

## *Preface*

This protocol is intended to guide attorneys through the strategic decisions they will need to make while representing parents in child protective cases. The protocol does not provide a comprehensive action-step checklist. Parents' attorneys can find that kind of guidance in other resources, including the "How-To-Kit: Representing Parents in Child Protective Proceedings" by the Institute of Continuing Legal Education; "Guidelines for Achieving Permanency in Child Protection Proceedings" by Children's Charter of the Courts of Michigan; and the American Bar Association's "Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases."<sup>1</sup> For its part, this protocol delves more substantively and subjectively into the choices that will confront attorneys and their parent-clients. We hope that the protocol will provide a useful decision-making framework for parents' attorneys who must grapple with the host of complexities inevitably present in child protective cases.

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<sup>1</sup> The ABA standards are available online. American Bar Association, *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases* <[http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentStds.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf)> (accessed June 18, 2013).

# Protocol For Attorneys Representing Parents In Child Protective Proceedings

## 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 parents' due process rights. The constitutional framework for child protective proceedings is premised upon the belief that the welfare of children is best served when they are in their parents' custody. For that reason, the state's evidence of parental unfitness must satisfy a high burden of proof 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 defense lawyers in criminal cases, parents' attorneys prevent the state from overreaching to unjustly remove children from their homes. In situations where temporary removal may be warranted, advocacy by attorneys 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 make. If the parent simply cannot care for the child properly, a parent's lawyer can serve the client by arranging for another temporary or permanent legal placement, such as a guardianship or an adoption, that will advance the entire family's interests. In these

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<sup>2</sup> *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (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 US 110, 123-124; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (The Supreme Court's decisions “establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.”).

<sup>3</sup> *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (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.”).

and other situations, strong advocacy on behalf of parents almost always furthers the best interests of the children and improves outcomes for both the children and their families.<sup>4</sup> Yet, the challenges confronting parents' attorneys are daunting. Parents involved in child protective cases typically confront a host of seemingly insurmountable problems, 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 the complex federal and state child-welfare laws and become familiar with related laws in areas such as adoption, guardianship, and special education. Next, the attorney must engage in cooperative, informal problem-solving with child protection authorities and the child's lawyer-guardian *ad litem* (L-GAL).<sup>5</sup> But the attorney must always hold the client's interests paramount, which may necessitate formal and assertive courtroom advocacy. Often, parents' attorneys must do all of this while receiving low compensation, handling high caseloads, and enduring criticism that advocacy for their clients actually harms their clients' children.<sup>6</sup> These and other challenges make representing parents among the most difficult and important areas in which to practice law.

### **Special Terms Used in this Protocol**

Many attorneys who read this protocol will never have represented clients in a child protection case. Others will have only very limited experience. Here are two term-of-art definitions that will help newcomers understand the material presented in this protocol.

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<sup>4</sup> See, e.g., Bridge & 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. The article also stated that "the enhancement of parents' representation has the potential to save . . . millions in state funding on an annualized basis.").

<sup>5</sup> The role and responsibilities of the lawyer-guardian *ad litem* are defined in MCL 712A.17d.

<sup>6</sup> These challenges are documented in a 2005 Court Improvement Program Report issued by the Muskie School of Public Service and the American Bar Association. The Report is available online. Muskie School of Public Service & American Bar Association, *2005 Michigan Court Improvement Program Reassessment*

<<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/CIPABA-Reassess.pdf>>

(accessed June 18, 2013).

The term “agency” means either the Michigan Department of Human Services (DHS) or a private entity that performs services under a contract with DHS.<sup>7</sup> For issues specific to one or the other, this protocol will identify the specific actor.

The term “services” encompasses the full array of educational and therapeutic programs designed to help parents improve their parenting skills. The agency provides these services either directly or through contractors (purchase of service providers), but parents sometimes also receive services from specialized private providers.

### **The Role of the Parent’s Attorney**

In many ways, the role of the parent’s attorney is no different than that of any attorney representing a client. The Michigan Rules of Professional Conduct (MRPC) establish the basic parameters of the attorney-client relationship. An attorney must zealously advocate on behalf of his or her clients and maintain an undivided loyalty to the client’s interests, regardless of the attorney’s personal beliefs.<sup>8</sup> The attorney must also act with “reasonable diligence and promptness in representing a client”<sup>9</sup> and must not “knowingly reveal a confidence or secret of a client” except in narrowly defined circumstances.<sup>10</sup> The MRPC 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>11</sup> Since “[a] clear distinction between objectives and means sometimes cannot be drawn, . . . in many cases the client-lawyer relationship partakes of a joint undertaking.”<sup>12</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

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<sup>7</sup> The definition of “agency” in MCL 712a.13a(1)(a) includes both public and private organizations.

<sup>8</sup> See MRPC 1.7 cmt. (“Loyalty is an essential element in the lawyer’s relationship to a client . . . . Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.”)

<sup>9</sup> MRPC 1.3.

<sup>10</sup> MRPC 1.6.

<sup>11</sup> MRPC 1.2.

<sup>12</sup> See MRPC 1.2 cmt.

interests and wishes of the client always remain paramount. Any attorney engaging in this work must read and understand the MRPC.

While having the same ethical obligations as all other lawyers, parents' attorneys confront unique challenges in developing relationships with their clients. Those challenges are discussed in the next several pages.

### *Trust*

Establishing mutual trust is crucial to 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. That takes time, so it rarely can be achieved in the initial meeting. Most of the parents involved in child protective cases are poor, and a disproportionate number come from traditionally disadvantaged populations.<sup>13</sup> Additionally, parents accused of child maltreatment may be frightened and may appear hostile and confrontational. Responding to the petition and, in many cases, the actual removal of their children by Children's Protective Services, parents may distrust all of the child welfare system's authority figures, including their own attorneys. 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.<sup>14</sup> In the parent's mind, the attorney may

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<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. Sedlak & Broadhurst, United States Department of Health and Human Services, *The Third National Incidence Study of Child Abuse and Neglect 5-4* (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*, No. 7, at 2 (2002). A recent report in Michigan confirmed these findings. Michigan Advisory Committee on the Overrepresentation of Children of Color in Child Welfare, *Equity: Moving Toward Better Outcomes for All of Michigan's Children* <[http://www.michigan.gov/documents/DHS-Child-Equity-Report\\_153952\\_7.pdf](http://www.michigan.gov/documents/DHS-Child-Equity-Report_153952_7.pdf)> (accessed June 18, 2013)

<sup>14</sup> Under Michigan law, parents accused of child abuse or neglect have the "right to a court-appointed attorney if . . . [they are] financially unable to employ an attorney." MCL 712A.17c(4)(b). See also MCR 3.915(B)(1).

appear as just another member of the establishment responsible for the child's removal from the home. The parent's attorney must recognize that the barriers created by these 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 the attorney. Even casual conversations outside of the courtroom with caseworkers, opposing counsel, or court staff may be *interpreted* by parents as signs that the attorney is working against their interests. In the early stages of the relationship, even the *appearance* of divided loyalties may irreparably impair the client's trust.

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 the first goal of the initial interview. The attorney should then use broad, open-ended questions to elicit information from the parent; reserve more specific questions about the case until after the client has had a full opportunity to tell his or her story. The attorney should close the first interview by reviewing the information obtained and outlining the next steps to be taken by both the parent and the attorney. Throughout this process, 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, is important to the trust-building process. Attorneys should consider meeting with the client in places that are comfortable to the client, including the client's home, or public buildings with private rooms, such as a library. Letting the client choose the meeting location may 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

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<sup>15</sup> MRPC 1.6(c).

meetings outside of court, and sending the client letters and copies of court orders.<sup>16</sup> 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. 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.

### ***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, parenting time, and services. Despite denying the state's allegations against the parent, will the client agree to participate in services such as parenting-skills programs? If the children cannot be returned home immediately, where should they live while the case proceeds? What type of parenting time should occur, where, and how frequent? 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 towards 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 and sensible advice.

The attorney must also ascertain whether 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 in front of a referee, judge, or jury.

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<sup>16</sup> Rule 1.4 of the Michigan Rules of Professional Conduct mandates that attorneys "keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains."

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 can now care for the child. Rather than pursuing the more adversarial techniques discussed above, this litigation strategy may acknowledge the court's jurisdiction and move immediately to cooperative problem-solving and the parent's participation in services.

In other words, exonerating a parent requires a different legal strategy than improving the parent. 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 may even elect to incorporate elements of both. But the one indispensable step is that the attorney starts by meeting with the client to establish individualized goals and priorities.

Regardless of the client's specific litigation goals, 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 may make it easier to resolve disputes regarding the child's placement, parenting time, and agency services to the family. Courts often cannot resolve those issues quickly unless the parties have already agreed on how to resolve them. The attorney must explain that the parent should cooperate with the caseworker despite their disagreements on some specific issues. The parent's attorney should model this cooperative behavior when interacting with the worker. That will help the client to understand that hostility and unnecessary confrontation will only undermine the client's position.

### ***Defining the Scope of Representation***

Defining the scope of the legal representation presents another challenge for parents' attorneys. Typically, the court has appointed the parent's attorney. The appointment order will authorize legal advocacy both inside and outside the courtroom—provided that the advocacy relates directly to the child protection case. Yet, attorneys who do this work recognize that resolving collateral legal disputes and related issues can significantly affect the child protection case. For example, a parent may need an attorney to file for custody or establish paternity, to pursue expunging the parent's name from the child protection central registry, 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 protection case forward. Unfortunately, in most 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 protection proceeding, which the appointment order 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. Sometimes just a little uncompensated work by the attorney can make a huge difference in the child protection case. Some examples include helping the client fill out standard court forms or 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 to help the client. At a minimum, try to provide the client with sufficient direction to enable the client to address the collateral legal issue. 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 protection case.

### ***Institutional Pressures***

Parents' attorneys often face enormous institutional pressures to undermine their own client's interests. For example, low compensation discourages active advocacy. Some jurisdictions pay attorneys based solely on how many times they appear at hearings, as opposed to paying an hourly fee for the attorneys' actual work. That compensation arrangement provides no incentive to work on the case outside the courtroom. 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 a jurisdiction trial. This pressure may be compounded by a perceived need to please the judge, who will control the attorney's appointments in future cases. Even worse, parents' attorneys who press their clients' arguments aggressively may be chastised by the other parties or even outside observers who believe that the parent's goals conflict with the child's best interests.

Regardless of these pressures, parents' attorneys must remember that their paramount obligation, under the MRPC, is to zealously advocate on behalf of their client. This responsibility remains despite external constraints such as low fees or pressure from third

parties.<sup>17</sup> 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.<sup>18</sup> Under no circumstances does the MRPC permit an attorney to deviate from the basic requirements set forth in those rules.

### ***Representing Non-Offending, or “Non-Respondent” Parents***

For the most part, this protocol speaks to attorneys who will represent parents accused of abusing or neglecting their children. But sometimes, child protection attorneys represent a non-offending parent. The non-offending parent is a parent who has not been accused of abuse or neglect. This section of the protocol will discuss issues that are unique to that context. Keep in mind, however, that much of the information presented elsewhere in the protocol will apply to these cases, too.

Representing non-respondent<sup>19</sup> or non-offending parents poses additional and different challenges. Under Michigan law, to obtain jurisdiction, the judge or jury needs to find only that the acts or omissions of *either* parent amounted to abuse or neglect of the child as defined in MCL 712A.2(b).<sup>20</sup> The agency does *not* have to prove allegations against *both* parents in order for the court to obtain jurisdiction over the child. Once the court obtains jurisdiction, it then may issue orders that it determines to be in the child’s best interests. Such orders sometimes deny the non-respondent parent custody, despite the absence of a finding of neglect or abuse by that parent. The orders also may require the non-respondent parent to comply with court-ordered

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<sup>17</sup> MRPC 1.7 makes clear that “a lawyer shall not represent a client if the representation of that client . . . may be materially limited by the lawyer’s responsibilities . . . to a third person, or by the lawyer’s own interests.”

<sup>18</sup> See MRPC 1.16 (requiring withdrawal where the representation would result in violation of the Rules of Professional Conduct).

<sup>19</sup> The court rules define a “respondent” as a “parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child.” MCR 3.903(C)(10).

<sup>20</sup> See *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2001) (“[T]he court rules simply do not place a burden on a petitioner like the FIA to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity.”).

services.<sup>21</sup> The state may even move to terminate the parental rights of the non-respondent parent despite the lack of an abuse or neglect adjudication against that parent.<sup>22</sup> Indeed, as a matter of strategy, the state often will proceed initially against only one parent (the one against whom the state has the strongest evidence), but later move to terminate the parental rights of both parents.

When representing the non-respondent parent in these situations, the attorney should consider both constitutional and practical arguments. If the state seeks to deprive the non-respondent parent of custody and place the child in foster care, the attorney should argue that the Constitution requires a finding of unfitness against the non-respondent parent before the custody deprivation can occur.<sup>23</sup> Any attempt to strip the parent of his or her parental rights without such a finding of unfitness contravenes the Due Process Clause.<sup>24</sup> Attorneys raising this argument should file a written motion and stand ready to appeal immediately if the trial court denies the non-respondent parent's right to an evidentiary hearing or refuses to return custody to the non-offending parent.

In addition to constitutional principles, practical arguments must also be considered. When the state proceeds on allegations against only one parent, the attorney representing the non-respondent parent should consider how to persuade the court to allow the child to reside with the non-respondent parent. The non-respondent parent can strengthen the argument by demonstrating to the court and the caseworker that he or she is willing to place the child's interests ahead of the relationship with the abusive parent. Under no circumstance should the attorney advise the non-respondent parent to try to persuade the child to recant the child's allegations of abuse by the other parent. There will be negative consequences if the non-respondent parent openly disbelieves the child or tries to influence the child's testimony.

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<sup>21</sup> See MCL 712A.6 ("The court has jurisdiction over adults . . . and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile . . . under its jurisdiction.").

<sup>22</sup> See *In re CR*, n 19 *supra* at 205 ("The family court's jurisdiction is tied to the children, making it possible, under the proper circumstances, to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding.").

<sup>23</sup> See *Stanley v Illinois*, 405 US 645, 649; 92 S Ct 1208; 31 L Ed 2d 551 (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>24</sup> See Sankaran, *But I Didn't Do Anything Wrong: Revisiting The Rights Of Non-Offending Parents In Child Protection Proceedings*, 85 Mich B J 22 (2006) for more information about this argument.

The attorney and the non-respondent parent should consider some tactical maneuvers that may help the non-respondent parent reunite with his or her child. For example, if the parents have been living together, the attorney should advise the client that separating from the respondent parent, either temporarily or permanently, may expedite the child's return to the non-respondent parent's home. Or, if the client agrees, counsel might ask the court to issue an order requiring the abusive parent to leave the home. If the parents are legally married, the attorney should discuss whether obtaining a divorce is in the client's interests. The appropriateness of these "separation" options often will depend on the severity of the abuse. Michigan law affords few rights to non-respondent parents; therefore, these options should be considered.

### **The Preliminary Hearing**

At the preliminary hearing, the court decides whether to authorize the agency's petition and whether to approve the child's 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. If the court finds probable cause to believe the petitioners' allegations of abuse or neglect, then the court will authorize the petition, which may result in a later full-scale trial to determine whether the court has jurisdiction over the child.

In most counties, parents' attorneys will meet their clients for the first time just before the preliminary hearing. Typically, 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 preliminary 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>25</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

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<sup>25</sup> See Cooper, Davis & 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).

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.

### ***Eliciting Information***

Knowledge about the case empowers an attorney to represent a client effectively. Therefore, a parent's attorney must make the most out of the brief initial interview with a new client. The attorney 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 Native American heritage<sup>26</sup>), the client's version of how the family became involved with Children's Protective Services, any previous family involvement with the courts or the agency, whether the family currently receives DHS support or assistance, 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.

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<sup>26</sup> If the client has Native American heritage, the attorney should carefully review the provisions of the Indian Child Welfare Act and the Michigan Indian Family Preservation Act (MIFPA) to determine whether special procedures must be applied in the case. See 25 USC 1901 *et seq.*; MCL 712B.1 *et seq.*

### *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 probable cause to believe that the facts in the petition are true and that the case comes 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.

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 probable cause to believe that one or more of the allegations in the petition are true and are among the grounds for jurisdiction listed MCL 712A.2(b).<sup>27</sup> Instead of ruling immediately during the preliminary hearing, the judge may grant an adjournment of up to 14 days to secure the attendance of additional witnesses or for other good cause.<sup>28</sup> If the petition is *not* authorized, the court may either dismiss the petition or refer the matter for alternate services.<sup>29</sup>

To help the 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 jurisdiction trial before a referee, judge, or jury.<sup>30</sup> 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 probable cause showing required of the petitioner at the preliminary hearing is a very low standard of proof. Black's Law Dictionary defines "probable cause" as "a reasonable ground for belief in certain alleged facts."<sup>31</sup> The Michigan Rules of Evidence do not apply at a preliminary

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<sup>27</sup> MCL 712A.13a(2).

<sup>28</sup> MCR 3.965(B)(10).

<sup>29</sup> MCR 3.965(B)(5).

<sup>30</sup> MCR 3.965 (B)(7) (requiring the court to advise the respondent of the right to trial on the allegations in the petition before a referee, judge, or jury).

<sup>31</sup> Black's Law Dictionary 1201 (6<sup>th</sup> ed).

hearing.<sup>32</sup> Consequently, the petitioner can use hearsay evidence to satisfy that burden of proof. Typically, the testimony of the Children’s Protective Services worker will suffice to meet the probable cause standard. Only rarely can a parent convince the court that a petition should not be authorized.

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 typically would not be admissible at a later jurisdiction 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 those 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 be appropriate for the parent to contest the petition’s authorization. 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>33</sup>

If the attorney thinks that the agency’s legal theory for jurisdiction looks weak, the preliminary hearing still may not be the appropriate time to challenge it. Again, the parent and attorney should consider that there will be a later and better courtroom opportunity to present their complete theory about why the court should not intervene in the family’s life.

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. Michigan Court Rules explicitly state that, “[I]f the court authorizes the filing of the petition, the court may release the child to a parent . . . and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child.”<sup>34</sup> In other words, even if the court authorizes the petition, it may also decide that the child should remain in the parent’s home.

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<sup>32</sup> MCR 3.965(B)(11).

<sup>33</sup> MCL 712A.2(b).

<sup>34</sup> MCR 3.975(B)(12)(a). See also MCL 712A.13a(3) (permitting the court to release the child to his or her parent “under reasonable terms and conditions necessary for either the child’s physical health or mental well-being”).

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 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 or remain home. Remember 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 a jurisdiction trial.

The attorney and client should also discuss the client'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, the statute requires that the court 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.<sup>36</sup> 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, and the proposed caregiver's previous involvement in this child's life. The attorney and parent should discuss those factors before the preliminary hearing in order to assess the feasibility of these placement options.

In addition to possible placements, the attorney should discuss parenting time issues with the client.<sup>37</sup> What type of parenting time would the client like? Where should the visits take place? How frequently should they occur? If parenting time must be supervised, does the client

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<sup>35</sup> MCL 722.954(2) (foster care agency must identify, locate, and consult with relatives).

<sup>36</sup> A review of DHS policy regarding relative placement may be helpful when working with a client and the agency to determine whether a suitable relative placement exists. *DHS Children's Foster Care Manual, Foster Care - Placement/Replacement, FOM 722-3* <<http://www.mfia.state.mi.us/olmweb/ex/fom/722-3.pdf>> (accessed, June 18, 2013)

<sup>37</sup> Unless the facts demonstrate that parenting time would be harmful to the child, "the court shall permit the parent to have frequent parenting time with the child." MCL 712A.13a(13). See also MCR 3.965(C)(6). If parenting time 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(13).



know someone who is willing to supervise the visits and can pass the agency's background checks? 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.

The attorney should make every effort to secure frequent parenting time that includes parental responsibilities, such as attending medical appointments and extracurricular activities. Recent research shows that parenting time is the best indicator of whether reunification efforts will succeed. In instances where the court's order leaves parenting time to the discretion of DHS, the attorney should be mindful of the parenting time outlined in DHS policy.<sup>38</sup>

### *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. The Children's Protective Services worker and the child's L-GAL will always attend the preliminary hearing. In some jurisdictions, attorneys representing the caseworker<sup>39</sup> and the child's other parent may also appear.<sup>40</sup> 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.<sup>41</sup> Stipulations on

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<sup>38</sup> See *DHS Foster Care Manual: Foster Care—Developing the Service Plan*, FOM 722-6, at 15 <<http://www.mfia.state.mi.us/olmweb/ex/fom/722-6.pdf>> (accessed June 18, 2013).

<sup>39</sup> See MCL 712A.17(5) (“upon request of the family independence agency . . . the prosecuting attorney shall serve as a legal consultant to the family independence agency or its agent at all stages of the proceeding.”); MCR 3.914 (“[o]n request of the court, the prosecuting attorney shall review the petition for legal sufficiency and shall appear at any child protective proceeding.”). Even if an attorney has filed an appearance on behalf of the DHS, a parent's attorney can speak directly with the caseworker without violating the MRPC. See RI-316 (December 13, 1999).

<sup>40</sup> MCR 3.915(B)(1)(b) states, “[t]he court shall appoint an attorney to represent the respondent at any hearing conducted pursuant to these rules if (i) the respondent requests appointment of an attorney, and (ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney.”

<sup>41</sup> In situations in which the law requires the agency to file a mandatory petition for termination, DHS may not be willing to negotiate a plea agreement. *DHS Children's Protective Services Manual – Family Court: Petitions*,

issues such as authorization, placement, parenting time, 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 provide 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.

In summary, 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.

### ***Courtroom Advocacy During 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 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 (if a longer adjournment will allow time for proper preparation). If the attorney needs more time, the court rules permit the court to adjourn the preliminary hearing for up to two weeks for the "attendance of witnesses or for other good cause shown."<sup>42</sup>

The preliminary hearing is the attorney's first chance to introduce the court to the parent and the parent's story. The court, the L-GAL, 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 put the child's interests ahead of the parent's or any other person's. 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 reactions may be understandable or even justifiable, but they will not 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 calm the client. The parent's attorney then should model

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*Hearings, and Court Orders, PSM 715-3* <<http://www.mfia.state.mi.us/olmweb/ex/PSM/715-3.pdf>> (accessed June 18, 2013).

<sup>42</sup> MCR 3.965(B)(10).

appropriate courtroom etiquette for the client by maintaining a professional and calm 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 client's *vocal* outbursts during other parties' arguments.

The major issues addressed at the preliminary hearing are: (1) whether to authorize the petition, (2) the child's pretrial placement, (3) parenting time, and (4) services for the family. 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. Judges may 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 must then make a separate determination about where the child will be placed pending trial. The court has the authority to place the child with one or both parents.<sup>43</sup> 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.<sup>44</sup>

The court rules specifically allow parents the "opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proofs to counter the admitted evidence."<sup>45</sup> Assuming that the court has authorized the petition, then, before removing the child from the home, and only after considering all the relevant evidence, the court must make a separate decision on whether to place the child into foster care. The court may place a child in foster care only if it finds all of the following: 1) continuing custody with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being, 2) no provision of service or other arrangement except removal is reasonably available to adequately safeguard the child from the substantial risk

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<sup>43</sup> MCL 712A.13a(3); MCR 3.965(B)(12).

<sup>44</sup> The court may also place the child with the parents of a putative father. MCL 712A.13a(1)(j).

<sup>45</sup> MCR 3.965(C)(1).

of harm, 3) continuing the child’s residence in the home is contrary to the child’s welfare,<sup>46</sup> 4) reasonable efforts were made to prevent removal or eliminate the need for removal, and 5) conditions of child custody away from the parent are adequate to safeguard the child’s health and welfare.<sup>47</sup> If removal is necessary, the court must order the child placed in the “most family-like setting available consistent with the child’s needs.”<sup>48</sup> 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 lessen 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. For example, in some counties, the Association for Retarded Citizens (ARC) has particularly helpful programs for developmentally-delayed parents. Local colleges may have programs to train aspiring social work students, which may offer services such as student-intern supervision of parenting time. Knowledge of these programs will enable the attorney to expand the court’s placement options at the preliminary hearing.

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. This obligation requires accessing community resources that might avoid the need to place the child in foster care.<sup>49</sup> The agency’s failure to make those mandatory “reasonable efforts” prior to seeking

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<sup>46</sup> MCR 3.965(C)(2). “Contrary to the welfare of the child” is defined in MCR 3.903(C)(3) to include “situations in which the child’s life, physical health, or mental well-being is unreasonably placed at risk.”

<sup>47</sup> MCL 712a.13a(9).

<sup>48</sup> MCR 3.965(C)(2).

<sup>49</sup> Before a court removes a child from the custodial parent, the court “must determine whether the agency has made reasonable efforts to prevent the removal of the child.” MCR 3.965(D)(1). Reasonable efforts are not required in certain situations enumerated in the statute and the court rules. MCL 712A.19a(2); MCR 3.965(D)(2).

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.<sup>50</sup>

The attorney should explore placement alternatives to the typical foster care placement. For example, the court may order a home placement if a trusted family member has offered 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 client was not the wrongdoer, the attorney may request that the court order the actual abuser to leave the home.<sup>51</sup>

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 jurisdiction trial. At the same time, the attorney must emphasize the importance of complying with the 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 orders an out-of-home placement, the parent attorney should advocate for frequent and family-friendly parenting time. As with placement issues, the attorney's role regarding parenting time is to expand the court's options. Parenting time can include things like medical appointments and extracurricular activities. The standard procedure allows parents weekly supervised parenting time at the beginning of the case, with parenting time becoming more frequent, and possibly unsupervised, as the case progresses in a positive direction. This standard practice, however, may not suit a particular family's needs and agency supervision of visitation may not be necessary.<sup>52</sup> Many child protective proceedings arise out of poverty-based

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<sup>50</sup> The DHS Children's Protective Services Manual describes the types of reasonable efforts the agency should make. "The services offered . . . may include but are not limited to 24 hour emergency caretaker, homemaker, day care, crisis or family counseling, emergency shelter, emergency financial assistance, respite care, parent-aide services, home-based family services, self-help groups, services to unmarried parents, mental health services, drug and alcohol abuse counseling, and vocational training." *DHS Children's Protective Services Manual, CPS Supportive Services, PSM 714-2* <<http://www.mfia.state.mi.us/olmweb/ex/PSM/714-2.pdf>> (accessed June 18, 2013).

<sup>51</sup> See MCL 712A.6b (permitting the court to issue an order removing a nonparent adult from the home). Additionally, the court may condition a child's return to the home on the removal of the abuser from the home. See MCL 712A.13a(3).

<sup>52</sup> In instances where the court's order leaves incremental parenting time up to the DHS worker, the attorney should be aware of DHS policy regarding parenting time. See, *DHS Children's Foster Care Manual, Foster Care—Developing the Service Plan, FOM 722-6*. <<http://www.mfia.state.mi.us/olmweb/ex/fom/722-6.pdf>> (accessed June 18, 2013).

neglect; in those cases, the issues that led to the child's removal may be related to the condition of the home, not the parent's conduct or culpability. In such situations, short day visits, with restrictions on where the parent may take the child, may suffice to protect the child.

Even if the parenting time 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 at nonagency sites such as a library, church, school, or even the client's home.

The court may determine the frequency of parenting time, rather than ordering it "at the discretion of DHS". Studies have shown that frequent parenting time significantly increases the likelihood that reunification will occur.<sup>53</sup> Parents afforded the opportunity to see their children regularly have an added incentive to comply with the service plan. This also assures the parent that their children are doing well in foster care. Regular parenting time also preserves the parent-child bond, which, especially for younger children, has important developmental consequences.<sup>54</sup>

Parents' attorneys must ensure that parenting time orders are tailored to the client's needs. Michigan statutes and DHS policies support that approach. The Juvenile Code mandates that the parent have "frequent parenting time"<sup>55</sup> and requires that the caseworker "monitor and assess in-home visitation between the child and his or her parents."<sup>56</sup> The parenting time

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<sup>53</sup> See Fanshel & 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 Farmer, *Family Reunification with High Risk Children: Lessons From Research*, 18 Child & Youth Serv Rev 287 (1996).

<sup>54</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." Bowlby, *Attachment and Loss: Vol II. Separation: Anxiety and Anger* 26 (1973). From the child's 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>55</sup> MCL 712A.13a(13).

<sup>56</sup> MCL 722.954b(3).

schedule must be flexible enough “to provide a number of hours outside the traditional workday to accommodate the schedules of the individuals involved.”<sup>57</sup>

DHS policy reinforces those statutory provisions. The agency’s foster care policies mandate that “[p]arenting time must occur in a child and family-friendly setting conducive to normal interaction between the child and parent.” Weekly parenting time is the *minimum*. For younger children, parenting time should be more frequent.<sup>58</sup> If reunification remains the goal, the DHS policies also require increasing the length of parenting time as the case continues.<sup>59</sup> Attorneys should buttress their arguments regarding parenting time by citing these statutes and DHS policies. That will ensure an individualized decision that is best for the family.

Services for the family are the fourth issue (after authorization, placement, and parenting time) 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>60</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, the attorney 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.

This protocol has taken many pages to summarize the preliminary hearing decisions regarding authorization, placement, parenting time, and services. In the real world and in real time, the court may make all of those decisions 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

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<sup>57</sup> MCL 722.954b(3).

<sup>58</sup> *DHS Children’s Foster Care Manual, Foster Care-Developing the Service Plan, FOM 722-6* <<http://www.mfia.state.mi.us/olmweb/ex/fom/722-6.pdf>> (accessed June 18, 2013).

<sup>59</sup> *Id* at 18.

<sup>60</sup> MCL 712A.19a(1).

pretrial phase. This protocol's next section discusses the strategic issues that arise during that phase.

## **The Pretrial Proceedings**

### ***Pretrial Counseling***

During the pretrial phase, the attorney should focus first on the client's immediate needs, on issues such as placement, parenting time, 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, 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 parenting time visit with the child. 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, the attorney and the parent should discuss those issues with the caseworker. 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.<sup>61</sup>

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 necessary for any nonroutine or elective medical treatment of the child, including surgery.<sup>62</sup> Similarly, parents retain the right to make major educational decisions for a child. They may attend all educational planning meetings. And they retain the right to decide whether the child will receive special education services,<sup>63</sup> be home

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<sup>61</sup> *DHS Children's Foster Care Manual, Developing the Service Plan, FOM 722-6* at 18 <<http://www.mfia.state.mi.us/olmweb/ex/fom/722-6.pdf>> (accessed June 18, 2013).

<sup>62</sup> MCL 722.124a(1). See *In re AMB*, 248 Mich App 144, 178-183, 640 NW2d 262 (2001).

<sup>63</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.").



schooled, or attend a private school.<sup>64</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.

### ***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.<sup>65</sup> Therefore, the parent’s attorney must actively monitor and help to enforce the court’s orders related to placement, parenting time, 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.<sup>66</sup> Depending on the date of the next scheduled court hearing, the attorney may ask the court to hear the contempt motion earlier, at a specially scheduled hearing.

In all cases, the Juvenile Code requires that the agency do certain things within specified intervals after the child’s removal or the preliminary hearing. Within 30 days of removal, the agency must prepare an initial service plan specifying the services that the agency will recommend that the parent complete before the child can be returned home.<sup>67</sup> The agency must encourage the parent to “actively participate in developing” the service plan. If the parents do not participate, the plan that the agency submits must document the reasons for a parent’s

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<sup>64</sup> *DHS Children’s Foster Care Manual, Foster Care—Administrative Rules, FOM 722-2*, at 4 <<http://www.mfia.state.mi.us/olmweb/ex/fom/722-2.pdf>> (accessed June 18, 2013).

<sup>65</sup> The DHS policy manuals for protective services, foster care, and adoptions are available online. Department of Human Services, *Policy and Procedure Manuals* <<http://www.mfia.state.mi.us/olmweb/ex/html/>> (accessed June 18, 2013).

<sup>66</sup> Contempt is an appropriate remedy when a person “willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce this chapter.” MCL 712A.26. Contempt proceedings are governed by MCL 600.1701 to 600.1745.

<sup>67</sup> MCL 712A.13a(10)(a).

nonparticipation.<sup>68</sup> 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 caseworker and the caseworker’s supervisor. If necessary, the court rules explicitly permit parties to request, by motion, that the court review a placement order or the initial services plan and “modify those orders and plan if [modification] is in the best interest of the child.”<sup>69</sup>

### ***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 other than 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, or holding the petition in abeyance while the parent complies with services.

If it appears likely that a jurisdiction trial will lead to the court assuming jurisdiction over the child, then the attorney should ask whether the parent will consider ceding parental rights to another caregiver, either temporarily or permanently. If so, then the attorney should consider arrangements like a limited or full guardianship,<sup>70</sup> a direct consent adoption,<sup>71</sup> or a voluntary relinquishment of parental rights.<sup>72</sup> But those options can have major collateral consequences that the parent must consider. For example, if the parent agrees to voluntarily relinquish parental rights to one child, he or she must understand that doing so can be grounds for the court later terminating that parent’s rights to a future child.<sup>73</sup> Regardless, all options must be explored and

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<sup>68</sup> *DHS Children’s Foster Care Manual, Foster Care—Developing the Service Plan, FOM 722-6*, at 2 <<http://www.mfia.state.mi.us/olmweb/ex/fom/722-6.pdf>> (accessed on June 18, 2013).

<sup>69</sup> MCR 3.966(A)(1).

<sup>70</sup> Guardianship proceedings are governed by MCL 700.1101 *et seq.*

<sup>71</sup> See MCL 710.23a (describing procedures for a direct placement adoption). Although a parent must possess physical and legal custody to effectuate a direct placement adoption, MCL 710.23a(1), a court in a child protective case may be willing to temporarily cede that authority back to the parent for the purpose of finalizing the adoption and resolving the child protective proceeding.

<sup>72</sup> See MCL 710.28 and MCL 710.29 (setting forth the process by which a parent may release parental rights to a child).

<sup>73</sup> See MCL 712A.19b(3)(m) (authorizing the court to terminate parental rights if the “parent’s rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a

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 plea that allows the court to take jurisdiction over the child.<sup>74</sup> The attorney should first have assessed the strength of the agency's case and estimated 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. Or, the client may prefer that the child remain out of the home temporarily 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, when everyone's goal will likely be to reunify the family.

Despite those 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 in front of a referee, judge, or jury.<sup>75</sup> 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, parenting time, or closure of the case will then rest in the court's discretion. The court may also use the parent's jurisdictional plea as evidence in a later proceeding to terminate parental rights.<sup>76</sup>

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similar law of another state.” However, termination under this provision also requires evidence that the prior case involved particular allegations of abuse or neglect).

<sup>74</sup> Pleas in child protective cases are governed by MCR 3.971.

<sup>75</sup> MCR 3.971(B)(3).

<sup>76</sup> MCR 3.971(B)(4).

Ultimately, after being advised by his or her attorney, it will be the 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. The parent can either admit 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.<sup>77</sup> 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, the attorney must determine the consequences of the plea, including both those noted above and others determined by local practices. For example, in some—but not all—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 can use those non-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 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.

Regardless of local practices, only those allegations that appeared in the petition and were acknowledged by the parent's jurisdictional plea may be treated as proven by the plea. If the agency later amends the petition and seeks a termination of parental rights, the agency must then prove any *additional* factual allegations by legally admissible evidence.<sup>78</sup>

Ultimately, the court must decide whether to accept a negotiated plea that concedes the court's jurisdiction.<sup>79</sup> With a no contest plea, the parent will not explicitly admit the petition's allegations; therefore, in order to accept the plea and take jurisdiction over the child, the court first must obtain evidentiary support—from a source other than the parent—for finding one or more of the statutory jurisdictional grounds alleged in the petition.<sup>80</sup> The court must also state

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<sup>77</sup> MCR 3.971(A).

<sup>78</sup> MCR 3.977(F)(1)(b).

<sup>79</sup> MCR 3.971(A).

<sup>80</sup> MCR 3.971(C)(2).

why a plea of no contest (as distinguished from a plea that admits jurisdiction) is appropriate.<sup>81</sup> The reasons most commonly cited include the potential civil or criminal liability that could result from a plea that includes explicit factual admissions by the parent.<sup>82</sup>

### ***Preparing for a Jurisdiction Trial***

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 civil 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. To obtain information from non-parties, attorneys can use the limited subpoena power granted by MCR 3.920(D) and MCR 2.506. Also, Michigan law permits parents to access their child protective files.<sup>83</sup> Armed with a subpoena and a release signed by the client, a parent's attorney can obtain copies of this information. 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, the attorney should request a court order compelling disclosure.

Attorneys should also use formal discovery procedures to uncover the details of the other parties' case so that no information unknown to the parent's attorney will be presented at trial. Discovery in child protective cases is governed by MCR 3.922, which specifies the categories of information that must be disclosed if requested.<sup>84</sup> In child protective cases, any additional compelled discovery, specifically including depositions, requires a court order.<sup>85</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> See *People v Hill*, 86 Mich App 706, 713-716; 273 NW2d 532 (1978) (discussing reasons why litigants are permitted to enter into no contest pleas).

<sup>83</sup> MCL 722.627(2)(f).

<sup>84</sup> Under MCR 3.922(A)(1), if timely requested, as a matter of right, the attorney is entitled to information from the other parties including “(a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing; (b) all written or recorded nonconfidential statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including police reports; (c) the names of prospective witnesses; (d) a list of all prospective exhibits; (e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;

The parent's attorney must also counsel the client about whether the trial should take place in front of a referee, judge, or jury.<sup>86</sup> The attorney must inform the court of the client's choice within 14 days after (a) the court gives notice of the procedural right or (b) the attorney files an appearance, whichever is later, but always at least 21 days before trial.<sup>87</sup>

Choosing between a jurist or a jury involves both subjective and objective factors. Most trial lawyers prefer juries for cases with favorable, compelling facts, but choose referees or judges for cases that hinge on questions of law. Cases that involve especially gruesome allegations of abuse almost always should be litigated before a jurist because jurors will react more emotionally to the evidence of abuse. The attorney must also consider the client's privacy interests. Many clients will feel shamed by standing accused of child abuse in front of a jury whose members live in the parent's own community. Finally, in the right cases, requesting a jury trial may give the parent's attorney more leverage to negotiate a favorable plea deal. Sometimes, the other parties will have reasons for not wanting the case to be tried by a jury.

A parent who does not request a jury may then be required to choose between a referee and a judge. The parent's attorney should consult experienced local practitioners, especially those who have practiced in the same courtroom. Consenting to a trial before a referee provides an additional level of appellate review in child protective cases because the parent has the right to have the referee's recommendation reviewed by the trial court judge.<sup>88</sup> A judge's decision may then be appealed to the Michigan Court of Appeals.<sup>89</sup> On the other hand, the referee often

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(f) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, that are relevant to the subject matter of the petition; (g) the results of any lineups or showups, including written reports or lineup sheets; and (h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories.”

<sup>85</sup> MCR 3.922(A)(2), (3).

<sup>86</sup> Where the court has assigned a referee to preside at the non-jury trial a party has the right to demand a judge preside instead. However, a party does not have a right to demand a referee preside at the trial—although nothing prevents a party from requesting this from the court. MCR 3.912(B); 3.913.

<sup>87</sup> MCR 3.911 (jury); MCR 3.912 (judge); MCR 3.913 (referee).

<sup>88</sup> Under MCR 3.991, “[b]efore signing an order based on a referee's recommended findings and conclusions, a judge of the court shall review the recommendations if requested by a party.” The party must request a review of a referee's recommendation in writing within seven days after the conclusion of the hearing or within seven days after the issuance of the referee's written recommendations, whichever is later. MCR 3.991(B).

<sup>89</sup> MCR 3.993(A) (listing orders of disposition placing a minor under the court's supervision and removing the minor from the home as ones that are appealable as of right to the Court of Appeals).

will have presided at the preliminary hearing, and thus the judge will not previously have heard any of the evidence or made any decisions in the matter. That circumstance can weigh in favor of foregoing the extra layer of judicial review and asking the judge to preside over the jurisdiction trial. That might be especially true if the parent has made significant progress since the preliminary hearing. A judge with no previous exposure to the case's facts will not start out with any unfavorable preconceptions of the parent. Ultimately, the client must make the choice of referee or judge. The attorney should explain the factors summarized above and offer a recommendation.

### ***The Pretrial Hearing***

The pretrial hearing presents another opportunity for the parent's attorney to resolve issues concerning placement, parenting time, and services. These issues may be addressed at *any* hearing in a child protective case. Updated information regarding the parent, including compliance with services, changes in employment and living situation, or successful parenting time may cause the court to revisit orders entered at the preliminary hearing. At every hearing, demonstrating the parent's continued progress 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. Pretrial hearing practice is governed by MCR 3.922 and MCR 2.401. 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, whether it will be before a judge, referee, or jury. 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, file a motion to compel discovery.<sup>90</sup> 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

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<sup>90</sup> Motion practice in child protective cases is governed by MCR 3.922(C) and MCR 2.119.

presented at trial, e.g., by invoking the tender years hearsay exception<sup>91</sup> or by allowing support persons to sit next to child witnesses while they testify.<sup>92</sup>

At the pretrial hearing, the parent's attorney should give the court an estimate of how many witnesses will testify 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.

### ***Other Pretrial Matters***

If a child has been removed from the family home, the court must hold the jurisdiction trial as soon as possible, and no later than 63 days after the court placed the child outside the parent's home. The only acceptable reasons for a longer delay are: (1) all the parties stipulate to allowing more time; (2) service of process could not be completed; or (3) the court needs to hear testimony from a witness who is presently unavailable.<sup>93</sup>

If the jurisdiction trial does not begin within the allowed time, no recognized reason for the delay is shown, and the parent wants the child to return home, then, citing the unjustified trial delay, the parent's attorney should file a motion requesting the child's immediate return. In those circumstances, the court rules allow the court to release the child to the parent "... unless

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<sup>91</sup> See MCR 3.972(C)(2).

<sup>92</sup> If the prosecutor seeks to use supports for the child witness or admit statements made by the child through the residual exception to the hearsay rule, notice must be given to the parties. See MCL 712A.17b(4); MCR 3.923(E) and (F) (listing different supports available to child witnesses including the use of a support person or an impartial questioner of the child); MRE 803(24) ("Statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.").

<sup>93</sup> MCR 3.972(A). See also MCL 712A.17(1) (requiring written motion for adjournment 14 days before the hearing and limiting the length of the adjournment to 28 days unless "the court states on the record the specific reasons why a longer adjournment or continuance is necessary."). If the child remains in the custody of either parent, then the trial must commence within six months. MCR 3.972(A).



the court finds that releasing the child to the custody of the parent . . . will likely result in physical harm or serious emotional damage to the child.”<sup>94</sup>

One additional issue that the parent’s attorney should always consider during the pretrial stage is the child’s possible “Indian” heritage.<sup>95</sup> A child who has Native American ancestors may qualify as an “Indian child” within the meaning of the Indian Child Welfare Act (ICWA), as well as the Michigan Indian Family Preservation Act (MIFPA). The law requires the agency to provide notice to the child’s tribe (if tribal affiliation is known) or to the Secretary of the Interior (if the child’s tribal affiliation is unclear).<sup>96</sup> All parents’ attorneys should check for possible ICWA issues. The law may require the state court to transfer jurisdiction to a tribal court, or permit the child’s tribe to intervene as a party to the case. Changing the venue to a tribal court often will help parents who want to regain custody of their children.

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.

### **The Jurisdiction Trial**

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 preponderance of evidence. The agency must also persuade the court that the proven allegations establish legal grounds for the court to take jurisdiction of the child.<sup>97</sup> The parent’s attorney usually will offer an alternate case theory to dispute the agency’s allegations. As appropriate, the attorney should call witnesses, cross-examine the agency’s witnesses, and introduce exhibits that support the client’s position. Ultimately, the referee, judge, or jury will determine whether the agency has proven that these are grounds for the court to exercise jurisdiction over the child. If the court assumes jurisdiction, the case then will proceed to its dispositional phase, which this protocol discusses in a later section.

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<sup>94</sup> MCR 3.972(A).

<sup>95</sup> See 25 USC 1901 *et seq.*; See also MCL 712B.1 *et seq.* Note that the terms ‘Indian’ and ‘Indian Child’ are terms of art under the ICWA and MIFPA, and that they do not include all persons with Native American heritage.

<sup>96</sup> 25 USC 1912; MCL 712B.9; See also *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012).

<sup>97</sup> MCR 3.972(C)(1); MCL 712A.2(b)

A comprehensive guide to jurisdiction-trial practice is beyond the scope of this protocol. 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>98</sup> The parent's attorney should also inquire about a county's local practices. Try to ascertain the presiding judge's preferences on procedural matters such as marking exhibits, submitting witness and exhibit lists, and entering stipulations. For all jury trials, the parent's attorney should carefully review Michigan's model jury instructions.<sup>99</sup>

In all jurisdiction trials, the parent's attorney has two overarching tasks: (1) develop a coherent theory of the case, and (2) preserve trial errors for later appellate review.

### *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 *Modern Trial Advocacy*, Steven Lubet suggests 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 the facts—both the good facts and the bad facts. The theory must then address both the positive and negative aspects of the case. Attorneys preparing for

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<sup>98</sup> See Steven Lubet, *Modern Trial Advocacy* (2004); Thomas Mauet, *Trial Techniques* (2002). For further information on trial advocacy directly related to child welfare, see Ventrell & Duquette, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* 493-644 (2005).

<sup>99</sup> See M Civ JI 97.01 *et seq.* < <http://courts.mi.gov/courts/michigansupremecourt/mcji/pages/child-protection-proceedings.aspx> > (accessed June 18, 2013)

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? 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.

### ***Preserving Issues for Appeal***

The need to preserve issues for appeal will determine some of the attorney's actions at trial. If the parent loses the jurisdiction trial, and the court then enters a dispositional order, the court rules give the parent 21 days to appeal the order.<sup>100</sup> 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 protective cases—before challenging the court's initial decision to take jurisdiction. The Michigan Supreme Court has held that the decision to exercise jurisdiction may not be collaterally attacked in a subsequent appeal of an order terminating parental rights.<sup>101</sup> Thus, unless parents appeal the court's jurisdiction decision within 21 days, they will have effectively waived the right to appeal that all-important decision.

For the parent to have any chance of prevailing on appeal, the parent's trial attorney must have preserved the appeal 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 the appellate courts almost always insist upon before they will rule on an issue.<sup>102</sup> This general rule applies to both procedural and evidentiary rulings.<sup>103</sup> The Court of Appeals is not required to review unpreserved issues. It will depart from that policy only if it concludes that the trial judge committed a "plain error" that affected the party's "substantial rights." In practice, that is a nearly insurmountable appellate

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<sup>100</sup> MCR 7.204(A)(1)(a).

<sup>101</sup> *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993).

<sup>102</sup> *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237, 713 NW2d 269 (2005).

<sup>103</sup> See *People v Fleming*, 185 Mich App 270, 279; 460 NW2d 602 (1990); MRE 103(a)(1).

standard.<sup>104</sup> Therefore, 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. 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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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, best practice is to file a written motion *in limine* before the issue arises, or a written motion for reconsideration if the court has already ruled on the issue. 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 protocol.

Through zealous advocacy at the jurisdiction trial, the parent's attorney 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.

### **Dispositional Proceedings**

If the court finds (based on either the parent's plea or the agency's trial evidence) that a child comes within the jurisdictional provisions of the Juvenile Code, the case then moves into

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<sup>104</sup> Violations of ICWA notice requirements are jurisdictional and can be appealed post-termination.

<sup>105</sup> MRE 103(a)(1).

<sup>106</sup> MRE 103(a)(2).

<sup>107</sup> MRE 103(a).

the dispositional phase.<sup>108</sup> The initial dispositional hearing will “determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult, once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds in the petition [are] true.”<sup>109</sup> The dispositional phase of a child protection proceeding consists of three and sometimes four distinct stages: (1) the initial disposition hearing; (2) periodic review hearings; (3) the permanency planning hearing; and (4) if reunification cannot be achieved, the termination of parental rights hearing. Before considering these distinct stages, several issues that transcend each hearing in this phase of the process will be addressed.

### *Continuous Proceedings*

Child protective proceedings are continuous in nature.<sup>110</sup> That means that the various hearings conducted during the case’s several phases are not isolated events. Rather, “evidence admitted at any one hearing is to be considered evidence in all subsequent hearings.”<sup>111</sup> While the client works toward reunification with the child, the attorney must always think along dual tracks. That requires advocating for the family’s reunification while simultaneously preparing to defend against a petition to terminate the client’s parental rights. At each dispositional hearing, the attorney should make a clear record of the parent’s progress by calling witnesses and, when appropriate, presenting documentary evidence.<sup>112</sup> The parent’s attorney also should point out any failures by the agency to provide timely, appropriate services that could help the client regain custody of the child. If the court ultimately must decide whether to terminate parental rights, the jurist will look at the case’s *entire* record to discern the child’s best interests.<sup>113</sup> Therefore, at each dispositional review hearing, the parent’s attorney should make a best-interests record for later reference by the court. At a minimum, this should include evidence

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<sup>108</sup> See MCL 712A.18; MCL 712A.18f; MCL 712A.19.

<sup>109</sup> MCR 3.973(A).

<sup>110</sup> *In re Gillispie*, 197 Mich App 440; 496 NW2d 309 (1992) (citing *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973)); *In re Perry*, 148 Mich App 601; 385 NW2d 287 (1986).

<sup>111</sup> *In re LaFlure*, n 104 *supra* at 391.

<sup>112</sup> At the initial dispositional hearing and each review hearing, the court must consider all oral or written information provided by any party. MCR 3.973(E)(2) (initial disposition); MCR 3.975(E) (dispositional review hearings); MCR 3.976(D)(2) (permanency planning hearing).

<sup>113</sup> *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000).

regarding parenting time, the quality of the parent-child relationship, and the child's expressed wishes regarding that relationship. At each hearing, the attorney should ask the court to make specific findings about those factual issues.

### ***Reports***

After the court has assumed jurisdiction, if the agency servicing the case recommends against placing the child in the parent's custody while the case proceeds, then the agency must submit a written report to the court.<sup>114</sup> Given that child protective proceedings are continuous in nature, what transpires at one hearing may be relied upon by the court at subsequent hearings. Therefore, the parent's attorney must ensure the accuracy of the oral and written record at every stage. This can be difficult when it comes to an agency's written reports, which often contain statements that the client disputes. The attorney should obtain all agency reports well in advance of each hearing, read them carefully, and then review them with the client. In those cases where timely receipt of agency reports is an issue, the attorney should consider seeking an order from the court to direct the agency to file its report several days in advance of the hearing. The agency's reports and treatment plans<sup>115</sup> 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.

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, as explained earlier, the court may rely upon at later stages in the proceeding.

Michigan law permits parents (usually through their attorneys) to submit their own written reports that summarize their views regarding their participation in services, the benefits derived from that participation, the child's best interests, and other relevant matters.<sup>116</sup> For example, a report filed by the parent's attorney should include information regarding the parent's efforts to comply with and benefit from the following components of the court-ordered service

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<sup>114</sup> MCL 712A.18f(1).

<sup>115</sup> *DHS Foster Care Manual – Parent-Agency Treatment Plan & Service Agreement, FOM 722-8C* <<http://www.mfia.state.mi.us/olmweb/ex/fom/722-8C.pdf>> (accessed June 18, 2013).

<sup>116</sup> MCR 3.973(E)(2).

plan: parenting time with the child, participation in counseling, substance abuse treatment, parenting programs, and other services. The parent's report also should call 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. If the parent's attorney does submit a written progress report, the court must consider it.<sup>117</sup> That 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.

### *Investigation*

To ascertain the client's needs or evaluate the client's performance, the parent's attorney should not rely solely on the information provided by the agency's caseworker. Rather, the attorney should conduct an independent investigation of the client's circumstances at each stage. 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 from service providers. The parent's attorney also should obtain the service providers' written documentation of the client's progress. Throughout the dispositional phase 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 the caseworker, the child's L-GAL, and (if the court has appointed one) the child's court-appointed special advocate (CASA).<sup>118</sup>

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. 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. However, the attorney must also 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.

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<sup>117</sup> MCR 3.973(E)(2) ("The court shall consider the case service plan and any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom the child is placed.").

<sup>118</sup> See MCR 3.917 for more information about the role of a CASA in a child protective case.

The parent's attorney should obtain and save 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 calendar record of: (1) interactions with the caseworker or other professionals, (2) dates and times when phone calls were made or attempted, and (3) dates and times when the client attended or attempted to attend services. Any documentation that the parent has benefited from services will be especially helpful. Examples of that include certificates from parenting classes, residence leases, and sign-in sheets for substance abuse treatment programs. The attorney should present copies of these documents to the court at the initial dispositional hearing and at subsequent dispositional review hearings.

### ***Client Counseling***

As during the other phases of a child protective proceeding, client counseling is crucial during the dispositional phase. 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.<sup>119</sup> 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.<sup>120</sup> The parent's attorney should explore with the client ways to convince the court that the client has benefited. For example, the attorney should try to attend and observe a visit between the parent and the children at the agency. That will help prepare the attorney to present evidence about the quality of those visits.

Some parents may have the idea that the services offered by the agency are merely "hoops" that they must jump through before they can regain custody of their children. Parents' attorneys should take care not to characterize the service plan in such a manner. The client must take the service requirements seriously, and the attorney must convey that strategic necessity to the client. Any attorney who explicitly or implicitly suggests that the services demanded by the agency are not to be taken seriously will undermine the client's goal of regaining custody of the

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<sup>119</sup> MCL 712A.19a(5) (stating "the court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan. . . as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being."); MCR 3.976(E)(2); See also *In re Trejo*, 462 Mich 341, 346; 612 NW2d 407, n 3 (2000).

<sup>120</sup> *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005).



child and may increase the likelihood that the agency will eventually file a termination petition. On the other hand, the attorney also should stand ready to provide immediate assistance if the client encounters problems with agency personnel regarding issues such as scheduling the services, obtaining transportation to and from services, or getting information from the agency in a timely manner.

Additionally, the attorney should 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 by “direct placement adoption”<sup>121</sup> or by asking the court to appoint the relative as the child’s guardian.<sup>122</sup> In some cases, a change of custody to the child’s other parent can resolve a child protective proceeding.<sup>123</sup> Finally, if the attorney concludes that the parent *never* will take the steps necessary 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.<sup>124</sup>

### ***Advocating for Appropriate Services***

Parents’ attorneys should 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.<sup>125</sup> This means that the services must address the primary barriers to reunification in the particular case.<sup>126</sup>

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<sup>121</sup> See MCL 710.23a. In order for a parent to effectuate a direct placement adoption, the parent must have legal and physical custody of the child. When the child is removed from the parent’s custody and placed in foster care under DHS supervision, the parent has neither legal nor physical custody of the child. Some courts, however, will return custody to a parent in a child protective proceeding for the parent to complete a direct placement adoption.

<sup>122</sup> See MCL 700.1101, *et seq.*

<sup>123</sup> MCL 722.21 *et seq.*

<sup>124</sup> MCL 710.29.

<sup>125</sup> See generally MCL 712A.18f(1); MCL 712A.19a(2). See also *DHS Children’s Foster Care Manual – Developing the Service Plan*, FOM 722-6 <<http://www.mfia.state.mi.us/olmweb/ex/fom/722-6.pdf>> (accessed June 18, 2013).

<sup>126</sup> The *DHS Children’s Foster Care Manual—Developing the Service Plan* states that “[c]ases work services are directed toward resolving the presenting problem or conditions which resulted in a child’s removal from his/her

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 necessary 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 the statutorily required reasonable efforts.<sup>127</sup>

Some clients’ parenting deficits result from conditions covered by the Americans With Disabilities Act (ADA).<sup>128</sup> If so, the agency must provide services that go beyond the general “reasonable efforts” requirement. The ADA additionally requires the agency to make “reasonable accommodations” to address that parent’s specific disability.<sup>129</sup> 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 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, the parent’s attorney may want to ask the agency or court to prioritize the services schedule in a way that gives the parent a fair chance to comply. “Parenting time” aims to maintain the parent-child attachment, which is crucial to a child’s development. The parenting time schedule must be tailored to the individual needs of the child. Particularly for infants and young children, weekly, supervised one-hour

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home.” 722-6. It goes on to state that “[o]ccasionally there will be cases which have additional serious problems underlying the initial presenting problem. If the new problem is determined to be serious enough to prevent returning the child home, steps must be taken to petition the court, or amend the current petition to enable the court to address the problems and ensure the parent’s due process.” *Id.*

<sup>127</sup> *In re Rood*, 483 Mich 73, 98; 763 NW2d 587 (stating “services in part underlie the ‘reasonable efforts’ in which the DHS must engage both to avoid removal and reunify the child with his family”).

<sup>128</sup> See *In re Terry*, 240 Mich App 14; 610 NW2d 563 (2000); 42 USC 12101 *et seq.* *Terry* held that while the agency providing services must accommodate ADA disabilities, the ADA does not provide a defense to a termination of parental rights petition. The parent’s attorney should advocate for appropriate services *prior* to the filing of a supplemental termination of parental rights petition.

<sup>129</sup> *Id.* at 25.

visits at the agency's office will not suffice to maintain the parent-child relationship.<sup>130</sup> The parent's attorney should advocate for maximum parenting time 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, Michigan law explicitly provides that some services must be made available to parents at times outside traditional office hours.<sup>131</sup> 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.

### ***Post-Hearing Advocacy***

After the court has concluded a dispositional review hearing, the parent's attorney should obtain and carefully review the dispositional order to ensure that it accurately reflects the hearing's outcome. The attorney should review the order with the client, answer the client's questions, and (if the order contains inaccuracies) immediately ask the court to amend the order.

### ***Intervals Between Dispositional Review Hearings***

Agency personnel often make critically important decisions during the intervals between court hearings. For example, before making any change in the child's placement between hearings, the agency should hold a Family Team Meeting (FTM) that includes the parent.<sup>132</sup> In

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<sup>130</sup> See generally *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).

<sup>131</sup> MCL 722.954b(3).

<sup>132</sup> The Family Team Meeting is part of Michigan's MiTEAM case practice model that was implemented in Michigan in 2013.

<<http://www.michiganchildwelfaretraining.com/LinkClick.aspx?fileticket=Rioq5RC51sU%3d&tabid=143>> (accessed June 18, 2013).

addition to the caseworkers, the L-GAL and parent attorney may participate in the FTM. Members of the extended family may also attend an FTM, but their participation requires the parent's consent, so they will be excluded if the parent does not attend. Because critical decisions are made at these meetings, and because there will be an inherent power imbalance if a parent attends alone, the parent's attorney should try to attend any FTM. Even when the parent's attorney cannot attend the FTM, 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.

In addition to participating in the FTM's described above, parents and their attorneys should provide input to the Foster Care Review Board if it selects the case for review. The Foster Care Review Board program uses panels of local citizen volunteers to periodically review individual foster care cases, monitor the agency's performance in those cases, and make recommendations for changes in Michigan foster care law.<sup>133</sup>

These administrative meetings provide additional opportunities for parents to stay involved in their children's lives. If newly emerged facts warrant a child's immediate return home, Michigan law permits the court to order that a child be returned to the parent at any time—even between review hearings.<sup>134</sup> The statute permits the court to return a child to the parent after the agency has given seven days notice to all the parties and the L-GAL.<sup>135</sup> When a client has demonstrated substantial recent progress while receiving services, the parent's attorney should consider asking the court to exercise this option.

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<sup>133</sup> See MCL 722.131, et seq.

<sup>134</sup> MCL 712A.19(10).

<sup>135</sup> *Id.*

## **Permanency Planning**

The law requires the court to hold a permanency planning hearing (PPH) within 12 months after the child's removal from the home.<sup>136</sup> The permanency planning process and each formal PPH will start with a presumption that the child and parent should reunite.<sup>137</sup> The court must return the child to the parent's custody unless the court finds that returning the child would cause a substantial risk of harm to the child's health or well-being.<sup>138</sup>

Parents' attorneys should begin thinking about the permanency plan as soon as they enter the case. A parent's failure to "substantially comply" with the court-ordered service plan is prima facie evidence that the child will be at risk if returned to the parent's custody.<sup>139</sup> Conversely, where a parent has substantially complied with the ordered services, the law presumes that the risk of harm has been reduced or eliminated.<sup>140</sup> Neither presumption is conclusive.<sup>141</sup>

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 a substantial risk of harm—even if the parent has not completed all treatment services. If possible, counsel should informally lobby the caseworker to recommend a return home or, at least a continued temporary wardship that will 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 can clarify a parent's issues in ways that caseworkers cannot or will not do. If providers cannot testify in person at a PPH, the attorney should solicit their letters or affidavits to help the court understand the parent's progress in the treatment program. The Michigan Rules of Evidence do not apply at the hearing.<sup>142</sup>

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<sup>136</sup> MCL 712A.19a(1).

<sup>137</sup> MCL 712A.19a(5).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003) (“[T]he parent's compliance with the parent-agency agreement is evidence of her ability to provide proper care and custody.”).

<sup>141</sup> *In re Gazella*, n 114 *supra* (parent must demonstrate benefit from services rather than just compliance).

<sup>142</sup> MCR 3.976(D)(2).

Just as evidence provided by those working directly with the *parent* can impact the court's permanency planning determination, the views of the L-GAL, who works directly with the *child*, also will carry considerable influence. Before a PPH, the parent's attorney should consult with the L-GAL regarding the permanency recommendation. Unless there are safety concerns, try to persuade the L-GAL 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 L-GAL include the following: What is the long term permanency goal? Is adoption likely? If so, has the L-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 will termination further the child's best interests?

In addition to advocating for the client when meeting with the L-GAL, the parent's attorney should consider allowing the L-GAL to meet with the parent so the L-GAL can independently assess the parent's progress.<sup>143</sup> Counsel may want to be present if such a meeting occurs.

Also, before most permanency planning hearings, the parent's attorney should counsel the client regarding three common alternatives to reunification or termination of parental rights. First, a child may be placed *permanently* with a fit and willing relative.<sup>144</sup> Second, for children who are 14 or older, the court may order *permanent* placement with a nonrelative foster parent under a "permanent foster family agreement."<sup>145</sup> Third, the court may appoint a legal guardian for the child.<sup>146</sup> All of these options achieve permanency for the child without terminating the parent's rights.

At the PPH, the parent's attorney should frame the issues and evidence by emphasizing the statutory preference for returning the child to the parent. Even where the parent has only partially complied with the court-ordered services, the attorney often can argue plausibly that the problems that led to the court's assumption of jurisdiction have been addressed at least to the extent that the child is no longer at a "substantial risk of harm."

During the permanency planning phase of a case, the child's "best interests" are the primary focus. Therefore, the attorney's theory of the case for the PPH should address both the

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<sup>143</sup> Michigan's L-GAL statute specifically requires the L-GAL "to determine the facts of the case by conducting an independent investigation including . . . interviewing . . . family members." MCL 712A.17d(1)(c).

<sup>144</sup> MCR 3.976(E)(4)(b).

<sup>145</sup> MCR 3.975(C)(2); See MCL 712A.13a(1)(i) (defining permanent foster family agreement).

<sup>146</sup> MCL 712A.19a(7)(c).

statutory best-interests standard and the unique facts of the particular case. This will enable counsel to present a cogent argument that the parent should regain custody or, alternatively, have more time to complete the required services.

### **Termination of Parental Rights**

At a 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.<sup>147</sup> If the child has been in foster care for 15 of the most recent 22 months, the court must order the agency to file a petition unless certain exceptions apply, which include 1) the child is being cared for by relatives, 2) the case service plan documents a compelling reason for determining that filing a petition to terminate parental rights would not be in the best interest of the child, and 3) the state has failed to provide the family with services the state considers necessary for the child's safe return to their home, if reasonable efforts are required.<sup>148</sup> As detailed in the next several sections, a termination petition will 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.

### ***Standing***

First, counsel must determine whether the petitioner has standing to request termination. Under Michigan law, *any* person may petition the court to initiate a child protective proceeding,<sup>149</sup> and a petition may request the termination of parental rights at the initial dispositional hearing.<sup>150</sup> Presumably, then, *any* person has standing to seek termination at the initial dispositional hearing, although this remains an open question that the parent's attorney should analyze carefully.<sup>151</sup> If a child has been in foster care, Michigan law *expressly* grants standing to file a petition to terminate parental rights to only the prosecuting attorney, the child,

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<sup>147</sup> MCL 712A.19a(6).

<sup>148</sup> *Id.*

<sup>149</sup> MCL 712A.11(1); *People v Gates*, 434 Mich 146, 161; 452 NW2d 627 (1990).

<sup>150</sup> MCL 712A.19b(4).

<sup>151</sup> *In re Huisman*, 230 Mich App 372; 584 NW2d 349 (1998), overruled on other grounds *In re Trejo*, n 107 *supra* (custodial parent has standing to bring initial petition for termination of noncustodial parent's rights).

the child’s legal guardian or custodian, the agency, the state’s children’s ombudsman or a “concerned person.”<sup>152</sup> Thus, the parent’s attorney should first determine whether the petitioner has standing to file a petition that seeks a termination of parental rights.

### *Notice*

In a termination proceeding, the petitioner must serve the parent-respondent with a summons and a copy of the termination petition.<sup>153</sup> Generally, the petitioner must serve the parent personally, i.e., someone must hand the documents directly to the parent.<sup>154</sup> If the parent cannot be personally served, the court may authorize substituted service.<sup>155</sup> But if a parent who has not received proper notice nonetheless appears at the termination hearing, that physical appearance waives all notice defects unless the parent promptly voices a specific objection to the service defects.<sup>156</sup> Thus, counsel should carefully consider whether the client has received proper notice of the termination petition and act accordingly.

### *Parenting Time*

If a petition to terminate parental rights is filed, the court may terminate parenting time for a parent who is the subject of the petition.<sup>157</sup> The parent’s attorney must be prepared to address this issue immediately. The attorney should review any reports submitted for prior hearings to identify evidence regarding the quality of parenting time and its benefits for the child. Counsel should present evidence and frame arguments in terms of the child’s needs, arguing that

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<sup>152</sup> MCL 712A.19b(1). “Concerned person” is defined in MCL 712A.19b(6) (“[A] ‘concerned person’ means a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under subsection (3)(b) or (g) and who has contacted the [DHS], the prosecuting attorney, the child’s attorney, and the child’s guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition under this section.”).

<sup>153</sup> MCR 3.920.

<sup>154</sup> MCR 3.920(B)(4).

<sup>155</sup> *Id.* See *In re Zaherniak*, 262 Mich App 560; 686 NW2d 520 (2004) (considering the interaction of MCR 3.920 and MCL 712A.13); *In re BAD*, 264 Mich App 66, n 2; 690 NW2d 287 (2004) (once parent has received summons, notices of subsequent continued hearing dates may be served on parent’s lawyer).

<sup>156</sup> MCR 3.920(H).

<sup>157</sup> MCL 712A.19b(4); MCR 3.977(D).



the child will not suffer any harm if the court allows continued parenting time until the court actually rules on the petition to terminate the parent's rights. One potentially compelling argument is that, instead of preventing harm, the abrupt discontinuation of parenting time may traumatize the child.

### ***Petitions to Terminate at the Initial Disposition Hearing***

Although significant efforts to reunite the family typically precede any thought of terminating parental rights, the agency occasionally requests termination as early as the initial disposition hearing.<sup>158</sup> In especially severe cases, the law requires the agency to seek termination of parental rights at the initial disposition.<sup>159</sup> When the agency files a petition to terminate parental rights at the initial disposition hearing, the law establishes a three-step process for addressing that request.<sup>160</sup>

First, as in all child protection cases, the petitioner must prove by legally admissible evidence that there is a basis under MCL 712A.2(b) for the court to assert jurisdiction. The parent is entitled to a jury trial to determine whether the court has jurisdiction. In the earlier section regarding jurisdiction trials, this protocol discussed several tactical factors that counsel should consider when deciding whether a jury trial will serve the client's interests. When jurisdiction and immediate termination are at issue simultaneously, then, in addition to the considerations discussed previously, the attorney may want to ask the court to bifurcate the trial. In a bifurcated trial, a jury will decide the jurisdictional issue even though, if jurisdiction is found, the judge will make the decision regarding immediate termination. Bifurcation will ensure that the jury does not hear evidence that is relevant only to the termination issue, such as information regarding the child's best interests.

Second, if the court takes jurisdiction, the court must next decide whether "clear and convincing" legally admissible evidence proves a statutory basis for terminating parental rights under MCL 712A.19b(3). Third, even if the evidence otherwise justifies termination, the court may order termination only if it also finds that termination is in the child's best interests.<sup>161</sup>

One important issue in cases involving the possible termination of parental rights at the initial disposition hearing is whether the agency must provide services to the parents while the

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<sup>158</sup> MCL 712A.19b(4).

<sup>159</sup> MCL 722.638(2).

<sup>160</sup> MCR 3.977(E).

<sup>161</sup> MCR 712A.19b(5).

court considers the termination petition. Generally, when a child is removed from the parent's home, the agency must make reasonable efforts to reunify the family, unless the court determines for reasons specified in the Juvenile Code that reasonable efforts are not required.<sup>162</sup> Thus, the statute at least suggests that the agency must provide services even when the initial petition seeks the termination of parental rights.<sup>163</sup> The parent's attorney should advocate for providing appropriate services until the court makes a final termination decision. Receiving interim services may allow the parent to demonstrate that the petitioner has failed to prove a statutory basis for termination.

When making the required "best interests" determination, the court generally will benefit from having psychological evaluations, substance abuse assessments, and similar information from the service providers. For instance, the agency may have alleged that the parent has a substance abuse problem and is not likely to benefit from treatment. In such a case, a substance abuse assessment and some actual treatment may provide the court with invaluable information about the severity of the substance abuse problem, whether the problem is treatable, and whether the parent is motivated to participate in treatment. This information could, for instance, rebut an agency assertion that the court should terminate parental rights immediately under MCL 712A.19b(3)(g) because, given the child's age, the parent is unlikely to be able to provide a fit home for the child within a reasonable time.

Although the law requires that the agency file a termination petition immediately if it can prove certain forms of child maltreatment, the law also allows the agency to amend the petition in light of subsequent developments.<sup>164</sup> Even when the agency files a mandatory petition for termination, it may ultimately settle the case short of an actual termination.<sup>165</sup> For example, the

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<sup>162</sup> MCL 712A.19a(2).

<sup>163</sup> Both MCR 3.977(E) ("The court shall order termination of the parental rights of a respondent . . . and shall order that additional efforts for reunification of the child with the respondent shall not be made . . .") and MCL 712A.19b(5) ("If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made . . .") provide support for the argument that services aimed at reunification must be provided until the court has actually adjudicated the issue of termination and has found that there is a basis to terminate parental rights.

<sup>164</sup> The statute merely requires that the agency *file* the petition seeking termination at the initial dispositional hearing. MCL 722.638.

<sup>165</sup> See, however, *DHS Children's Protective Services Manual—Family Court: Petitions, Hearings, and Court Orders*, PSM 715-3, at 6 (stating that only DHS legal counsel, not caseworkers, may engage in plea negotiations with regard to a mandatory petition. Additionally, supervisor approval is necessary before caseworkers may support

agency may agree to withdraw the request to terminate if the parent admits that the court has jurisdiction over the child and agrees to work on a treatment plan. The parent's lawyer should explore these settlement possibilities with the caseworker and the other attorneys. Here, filing a demand for a jury trial (on the jurisdiction issue) may give the parent's attorney some negotiating leverage because the agency, the prosecutor, or the child's L-GAL may prefer not to risk submitting the case to a jury.

### ***Termination Based Upon Changed Circumstances***

The second major category of termination petitions consists of petitions to terminate based upon changed circumstances.<sup>166</sup> In this type of case, the children typically will have entered foster care based upon one type of alleged maltreatment (e.g., neglect), and the agency subsequently has learned about other maltreatment, such as sexual or physical abuse. In these situations, rather than provide additional services to address the newly discovered form of maltreatment, the agency may file a petition to terminate the parent's rights.

The prior alleged neglect or abuse will already have been proven by legally admissible evidence or the parent's plea, but the law requires that the agency prove the *new* neglect or abuse allegations by legally admissible evidence.<sup>167</sup> In such a case, the agency may also allege that the parent failed to comply with or benefit from the services intended to address the original problems. If so, the termination petition's multiple allegations will be subject to differing evidence rules and standards of proof. The agency can prove noncompliance regarding the original neglect by "any relevant evidence," meaning that the MRE do not apply so the court may consider hearsay evidence. But, as stated above, the agency must prove the new neglect or abuse allegations by "legally admissible evidence."<sup>168</sup>

Each statutory allegation must be proven by "clear and convincing evidence,"<sup>169</sup> which is defined as evidence that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and

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a plea agreement on the record) <<http://www.mfia.state.mi.us/olmweb/ex/PSM/715-3.pdf>> (accessed June 18, 2013).

<sup>166</sup> See MCR 3.977(F); *In re Snyder*, 223 Mich App 85; 566 NW2d 18 (1997); *In re Gilliam*, 241 Mich App 133; 613 NW2d 748 (2000); *In re CR*, n 19 *supra*.

<sup>167</sup> MCR 3.977(F)(1)(b); *In re Snyder*, n 160 *supra*.

<sup>168</sup> See, e.g., *In re CR*, n 19 *supra*.

<sup>169</sup> MCR 3.977; *Santosky*, n 3 *supra*.

convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.”<sup>170</sup> Notably, the “clear and convincing” standard is second only to the “evidence beyond a reasonable doubt” standard required in criminal cases prior to convicting a defendant.

Because these supplemental or “changed circumstances” petitions to terminate parental rights may include both previously proven and never-proven allegations, a parent’s attorney must carefully separate the bases for the court’s original jurisdiction from any new allegations. Again, issues related to the original allegations may be proven by “any relevant evidence,” while the new allegations must be proven by “legally admissible evidence.” Counsel will need to develop a trial strategy that addresses each allegation and determines which set of evidence rules applies to each allegation.

### ***Termination Based Upon Failure To Comply With The Service Plan***

This third type of termination petition is neither an original petition nor one premised upon changed circumstances. These petitions almost always involve the parents’ failure to adequately address the problems that led to the court’s assumption of jurisdiction. These petitions, termed “Other” in the court rule, are governed by MCR 3.977(H). The parent will already have admitted, or the agency will have proven, the basis for the court’s jurisdiction. The termination petition typically will allege either that the parent failed to comply with the service plan or that the parent failed to benefit from the services. The MRE do not apply here, meaning that the agency can prove these allegations by “any relevant evidence.”<sup>171</sup> However, remember that the court may terminate the parent’s rights only if the evidence for termination is “clear and convincing.”

The parent’s attorney must carefully prepare for the termination hearing by determining as to each factual allegation whether the agency asserts: (1) that the parent did not comply sufficiently with the service plan, or (2) that the parent complied but did not benefit.

Regardless of the basis for the termination request, the parent’s attorney should ensure during the termination hearing that all evidentiary and procedural objections are preserved for appeal. The need to preserve possible appellate issues was covered more fully in the earlier section on jurisdiction trials.

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<sup>170</sup> *Martin v Martin (In re Martin)*, 450 Mich 204, 227; 538 NW2d 399 (1995).

<sup>171</sup> MCR 3.977(H)(2).

### ***Voluntary Release of Parental Rights***

Whenever the agency files a petition to terminate parental rights, the parent's attorney should advise the client that under the Adoption Code, a parent has the option to release parental rights voluntarily rather than fight the agency's petition to terminate.<sup>172</sup> When considering this option, the attorney and parent should weigh three basic factors. First, how likely is it that the parent would prevail at a termination hearing? In most cases, the parent will have had a year or more to benefit from agency services. By then, the parent's attorney should have some sense of how the court will respond to the petition for termination. Second, even if the client is successful at the termination hearing, will the client then finally take the steps necessary to regain custody of the child? Third, a voluntary release of parental rights after the initiation of a child protective case may have negative consequences in the future. Under MCL 712A.19b(3)(m), a prior release of parental rights to one child can serve as statutory grounds for the subsequent termination of parental rights as to another child. In contrast, proceeding with the termination hearing may not have that additional negative consequence for the client—if he or she prevails.

Where the client has made no real effort to utilize the services offered, or has been wholly unable to benefit from the services, the parent's attorney should consider recommending that the parent release parental rights rather than contest the termination petition. Conversely, where a parent has made at least some progress, the attorney should try to negotiate to obtain additional services from the agency. For example, where a parent has made progress in drug treatment, but then relapsed, the parent's attorney might point out that relapse is part of the recovery process,<sup>173</sup> that a relapse should have been expected, and that the parent remains motivated to continue in or re-engage in treatment. In this situation, there may well be realistic hope that the child can be reunified with the parent within a reasonable time.

### ***Address Every Alleged Basis for Terminating Parental Rights***

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<sup>172</sup> See MCL 710.29.

<sup>173</sup> See United States Department of Health and Human Services, *Blending Perspectives and Building Common Ground* <<http://www.aspe.hhs.gov/HSP/subabuse99/chap2.htm>> (accessed on June 18, 2013).

The court may terminate parental rights if it finds that one or more of the grounds for termination listed in MCL 712A.19b(3) have been proven by clear and convincing evidence. Because even a single basis constitutes a sufficient reason to terminate, counsel must carefully address each and every basis alleged in the termination petition. Some grounds for termination have specific, technical requirements; e.g., MCL 712A.19b(3)(c) requires, among other things, that 182 days have elapsed since the issuance of the initial dispositional order. Other grounds for termination grant broad discretion to the trial court judge. See, e.g., MCL 712A.19b(3)(g). The parent's attorney should look carefully at the law, investigate and analyze the case's facts, and develop a persuasive argument as to each basis on which termination is requested.

### ***Preparing for a Termination Hearing***

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 and listed in MCL 712A.19b(3). 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.

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 L-GAL'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 child's L-GAL. 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. Review the file's contents and make copies of important documents. If the agency resists discovery, the parent's attorney should file a discovery motion seeking access to

the information. The discovery rules in MCR 3.922(A) were more fully discussed in the earlier section on jurisdiction trials.

### ***Theory of the Case***

As with the jurisdiction trial, the parent's attorney must develop a coherent theory of the parent's case. 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, a parent's theory of the case for a termination hearing might assert: "This is a case about a young mother who has not received adequate services or had sufficient time and a fair opportunity to address the issues that brought her children to the court's attention. The agency has rushed to terminate her parental rights without giving the mother a real chance to regain custody of her children; therefore, the court should reject the termination request." Developing a coherent and comprehensive theory helps 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.

### ***Prehearing Motions and Notices***

Counsel may need to file prehearing requests for information and discovery motions to obtain a more specific statement of the agency's reasons for seeking the termination of parental rights. These motions should be filed well before the termination hearing date. The court may have to conduct special motion hearings to address the discovery issues and other motions.

Attorneys must familiarize themselves with MCR 3.972(C)(2) and MRE 803(24),<sup>174</sup> which provide separate hearsay exceptions for certain statements made by children. The parent's attorney must be aware of both how to defend attempts by other parties to introduce hearsay and how these rules may be used to admit hearsay helpful to the parent's case. These provisions each require that the party seeking to introduce the hearsay statements file a pretrial motion or a notice that informs the other parties and asks the court to admit the child's earlier statements.<sup>175</sup> Take note, however, that when the agency files a supplemental petition asserting that the parent has

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<sup>174</sup> See generally *People v Katt*, 468 Mich 272; 662 NW2d 12 (2003).

<sup>175</sup> See MCR 3.922(E).

failed to comply with or benefit from services, the MRE do not apply.<sup>176</sup> As explained earlier, a mixed bag of evidence rules apply during the hearing on a changed-circumstances petition to terminate. There, the MRE will apply to any *new* allegations, but not to the allegations that caused the court to take jurisdiction in the first place.

### ***Petitioner's Burden of Proof***

In a termination of parental rights proceeding, the petitioner has the burden of proving, by clear and convincing evidence, at least one statutory ground for termination and that termination is in the child's best interests.<sup>177</sup>

Because the court must find that termination of parental rights is in the child's best interests, the parent's attorney should prepare to demonstrate that termination would harm the child. In this phase of the termination process, the court may consider any issue that impacts the child's best interests.<sup>178</sup> While every case has unique issues, the attorney should generally prepare to address concerns such as the likelihood of the child being adopted or otherwise *permanently* placed in a new home within a reasonable time, the likelihood that the child instead will simply "age out" of the foster care system,<sup>179</sup> the child's special needs (which may complicate permanent placement), the child's age, the child's wishes regarding termination and permanent placement, the type and extent of abuse or neglect the child suffered, the residual effects of that maltreatment on the child's functioning, and the quality of the child's relationship with the parent. Additionally, to the extent that they are helpful, the court may consider the best interest factors set out in the Child Custody Act.<sup>180</sup>

### **Appeals**

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<sup>176</sup> MCR 3.977(H)(2).

<sup>177</sup> MCL 712A.19b(5).

<sup>178</sup> See *In re JS and SM*, 231 Mich App 92, 102-103; 585 NW2d 326 (1998) rev'd on other grounds; *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000) (reasoning that while the court may look to the factors listed under the Child Custody Act as guidance, the court is not bound to limit its examination to those factors) .

<sup>179</sup> Studies strongly suggest that children who "age out" of foster care are at high risk of negative outcomes such as homelessness, unemployment, incarceration, and teen pregnancy. See Stangler & Shirk, *On Their Own: What Happens to Kids When They Age Out of the Foster Care System* (2006).

<sup>180</sup> *In re EP*, 234 Mich App 582, 594; 595 NW2d 167 (1999); see MCL 722.23 *et seq.*



As soon as the court enters an order terminating parental rights, the court must advise the parent of the right to appeal and the right to be represented by court-appointed appellate counsel.<sup>181</sup> The parent's attorney should also personally and carefully advise the client about the right to appeal and the appellate process generally.<sup>182</sup> Appeals are governed by MCR 3.993 and MCR 7.200 *et seq.* The State Court Administrative Office has a standard form that litigants can use to assert their right to appeal and to request that the trial court appoint appellate counsel.<sup>183</sup> In most counties, when trial counsel was court appointed, the court will appoint a different attorney to pursue the appeal.

### ***Review of Referee Recommendations***

As noted earlier, Michigan law permits referees to preside at both jurisdiction trials and termination hearings.<sup>184</sup> In most counties, termination hearings take place before a judge, but some counties use referees even for termination hearings. With the exception of *ex parte* orders authorizing immediate protective custody of a child,<sup>185</sup> referees do not enter orders; they may only make recommendations to judges, and the referee's recommendation becomes an order of the court only after it has been reviewed and signed by the judge.<sup>186</sup> If a referee, rather than a judge presides, the parent's attorney should consult with the client regarding the right to have the trial court judge review the referee's rulings and recommendation.<sup>187</sup> A petition for judicial review of a referee's recommendation must be filed within seven days after the referee files the recommendation. However, if the judge signs the referee's recommended order before the parent files a petition for review, then the parent loses the right to have the trial judge review the referee's recommendation even if the seven days allowed by rule have not yet elapsed. The parent must then either file a motion for rehearing by the trial court judge or take other appellate

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<sup>181</sup> MCR 3.977(J).

<sup>182</sup> As noted earlier, issues from the initial adjudication must be appealed following the adjudication and cannot be appealed after a termination of parental rights on a supplemental petition. *In re Hatcher*, n 95 *supra*.

<sup>183</sup> See JC 84 <<http://courts.mi.gov/Administration/SCAO/Forms/courtforms/jc84.pdf>> (accessed on June 18, 2013).

<sup>184</sup> MCR 3.913(A).

<sup>185</sup> MCL 712A.14b(1).

<sup>186</sup> See *In re AMB*, n 57 *supra* at 217.

<sup>187</sup> MCR 3.991.

action.<sup>188</sup> Obviously then, the decision whether to seek review of the referee’s recommendation must be made quickly.

### ***Appealable Orders***

The appellate courts expedite all appeals in child protection proceedings compared to standard civil proceedings. Although a parent can appeal any order in a child protection proceeding to the Court of Appeals, there are only certain types of orders that trigger an appeal by right. In an appeal appealed “by right,” the Court of Appeals must afford plenary review, hear oral arguments, and issue an opinion. MCR 3.993(A) lists the orders that a parent may appeal by right. These include an order placing a child under the court’s jurisdiction or removing the child from the parental home, an order terminating parental rights, any other order required by law to be appealed to the Court of Appeals, and any final order. If the attorney misses the deadline for filing an appeal by right, the attorney can file a delayed application for leave to appeal. The application should demonstrate good cause for delay and highlight that the appeal would have been an appeal by right. The time limit for late appeals from orders terminating parental rights is 63 days. Orders that are not appealable by right may be appealed only by seeking discretionary leave to appeal from the Court of Appeals.<sup>189</sup> Appeals by leave do not stay child protection proceedings. In some cases, the parent’s attorney may want to ask the trial court to stay (pending a final decision on appeal) the order placing the child under the court’s jurisdiction or terminating a parent’s rights.<sup>190</sup> If the trial court denies the requested stay, the parent’s attorney may ask the Court of Appeals to stay the lower court’s order.<sup>191</sup> Attorneys should assume that the Court of Appeals will strictly enforce the filing deadlines specified in the court rules.

### ***Representing the Parent on Appeal***

Upon receiving an appeal appointment, the appellate attorney should obtain the full case record and then meet with the client and trial counsel to discuss what occurred during the trial and identify potential appellate issues. The appellate attorney should carefully review the record, including all transcripts and the court’s file—both the public and confidential portions of that

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<sup>188</sup> See MCR 3.991(A)(2)-(4).

<sup>189</sup> MCR 3.993(B).

<sup>190</sup> MCR 7.209.

<sup>191</sup> *Id.*

file.<sup>192</sup> The trial court clerk generally files the appeal and orders initial transcripts, but the parent attorney should immediately compare the clerk's transcript order against the register of actions. If there are transcripts that have not been ordered, but are necessary for preparation of the appeal, the attorney should immediately order the additional transcripts and verify that the court reporter files a certificate of ordering transcripts with the Court of Appeals.

After reviewing the files and transcripts, appellate counsel must decide which issues to raise on appeal. Appellate attorneys in child protection cases are usually court appointed. Because appointed attorneys seldom have a chance to evaluate the case before accepting an appointment, the appellate rules allow appointed appellate attorneys to withdraw from a case if the attorney cannot identify any legitimate issues to raise on appeal.<sup>193</sup> However, it is important to first discuss this concern with the client. If the record genuinely lacks appealable issues, explain this to the client in a simple way, explain your efforts to find issues, and counsel the client about dismissing the appeal or your desire to withdraw from the case. An appellate attorney should never prejudice the client in any way, no matter what stage the case is in. Instead, the attorney should take care to explain all avenues to the client. For example, if there is a case that presents aggravated circumstances and the record reveals no error and your professional opinion is that there are no meritorious appellate issues, one strategy might be to talk to the client about how the child might benefit if the appellate delay is eliminated. These instances will be rare, but should be considered.

In all cases, the attorney should consider constitutional issues, statutory issues, and possible abuses of discretion by the trial court. The constitutional guarantee of procedural due process requires "fundamental fairness."<sup>194</sup> Counsel should have a comprehensive understanding of what the Constitution requires, and should review the transcripts and court files with a focus on spotting issues of procedural fairness. Potential procedural due process issues include defects in service or a trial court's failure to appoint counsel in a timely manner. Counsel should also discern whether the trial court proceedings followed all the statutory and court-rule requirements. If those requirements were not met, either procedurally or substantively, counsel should raise the issue before the Court of Appeals.

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<sup>192</sup> See MCR 3.925(D).

<sup>193</sup> MCR 7.211(C)(5).

<sup>194</sup> See generally, *Santosky* n 3 *supra*; *Lassiter v Dep't of Social Services*, 452 US 18; 101 S Ct 2153; 68 L Ed 2d 640 (1981) (both discussing due process and fundamental fairness in the context of termination of parental rights proceedings).

Michigan’s Juvenile Code states that it is to be “liberally construed.”<sup>195</sup> That means that family courts have broad discretion in child protection proceedings. The parent’s appellate attorney should identify the trial court’s key decisions and test those decisions against the abuse-of-discretion standard. Counsel should also consider whether any statutes outside the Juvenile Code apply to some aspect of the case. For example, the Michigan Court of Appeals has held that, although the Americans with Disabilities Act does not provide a defense to a termination of parental rights petition, it does, however, apply to the earlier stages of child protective proceedings. That means that the agency must make “reasonable accommodations” for a parent who has a disability covered by the ADA.<sup>196</sup> Examples of other possibly relevant statutes include the Indian Child Welfare Act and the Interstate Compact on the Placement of Children.

The parent’s appellate attorney must file a brief raising the parent’s best issues and arguing the law relevant to each issue.<sup>197</sup> For appeals from an order terminating parental rights, counsel must remember that even *one* recognized basis for terminating parental rights is sufficient to justify a termination. For this reason, appellate counsel must challenge *every* basis on which the trial court has terminated parental rights; otherwise, the Court of Appeals may peremptorily grant a motion to affirm.<sup>198</sup>

### ***Appellate Motion Practice***

Sometimes filing a special motion in the Court of Appeals may resolve the appeal more quickly. Early in the appeal, parents’ attorneys should review the section of MCR 7.211 that authorizes special motions for peremptory disposition of appeals.<sup>199</sup> For appellants, the two most commonly filed motions are the motion to remand for further proceedings and the motion for peremptory reversal.

A motion to remand can: (1) permit the trial court to address an issue that should already have been addressed, but was not; or (2) allow appellate counsel to further develop the factual record in order to permit a better-informed appellate review.

A motion for peremptory reversal asks the Court of Appeals to peremptorily reverse the judgment without requiring full briefing or oral arguments because the trial court’s reversible

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<sup>195</sup> MCL 712A.1(3).

<sup>196</sup> *In re Terry*, n 122 *supra*.

<sup>197</sup> See MCR 7.212.

<sup>198</sup> See MCR 7.211(C)(3).

<sup>199</sup> See MCR 7.211(C).

error is patently obvious. Appellate counsel might file a motion for peremptory reversal when, for example, there were obvious defects in the notice provided to the parent and trial counsel properly preserved the issue for appeal.

### **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 protect the parent's interests and ensure that the court makes a decision that serves the best interests of the child.