DISPOSITION & PERMANENCY PLANNING

Joshua B. Kay, Ph.D., J.D.
Child Advocacy Law Clinic
University of Michigan Law School
Legal Update

• As of June 12, 2018, “child neglect” will be redefined in MCL 722.622(k). Public Act 59 of 2018.
• New definition: "Child neglect" means harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following:
  • (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or by the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care.***
• Similar change in MCL 722.602(1)(d), the Child Abuse and Neglect Prevention Act. Public Act 60 of 2018.
Goals of Disposition & PPH

• Determine and implement what must be done to address the problems identified in the case.
  • Meet the needs of parents and children.
• Ensure compliance by the parent and agency with the treatment plan and court orders.
• Monitor progress and child’s well-being.
• Tackle any placement problems.
• Identify and address barriers to compliance, issues of non-compliance, and new problems that arise.
  • A wide array of informants may be needed. Foster parent input may be especially valuable, and they must receive notice. See MCR 3.921.
• Move the child toward timely permanency.
  • Reunification? Adoption? Another permanency option?
DHHS Policies re: Service Plans

- DHHS is required to engage the family in case service planning. See FOM 722-06.
  - This section of the FOM repeats and emphasizes this requirement in various ways.
  - DHHS must help the family understand what conditions must be met prior to return of the child, how these relate to the issues that required out of home placement, and what the agency will do to help the family meet the conditions.
  - DHHS must encourage the family to participate in service planning.
- Treatment plan must be...
  - Specific to the individual needs of the parent(s) and child(ren).
  - Inclusive of the family’s viewpoint.
  - Written to be easily understood.
DHHS Policies re: Svc Plans (cont’d)

• Caseworker must engage youth 14 and older in development of case service plan.
• The agency generally must make reasonable efforts, which are executed largely via services. Some examples of services in FOM 722-06:
  • Respite care.
  • Homemaker.
  • Day care.
  • Mental health care.
  • Emergency shelter.
  • Emergency financial assistance.
  • Home-based services.
  • Parenting classes.
  • Substance abuse services.
• Services provided must facilitate movement toward goals of safety, child well-being, and permanence.
DHHS Policies re: Parenting Time

• See FOM 722-06I: “One of the best predictors of successful reunification is the frequency and quality of visits between a child and his or her parents.”
• “Whatever the goal, visiting strengthens or maintains family relationships, enhances a child’s well-being, and affirms the importance of parents in the child’s life.”
• If visits are supervised, DHHS may designate any number of people as supervisors.
• Even if unsupervised, caseworker must observe at least one visit per month.
• If siblings placed separately, at least one sibling visit per month in addition to parenting time.
• Scheduling parenting time must be done with primary consideration for the parent's 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.

• First visit should occur within two business days—and must occur within seven business days—of placement.

• Ages zero to five, at least two visits per week. Ages six and up, at least one. Must always explore instituting more parenting time than these minimums.
More About Parenting Time (722-06I)

- If safety permits, visits should be outside the agency, including in the parent’s home if possible.
- If the goal is reunification, then there must be a written plan for the progression of parenting time.
- Parenting time must not be curtailed:
  - To discipline a child for misbehavior.
  - Due to missed or positive drug screens.
    - Though if a parent is under the influence at the time of a visit, it can be cancelled.
  - The parent has not complied with the treatment plan.
- The caseworker must arrange for visits or contact with an incarcerated parent unless it would be harmful to the child.
Practice Tips re: DHHS Policies

• Become familiar with DHHS policies.
  • Various policies are relevant at different times in the case. Read them as you prepare for each phase of the case.

• No matter who you represent, ensure compliance.
  • Good casework leads to better results for children and families.

• If you represent a parent and policies have been violated, raise this issue in court. *In re Rood* says DHHS must follow its own policies.
  • I like using DHHS policies during cross-examination of workers.

• LGAL’s should be concerned about violations as well.
  • Are your clients getting what they need?
  • Is progress being hampered?
  • Are appealable issues arising? Appeals mean delay.
In re Newman (Opportunity to Rectify)

- Agency must give respondents a full and fair opportunity to address identified problems.
  - In this case, homemaker assigned to assist with cleaning the home, dropped off cleaning supplies and left because the house was dirty.
- Agency cannot prove that conditions would not be rectified in a reasonable time, or that proper care and custody are unlikely to be provided in a reasonable time, if it does not give appropriate services to resolve the identified problems.
In re JK (Treatment Compliance)

• Compliance with a parent-agency treatment plan is evidence of ability to provide proper care and custody.
  • Agency must create a plan that is adequate to address its concerns. Failure to do so is the agency’s problem, not the respondent’s.
**In re Rood (Reasonable Efforts)**

- 483 Mich. 73, 763 N.W.2d 587 (2009)
- A service plan was not provided for father.
- Many agency policies not followed about working with parents to develop service plan, finding out if relatives available, implementing a service plan designed to address problems in the case, and parenting time.
- Court stressed centrality of service plan to the reasonable efforts requirement.
  - States reasonable efforts to preserve and reunify the family required in *all cases* unless aggravated circumstances.
  - DHHS *must* follow its own policies.
- Parents must have an opportunity to participate in the case, including services.
**In re Mason (Incarc. Parents & RE)**

- Incarcerated parents must have an opportunity to participate in proceedings and reunification process. Reasonable efforts required unless aggravated circumstances.
  - Court appearance may be by phone.
    - MCR 2.004 (MDOC custody).
- A failure by the agency to make reasonable efforts creates “a hole in the evidence,” rendering TPR premature.
More About Incarcerated Parents

- DHHS policy has been adjusted to comply with *Mason*. See FOM 722-06.
- Reasonable efforts required to identify and locate incarcerated parents. Also…
  - Engage parents in case service plan.
  - Contact parents monthly.
  - Assess parents’ needs and strengths.
  - Determine what services are available to parents.
**In re H.R.C. (Reasonable Efforts Limit)**

- Reasonable efforts to preserve/reunify family not required if TPR is agency’s goal.
  - Conflicts with *Mason* and *Rood*, which held that RE required unless aggravated circumstances.
    - The agency merely seeking termination is not enough. There must be aggravated circumstances.
  - *H.R.C.* is actually an aggravated circumstances case, so court’s statement was unnecessary to the holding and should be construed as dicta. Yet COA has followed this rule time and again.
- This conflict requires resolution.
Aggravated Circumstances

- MCL 722.638(1) and 712A.19a(2).
- Current risk, plus abuse of child or sibling that includes one or more of following:
  - Abandonment of young child.
  - CSC with penetration, attempted penetration, or assault with intent to penetrate.
  - Battering, torture, or other severe physical abuse.
  - Loss or serious impairment of an organ or limb.
  - Life threatening injury.
  - Murder or attempted murder.
Aggravated Circumstances (cont’d)

• Prior involuntary termination if **conditions leading to that TPR have not been rectified.** (bolded portion starts June 12, 2018).

• Prior voluntary termination if aggravated circumstances in that case and **conditions leading to that TPR have not been rectified.** (bolded portion starts June 12, 2018).

• Reasonable efforts to preserve and reunify the family are not automatically required in these cases, but may still be ordered.
In re Hicks/Brown (Disability)

- 893 N.W.2d 637 (Mich. 2017)
- Agency services must accommodate disability pursuant to Americans with Disabilities Act if agency aware or should be aware of disability.
- If reasonable accommodations are not made, then no reasonable efforts, and TPR is improper.
- Old rule about timeliness of request for accommodations cast into serious doubt. Court dismissed it as dicta from COA case (In re Terry, 240 Mich. App. 14 [2000]).
  - Old rule was that request must be made when initial service plan adopted or shortly thereafter.
  - New rule appears to be that there needs to be time to effectuate the accommodations. But agency cannot sandbag.
Practice Tips for Case Service Planning

• Parents, and thus their attorneys, should be highly involved in service planning.
• Facilitate meaningful discussion of the problems in the case and how they will be addressed. What constitutes success?
• Ensure the agency is ascertaining the actual needs of parents and children.
• Identify any barriers to compliance and benefit.
  • Work hours.
  • Transportation.
  • Learning or other disabilities.
  • Feeling alienated in the process.
  • Immediately raise and address concerns that arise along the way.
• Identify alternative service providers as needed.
• Press for high quality, early assessment.
• Go to FTM’s.
Dispositional Hearings

• See MCL 712A.18 and 712A.18f; MCR 3.973.
• If the child is in foster care, then the hearing must be within 28 days of adjudication.
• Rules of evidence do not apply.
  • Note that most privileges are also abrogated in child protection proceedings. MCL 722.631.
  • The court may receive and rely on all relevant and material evidence.
  • The court shall consider the case service plan and any information from a parent, guardian, custodian, foster parent, child caring institution, relative who has placement, attorney, and LGAL.
  • Parties may examine written reports and cross-examine reporters.
• Reasonable efforts made?
• Why can’t this child go home today?
Disposition (cont’d)

- Court must order the release of child’s medical records in the placement order or previous order.
- If the child is at home and needs to be removed, findings are necessary under MCR 3.965(C)(2) criteria. MCR 3.974.
- The court may order compliance with all or part of case service plan and enter such orders as it considers necessary in the interest of the child.
- Note that the court may make orders affecting adults as needed for the physical, mental, or moral well-being of the child. MCL 712A.6.
  - However, unadjudicated parents are not subject to the court’s dispositional authority. *In re Sanders*, 495 Mich. 394, 852 N.W.2d 524 (2014).
New Addition to Disposition Law

- As of June 12, 2018, MCL 712A.18(1) will include a provision that requires return of the child to a parent if return will not place the child at substantial risk of harm to the juvenile or society.
- This is similar to a longstanding provision in MCL 712A.19a(7).
Case Service Plan and Reports

- MCL 712A.18f.
- Case service plan must be available to the court and all parties.
  - Must provide for placing child in most family-like setting available and as close to the parents’ home as is consistent with child’s best interests and special needs.
  - Must be clear about the efforts to be made by the parent for reunification to occur.
  - Must be clear about the efforts to be made by agency for reunification to occur.
  - Include schedule of services.
  - Include parenting time schedule.
    - Minimum is 1x per week.
  - Update and revise every 90 days or more frequently.
Dispositional Reviews

• See MCL 712A.19; MCR 3.974 and 3.975.
• First one within 182 days of removal, then every 91 days for first year.
  • May be more frequent (any party may move for accelerated hearing, or court may do so).
• What does the court review?
  • Service plan compliance and benefit. Reasonable efforts made?
  • Parenting time compliance and barriers.
  • Likely harm if child remains removed.
  • Likely harm if child is returned.
  • Necessity of new or continued removal.
• Court may modify service plan.
• Why can’t this child go home today?
More About Dispositional Reviews

- MCL 712A.19
- Agency report must be given to all parties and offered into evidence (rules of evidence do not apply).
- Court must consider information offered by parent, guardian, custodian, foster parent, child caring institution, relative who has placement, attorney, and LGAL.
- Concurrent planning
- DHHS may pursue multiple routes to permanency.
- Prior discussion with all parties is critical for success.
  - Identify barriers/problems and solutions.
  - Discuss compliance and benefit.
  - Surface new issues and how they will be addressed.
  - Expand or otherwise modify parenting time?
New Addition to Dispo. Review Law

- As of June 12, 2018, MCL 712A.19(8) will include a provision that requires return of the child to a parent if return will not place the child at substantial risk of harm.
- This is similar to a longstanding provision in MCL 712A.19a(7).
Permanency Planning Hearing

- MCL 712A.19a and MCR 3.976.
- No rules of evidence. All relevant and material evidence, like in disposition and dispositional review hearings.
- First one within 12 months of removal.
  - Or within 28 days of a judicial determination that reasonable efforts are not required based on aggravated circumstances.
- May be combined with a dispositional review hearing.
- Reasonable efforts to finalize the permanency plan made?
- The court shall obtain the child’s views regarding the permanency plan in a manner that is appropriate to the child’s age.
- The court shall ensure the agency is providing transition planning/services for foster youth who will be transitioning to independent living from foster care.
PPH (continued)

- Has the agency, foster home, or institutional placement followed the reasonable and prudent parenting standard? (MCL 712A.19a(5))
  - Decisions characterized by careful and sensible parental decisions that maintain a child’s health, safety, and best interest while encouraging the emotional and developmental growth of the child when determining whether to allow a child in foster care to participate in extracurricular, enrichment, cultural, and social activities. MCL 712A.1(1)(q).

- Has the child had regular opportunities to engage in age or developmentally appropriate activities?
• If return of the child would not cause a substantial risk of harm to the child’s life, physical health, or mental well-being, the court shall return the child. MCL 712A.19a(7).
  • Why can’t this child go home today?
  • Parent’s failure to substantially comply with case service plan is evidence of risk.
  • Any other evidence of risk must be considered as well.
Order Agency to File for TPR?

• If no return home, the court may order the agency to initiate TPR proceedings.

• If child in foster care for 15 of the most recent 22 months, the court shall order agency to initiate TPR proceedings.
  • Exceptions:
    • Child being cared for by relatives.
    • Case service plan documents compelling reason that filing a TPR petition would not be in child’s best interests. Compelling reasons include but are not limited to:
      • Adoption is not appropriate goal.
      • No grounds for TPR.
      • Child is an unaccompanied refugee minor.
      • International legal obligations or compelling foreign policy reasons preclude TPR.
    • Agency has not made reasonable efforts (by providing necessary services).

• File TPR petition within 28 days.
Permanency Options if No Initiation of TPR

- Return child to parent.
- Continue foster care for limited period to be stated by the court.
- Long-term foster care.
- Permanent placement with fit and willing relative.
- Place child in a legal guardianship.
- Place child in another planned permanent living arrangement.
  - Agency must document a compelling reason that it would not be in the child’s best interests to follow another option.
  - Only for children age 16+
- The above list is a mash-up of MCL 712A.19a(4) and (9).
Juvenile Guardianship

- MCL 712A.19a(10)-(17) and MCR 3.979.
- Juvenile guardianship is contemplated as a permanency option and may be subsidized.
- A juvenile guardian can be appointed if in the child’s best interests.
- Terminates court jurisdiction under MCL 712A.2(b) after the guardian is appointed and the court conducts a review hearing.
- Guardianship reviewed at least annually.
- To terminate the guardianship, court must decide by preponderance of evidence that continuation is not in child’s best interests.
Juvenile Guardianship Case Law

  - Judge had a general policy of disfavoring juvenile guardianships for children under 14.
  - MSC decided that court must make individualized determination of whether juvenile guardianship is in the best interests of a child.
    - Cannot rely on a generalized policy.
  - Courts have the authority to make parenting time orders regarding children in juvenile guardianships.
Children in Court

- “Nothing about us without us.”
  - Danger of kids becoming abstractions in child protection proceedings.
- Children cannot be excluded, but may be excused from court. MCL 712A.12.
- Children over 11 must be notified of dispositional review, permanency planning, and juvenile guardianship hearings. MCR 3.921.
- Ensuring that children have a voice keeps the proceedings focused on their safety and well-being.
- There is some indication that civility and decision-making are enhanced when children are present.
- Obviously, take into account the child’s wishes and needs in this regard. Some kids prefer not to be there (e.g., they don’t want to miss school or might not want to see the parent in the court context).
Take-Aways

• Reasonable efforts to preserve and reunify the family must be made in nearly all cases.
  • Aggravated circumstances cases are the exception.
• Parenting time is the strongest predictor of timely and successful reunification.
  • Designated supervisors can add scheduling flexibility.
• Know and use DHHS policies.
• Be active in the service planning process. Get creative!
• Go to FTM’s if you can.
• Child must be returned if doing so will not cause substantial risk of harm.
• Explore various permanency options.
• Think about having children participate in court.