



# PERFECTING PRACTICAL PERMANENCY

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# Brief Recap of Milestones

- Because we are dealing with children, we have certain timelines for when hearings need to take place
- Protective Custody-within 3 days of the ex parte being signed
- Adjudication-within 60 days of the children coming into care
- Disposition-within 90 days of the children coming into care
- Case Reviews-every 60-90 days after disposition
- Permanency Hearing-within 1 year of the children coming into care
- Permanency Review Hearings-every 90-120 days
- Tidbits
  - Hearings can be held outside of these time frames if there are compelling reasons for doing so
  - It is not uncommon to get a notification saying “delayed sched adjudication” → This just means adjudication has been scheduled outside of milestones, adjudication is still on.
  - Milestones do not apply if the child is placed in a parent’s custody

# Permanency Options

- Permanency Goal Options
  - Reunification
  - Termination of Parental Rights (TPR)/Adoption
  - Guardianship
  - Another Planned Permanent Living Arrangement (APPLA)
- Focusing Primarily on TPR and Guardianship

# Goal Changes-When Can They Happen?

- Anytime!
  - This is debated amongst practitioners.
  - Missouri Supreme Court Rule 124.01-a permanency hearing shall be held “within 12 months of the date the juvenile is taken into judicial custody...”
  - There are references throughout Chapter 210 and 211 about a goal change occurring sooner than 12 months-automatic grounds for TPR
- Generally, we wait one year and address the permanency goal at the Permanency Hearing.
- There are times when the Juvenile Office, Guardian ad Litem, or Children’s Division may request a goal change sooner than 1 year:
  - Abandoned infant
  - Safe Haven baby
  - Severe/Recurrent Acts of Abuse
  - Presumption of Unfitness

# What to Expect After a Goal Change

- Staffings-who do the parents want to parent the children?
- Mediation-can be ordered amongst parents, relatives, permanency resources, etc.
- PACA-Post Adoption Contact Agreement
  - RSMo 453.080.4
    - Written
    - Must be filed with the Court prior to finalization
    - Judicial approval required and granted only if in child's best interest
    - Biological Parent must acknowledge
      - Adoption is irrevocable, no matter what
      - consent not predicated upon PACA
    - Adoptive Resource must acknowledge
      - Biological Parents have rights to bring action to enforce
      - Remedy is specific performance

# Guardianship-Overview

- A separate case is filed in the Probate Court
- RSMo 475.030 governs
- Probate case is happening simultaneously with the CAN case
- A new GAL is appointed (in Jackson County)
- Parents are entitled to an attorney
- Burden of proof–Preponderance of the evidence the parent is unfit, unable, and unwilling to assume duties of guardianship.
  - K.R. v. A.L.S., 511 S.W.3d 408 (Mo. Banc 2017).
- Children's Division or a hired/subsidy attorney files the probate case
- Juvenile Office is not a party to the probate case

# Guardianship-Overview Continued

- Settlement negotiations in the CAN case don't necessarily follow in the guardianship case
- There can be a trial
- If the guardianship petition is not sustained, no guardianship is issued. The case may remain in juvenile court.
- Guardianships can be dissolved
- Scope of representation doesn't extend to the probate matter

# Termination of Parental Rights- Overview

- A separate case filed within the Juvenile Court
- Chapter 211.447 governs
- Case is heard by our Judge
- Same GAL agency, can have the same attorneys for the parents
- Filed by the Juvenile Officer or Children's Division\*-Petitioner has the Burden of Proof.
- TPR can occur through a TPR Petition or through a 2 Count Adoption Petition (the TPR and Adoption occur in the same action)
  - If a 2 Count Petition is filed, this will be heard by a Commissioner
- If the TPR petition is not sustained, barred from re-pleading any of the facts in the future and must wait 1 year before re-filing a TPR
- If there is an involuntary TPR (i.e. a contested or uncontested/default TPR), and the parent is unsuccessful at trial, parent is presumed unfit to the parent-child relationship for 3 years
- We have "may" grounds and "shall" grounds



# Stages of a TPR

- 2 Stages of a TPR
  - 1<sup>st</sup> Stage-Proving Grounds for TPR by Clear, Cogent, Convincing Evidence
    - BOP is different if the Indian Child Welfare Act (ICWA) applies-then, it's beyond a reasonable doubt
    - Only need to prove 1 ground to be successful
  - 2<sup>nd</sup> Stage-Proving TPR is in the Best Interests of the Child by a Preponderance of Evidence
    - Do not have to demonstrate all of the listed factors-could have 1 or more

# Grounds for TPR

- Abandonment (under 2)
- Abandonment (2 and older)
- Guilty of a Crime Against a Child (related to child)
- Guilty of a Crime Against a Child (not related to child)
- Abused or Neglected
- Jurisdiction for One Year or More
- Conceived Due to Forcible Rape
- Unfitness

# Abandonment

- Standard differs depending on the child's age
  - If younger than 2, abandonment period is 60 days-RSMo 211.447.2(2)
  - If older than 2, abandonment period is 6 months-RSMo 211.447.5(1)
- Conduct to consider
  - Failure to provide support-money, gifts, cards, clothing, etc.
  - Only providing support during occasional visits
  - Ability to provide support
  - Attempts to make contact
  - Knowledge of child
- *In re G.T.M.*, 360 S.W.3d 318, 323 (Mo. App. S.D. 2012)-Courts are looking at the parents' intent by considering conduct during the statutory period and before/after the statutory period.
  - The greatest weight *MUST* be given to conduct during the statutory period.

# Abused or Neglected

- JO must prove the child was abused and/or neglected + at least one factor
- RSMo 211.447.5(2)
- 4 factors the Court must consider
  1. Mental Condition
  2. Chemical Dependency
  3. Severe, Recurrent Act of Abuse
  4. Repeated or Continued Failure to Provide Necessary Care
- JO just needs one factor to prevail

# Abused/Neglected Factor 1-Mental Condition

- The parent has a mental condition which is permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders him unable to knowingly provide the necessary care, custody and control of the child.
- Mental condition + unlikely to be reversed + ability to parent is impaired

# Mental Condition-Case Law

- *In the Interest of J.G.W.*, 613 S.W.3d 474 (Mo.App.E.D. 2020)-good details on what evidence was provided to prove mental condition
- *In re K.A.W.*, 133 S.W.3d 1 (Mo Banc 2004)- The condition is so severe that Parent is unable to knowingly provide the necessary care, custody, and control for the child.
- *In re S.M.H.*, 160 S.W.3d 355 (Mo banc 2005)/*In re A.S.W.*, 137 S.W.3d 448, 453 (Mo banc 2004)-must show that the parent has a mental condition that prevents the parent from caring for the child alone and the parent cannot make arrangements for assistance in caring for the child
- *A.M.G. v. P.F.*, 140 S.W.3d 201 (Mo. Ct. App. 2004)
  - (1) documentation-whether the condition is supported by competent evidence
  - (2) duration-whether the condition is permanent or such that there is no reasonable likelihood that it can be reversed; and
  - (3) severity of effect-whether the condition is so severe as to render the parent unable to knowingly provide the child necessary care, custody or control.
- *In re D.C.H.*, 835 S.W.2d 533 (Mo. App. S.D. 1992)/*In re S.P.W.*, 707 S.W.2d 814, 824 (Mo. Ct. App. 1986)-need an expert to testify

# Abused/Neglected Factor 2-Chemical Dependency

- The parent has a chemical dependency which prevents him from consistently providing the necessary care, custody, and control of the child and which cannot be treated so as to enable the father to consistently provide such care, custody, and control over the child.
- Drug use + unable to be treated + ability to parent is impaired

# Chemical Dependency Case Law

- *In the Interest of D.D.C.*, 351 S.W.3d 722, 730 (Mo. App-W.D. 2011)-A parent's drug use may be treatable, but a child is not required to remain in legal limbo for an indeterminate time.
- *In re S.D.*, 472 S.W.3d 572, 578 (Mo. App. W.D. 2015)/*In the Interest of E.R.M.S.*, ED111003- Courts may draw an adverse inference of continued drug usage from a parent's refusal to submit to drug testing.
- *In re K.M.B.*, 883 S.W.2d 123 (Mo. App. W.D. 1994)-Evidence of prior unsuccessful attempts at drug rehabilitation may provide a sufficient basis for the court to terminate a parent's rights, even if there is no expert medical testimony



# Abused/Neglected Factor 3-Severe, Recurrent Acts of Abuse

- The parent committed a severe act or recurrent acts of abuse against the child or a child in the family, or that the father knew or should have known that acts of physical, emotional or sexual abuse towards the child or another child in the family were being committed.
- Severe-think of acts that shock the conscious.
- Recurrent-more than once

# Severe/Recurrent Case Law

- In the Interest of S.R.H., 589 S.W.3d 62, 2019 Mo. App. LEXIS 1527, 2019 WL 4618400
  - Isolated abusive acts or conditions may not support termination when considered individually, but if they form a consistent pattern, are recurrent or are repeated, they can, when considered in combination, rise to the level of abuse and support termination. *Id.* at 11.
  - When a parent has committed severe and recurrent acts of abuse toward his child, logic and life experiences dictate the presumption that an unreformed parent will continue to be a threat to the welfare of the child for the foreseeable future." *In re J.L.G.*, 399 S.W.3d 48, 60 (Mo. App. S.D. 2013) (quoting *In re T.M.E.*, 169 S.W.3d 581, 588 (Mo. App. W.D. 2005)).
- *In re C.M.W.*, 813 S.W.2d 331 (Mo. App. W.D. 1991); *In re M.H.*, 859 S.W.2d 888 (Mo. App. S.D. 1993)-Direct abuse against the child for whom the court has terminated parental rights is not necessary
- *In re J.A.F.*, 570 S.W.3d 77 (Mo. App. W.D. 2019)-A "severe act" finding in the underlying adjudicatory proceeding under [§ 211.031.1, RSMo Supp. 2019](#), may serve as conclusive evidence of the severe act in the termination case.

# Abused/Neglected Factor 4-Repeated or continued Failure to Provide

- The parent has repeatedly and continuously failed, although physically and financially able to do so, to provide the child with adequate food, clothing, shelter, education, and other care necessary for his physical, mental or emotional health and development.

# Failure to Provide Case Law

- *Juvenile Officer v. J.M. (In the Interest of K.M.)*, 249 S.W.3d 265, 2008 Mo. App.- Contribution, no matter how minimal, demonstrates a parent's intent to continue the parent--child relationship.
- *In re A.L.B.*, 743 S.W.2d 875 (Mo. App. E.D. 1987); *R.L.P. v. R.M.W.*, 775 S.W.2d 167 (Mo. App. E.D. 1989)-A parent's lack of employment is no defense to an allegation of failure to support, but a parent's lack of *capacity* to be employed may be a defense.
- *In the Interest of M.J.H.*, 398 S.W.3d 550 (Mo.App.S.D. 2013)-A parent is obligated to provide support even in the absence of a demand for payment.

# One Year Under Jurisdiction

- the child has been under the jurisdiction of the Family Court for more than one year, the conditions which led to the assumption of jurisdiction still persist, and conditions of a potentially harmful nature continue to exist.
- RSMo 211.447.5(3)
- 4 Factors the Court must consider
  1. Failure to comply with services
  2. Circumstances still exist
  3. Mental condition
  4. Chemical dependency
- JO just needs one factor to prevail

# One Year Factor 1-Failure to Comply with Services

- Compliance with terms of a social service program entered into with the Children's Division
- Missouri Supreme Court has stated that a "parenting, social services, reunification or treatment plan can provide a trial court with highly relevant evidence." *In re K.A.W.*, 133 S.W.3d 1, 10 (Mo. banc 2004).
- "A parent's efforts to comply with such a plan will provide the court with an indication of the parent's likely efforts in the future to care for the child." *In re K.A.W.*, 133 S.W.3d 1, 10 (Mo. banc 2004).
- "A lack of effort to comply with a plan, or a lack of success despite effort, can predict future problems." *Id J.T.S. v. L.K.T. (In the Interest of S.D.)*, 472 S.W.3d 572, 577 (Mo. Ct. App. 2015).
- The issue in termination of parental rights cases is whether progress has been made toward the plan goals, not whether there has been full or even substantial compliance. *S.M.H.*, 160 S.W.3d. at 369.
- Failure to comply with parts of the service plan is not grounds for automatic termination, nor does partial compliance with a service plan prevent termination. *In the Interest of K.M.A.-B*, 493 S.W.3d 457, 474 (Mo. Ct. App. 2016).

# One Year Factor 2-Circumstances Still Exist

- The success or failure of the efforts of the Juvenile Officer, Children's Division, or other agency to aid the parent on a continuing basis in adjusting his or her circumstances or conduct to provide a proper home for the child

# One Year Factor 3-Mental Condition

- A mental condition rendering the parent unable to knowingly provide the child the necessary care, custody and control.



# One Year Factor 4-Chemical Dependency

- A chemical dependency which prevents the parent from consistently providing the necessary care, custody and control over the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control.

# Unfitness

- The parent is unfit to be a party to the parent and child relationship because of a consistent pattern of committing a specific abuse including, but not limited to, specific conditions directly relating to the parent and child relationship which are of a duration or nature that render him unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental or emotional needs of the child.
- RSMo 211.447.5(5)
- Unfitness is a rebuttable presumption

# Best Interests of the Child

- 7 factors the Court considers

1. Emotional ties to the parent
2. Attempts to maintain regular visitation with the child
3. Providing support for the cost or care and maintenance of the child
4. Whether additional services would likely bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time
5. The parents interest and commitment to the child
6. Whether the parent is incarcerated
7. Whether the parent committed d any deliberate acts, or knew or should have known of any deliberate acts of another, which subjected the child to a substantial risk of physical or mental harm.

# What Happens after the TPR Trial?

- If contested-there will be a waiting period for the Court to review everything.
- Wait for the judgment
- Underlying CAN case continues, all prior orders continue. Visits can continue, parents can continue participating in services.
- After the judgment is entered-
  - Guardianship-CAN case is released from jurisdiction
  - TPR-Adoption can proceed. Depending on the type of TPR petition, jurisdiction may be released or be ongoing until the adoption is finalized
- Parents have a right to appeal-it is the civil death penalty

# TPR vs. Guardianship

- Look at the permanency resource-foster parent vs. relative
- Concerns if parent were to ever reunify
- Child's wishes
- Severity of the allegations
- Parent's history
- Parent's wishes
- Age of the child
- Parent could still have to pay child support with guardianship, not with TPR

# Tips, Tricks, and Tidbits-TPRs

- If handling a TPR, consider record summaries as aids to the Court
- Consider whether the parent will testify-remember, the parent doesn't have a 5<sup>th</sup> amendment right to remain silent
- Think about what exhibits you're willing to stipulate about
- A goal can always be changed back to Reunification
- If the Indian Child Welfare Act applies, you must have a tribal expert testify
- JO/DLS should file a TPR petition within 90 days of the underlying case changing the goal
- Jackson County requires each party to file a Pre-Trial Statement 10 days prior to trial
- Discovery is informal
- Length of time to trial-varies based on how contested the matter will be
- Consider reaching out to attorney on the underlying CAN case
- Consider filing a motion for access to the records on the underlying CAN case