

The Preliminary Hearing: Where Our Advocacy Must Begin

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The way things are: A little lemonade, a lot
of trouble



The Reality

- “Defensive social work has flourished in the past 20 years, fueled by the news media’s appetite for sensational child maltreatment stories as well as by laws that purposely magnify the public visibility of child maltreatment fatalities and near fatalities.” Paul Chill
- “Although significant risks may attend to removal and nonremoval, the latter inevitably gets more play in court hearings. . . [I]t is much easier to overlook the less sensational and palpable risks of family separation and substitute care.” Paul Chill
- In Washington, DC, after a high profile child fatality, removals spiked by 41%. Wash. Post – 1/8/09
 - Same dynamic has occurred in NYC, Philadelphia

The First Court Hearing

- Rushed
- Perfunctory
- Short – typically 20 minutes or less
- Agency Decisions are Rubber-Stamped

A Child Removed Tends To Stay Removed

- Sequentiality effect - once removal occurs, child welfare system tends to favor removal
 - Bias towards preserving status quo
 - Heightened emphasis on risks associated with placing child with party with fewer litigation resources
 - Litigation is focused on whether parent has harmed the child
 - Judge's vulnerability to negative feedback caused by failure to intervene
- Peggy Cooper Davis & Guatam Barua, Custodial Choice for Children at Risk: Bias, Sequentiality & The Law

"Once a child is removed, it becomes logistically and practically more difficult to help a family resolve its problems."

-National Council of Juvenile and Family Court Judges,
Resource Guidelines

Summary of Status Quo

- Ex parte removals
- Quick hearings
- Relaxed advocacy
- Little judicial oversight
- Children remain in placement
- Continue in placement
- Very little momentum to get kids home

Best Practices – National Council of Juvenile and Family Court Judges: Resource Guidelines

- “A timely and thorough preliminary protective hearing can shorten the time of foster care and speed the judicial process.”
- “The parties should leave the hearing with the perception that they were treated fairly by a court that is concerned about their interests and that is striving to build a working relationship between the parties so that the need for court intervention can be ended as quickly as possible.”
- “A complete preliminary protective hearing requires a substantial initial investment of time and resources. Such an investment results in better decisions for children and their families, and preserves the resources of the court and child welfare system.”
- “It is recommended that **60 minutes** be allotted for each preliminary protective hearing.”

Best Practices – Judge Len Edwards

“Juvenile court judges must accomplish as much as possible at the shelter care hearing. The more the court can accomplish at the shelter care hearing, the more meaningful each hearing thereafter will be, and the more likely that the case will be resolved early in the court process.”

-Achieving Timely Permanency in
Child Protection Courts

It is our job to transform reality
into the ideal

**And The Law And DHS Policy Are On
Our Side**

Main Issues To Be Addressed At The Preliminary Hearing

- Authorization
- Placement
- Services
- Reasonable Efforts

Time Before The Hearing

- **What time?** May be 5 minutes, may be longer
- MEET WITH YOUR CLIENT
- Discuss case with other parties/interested people
 - Caseworker, L-GAL, relatives, other attorneys
 - Explore whether settlement is possible
 - Obtain info for client (e.g. child's placement)
- Get relevant documents
 - Petition, CPS reports, other pertinent records

Many of us spend a lot of time waiting for hearings to be called. Use that time wisely.

Initial Client Meeting

- Confidentiality – difficult in crowded courthouse
- Elicit basic information
 - Date of birth, address, phone number, ICWA info
 - Version of facts; documents to support story
 - School records, medical records, lease
 - Previous CPS history, criminal history, involvement in other court proceedings
 - Other placement resources – family and non-family
 - Work with service providers – names, phone numbers, documentation, releases

Initial Client Meeting

- Client counseling
 - Review major decisions that will be made at the preliminary hearing
 - Position on major issues (authorization, placement and services)
 - Willingness to accept reasonable terms and conditions.
 - Options for parenting time
 - Other placement resources
 - What's next – pretrial, adjudication

If you are not given enough time to meet with your client or discuss the case with the other parties

ASK FOR MORE TIME

Courtroom Advocacy -- Authorization

- At the preliminary hearing, the court must determine whether to authorize the petition. Authorization is permitted “upon a showing of probable cause that 1 or more of the allegations are true and fall within the provisions of section 2(b) of this chapter.” MCL 712A.13a(2).
- But first, the court “shall determine if the petition should be dismissed or the matter referred to alternate services.” MCR 3.965(B)(4).
 - When would dismissal be appropriate?

When should you contest authorization? Some considerations

- Low standard of proof: “probable cause”
 - Black’s Law Dictionary – “reasonable ground for belief.”
- Michigan Rules of Evidence do not apply
- May hurt momentum
- Opportunity to have full-fledged trial – jury trial – exists.
- May be best in cases in which, even if the facts are assumed to be true, grounds for jurisdiction do not exist
 - substance abuse, child already in care with another family member. Use DHS policies to your advantage.

Placement – Authorization Does Not Equal Removal

- Even if petition is authorized, child can be released to a parent – court can order “reasonable terms and conditions necessary to protect the physical health or mental well-being of the child.” MCL 712A.13a(3); MCR 3.965 (B)(12)
- Work with your client to develop “reasonable terms and conditions” aka whatever it takes to prevent removal

If placement in care is contemplated, you have a right to a hearing

- Placement only permitted if evidence establishes that remaining at home is contrary to the welfare of the child. MCR 3.965(C)(2)
 - “Contrary to the welfare of the child” – situations in which the child’s life, physical health, or mental well-being is unreasonably placed at risk. MCR 3.903(C)(3).
- Court **SHALL** receive EVIDENCE to establish criteria for placement. MCR 3.965(C)(1).

Placement Hearing

- You have the right to
 - Cross examine witnesses
 - Subpoena witnesses
 - Offer proof to counter the admitted evidenceMCR 3.965(C)(1)
- If you need more time to secure witnesses, hearing can be adjourned for up to 14 days. MCR 3.965(B)(10).
- Hearsay is permissible as long as evidence “possesses adequate indicia of trustworthiness.”
- **Demand a real hearing**

Placement with relatives

- If child cannot go home, argue for placement with relatives
 - If child cannot go home, child shall be placed in the “most family-like setting available consistent with the child’s needs.” MCR 3.965(C)(2)
 - Federal law prioritizes placements with relatives. 42 U.S.C. § 671(a)(19)
 - Home study and criminal records check do not have to be done before child is placed with relative. MCR 3.965 (C)(4)
 - Licensing is not a requirement for placement.
 - DHS L-letter dated March 11, 2009 (L-09-026)

Parenting Time

- Even if out of home care is ordered, your client has a right to parenting time.
 - The Court MUST permit each parent “FREQUENT parenting time with a child in placement unless parenting time, even if supervised may be harmful to the child.” MCR 3.965(C)(6); MCL 712A.13a(11)
 - If parenting time, even if supervised, may be harmful to the child, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. MCL 712A.13a(11)
 - Right exists even if agency is seeking TPR at initial disposition. No automatic suspension of parenting time.
- Don’t accept the common practice that all parenting time must be supervised. Make them justify supervision. Showing of HARM is required
 - E.g. Conditional neglect cases
- Studies indicate that likelihood of reunification increases with more parenting time (e.g. Fanshell and Shin). This is a big issue.

Parenting Time – DHS Policies

- DHS Foster Care Manual 722-6: “The frequency of parenting time prior to the dispositional hearing is an important indicator of how quickly children can be reunited with their families, when this is the plan. Therefore, the more frequent the parenting time, the more likely the child will return home.”
- “Scheduling of parenting time must be done with primary consideration for the parents’ time commitments which may include employment and mandated service requirements. The supervising agency must institute a flexible schedule to provide a number of hours outside of the traditional workday to accommodate the schedules of the individuals involved.”

Parenting Time – DHS Policies

- “Parents **must not be prevented from interaction with their children because they are unable** to pay for necessary transportation or they have not complied with the treatment plan.”
 - Substance abuse and parenting time: “An allegation of neglect based **solely on a caretaker’s substance use is not, in and of itself, appropriate for CPS investigation.**” DHS Children’s Protective Service Manual 712-6
- “If the child is very young, parenting time should be more frequent.”
- “The standard scheduling for parenting time, when the plan is reunification, is to increase the length of parenting time and to allow unsupervised parenting time in the parental home.”

If supervision is necessary, be creative

- Recruit non-DHS supervisors: relatives, friends, clergy, teachers
- Advocate for visits to occur in non-DHS settings: family home, library, McDonalds, park
- Advocate for visits to occur often – don’t settle for an hour a week. That is not enough to maintain the parent-child bond
- Keep pushing at subsequent hearings. Show progress.

Services

- Is your client willing to start participating in services immediately?
 - Strongly encourage that he/she do so.
 - Participation in services is not an admission of guilt
 - Timeline to the PPH starts at the time of removal. No time to spare.
- If so, get a detailed court order setting forth the obligations of the agency: what, by when
- ISP needs to be prepared within 30 days after removal. MCL 712A.13a(8)(a). Parent need to be involved in the preparation. DHS 722-6.

Reasonable Efforts

- If the court has placed the child with someone other than the custodial parent, it must determine “whether reasonable efforts to prevent the removal have been made or that reasonable efforts are not required.” MCR 3.965(D)(1)
- Court finding must be made within 60 days from the date of removal and must state the factual basis for the determination.
- Requirement stems from federal law. 42 U.S.C. 671(a)(15)(B).

Why does this matter?

- \$
- If the court makes a finding that reasonable efforts to prevent removal were NOT made, then the ENTIRE cost for the child's stay in foster care rests with the county. No federal reimbursement.
- Challenging reasonable efforts will get the attention of the DHS very quickly.

What are reasonable efforts?

- Phrase not defined by the statute or court rules
- Case-specific advocacy
- DHS Policy Manual 722-6. Reasonable efforts include the following
 - 24 hour emergency caretaker
 - Day care
 - Emergency shelter/financial assistance
 - Respite care
 - Mental health counseling

How do we challenge it?

- If the agency failed to make reasonable efforts, object. Raise the issue.
- Ask for specific findings.
- Make sure proffer by agencies are actual “efforts.” Make the agency work
 - E.g. TDMs, “referrals”, petition-filing, drug testing
- Underutilized advocacy tool

If preliminary hearing doesn't go well, consider review processes

- Motion for review of referee's recommendation. MCR 3.991
 - w/i 7 days of recommendation
- Appeal to the Court of Appeals – will need to seek leave to appeal. MCR 7.205. w/i 21 days after entry of the judgment or order

Running Against The Wind

- Forcing courts and agencies to apply the law will be difficult.
- You will get yelled at, ridiculed, harassed, mocked, antagonized.
- But so has every other person who has ever tried to achieve social justice.
- Build a community. Join the Parents' Attorney Listserv.
- Email me at vss@umich.edu