

The Role of the Attorney for the Child in The TPR and Alternatives

Margaret A Burt 2018

Role of AFC in TPRs

- ▶ Do you want child to be freed or not? Arguing for a filing or trying to stop one
- ▶ Do you want a settlement? Suspended Judgment or Surrender with conditions or no conditions, Art. 6 custody or guardianship to someone - POSSIBLE kin gap
- ▶ Your role if it goes to trial - fact finding and potential dispo

ASFA Requirements

- ▶ Under ASFA and NYS law SSL § 384 -b the DSS must file a TPR for :
- ▶ A child in foster care for 15 months in a row or 15 out of the most recent 22 months - starting at adjudication or 60 days after temp placement
- ▶ A child in foster care that a court has determined is abandoned
- ▶ A child in foster care where the parent has been criminally convicted of ASFA crimes

Exceptions to the filing

- ▶ The child is in foster care but with a relative
- ▶ There is a “compelling reason” why it is not in the child’s best interests
- ▶ The agency did not provide the services needed
- ▶ The parent is incarcerated or in substance abuse program and this is significant reason child is in foster care and has maintained a “meaningful role” in the child’s life

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What is a compelling reason?

- ▶ Statute lists some possible ones:
 - Child in care on JD or PINS and other goal is more appropriate
 - Child is 14 or older and will not consent
 - There are insufficient grounds for a TPR
 - The child is in care on an Art. 10, no dispo yet and appropriate goal is still reunification
 - Others based on child’s best interests

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What does it mean to maintain a “meaningful role” ?

- Evidence that shows that the parent expresses or acts in ways that show concern for the child such as:
- Letters, telephone calls, visits with child
 - Working with caseworker, court, lawyers, service providers
 - Taking advantage of services offered, complying with the service plan, positive response to diligent efforts by agency

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Who Decides?

- ▶ The DSS decides if they are going to file and when
- ▶ There is no LAW re what the permanency goal has to be in order to file - policy considerations
- ▶ Court can order the filing but does not have to order it; would not seem court can order agency NOT to file
- ▶ A foster parent can file a TPR if child in care 19 months - BUT.....
- ▶ An AFC can file IF the court orders DSS to do it and they don't and court directs AFC to do it
- ▶ SSL § 384-b (3)(b)

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Termination - SSL§384-b Clear & Convincing Burden of Proof

Abandonment	Permanent Neglect	Intellectual Disability
Mental Illness	Severe Abuse	Repeated Abuse

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Abandonment

Six Months In Care

Most recent 6 months:

- ▶ No visits or communication or no substantial contact
- ▶ Not discouraged or prevented visitation
- ▶ Diligent efforts doesn't have to be proved
- ▶ Dispositional hearing not required

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Abandonment

- ▶ Or any such visits/communications/contacts were inconsequential (lots of case law on this) **and**
- ▶ Parent physically and financially able to visit/communicate/contact **and**
- ▶ Parent not prevented or discouraged from doing so by agency or court **and**
- ▶ Parent evinced an intent to abandon.

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SSL§384-b 5(a)(b)

- ▶ The ability to visit or communicate is legally presumed unless there is evidence to the contrary.
- ▶ The subjective intent of the parent unsupported by evidence shall not preclude a finding of abandonment.
- ▶ The court cannot require a showing of diligent efforts to encourage the parent to visit or communicate.

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Permanent Neglect

One Year in Foster Care or 15 of Last 22 Months in Foster Care

- ▶ Agency provided diligent efforts to reunify unless court excuses AND
- ▶ Parent fails to:
 - Maintain contact with child or
 - Plan for return of child

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Insubstantial or Infrequent Contacts

Visits or communication which is of such a character as to overtly demonstrate a lack of affection and concerned parenthood shall not be deemed a substantial contact.



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Failure to Plan

- ▶ Take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a reasonable period of time under the available financial circumstances.
- ▶ The plan must be realistic and feasible.
- ▶ Court may consider the failure of the parent to utilize medical, psychiatric psychological, and other social and rehabilitative services and material resources made available to the parent.

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Diligent Efforts MUST be Proven Unless Excused:

- ▶ Visitation
- ▶ Appropriate assessment and services and transportation and funding
- ▶ Planning with parent
- ▶ Keeping parent informed



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What Are “Diligent Efforts to Reunify Foster Child with Parent”?

- ▶ Diligent efforts are reasonable efforts.
- ▶ Social Services Law 384-b 7 (f) Reasonable attempts by an authorized agency to assist, develop, and encourage a meaningful relationship between the parent and child, include:

- (1) **consultation and cooperation** with the parents in developing a plan for appropriate services to the child and his/her family;
- (2) making suitable arrangements for the parents to **visit the child**;

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What Are “Diligent Efforts to Reunify Foster Child with Parent”?

- (3) **provision of services and other assistance** to the parents, except incarcerated parents, so that problems preventing the discharge of the child from care may be resolved or ameliorated;
- (4) **informing the parents** at appropriate intervals of the child’s progress, development, and health.

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Permanent Neglect

Exceptions to Diligent Efforts Requirement

- ▶ Court has previously found that agency need not provide reasonable efforts –FCA § 1039-b – what are these?
- ▶ Certain crimes, severe abuse, refused services for 6 months, abandoned baby under 5 days old. prior TPR

Also –

- ▶ More than six months without address
- ▶ Incarcerated and fails to cooperate more than once
- ▶ Efforts to reunite would be detrimental

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Permanent Neglect

Special Situations

- ▶ Missing parents
- ▶ Incarcerated parents
- ▶ “Denying” Parents



Must Hold Dispositional Hearing

- ▶ May or may not terminate
- ▶ Suspended judgment

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Incarcerated and Residential Parents

- ▶ Need to be careful
- Court must consider “special circumstances” of incarcerated and residential treatment parents and if there was some “limitations” placed on contact or on service availability that impacted the parent’s ability to stay in contact with the child or to plan for the child’s future
- What does this really mean?

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Mental Illness/ Intellectual Disability

One Year In Care

Parent presently mentally ill or intellectually disabled as defined by statute

- ▶ Expert examines parent and testifies
- ▶ Must not be able to parent for the foreseeable future
- ▶ Diligent efforts do not have to be proven
- ▶ Dispositional hearing not required

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Mental Illness/Intellectual Disability

- ▶ child has been in care of county/agency for the **last year** prior to filing the TPR petition **and**
- ▶ Parent is mentally ill (expert evidence needed) **or**
- ▶ Parent is intellectually disabled (expert evidence needed) **and**
- ▶ As the result of mental illness or intellectual disability the parent cannot now provide proper and adequate care for the child and such impairment is likely to remain in the foreseeable future.

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Mental Illness

Mental illness means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in 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.

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Intellectual Disability

Intellectual Disability means subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in 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.

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Severe Abuse/Repeated Abuse

Child in Care

- ▶ Severe abuse based on certain family court or criminal court findings
- ▶ Repeated abuse based on more than one family court abuse finding same child or sibling
- ▶ Must show diligent efforts unless court has previously ruled or finds exception
- ▶ Must have dispositional hearing

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Repeated Abuse

- ▶ Child in care of county or agency **and**
- ▶ This child has been found to be abused (case #2) [under FCA §1012 (e)(i) or (iii)] **and**
- ▶ This child and/or another child of this parent was previously adjudicated as abused(case #1) [under FCA §1012 (e)(i) or(iii)] within **5 years** of filing abuse case #2 **and**

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Other Information

- ▶ DSS can plead one or more grounds to do a TPR
- ▶ You may settle case as to one or both parents via a surrender (with or without conditions) or a suspended judgment and proceed with the trial vs. other
- ▶ DSS can prevail as to one parent and fail as to the other
- ▶ Some unwed fathers may have consent father rights and others will have only notice father rights or no rights

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Other Information

- ▶ Court will have to rule on whether the unwed father has rights which will be binding on any adoption court
- ▶ “Dale P” TPR possibilities
- ▶ TPRS can and do often get appealed and you cannot do the adoption while it is on appeal as per reg – 18 NYRR 421.19(i)5(i)
- ▶ Other permanency options should be considered when and where appropriate

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Dispo Issues

- ▶ Children who will not consent to an adoption
 - Before 14
 - After 14Should DSS even file?

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TPR is filed!

- ▶ Go to FF (and dispo) on the TPR – also deal with any appeal – takes several years in this part of the state; no possibility of mandated contact after

OR

Surrenders – mostly conditional
Suspended judgments

Options at Dispo

- ▶ Dispos on perm neglect TPRs – must be solely on the basis of best interests, no presumption that any particular disposition is in best interests
- ▶ 1. Dismiss petition
- ▶ 2. Suspend judgment
- ▶ 3. Free child for adoption and commit guardianship and custody of child to agency
- ▶ 4. If someone has filed an Art 6 custody or guardianship petition, Judge can consider it and hear that with the dispo – Judge then would not free child but would grant custody or guardianship

Suspended Judgments – FCA § §631 and 633

- ▶ Only allowed where TPR ground is Permanent Neglect or Severe/Repeated Abuse
- ▶ Terms and conditions in order must relate to acts of parents
- ▶ Can be for up to one year and another year under exceptional circumstances – no more at all after that

Suspended Judgments on Permanent Neglect TPR

Court can issue suspended judgment on permanent neglect TPRs for up to 1 year and can issue an extension for additional 1 year, but NO MORE.

- ▶ SJ order must have terms and conditions and duration specified – report 60 days before end of SJ re compliance
- ▶ SJ order must contain date for court review no later than 30 days before end of order

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Suspended Judgments

What happens if parent violates SJ?

- Must bring case back into court before the set date for the review
- Judge can now TPR or continue SJ if not continued before
- Must make sure court finds violation but also reviews best interests



CONDITIONAL
SURRENDERS
AND
ADOPTIONS WITH
CONDITIONS
SSL 383-c
SSL 384
FCA 1055-a
DRL 112-b

Conditional surrender?

- ▶ If one of the conditions is that a particular person adopt the child, that person must already be a foster parent or an approved adoptive parent or the surrender can't be conditioned on them adopting SSL § 383-c(2)
- ▶ If there are conditions of any kind that include a particular person(s) adopting then that person(s) must also agree to and sign the conditions SSL § 383-c
- ▶ DSS could legally accept terms that did not include condition of a particular person adopting BUT arguable that if foster parent for over a year, is a party - no case law on this yet

So WHEN is it a good idea to consider?

Ideas

- ▶ Child knows the parent and there are positive aspects to the relationship
- ▶ Birth parent and adoptive parent have relationship – there are able to manage it
- ▶ Agency can get out
- ▶ DETAILS of agreement are crystal clear
- ▶ KEEP it from coming back
- ▶ ANTICIPATE problems

Not such a good idea? DANGER SIGNS

- ▶ Child does not know parent
- ▶ Child has had problems with contact
- ▶ No adoptive parents have been identified and there are lots of terms
- ▶ More than one set of adoptive parents who do not agree on issues
- ▶ Adoptive parents who have never met/do not know/ actively have problems with birth parents

What terms should be considered?

- ▶ Take your time
- ▶ Everyone needs to think of THE CHILD
- ▶ Assume it will be honored
- ▶ It must be DETAILED and CLEAR to everyone

Terms to consider

- ▶ Details on what will happen before the finalization and what will happen after – who is responsible
- ▶ Understanding the options if there are problems – clarify if all will follow the law, if there is an agreement for more
- ▶ How will communication re contact be made?
- ▶ What exactly are “reports”? Details re photos and use of photos on internet

Terms to Consider

- ▶ DETAILS on visits – contact, time, location, people, “o/p”, makeups
- ▶ A “Dead Man’s Clause” – negotiate time, details that would mean obligation ends
- ▶ Child can refuse at a certain age?
- ▶ Therapist who says no longer in best interests – is this a case law issue?
- ▶ Resumptions of terminated visits

What other terms have some people considered?

- ▶ Failure of terms before finalization allows for filing of TPR
- ▶ Failure of some terms before finalization and birth parent can not revoke
- ▶ Relocation
- ▶ Re-surrender and re- adopt
- ▶ Consent to allow court modification
- ▶ Consent to submit disagreements to a body before litigation permitted

What if relative files a custody petition when TPR is filed or near ?

- ▶ Foster parent have right to intervene as a party in ANY proceedings involving the custody of the child if the child has lived in their home for more than 12 continuous months. SSL§ 383(3)
- ▶ Foster parents who have had a child for more than a year must consent OR can ask court for a "best interests" of the child hearing. FCA §§1055-b; 1089-a
- ▶ Can be more problematic if this happens BEFORE any TPR is filed, and/or if the relative was never notified about the child being in care
- ▶ Foster parent may want to hire a lawyer in these situations

- ▶ Can the Family Court Judge ORDER that the adoptive parents provide contact as part of a surrender or as a dispostional to a TPR?

Court of Appeals

- ▶ The four Appellate Divisions varied on this issue but.....
- ▶ C/A says “**NO**” – Family Courts **do not** have authority to order post TPR contact
- ▶ Matter of Hailey ZZ., 19 NY2d 422 (2012)

So – make a deal or there is nothing enforceable after a TPR and adoption

Art. 6 Custody/V docket around time of a TPR

- ▶ “Relative” must file a petition
- ▶ Court can consider at dispo of TPR
- ▶ If court orders it, there will be no ordered services or supervision
- ▶ Money may be a problem – child only grant for non parent
- ▶ Non-parent custodian – education, health insurance – FCA §§657

Art. 6

- ▶ Parent could modify without knowledge of agency or without going to court – order can be made to the contrary – “loaded 6s” – see handout!
- ▶ Change of circumstances required to modify in court
- ▶ No adoption possible for custodian in the future without consent, abandonment, or mental illness or intellectual disability – no Kingap possible

Art. 6

- Can be done if all parties agree
- It is really permanency – court can order Art. 6 as a dispo at a TPR but no order of supervision or services – so must be “safe” and seen as permanent
- Problem with subsequent voluntary placement

Art. 6

- › If parents do not consent – court combines Art. 6 with the dispo and there must be proof of extraordinary circumstances and then best interests, evidentiary rules for an Art. 6 apply to that portion of the dispo
- › If anyone else does not consent – like DSS/ACS or AFC or foster parent with more than a year with child, then court combines Art. 6 with the dispo and makes finding based on best interests

“Regular” Guardianship

- › Court order under Family Court or Surrogate’s Court
- › Relative must file the petition
- › Non parent re schools , medical insurance
- › May be lack of services – can’t order agency to provide
- › Can go to 21 if child agrees

“Regular” Guardianship

- No supervision of services can be ordered
- May be a problem with money – can get child only grant
- No problem with subsequent voluntary placement

Permanent Guardianship Under FCA §661(b)

- ▶ Child who is in foster care and freed for adoption or orphaned
- ▶ “Best interests” and “not in conflict” with FCA intent
- ▶ Can make all parental decisions – including to consent to an adoption
- ▶ Can be brought by anyone on behalf of the child – must be agency assessment and recommendation

Permanent Guardianship

- ▶ If child is over 14 court will consider their wishes
- ▶ Good alternative to adoption or long term foster care where child does not want to be adopted
- ▶ No foster care or adoption subsidy money!
- ▶ Can continue to age 21 with child’s consent

Subsidized Kinship Guardianship – SSL §458

Allows RELATIVES – and now – NON Relatives WHO have stepped forward FOR THIS CHILD, to APPLY to local district for an ongoing subsidy that is different from the foster care or adoption subsidy and if granted, then petition the court to be appointed as the guardian of the child and receive a subsidy

Relative/ suitable person must be current foster parent of the child **must be related, by any degree**, to the child by blood, marriage or adoption or someone who stepped forward for this child as they knew child or family and must be the child's **CERTIFIED or APPROVED** foster parent for over **6 months** before any application is made

Child must be **under 21** and have been placed in **foster care before 18**
Must be foster care, not an Art. 6 or Art. 10 direct custody arrangement
Can be a foster care under an **Art. 10, a voluntary under SSL or a PINs or a JD**
Art. 10 – the FF and 1st PH must be completed before any application, all others, 1st PH must be completed

Must first APPLY to the local district

- ▶ LOCAL DISTRICT MUST APPROVE FIRST – Court **cannot order until after** local district’s approval of the subsidy
- ▶ Local District controls the decision – not the court

- ❖ **Return home or adoption must not be appropriate** for child – there are “compelling reasons” why these are not in child’s interests – this permanency is subordinate to return home or adoption
- ❖ Child must have strong attachment to relative and relative has strong commitment to **permanently** care for child

- ❖ Child consulted – over 18 must consent
- ❖ Cannot consider the financial status of the relatives
- ❖ Criminal record check of all in home over 18, SCR checks here, other states for last 5 years
- ❖ **THAT THIS IS IN CHILD’S BEST INTERESTS** – again this is subordinate to return home and adoption as a goal

▶ “Relative” can now move the court for the guardianship status and if court grants it, child exits foster care and relative will continue to get a monthly subsidy for the child

▶ “Relative” will get up to \$2,000 to pay for one-time expenses of guardianship proceeding – including attorney expenses

▶ “Relative(s)” is/are child’s sole guardian – local district and court end involvement with child

▶ If the local district denies a relative’s request for this option, can the relative do anything? YES – they will have a limited fair hearing right with OCFS

▶ Could we do this for a freed child? Yes, combine with a Permanent Guardianship under FCA§ 661

▶ **Will these subsidized guardianships provide medical insurance?** YES – if IV- E then would cover, or if guardian cannot provide insurance, then district shall

▶ **Any other services?** YES – independent living services, education and training vouchers

▶ **How long would a guardian get the money?** Until 21

▶ Money stops if guardian no longer has legal authority like guardianship was revoked or suspended or guardian no longer supporting the child

▶ Successor Kin Gaps can be appointed! –need not be a relative!!

FCA §1055-b and FCA §1089-a will require Judge to consider child's best interests including:

- ❖ Permanency goal of the child – **Judge** must determine that there is a **compelling reason why return home and adoption are not appropriate for the child** – just like district was required to do as well

❖ FF and 1st perm hearing are completed

❖ Will be a safe and **permanent** home

❖ Relationship between child and relative

❖ Must consult with the child, 14 or over must ask preference, over 18 must consent

▶ In dispo or perm hearing – (not likely at dispo, too soon to rule out return home or adoption, usually)

▶ If in dispo, 1st perm hearing must be finished

▶ If parents do not consent – court must find **extraordinary circumstances**

▶ If AFC does not consent, then court must rule on **best interests** – DSS/ACS already consented re approval of subsidy

▶ **MUST** order that ACS/DSS and AFC be notified and be parties to any subsequent proceeding to modify to modify the guardianship or it's terms

▶ Could you add other terms to the order?
"Loaded Order" - Like Art. 6?
See handout for suggestions!

▶ FCA §1089(a) - Court **MAY NOT** order anything further under the Art. 10 - it's over

▶ No supervision or services for the guardian or the parents or respondents

▶ Guardian may be eligible for preventive services but court cannot order district to provide

THIS IS AN IMPORTANT CONSIDERATION!

▶ Guardian has right to physical custody of the child and the right to "make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs"

▶ May want even more detail in the order in certain kinds of cases

▶ Parents still have parental rights

▶ Parents can seek visitation and can move to modify/cancel this guardianship in the future

Pop-Up Relatives

- ▶ Proper notification reduces likelihood
- ▶ Proper notification make relative less sympathetic
- ▶ Foster parents who have had child for one year and want to adopt can trump relatives—relatives must be told

What if relative wants child who has already been freed for adoption?

- Foster parents have a first priority to adopt – even over relatives – if the child has lived in their home for more than 12 continuous months before being freed for adoption. Social Services Law § 383(3)
- Case law in this area supports foster parents in most instances, could be problematic if foster parents are unsure about an adoption or have had child less than 12 months
- Rare cases – but can happen – that court will allow relative to adopt over foster parent
- Foster parent may want to hire attorney

Can DSS stop a particular person from adopting a freed child?

- ▶ YES
- ▶ DRL §111 (f) requires agency to consent to the person(s) who are going to adopt – so agency could stop a foster parent or a relative from adopting by refusing to consent
- ▶ The case law supports this as well

Do foster parents have the right to file for custody or visitation of a child might be going home or with a relative?

- So far, NYS courts have not recognized a foster parent as having a “right” to visit with a former foster child –also former foster parents who had child in their home for over 12 months are supposed to be formally noticed of perm hearings if child is still in care or returns to care
- So far, NYS courts have generally said that foster parents cannot file “custody” petitions as a way of stopping a child from returning to a birth home – can argue as a party to any proceeding in which the court contemplates doing so

Does a birth family have any rights to see a child after an adoption?

- ▶ Yes, but only if the birth parent did a conditional surrender, enforceable as per the conditions and as per child’s best interests
- ▶ Yes, birth grandparents can still seek visitation but would have to show prior positive relationship– DRL§ 72
- ▶ Yes, birth sibs and half sibs can still seek visitation if in child’s best interests – DRL§ 71

QUESTIONS?
