



The Preliminary Hearing: Preventing Unnecessary Removals



The Reality

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



The First Court Hearing

- Rushed
- Perfunctory
- Short – typically 20 minutes or less
- Watch out for rubber-stamping of agency decisions



A Child Removed Tends To Stay Removed

- Sequentiality effect - once removal occurs, child welfare system tends to favor removal
 - Bias towards preserving status quo
 - Heightened emphasis on risks associated with placing child with party with fewer litigation resources
 - Litigation is focused on whether parent has harmed the child
 - Judge's vulnerability to negative feedback caused by failure to intervene

Peggy Cooper Davis & Guatam Barua, Custodial Choice for Children at Risk: Bias, Sequentiality & The Law

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

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



Summary of Status Quo

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



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

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



Best Practices – Judge Len Edwards

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

-Achieving Timely Permanency in Child Protection Courts



It is our job to transform reality into the ideal

And The Law And DHHS Policy Are On Our Side



Main Issues To Be Addressed At The Preliminary Hearing

- Authorization
- Placement
- Services
- Reasonable Efforts



Time Before The Hearing

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



Initial Client Meeting

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



Initial Client Meeting

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

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

ASK FOR MORE TIME

Time Limit for Prelim Hearing

- The preliminary hearing must commence within 24 hours of an *ex parte* ordered removal. MCR 3.965(A)(1).
- The court can adjourn for up to 14 days for the attendance of witnesses or for "other good cause shown." MCR 3.965(B)(10).
 - If adjourned, court may make temporary orders for placement only when "necessary to assure the immediate safety of the child."
 - Demand factual findings on "good cause" and "necessary to assure immediate safety" findings.
- Never waive probable cause unless you have a specific reason for doing it that your client understands and agrees with

Courtroom Advocacy -- Authorization

- At the preliminary hearing, the court must determine whether to authorize the petition. Authorization is permitted "upon a showing of probable cause that 1 or more of the allegations are true and fall within the provisions of section 2(b) of this chapter." MCL 712A.13a(2).
- But first, the court "shall determine if the petition should be dismissed or the matter referred to alternate services." MCR 3.965(B)(5).

When should you contest authorization? Some considerations

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

Placement – Authorization Does Not Equal Removal

- Even if petition is authorized, child can be released to a parent – court can order "reasonable terms and conditions necessary to protect the physical health or mental well-being of the child." MCL 712A.13a(3); MCR 3.965 (B)(5) and (12)(a)
- Work with your client to develop "reasonable terms and conditions" a.k.a whatever it takes to prevent removal

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

- Placement only permitted if evidence establishes the following. MCL 712A.13(a)(9); MCR 3.965(C)(2)
 - Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health or mental well-being
 - No provision of service or arrangement except removal is reasonably available to adequately safeguard the child from the above risk
 - Continuing the child's residence in the home is contrary to the child's welfare
 - Reasonable efforts to prevent removal were made
 - Conditions for custody away from the parent are adequate to safeguard the child's health and welfare.
- Court **SHALL** receive EVIDENCE to establish criteria for placement. MCR 3.965(C)(1).



Placement Hearing

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



Placement with relatives

- If child cannot go home, argue for placement with relatives
 - If child cannot go home, child shall be placed in the "most family-like setting available consistent with the child's needs." MCR 3.965(C)(3)
 - Federal and state law prioritize placements with relatives. 42 U.S.C. § 671(a)(19); MCL 722.954a
 - Home study and criminal records check do not have to be done before child is placed with relative. MCR 3.965 (C)(5)
 - Licensing is not a requirement for relative placement. Waiver process is outlined in Foster Care Manual 722-03B.



Parenting Time

- Even if out of home care is ordered, your client has a right to parenting time.
 - The court **MUST** permit each parent "FREQUENT parenting time with a child in placement unless parenting time, even if supervised may be harmful to the child." MCR 3.965(C)(7); MCL 712A.13a(13)
 - If parenting time, even if supervised, may be harmful to the child, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. MCL 712A.13a(13)
 - Right exists even if agency is seeking TPR at initial disposition. No automatic suspension of parenting time.
- Don't accept the common practice that all parenting time must be supervised. Make them justify supervision. Showing of HARM is required.
- Studies indicate that likelihood of reunification increases with more parenting time (e.g. Fanshell and Shin). This is a big issue.



Parenting Time – DHHS Policies

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



Parenting Time – DHHS Policies

“Maintaining family contact and regular visitation is a service to children. Visits preserve a child’s attachment to his or her parents, siblings, and other family members, and can lessen both the child’s and the parent’s anxiety about the child being placed in substitute care.”

“Scheduling of parenting time must be done with primary consideration for the parents’ time commitments which may include employment and mandated service requirements. The supervising agency must institute a flexible schedule to provide a number of hours outside of the traditional workday to accommodate the schedules of the individuals involved.” See also MCL 722.954(b)(3)



DHHS Parenting Time Guidelines

- Ages 0-2: Minimum – 3 times a week
- Ages 3-5: Minimum – 2 times a week
- Ages 6 and older: Minimum – Once a week

“Parenting time should occur in a child and family friendly setting conducive to normal interaction between the child and parent. Parents should continually be involved in activities and planning for their child; such as attendance at school conferences and involvement in medical, dental, and EarlyOn appointments, unless documented as harmful to the child.”

Parenting Time – Incarcerated Parents

Unless there is documented evidence that parenting time or contact would be harmful to the child or there is a no contact order in place, the caseworker must arrange for regular visits or contact between the child and the parent. Alternatives to regular visitation could include phone calls, letters or video visitation via a JPay account.

If supervision is necessary, be creative

- Recruit non-DHS supervisors: relatives, friends, clergy, teachers
- Advocate for visits to occur in non-DHS settings: family home, library, McDonalds, park
- Keep pushing for expansion of parenting time. “As the parent(s) progresses through the case plan, successfully addressing barriers and achieving the parenting time standards as outlined in the parent agency treatment plan, the natural progression of the case is expansion of parenting time.”

Services

- Is your client willing to start participating in services immediately?
 - Strongly encourage that he/she do so.
 - Participation in services is not an admission of guilt
 - Timeline to the PPH starts at the time of removal. No time to spare.
- If so, get a detailed court order setting forth the obligations of the agency: what, by when
- Consider negotiation of dismissal upon completion of short term services.
- ISP needs to be prepared within 30 days after removal. MCL 712A.13a(10)(a); MCR 3.965(E)(1). Parents need to be involved in the creation. The assigned caseworker must make appropriate service referrals for the family, as soon as possible, but no later than 30 calendar days after entry into care. Foster Care Manual, 722-6.

Reasonable Efforts

- The court may order placement of a child in foster care if it finds, consistent with the circumstances, that reasonable efforts to prevent the removal have been made or that reasonable efforts are not required. MCL 712A.13a(9); MCR 3.965(D)(1)
- For federal funding, court finding must be made within 60 days from the date of removal and must state the factual basis for the determination. Requirement stems from federal law. 42 U.S.C. 671(a)(15)(B).

Why does this matter?

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

What are reasonable efforts?

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



How do we challenge it?

- If the agency failed to make reasonable efforts, object. Raise the issue.
- Ask for specific findings.
- Make sure proffer by agencies are actual “efforts.” Make the agency work
 - E.g., FTMs, “referrals”, investigations, petition-filing, drug testing are not reasonable efforts
- Underutilized advocacy tool



MIFPA Considerations; MCL 712B.1 et seq.

- Is there reason to suspect child is either a member of a federally-recognized Indian tribe or eligible for membership?
- If so, court must provide notice to the parent or custodian and tribe by registered mail with return receipt requested.
- No placement hearing can be held until at least 10 days after receipt of notice by the parent and the tribe.



If child is Indian as defined in MIFPA

- Cannot be placed in foster care absent clear and convincing evidence, that includes testimony from at least one expert witness who has knowledge of child-rearing practices of the tribe, that **active efforts** to prevent the breakup of the family were made, that the efforts were unsuccessful and that continued custody would result in serious emotion or physical damage to the child. MCL 712B.15.



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

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



Questions????



Preliminary Hearing Exercise

- Initial client interview – what should you discuss?
- Initial fact investigation – who do you want to talk to? What do you want to learn before the preliminary hearing?
- What is your working theory of the case? What arguments will you make? What requests will you make?
