

HANDLING A TPR: FROM SOUP TO NUTS

Presenters:

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PERMANENT NEGLECT

- Applicable Statutes:
 - Social Services Law:
 - SSL §384-b(7)(a): Definition of Permanently Neglected Child
 - SSL § 384-b(7)(b): Evidence
 - SSL § 384-b(7)(c): Defines “to plan for the future of the child”
 - SSL § 384-b(7)(d): Substance Use Exception-Has to be institutional or hospital (Cross reference with Abandonment)
 - SSL § 384-b(7)(e)(i) and (ii): Relieves Agency of Diligent Efforts by Statute
 - SSL § 384-b(7)(f)(1-6) Defines diligent efforts, explains what are diligent efforts

PERMANENT NEGLECT CONT'D

- FCA § 611: Definition of Permanently Neglected Child Definition
- FCA § 614: Originating proceeding for the commitment of the guardianship and custody of a permanently neglected child
- FCA § 616: Issuance of Summons
- FCA § 617: Service of Summons:
- FCA § 622: Fact-Finding Hearing

PERMANENT NEGLECT CONT'D

- FCA § 623: Dispositional Hearing
- FCA § 624: Evidence in Dispositional Hearings
- FCA § 625: Sequence of Hearings
- FCA § 626: Adjournments
- FCA § 631: Disposition on adjudication of permanent neglect
- FCA § 632: Order Dismissing Petition
- FCA § 633: Suspended Judgment
- FCA § 634: Commitment of Guardianship and custody; further orders

MENTAL ILLNESS & INTELLECTUAL DISABILITY

- **Applicable Statutes:**

- SSL 384-b(4)(c): “ The parent or parents...are presently **and** for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for a child who has been in care of an authorized agency for the period of one year immediately prior to the date on which the petition is filed in the court.”
- SSL 384-b(6)(a): Definition of Mental Illness
- SSL 384-b(6)(b): Definition of Intellectual Disability

MENTAL ILLNESS & INTELLECTUAL DISABILITY

- Proof of Mental Illness or Intellectual Disability
 - SSL 384-b(6)(c): Judge can only make a finding of permanent neglect after having taken testimony from a psychologist or psychiatrist.
 - SSL 384-B(6)(e): “...judge shall order the parent to be examined by, and shall take the testimony of, a qualified psychiatrist or a psychologist licensed ...The parent and the authorized agency shall have the right to submit other psychiatric, psychological or medical evidence. If the parent refuses to submit to such court-ordered examination, or if the parent renders himself unavailable ...the appointed psychologist or psychiatrist, upon the basis of other available information, including, but not limited to, agency, hospital or clinic records, may testify without an examination of such parent, provided that such other information affords a reasonable basis for his opinion.”

MENTAL ILLNESS

- Elements to prove mental illness for termination of parental rights:
 1. The birth parent must have an affliction with mental disease or mental condition;
 2. The disease or condition must be manifested by a disorder or disturbance in behavior, feeling, thinking or judgment; and
 3. The disorder must be of such an extent that if the child were placed or returned to the custody of the parent, the child would be in danger of becoming a neglected child.

INTELLECTUAL DISABILITY

- Elements to prove intellectual disability for termination of parental rights:
 1. The birth parent must have a subaverage intellectual functioning;
 2. The sub-average intellectual functioning must be associated with impairment in adaptive behavior; and
 3. The impairment must be of such an extent that if a child were placed or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the Family Court Act.

ABANDONMENT

- SSL § 384-b(5)(a) and (b): Definition of Abandoned Child
- SSL § 384-b(7)(d): Substance Use Exception
- SSL § 384-b(3)(g)(i): Standard of Proof

PERMANENT NEGLECT

- **Standard of Proof**
 - FCA §624 “Only competent, material and relevant evidence may be admitted in a fact-finding hearing... Evidence of parental contact or of failure to maintain contact with a child subsequent to the date of the filing of a petition under this part shall be inadmissible in the fact-finding hearing.”
 - SSL 384-b(3)(g): Clear and convincing evidence
 - NO HEARSAY!

GATHERING YOUR EVIDENCE

- **Witnesses**
 - Prepare the caseworker(s)!
 - Should you call the service providers?
 - Should you call the Respondent(s)?
- **Records**
 - Subpoenas / Order to Show Cause
 - Certified Records
 - Delegation of Authority

Send Subpoenas out early!!!

ABANDONMENT

- Pursuant SSL § 384-b(5)(a) the following elements must be proven
 - The parent failed to visit the child;
 - The parent failed to communicate with the child OR agency
 - For a 6-month period prior to the filing of the petition
 - The was able to visit and communicate with the child
 - The agency did not prevent or discourage the parent from visiting or communicating with the child
- ** All of these elements must be proven**

ABANDONMENT

- SSL § 384-b(7)(b) “...evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child.”
- SSL § 384-b(7)(d) “For the purposes of this subdivision:
 - (i) A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor; **and**
 - (ii) The time during which a parent is actually hospitalized or institutionalized shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.”
- SSL § 384-b(7)(e) “...evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when (i) The parent has failed for a period of six months to keep the agency apprised of his or her location, provided that the court may consider the particular delays or barriers an incarcerated parent or parents, or a parent or parents participating in a residential substance abuse treatment program, may experience in keeping the agency apprised of his or her location: ”

EVIDENCE

- Standard of Proof
 - Time period
 - Meaningful Contact – what does that mean?
 - Agency did not discourage contact
- Witnesses – call the foster parent?

SURRENDERS

- SSL 383-c, 384, 384-c (notice)
- Types
 - Judicial Surrender
 - Extrajudicial Surrender
- Surrender Committee Meeting
- Conditions – What to take in to consideration?

SURRENDERS

- Who can surrender? (SSL§384)
 - Both parents
 - Other parent if one has abandoned the child
 - Mother and Consent Father (DRL § 111) - Out of wedlock child
 - Guardian of the person (if both parents dead or if mother dead and child born out of wedlock)

JUDICIAL SURRENDERS

- Executed before a Family Court Judge (or Surrogate)
- If child placed through Article 10, Surrender shall be before Family Court that exercised jurisdiction and assigned to same judge wherever practicable
- Prior to Surrender, Judge shall order that notice of the Surrender be given to:
 - (a) any person adjudicated by a court in this state to be the father of the child;
 - (b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of this chapter;
 - (c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of this chapter;
 - (d) any person who is recorded on the child's birth certificate as the child's father;

JUDICIAL SURRENDERS CONT'D

- (e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated or at the time the child was placed in the care of an authorized agency, and who is holding himself out to be the child's father;
- (f) any person who has been identified as the child's father by the mother in written, sworn statement;
- (g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b ; and
- (h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law .

SURRENDER

- **The Judge is required to:**
 - Inform parent or guardian of right to counsel;
 - Right to obtain supportive counseling;
 - Right to have counsel assigned;
 - Consequences of such surrender;
 - Determine if the terms and conditions agreed to in the Conditional Surrender are in the child's best interests;
 - surrender shall become final and irrevocable immediately upon its execution and acknowledgment.
 - Give a copy of the surrender upon the execution
- **The parent is required to:**
 - Provide a mailing address to the agency, and notify the agency of any change in the mailing address;

EXTRAJUDICIAL SURRENDER

- Executed and acknowledged by the parent in the presence of at least two (2) witnesses, before a notary public or other person authorized to take proof of deeds (Commissioner of Deeds);
- At least one (1) witness shall be an employee of an authorized agency trained in accordance with the regulations of the Dept. of Children and Family Services to receive Surrenders.
- At least one (1) witness shall be a person who is LMSW, LCSW, or an attorney who is not an employee, volunteer, consultant or agent of or attorney for the authorized agency to which the child is being surrendered. (Get your friends)
- Any witness may serve as notary
- Authorized agency to which the child was surrendered shall file an application for approval of the extra-judicial surrender with the Court the Adoption is expected to take place in
- Application shall include Affidavits from witnesses stating:
 - the date, time & Place where the surrender was executed and acknowledged;
 - that the parent was given a copy of the surrender;
 - if parent accepted, when supportive counseling was provided and the nature of the supportive counseling;
 - If the agency receives any correspondence or communication, prior to the final order of adoption, that could reasonably indicate the parent's wish to revoke the surrender, they **MUST** promptly notify the Court of the receipt of the correspondence

SURRENDER INSTRUMENT

- Surrender Instrument **SHALL**:
 - Recite that the authorized agency is authorized and empowered to consent to the adoption of such child in the place and stead of the person signing the instrument
- Be executed in the presence of a Family Court Judge (same Judge as all prior proceedings or most recent proceeding if practical) **OR** In the presence of a notary and witnesses and filed in the County Clerk's Office (Unless parent surrendering is in foster care, then it must be a FCJ)

ADOPTION INFORMATION REGISTRY BIRTH PARENT REGISTRATION CONSENT FORM

- Include an adoption information registry birth parent registration consent form, stating whether or not such biological parent or parents, consents to the receipt of identifying information by the child to be adopted, upon the adoptee reaching 18.
- Consent by either parent is revocable at any time
- Revocation of consent of one parent revokes consent for both
- Failure to complete form has no impact on the adoption
- Copy of the Form must be forwarded to the state adoption information registry for inclusion in records maintained by the registry

SURRENDER INSTRUMENT

- Surrender Instrument **MAY**:
- Recite that the person signing the instrument waives any notice of such adoption, provided that an authorized agency shall not accept a surrender conditioned upon adoption by a particular person, unless the agency has fully investigated and certified or approved such person as a qualified adoptive parent.
- Designate a person or persons who will adopt the child
 - If so, adoptive parent or parents need to be a party (signor) of the Surrender Instrument, along with Agency Attorney, Parent or Parents, Attorney for the Child
- Make provision for sibling contact (full or half sibling) subject to Court approval, except if sibling is 14 or older, such terms shall not be enforceable unless the sibling consents to the terms in writing

SURRENDERS

- **Who may intervene in proceeding to set aside a Surrender?**
 - Potential Adoptive Parent
 - Any Person having custody for more than 12 months through an authorized agency

CONDITIONAL SURRENDERS

- The authorized agency shall notify the parent (unless expressly waived by a statement written by the parent and appended to or included in the instrument), the attorney for the child and the court that approved the surrender within 20 days of any substantial failure of a material condition of the surrender prior to the finalization of the adoption of the child
- Prior to adoption, if biological parent fails to adhere to a material condition of the surrender, authorized agency shall file a petition on notice to the parent, with Family Court, informing them of such failure (within 30 days of the failure). In the absence of such filing, the parent or attorney for the child may file such a petition at any time up to 60 days after notification of such failure.
- Parent needs to provide his/her mailing address to the agency

CONDITIONAL SURRENDERS

- **Example Conditions:**
 - Pictures
 - Letters about the child
 - Visitation (This is what bio parents usually want)
 - Is the parent actively visiting with the child?
 - Will visits be detrimental to the child?
 - In Person Visits vs. Virtual visits
 - Try to avoid visitation in months with the child's birthday, and major holidays
 - What can be discussed during visits?
 - Who can attend visits
 - What affect if parent is incarcerated
 - Drop Dead Clauses
 - No pictures / letters on social media

CONDITIONAL SURRENDERS

- **Considerations:**
 - Approach the terms of a Surrender with the best interests of the child (not the parent) in mind
 - Our agency meets with what we call the “Surrender Committee” to incorporate the thoughts of various different people with knowledge regarding the case to get multiple opinions about what is best
 - Consider the ability of the foster/adoptive parents to facilitate the terms

QUESTIONS???

DISPOSITIONS

- **FCA § 623:** Dispositional Hearing
- **FCA § 624:** Evidence in Dispositional Hearings
- **FCA § 631:** Disposition on adjudication of permanent neglect
- **FCA § 633:** Suspended Judgments

DISPOSITION HEARING

- **FCA § 623:** Dispositional Hearing
- **FCA § 624:** Evidence in Dispositional Hearings
- Case Discussion

NEGOTIATIONS / SETTLEMENTS

- Suspended Judgments
- Surrenders
- Filing both Permanent Neglect and Abandonment

SUSPENDED JUDGMENT

- FCA § 633(a) Rules of Court shall define permissible terms and conditions of a suspended judgment. These terms and conditions shall relate to the acts or omissions of the parent or other person responsible for the care of the child.
- So what does that mean?
- Consult Court Rules 205.50

SUSPENDED JUDGMENTS

- **Finding by Admission:** 2 prongs:
 - Diligent Efforts to encourage and strengthen the parental relationship; **and**
 - Respondent has failed: substantially and continuously or repeatedly maintain contact with the child; **or**
 - Plan for the future of the child.
- **Consent Finding:**
 - Doesn't appear to be statutory authority to support consent findings.
 - We have done them and Judges have accepted them.

SUSPENDED JUDGMENTS

- Trial Court Rules 205.50: Terms must be related to the adjudicated acts or omissions of the Respondent and must contain one of the following:
 - (1) sustain communication of a substantial nature with the child by letter or telephone at stated intervals;
 - (2) maintain consistent contact with the child, including visits or outings at stated intervals;
 - (3) participate with the authorized agency in developing and effectuating a plan for the future of the child;
 - (4) cooperate with the authorized agency's court-approved plan for encouraging and strengthening the parental relationship;
 - (5) contribute toward the cost of maintaining the child if possessed of sufficient means or able to earn such means;
 - (6) seek to obtain and provide proper housing for the child;
 - (7) cooperate in seeking to obtain and in accepting medical or psychiatric diagnosis or treatment, alcoholism or drug abuse treatment, employment or family counseling or child guidance, and permit information to be obtained by the court from any person or agency from whom the respondent is receiving or was directed to receive such services; and
 - (8) satisfy such other reasonable terms and conditions as the court shall determine to be necessary or

SUSPENDED JUDGMENTS

- **FCA § 633 (c):** Maximum term of a suspended judgment is one year. Court at the end of the one year can extend for an additional year. The Order must set forth the “duration, terms and conditions” of the suspended judgment and must contain a date certain for a court review not later than thirty (30) days prior to the expiration of the period of the suspended judgment. Order must contain warning (conspicuous print) that a failure to obey the order may lead to its revocation and to the issuance of an order terminating parental rights and committing the guardianship and custody of the child to an authorized agency (DSS) for adoption. A copy of the order, along with the permanency plan, must be provided to the Respondent.

SUSPENDED JUDGMENTS CONT'D

- **F.C.A § 633(d):** Petitioner must report to the Court no later than 60 days prior to expiration of the suspended judgment. Report must be filed with all parties (including intervenors) and indicate how the Respondent has complied with the terms and conditions. The report shall be reviewed by the Court on the scheduled Court date.

Unless a motion or order to show cause has been filed prior to the expiration of the period of the suspended judgment, the terms of the disposition of suspended judgment shall be deemed satisfied and an order committing the guardianship and custody of the child shall not be entered.

SUSPENDED JUDGMENT

- **Violations**

- **FCA § 633 (e):** The filing of a Motion or Order to Show Cause alleging violation of the terms tolls the suspended judgment until entry of the order that disposes of the Motion or Order to Show Cause.
- **FCA § 633 (f):**
 - Upon finding of a violation of the terms of the suspended judgment the Court can:
 - Revoke the Suspended Judgment;
 - Extend the Terms and Conditions of the Suspended Judgment, for up to one year if no prior extension was granted.

SUSPENDED JUDGMENT

- **Hearing on Violation of a Suspended Judgment:**
 - It is a Dispositional Hearing under FCA §623?
 - What is the standard of proof = Best interests of the Child
 - **FCA § 624:** Material and Relevant Evidence is admissible = Hearsay is admissible

SUSPENDED JUDGMENTS

- When should I pursue a hearing on my Permanent Neglect vs. When should I pursue a Suspended Judgment?
 - This is very case specific, but generally,
 - If there is a proof problem with your TPR
 - Caseworker no longer works at agency
 - Caseworker's diligent efforts really weren't that great
 - The case is going to go on for forever and this will be a quicker path to permanency, one way or another
 - Did COVID create additional barriers to visitation and/or services

PRACTICE TIPS

- Be courteous to your adversary, ensure that they have enough time to go over the terms and conditions of the documents with their client;
- Different Judges approach Surrenders differently
- Some will just hit what they need to hit and some will try and talk the parent out of it
- The parent's state of mind may change, if you have a parent ready to surrender, do not hesitate
- If you are between a surrender and a termination petition (PN or Abandonment), TAKE THE SURRENDER
- Don't Forget! Need to have a Permanency Hearing within 30 days of a child being freed, try to address permanency immediately following the Surrender, change the goal to adoption

RESTORE PARENTAL RIGHTS

- **FCA §635:** A parent whose parental rights have been terminated may file the petition when:
 - a. the prior termination of parental rights proceeding occurred more than two years earlier and was based upon the grounds of abandonment, mental illness, intellectual disability, or permanent neglect;
 - b. the subject child is at least 14 years old, remains in foster care, and does not have a permanency planning goal of adoption;
 - c. clear and convincing proof is provided that it is in the child's best interests to restore parental rights; and
 - d. the petitioning parent, the subject child, and the agency with care and custody all consent, unless the court finds that the agency's withholding of consent is without good cause.
- **FCA §636:** Who can Originate Proceeding? Child's Attorney, Agency or Individual to whom Guardianship and custody of the child had been committed, Respondent and/or Respondent's Attorney

CASE LAW

QUESTIONS???