

EVERY FOSTER CARE CASE IS A COURT CASE:
An Outline of NYS's Family Court Process
By Michael Neff, Esq.

From its inception, and for its duration, every foster care case is a Court case. The child and parent remain within and subject to the jurisdiction of the Court and the case remains with the same Judge until the child is discharged from foster care, whether by reunification with his birth family, release into the legal custody or guardianship of a relative or adoption.

A. Order Approving Voluntary Placement (S.S.L. 358-a)

1. Agency must commence proceeding within 30 days after execution of a Voluntary Placement Agreement
2. To approve the agreement the Court must find:
 - a. Parent or person executing agreement did so knowingly and voluntarily because unable to provide adequately for care, maintenance and supervision of child; and that it would be contrary to welfare of child to remain in home; and
 - b. Agency made reasonable efforts to prevent or eliminate the need for placement and, following execution of agreement until date of hearing, made reasonable efforts for child's safe return home; unless such efforts were not required because of aggravated circumstances.
3. Upon approving agreement Court must set date certain for permanency hearing no later than 240 days after removal.

B. Order of Placement for Neglect or Abuse (F.CA 1055)

1. Court order required for removal of child from home and for remand of child into care of public agency (DSS/ACS) during pendency of proceeding. Each case is initiated by a removal hearing.
 - a. Order required even if parent consents to removal (F.CA 1021)
 - b. Post-petition removal order. (F C A 1027)
 - c. Pre-petition removal pursuant to order where child in "imminent danger" (F.CA 1022)
 - d. Post-removal order where child removed without order because in imminent danger (F.CA 1024)
2. Title IV-E Findings: For New York State to claim federal financial assistance for a child removed to out-of-home care, there must be a determination by the Court within 60 days after removal that:
 - a. Agency made reasonable efforts to prevent or eliminate the need for removal, or
 - b. Reasonable efforts by Agency to prevent or eliminate the need for removal were not required due to aggravated circumstances, and
 - c. It is or would be contrary to welfare of child to remain in home.
3. Court must assign attorney to represent parent until child is returned home or adopted.
4. Parent may apply for return of child during pendency of proceeding. (F.C.A 1027)
5. DSS/ACS has duty to identify, locate, contact and inform non-respondent parent, grandparents, other relatives and persons identified by child over 5 as playing or having played a significant

role in his life of pendency of protection proceeding; ascertain their interest and willingness in either obtaining custody of the child or becoming the child's foster parent; and to inform Court accordingly.

6. Court may order DSS/ACS to expedite investigation into suitability of interested persons and to expedite approval or certification of qualified persons as foster parents.
7. When first hearing case after child removed, the Court must set a date certain for Permanency hearing, no later than 240 days after removal.
8. Court may order DSS/ACS to provide or arrange for such services or assistance as are authorized by existing State Comprehensive Service Plan for rehabilitation of the birth family.
9. Agency must prove by a fair preponderance of evidence at fact finding hearing that child is, is in imminent danger of becoming, or is derivatively, neglected or abused. (F.CA 1044)
10. Agency must prove by a fair preponderance of evidence at dispositional hearing that child's health, safety "and interests are served best by placement. (F.CA 1045)
11. Order placing child with Agency transfers legal custody of child to ACS/DSS.
12. Placement order effective until (and proceeding remains on Court calendar for) permanency hearing on date previously selected.

C. Permanency Hearing (F.CA 1089)

1. Agency-prepared Permanency Report must be served upon parent, non-respondent parent, foster parent in whose home child resides and Law Guardian no later than 14 days before hearing.
2. Report must set forth facts sufficient for the Court to determine
 - a. Whether agency made reasonable efforts to effectuate child's permanency goal.
 - b. Whether parent has utilized resolutely and constructively the services and resources made available to her and has put into practice the insights, lessons learned or tools acquired.
 - c. Whether parent has demonstrated change in her ability to parent her child to the extent she is in a better position to do so now than she was at the time the child was removed from the home.
 - d. Whether there has been amelioration of the conditions or circumstances precipitating placement and a reduction of risk; or, if not, facts demonstrating the child would be at risk if returned home.
 - e. The child's medical, mental health and educational needs and whether those needs are being met adequately by the services he is receiving; or if different or additional services are needed,
 - f. Whether tasks that must be completed require revisions in the family service plan or visitation schedule, and
 - g. The agency's recommendation whether the child should be discharged or remain in foster care; and, if the latter:
 - i) until when
 - ii) under what permanency goal, and

- iii) what actions it will take and by when to effectuate that goal.
3. Report must be made under oath.
 4. Court must determine upon facts and law that agency made reasonable efforts to effectuate permanency goal. If not, eligibility of state to receive federal financial assistance for foster care services rendered the child terminates but may be restored by subsequent finding that reasonable efforts have been made.
 5. Court determines permanency goal for child remaining in care.
 6. Placement of child remaining in care extended until (and Court must set a date certain for) next permanency Hearing no later than 180 days after conclusion of hearing.
 7. Permanency hearing must be completed within 30 days of date certain.
 8. Service plan as modified at hearing and permanency order containing the following must be given to parent
 - a. Child's permanency goal,
 - b. Date of next permanency hearing,
 - c. Visitation plan,
 - d. Direction to parent to keep agency informed of her whereabouts and current mailing address,
 - e. Warning to parent that a proceeding for termination of parental rights could be commenced if child remains in care for 15 of most recent 22 months,
 - f. Notice to parent of her right to attend Service Plan Reviews with attorney or other representative and (vii) notice to parent of her right to appeal
 - g. If discharge of child is likely before next permanency hearing, Court may authorize discharge provided DSS/ACS gives Law Guardian and Court 10 day advance notice
 - h. Absent preauthorization, DSS/ACS cannot discharge child without applying for and obtaining discharge order

D. Freed Child Permanency Hearing

1. Hearing must be held within 30 days after child fully freed for adoption.
2. Purpose of hearing is for Court to monitor progress toward, and by using its powers to overcome (or eliminate) obstacles or barriers to permanency, and expedite finalization.

E. Voluntary Relinquishment of Child for Adoption (S.S.L 383-c)

1. Judicial surrender
 - a. Court must approve surrender upon allocuting parent as to satisfaction with pre-surrender counseling, voluntariness of surrender (no duress), understanding of consequences (knowledge of what surrender means), mental competency, (orientation to time, place and event), and willfulness (not influenced by drugs, alcohol promises or payment of money or other consideration).
 - b. In the event of failure of a material condition of the surrender, within 20 days after failure agency must commence a proceeding for Court to determine consequence of failure.

2. Extra-judicial surrender
 - a. Agency must commence proceeding within 15 days after execution for order approving extra-judicial surrender.
 - b. Court must appoint attorney or guardian ad litem for parent unable to appear in Court to confer with parent and inform Court whether he/she executed surrender voluntarily, knowingly and willingly and consents to its approval.
3. Preserving post-adoption communication and contact by parent with child through written agreement.
 - a. Agreement must be executed/signed by parent, Law Guardian, agency and adoptive parent, if any.
 - b. Court must determine whether terms are in child's best interests and must approve agreement for incorporation into Order of Adoption by reference or otherwise.
 - c. Post-adoption failure or refusal by adoptive parent to comply with terms of agreement does not affect finality of adoption.
 - d. Agreement affords parent standing to commence post adoption enforcement proceeding.
 - e. Agreement may provide for sibling as well as parental communication and contact and any sibling 14 and older must sign agreement.

F. Involuntary Termination of parental Rights (S.S.L. 384-b)

1. Filing petition
 - a. Agency has discretion in deciding whether and when to file petition; except it must file petition after child has been in placement for 15 of the most recent 22 months, unless it can document a compelling reason for not doing so.
 - b. If the Court during a permanency hearing finds reasonable cause to believe that termination grounds exist, it may order agency to file petition.
 - c. Agency may move to vacate order or extend time for filing.
 - d. If time not extended, and agency does not file petition within 90 days after having been ordered to do so, foster parent may file petition unless Court finds reasonable cause to believe foster parent would not be approved as adoptive parent for child.
 - e. If agency does not file petition within 90 days after having been ordered to do so, Court may authorize Law Guardian to file.
 - f. Foster parent may file petition after child has been in placement 19 months.
2. Jurisdiction
 - a. Agency must join as necessary parties, and allege against each grounds for terminating rights, all persons having the right of consent to the child's adoption:
 - i) always the mother,
 - ii) her husband if she was married when the child was born,
 - iii) the child's legal (if not biological) father, and any father not married to the mother who has acquired the right of consent by establishing and maintaining a substantial relationship with the child.
 - b. For the Court to acquire jurisdiction over all necessary parties, the agency must serve or cause to be served upon each personally a summons and petition no later than 20 days before date set to appear in court; or if service cannot be made personally, no later than 30 days by alternative means authorized by the Court. Also, notice must be timely served upon any non-consent father formally identified:
 - i) by mother in sworn statement,
 - ii) in child's certificate of birth or
 - iii) in Putative Father Report

3. Agency has burden of proving by clear and convincing evidence at fact-finding hearing one of the following grounds against each parent:
 - b. Mental illness
 - c. Mental retardation
 - a. Permanent neglect
 - b. Abandonment
 - c. Repeated abuse
 - d. Severe abuse

4. Proof of grounds at fact finding does not terminate parental rights, but instead activates the Court's power to do so. Agency must prove by a fair preponderance of evidence at a dispositional hearing that the child's needs, welfare and interests are served best if freed for adoption.
 - a. Foster parent who has cared for child for 12 months may intervene as of right and become a party to dispositional hearing.
 - b. Relative may intervene and become a party by leave of Court.
 - c. There are no presumptions or preferences afforded any party, whether parent, relative or foster parent. All are "legal strangers" to child and on same footing.
 - d. Sole standard for disposition is child's "best interests" as they are at the time of the hearing, not when the proceeding was commenced, and not by what could have been and even should have been had all concerned adults acted differently earlier; or by what might be because of what they are now willing to do. **What is out-weighs what isn't.**

5. Dispositional alternatives
 - a. While proof the child will be adopted is not a legal prerequisite to termination of parental rights, when a 14 and older child does not want to be adopted, the petition may be dismissed in the interests of justice, notwithstanding proof of grounds at fact-finding, as serving no beneficial purpose.
 - b. Court may afford parent a "second chance or time to complete rehabilitation or recovery by suspending judgment for up to 1 year upon terms and conditions for the parent to observe or fulfill. Agency may move to revoke suspended judgment if parent violates any term or condition. If no revocation motion is made, no less than 60 days before expiration of the suspended judgment, the agency must serve a compliance report and, not less than 30 days before expiration, the Court must hold a compliance hearing.
 - c. The legal import of an order terminating parental rights is that it commits guardianship of the person to the agency, thereby empowering the agency to give consent to the child's adoption without and in lieu of the parent's consent.

H. Agency-sponsored adoption of child in foster care (D.R.L. 110 et seq.)

1. Agency-approved adoptive parent residing in New York may file adoption petition in Family Court for the county in which he resides or in The Family Court freeing child for adoption.
2. Adoptive parent residing out-of-state but finalizing in New York may file adoption petition in the Family Court freeing the child for adoption or in Family Court for the county in which the agency has its principle place of business.
2. Court may grant petition upon determining from its assessment of the suitability of the adoptive parent and the circumstances and needs of the child that it is in the child's best interests that the

adoption be approved.

3. No single factor predominates or controls and negative and positive factors are weighed, balanced and offset.
4. Court not confined to documents and reports submitted by adoptive parent and agency and may request additional documents, reports and information and may appoint Law Guardian or order Probation Office to make investigation and submit independent recommendation regarding finalization.
5. A husband and wife must adopt jointly unless legally separated, or living separate and apart for over 3 years. A cohabiting, but unmarried couple, whether heterosexual or gay, may adopt jointly,