

TRIAL PREP 201

THEORY OF THE CASE

- Start thinking of this when the social services agency submits the file requesting a CHIPS.
- Review information submitted, talk with worker, review prior CP intakes, Family Assessment Notes, PSOP or CW involvement
- Review Odyssey for relevant criminal charges/convictions
- Choose relevant statutory basis (M.S. § 260C.007 subd. 6) that fit your theory of the case/Develop Theory of case based on statute and supported by facts.
- Draft petition
- Facts that support your theory of the case and the statutory basis
- Try to verify spelling of names an DOB, ID father, Race, Tribal involvement
- Address of child's foster care placement on 11.4

PETITION

- Content – See Juv. Prot. Proc. Rule 33.02
- Facts that support relief requested
- Know how you will be able to prove those facts

**If these are clearly identified your case is much easier to settle.

THEME OR THEORY OF THE CASE

THEME OR THEORY OF THE CASE IS A UNIFYING IDEA, NOT JUST A COLLECTION OF FACTS.

HOWEVER, WITHOUT SOLID FACTS A THEME WILL NOT BE CREDIBLE

- Best to keep the Theme as simple as possible
- May be modified as new facts develop
- ALWAYS keep focused on BEST INTEREST OF THE CHILD

DEVELOP INITIAL THEORY OF THE CASE

When case comes in starting thinking of your theory of the case

- What are the facts that support the child being in need of protection or services
- What are the facts and circumstances that support one or more statutory basis in M.S. § 260C.007 subd. 6
- What is needed to facilitate the parent(s) being able to safely parent the child.

BE SURE YOUR THEORY OF THE CASE SUPPORTS BOTH:

- The statutory basis
- Facts that support the child being found in need of protection or services

THE BETTER YOU KNOW YOUR CASE AND THE MORE PREPARED YOU ARE TO TRY IT, THE MORE SUCCESS YOU HAVE WITH SETTLING THE CASE.

MEDIATION OR PPP

- Good to identify strengths or good things about parents
- Ideas everyone can agree to
 - Address behaviors or conditions that led to agency feeling child unsafe
 - Identify statutory basis can agree on
 - Develop next steps

CASE PLANNING ASAP

- Ask SW for a list of suggested Services for discussion at the EPC hearing.
- Discuss settlement with parent attorney at this point
 - If CHIPS not admitted at EPC, discuss settlement prior to admit deny.
 - Written offer often helps settlement. See more detailed chips settlement agreement in materials.
- Provide discovery as early as possible
 - Bates stamping helps with organizing and identification of document during trial
 - Continue to provide as information becomes available
 - Beware if there is an ongoing criminal investigation at the same time as you have a Juvenile Protection Trial pending. Confidential information can not be disclosed, without a court order. (requires motion, court engage in in camera review and determine what if anything should be disclosed after balancing need for sufficient information to prepare again harm to criminal investigation)
- If Criminal matter pending interfering with admission, discuss the parents asserting his 5th amendment right and the court taking adverse inference
 - In Re: The Matter of the Welfare of J.W., 391 N.W. 2nd 791, 795-6 (Minn. 1986), Cert. Den. 479 U.S. 1040 (1987)
- Rule 36 Narrowing Issues:
Prior to the pretrial conference, the parties and their attorneys shall make reasonable efforts to identify and narrow issues of law and fact for trial. This includes identifying (1) the factual allegations admitted or denied; (2) these statutory grounds admitted or denied; (3) any stipulations to authenticity foundation for documents and relevance of documents; (4) specifically state the basis for their objection(s) to the authenticity of or foundation for trial documents and exhibits; and (5) any other stipulations, admissions or denials to identify and narrow issues of law and fact for trial and to avert unnecessary costs in this litigation.

CHIPS TRIAL NORMALLY LESS COMPLICATED THAN PERMANENCY TRIALS LESS INFORMATION OVER SHORTER PERIOD OF TIME

WHEN WORKING ON SETTLEMENT AT CHIPS STAGE

- Understand what big issues are –
- what needs to be admitted
- What needs to worked on/corrected to work toward safe reunification

NEED TO BE ABLE TO SURVIVE AN APPEAL

- Need to be able to prove a
 - Statutory basis
 - Reasonable efforts/active efforts
 - Basis child in need of protection or service
- Provide Evidence to support
 - Clear and convincing evidence
 - Or Proof beyond a Reasonable doubt for ICWA TPR

ASK FOR NECESSARY FINDINGS

- Statutory Basis
- Best Interest
- Reasonable efforts /Active Efforts
- If ICWA Active Efforts
- If ICWA Qualified Witness Testimony
- Balancing (TPR)

PROMOTE CONCURRENT PLANNING AT START OF CASE

- Notice of timelines are given at first hearing
- Work with parent attorney trying to engage parents in concurrent planning

REASONABLE EFFORTS

- Case plan should be road map to reunification
- More than services- include needed outcomes
- Parents should be encouraged to work with case worker
- Case plan goals and progress towards goals need to be reviewed at each review period
- Ask parents at each review is there anything else you feel would be helpful to work on reunification

REASONABLE EFFORTS & WORKING WITH FAMILY ON REUNIFICATION

- Key to best outcomes for children
- Safe reunification
- Or
- Settlement at time of permanency
- Should be put forth in order from review hearings
- Case plan expectations in intermediate disposition/review reports of social worker
- At every hearing inquiry of parents if there are any additional services needed by parent or children.
- Ask for findings at every hearing
- Should be put forth in order from review hearings

PREPARE FOR TRIAL

- Find an organizational process that works for you
- Detailed List of exhibits
 - exhibit list - How will they be accepted into evidence
 - By stipulation, through testimony of author, as business record or other exception to hearsay rule
 - Have exhibits pre-marked
- Petition or list with identification of what exhibit/witness will providing sufficient evidence to prove your case
- Know your case backward and forward
- Be sure you have read all prior orders, reports to court, case notes, intakes, police reports, medical records etc. of your case
- Develop your method for having your materials organized
 - trial notebook
 - folders
 - etc.
- Nicole and Sherry will go over exhibits and witness in more detail,
- Exhibits: Have your copy, Judges copy, and copy for witness if court allows.
- Prepare your witnesses

OPENING STATEMENT - CLOSING OR SUBMISSIONS

- Consistent theory of the case
 - Keep as Simple and concise as possible
- Opening statement
 - Set the stage for the Court to see how you will provide sufficient evidence for your required outcome
- Closing or submissions
 - Help court see how the witness and exhibits provided the court with sufficient evidence to support the findings you are requesting

PETITION

- CHIPS basis
 - M.S. § 260C.007 subd. 6
- Permanency petition filed by month 11
- TPR (preferred M.S. §260C.513(a))
 - M.S. §260C.301
 - By Pass TPR M.S. §260C.503 subd. 2
- Transfer of custody
 - M.S. § 260C.515 subd. 4
- Permanent custody to agency
 - M.S. § 260C.515 subd. 5

PERMANENCY FINDINGS

- M.S. § 260C.517 (Permanency – except TPR)
- Minn. Rules of Juv. Prot. Proc. 42.05
- Court governed by Best interest of child M.S. § 260C.511
- TPR or Consent to Adopt M.S. § 260C.301 -325 (TPR)
- Minn. Rules of Juv. Prot. Proc. 39.05 and 42.08 -42.10
- Determine what Prior Findings already made
 - Ask Court to take Judicial Notice of these Prior Findings and Orders
- Discuss so part of the record.
 - Can as Parents or SW

PREPARE YOUR SOCIAL WORKER

- Insist on Social worker doing a timeline
- Do your own timeline or add to theirs
- Ask for help taking notes during trial
- Make objections where needed – only where needed to preserve issues on appeal
- Be open to settlement even after started trial. Empathy for all is a good thing.

CHIPS AND PERMANENCY TRIAL EXHIBITS

POSSIBILITIES (THEY ARE ENDLESS...)

- Photos, video, audio (including current photo of kids)
- Expert reports
- Curriculum Vitae for experts
- Risk Assessment tools (current and past)
- School records (attendance, grades, IEP testing, plans and meeting summaries AND school nurse and SW records)
- Diagnostic Assessments (parents and kids)
- Treatment Plans
- Case Plans
- ETC!!!

PERMANENCY- DON'T FORGET THE BEST INTEREST FACTORS WHEN COLLECTING RECORDS AND DEVELOPING YOUR EXHIBIT LIST

HOW TO GET THEM???

- Send out records request letters early- it takes time to get them gathered and to follow up with less than cooperative providers...
- Include a parent signed release to your DHS if you have one... indicate in your letter that if they won't send the records to you as the DHS atty to send the records to the social worker...
- If you do not have a signed release- file a motion with the court to request an order for discovery

DISCOVERY

- Easier now with e-service... can serve as received
- Consider requesting an order from the Court allowing all parties access to all the other parties records- otherwise sorting who has access to what records can get tricky when you have multiple fathers or mothers involved
- Save time in trial by re-disclosing all your marked exhibits and exhibit list immediately before the trial... then you don't have the fight of whether they received it amongst the large amount of other discovery in the case
- Do not forget to disclose CV's for your potential witnesses
- SW case notes should be disclosed (may have to redact for atty-client privilege, etc.).
- Remember- discovery is ongoing up through the END of the trial... frequently new things are happening daily on these cases (including while you are in trial)

PERMANENCY TRIALS

- Remember- this is technically a new file... it is cleanest to re-disclose all the materials from the CHIPS case- if you have it all electronically already it is easy to burn to a disk and send all at once
- Consider also disclosing copies of all the previously filed significant Court orders, case plans, treatment reports, etc. that are from the current and all past CHIPS cases

STAY ORGANIZED

- You have to develop your own system... here is mine...
 - Police Records
 - SW records
 - Intakes
 - Assessments
 - Case plans
 - Case notes
 - Provider records- organized by parent/child
 - GAL records
- Use an Excel sheet for your exhibit list... exhibits for these trials can be numerous

WITNESSES: WHO YOU GONNA CALL?

GETTING STARTED:

- Talk to the social worker
- Read through social services' file
- Read through chronology
- If assessments are available, read through those

ITEMS TO CONSIDER:

- Does this person add to my case?
- How is their demeanor?
- Are they going to help me meet one of the elements/burden of proof?
- Are they necessary?
- Are they an expert?
- Can I get information in through another witness?
- Should the children be called to testify?
- Do I need to call the reporters?
- Items to consider (continued):
- How much testimony do I need to prove my case?
- Would this witnesses' testimony be cumulative?
- Will there be a cost to have this person testify and can I justify the expense?
- Should you call the parents to testify?
- Can there be a stipulation to avoid testimony?

REGULAR CHIPS WITNESSES:

- Social Worker
- Law Enforcement
- School (teachers, counselors, principals, nurses)
- Guardian ad Litem
- Parents
- Regular Permanency Witnesses:
- Social Worker
- Guardian ad Litem
- School
- Relatives
- Parents
- Foster care licensor
- Foster Parent(s)
- Supervised Parenting Time Coordinator
- In-Home Family Therapist

OTHER POSSIBLE WITNESSES:

- Individual who completed the parental capacity or parenting assessment
- Therapist (child's and parent's)
- Psychologist
- Psychiatrist
- Physician
- Dentist
- Drug patch expert
- Hair follicle expert
- Records clerk from the hospital or clinic

NOTIFYING WITNESSES:

- Notify and/or subpoena witnesses as soon as possible.
- Prepare a master list of witnesses with their names, telephone numbers, and approximate time they will testify.

PREPPING WITNESSES:

- Talk to every witness prior to trial (they may know more than you expect or be willing to talk about less).
- Meet with your social worker at least twice before the trial and try to go through your intended questions.
- Explain the process to witnesses.
- Discuss cross examination and possible questions they may face.
- Be respectful of their time.

SOCIAL WORKER:

- Make sure they have reviewed their case file, including the case plans prior to meeting with you.
- Decide how comfortable you and the social worker are with one another to determine if you need to go through the proposed questions and answers.
- Discuss the weaknesses you see in the case with them.
- Discuss which exhibits you intend to introduce through them.
- Discuss objections and what they should do if there is an objection.
- Discuss foundation questions if you are intending to introduce a business record through them.
- Remind them to keep their composure during testimony and to listen to each question before answering.
- Are they going to testify to statements made by the child (see Minn. Stat. 260C.165)

EXPERTS:

- Always offer their CV into evidence.
- Discuss your questions with the expert before testimony.
- Discuss possible cross examination questions.
- Can you stipulate to their report being admitted as evidence, rather than having them testify?

PARENTS:

- Do you want to call the parents first?
- Do want to call the parents at all?
- In a child protection matter if the parents invoke the 5th Amendment, the agency may seek a negative inference. In re Welfare of Udstuen, 349 N.W.2d 300 Minn. Ct. App. 1984).

COMMON FOUNDATION QUESTION FOR WITNESS'S OWN BUSINESS RECORD:

- Show them a copy of the Exhibit.
- Do you recognize this document?
- Identify the document.
- Do you have knowledge of the acts and events referred to in the exhibit?
- Was the record made at or near the time of the acts and events referred to in the record?
- Does the Agency have regular record keeping practices?
- Are you familiar with those practices?
- Is it the regular practice of the agency to make this record?
- Was this record kept in the regular course of the agency's business?

QUALIFIED WITNESS-NOT THE WITNESS'S BUSINESS OR AGENCY

- Show the witness the exhibit and identify.
- Is this a document that was received by you (or other CP worker) for the purposes of providing case management services to the family in this case?
- Have you reviewed the record?
- Who made this record?
- Who is that person?
- What is their position?
- What organization is that person with?
- Are you familiar with the organization?
- Was the organization established to do the kind of work involved in preparing the report?
- Did the Agency make a referral relating to the case plan for this person?
- Did you ask the author to provide you with periodic reports (or a report) about the parent's progress?
- Is this report the report requested or one of the periodic reports?
- Did the person have knowledge of the acts and events referred to in the record (or is the record made from information transmitted by a person with knowledge of the acts and events referred to in the record?)
- Is the organization (or author) independent from the child protection agency?
- Is it important that the provider provide accurate information in the report?
- Does the Agency rely on the reports from the provider for case planning purposes?
- Was the record made at or near the time of the acts and events referred to in the record?
- Was the record made in preparation for this trial? (NO!)
- Is document kept in the Agency's file?

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