

Defending TPR Grounds Phase

- Upfront Stuff
- Types of Grounds
- Post-TPR Hearing Stuff

Upfront Stuff

- Two phases in TPR hearings
 - Grounds (adjudication)
 - Best Interests (disposition)
- Grounds: Clear & convincing evidence std
- BI: Anything goes
- Can mix evidence between two phases

Upfront Stuff Cont'd

- Issue in grounds phase:
 - Do grounds exist to terminate parental rights?
 - Appellate std of review: FOFs spt COLs? COLs spt judgment?
- Issue in BI phase:
 - Is it in the children's best interests to terminate despite the existence of grounds to terminate?
 - Appellate std of review: abuse of discretion

Upfront Stuff Cont'd

- Issue stuff cont'd
 - Issue in an underlying adjudication petition focuses on the status of the child
 - Is the child abused, neglected, or dependent?
 - Issue in a TPR action focuses on the parent's actions
 - Did the parent abuse, neglect or render dependent their child?

Upfront Stuff Cont'd

- Two types of TPRs (NCGS § 7B-1104)
 - Petition
 - Motion in the cause
- Petition is like a new lawsuit
- Motion is same lawsuit continued
- Petition requires Rule 4 service
- Motion service can be by Rule 5

Upfront Stuff Cont'd

- Think like a civil litigator
- Be proactive (cases are won or lost long before you get to trial)
- Make affirmative defenses pretrial
- But: Parent doesn't have to file an Answer
- Have a theory of defense
- I cannot argue on appeal what you do not argue at trial

Upfront Stuff Cont'd

- Burden of proof is on petitioner
- Evidence std is clear & convincing
- During trial, court can take judicial notice of underlying file in either type of TPR
 - Does not mean all of underlying file is in evidence
 - Still must have a hearing with sworn testimony

Types of Grounds

- NCGS § 7B-1111(a)
- 10 of them
- Only takes one to terminate

Abuse or Neglect

- NCGS § 7B-1111(a)(1)
- Need not be a prior adjudication
- Elements
 - Abuse or neglect exists per NCGS § 7B-101
 - Underlying (prior adjudication) or ongoing or both
 - If not ongoing, must be likelihood of repetition
 - Parent must be unfit to parent at time of TPR hearing

Willfully Left in Foster Care

- NCGS § 7B-1111(a)(2)
- Elements
 - Child in out-of-home placement for at least 12 months before TPR action filed
 - Parent failed to make progress in correcting conditions that led to child’s removal
 - Parents lack of progress was willful
- Can’t be based on poverty

Failure to Pay Support

- NCGS § 7B-1111(a)(3)
- Elements
 - Child in out-of-home placement for at least 6 months before TPR action filed
 - Parent failed to pay a reasonable amount of child’s cost of care
 - Failure to pay was willful

Failure to Pay Support (Pvt TPR)

- NCGS § 7B-1111(a)(4)
- Elements
 - Child in custody of one parent for at least 12 months pursuant to a court order
 - Court order requires non-custodial parent to pay support
 - Non-custodial parent failed to pay the court-ordered support
 - Failure to pay was willful

Failure to Legitimate

- NCGS § 7B-1111(a)(5)
- Fathers only
- Petitioner must show the father did none of the things he could have done to avoid TPR under this section
- Petitioner must present DHHS certificate into evidence

Failure to Legitimate Cont'd

- Elements
 - Child is born out of wedlock
 - Father failed to do at least one of the following before TPR action filed:
 - Legitimate judicially or by affidavit w/DHHS
 - Legitimate per NCGS § 49-10
 - Marry the momma
 - Provide the child with substantial financial support or consistent care

Dependency

- NCGS § 7B-1111(a)(6)
- Dependency is not a lesser included offense of neglect (or abuse)
- Dependency Definition (NCGS § 7B-101)
 - No parent or
 - Parent is under some incapability, and
 - Has no alternative care plan

Dependency Cont'd

- TPR Elements
 - Child is dependent per NCGS § 7B-101(9)
 - Parent's incapability will cont indefinitely
 - Parent has no (long-term) alternative child care arrangement
- Parent's incapability can be based on anything, not just a mental health problem
- If mental health problem though, ask for a GAL for parent

Abandonment

- NCGS § 7B-1111(a)(7)
- Abandonment used in both this section and NCGS § 7B-1111(a)(1) (Neglect)
- However, abandonment under NCGS § 7B-1111(a)(7) connotes more than mere neglect
- Failure to pay support is not abandonment

Abandonment Cont'd

- Elements
 - Parent and child are without significant contact for at least 6 months before TPR action filed
 - Parent's lack of contact with child was willful or
 - Child is an infant and parent voluntarily abandoned child for at least 60 days before TPR action filed

Murder, Manslaughter, Etc

- NCGS § 7B-1111(a)(8)
- Elements
 - Parent has committed or aided & abetted murder, voluntary manslaughter, or felony assault resulting in serious bodily injury to the child, another child previously living in home, or to the TPR child's other parent

Murder, Manslaughter Cont'd

- Need not necessarily be an underlying criminal conviction
 - DSS must prove the elements, or
 - DSS must prove the criminal conviction
- If murder/manslaughter/assault is of other parent, self-defense in that action is a defense in the TPR action

Prior TPR

- NCGS § 7B-1111(a)(9)
- Elements
 - Prior TPR on parent's previous child
 - Parent lacks ability or willingness to establish a safe home for the current child
- If it's parent's first TPR action and TPR is inevitable, consider relinquishment

Relinquishment to DSS

- NCGS § 7B-1111(a)(10)
- Elements
 - One parent has relinquished to DSS for adoption purposes
 - That consent/relinquishment has become irrevocable
 - TPR is necessary
 - Parent does not contest TPR

Post-TPR Hearing Stuff

- Review the proposed TPR order
- Get your objections into the court file
- File a motion to light a fire under the court if it's dragging its feet on producing the written order
- Properly perfect the appeal
- Communicate with the appeal attorney
