Defending Against Termination of Parental Rights Petitions

Advocacy Must Begin At The Beginning

- Prevent unnecessary removals
- Challenge unwarranted adjudications
- Limit the scope of service plans
- Ensure that the agency is making reasonable efforts to reunify
- Fight for liberal parenting time
- Demonstrate your client's progress at every hearing. Conduct your own investigation
- Argue for the return of the child at the PPH, or sooner, if reunification would not cause a "substantial risk of harm to the child's life, physical health, or mental well-being." MCL 712A.19a(5)

Challenge the need to file a TPR petition

- Too soon. Child has not been in foster care for 15/22 months. MCL 712A.19a(6)
- MCL 712A.19a(6) exceptions:
  - The child is being care for by relatives
  - Compelling reasons that filing a petition is not in the best interest of the child
    - Adoption is not the appropriate permanency goal
    - No grounds to file a TPR petition exists
    - Child is unaccompanied refugee child
    - International legal obligations or compelling foreign policy reasons that preclude TPR
  - State has not provided the child's family necessary services

Prior to ordering the filing of a TPR petition

- The court must consider the views of the child.
- MCL 712A.19a(3): "The court shall obtain the child's views regarding the permanency plan in a manner that is appropriate to the child's age."

TPR Petitions

- Must file an original, amended or supplemental petition requesting TPR. MCR 3.977(2)
- Who can file a TPR petition?
  - Prosecutor
  - Agency
  - Child, guardian, custodian
  - Concerned person (foster parent, under certain conditions)

Court may suspend parenting time. But it is not mandatory. MCR 3.977(D). Decision is based on the child's best interest. *In re Laster*, 303 Mich App 485 (2013)

TPR Cases

- No right to jury trial. But if TPR is requested at the initial dispositional hearing, you have the right to a jury trial for jurisdiction
- Rules of evidence may or may not apply
  - No – allegations related to grounds of jurisdiction
  - Yes – new or different allegations, TPR at initial disposition
  - No – best interests findings

TPR Cases

- Timing for Hearing on TPR Petition:
  - 42 Days after filing Supplemental Petition – MCR 3.977(F)(2), 3.977(H)(3)
- Two Part Determination:
  - Statutory Grounds For Termination – 712A.19b(3)
  - Court need only find one statutory ground to terminate
  - Best Interests Determination – 712A.19b(5)
- Burden of Proof:
  - Statutory grounds = Clear and Convincing
  - Best Interests = Preponderance of Evidence
    - *In re Moss*, 301 Mich App 76 (2013)

7

TPR – Child's Best Interests

Mandatory Factor(s) to Consider:

- Placement with relative at time of termination—must explicitly state this factor was considered
  - *In re Mason,* 486 Mich 142 (2010); placement with relatives is a factor that weights AGAINST TPR.
  - *In re Mays*, 490 Mich 993 (2012)
  - *In re Olive/Metts*, 297 Mich App 35 (2012)
    - *** since Mason, several cases reversed because of failure to explicitly consider this factor*

8

TPR– Best Interests

- Factors that MAY Be Considered, include but not limited to the following:
  - Need for stability and permanency
    - *In re VanDalen*, 293 Mich App 120 (2011)
  - Child's bond to parent
    - *In re Olive/Metts*, 297 Mich App 35 (2012)
  - Parent's parenting ability
    - *In re Olive/Metts*
  - Advantages of foster home over the parent's home
    - *In re Olive/Metts*
  - Parent's history of substance abuse and/or mental health
    - *In re AH,* 245 Mich App 77 (2001)

9

After receiving the petition, you must

- Review it closely. Move to strike irrelevant allegations.
- Request discovery pursuant to MCR 3.922
- Receive and review *the entire agency file*, including all court reports, service plans, evaluations and even documents not filed with the court
- Closely review the DHHS Foster Care Manual to assess whether the agency followed its own policies

Next steps

- Review the case with your client.
- Interview all service providers and foster care workers
- Consider retaining an independent expert to assess your client's capacity
- Explore settlement possibilities – guardianship (probate/juvenile), custody with non-respondent parent, voluntary release (see MCL 712A.19b(3)(m)

- Litigate facts drawn from the language of the statutory provisions alleged in the petition.

Special considerations - TPR at initial disposition

- Rules of evidence apply! MCR 3.977(E)(3)
- Is this an aggravated circumstances case?
  - MCL 722.638
- If not, must DHHS make reasonable efforts before proceeding to TPR?
  - *In re Mason*/*In re Rood*/MCL 712A.19a(2) – YES
  - COA case law, *In re HRC*, 286 Mich App 444 (2009) – NO
  - Preserve the issue for appeal!

Special considerations - TPR and incarcerated parents

- *In re Mason*, 486 Mich 142 (2010)
  - Incarceration alone is not grounds for termination
  - Incarcerated parent CAN provide proper care and custody for a child by arranging for someone else to care for the child
  - DHHS must make reasonable efforts to reunify child with incarcerated parent
  - Incarcerated parents must be given the opportunity to participate in all hearings, via phone, as set forth in MCR 2.004

Special considerations – ICWA/MIFPA

- Additional findings – MCR 3.977(G)
- Court must be satisfied that "active efforts" have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
- Court must find, beyond a reasonable doubt, including the testimony of at least one qualified expert witness, as defined in MCL 712B.17, that continued custody will likely result in serious emotional or physical damage to the child.

Common TPR Defenses

- Agency has failed to make reasonable efforts
- Parent has substantially complied with the service plan
- Parent has a valid justification for any failure (financial, incapacity, illness)
- TPR will cause more harm than good for the child
- TPR is unnecessary because adoption is not the permanency goal
- Child is living with relatives or other parent.

Advice of Rights Following TPR

Immediately after entry of a TPR order, court must provide respondent either orally or in writing (see JC44) of:

- Right to appellate review
- Right to attorney for appeal & provide transcripts, if financially unable to obtain
- Request for attorney must be made w/in 14 days of either notice of TPR order or order denying post-judgment motion
- Right to file a denial of release of identifying information, revocation of release, and to keep information current

17