

Legal Training for Dependency, Neglect and Abuse Cases



Track 2



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CHILD AND ADOLESCENT DEVELOPMENT TRAINING FOR GUARDIANS AD LITEM



Child & Adolescent Development Training for Guardians ad Litem

August 4, 2020



Diane Gruen-Kidd, LCSW

Program Administrator at the KY Department
for Behavioral Health, Developmental and
Intellectual Disabilities

Social Worker

Avid sportsfan

Former caregiver for an elder

Dog mom

26+ year (and counting) spouse

Adoptee, adoptee aunt, adoptee great-aunt

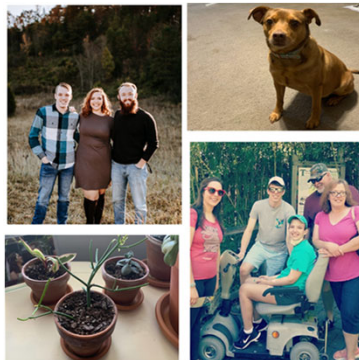
Excels at keeping an organized home and
office, eating my partner's delicious meals,
cursing, and binge-watching Supernatural.





Dyzz Cooper

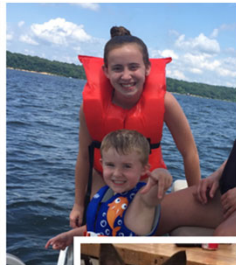
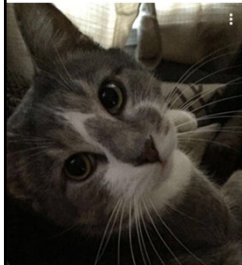
- Youth Coordinator/with lived experience
- Son/Grandson/Nephew
- College Graduate
- Best Friend
- Sports enthusiast
- Avid thrill seeker looking to live my best life



Jesse Dillow

- ★ Young professional with lived experience
- ★ Youth Coordinator
- ★ Son and Brother
- ★ Plant Uncle
- ★ Dog Dad
- ★ Excels in eating Hibachi, playing sims, and never taking off work





Stephanie Sikes-Jones

- Young professional w/lived experience
- Youth Leadership Coordinator
- Wife
- Aunt and Sister
- Cat & Dog Mom
- Excels in napping, eating, adventure, and staying way too busy



Objectives

1. Receive a high level overview of child development for 6-12 years of age.
2. Learn about typical adolescent development stages for teens and emerging adults.
3. Explore the impact of trauma on brain development and behavior.
4. Learn best practices and strategies for engaging with youth in the child welfare system.



"I HAVE COME TO THE FRIGHTENING CONCLUSION THAT I AM THE DECISIVE ELEMENT. IT IS MY PERSONAL APPROACH THAT CREATES THE CLIMATE. IT IS MY DAILY MOOD THAT MAKES THE WEATHER. I POSSESS TREMENDOUS POWER TO MAKE LIFE MISERABLE OR JOYOUS. I CAN BE A TOOL OF TORTURE OR AN INSTRUMENT OF INSPIRATION, I CAN HUMILIATE OR HUMOR, HURT OR HEAL. IN ALL SITUATIONS, IT IS MY RESPONSE THAT DECIDES WHETHER A CRISIS IS ESCALATED OR DE-ESCALATED, AND A PERSON IS HUMANIZED OR DE-HUMANIZED. IF WE TREAT PEOPLE AS THEY ARE, WE MAKE THEM WORSE. IF WE TREAT PEOPLE AS THEY OUGHT TO BE, WE HELP THEM BECOME WHAT THEY ARE CAPABLE OF BECOMING."

-HAIM G. GINOTT



Considerations

- Development occurs in stages related to age.
- These stages are sequential; they cannot be skipped.
- Each stage of development has certain tasks associated with it that must be accomplished before moving to the next stage.
- A person can become "stuck" at a certain stage of development in one or more areas.
- Abuse and neglect can slow the developmental process.



Middle Childhood

Ages 6-12



Physical Development

- Kids grow taller. Between the ages of 6 and 12, children grow an average of 2 inches per year.
- An average of 6-7 pounds per year is gained.
- Motor skill development may show wide variations.
- Signs of puberty emerge at around age 10 (girls) and 11 (boys) on average, but could start as early as age 8 or 9.
- **Key Point:** Children are frequently at different points in their growth and sexual development, despite being the same age.



Cognitive Development



- This is a great time to learn! Brain connections are being strengthened as they are used more frequently, and new connections continue to be built.
- Magical thinking is replaced with concrete, logical thinking.
- Skills such as sequencing, sustained attention to tasks, and filtering out distractions are built.
- Learning to memorize and recall information on demand is important here.



Language Development

- At the beginning of Middle Childhood, kids should be able to speak in simple, complete sentences. As they progress through this phase of development, those sentences should become longer and more complex and include use of proper grammar and pronunciation.
- By age 6, most children can follow a series of 3 commands, which expands to 5 commands around age 10.
- Challenges in hearing or language processing can manifest as acting-out behaviors.



Social Development



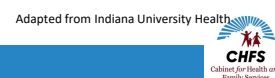
- This is the process by which kids learn to interact with others, and it includes not only building friendships, but also handling conflict.
- Having friends is very important!
- Power differentials become more recognized.
- Later in Middle Childhood, kids start to exhibit some rejection of adult opinions.



The Path to Further Progress

Some important things kids need to learn during Middle Childhood include:

- Building and sustaining self-esteem
- Functioning within a peer group
- Exploring independence
- Skill mastery
- Acceptance of one's own body
- Managing desires, accepting compromises
- Developing a realistic sense of self (ability to identify personal strengths and weaknesses)



Adolescent Development



Shift from “Kids” to “Youth/Young Person”



What words come to mind when you hear “adolescence”?



Adolescent Development

We often describe adolescents by their behavior, and are not always aware of how their behavior is influenced by the changes happening during adolescence in the brain.



Challenging behavior =
symptom of development =
indication of skill need



Video on Adolescent Development

<https://youtu.be/0BJFoGK5GIY>

Think of a youth you work with...



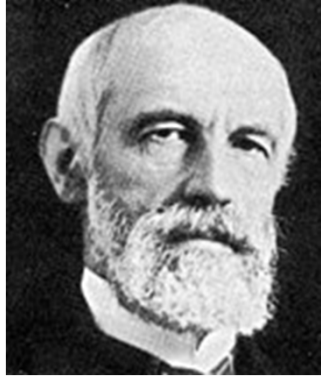
Adolescence is....



- For this presentation:the period after puberty begins and ends between 25-30 for most people (includes emerging adulthood)
- A fairly new term, coming into common usage in the early 20th Century.
- Each adolescent's culture shapes their development.



G. Stanley Hall



“Storm and Stress”

High rates of difficulty in:

- Conflict with parents
- Mood disruptions
- Risk behaviors

“to be normal during the adolescent period is by itself abnormal”



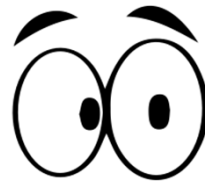
Things we can see, and things we cannot.

Observational Changes in Adolescence:

- Growth + Voice Changes + More Complex Thought Process
 - ***Males of color experience adultification, caucasian males often treated as much younger

Brain Based Changes:

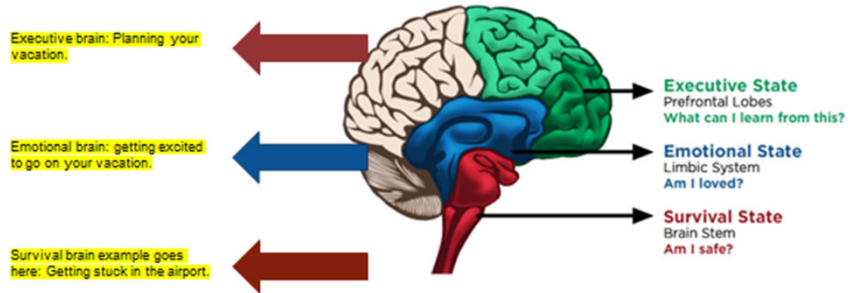
- Peak level of changes in the brain driven by hormones and experiences
 - ***Every moment is an opportunity to support optimal brain development



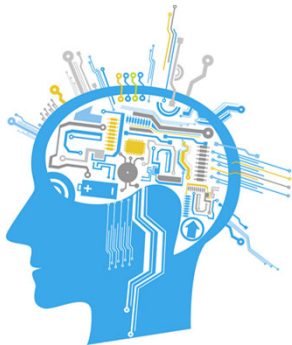
Think of a youth you work with...



What are the three main parts of the brain?



Heightened Brain Wiring During Adolescence



- Pathways - connections made in the brain based on experiences
- Pruning - when underutilized connections are removed (indicates to the brain that these are not necessary)
- Myelination - when commonly utilized connections are strengthened and insulated (indicates to the brain that they are needed)

Adapted from Youth Thrive - The Center of the Study of Social Policy



Experiences
influence the
way our brains
develop, thus
the way we see
the world...



We can help the brain to develop.

- Environments and interactions need to be emotionally and physically safe.
- It's on us to recognize that young people have lived in high stress environments.
- The brain continues to develop through the age of 25-30 for many people.
- Adolescents experience many changes very quickly.
- Stress of Child Welfare Involvement + COVID + Racial injustice and trauma



5 Minute Break



Let's think of a time where you felt extremely upset...



- What happened?
- How did you behave?
- What helped?
- What made it worse?



Impact of Trauma on Development



ACEs

Adverse Childhood Experiences (**ACEs**) are stressful or **traumatic** events, including abuse and neglect. They may also include household challenges such as witnessing domestic violence or growing up with family members who have substance use disorders.

10 original ACE indicators:

- Experiencing physical, sexual or emotional abuse; experiencing physical or emotional neglect; witnessing domestic violence in the home; living with someone who abused substances, was mentally ill, or who was imprisoned/sentenced to serve time; and divorce

5 newly identified Philadelphia Urban ACE indicators:

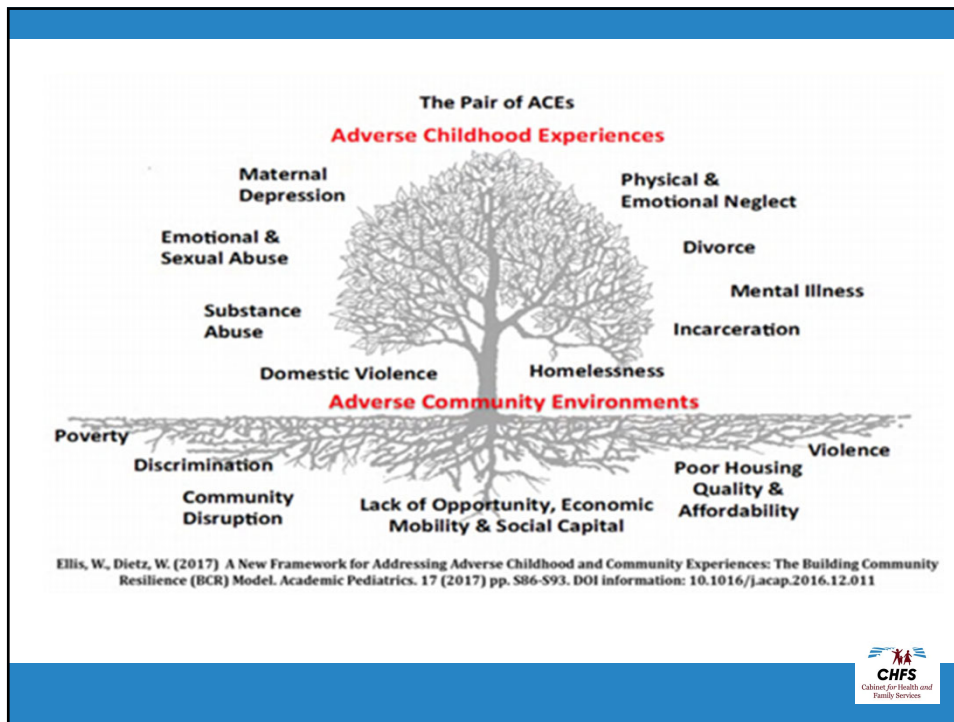
- Experiencing racism, witnessing violence, living in an unsafe neighborhood, living in foster care, or experiencing bullying

Increased risk of certain behavioral and health outcomes:

- Smoking and nicotine use, risk of suicide, substance misuse, cancer, diabetes, obesity, asthma, mental health challenges



Adapted from Youth Thrive - The Center of the Study of Social Policy



Generational Trauma



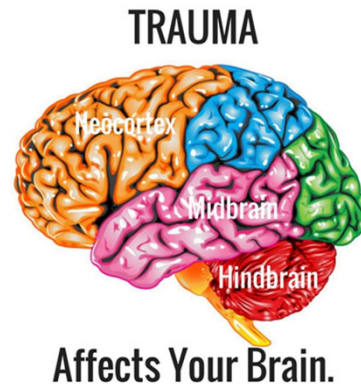
- “Transgenerational epigenetic inheritance”
- Means that research has shown that experiential information is passed down via DNA for generations.
- Descendants of those people impacted by chronic stress and trauma, such as victims of slavery, Holocaust/genocide survivors, witnesses to terrorist attacks, etc., are more likely to be impacted by that trauma in their own DNA makeup before even being born.
- Effects of this can change one’s ability to cope with stressful situations in a way that does not negatively impact them.

Adapted from Youth Thrive - The Center of the Study of Social Policy



What is trauma and why are we talking about it?

- Science shows that trauma changes the brain
- When the event, or series of events, causes a lot of stress, it is called a **traumatic** event. **Traumatic** events are marked by a sense of horror, helplessness, serious **injury**, or the threat of serious **injury** or death.



Understanding the Impact of Trauma



When a young person has experienced significant trauma:

- Impacts all areas of development
- Impulsive and difficulty regulating emotions
- Poor view of self
- Interpersonal connections, trust, & relationships are affected



We can help by understanding...

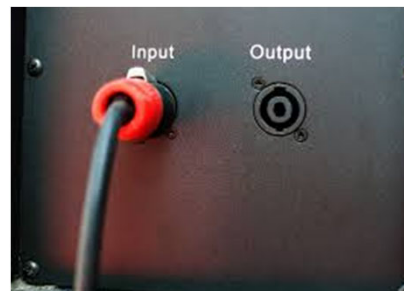
Young people who have lived in high stress environments for long periods:

- Are not easily returned to the calm & connected state
- Respond with rejection, suspicion, aggression, or withdrawal
- Lower brain areas are likely to be more developed (emotional brain)
- Need repetitive positive experiences & opportunities to create new brain pathways



Brain activation may affect brain functioning

- Incoming experience is compared to previous experience, then activates responses on multiple levels
- Perceived as safe, stress system not activated; if perceived as unsafe, activation occurs.



Cycle of Brain Activation

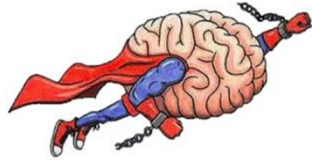


Tips for Calming the Barking Dog

- Belly Breathing
- Visualization
- Finger Fidgets
- Tense and Relax
- Inversion
- Counting
- Walking
- Rocking
- Coloring/Drawing
- 5-4-3-2-1 (See, Touch, Hear, Smell, Taste)



Activation Happens



Activation happens when something reminds you of a past experience.

- Reminders can include certain places, people, words, sounds, smells, sensations, etc.
- When you experience these reminders, it can cause your body to react in a certain way.
- A reminder of trauma may make you feel unsafe or as if you were living through the trauma(s) over again.
- *But youth can use their coping and relaxation skills to gain control!*



Grace LaConte's The 4 Responses to Fear



LaConte Consulting ©2017
<http://lacontecconsulting.com>



Impact of Trauma is NOT Permanent

- Brain cells and connections can be rewired (Neuroplasticity)
- Positive relationships & experiences are critical to build new neural pathways
- There is NO point of no return – everyone can THRIVE!!!!



Youth Engagement Best Practices



What are some examples of practices of Youth Engagement in your work?



What is Youth Engagement?

“The active, empowered, and intentional partnership with youth as stakeholders, problem solvers, and change agents in their communities.”
(Youth Leadership Institute 2009)



Understanding Youth

DOs

- Do use youth views; consider their side of the issue
- Do be personal and interactive
- Do listen
- Do use language we can understand
- Do be straightforward
- Do be patient
- Do stick with it
- Do have respect for youth
- Do communicate appropriately
- Do be open-minded
- Do look for positives

Think of a youth you work with...



Understanding Youth

DON'Ts

- Don't assume that youth have the same views as adults
- Don't just write stuff down
- Don't talk the whole time
- Don't assume that youth don't have stress
- Don't use jargon
- Don't beat around the bush
- Don't assume anything
- Don't lose your temper

Think of a youth you work with...



DON'T GIVE UP ON YOUTH!!!!

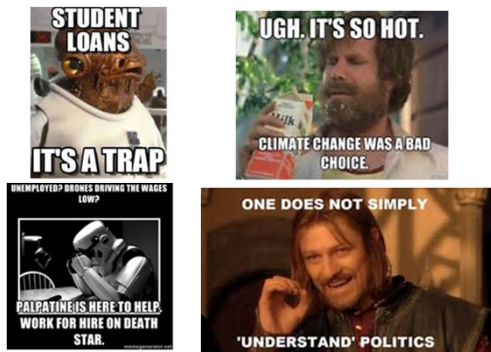


Youth Culture then...



Youth Culture Today

- Text messages
- Memes
- TikTok



TO	FOR	WITH
Young People Viewed as Objects	Young People Viewed as Recipients	Young People Viewed as Resources
Style #1	Style #2	Style #3
<p>The adult is in control with no intention of youth involvement.</p> <ul style="list-style-type: none"> > The objective: Personal growth of young people. > The byproduct: Conformity of young people and acceptance of the program as it is. 	<p>The adult is in control and allows youth involvement.</p> <ul style="list-style-type: none"> > The objective: Personal growth of young people. > The byproduct: Increased organizational effectiveness. 	<p>There is a Youth/Adult Partnership (Shared Control).</p> <ul style="list-style-type: none"> > The objective: Increased organizational effectiveness. > The byproduct: Personal growth of young people and adults.

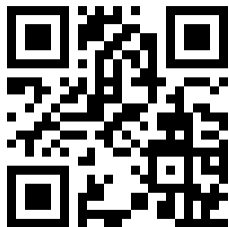


Lived Experiences Examples



Closing

What is one thing you might do differently in your practice based on today's presentation?



Answer by going to
slido.com and typing in
the code below:

#78342



Conclusion

- You have a powerful role in the development of the young people you serve.
- You have power in determining the future with the young people you serve.
- Youth are resources in their own lives!

"I HAVE COME TO THE FRIGHTENING CONCLUSION THAT I AM THE DECISIVE ELEMENT. IT IS MY PERSONAL APPROACH THAT CREATES THE CLIMATE. IT IS MY DAILY MOOD THAT MAKES THE WEATHER. I POSSESS TREMENDOUS POWER TO MAKE LIFE MISERABLE OR JOYOUS. I CAN BE A TOOL OF TORTURE OR AN INSTRUMENT OF INSPIRATION. I CAN HUMILIATE OR HUMOR, HURT OR HEAL. IN ALL SITUATIONS, IT IS MY RESPONSE THAT DECIDES WHETHER A CRISIS IS ESCALATED OR DE-ESCALATED, AND A PERSON IS HUMANIZED OR DE-HUMANIZED. IF WE TREAT PEOPLE AS THEY ARE, WE MAKE THEM WORSE. IF WE TREAT PEOPLE AS THEY OUGHT TO BE, WE HELP THEM BECOME WHAT THEY ARE CAPABLE OF BECOMING."

-HAIM G. GINOTT



Contact Us

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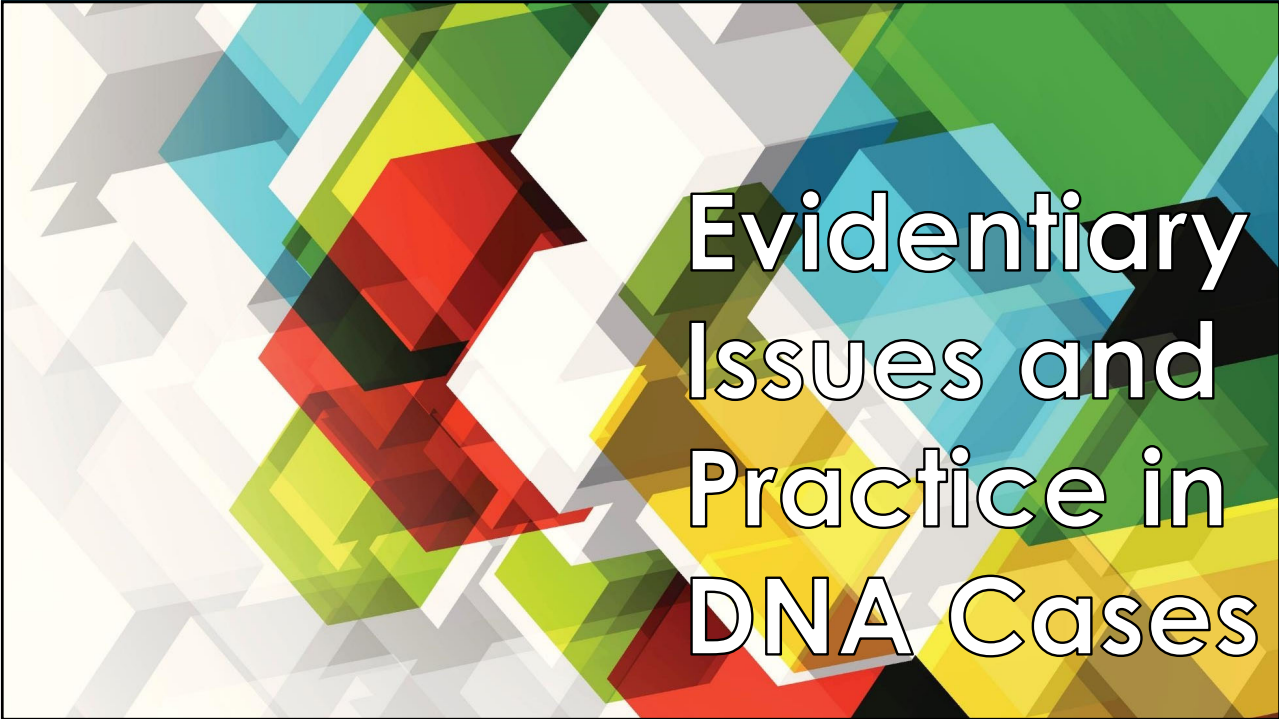
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EVIDENTIARY ISSUES AND PRACTICE IN DNA CASES



Evidentiary Issues and Practice in DNA Cases

Presented by:

- ▶ Rebecca Ballard DiLoreto
*Executive Director, The Institute for Compassion in Justice
Adjunct Professor of Law, University of Kentucky College of Law*
- ▶ Susan Stokley Clary
Attorney and prior Clerk of the Supreme Court of Kentucky
- ▶ Sara Boswell Janes
Attorney and Consultant
- ▶ Anna Stewart Whites
Anna Whites Law Office, LLC
- ▶ Ashley Nicole Larmour
Larmour Law Offices, PSC



THE IMPORTANCE
OF EVIDENTIARY
PRACTICE



The Role of
Ethics in DNA
Cases

FCRPP APPENDIX D –
STATEWIDE STANDARDS OF
EXPECTED CONDUCT FOR
COURT-APPOINTED COUNSEL

Scope

- ▶ Statewide Standards apply to ALL court-appointed counsel (CAC) who represent children, parents, PECCS, or any other person entitled to representation in adoption, DNA and TPR actions.
- ▶ Each CAC shall follow these standards, as well as the Kentucky Rules of Professional Conduct (SCR 3.130 – 3.995).
- ▶ If the Rules of Professional Conduct impose a different duty than the FCRPP Statewide Standards, the higher standard controls.
- ▶ These are default standards for attorneys appointed to represent an adult or child in adoption, DNA and TPR actions. However, local courts may have alternative standards by way of local rule. Please consult any court's local rules to find out if alternative standards have been approved and adopted.

SCR 3.130 (1.3) Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Commentary:

- ▶ *Pursue matters on behalf of a client despite opposition, obstruction or personal inconvenience and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.*
- ▶ *Workload must be controlled so each matter can be handled competently.*
- ▶ *Procrastination is not tolerated.*
- ▶ *Carry through to conclusion all matters undertaken for a client.*

History of GAL/Parent Attorney Initiatives

- ▶ 1998 Audit of GAL Program by the Kentucky Auditor of Public Accounts
- ▶ Kentucky Blue Ribbon Panel on Adoptions
 - ▶ GAL Subcommittee of stakeholders
- ▶ GAL Legislation 2006-2007
- ▶ Ky Supreme Court Family Law Initiative – Subcommittee Recommendations on GAL/Parent Attorney Standards & Guidelines
- ▶ KBA Children's Rights, Child Protection and Domestic Violence Committee GAL/Parent Attorney Standards & Guidelines (compilation of past initiatives) & 2015 KBA Proposed Standards and Guidelines for GALs and Parent Attorneys

Essential Practices For All Court-appointed Attorneys

- ▶ Zealously advocate for your client.
- ▶ Communicate with your client REGULARLY.
- ▶ Explain the child welfare legal process and your client's rights and duties in a way they can understand.
- ▶ Have knowledge and understanding of current federal and state child welfare laws.
- ▶ Prepare for and attend court hearings and reviews.
- ▶ Discuss and understand your client's life circumstances, including strengths, needs, and available resources; and assist them with accessing those resources when possible.

Essential Practices(Cont.)

- ▶ Understand your client's specific trauma history, how your client's trauma history impacts their experience with the child welfare system and ability to engage in child welfare services, and how trauma impacts the attorney-client relationship.
- ▶ Build a relationship of trust and ensure your client experiences fairness.
- ▶ Seek court accommodations that promote equal access and full participation in proceedings.
- ▶ Prepare your client and witnesses for court.
- ▶ Maintain a reasonable caseload and devote sufficient time for advocacy.

Essential Practices(Cont.)

- ▶ Conduct an independent investigation at EVERY stage of the proceeding, before and after the jurisdictional/dispositional phases, which should include obtaining and reviewing ON AN ONGOING BASIS and, to the extent allowable under state law (including subpoena, discovery, or court order), child welfare agency records, service provider records, and all other relevant records for parents and children.
- ▶ Provide ethical legal representation.
- ▶ Confirm your client receives proper notice and understands, to the best of their ability, the duties/restrictions imposed by court orders.
- ▶ Actively engage in conflict resolution and negotiation.

Essential Practices(Cont.)

- ▶ Proactively move the case forward if it is in your client's interests, including reducing case continuances and timely filing any necessary pleadings, motions, or briefs.
- ▶ File motions and appeals necessary to protect your client's rights and interests.
- ▶ Understand how cultural, social, and economic differences affect the attorney-client relationship to ensure that all clients receive the same quality of representation.
- ▶ Understand and recognize the impact of personal and system bias stemming from race, gender identity, and socioeconomic status, and develop strategies, including legal strategies, to mitigate the negative impact of personal and system bias on clients' case goals.
- ▶ Identify and use to your client's advantage their individual, familial, cultural, and community strengths.

Standards For Attorneys Representing Adults

- ▶ The role of an attorney appointed to represent an adult is to:
 - ▶ Protect client's legal rights;
 - ▶ Advance client's interests in court; and
 - ▶ Help client understand the legal process.
- ▶ To achieve this ...

Standards For Attorneys Representing Adults (Cont.)

- ▶ In addition to the Essential Practices, all CACs should:
 - ▶ Diligently pursue client's case goals, as needed and when consistent with their interests and objectives;
 - ▶ Ensure client's voice is heard in the proceedings;
 - ▶ Help client problem-solve and meet case goals;
 - ▶ Advocate parent-child contact through visitation and permanency planning; and
 - ▶ Identify potential ancillary legal issues that could impact client's dependency case, refer client to legal resources to address issues, and communicate regularly with client's other legal service providers with the goal of ensuring that dependency proceedings or other legal proceedings benefit client.

SELF-CHECK FOR ATTORNEY-CLIENT RELATIONSHIP AND REALITY

- **Transference and Countertransference Issues in Professional Relationships**

RHODA FEINBERG and JAMES TOM GREENE
Family Law Quarterly

Vol. 29, No. 1, Special Symposium on Working with Mental Health
Professionals (Spring 1995), pp. 111-120 (10 pages)

Published by: American Bar Association

- **SYNOPSIS:** Family law challenges all kinds of hidden bias by the attorney, the court, and CPS/other agency involved; and, bias as well as personal family dynamics can reduce our objectivity and the objectivity of all individuals involved. Be prepared to check yourself.

Attorney as a Witness – SCR 3.130

Holt v. Commonwealth, 219 S.W.3d 731 (Ky. 2007)

- ▶ “The Kentucky Rules of Professional Conduct, SCR 3.130, et seq., are mandatory for all Kentucky lawyers. SCR 3.130-3.4(e) provides that a lawyer shall not ‘assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.’ SCR 3.130-3.7 generally prohibits a lawyer from acting as an advocate at trial where the lawyer is likely to be a necessary witness. The case at bar touches upon the foregoing Rules of Professional Conduct and various rules of evidence. *This opinion will examine the propriety of what appears to be a practice common among some lawyers where a witness has made extra-judicial statements to the lawyer prior to trial. Thereafter, when the witness fails to give testimony consistent with the prior statements, the lawyer takes such broad liberties in the mode of examination as to essentially give testimony as to the substance of the prior statement.*” (Emphasis added)
- ▶ This is a violation of the rule and subject to harmless-error review; is an appropriate basis for reversal.

Dillon v. Commonwealth, 475 S.W.3d 1 (Ky. 2015) Holt decision was affirmed.

Resources

▶ CHILD-PARENTSATTORNEYS@MAIL.AMERICANBAR.ORG

Mimi Laver

Director Legal Representation

ABA Center on Children and the Law

202-662-1736

<http://www.americanbar.org/child>

Subscribe to CLP Today<<http://ambar.org/cclsubscriptions>> for free practice-based articles.

Follow the Center

<https://www.americanbar.org/groups/public_interest/child_law/resources/social-media/> on social media.

▶ **Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions Third Edition** by [Jean Koh Peters](#)

Resources (Cont.)

“Transference and Countertransference Issues in Professional Relationships”

RHODA FEINBERG and JAMES TOM GREENE

Family Law Quarterly

Vol. 29, No. 1, Special Symposium on Working with Mental Health Professionals (Spring 1995), pp. 111-120 (10 pages)

Published by: American Bar Association



**UNDERSTANDING
DNA CASES**

Understanding DNA cases

DNA cases

- ▶ Stated goal is to get the family services to reunite/keep the family together while addressing safety concerns
- ▶ Adjudication/Disposition is often the real start of a case
- ▶ Often the stages of the cases which most impact some getting their children back occur post-disposition

Criminal

- ▶ Punishment for bad behavior
- ▶ For the attorney, a guilty finding/plea is really the end of the case

DNA Narrative

Issue spotting if you represent the Mother

- ▶ At the Temporary Removal Hearing (TRH), object to orders being put into place for a substance abuse assessment or for a drug screen order being put into place.
 - ▶ The petition should stand on its own and not have post-removal behaviors be used to prove the petition. However, the Judge can look at post-removal behaviors to determine if the children would be at risk for further neglect.
- ▶ At the Adjudication Hearing (AH), the County Attorney (CA) will need to enter certified records or have the custodian of records present to testify as to the records.
- ▶ If the Mother has a drug issue, her best chance at reunification, and the best thing for the family, is for her to get treatment. The Cabinet is not going away, whether it is in court or not, as long as they have safety concerns.

DNA Narrative

Issue spotting if you represent the Father

- ▶ Paternity - Are the Parents married? If no:
 - ▶ Is the Mother married to anyone else?
 - ▶ Is the Father on the birth certificate?
 - ▶ Has he completed a paternity affidavit or paternity test?
 - ▶ Is there any dispute that he is the father?
- ▶ There is a second older child mentioned. Is he the father of that child?
- ▶ Do the parties live together? Did they live together prior to the child's birth?

DNA Narrative

Issue spotting if you represent the Father (Cont.)

- ▶ The Father is charged based on protective capacity.
 - ▶ If the Parents do not live together, the CA will have a harder time proving lack of protective capacity. It will turn on more specific factors such as what he admits to knowing or what a reasonable person in his position should have known.
 - ▶ If the Parents live together, it will be much harder to defend his protective capacity, but it is still a fact-specific issue.
 - ▶ It is likely that the Cabinet would ask for a drug screen from the Father.

DNA Narrative

Issue spotting if you represent the Father of the second child

If the second child has a different father:

- ▶ Are there any allegations against the Second Father in this petition?
 - ▶ Is he on the birth certificate?
 - ▶ Has he completed a paternity affidavit or paternity test?
 - ▶ In some courts, the Judge will look at whether the Father filed/established custody/visitation.
- ▶ If there is no allegation against the Second Father, and he has established paternity/custody (legal father) or a relationship (fictive kin), then his child should be placed with him.

Placement of the Children

- ▶ The children are placed with the Chamberlains (maternal grandparents), but there may be a less restrictive option of placing with the Father if the Mother leaves the home. The Judge will likely require a clean drug screen before considering this option.
- ▶ Unless the Judge chooses to unilaterally place the children with the Chamberlains, a completed/approved home study by the Cabinet would be needed.
- ▶ The paternal relative might not have been considered if no paternity was established.

Adjudication/PTC versus Disposition

- ▶ Compliance on the case plan should not be a discussion at a Pre-Trial Conference (PTC) or AH. The case plan becomes part of the court orders at disposition.
- ▶ The dispositional report will update the court as to your client's case plan but also any progress as to the case plan.
- ▶ Dispositional reports should be filed with the court and distributed to counsel no later than seven days before court.
- ▶ Some courts require written Guardian Ad Litem reports.
- ▶ You may file a written objection to the dispositional reports.

Cross Examination and Objections

- ▶ The report of a court appointed expert does not require foundation to be laid for it to be entered.
- ▶ Have records been certified or has a proper foundation been laid?
- ▶ Does a document being entered have a date, letterhead, and signature with a title and can a witness lay a foundation?
- ▶ Chain of custody of the drug screens.
- ▶ Is the witness testifying to something they have first hand knowledge of?
- ▶ The competency of a child witness.

Least Restrictive Placements

- ▶ If the children did not remain with a parent or were not placed with a relative or fictive kin then possible relative placement possibilities should be constantly provided to the social worker. The parent does not need to wait for court to provide this information.
- ▶ Out-of-state relatives will require an ICPC (Interstate Compact for the Placement of Children checks). ICPCs take longer and each state will have its own requirements. As an example, some states require that the possible placements complete foster parent classes before they will approve their ICPC.

Post-Disposition

- ▶ The goal of all dependency, abuse, and neglect cases are “return to parent” but the Judge can change the goal to adoption or independent living. The Judge can also grant permanent custody to a relative or fictive kin placement.
- ▶ Some Judges will hold a separate off-docket permanent custody or goal change hearing if the case requires special considerations and witnesses.



Investigating the Case

- ▶ Until you understand your case, it is hard to decide on a case theory and strategic plan.
- ▶ It is valuable to have your case management steps laid out for each type of case, but also to take time to outline the case and what issues are specific, new, or interesting in this particular action.
- ▶ In this case, there are several interesting components: the drug testing; the age of the Parents at the time of the birth of the older child (he is 4, they are 19 – their parenting of that child may not necessarily be relevant to their parenting of the infant now that they are older); and there is a potential for race bias or concern given the fact that the Father is a person of color (POC).

Investigation – Informal Discovery

- ▶ Service providers – Check for physicians, teachers, daycare staff, therapists, and physicians for your client
 - ▶ Request certified copies of records and check that you have the entire documents – remember a lot of healthcare records are double sided.
 - ▶ Interview daycare staff regarding interaction with the child or ask for copies of records (hoping to show positive parenting by the Father, sobriety and positive parenting by the Mother). Be aware of privacy requirements in a school setting and have an executed waiver for the records from a parent.
 - ▶ Therapy records are more difficult to obtain than clinical (medical) records. To make it simple, request a summary of status/progress from a therapist or counselor rather than complete records. Obtain an executed waiver or request from your client. Remember that a patient is entitled to one free copy of his/her records, so you do not get charged if that patient (the Mother or the Father) signs the records request.
 - ▶ 42 CFR Part 2 – Some addiction treatment or psych providers require a waiver compliant with that federal law before they will provide drug treatment or counseling records. Have the patient execute that very specific waiver (which affirms that no party will use those records for criminal prosecution). In the alternative, get a court order for the records.

Investigation – Informal Discovery (Cont.)

- ▶ Also, request records on the other parent/parties
 - ▶ Engage in short, limited discovery
- ▶ Cabinet records – Request entire file
 - ▶ Read and summarize in your notes
 - ▶ Make sure it is complete

Investigation – Drug Testing

- ▶ Drug testing – an issue in this case for both parents
 - ▶ Determine what type of testing was used on the Mother.
 - ▶ Tests measure for different timeframes and types of drug use:
 - ▶ **Oral fluid:** Typically shows more recent use of a drug
 - ▶ **Urine:** Is the “gold standard” (all puns intended by the urine drug testing industry!) and gives a fairly complete weeklong summary for most drugs
 - ▶ **Hair follicle:** Gives a lengthier picture – up to several months with some drugs like THC
 - ▶ **Umbilical blood/blood from the Mother:** Both give a history similar to urine drug testing – a week or so – and include ETG (alcohol)
 - ▶ **Umbilical cord solid sample:** Gives a result like hair testing – a month or several months

Investigation – Drug Testing (Cont.)

- ▶ Drugs stay in your body different lengths of time. You can use peer reviewed materials to support an appropriate argument.
- ▶ To get free and peer reviewed materials on drug testing to educate your court, you can use data/papers from SAMHSA, ASAM, KYSAM, or the National Laboratory Association.

Pre-Trial Motions


- ▶ Motion practice is not often used in DNA cases, but it can be a valuable tool in some situations.
 - ▶ Remember, without motion practice it may be harder for a reviewing court (Court of Appeals, Supreme Court) to address what went wrong in a case or reverse the findings.
 - ▶ Make sure you understand and note what investigative steps were taken and what reasonable efforts have been made. Reasonable efforts are important throughout the case but are essential during the Disposition Hearing, or if the Cabinet seeks a goal change or Termination of Parental Rights.
 - ▶ Use this time to set the ground for motions you may file later.

Pre-Trial Motions (Cont.)

- ▶ Hearsay motions
 - ▶ The Chamberlains' allegation about abusive behavior by the Father is hearsay. This is not in the record and no petition or claim has been brought on that issue. Prepare to verbally object to such testimony. A motion might also be necessary.
 - ▶ Certain types of medical records can be attacked for hearsay or privilege. A court order or consent is required for some types of addiction or psychiatric treatment records. Object if the records are obtained/introduced without that consent or order.

Pre-Trial Motions (Cont.)

- ▶ Constitutional grounds for motions
 - ▶ Familiarize yourself with potential Constitutional objections prior to the hearing and be prepared to object or otherwise ensure that the record reflects the grounds of your objection. This will allow you to appropriately challenge the court's ruling by motion or appeal.
- ▶ Object to error contemporaneously
 - ▶ Do not be afraid to object.
 - ▶ Be clear and concise.
 - ▶ Wait for the court to make a ruling on your request – on the record – otherwise there is nothing to challenge.
 - ▶ If the court rules against your client, object to the court's ruling to preserve that error. For example, "Thank you, your Honor. I'd like to preserve my objection on the record."



AOC DNA:
Lawyering for
the Parent
NEED FOR EXPERTS

The image features a colorful, abstract geometric background composed of overlapping triangles in shades of green, yellow, red, and blue. The text is overlaid on the right side of the image.

Do you need Experts to Defend Client?

- ▶ Begin with the experts already involved with your client and family.
- ▶ Review their records, schedule a time to talk with them about your client and the purpose of the upcoming hearing, and receive their thoughts.
- ▶ If you perceive bias or frustration, see if you can bring them a new perspective on your client. Alternatively, they may help you understand your client better.

Experts (Cont.)

- ▶ If they have favorable testimony, try to persuade them to testify free of charge for your client or to consult with you.
- ▶ If they will not testify, work to get the experts to attend a case management conference or a meeting with the Cabinet social workers so that the expert's opinions can be clearly stated to all involved.
- ▶ If they will not testify, and you cannot overcome that resistance, ask them for advice about other qualified experts you could use for consultation or as witnesses. If they perceive the system as unfair, help them understand you cannot overturn injustices without expert assistance.

Experts (Cont.)

- ▶ If you think decision-making by the Cabinet and/or the allegations are riddled with bias that, if established, would undermine cabinet findings, then seek out experts to assist who are part of advocacy groups for the targeted population (Urban League, NAACP, colleges and universities; Race, Community, and Child Welfare Initiative members; or members of faith communities who will stand as advocates).
- ▶ Develop a relationship with experts in academia who may assist you. The Center for Equity and Justice at UK and the College of Social Work at UofL might be good resources.

More Alternative Paths for Experts

- ▶ Family Members who may have means to pay for experts for your client.
 - ▶ Note – Be aware of the impact this might have on your client's indigency status. Also, ensure that the boundaries are clear so that 3rd-Party funding does not create any loyalty/confidentiality issues between you and your client.
- ▶ Develop relationships with purely consulting experts - experts who are willing to consult with you, for free or a reduced fee, and provide you with insight into the case or point you toward treatises and resources you could rely upon.

What Do You Do If You Think You Need Funds for an Expert Witness

- ▶ If seeking funding for an expert, the way you frame the argument and preparation is critical.
 - ▶ Tie the need for the expert to the duty to fulfill ethical obligations to provide competent legal representation.
 - ▶ Identify your expert.
 - ▶ Get the expert's: CV, statement of assessment and testimony expert will offer, and cost of services.
 - ▶ Prepare a motion to court for funds that links the need to the preparation of a proper defense. Include the expert's qualifications, the cost, the necessity for the testimony, and how the necessity is tied to the obligation to provide effective, competent legal representation.
 - ▶ Prepare and file the motion in a timely manner- well before the hearing.

If Denied Funds for Expert

- ▶ Return to your cadre of academic and/or volunteer experts and seek help in preparing cross of any anticipated state experts.
- ▶ Also ask for learned treatises you might use to refute opposing experts by introducing them at the hearing and/or by relying on them to challenge the opposing expert on cross examination.
- ▶ Meet with state experts to be prepared for crossing them and ensure that you have all possible documents they will have, or should have, relied upon.
- ▶ When hearing begins, note on the record your objections to the lack of your client's access to an expert and the prejudice to your client's case – highlight that prejudice during hearing.

Challenging State's Experts or Introducing Your Own Expert

- ▶ **Daubert Continues to Control.**
- ▶ Is there a demonstrable question of the expert's qualifications or of the reliability of the expert's opinion?
 - ▶ Go back to required steps in investigating the state's case, all pertinent records, and any tests used by state professionals or experts.
 - ▶ Review the accuracy of any "testimony" about the underlying allegations.

Standard of Review of Trial Court's Decision Concerning Experts

- ▶ Remember, tie need for the expert to your obligation to provide competent legal representation.
- ▶ You may challenge state's experts and the state may challenge your expert.
- ▶ In a jury trial, expert testimony can be evaluated based on its admissibility or the weight it should be given. It is a different issue in DNA cases where the Judge is the sole determiner of fact.

Standard of Review of Trial Court's Decision Concerning Experts (Cont.)

- ▶ A trial court, at a minimum, must make an affirmative statement on the record that the court has reviewed the material submitted by the parties relevant to the testimony of the expert witnesses and has concluded that the testimony was reliable. Lukjan v. Com., 358 S.W.3d 33 (Ky. App. 2012).
- ▶ The Kentucky Supreme Court has stated its preference that trial courts include findings of fact and conclusions of law in their Daubert rulings, regardless of whether or not a Daubert hearing is conducted. Hyman & Armstrong, P.S.C. v. Gunderson, 279 S.W.3d 93 (Ky. 2008).

Standard of Review of Trial Court's Decision Concerning Experts (Cont.)

- ▶ Trial court's preliminary findings of fact on reliability will be reviewed on appeal under a clear error standard, wherein the appellate court reviews the record to see if there is substantial evidence to support the trial court's rulings. Miller v. Eldridge, 146 S.W.3d 909 (Ky. 2004).
- ▶ Trial court's determinations as to whether the evidence will assist the trier of fact and the ultimate decision as to admissibility will be reviewed on appeal under the abuse of discretion standard - whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id.

Questions?

Please ask questions in the Q&A window.



PREPARATION OF
CLIENTS AND
WITNESSES

Client Preparation – Generally

- ▶ Meet your client.
- ▶ Establish a rapport (build trust and learn who your client is) **and attend to the credibility of your client as a witness. Be prepared to include background information (education, job, community or family involvement) in order to humanize your client in court.**
- ▶ Explain how the legal process works in child welfare cases (why they are going to court).
- ▶ Address appropriate clothing (what to wear – no shirt with words on it, etc.).
- ▶ Explain the courtroom (especially now during COVID with Zoom, Live and wearing masks/social distancing, etc.) and other rules courts may have regarding placement of items in the courtroom, on surfaces, etc. **to alleviate fear(s) and prepare them for reality.**

Client Preparation – Generally (Cont.)

- ▶ Go over the case file/CPS records with your client **carefully.**
- ▶ **Go over the facts of the case, including both undisputed and disputed facts. Prepare your client to testify about undisputed facts to get them into evidence, and to put forward your client's version of the disputed facts.**
- ▶ Be honest with your client about their case and what their expectations should be considering the facts of the case.

Client Preparation – The Mother

- ▶ *Assuming the Mother admits to you as her attorney to the drug use:* She was drug-positive at birth (routine post-natal) and was diagnosed with substance use disorder and recommended to trauma-focused cognitive behavior therapy due to previous experience. She has completed 8 drug tests, with 3 being positive for THC and 5 being negative. She is participating in all recommended therapies and has family support.
- ▶ She has been compliant with the case plan and should be advised to continue cooperating with the Cabinet and completing her case plan.
- ▶ Focus her on the need to testify about staying clean, seeing the error of her ways, her devotion to the children, and her desire to be a good parent.
- ▶ Inquire whether prior trauma experience was related to her parents (who are family support) and whether that experience has been resolved; and, if they were cause of the trauma, what alternative support is available.

Client Preparation – The Father

- ▶ His drug tests were all negative, but he only completed 3 and didn't show up for the other 5 tests. He advised work and car trouble prevented him from attending the other 5 tests. He participated in substance abuse assessment (no treatment recommended) and attended parenting classes but declined treatment for signs of acute anxiety.
- ▶ Recommend and procure a paternity test for both boys.
- ▶ Ask him if he lives with the Mother. If not, where does he live? How often does he see the older child and/or does he have visitation if they do not reside together?
- ▶ Explain why having a dependable car is necessary for care of children. Can he resolve his car problem issue?
- ▶ **Ask him what childcare arrangements are available to him when he works if he were to be awarded custody of the children.**
- ▶ **Ask him why he declined weekly therapy sessions for acute anxiety.** Was this due to the cost, work conflict, prior bad experience, etc.? If there is a legitimate reason he could not participate, versus simple refusal, prepare him to explain this to the Judge.

Client Preparation – The Father (Cont.)

- ▶ Ask him about the domestic violence allegations by the Mother's parents reported by CASA? Is there any legitimacy to the claim? Prepare him for the potential of this being allowed despite being "hearsay" and not being part of the petition. (You never know what the Judge will allow in a hearing so prepare him and KNOW what might be coming.)
- ▶ Prepare him regarding bias towards men with respect to babies. Prepare him by finding out what his strengths are for parenting a child (e.g., worked with children, sibling care, etc.) and also explain the uphill battle in men being awarded custody of a baby. You must make a strong case why he would be a good parent and, if he can demonstrate his strengths through testimony, prepare him to do so.
- ▶ Ask him about family support and his mother's involvement with the 4-year-old son. Does he have a good relationship with his mother (Ms. Thomas) and will she be available to assist him in support of the child(ren)?

Preparation Of Non-Expert Witnesses


- ▶ CPS (likely a witness against your client's interests)
 - ▶ Be very familiar with the file and have your strategy of *attack* on their findings and recommendations.
 - ▶ Ask the CPS worker about measures CPS may not have explored and why.
 - ▶ Ask the CPS worker about client and case plan interaction. What are each client's strengths and how can they become better involved?
 - ▶ Have there been any home studies done? The Mother? The Father? The Grandparents (both sets)?
 - ▶ Is the older child in pre-school and did CPS investigate/interview staff at the pre-school?

Preparation Of Non-Expert Witnesses (Cont.)

- ▶ The Chamberlains (if you determine they should be called)
 - ▶ What has their involvement been with the social services worker?
 - ▶ What have their observations been about the Mother's (and/or the Father's) parenting skills with the older child (this will give a 4-year history)?
 - ▶ Ask them if Ms. Thomas regularly saw the 4-year-old and why they are not allowing her to see the children now.
- ▶ Ms. Thomas (if you determine that she should be called)
 - ▶ What has her observation been about the Father's (and/or the Mother's) parenting skills with the older child (this will give a 4-year history)?
 - ▶ Ask what her interactions have been with the older child and what her interactions have been with the Mother and the Chamberlains.
 - ▶ Has the worker contacted her? Has she been offered visitation? If not, why?

Questions?

Please ask questions in the Q&A window.



Direct and Cross at the Evidentiary Hearing Advocacy at DNA Adjudications

Purpose of the Adjudicatory Hearing

- ▶ Per KRS 620.100, the purpose is for the court to “determine the truth or falsity of the allegations in the complaint. The burden of proof shall be upon the complainant, and a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence. The Kentucky Rules of Civil Procedure shall apply.”

Strategies for the Adjudicatory Hearing

- ▶ Advocate for your client by defending them against DNA allegations while balancing the need to insulate them from negative testimony (positive drug screens, violations of court orders, collateral criminal consequences) that might impair them from reunification if the defense is unsuccessful.
- ▶ Craft and present a theory of the case that explains your client's position and is supported by relevant evidence.
- ▶ If applicable, establish that the Cabinet failed to provide adequate (if any) interventions and/or supports before bringing the petition or make reasonable efforts to prevent removal.
- ▶ Ensure you only make the hurdles as high as you need to in order to prevail.
- ▶ Remember the state's burden is not at the same level as a TPR action or a criminal charge, so make sure that your client knows the risks of a contested adjudication.

Basic Tips for Introducing Exhibits

- ▶ Make an "Exhibit Chart" with columns for "Relevance" (shorthand), "Admissibility" (to counter opponent's objections), and "Admission into Evidence" (check off after moving to admit).
- ▶ Have all exhibits marked and ready to go before the hearing.
 - ▶ Check with the Clerk at the hearing to ensure you have met her/his, and the Judge's, standards for marking.
 - ▶ Make an extra copy for the Judge, all opposing counsel, and your trial notebook. Keep your copies together and place a post it on each indicating which document goes to whom.
- ▶ Identify the exhibits you want to keep at the witness chair during their testimony. It can be the original to be filed or a copy.
- ▶ Lay the foundation for admitting the exhibit.
- ▶ Have your witness explain the exhibit in sufficient detail or, if through cross, by your leading questions, so that the court understands its importance.
- ▶ Introduce the exhibit into evidence before your witness leaves the stand.
 - ▶ Mark that you did so on your exhibit chart in your trial notebook.

Laying the Foundation

- ▶ CREATE A CHECKLIST FOR EACH EXHIBIT
- ▶ Lay the foundation before the hearing if helpful.
 - ▶ Strategy Call: Should you agree on admissions and stipulations with opposing counsel?
- ▶ Prove authentication and first-hand knowledge.
 - ▶ Ex. Photo – Did the witness take it or will witness acknowledge it is a true and accurate representation of the matter depicted?

Laying the Foundation

- ▶ Determine the theory of admissibility before the hearing.
- ▶ If opposing counsel objects to foundation, move to have them identify what is missing from your foundation.
- ▶ If the objection by opposing counsel is sustained, try to ask the required questions to admit and state on record why you are entitled to admit the exhibit.
- ▶ If the court refuses to allow you to ask the questions or the witness becomes difficult to control or does not comprehend, move to ask the questions by avowal and move to admit evidence by avowal. State how your client is prejudiced in its omission.

KRE 1006

Summary of Evidence

- ▶ Where helpful, create a summary of evidence.
- ▶ The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. A party intending to use such a summary must give timely written notice of his intention to use the summary, proof of which shall be filed with the court. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.
- ▶ If you use summaries, you must give opposing counsel notice of your exhibits and have copies available.

Hearsay and the Constitution

5TH, 6TH, & 14TH Am. Section 1 & 2

- ▶ Is it a statement made out of court?
- ▶ Is it being offered for the truth of the matter asserted?
- ▶ Instead it may be a:
 - ▶ Verbal act
 - ▶ Verbal part of an act
 - ▶ Indicate knowledge
 - ▶ Indicate state of mind
- ▶ Even if original statement is not now being offered for truth of matter asserted, if the witness to the verbal act, etc. is not on the stand, hearsay challenge can be made to what witness claims someone told them about the verbal act, etc.
- ▶ Admissible at a Temporary Removal Hearing but not at an Adjudication Hearing.

The Art of Persuasion

- ▶ When deciding what evidence to present and what objections to make against opposing counsel(s), the decisions are guided by the strategic reason for holding the hearing.
 - ▶ Is your client being railroaded?
 - ▶ Are allegations in the petition false, exaggerated, or misconstrued?
 - ▶ How do you convince this judge that you are right?
 - ▶ How do you build a record that may be helpful as state moves forward against your client?



SUPPLEMENT

Case Narrative

EVIDENTIARY ISSUES AND PRACTICE IN DNA CASES

DNA CASE NARRATIVE

Case Facts

Parties and Interested Persons

Older Child: Layton Thomas (Layton)

Infant Child: Landon Thomas (Landon)

Mom: Kayla Thomas (Mom)

Dad: John Roberts (Dad)

Maternal grandparents: Tim and Barbara Chamberlain (The Chamberlains)

Paternal grandmother: Wanda Thomas (Thomas)

Social Services Worker: Sara Clark (SSW)

CASA Worker: Jim Barker (CASA)

Licensed Clinical Social Worker: Debbie Anadarna (the LCSW)

Clinical Psychologist: Arnold Ridge (the Psychologist)

Narrative

The Cabinet for Health and Family Services (CHFS) received an intake-hotline call from a hospital in a city of approximately 90,000 people, alleging that a local resident, Mom, a white woman, age 19, tested positive for methamphetamines and THC during a routine post-natal test immediately following the birth of her infant, Landon. Dad, a local resident, black man, age 19, was also mentioned in the referral as the potential father. CHFS's intake accepted the referral for investigation and response due to potential neglect/abuse related to the two children, Layton, age 4 years, and Landon, age 1 day.

CHFS visited the hospital and interviewed the staff nurse, Mom, and Dad. CHFS spoke with the Chamberlains and Thomas, both of which indicated that they knew nothing about any drug use. They both also assured CHFS that they would care for the child, if the parents had any "issues" that needed to be resolved. Upon receiving the drug test results, CHFS filed a petition alleging dependency, abuse and neglect (AOC-DNA-1), including a request for emergency custody in favor of the Chamberlains.

At the temporary removal hearing, both parties waived their right to contest temporary removal to the Chamberlains. The court ordered both parents to cooperate with CHFS, submit to drug testing, and complete a substance abuse assessment from the Psychologist. After each consulted with his/her attorney, both parents asked for a full evidentiary Adjudication Hearing. The court scheduled the hearing for 3 months later and entered a pre-hearing order requiring each party to disclose potential evidence and witnesses at least 10 days prior to the hearing.

The follow occurred during the 3 months leading up to the Adjudication Hearing:

- Mom completed semi-weekly drug tests for a total of 8 tests. The first 3 were positive for THC and negative for all other monitored substances. The remaining 5 were completely negative.

- Dad completed 3 drug tests, which were all negative. He was unable to appear for 3 drug tests due to work. He claimed that car trouble prevented him from going to 2 other drug tests.
- The parents completed nearly every parenting class that CHFS asked them to complete.
- Mom and Dad were referred to the LCSW for treatment. She assessed each parent. Substance abuse treatment was not indicated for the father, but he showed signs of acute anxiety. She suggested weekly sessions, but he declined. Substance use disorder treatment was indicated for Mom, as well as trauma-focused cognitive behavioral therapy due to previous experiences. She suggested semi-weekly sessions. Mom attended each and actively participated.
- Mom and Dad participated in the Psychologist's substance use disorder assessment, and the results were released to the court two weeks prior to the Adjudication Hearing. Mom's results indicated that she needed substance use disorder intervention. Dad's results indicated no need for intervention.
- CASA submitted a report 7 days prior to the Adjudication Hearing. The report included the following:
 - o "Dad has been abusive to Mom for several months, according to the Chamberlains. Thomas, the paternal grandmother, is upset because she has not seen either child for weeks. Mom is cooperating with therapy. Dad has not. Mom has been clean for a few weeks. Dad has missed several drug tests. The child should stay with the Chamberlains."

SUPPLEMENT

Case Summaries

EVIDENTIARY ISSUES AND PRACTICE IN DNA CASES

CASE SUMMARIES

Testimony - Generally

T.C. v. M.E., 2019-CA-000431-DGE, 2020 WL 2092019 (Ky. App. May 1, 2020)

The Court of Appeals reversed, with instructions to dismiss, the trial court's finding of abuse when the only testimony on the record came from the father and refuted the allegations. The case began as a request for an emergency protective order and was referred to the Department for Community Based Services, which led to a dependency, abuse and neglect action. At the adjudication, the father testified under oath that the injury resulted from playing. The mother declined to testify under oath.

Judicial Notice

S.R. v. J.N., 307 S.W.3d 631(Ky. App. 2010)

The Court of Appeals found that the trial court could not take judicial notice of evidence in prior custody actions in making a finding in a DNA case. In its conclusions of law following the adjudication, the trial court referenced testimony from a prior divorce action. The Court held, "Unless the circuit court ruled on the truth or falsity of that evidence in the prior proceedings, thereby making it a judicially noticeable finding of fact, then that evidence cannot be judicially noticed."

Hearsay

Prater v. Cabinet for Human Resources, Commonwealth of Ky., 954 S.W.2d 954 (Ky. 1997)

DCBS reports may be admitted under the business records exception of KRE 803(6). However, that does not apply to hearsay evidence included in those reports. Such hearsay does not become admissible simply by being included in reports. It must meet an exception.

M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114 (Ky. App. 1998)

While preparing for the case, a court-appointed psychologist reviewed prior psychological evaluations, criminal records, and court records. The parent argued that allowing the psychologist's testimony was an error because it relied on inadmissible hearsay. The Court of Appeals held that the records the psychologist reviewed included the type of information that is commonly relied upon in the field of court-appointed psychologists in TPR cases, and therefore was allowed per KRE 703.

T.R.W. v. Cabinet for Health and Family Services, 599 S.W.3d 455, 464 (Ky. App. 2019), review denied (Feb. 12, 2020)

Properly certified DNA case records were deemed admissible in a subsequent TPR case because there were not excluded as hearsay and were self authenticating public documents.

D.L.B. v. Cabinet for Health and Family Services, 418 S.W.3d 426, 431 (Ky. App. 2014)

The Court of Appeals held that a therapist's testimony of a child's disclosure of parental sexual abuse was admissible under the "state of mind" exception, but not the "medical diagnosis" exception. *Compare to* Cabinet for Health and Family Services v. A.G.G., 190 S.W.3d 338 (Ky. 2006); Colvard v. Commonwealth, 309 S.W.3d 239 (Ky. 2010), as corrected (Apr. 9, 2010). Also, a document need not be disclosed to be used to refresh memory.

Prior Bad Acts

C.M.C. v. A.L.W., 180 S.W.3d 485, 492 (Ky. App. 2005)

The Court of Appeals affirmed the trial court's ruling that the testimony about alleged sexual abuse of a babysitter by the mother was excluded by the prior bad acts rule. KRE 404(b).

THE EFFECT OF TRAUMA ON CHILD DEVELOPMENT & FUNCTIONING



THE EFFECT OF TRAUMA ON CHILD DEVELOPMENT & FUNCTIONING

TRAINING FOR GUARDIANS AD LITEM
AUGUST 4, 2020
MIRIAM SILMAN, MSW,
DEPARTMENT FOR BEHAVIORAL HEALTH,
DEVELOPMENTAL AND INTELLECTUAL DISABILITIES



GOALS

- Identify types of trauma exposure common to youth in the child welfare system
- Learn about the lessons from the Adverse Childhood Experiences Study and subsequent research
- Recognize the impact of trauma exposure on brain & body development & functioning for youth
- Understand how this informs the work of Guardians Ad Litem



SELF-AWARENESS REMINDER

- Pay attention to your own needs & responses
- Take care of yourself however you need to during the presentation
- You may be impacted even after you leave
- Use coping skills that help you metabolize your responses to trauma
- Find a safe space in which you can process your experiences – this may mean using coping strategies including talking to colleagues, friends, family, or a professional provider



WHAT IS TRAUMA AND HOW DOES IT IMPACT YOUTH?



WHAT IS TRAUMA?

Event

- conveys actual or perceived threat of death, serious injury or sexual violation to one's self or someone close

Experience

- unique, individual perception of threat to one's self or someone close

Effect

- adverse, may be long-lasting, & global: impact social, emotional, cognitive, spiritual & physical development & functioning



TYPES OF TRAUMA



TRAUMA IS LAYERED & CUMULATIVE



- Historical Trauma
- Racial Trauma
- Community Trauma
- Individual Trauma – experienced directly or witnessed



WHAT IS TRAUMATIC STRESS?

- Part of the third E, **effect**
- The experience of exposure to the traumatic event overwhelms our coping capacity
- Often leaves us feeling overwhelmed, powerless, afraid, or terrified
- Rooted in our short- and long-term brain and body stress response
- Traumatic stress responses vary in intensity, symptom presentation, duration, and areas impacted



SIGNS & SYMPTOMS OF TRAUMATIC STRESS

- **Intrusive** thoughts, dreams, memories, flashbacks, difficulty concentrating
- **Avoidance** of people, places, things, feelings & thoughts that remind us of the trauma or our response to it; *both external & internal reminders*
- Increased **activity**, e.g. hyper-arousal, exaggerated reactions, quick startle response, agitation, poor sleep, hypervigilance
- Impairments in **social behavior**, e.g. withdrawal, lethargy, inertia, sleeping more
- **Mood** changes, e.g. depression, anxiety, loneliness, hopelessness, suicidality
- Negative **thinking**, e.g. blaming self, blaming others & avoiding responsibility, lack of trust, sense of futility, absence of agency



THE ADVERSE CHILDHOOD EXPERIENCES (ACE) STUDY



WHAT IS THE ACE STUDY?

- Video available here:
<https://vimeo.com/139998006>

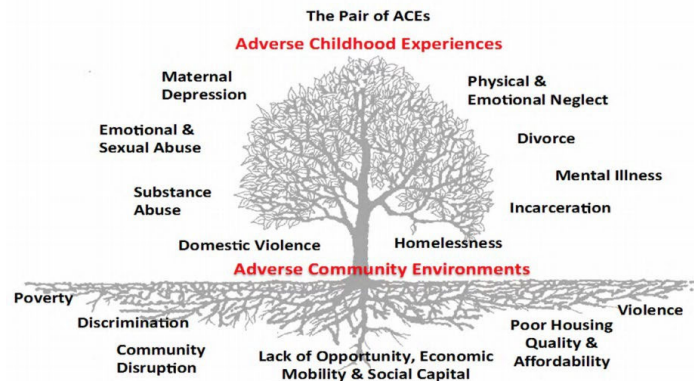


LESSONS FROM THE ACE STUDY

- ACEs aren't over when the trauma ends: *what happens in childhood doesn't stay in childhood*
- More is NOT better: *the higher the dose of ACEs, the worse the impact*
- ACEs don't discriminate: *ACEs don't happen to "those people", they happen to all of us*
- ACEs can spread their effects far & wide: *the immediate and long term impacts can effect all areas of development & functioning*



THE PAIR OF ACEs



Ellis, W., Dietz, W. (2017) A New Framework for Addressing Adverse Childhood and Community Experiences: The Building Community Resilience (BCR) Model. *Academic Pediatrics*. 17 (2017) pp. S86-S93. DOI information: 10.1016/j.lacap.2016.12.011

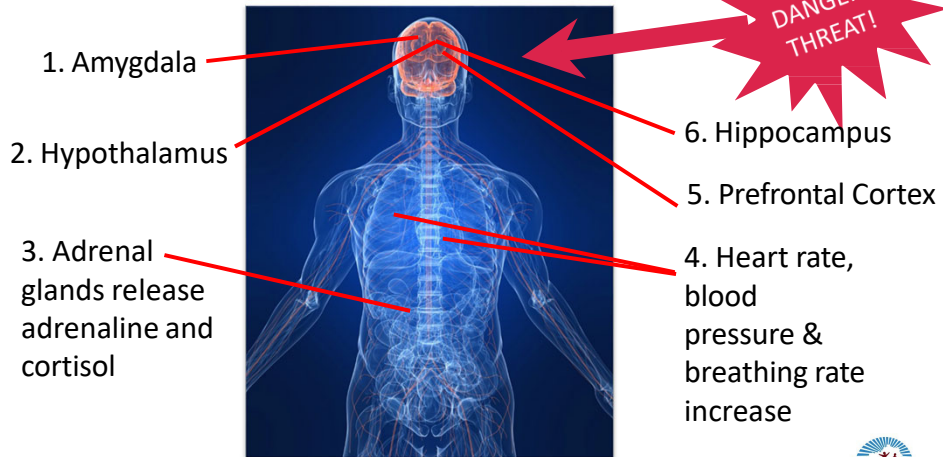


ACEs +5

Abuse & Neglect	Household Dysfunction	ACE Plus 5
<ol style="list-style-type: none"> 1. Emotional abuse 2. Physical abuse 3. Sexual abuse 4. Emotional neglect 5. Physical neglect 	<ol style="list-style-type: none"> 6. Mother Treated Violently 7. Household Substance Abuse 8. Household Mental Illness 9. Parental Separation or Divorce 10. Incarcerated Household Member 	<ol style="list-style-type: none"> 1. Experiencing racism 2. Witnessing violence 3. Living in an unsafe neighborhood 4. Living in foster care 5. Experiencing bullying

THE IMPACT OF TRAUMA ON BRAIN AND BODY

BRAIN & BODY STRESS RESPONSE



TOXIC STRESS

- From the Harvard Center for the Developing Child:
<https://developingchild.harvard.edu/resources/toxic-stress-derails-healthy-development/>



COMPLEX TRAUMA

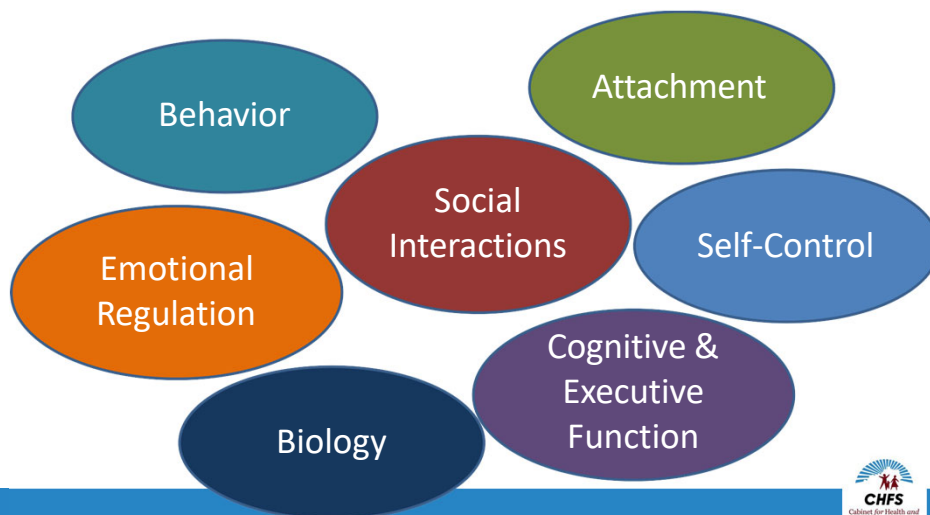
The childhood exposure to **multiple traumatic events**, often interpersonal, invasive, and at the hands of known people close to the child,

and

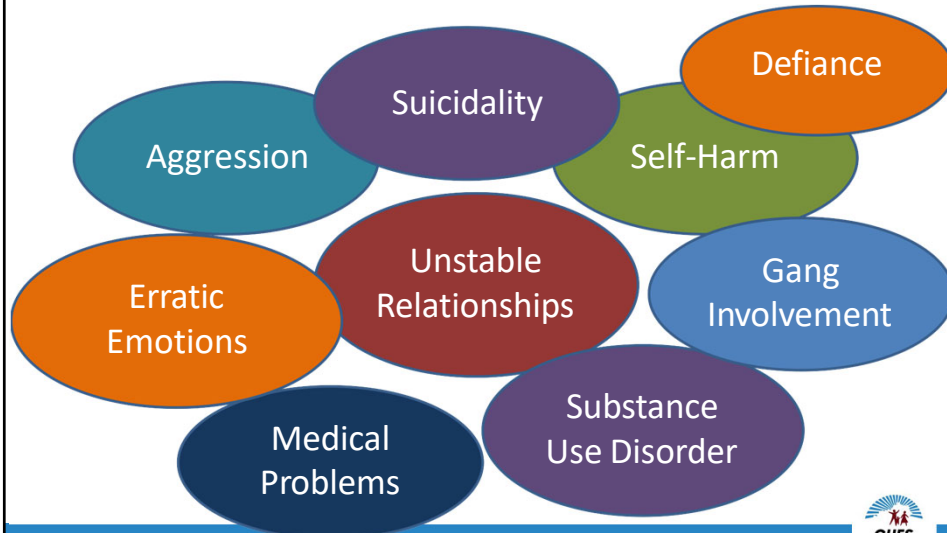
the **long term effects** and impacts of that exposure to multiple traumatic events which can disrupt numerous areas of development and functioning; the **experience of harm at the hands of a caretaking person** often creates a sense of betrayal and loss of trust in others.



COMPLEX TRAUMA IMPACTS...



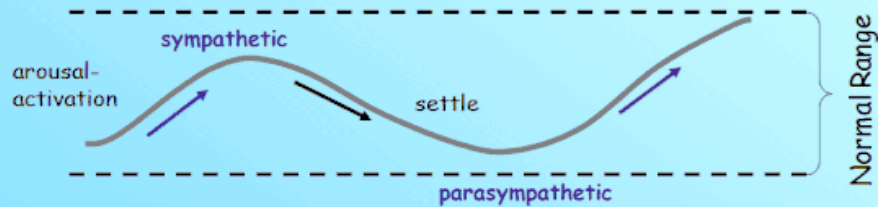
COMPLEX TRAUMA LOOKS LIKE...



WHY DO THEY GET SO EMOTIONAL ABOUT EVERYTHING?

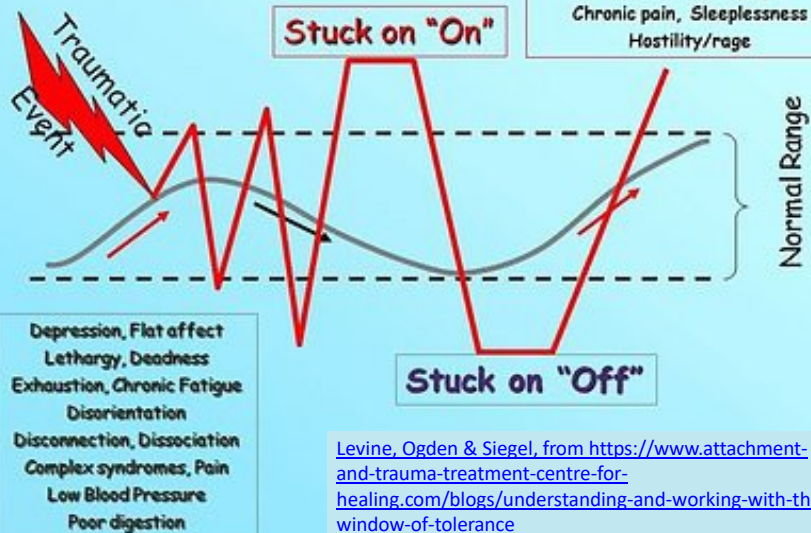


A Healthy Nervous System



Levine, Ogden & Siegel, from <https://www.attachment-and-trauma-treatment-centre-for-healing.com/blogs/understanding-and-working-with-the-window-of-tolerance>

Symptoms of Un-Discharged Traumatic Stress



Levine, Ogden & Siegel, from <https://www.attachment-and-trauma-treatment-centre-for-healing.com/blogs/understanding-and-working-with-the-window-of-tolerance>

HOW TRAUMA ALTERS DEVELOPMENT AND FUNCTIONING ACROSS CHILDHOOD



PHYSICAL EFFECTS

- Compromised immune response; sick more frequently
- Alterations in growth
- Vague somatic complaints; stress-induced illness
- Lower threshold tolerance for stress; more quick to respond with fight-flight-freeze
- Hyper- or hypo-sensitivity to sensory stimuli
- Dissociation of body parts



EMOTIONAL EFFECTS

- More internalized or externalized emotions
- Difficulty identifying, naming, expressing emotion; poverty of emotional vocabulary and understanding; rigid conceptualization of emotions
- Explosive, unpredictable, erratic emotions
- Highly defensive, hyper-vigilant, guarded
- Low frustration tolerance
- Disaffected, unfeeling, lacking empathy of emotion
- Unable to self-regulate, calm, self-soothe



COGNITIVE EFFECTS

- Poor memory, focus, concentration, task completion
- Difficulty making decisions
- Inability to think abstractly
- Rigid, inflexible, highly distressed by change, difficulty with normal transitions
- Inability to plan, imagine the future
- Cynical, negative, expect the worst
- Cognitive delays
- Shame, guilt, sense of stigma



SOCIAL EFFECTS

- Impaired attachment: too close or too distant
- Difficulty tolerating intimate or close interpersonal relationships
- Lack of trust for others
- Erratic, appear to be “manipulative” or “attention-seeking”
- Overly personalize intent of others as negative



EFFECTS ON BEHAVIOR

- Poor self-regulation
- Erratic, variable, contextually driven
- Increased risk-taking
- Problems with authority
- Easily activated and escalated
- Trigger responses
- Inability to stop and change course
- Aggressive, defensive, physical



WHAT DOES THIS MEAN FOR THE WORK OF GALs?



TRAUMA IS SOMEONE'S STORY

- Dr. Allison Jackson, Ted Talk:
<https://www.youtube.com/watch?v=-HG8H4n2j9I>



ATTACHMENT

- Parents are attachment figures
- Consistency and duration, quantity and quality, must be considered
- Attachment provides psychological safety
- Impact of disrupted attachment is severe
- More than meets the eye
- Who, when, how, and how long must be considered
- Sibling attachment matters



PERMANENCY

- What is permanent for this child?
- What is consistent in his/her life?
- What was consistent at key developmental windows?
- What are the developmental tasks of the present?
- What does the future portend?
- How can there be warm handoffs?



DEVELOPMENTAL LEVEL

- How important is stability and consistency of people? Rules? Peers?
- Is this bad behavior or immaturity?
- Development can vary across domains
- Watch for setting kids on the prison-to-pipeline journey or responding by pushing them out
- Are we consistent across race and ethnicity?



PLACEMENT HISTORY

- Periods of stability v. disruption
- Duration of out-of-home placements
- What happens after the honeymoon?
- Caregiver supports and interventions?
- Who and what are the constants?
- Developmental windows; developmental tasks
- Trauma reminders



RACE, ETHNICITY, SES

- Consider the data: our systems are structurally and systemically racist
- Self-reflection and self-awareness are critical
- Are your expectations and measures culturally appropriate?
- What if this child were white, middle class, clean, better spoken?
- What if this parent were white, middle class, clean, better spoken?
- Do these lives really matter to our system?



SCREENING, ASSESSMENT & INTERVENTION

- Trauma-focused and trauma-informed
- Don't assume, don't depend on the work of others
- ACEs are not predictive or diagnostic
- Treatment must provide psychological safety, trust, choice, empowerment, collaboration and be culturally responsive



COMPREHENSIVE TRAUMA ASSESSMENT

- Clinical interview with youth
- Clinical interview with caregiver
- Conjoint observation/ session
- Psychometric measures from youth, caregiver, school
- Records review: medical, school, behavioral health, DCBS
- *Multi-session, multiple data points, multiple types of data*



EVIDENCE-BASED TRAUMA-FOCUSED INTERVENTIONS: CORE COMPONENTS

- Educate about the impact of stress and trauma exposure
- Teach self-regulation skills and raise self-awareness about dysregulation
- Address relational dynamics between child and caregiver
- Teach child safety skills
- *May process trauma using play or trauma narrative; this is not always necessary*



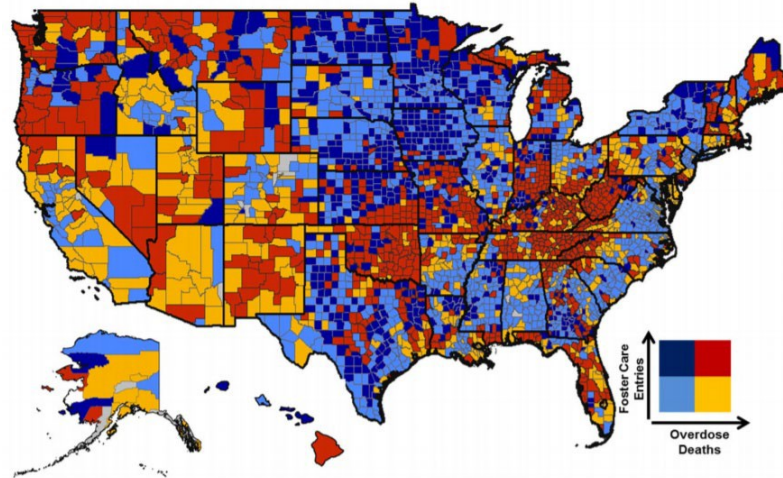
ACEs & SUD

- Adverse Childhood Experiences **increase risk of substance use and use of injectable substances**
- Adverse Childhood Experiences **increase risk of being a victim and of being a perpetrator of domestic violence**
- Adverse Childhood Experiences **increase risk of early initiation of sexual activity and substance misuse**

(Hillis et al, 2004; Anda et al, 2008; Dube et al, 2003; Anda et al, 2002; Whitfield et al, 2003)



Figure 3. Foster Care Entry Rates and Drug Overdose Death Rates, 2016

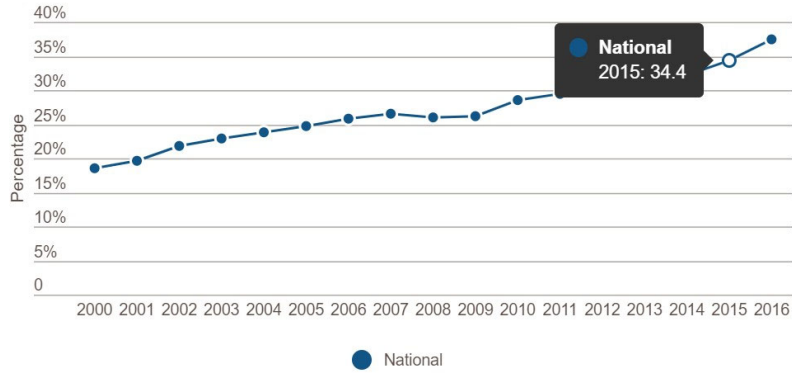


Source: AFCARS and CDC Small Area Estimates of Drug Overdose Death Rates (Age Adjusted). Colors indicate counties above or below the county median age-adjusted overdose death rate (15.4 per 100,000) and foster care entry rate (906 per 100,000 children).

From ASPE Research Brief, *The Relationship between Substance Use Indicators and Child Welfare Caseloads*:
<https://aspe.hhs.gov/system/files/pdf/258831/SubstanceUseCWCaseloads.pdf>



Prevalence of parental alcohol or other drug use as a contributing factor for reason for removal in the United States, 2000 to 2016



Source: AFCARS Data, 2000 - 2016

Note: Estimates based on all children in out-of-home care at some point during Fiscal Year



SUD & CHILD MALTREATMENT

Kentucky, Indiana have highest child abuse rates in US

Kentucky and Indiana rank first and second in the country for child abuse rates, according to the United States Children's Bureau.

REPORT: KENTUCKY HAS HIGHEST CHILD ABUSE RATE IN U.S.

July 5, 2020:

9797 children in out-of-home care in Kentucky with active placements



KENTUCKY OUT-OF-HOME CARE

JULY 5, 2020

Demographics		
African American Children	1729	18
Children with a Goal of Adoption	3104	32
Children with a Goal of Reunification (note C)	5342	55
Average Age of Entry into Foster Care	7	
Average Age Now	10	
Average Number of Months in Care at this Point in Time	23	
Average Percent of Life in Care	30	
Average Number of Days to Re-Enter for those with any Re-Entry	1237	
Average Number of Placements this Removal Episode	3	

From Kentucky Cabinet for Health and Family Services *Statewide Foster Care Facts*:
<https://chfs.ky.gov/agencies/dCBS/dpp/Documents/Statewide.pdf>



Considerations re:

Attachment & Relationships

- What is the nature of the current attachment?
- How old is the child?
- Are the caregivers willing to engage in treatment? Are the caregivers getting the appropriate treatment?
- Who else does the child have an attachment to?

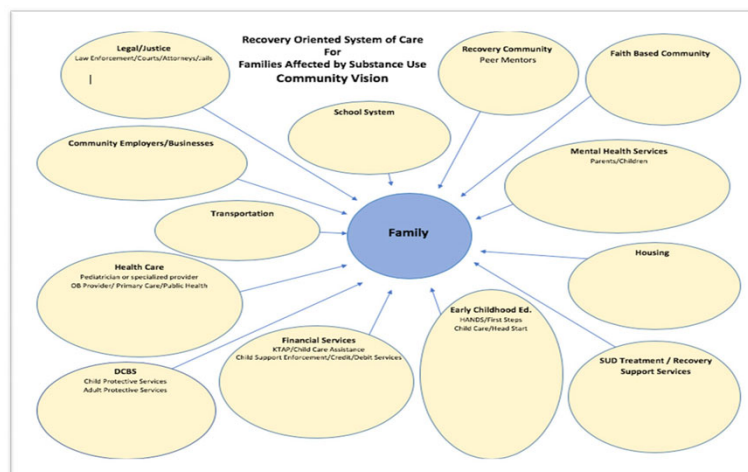


Considerations re: MEDICATIONS FOR OUD & CAREGIVING

- How long has the caregiver been using medications for OUD without return to use?
- How engaged is the caregiver in the treatment?
- How is the caregiver's overall functioning?
- What is the level of collaboration between the MAT Provider and DCBS?



RECOVERY EFFORTS



RECOVERY CAPITAL

Basic Needs:
housing, food,
transportation, health
care

Abilities &
Competencies:
skills, knowledge,
education, problem-
solving, self-esteem

Family/Social:
relationships, supports

Community & Culture:
community support,
stigma, peer support,
recovery community,
role models, providers

HOPE

- Brains are highly plastic, humans are very resilient
- Stability, safety, consistency, corrective relationships matter at any and all times
- Sometimes the child is fine, we need to adjust the environment
- We can promote, support, build resilience
- *“What’s predictable is preventable” (Robert Anda, MD, CDC, Co-PI of the ACE Study)*

BEING WITH YOUTH & ADULTS

Self-Awareness

Observation

Response



SELF-AWARENESS

- *How are you feeling?*
- *How do you carry the burden of your clients' trauma?*
- *What implicit biases or stereotypes do you carry?*
- *How does your position of relative privilege and authority inform your understanding?*
- *Where is your compassion directed?*



OBSERVATION

- *What are you thinking?*
- *What do you see? What have you read or heard?*
- *Could this behavior be trauma-related?*
- *How does the past inform the present?*
- *What expectations are you communicating? What expectations are the youth and family hearing?*



TRAUMA-INFORMED RESPONSE

- *What are you doing?*
- *Are you promoting psychological safety?*
- *Are you promoting trust, empowerment, choice & collaboration?*
- *Are you being culturally responsive?*
- *Are you avoiding re-traumatizing others?
Attending to potential trauma reminders?
Avoiding exclusionary outcomes?*



KEY CONCEPTS

- Trauma exposure is cumulative, has a dose response, impacts many areas of functioning
- Traumatic stress is a brain and body response; chronic trauma exposure causes toxic stress
- Complex trauma is truly complex; looks like other diagnoses or problems
- Trauma exposure requires trauma-focused assessment and intervention
- GAL responses must be trauma-informed in process and content



TAKING IT BACK TO WORK

- What new information have you learned?
- What does that mean for the way you review cases? Do you need to add things to your case conceptualization? History taking? Case review? Recommendations?
- Is there anything you want to learn more about?
- What additional resources do you need?



RESOURCES

- National Child Traumatic Stress Network: <https://www.nctsn.org/>
- Child Trauma Academy: <https://www.childtrauma.org/>
- CDC Adverse Childhood Experiences page: <https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/index.html>
- Harvard Center on the Developing Child: <https://developingchild.harvard.edu/>
- Resilient Communities: <https://publichealth.gwu.edu/departments/redstone-center/resilient-communities>



FOR MORE INFORMATION:

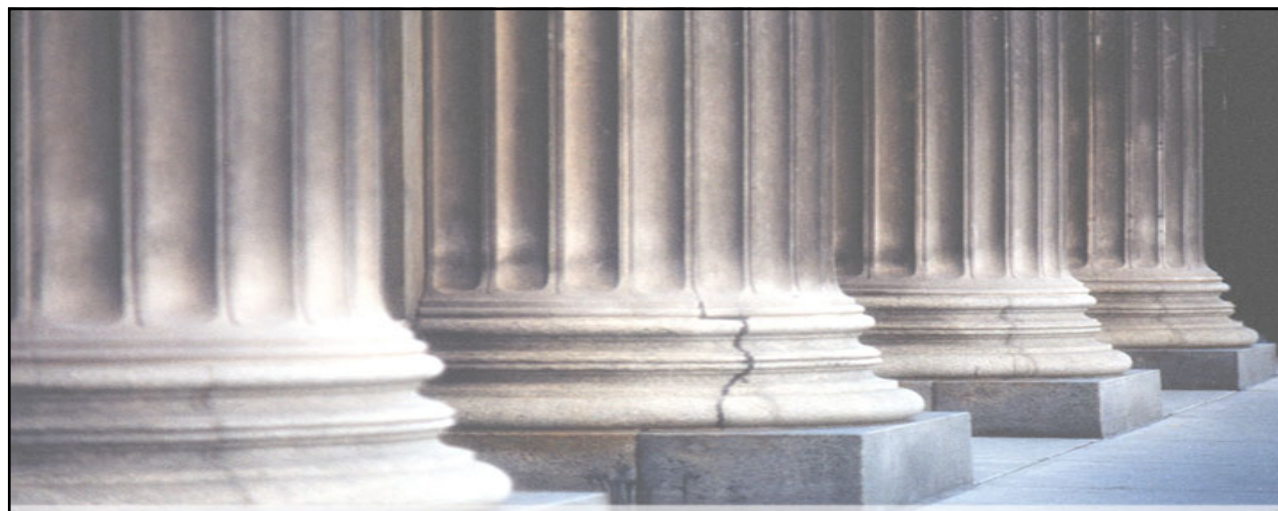
Miriam Silman, MSW
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Trauma Informed Care Training through DBHDID:
Brittanya A. Barber
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APPELLATE PRACTICE GUIDE





APPELLATE PRACTICE GUIDE



Overview

This session will cover basic appellate procedure for court-appointed counsel (CAC) and guardians *ad litem* (GAL) in appeals from termination of parental rights (TPR); dependency, neglect and abuse (DNA); and adoptions following an involuntary termination of parental rights. While appeals in these cases overwhelmingly tend to be taken by CACs on behalf of parents, children are also parties to the appeals and may file motions, responses, and briefs through their GAL. We will be focusing on direct appeals from Family or Circuit Courts to the Court of Appeals. The procedure for appeals from District courts to Circuit courts is covered by Kentucky Rules of Civil Procedure (CR) 72, *et seq.*

Overview

- It is not the goal of this session to cover substantive appellate case law (i.e., the law regarding the merits of an appeal).

Overview

- The Court of Appeals, in A.C. v. Cabinet for Health and Family Services, 362 S.W.3d 361 (Ky. App. 2012), held that indigent parents were entitled to appointed counsel on the direct appeals of judgments terminating parental rights. The A.C. Court relied on statutory interpretation and prior holdings that an indigent parent has a right to representation during every critical stage of the termination proceedings including those stages leading up to a termination, such as the underlying DNA action. *Id.*
- A.C. has been applied to DNA cases. See A.S. v. Commonwealth, 2018-CA-000673-ME, 2018-CA-000680-ME, 2019 WL 1510799 (Ky. App. Apr. 5, 2019).
- In conformance with A.C., the recent amendments to the Family Court Rules of Procedure and Practice (FCRPP) clearly delineate that CACs are expected to file appeals when necessary to protect their client's rights and interests.

Overview

- Between 2018-2019, 108 TPR, DNA, and adoption appeals were involuntarily dismissed. This was 22% of the total appeals filed in this area of law within the same timeframe (483 cases - 22 adoptions, 150 DNA actions, and 311 TPR actions).
- The top three reasons for dismissal are: untimely appeals (49 cases), interlocutory appeals (24 cases), and failure to name an indispensable party (11 cases). Only seven of these appeals were prosecuted by *pro se* litigants. These dismissals reveal that a significant number of TPR, DNA, and adoption appeals were lost as a result of procedural missteps by attorneys.

Overview

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Ky. S. Ct. Rule 3.130(1.1).
- It is an expectation that counsel know state and federal law regarding this area of law, as well as applicable procedural rules. FCRPP Appendix D(2)(4).

Overview

- While many CACs do not have a plethora of experience with appellate practice, a lawyer can ethically accept appellate representation if they undertake reasonable preparation to reach the requisite level of competence. Ky. S. Ct. Rule 3.130(1.1), Commentary (4).
- It is important to note that the ethical rules apply with equal force to appointed counsel. *Id.*

When to Take an Appeal

- Generally, appeals can only be taken from final and appealable judgments.
- CR 54.01 defines a final and appealable judgment as "a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02."

When to Take an Appeal

- Where a case has multiple claims and/or multiple parties, "the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay." The order must include full recitations, i.e. a statement that the order is final and appealable **and** that there is no just cause for delay. CR 54.02.

When to Take an Appeal

- The Court of Appeals only has jurisdiction over final orders and some interlocutory orders as permitted by the civil rules. Kentucky Revised Statute (KRS) 22A.020.
- Accordingly, the Court of Appeals is required to "raise the issue of want of jurisdiction if the order appealed from lacks finality."
Francis v. Crouse Co., 98 S.W.3d 62 (Ky. App. 2002).

When to Take an Appeal

- In TPRs, generally the final appealable order is the judgment granting or denying the termination of parental rights.
- Likewise, in adoptions the final order is generally the judgment granting or denying the adoption; however, be aware that courts may bifurcate the proceedings and enter a judgment solely resolving the parental rights portion. This may implicate CR 54.02.

When to Take an Appeal

- In DNA cases, the finding of dependency, neglect or abuse is reviewable from an appeal of the dispositional order. J.E. v. Cabinet for Health and Family Services, 553 S.W.3d 850 (Ky. App. 2018).
- DNA cases often proceed long after disposition and can give rise to other appealable judgments such as permanent custody orders.

When to Take an Appeal

- It is important to note that not every order is final and appealable. The following are generally found not to be final and appealable:
 - Temporary custody orders. Druen v. Miller, 357 S.W.3d 547 (Ky. App. 2011)
 - Goal changes. A.S. v. Commonwealth, 2018-CA-000673- ME, 2018-CA-000680-ME, 2019 WL 1510799 (Ky. App. Apr. 5, 2019); J. H. v. Cabinet for Health and Family Services, 2009-CA-000629-ME, 2009-CA-000630-ME, 2010 WL 1628494 (Ky. App. Apr. 23, 2010)
 - Reasonable efforts determinations in DNA cases.

How to Take an Appeal

- Appeals must be taken timely. Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918 (Ky. App. 1998); United Tobacco Warehouse. Inc. v. Southern States Frankfort Co-op. Inc., 737 S.W.2d 708 (Ky. App. 1987). Failure to strictly comply necessitates dismissal of the appeal. CR 73.02(2).
- CR 73.02(1) provides the general rule, which is that a "notice of appeal shall be filed [with the circuit court clerk] within 30 days after the date of notation of service of the judgment [on the clerk's docket] under Rule 77.04(2)."

How to Take an Appeal

- A common exception to CR 73.02 is the filing of a motion to alter, amend, or vacate a final order pursuant to CR 59.05.
- CR 59.05 motions must be served within 10 days of entry of the final judgment. If timely served, as evidenced by a signed certificate of service, the time to take an appeal is tolled pending resolution of the motion. If the motion is denied, the time to appeal runs for the full 30 days after the order is entered on the docket. CR 73.02(1)(e).

How to Take an Appeal

How to timely file a notice of appeal for indigent appellants:

- As court appointed counsel, it is likely that you will be dealing with indigent appellants. In these cases, to timely file a notice of appeal per CR 73.02, counsel must tender to the circuit court within the 30 days:
 - The notice of appeal,
 - A motion to proceed *in forma pauperis* (without filing costs), and
 - An affidavit in support of proceeding *in forma pauperis*.

How to Take an Appeal

What should be in the notice of appeal:

- The body of the notice should designate the judgment, order, or part thereof you are appealing from and shall specify by name all the parties on appeal. CR 73.03(1).
- "*Et al.*" is not appropriate when naming parties. *Id.*

How to Take an Appeal

Who must be named:

- All indispensable parties are required to be specifically named in the body or the caption of the notice of appeal. Browning v. Preece, 392 S.W.3d 388 (Ky. 2013). Naming parties in the body is the best practice.
- Service of the notice of appeal on a party without naming the party in the body or caption of the notice of appeal is insufficient. City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990).
- Because the obligation to name parties is reviewed for strict compliance, failure to include an indispensable party must result in dismissal. *Id.*
- It is also important to note that the failure to name an indispensable party cannot be cured by filing an amended notice of appeal if that amendment is outside of the 30 days to take an appeal. *Id.*

How to Take an Appeal

- In determining whether a party is truly necessary on appeal, the court must ask "who is necessary to pursue the claim.... If a party's participation in the appeal is unnecessary to grant relief, and requiring its participation would force unnecessary expense on the party, then ... such a party is not indispensable." Browning v. Preece, 392 S.W.3d 388 (Ky. 2013).

How to Take an Appeal

Determining who is indispensable on appeal is fact-specific, but general rules are as follows:

- It is well settled that the child is an indispensable party who needs to be named and served. R.L.W. v. Cabinet for Human Resources, 756 S.W.2d 148 (Ky. App. 1988).
- Where permanent custody is determined, the custodian is an indispensable party.

How to Take an Appeal

- The Cabinet is indispensable when the agency files the petition. M.M. v. Allen County Attorney's Office, 590 S.W.3d 836 (Ky. App. 2019).
 - Merely naming the Commonwealth is insufficient for purposes of naming the Cabinet. K.H. v. Commonwealth, 2017-CA-001863-ME, 2018 WL 5310145 (Ky. App. Oct. 26, 2018).

* Samples of a TPR Notice of Appeal and a motion and affidavit to proceed *in forma pauperis* are provided in the materials.

What to Expect After You File a Notice of Appeal

- One child, one case rule - Each child will be assigned their own Court of Appeals case number.
- If there is a family group, the cases are all separate, but the general rule is that the individual cases will be associated, i.e. travel together and will be heard by the same panel.
- Once the appeal is received by the Court of Appeals, the Court will enter a notice of an expedited appeal that provides the appellate case number and an overview of the applicable civil rules.

*A sample Court of Appeals expediting notice is provided in the materials.

What to Expect After You File a Notice of Appeal

- After entering the notice and creating the appellate case file, the notice of appeal is reviewed by the Court for any deficiency.
- If there are no issues, the Court will enter a confidentiality order. This order prevents individuals who are not parties to the action from accessing case information or the court file. In practice, this means that parties are referred to by their initials and case information will not show up on the Court's public site. If you need basic case information that you generally would be able to find on the Court's website, you may call the clerk.

What to Expect After You File a Notice of Appeal

- If the Court finds a potential procedural deficiency; e.g., timeliness, indispensable party, or finality; the Court will issue an order for Appellant's counsel to show cause why the appeal should not be dismissed.
- Just because a show cause order is issued does not mean dismissal is a certainty. It is critical that counsel responds because the failure to respond in and of itself is grounds for dismissal, and additional information or argument can make the difference.

Record on Appeals

- Designations of record are due to the circuit court clerk within 10 days after the notice of appeal is filed. CR 75.01; CR 98(3).
- “It is the Appellant's duty to ensure that the record on appeal is ‘sufficient to enable the court to pass on the alleged errors.’” Smith v. Smith, 450 S.W.3d 729 (Ky. App. 2014).
- For video records, the attorney shall list specifically “the dates on which video recordings were made for all pre-trial and post-trial proceedings necessary for inclusion in the record on appeal.” CR 98(3).
- Designation is especially important in family cases where hearings are not generally designated as trials.

Record on Appeals

- Where review of the video record is necessary to the claim, the failure to specifically designate the video record will prevent appellate review on the merits. Oldfield v. Oldfield, 663 S.W.2d 211 (Ky. 1983); Gambrel v. Gambrel, 501 S.W.3d 900 (Ky. App. 2016). Best practice is to set out all necessary court dates specifically.
- Circuit courts have 30 days to certify the appellate record, notice of which will be served on counsel at their address of record. CR 73.08.
- The time for briefing begins once the notice of certification is issued by the circuit court clerk. CR 76.12.

* A sample designation of record is provided in the materials.

Motion Practice

- Standard rules apply. Motions must be captioned to the Court of Appeals, contain a certificate of service, state with particularity the request and grounds therefor, and be signed. CR 5.01; CR 7.02; CR 11; CR 76.34. There is no need to tender proposed orders.
- When a motion is filed, the motion sits in the clerk's office for the running of response time. Any party is permitted to file a response within 10 days of the date of service of the motion. CR 76.34(2).
- If served by mail, response time is extended three days - this is the only time this rule applies to practice before the Court of Appeals. CR 6.05.

Motion Practice

- Motions are the only documents filed in the Court of Appeals for which the response time runs from the date of service, instead of the date of filing.

Motion Practice

- Time computation is governed by CR 6.01.
- “To be timely filed, a document must be received by ... the Clerk of the Court of Appeals within the time specified for filing, except that any document shall be deemed timely filed if it has been transmitted by United States registered (not certified) or express mail, or by other recognized mail carriers, with the date the transmitting agency received said document from the sender noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.” CR 76.40(2).
- Best practice is not to wait until the final day.

Motion Practice

Common motions:

- Consolidate appeals - Where Appellant has multiple cases involving the same or similar facts, consolidating allows counsel to file a single consolidated pleading in all of the appeals.
- Voluntary dismissals - Court practice requires the motion to be accompanied by a signed and notarized affidavit from the client in support of the motion. The affidavit should state that the client was advised of their right to appeal and the merits of the appeal, and that the decision to dismiss is voluntary.

Motion Practice

Common motions (cont.):

- Additional time motions - Should be the exception, not normal practice. CR 76.12(2)(b) states that extensions shall “not be considered except under extraordinary circumstances.” The motion should be timely filed, and the expectation is that counsel will diligently work to complete and tender a brief even before the motion is ruled upon.

Briefing Practice

General rules:

- These types of cases are expedited by the civil rules. Briefs are due within 30 days of the date the record is certified and reply briefs are due within 10 days of the date the last appellee's brief is filed or is due to be filed. CR 76.12(2)(b).
- 5 copies of the pleadings must be filed. CR 76.12(3)(a).
- Form and content rules can be found at CR 76.12.

* A sample checklist of the briefing requirements is provided in the materials.

Briefing Practice

Common mistakes:

- Failure to include a statement concerning whether the record was checked out and, if so, returned.
- Failure to include ample references to specific pages of the record or digital video references in both the Statement of the Case and Argument sections.
- Failure to include a statement concerning whether and how the argument is preserved for review.
- Failure to include an index to the appendix that lists the attachments and states where they can be found in the record.
- Failure to attach the judgment on appeal as the first item in the appendix.

Briefing Practice

- Failure to substantial comply with CR 76.12 can result in the brief being stricken. CR 76.12(8)(a).
- If an Appellant's brief is not filed on time, the appeal may be dismissed. CR 76.12(8)(b).
- If the Appellee does not timely file a brief, the court may:
 - Accept the Appellant's statement of facts and issues as correct,
 - Reverse the appealed judgement/order based on the Appellant's brief, OR
 - Regard Appellee's failure to as a confession of error and reverse the judgement/order. CR 76.12(8)(c).

* A sample brief is provided in the materials.

Anders briefing pursuant to A.C.

- The Court of Appeals in A.C. v. Cabinet for Health and Family Services, 362 S.W.3d 361 (Ky. App. 2012) held that Anders style briefing was permissible in TPR appeals. See Anders v. State of California, 386 U.S. 738 (1967).
- Anders briefs have also been accepted in DNA actions.
- The allowance of Anders briefs balances the client's rights to counsel on appeal with the attorney's obligation to provide zealous representation, candor to the court, and the ethical duty to not bring frivolous actions.

Anders briefing pursuant to A.C.

- Anders style briefing is appropriate when court appointed counsel “has conducted a thorough, good-faith review of the record and can ascertain absolutely no meritorious issue to raise on appeal.” *Id.*
- Anders briefs should not be used as a means of escaping representation obligations.

Anders briefing pursuant to A.C.

Drafting and filing an Anders brief:

- Still must observe CR 76.12's general briefing rules. *Id.*
- Counsel should note in the brief “anything in the record that might arguably support the appeal” and “objectively demonstrate the issues identified are wholly frivolous.” *Id.*
- The Anders brief must be accompanied by a separate motion to withdraw as counsel which provides the client's last known address and certifies that the client was informed that they have the right to file a supplemental brief raising any issues they deem meritorious. Both the motion and the brief must certify that the pleadings were served on the client.

Anders briefing pursuant to A.C.

Drafting and filing an Anders brief (Cont.):

- Upon receipt of the Anders pleadings, if compliant with A.C., the Court will enter an order:
 1. Passing the motion to withdraw to the merits panel,
 2. Filing the Anders brief, and
 3. Granting the *pro se* Appellant 30 days to file a supplemental brief.

Anders briefing pursuant to A.C.

Drafting and filing an Anders brief (Cont.):

- After briefing is completed, the Court will “fully examine the record and decide whether the appeal is wholly frivolous.” *Id.* The Court may order any party to file a supplemental brief if deemed appropriate.
- See A.C. for a more in-depth discussion of requirements.

*A sample argument section from an Anders brief and a motion to withdraw are provided in the materials.

After Opinion

- There are options for seeking additional review, including motions for reconsideration (CR 76.38), petitions for rehearing (CR 76.32), and motions for discretionary review by the Kentucky Supreme Court (CR 76.20).
- Note, where the underlying judgment in a DNA case is from district court and an appeal has been taken with the circuit court, motions for discretionary review are filed in the Court of Appeals. CR 76.20(1).

SUPPLEMENT

Sample Appellate Documents

INDEX OF SAMPLE DOCUMENTS

1. Notice of Appeal from a judgment terminating parental rights
2. Form AOC-026: Motion for waiver of costs and fees and to proceed *in forma pauperis*; affidavit; financial statements; and order

This document is available at <https://kycourts.gov/resources/legalforms/LegalForms/026.pdf>
3. Court of Appeals expediting notice
4. Designation of Record
5. Briefing checklist
6. Appellant's brief

This is a sample appellant's brief from a domestic violence matter but is included to demonstrate compliance with the technical requirements of CR 76.12.
7. Argument section from an *Anders* brief
8. Motion to withdraw as counsel pursuant to *A.C. v. Cabinet for Health and Family Services*

These sample documents are provided for educational purposes only. They are not meant to constitute legal advice and do not substitute counsel's obligation to fully comply with relevant law, including the Kentucky Rules of Civil Procedure.

COMMONWEALTH OF KENTUCKY
[COUNTY] CIRCUIT COURT
DIVISION __
ACTION NO. 20-AD-00000

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES

PETITIONER

v.

NOTICE OF APPEAL

[BIOLOGICAL PARENT];
[CHILD], A MINOR CHILD; and
[FOSTER PARENT]

RESPONDENTS

Notice is given that [biological parent], the natural mother/father, in this proceeding, hereby appeals to the Kentucky Court of Appeals from the Judgment of the [County] Circuit Court terminating his/her parental rights to the minor child entered on [date].

The names of the appellees against whom this appeal is taken are the Commonwealth of Kentucky, Cabinet for Health and Family Services; [Child’s name], a minor child; and [Foster Parent]¹.

[attorney signature block]

¹ Pursuant to KRS 625.060(1)(d), the foster parent with whom the child is currently placed should be named as a party in the petition for termination of parental rights. On this basis, best practice would be to also name the foster parent as a party to an appeal from the judgment terminating parental rights.

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was on the ____ day of _____, 2020, mailed to the following:

[Counsel's name]
Commonwealth of Kentucky
Cabinet for Health and Family Services
[Address]

[Counsel's name]
[Address]
GAL for minor child

[Counsel's name]
[Address]
Counsel for Foster Parent

[attorney signature]

AOC-026 Doc. Code: AFP
 Rev. 10-18
 Page 1 of 3
 Commonwealth of Kentucky
 Court of Justice www.courts.ky.gov
 KRS 453.190; CR 5.05(4)



MOTION FOR WAIVER OF COSTS AND FEES AND TO PROCEED *IN FORMA PAUPERIS*; AFFIDAVIT; FINANCIAL STATEMENT; AND ORDER

Case No. _____
 Court _____
 County _____
 Division _____

PLAINTIFF/PETITIONER

VS.

DEFENDANT/RESPONDENT

Motion for Waiver of Costs and Fees: Affiant is unable to pay the costs and fees of this action and hereby requests that the Court waive them and allow Affiant to proceed *in forma pauperis*.

Affiant hereby submits the following information in support of the above Motion.

NAME: _____

ADDRESS: _____

DOB: _____ Telephone: () _____

I. MONTHLY INCOME/MONTHLY EXPENSES

1. Are you employed? Yes, full-time. Yes, part-time. No.

Employer name and address: _____

2. Marital status: _____ If married, spouse's name: _____

3. Number of dependents (children, elderly, or disabled): _____ Relationship: _____ Age(s): _____

4. If married, is spouse employed? Yes No. If yes, include spouse's income and expenses below unless this is a divorce proceeding.

Monthly Income

Gross salary (before deductions) \$ _____
 Public/Gov't assistance: \$ _____
 Food stamps/SNAP \$ _____
 TANF \$ _____
 K-TAP \$ _____
 KCHIP \$ _____
 LIHEAP \$ _____
 WIC \$ _____
 Child Care Assistance \$ _____
 Foster care \$ _____
 Other \$ _____
 Social Security (SSI/SSD) \$ _____
 Worker's Compensation \$ _____
 Unemployment \$ _____
 Retirement/Pension \$ _____
 Child support \$ _____
 Maintenance/Alimony \$ _____
 Stocks, trusts, bonds \$ _____
 Student financial aid \$ _____
 Other \$ _____

Monthly Expenses

Mortgage Rent payment \$ _____
 Utilities (electric/gas) \$ _____
 Water/Sewer/Trash \$ _____
 Food \$ _____
 Phone(s) (landline and/or cell) \$ _____
 Internet \$ _____
 Cable/Satellite \$ _____
 Transportation \$ _____
 Clothing/Shoes \$ _____
 Vehicle payment(s) \$ _____
 Insurance (vehicle, health, house/renter's) \$ _____
 Credit card payment(s) \$ _____
 Unreimbursed childcare \$ _____
 Tuition/student loans \$ _____
 Medical/Dental payments/installments \$ _____
 Child support \$ _____
 Other \$ _____

5. TOTAL MONTHLY INCOME \$ 0.00

6. TOTAL MONTHLY EXPENSES \$ 0.00

II. ASSETS / DEBTS

Assets

Cash on hand \$ _____
 Bank accounts
 Checking \$ _____
 Savings \$ _____
 Other _____ \$ _____
 Value of home (if homeowner) \$ _____
 Value of other real estate owned (*please list*)
 _____ \$ _____
 _____ \$ _____
 _____ \$ _____
 Value of vehicle(s) in working order
 (1) Yr/Make _____ \$ _____
 (2) Yr/Make _____ \$ _____
 (3) Yr/Make _____ \$ _____
 Value of personal possessions (*i.e., jewelry, boat*)
 _____ \$ _____
 _____ \$ _____
 _____ \$ _____
 _____ \$ _____

Debts / Outstanding balances owed

Home loan, if homeowner \$ _____
 Vehicle loan(s) \$ _____
 Credit card(s) \$ _____
 Student loan(s) \$ _____
 Medical \$ _____
 Other _____ \$ _____
 Other _____ \$ _____
 Other _____ \$ _____
 Other _____ \$ _____
 Other _____ \$ _____

7. TOTAL ASSETS \$ 0.00

8. TOTAL DEBTS \$ 0.00

9. Additional comments:

 Date

 Affiant's Signature

 Affiant's Name (*print or type*)

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 2_____

My Commission Expires: _____

 Attesting Officer or Notary's Signature

AOC-026
Rev. 10-18
Page 3 of 3

Doc. Code: OFP
or OFD



Commonwealth of Kentucky
Court of Justice www.courts.ky.gov
KRS 453.190; CR 5.05(4)

**MOTION FOR WAIVER OF COSTS AND FEES AND
TO PROCEED *IN FORMA PAUPERIS*; AFFIDAVIT;
FINANCIAL STATEMENT; AND ORDER**

Case No. _____

Court _____

County _____

Division _____

ORDER

This case having come on the Court's docket on a motion for waiver of fees and costs associated with this action and to proceed *in forma pauperis* pursuant to KRS 453.190, and the Court having reviewed the foregoing Affidavit and Financial Statement, and being otherwise sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED that the Motion to Proceed *In Forma Pauperis* is:

- GRANTED.** (Doc Code: OFP) Affiant is a poor person pursuant to KRS 453.190(2) as follows: *(Check one)*
- Affiant is unable to pay the costs and fees associated with this action without depriving himself or herself or his or her dependents of the necessities of life, including food, shelter, or clothing. OR
 - Affiant's income is at or below 100% on the sliding scale of indigency established by the Kentucky Supreme Court.

OR

- DENIED.** (Doc Code: OFD) Affiant is not a "poor person" pursuant to KRS 453.190(2). Affiant shall have thirty (30) days to pay any required fees or costs to appeal this decision. If Affiant fails to pay the required fees or costs, or fails to seek review, the matter shall be treated as though not timely filed. CR 5.05(4).

Date

Judge's Signature

Commonwealth of Kentucky

Court of Appeals

NO. [Click here to enter CA #.-ME](#)

[Click here to enter Appellant.](#)

APPELLANT

v. APPEAL FROM [Click here to enter County.](#) CIRCUIT COURT
ACTION NO. [Click here to enter circuit court #.](#)

[Click here to enter Appellee.](#)

APPELLEE

NOTICE EXPEDITED APPEAL

* * * * *

Pursuant to CR 76.03(1), CR 73.08, and CR 76.12(2)(a)(i) as amended and effective January 1, 2019, a special procedural process has been established and time specific deadlines have been set for appeals arising from actions concerning paternity, dependency, abuse, neglect, domestic violence, juvenile status offense; or involuntary termination of parental rights. It has come to the Court’s attention that this appeal arises from one of those actions. Therefore, the attorneys, parties, and circuit clerk should pay careful attention to the applicable rules as follows:

A) Prehearing Conference Procedure does not apply pursuant to CR 76.03:

This Rule, 76.03, applies to all civil actions appealed to the Court of Appeals, except prisoner applications seeking relief relating to confinement or conditions of confinement and appeals from Circuit Court orders

determining paternity, dependency, abuse, neglect, domestic violence, or juvenile status offense. CR 76.03

B) Reduced time for the Circuit Court Clerk to Certify the Record pursuant to CR 73.08:

If the proceedings were taken exclusively by video recording, if there are no proceedings to transcribe, or if the appeal is from a Circuit Court order determining paternity, dependency, abuse, neglect, domestic violence, or juvenile status offense, then the record on appeal shall be certified by the clerk within 30 days after the date of filing the first notice of appeal. CR 73.08.

C) Reduced Briefing Time pursuant to CR 76.12:

Appeals in these cases shall be expedited. The appellant's brief shall be filed with the clerk of the appellate court within 30 days after the date of the notation on the docket of the notification required by Rule 75.07(6). The appellee's brief shall be filed within 30 days after the date of filing of the appellant's brief. The appellant's reply brief shall be filed within 10 days after the date of filing of the appellee's brief. Motions for extension of time will not be considered except under **extraordinary** circumstances. CR Rule 76.12 (2)(a)(i).

Please note that the new rules impose time deadlines that are strictly limited and allow for no latitude or relaxation.

COMMONWEALTH OF KENTUCKY

CIRCUIT COURT
CASE NO. 20-AD-_____

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY

PETITIONER

v.

[PARENT'S NAME]

RESPONDENTS

DESIGNATION OF RECORD

Pursuant to CR 75.01 and CR 98, [parent's name] hereby designates as the record on appeal the entire court record, including all pleadings and exhibits entered into evidence, as well as the video record from the following dates:

1. July 17, 2019 – hearing on post judgment motions;
2. July 1, 2019 – termination hearing; and
3. May 1, 2019 – prehearing conference.

Respectfully Submitted,

[attorney signature block]

Certificate of Service

The undersigned hereby certifies that true copies of this motion were served upon the following named individuals by [method of service] on [date]. [Name and address persons served].

[attorney signature]

Updated 08/15/2013	KENTUCKY COURT OF APPEALS ATTORNEY CHECKLIST FOR APPELLANT'S BRIEF		
SUBJECT	REQUIREMENT	✓	RULE
Copies:	5 Copies		76.12(3)(a)
Cover:	Enclosed Front and Back in Red Covers		76.12(4)(a)(iii)
	Captioned with the Court of Appeals case number(s); circuit court case number(s); and at least the lead appellants and appellees		76.12(4)(a)(iii)
	The name of the party on whose behalf the brief is submitted		76.12(6)
	Certificate of Service identifying persons served		76.12(6)
	Service on Circuit Court Judge		76.12(5)
	Criminal - Service on Commonwealth Attorney		76.12(5)
	Signed and Dated certificate of service		76.12(6)
	Statement that circuit court record has been returned or not withdrawn		76.12(6)
Formatting:	8.5" X 11" Paper		76.12(4)(a)(ii)
	No smaller than 12pt set at standard width (Exceptions: Footnotes)		76.12(4)(a)(ii)
	Double Spaced (Exceptions: Footnotes, Block Quotes)		76.12(4)(a)(ii)
	1.5" Margin on the left, 1" margin all other edges		76.12(4)(a)(ii)
	Securely Bound on the Left		76.12(4)(a)(ii)
	Exception: (One unbound copy for the clerk's file is helpful)		
Content:	INTRODUCTION -Brief introduction not exceeding two sentences		76.12(4)(c)(i)
	STATEMENT CONCERNING ORAL ARGUMENT -a statement indicating whether appellant desires oral argument -why it would or would not be helpful to the Court.		76.12(4)(c)(ii)
	STATEMENT OF POINT AND AUTHORITIES -Listing of Arguments and Cases cited in the brief with page numbers.		76.12(4)(c)(iii)
	STATEMENT OF THE CASE -Summary of the Facts and Procedural Events -Ample references to the specific pages of the record or digital counter Video Record (VR No. 1: 10/27/06: 14:24:05) Circuit Record (Circuit Clerk Volume and Page Number) Depositions included in the circuit court record on appeal (Name, Date and Page Number)		76.12(4)(c)(iv)
	ARGUMENT -Conforming to the page layout of the Statement of Points and Authorities -At the beginning, a statement of where the argument was preserved -Ample references to the specific pages of the record or digital counter -Supporting Citations of Authority		76.12(4)(c)(v)
	CONCLUSION -Setting Forth relief sought from appellate court		76.12(4)(c)(vi)
After Conclusion:	Name of attorney submitting the brief must appear after the conclusion (Signature must be here or on front cover, CR 11)		76.12(6)
Length:	-25 Pages excluding the introduction; statement of points and authorities; exhibits and appendices -Name after conclusion must be contained within 25 pages		76.12(4)(b)(i)
Appendix: (Mandatory)	Extruding Tabs		76.12(4)(c)(vii)
	Appendix List or Index -listing all documents included in the appendix. -where the documents may be found in the circuit court record (see above)		76.12(4)(c)(vii)
	Judgment, Opinion, or Order under review must be placed immediately after appendix list		76.12(4)(c)(vii)

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
APPEAL NO. 2020-CA-000000-ME

[APPELLANT'S NAME]

APPELLANT

VS.

APPEAL FROM [COUNTY] CIRCUIT COURT
HONORABLE [JUDGE'S NAME]
CIVIL ACTION NO. 19-D-00000-001

[APPELLEE'S NAME]

APPELLEE

APPELLANT'S BRIEF

Submitted by:

[attorney signature block]

CERTIFICATE OF SERVICE

I hereby certify that on the __ day of _____, 2020, the original of the foregoing appellant's brief has been mailed to Rebecca C. Lyon, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, and true and accurate copies of appellant's brief were served upon the following: [appellee's counsel's name], [counsel's address] and Hon. [Circuit Judge's name], [circuit court address].

I further certify that the record on appeal was not removed from the [county] Circuit Clerk's office.

[attorney signature]

INTRODUCTION

This appeal involves ██████████ Family Court's Domestic Violence Order and subsequent denial of Appellant's 59.05 Motion from October 28, 2019 and November 20, 2019, in L ████████ W ████████ v. M ████████ W ████████, Case No. ██████████. At a hearing on October 21, 2019 the Court heard testimony regarding Appellant fatally shooting his brother's dog and erroneously found that the actions of Appellant rose to the level of domestic violence against Appellant's brother's ex-wife, and current girlfriend, L ████████ W ████████, on behalf of herself and her minor children.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes oral argument is not necessary in this case and will not be helpful in resolving the issues.

STATEMENT OF POINTS AND AUTHORITIES

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<u>Caudill v. Caudill</u> , 318 S.W.3d 112 (Ky. App. 2010)	4
<u>Barrett v. Wiley</u> , 103 S.W.3d 17 (Ky. 2003)	4
<u>Fraley v. Rice-Fraley</u> , 313 S.W.3d 635 (Ky. App. 2010)	5
<u>Pasley v. Pasley</u> , 333 S.W.3d 446 (Ky. App. 2010)	5
<u>Telek v. Daugherty</u> , 376 S.W.3d 623 (Ky. App. 2012)	5
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STATEMENT OF THE CASE

The Appellant, M [REDACTED] W [REDACTED] was at his parents' home with his minor children C.W. and B.W. While his children were in bed he and his mother, J [REDACTED] W [REDACTED] got into an argument about M [REDACTED] drinking alcohol. (10:20:25-10:21:00) Everyone acknowledged that during this argument M [REDACTED] was not intoxicated and had not been drinking. (10:30:00-10:30:25) (10:36:44) M [REDACTED] left the residence, got into his vehicle and drove across the property to his "chicken coop." (10:37:08) Once he arrived at his "chicken coop" M [REDACTED] shot and killed his brother's dog which was inside the coop. M [REDACTED] got back in his vehicle, returned to the home of his parents briefly, then left. (10:39:00) (11:06:50-11:07:02)

At no point did M [REDACTED] physically harm, sexually harm, or threaten to harm any of the persons that filed for protection orders against him. The dog that was shot belonged to his brother, who was not present at the home, and the dog was not a pet of any of M [REDACTED]'s children against whom the Domestic Violence Orders were entered. (10:26:30) Moreover, the children were in bed inside the home and unaware that the animal had been shot. (10:21:54-10:22:06)

M [REDACTED] testified that the dog bit him when he opened the door to the "chicken coop," that he was unaware the dog was in the "coop" and that he shot it in self-defense. (11:07:02-11:09:16)

Testimony continued that M [REDACTED]'s story never changes. (10:29:45-10:30:25) (10:38:00-10:38:15) (11:03:14) (11:10:28-11:11:42) Text messages introduced by his brother also showed that M [REDACTED] had told his brother the dog had attacked him and he killed it in self-defense.

M [REDACTED]'s brother testified that he believes M [REDACTED] shot his dog because M [REDACTED] was mad at him for telling their mother that M [REDACTED] was drinking again. (10:54:54) No one was present when M [REDACTED] shot the dog except M [REDACTED].

M [REDACTED]'s ex-wife, H [REDACTED] W [REDACTED] filed an EPO after being told of the incident, on behalf of herself and their child. His brother, J [REDACTED] W [REDACTED] and his ex-wife, L [REDACTED] W [REDACTED] filed for an EPO after learning the dog was shot.

M [REDACTED]'s mother, J [REDACTED] W [REDACTED], testified that she filed for the EPO against M [REDACTED] because she was informed others were filing and she did not want the children taken out of her home by Child Protective Services. (10:21:42-10:22:06)

These undisputed facts resulted in the entry of four (4) Domestic Violence Orders against M [REDACTED] W [REDACTED].

STANDARD OF REVIEW

The standard of review in this appeal is whether the lower court's Order was clearly erroneous. CR 52.01. Although our domestic violence statute may be construed in favor of protecting victims of domestic violence, the construction cannot be unreasonable. Barret v. Wiley, 103 S.W.3d 17 (Ky. 2003).

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE ENTRY OF A DVO

Preservation of Error: Appellant preserved this issue raised in his appeal during the evidentiary hearing (11:21:32) and in his motion to set aside the Domestic Violence Orders pursuant to CR 59.05.

[REDACTED] Family Court may not enter a DVO unless it finds two prerequisites from the proof:

- (1) An act of domestic violence and abuse; and
- (2) It may occur again.

This standard was enunciated by the Kentucky Supreme Court in Wright v. Wright, 181 S.W.3d 49 (Ky. App. 2005). The Court of Appeals addressed the DVO process in Caudill v. Caudill, 318 S.W.3d 112 (Ky. App. 2010).

KRS 403.720(1) defines domestic violence and abuse as “physical injury, serious physical injury, stalking, sexual abuse, assault, or the infliction of fear or imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple.” The only possible application of this definition to the facts of this case is the “infliction of fear” clause.

In the case at bar, M [REDACTED] never undertook any actions to inflict fear, let alone imminent fear of any of the parties. M [REDACTED] left his parents’ home, drove to a shed-like structure and killed an animal that had been pinned up. (10:28:00-10:28:40) (11:06:45-11:07:02) M [REDACTED] then got back in his vehicle and left to his farm.

The act of killing an animal, devoid of other facts, is not a threat. In this case, the only other evidence is that the owners of the dog actively engaged in conversations with M [REDACTED] and were met with the consistent response that the act was in self-defense. (10:29:45-10:30:25) (10:38:00-10:38:15) (10:03:14) (11:10:28-11:11:42) Regardless of any possible ulterior intent, the nature of the communications foreclosed the possibility that any party had any reason to fear M [REDACTED]. M [REDACTED] did not publicize or display the killed dog, nor did he taunt or threaten any of the parties involved. (11:12:50)

Fear must be predicated on a present threat, or the source of her fear becomes unconnected to the allegation of domestic violence. See: Fraley v. Rice-Fraley, 313 S.W.3d 635

(Ky. App. 2010). Mere fear alone of some future event is insufficient to support the issuance of a DVO. Pasley v. Pasley, 333 S.W.3d 446 (Ky. App. 2010). The alleged fear must be of “imminent danger.” KRS 503.010(3). See also: Telek v. Daugherty, 376 S.W.3d 623 (Ky. App. 2012).

The second prong of the statute is likewise lacking in the instant case. There also is no evidence in the record to support the Court’s finding of domestic violence and there is no evidence that any domestic violence, “may occur again.” Absent such evidence, the second prong of the statute becomes illusory. The Court cannot merely find that it may occur again because it occurred once. Findings are clearly erroneous when unsupported by substantial evidence in the record. Moore v. Asente, 110 S.W.3d 336 (Ky. 2003). There is no evidence in the record to support a finding that domestic violence may occur again.

CONCLUSION

Based upon the foregoing citations to facts and applicable law, the Domestic Violence Orders entered by [REDACTED] Family Court should be reversed and set aside.

Respectfully submitted,

[attorney signature block]

APPENDIX

A. Domestic Violence Order entered on October 28, 2019 R. 6-8

B. Order overruling CR 59.05 motion entered on November 20, 2019 R. 10

STANDARD OF REVIEW

An appellate court reviews a termination of parental rights judgment under a clearly erroneous standard of review. *M.E.C. v. Com., CHFS*, 254 S.W.3d 846, 850 (Ky. App. 1986). The circuit court's determination is clearly erroneous if there is not substantial, clear, and convincing proof to support the decision. *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010).

ARGUMENT

Issue Preservation

Following a bench trial, the circuit court rendered its written Findings of Fact and Conclusions of Law, the Order Termination Parental Rights, and Order of Judgement, all of which were entered on October 25, 2017. [Record Cite and page number]. Appellant properly filed a notice of appeal seeking review of the aforementioned orders. [Record Cite and page number]. The argument herein was raised below and considered by the circuit, as reflected in the judgment on appeal.

Summary

The undersigned has conducted a thorough, good-faith review of the record, and after doing so, can ascertain absolutely no meritorious issue to raise on appeal. However, in accordance with *Anders*, the undersigned sets forth the following argument in support of the appeal. See *A.C. v. CHFS*, 362 S.W.3d 361 (Ky. App. 2012), citing *Anders v. State of California*, 386 U.S. 738 (1967). Appellant argues that the Cabinet did not make reasonable efforts to reunite the child with him.

THE CIRCUIT COURT ERRED WHEN IT GRANTED TERMINATION OF PARENTAL RIGHTS.

Appellant could argue that the circuit court erred in granting termination of his parental rights: however, the following findings of the circuit court objectively demonstrate that this argument and the appeal are wholly frivolous as substantial evidence supports the determination.

The child was previously adjudged to have been abused in _____ County action 00-J-00000. [Cite]. Appellant was named in the petition as the party responsible. [Cite]. Furthermore, in the present action, the Court again found that the Appellant had created a risk of physical or emotional harm by other than accidental means when Appellant exposed the child to domestic violence. [Cite]. This finding was supported by the child's testimony regarding the violence he had witnessed and the effects it had on him. [Cite]. As such, the court's finding of abuse or neglect is not clearly erroneous.

The circuit court found that, for reasons other than poverty, Appellant had failed to provide essential food, clothing, shelter, medical care or education, and there is no expectation of improvement and that the child had been in foster care for 15 of the most recent 22 months. [Cite]. Appellant asserted he provided gifts to the child on two occasions, however, Appellant was unable to provide any evidence that he provided the necessities for the child or financial support therefore. [Cite]. Additionally, there is no expectation of improvement because Appellant has taken no steps to gain employment or stable housing. [Cite]. Appellant cannot refute the fact the child has had custody of the minor child since May 1, 2018 – which is well in excess of the stated 15 of the most recent 22 months. [Cite]. Accordingly, the court's finding that the Cabinet established the requisite grounds for termination is not clearly erroneous.

Finally, the circuit court found that it was in the child's best interest to terminate Appellant's rights. [Cite]. In making this determination the court considered the Cabinet's

testimony of the efforts it made towards reunification which included a prevention plan and referrals to assessment and treatment facilities. [Cite]. The Cabinet further testified that the child has been placed with foster parents who wish to adopt him. [Cite]. The child testified as to his general well-being in his current placement, his improvements since entering state care, and his wish to remain with his foster parents. [Cite]. While Appellant asserted at the hearing that he believes he is ready for custody, Appellant was unable to present any evidence that he abided by the prevention plan or that he made any steps towards overcoming his admitted alcoholism and drug use. Accordingly, the court's findings that termination is in the child's best interest is not clearly erroneous.

CONCLUSION

While undersigned counsel has been unable to discern any meritorious argument to present herein, counsel urges this Court to fully review the record and afford Appellant any and relief to which he is entitled.

[Attorney Signature Block]

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2020-CA-_____-ME

[PARENT’S INITIALS]

APPELLANT

APPEAL FROM _____ CIRCUIT COURT
ACTION NO. 20-AD-_____

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; ET AL.

APPELLEES

MOTION TO WITHDRAW

Comes now [counsel’s name], appointed counsel for Appellant [parent’s name] and hereby respectfully requests the Court to withdraw him/her as counsel of record in this matter pursuant to *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. 2012). In support, counsel states the following:

- 1) Counsel has conducted a thorough, good faith review of the entire record on appeal and can ascertain absolutely no meritorious issues to raise on appeal. Accordingly, counsel has contemporaneously tendered an *Anders* brief.
- 2) Counsel has communicated to the appellant that he/she may file a *pro se* brief raising any issues he/she deems meritorious.
- 3) Counsel hereby certifies that he/she has provided Appellant with a copy of both this motion and the tendered Appellant’s brief.
- 4) Appellant’s address is _____.

Wherefore, counsel respectfully requests to be withdrawn as counsel of record for Appellant.

[attorney signature block]

Certificate of Service

The undersigned hereby certifies that true copies of this motion were served upon the following named individuals by [method of service] on [date]. [Name and address of Appellee's and Appellant].

[attorney signature]