(m) (West 2008).

while services are provided. Entering a plea that allows the court to take jurisdiction may create positive strategic momentum for the parent by causing the other parties and the court to view the parent as cooperative.

Additionally, the plea will avoid a jurisdiction trial, which often carries negative consequences for the parent. During a trial, the agency may present detailed evidence of abuse or neglect by the parent. That will inevitably focus everyone's attention on the parent's past mistakes. A trial may also exacerbate hostilities between the parent and the caseworker, service providers, and any family members who testify about the parent's past conduct. Entering a plea that allows the court to take jurisdiction may avoid some of these consequences because the plea will allow the case to move directly to the dispositional phase, where the goal will likely be to reunify the family.

Despite the possible advantages of entering a jurisdictional plea, attorneys must also advise their clients about some possible negative consequences. By entering a plea, the parent waives, among other things, the right to a jurisdiction trial. Many parents will view this trial as their first real opportunity to tell their story, and they will want to exercise that right regardless of the possible negative consequences. Also, if the parent waives the right to a jurisdiction trial by entering a plea, the court's power over the family increases significantly. All future decisions regarding placement, visitation, or closure of the case will then rest with the court. The court may also use the parent's jurisdictional plea as evidence in a later proceeding to terminate parental rights.

Ultimately, after being advised by his or her attorney, it will be the parent-client who must decide whether to settle the jurisdiction issue or proceed to trial. Under no circumstances should anyone, including the attorney, try to force the parent to enter a plea.

If the client will at least consider entering a jurisdictional plea, the attorney should negotiate the plea's details with the prosecutor and the other parties. In most jurisdictions, the parent can either admit to all or some of the allegations in the petition or plead "no contest" to the allegations in either the original petition or a petition that the agency has amended after negotiations with the parent's attorney. The attorney should review these options with the client and then propose to the agency's lawyer the plea language that the client finds acceptable. Before reviewing the options with the client, counsel must determine the consequences of the plea, including both those noted above and others determined by local practices. For example, despite the usual expectation that "no contest" means neither admitting nor denying the allegations in the petitions but being willing to accept the court's jurisdiction, in some jurisdictions, a no contest plea is treated as a finding by the court that the petition's allegations are true. In those jurisdictions, the agency and the court then may be able to use those not-contested "facts" against the parent at a later termination of parental rights hearing. Other judges

will expect a parent who has pled no contest on the jurisdictional issue to (later) make explicit admissions during the dispositional phase. These judges view the belated admissions as evidence that the parent now fully appreciates the wrongfulness of the previous conduct, which indicates to these judges that the parent has made real progress in treatment. Understanding these differing local practices will allow the attorney to better evaluate the possible plea deals discussed during negotiations.

#### **§28.4.4 Preparing for a Jurisdiction Trial or Fact-Finding Hearing**

If the parent wishes to proceed to a jurisdiction trial, much of the pretrial phase will be consumed by trial preparation similar to that in any case. The attorney should thoroughly investigate the matter by interviewing potential witnesses and reviewing relevant documents. There may be alternate explanations for the alleged abuse or neglect and the context in which something occurred may be determinative of the need for state intervention. Potential witnesses may include medical or psychological experts, teachers, neighbors, police officers, and family members. To obtain information from non-parties, attorneys can use their subpoena power if necessary. Attorneys should also obtain a copy of the complete child protective files which—if not already allowed by state statute or court rule—they should be able to do with a subpoena and a release signed by the client. If the agency will not open its files, the parent’s attorney should first seek to resolve that issue with the attorney representing the agency. If negotiating fails, counsel should then request a court order compelling disclosure.

Attorneys should also use formal discovery procedures to uncover the details of other sides’ case—if that right is available under state law—so that no information unknown to the parent’s attorney will be presented at trial. Discovery procedures may include interrogatories, requests for production of documents, depositions and requests for admissions. As part of this inquiry, the attorney should also interview all of the witnesses testifying on behalf of the state, the guardian *ad litem* and the children’s attorney. Some states have mandatory disclosure procedures in lieu of or in addition to the availability of discovery.

#### **§28.4.5 The Pretrial Hearing**

The pretrial hearing presents another opportunity for the parent’s attorney to resolve issues concerning placement, visitation, and services. Generally these issues may be addressed at *any* hearing in a child welfare case. Updated information regarding the parent, including compliance with services, changes in employment and living situation, or successful visitation, may cause the court to revisit orders entered at the preliminary hearing. At every hearing, it is critical that the attorney make the court aware, through testimony, exhibits and argument, that

the parent is making continued progress, something that is crucial to creating and maintaining positive momentum.

The pretrial hearing also allows the jurist and the attorneys to anticipate and resolve issues that may arise during the jurisdiction trial. The parent's attorney should inform the court whether the parent is willing to enter into a plea admitting jurisdiction or if the client wants a trial. At the pretrial hearing, attorneys may file trial-related motions or enter stipulations regarding particular pieces of evidence. For example, if the agency has failed to respond to a discovery request, the pretrial hearing affords a good opportunity to raise that issue with the jurist and, if necessary, request that discovery be compelled by the court. If the petition contains factual allegations that have no relevance to the jurisdiction determination, the attorney should request that the agency amend the petition by striking the irrelevant allegations. The pretrial hearing may also resolve motions *in limine* on issues such as the admissibility of specific pieces of evidence or the manner in which children's testimony or out-of-court statements will be presented at trial.

At the pretrial hearing, the parent's attorney should give the court an estimate of how many witnesses will testify at trial and what exhibits will be introduced. A thorough pretrial investigation and discovery effort will have prepared the attorney to provide that information. The attorney should also request that the court's pretrial order include deadlines for exchanging witness and exhibit lists and for filing any remaining motions. At the end of the pretrial hearing, the court will set a trial date, if it has not already done so.

Through zealous advocacy at the pretrial stage, the parent's attorney can achieve or advance the client's goals by facilitating a mutually agreeable plea bargain or assembling a strong case for trial. If the allegations cannot be resolved completely during the pretrial phase, then a trial regarding jurisdiction will be necessary. The next section addresses the issues that may arise at a jurisdiction trial.

## **§28.5 The Jurisdiction Trial**

### **§28.5.1 Use Traditional Trial Practice Techniques**

The role of the parent's attorney during the jurisdiction trial resembles that of a defense attorney in a criminal case. The agency bears the burden of proving the petition's allegations by a standard of proof defined by state law and the parent's attorney usually will offer an alternate case theory to dispute the agency's allegations. As appropriate, counsel should call witnesses, cross-examine the agency's witnesses, and introduce exhibits that support the client's position. If the client is going to testify, it is crucial that the attorney prepare her or him to present the testimony as sympathetically as possible. At a minimum, the attorney must meet with the client to practice the direct exam and likely cross exam questions and advise the client on the

disadvantages of appearing hostile or inconsistent. If there is a possibility of a parallel criminal trial, the decision to testify should be coordinated with the criminal defense attorney. Ultimately, the referee, judge, or jury will determine whether the agency has proven that grounds exist for the court to take jurisdiction of the child. If the court does assume jurisdiction, the case then will proceed to its dispositional phase, which this chapter discusses in a later section.

A comprehensive guide to trial practice is beyond the scope of this chapter. To prepare for trial, parents' attorneys may wish to review a trial practice manual to familiarize themselves with such basics as delivering opening statements and closing arguments, asking direct and cross-examination questions, and introducing documents into evidence.<sup>46</sup> (See Chapter 32, "Trial Advocacy".) Parent's counsel should also inquire about a county's local practices. He or she should try to ascertain the judge's preferences on procedural matters such as marking exhibits, submitting witness and exhibit lists, and entering stipulations.

In all jurisdiction trials, the parent's attorney has two 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.

### **§28.5.1 Theory of the Case**

To tell the client's "story" effectively at trial, the parent's attorney must develop a coherent theory of the case that adapts the client's story to the case's legal issues. A successful theory speaks directly to the case's legal issues and is logical, simple, and easy to believe. In Chapter 32, Steven Lubet and John Myers suggest three questions for attorneys to ask when developing and expressing their case theory: What happened? Why did it happen? Why does that mean the client should win?

An ideal case theory can be expressed in a single paragraph. For example, if the agency alleges that a mother left her ten-year-old child unsupervised for several hours while she was at work, the mother's case theory could be: "Being poor does not make one a neglectful parent. Ms. Smith is a hardworking, single parent who was forced by emergency circumstances to leave her child alone. Court supervision, however, is not needed to protect this child."

The attorney can formulate a solid case theory only after conducting a thorough investigation that has uncovered both the good and bad facts of the case. The theory must then address both the positive and negative aspects of the case. Attorneys preparing for trial will often draft several case theories before settling on the one that best explains their client's actions.

A coherent theory of the case will guide the attorney's tactical decisions at trial. Should a specific witness be called? What types of cross-examination questions should the attorney ask?

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<sup>46</sup> See generally STEVEN LUBET, MODERN TRIAL ADVOCACY (2009); THOMAS MAUET, TRIAL TECHNIQUES (2002).

Should a document be introduced into evidence? Should the attorney object to a particular line of questioning? The parent's attorney can make better trial decisions by always considering which actions best support the prepared theory of the case.

### **§28.5.1 Preserving Issues for Appeal**

The need to preserve issues for appeal also will determine some of the attorney's actions at trial. If the parent loses the jurisdiction trial, the court will then enter a dispositional order, which most jurisdictions consider an appealable final order. A parent who wishes to appeal the trial court's assumption of jurisdiction must act quickly. Inexperienced parents' attorneys often make the mistake of waiting until the client's parental rights have been terminated (a much later phase of some child welfare cases) before challenging the court's initial decision to take jurisdiction, and often these appeals are deemed moot.<sup>47</sup> Attorneys must know at what points in their states appeals are available as a matter of right or within the court's discretion, and must know the applicable deadlines for filing notices of appeal. (See Chapter 26, Child Welfare Appellate Law and Practice.)

For the parent to have any significant chance of prevailing on appeal, the parent's trial attorney must have preserved the appellate issues during the trial. An attorney can preserve issues for appeal by clearly presenting them to the trial court and requesting rulings during the trial. The attorney usually should raise the issue with a timely objection or a motion *in limine*. That gives the trial court the first opportunity to decide the issue, something that appellate courts almost always insist upon before they will rule on an issue. This general rule applies to both procedural and evidentiary rulings. Appellate courts routinely decline to consider unpreserved issues unless they conclude that the error was both plain and substantially affected the party's rights. In practice, that is a nearly insurmountable appellate standard. Trial attorneys must take care to preserve all potential appellate issues with timely objections or motions.

As a practical matter, the steps required to preserve an issue for appeal are straightforward. The precise steps will vary by state law. But generally speaking, if the parent's attorney disagrees with an evidentiary ruling, the attorney need only present a timely objection or motion to strike that states the specific ground for the objection. If the objection involves admitting or excluding a particular piece of evidence that the court has not yet heard or seen, the attorney must also ensure that the court knows the substance of the evidence. Once the court makes a definitive ruling on the record either admitting or excluding evidence, the attorney does not need to object repeatedly or make a formal offer of proof in order to preserve the question for appeal.

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<sup>47</sup> See, e.g., *In re Hatcher*, 505 N.W.2d 834 (Mich. 1993).

Similarly, for a procedural ruling such as one involving service of process, or how to present testimony by a child witness, the attorney need only state the objection, ensure that the court understands the basis for the objection, and request a ruling on the issue.

To create the clearest possible record for the appellate court, the best practice often will be to file a written motion *in limine* before the issue actually arises, or a written motion for reconsideration if the court has already ruled. Filing written motions will eliminate any uncertainty as to whether the issue has been properly preserved for appeal. The same considerations about preserving issues for appeal apply at termination of parental rights hearings, which are discussed later in this chapter.

Through zealous advocacy at the jurisdiction trial, the parent's counsel will further the interests of both the parent and the child by ensuring that the court intervenes only in appropriate cases. Winning a dismissal at the conclusion of the jurisdiction trial will end the attorney's involvement in the case. If, however, the court decides to assume jurisdiction over the child, then the case will proceed to the dispositional phase, where different tactical considerations arise. These are discussed below.

## **§28.6 Dispositional Hearing**

If the court finds—based on either the parent's plea or the agency's trial evidence—that a child comes within the court's jurisdiction, the case then moves to the dispositional phase.<sup>48</sup> At the initial dispositional hearing, the court typically decides who should have custody of the child, who is entitled to services, and what steps must be taken to resolve the issues that led to the adjudication of abuse or neglect. The hearing is crucial because at its conclusion, the plan ordered by the court will guide the future of the case. Quite often, the subsequent termination of a parent's rights is based on his or her failure to comply with the dispositional plan. Thus, attorneys representing parents must be very diligent in ensuring that the plan is narrowly tailored to address the specific issues that led to the child's adjudication.

One of the first steps the attorneys should take in preparing for a dispositional hearing is to ascertain the agency's goals. Most states require the agency to submit a detailed, written dispositional report or service plan for the court to consider. Federal law requires a case service plan to be developed within 60 days of the child's removal.<sup>49</sup> The parent's attorney must obtain all agency reports well in advance of each hearing, read them carefully, and then review them

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<sup>48</sup> Some courts may consolidate the evidence in one trial and make adjudicatory and dispositional findings and orders at the end of the trial while others may have separate phases sequentially within the same trial or set a separate dispositional hearing.

<sup>49</sup> 45 C.F.R. § 1356.21(g).

with the client. The agency's reports and treatment plans should detail both the services provided or planned for the parent and the behavioral changes that the agency expects to result from the parent's participation in those services. If the attorney cannot obtain a copy of the report prior to the hearing, he or she should consider requesting a short adjournment of the proceeding. The attorney should also obtain copies of other reports filed by other individuals including the guardian *ad litem* or children's attorney, the court-appointed special advocate, and mental health professionals. The attorney should also meet with and provide relevant information to the child's legal representative and should consider permitting that individual to meet directly with the parent.

To assess the appropriateness of the agency's recommendations, the attorney should conduct an independent investigation of the client's circumstances. At a minimum, this should include regularly discussing the case with the client and asking the client to sign releases so the attorney can obtain additional information directly from service providers. The parent's attorney also should obtain the service providers' written documentation of the client's progress. Throughout the dispositional and review phases of the proceedings, the parent's attorney should communicate regularly with anyone who may possess information that will help the attorney advocate for the client. That list includes, at a minimum, the caseworker, the child's guardian *ad litem* or children's attorney, the state's attorney and other participants such as the child's court-appointed special advocate.

During this investigation it may become apparent that the client has needs which are not being met. For example, the attorney may learn that the client is developmentally delayed or has a previously undisclosed substance abuse problem or mental health diagnosis. In such circumstances, the parent's attorney must meet with the client and explain that additional evaluations and services may identify deficits that have impaired the client's ability to parent. But the attorney also must explain that coming forward with such information may further delay reunification or make it less likely. Parents' attorneys should counsel their clients carefully about the risks and advantages that accompany each course of action.

The parent's attorney should obtain official documentation showing that the client has complied with or completed services. In addition, the attorney should advise clients to document their own efforts. For example, the attorney may suggest that the parent keep a journal of dates, times and details of: (1) interactions with the caseworker or other professionals, (2) attempted or made phone calls to service providers, (3) attendance at services, and (4) visits with their children. Any documentation that the parent has benefited from services will be especially helpful. Examples of that include certificates from parenting classes, residence leases (to show that the parent has obtained proper housing), and sign-in sheets for substance abuse treatment programs. Counsel should present copies of these documents to the court at the initial

dispositional hearing and at subsequent review hearings. Counsel should also share this information with the guardian *ad litem* or children's attorney and all other parties before the hearing as the information may affect the recommendation those parties make to the court.

As during the other phases of a child welfare case, client counseling is crucial before and after the dispositional hearing. The parent's attorney should encourage the parent to cooperate with the agency's efforts to provide services directed at reunification, and should explain the consequences of failing to cooperate. The parent's attorney should also advise the client that, although reunification will not occur unless the parent complies with the agency's recommendations, compliance alone will not ensure reunification. The parent must also demonstrate that he or she has benefited from the services. If the agency worker does not agree that the parent has benefitted from services and made progress, the parent's attorney should explore with the client ways to convince the court that the client has benefited. For example, if possible, the attorney should retain a social worker to observe a visit and testify or write a report, or encourage one of the service providers to observe a visit for that purpose."

The attorney should also counsel the parent about alternative dispositional options that could resolve the case. For example, if the child has been placed temporarily with a relative, the attorney might discuss trying to resolve the case through a custody or guardianship agreement or through an adoption, if the client wishes to do so. In some cases, a change of custody to the child's other parent may resolve a child welfare case. Finally, if the attorney concludes that the parent does not wish to take any steps to regain custody of her child, the attorney should consider counseling the parent about releasing his or her parental rights so that the child will be eligible for adoption. Of course, the attorney must discuss with the parent the potential pros and cons of any dispositional alternatives.

At the actual dispositional hearing, the parent's attorney should zealously advocate for a plan that meets the client's objectives. Where the client believes that the agency report includes inaccurate information, the attorney should explain the disagreement to the court and request an explicit finding as to which version is true. If the court finds that a statement made in a written report is inaccurate, the parent's attorney should request that the report be amended. A failure to take those steps will allow the inaccurate information to become part of the court's continuing record that the court may rely upon at later stages in the proceeding. Parents' attorneys should also consider submitting into evidence their own written reports that summarize their clients' views regarding participation in services, the benefits derived from that participation, the child's best interests, and other relevant matters. For example, a report filed by a parent's attorney could include information regarding the parent's efforts to comply with and benefit from the following components of the court-ordered service plan: visitation with the child, participation in counseling, substance abuse treatment, parenting programs, and other services. The parent's

report also could direct the court's attention to any difficulties the parent has encountered in accessing agency services or contacting the caseworker. Finally, the report may also include the attorney's requests that the court order additional or different services (or eliminates the requirement of compliance with a service). The submission of an independent report can do much to counterbalance inaccurate or incomplete information in the agency's report. It also serves to balance the entire written record of the case, which could be vitally important if the court reviews its file in a subsequent termination proceeding.

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Parents' attorneys should also advocate for the services that best suit the client's individual needs. In order to do this effectively, an attorney should learn everything possible about the local community's service providers. Regardless of the client's apparent capacity to parent, if reunification is the articulated goal, the agency has a statutory duty to make reasonable efforts to provide services that address the parent's deficits. This means that the services must address the primary barriers to reunification in the particular case. That may require more than the agency's favored boilerplate services, which often will not address a particular client's identified parenting deficits. The attorney should be prepared to use cross examination of the caseworker or to submit evidence from experts or service providers to support an argument for services individualized to the client's needs.

The agency must offer services of sufficient quality, duration, and intensity to allow a parent who complies with the service plan a fair chance to demonstrate that he or she has made the needed changes. When services do not address the parent's needs, are not of sufficient quality, do not last long enough, or are not sufficiently intense, parents' attorneys should argue that the agency has failed to make reasonable efforts to reunify the family.

Some clients' parenting deficits result from conditions covered by the Americans with Disabilities Act (ADA).<sup>50</sup> If so, the agency must provide services that go beyond the general "reasonable efforts" requirement.<sup>51</sup> The ADA additionally requires the agency to make "reasonable accommodations" to address that parent's specific disability. For example, a developmentally-delayed parent should attend parenting classes that are hands-on rather than classes that use a lecture format. To give developmentally delayed parents a fair opportunity to learn and integrate the necessary parenting information, they usually need to attend more class sessions over a longer period of time. The parent's attorney should track the agency's compliance with the ADA throughout the dispositional and review hearing process.

Parents who have two or more co-existing problems (e.g., substance abuse and a mental illness) may be required to engage in multiple services. That will require substantial time commitments, and can be especially difficult for parents who work. Those competing demands may cause conflicts or transportation difficulties. Therefore, counsel may have to ask the agency (or the court if the agency refuses) to prioritize the services schedule in a way that gives the parent a fair chance to comply.

Visitation aims to maintain and strengthen the parent-child attachment, which is crucial to a child's development and successful reunification. The visitation schedule must be tailored to the individual needs of the child. Particularly for infants and young children, weekly, supervised

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<sup>50</sup> See 42 U.S.C. § 12101 (2006).

<sup>51</sup> See, e.g., *In re Terry*, 610 N.W. 2d 563 (2000).

one-hour visits at the agency's office will not suffice to maintain the parent-child relationship.<sup>52</sup> The parent's attorney should advocate for maximum visitation in order to develop, preserve, or enhance the natural bonding between parent and child.

The parent's attorney must consider two additional issues concerning services. First, the attorney must advocate for the availability of services to parents at times outside traditional office hours, which is particularly important because many parents do not have jobs that allow for much time off or for flexibility. This means that agencies sometimes must accommodate the parent's or child's need for services in the evenings and on weekends. Second, the service location may present problems because many parents do not have ready access to reliable transportation. The attorney should know the local community's public transportation options and advocate for services in convenient locations, or for special transportation services that will allow the parent to travel to and from the service providers.

After the court has concluded a dispositional review hearing, the parent's attorney should obtain and carefully review the dispositional order. If the order does not accurately reflect the hearing's outcome, the attorney should immediately ask the court to amend the order. The attorney should provide the client a copy of the order and review it with the client to ensure that the client understands what the order requires and the possible consequences of failing to comply with it.

### **§28.7 Advocacy Between Hearings**

After the dispositional hearing, the next court hearing—the review hearing—will occur approximately three to six months later. During the intervals between court hearings, agency personnel often make critically important decisions. In many states, administrative meetings occur on a regular basis at which many issues are discussed including modifications to the case service plan such as additional services for the family, selection of treatment/service professionals and changes to the visitation schedule. Ideally attorneys for parents should attend these meetings and view them as opportunities to solve problems prior to heading to court. At the very least parent's attorneys should closely monitor these developments through in-person and phone contacts with the client, the caseworker and service delivery personnel. Because these decisions will often be ratified by the court an attorney can dramatically improve case outcomes by advocating for the client between court hearings. If formal conferences are not routinely held, the parent's attorney should request opportunities to address issues as they arise. Ideally,

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<sup>52</sup> See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD DEVELOPMENT: A JUDGE'S REFERENCE GUIDE 22–24 (1993) (discussing attachment and bonding and noting that a primary ingredient of healthy development is time with the parent).

the attorney should seek to convene a meeting before every court hearing to attempt to resolve issues.

In some states, before making a placement or any change in the child's placement between hearings, the agency convenes Team Decision-making Meetings (TDM) that include the parent, caseworkers, the guardian *ad litem* or children's attorney and other members of the family.<sup>53</sup> Critical decisions about placement, visitation and services are made at TDM meetings, and, because there will be an inherent power imbalance if a parent attends alone, the parent's attorney should try to attend TDMs and ensure that the parent has additional support persons in attendance. Even when the parent's attorney cannot attend the TDM, the attorney should encourage the parent to attend and to work cooperatively with the team members to ensure that the parent's voice is heard. These administrative meetings provide additional opportunities for parents to stay involved in their children's lives and for attorneys to address their client's concerns.

## **§28.8 Review Hearings**

Review hearings are post-disposition proceedings at which the judge assesses the progress of the case and determines whether any changes need to be made to the service plan. Typically, the primary issues addressed at a review hearing are placement, services and visitation. The court will determine whether the agency has met its obligations to provide services and facilitate visitation under the statute and the court order and will ascertain whether the parent has made progress towards remedying the factors that led to the adjudication. At each hearing, the court should also be assessing whether the grounds for dependency continue to exist.

Preparing for a review hearing is similar to getting ready for the initial dispositional hearing. The attorney should obtain a copy of the agency's report and all documents prepared by other parties and interested actors in the case. The attorney should review the documents with his or her client and should also independently speak to all of the service providers working with the client to determine who may be able to provide the court with information helpful to the parent. Potential service providers may include the parenting class instructor, the mental health therapist or the visitation supervisor. Once these individuals are identified, the attorney should obtain written reports from them and should consider subpoenaing them for the hearing so that they can provide testimony to the court. As is the case before the initial dispositional hearing,

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<sup>53</sup> Team decision-making meetings are a key component of the Family to Family initiative pioneered by the Annie E. Casey Foundation. For more information about the Family to Family program, visit <http://www.aecf.org/MajorInitiatives/Family%20to%20Family/Resources.aspx>.

the attorneys should also consider filing a written report documenting the client's progress towards fulfilling the case service plan.

At the review hearing, the attorney should request modifications to the service plan and court orders—including changes in placement and visitation—that the client requests. Counsel should advocate for return of the child to the parent's custody where the risk to the child is eliminated, the child is no longer vulnerable to risk or the parent have sufficient protective capacities to manage or control the threats of danger to the child. (See Chapter 14, Child Safety Decision-making. Parent's counsel should use every opportunity to demonstrate to the court that progress is being made and should ensure that the court focuses on the parent's strengths and successes, not just on the shortcomings that the other parties may dwell on. Counsel should also ensure that the agency's actions are consistent with state and federal mandates and that the state made reasonable efforts towards reunification. Additionally, if the grounds for dependency no longer exist, counsel should request the immediate closure of the case.

After the hearing, the attorney should carefully review the order with the parent to ensure that the court did not err in its findings and that the parent understands exactly what is expected by the court and the agency.

### **§28.9 Permanency Planning Hearing**

Federal law requires the court to hold a permanency planning hearing (PPH) within 12 months after the child's removal from the home or within 30 days of a determination that no reunification efforts are necessary. The requirement to hold a PPH was intended to make courts expedite a permanent placement for the child, which may include reunification, adoption, or a legal guardianship, among other options. At the PPH, the court may direct the agency to file a petition to terminate the parent's legal rights to the child. The specific decisions that are made at the PPH and the legal standards may vary from state to state.

Parents' attorneys should begin thinking about the permanency plan at the inception of the child welfare case, when they counsel their clients about complying with the case service plan. A parent's failure to comply with the court-ordered service plan is typically considered evidence that the child will be at risk if returned to the parent's custody. Conversely, where a parent has substantially complied with the ordered services, the parent's attorney should be prepared to make an argument that any risk of harm has been reduced or eliminated and that the child should be returned home.

To prepare for a PPH, the parent's attorney should consider how best to demonstrate that returning the child home would not subject the child to harm—even if the parent has not completed all treatment services. Counsel should informally lobby the caseworker to

recommend a return home or, at least allow more time for the parent to complete the court-ordered services.

Before a PPH, the attorney should interview all the service providers to assess the client's compliance with and benefit from services. If the providers offer helpful information, the parent's attorney should subpoena them to testify at the hearing.

The service providers often can clarify a parent's issues in ways that caseworkers cannot or will not do. If sympathetic providers cannot testify in person at a PPH, the attorney should solicit letters or affidavits from them to help the court understand the parent's progress in the treatment program. Hearsay is typically admissible at the hearing.

Just as evidence provided by those working directly with the parent can impact the court's permanency planning determination, the views of the guardian *ad litem* or children's attorney, who works directly with the child, also will carry considerable influence. Before a PPH (and ideally before every hearing), the parent's attorney should consult with the child's attorney regarding the permanency recommendation. The parent's attorney should try to persuade the child's legal representative to support the child's return home or, at least, continued efforts to reunify the family. This conversation also should include a realistic assessment of other permanency options and their likely effects on the child. Questions to ask the GAL may include the following: What is the long term permanency goal? Is adoption likely? If so, has the GAL already identified a viable adoptive placement? Does the child have special needs that would make adoption difficult to arrange? If the plan is for the child to transition to adulthood from foster care, how would termination of parental rights further the child's best interests?

In addition to advocating for the client when meeting with the GAL, the parent's attorney should 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 if such a meeting occurs.

Also before the permanency planning hearing, the parent's attorney should counsel the client about all possible options. In cases in which reunification appears unlikely, the attorney should consider discussing with the client the possibility of consenting to a legal guardianship, custody order or adoption decree, or of relinquishing his or her parental rights. Pursuing one of these options, where reunification appears in doubt, may enable the client to avoid the involuntary termination of his or her rights. If the client decides to relinquish his or her parental rights, counseling may be appropriate and the attorney can help construct a therapeutic process so that the parent and the child can say good-bye in the least detrimental way possible.

At the hearing itself, the attorney should zealously advocate to achieve the client's objectives. Attorneys should use state statutory language to request that a child be returned

home if return does not pose a substantial risk of harm to the child.<sup>54</sup> If the agency is seeking permission to file a petition to terminate parental rights, the attorney should argue that a petition is premature. Although federal law requires that a petition be filed if a child has been in foster care for 15 of the most recent 22 months, certain exceptions apply, including the placement of the child with a relative or the state's failure to provide appropriate services to the family.<sup>55</sup> The attorneys should be prepared to argue that one of these exceptions applies or that compelling reasons demonstrate why filing the petition would be contrary to the child's best interests.<sup>56</sup> For example, termination of parental rights may not be appropriate in the case of an older child who does not wish to be adopted or for a child living with a relative who does not wish to adopt her. The attorney should also consider having the parent testify if he or she could persuasively testify as to steps taken to address the issues that led to the foster care placement.

## **§28.10 Termination of Parental Rights**

### **§28.10.1 Investigation and Analysis**

After the permanency planning hearing, the court, often acting on the agency's recommendation, may order the agency to file a petition to terminate the parent's rights. Generally speaking, a termination order permanently severs the legal relationship between the child and the parent. After the issuance of the order, the parent has no legal right to visit, plan for, or contact the child. Due to the severity of the sanction sought by the state, termination cases require the parent's attorney to confront a new series of difficult legal and strategic challenges. Counsel must carefully identify the issues presented in the individual case and address each issue in turn.

When the agency files a termination petition, the parent's attorney should meet with the client to review each factual allegation and the corresponding legal basis for termination cited in the petition which the state must prove by at least clear and convincing evidence.<sup>57</sup> After hearing the client's response to each factual and legal allegation, the attorney should then work with the client to develop a list of potential witnesses. For example, the client's mental health evaluator, substance abuse counselor, or therapist might provide important testimony that will challenge the termination petition's factual or legal allegations.

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<sup>54</sup> See, e.g., Mich. Comp. Law. 712A.19a(5) (child must be returned home unless return home would cause a "substantial risk of harm to the child's life, physical health, or mental well-being.").

<sup>55</sup> 42 U.S.C. § 675(5)(E).

<sup>56</sup> 42 USC 675(5)(E)(ii).

<sup>57</sup> In *Santosky v. Kramer*, 455 U.S. 745 (1982), the United State Supreme Court held that a clear and convincing standard of proof was constitutionally required in termination of parental rights cases.

After developing the list of potential witnesses, the attorney should contact and interview each one. To interview some witnesses (e.g., therapists), the attorney will first need to have the client sign a release that authorizes the witness to reveal confidential information to the attorney. Counsel will need the guardian *ad litem*'s or children's attorney's permission to interview the client's children. After interviewing the potential witnesses, the parent's attorney will need to decide which witnesses' testimony will bolster the parent's theory of the case. The attorney should subpoena those witnesses and develop direct-examination questions that will elicit the information that the court needs to understand the parent's theory of the case. The parent's attorney should also obtain the witness and exhibit lists prepared by the agency and the guardian *ad litem* or children's attorney. The attorney should interview those potential adverse witnesses and obtain copies of all documents that the other parties will seek to introduce into evidence. This advance preparation will allow the parents' attorney to develop a theory as to each adverse witness and a strategy for cross-examining that witness. The parent's attorney should also gather documentary evidence that supports the parent's case. As part of that effort, the attorney should request (and subpoena if necessary) the caseworker's file. The attorney must review the file's contents and make copies of important documents. When reviewing the history of the case, the attorney should identify the original basis for the court's jurisdiction over the child and the services ordered by the court, and assess the agency's efforts to work with the client and provide the required services. If the agency resists providing this information, the parent's attorney should file a discovery motion seeking access to the information as permitted under state law.

### **§28.10.2 Pre-trial motions**

While conducting a thorough investigation of the case, the parent's attorney should evaluate whether any pre-trial motions are required. If the state intends to call witnesses whose sole basis of knowledge comes from hearsay evidence, the attorney should file a motion *in limine* to exclude the testimony. The attorney may also determine that expert evaluations are necessary to assess the relationships between the child, the foster parent and the birth parents or to determine the parent's capacity to take care of the child. In some states, the court or the agency may be required to pay for such evaluations where the parent is indigent. Whether an attorney wants to take the risk inherent in requesting an evaluation of the parent may depend on the strength of the case. Where the facts are strong, the evaluation may be unnecessary and may only threaten to undermine the case. However, where the case is weak, the attorney may determine that a good evaluation may be crucial (and worth the risk) to prevent the termination of the client's parental rights.

### **§28.10.3 Theory of the Case**

As with the jurisdiction trial, the parent's attorney must develop a coherent theory of the parent's case. (See Chapter 32, Trial Advocacy.) The theory should present a short and logical summary of the case's facts and the parent's legal position. An ideal theory distills both the client's story and the applicable law. For example, the following might be the parent's theory of the case for a termination case. "The existing attachment between this mother and her daughter is such that a severing of the existing bond would be severely detrimental to the child." Other theories may involve the feasibility of other, less drastic, permanency options such as guardianship, custody or placement in a "planned permanent living arrangement" as defined by federal law.<sup>58</sup> Developing a coherent and comprehensive theory will help the attorney organize the facts and provides a framework for determining which witnesses to call, what evidence to present, and what questions to ask. To make sure that the judge understands the theory and sees how the evidence supports it, the attorney should outline the theory during both the opening statement and the closing argument.

### **§28.11 Appellate Advocacy**

When a court issues an adverse ruling at any point in the child welfare cases, attorneys will be confronted with a decision as to whether to appeal the order. After determining whether the order is one that is appealable under state law,<sup>59</sup> the attorney should counsel the client on the likely outcome of the appeal. The attorney should carefully review the record, including all transcripts and the court records and should make an initial determination of what potential issues can be raised on appeal. The attorney should consider constitutional claims, statutory arguments, and abuses of discretion by the trial court. To be a successful appellate attorney, counsel must be well-versed in the substantive and procedural constitutional rights afforded to parents by the Fourteenth Amendment, federal and state child welfare laws and the intricacies of appellate practice. (See Chapter 26, Child Welfare Appellate Law and Practice.)

If the parent's attorney determines that legitimate claims exist for an appeal, then the attorney should counsel the client on the pros and cons of appealing. The attorney should advise the client about the length of time an appeal is likely to take in the jurisdiction and how the delay may affect the family's situation. At times, appealing a determination of jurisdiction will slow efforts toward reunification; during an appeal of a termination of parental rights, the parent may not be allowed to see the child.

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<sup>58</sup> 42 U.S.C. § 675(5)(C).

<sup>59</sup> Typically, state laws permit the appeal of the initial dispositional order and the final termination of parental rights decision. Other appeals may be discretionary.

Ultimately, after counseling the client about the pros and cons of going forward with the appeal, it is the parent's decision whether or not the claim should be pursued. If a parent wishes to go forward, the attorney should take all steps permitted under state law to expedite the completion of the process.

### **§28.12 Conclusion**

Parents have a constitutionally protected right to the care, custody, and control of their children. The state may interfere with these rights only by following proper procedures, and only after showing that the parent is unfit to parent his or her child. Parents' attorneys must utilize the law to protect these critically important rights, working with the parent to establish the goals of the representation, which usually are to minimize the state's interference with parental rights. The parent's attorney must be a zealous advocate for the parent and must counsel the client based on a comprehensive knowledge of the law and a detailed understanding of the particular case. The parent's attorney must carefully investigate the case at every stage and advise the client regarding all the options at each stage, but ultimately let the client determine the goals to be achieved. By taking these steps, the parent's attorney will fully explore all aspects of the case, protect the parent's interests, ensure that the need for court involvement continues to exist and increase the likelihood that the court makes a decision that serves the best interests of the child.