

TERMINATION OF PARENTAL RIGHTS

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Preliminary Points

- Termination of parental rights (TPR) is the permanent, total, and irrevocable severance of the legal relationship between parent and child.
 - Some states have reinstatement of parental rights statutes, but Michigan does not.
- Two decisions: statutory grounds and best interests.
- Termination may be at initial disposition or later in the case.

Who Can Petition for TPR?

- The prosecutor, child, guardian, custodian (this includes a parent), concerned person, agency, or children's ombudsman. MCL 712A.19b(1).
 - Also a "representative of the child." MCR 3.977(A)(2)(c).
 - "Concerned" person means a foster parent with specific knowledge of parental behavior constituting grounds for TPR if the foster parent has contacted the department, prosecutor, child's attorney, and child's GAL and is satisfied that none of them intend to file a petition to TPR. MCL 712A.19b(6)

When Can TPR Happen?

- When a child remains in foster care in the temporary custody of the court following a review hearing held under MCL 712A.19(3) or a permanency planning hearing held under MCL 712A.19a
- Or when a child remains in the custody of a guardian or limited guardian. MCL 712A.19b(1).
- Or at initial disposition. MCL 712A.19b(4).

Aggravated Circumstances

- MCL 722.638(1)(a): Parent, guardian, custodian, or adult residing in child's home abused the child or a sibling of the child and the abuse included 1 of the following:
 - Abandonment.
 - CSC with intended, attempted, or actual penetration.
 - Battering, torture, other severe physical abuse.
 - Loss or serious impairment of an organ or limb.
 - Life threatening injury.
 - Murder or attempted murder.
- MCL 722.638(1)(b): Risk of harm to child and either prior involuntary termination or prior voluntary termination in a case involving above aggravated circumstances.
- MCL 722.638(2): If a parent is perpetrator or fails to protect child in above circumstances, petition **must** include request for termination at initial disposition.
- No reasonable efforts to prevent removal or reunify are required in these cases. MCR 3.965(C)(4), MCL 712A.19a(2).

Other (Semi-)Mandatory TPR Petition

MCL 712A.19a(8): At PPH, if the court determines that the child should not be returned to parent, and the child has been in foster care for 15 of most recent 22 months, the court **shall** order the agency to initiate TPR proceedings. However, the court is not required to do so if:

1. The child is being cared for by relatives.
2. Case service plan documents compelling reason that filing TPR petition would not be in the best interests of the child.
Compelling reasons include but are not limited to:
 - Adoption is not the appropriate permanency goal.
 - No grounds exist.
 - Child is unaccompanied refugee minor.
 - International law or compelling foreign policy issues preclude TPR.
3. The state hasn't provided services necessary for safe return.

Procedural Points

- Burden of proof is on the party seeking TPR. MCR 3.977(A)(3).
- No jury. MCR 3.977(A)(3).
- “Respondent” means the natural or adoptive mother or the father as defined by MCR 3.903(A)(7). MCR 3.977(B).
 - Who is excluded? Legal custodians, people acting in place of a parent, other persons responsible for the child. Also, putative fathers. See MCR 3.977(B) and *In re KH*, 469 Mich. 621, 677 N.W.2d 800 (2004).
- Parenting time *may* be suspended upon filing of petition to TPR. MCL 712A.19b(4), MCR 3.977(D).

Statutory Grounds for TPR, Generally

- Require **clear and convincing evidence**.
MCL 712A.19b(3), MCR 3.977(E)(3), (F)(1)(b), (H)(3)(a).
 - Evidence is clear and convincing when it “produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” *In re Martin*, 450 Mich. 204, 227 (1995).
- Court need only find that evidence supports one ground.

Specific Statutory Grounds

- Numerous grounds available under MCL 712A.19b(3)
 - Desertion by parent. (a)(i) & (ii).
 - Injury/abuse to child or sibling. (b)(i), (ii), (iii).
 - Adjudication conditions or other conditions that would lead to jurisdiction still exist and no reasonable likelihood they'll be rectified in reasonable time considering child's age. (c)(i) & (ii).
 - Parental non-compliance with limited guardianship placement plan or guardianship court-structured plan. (d), (e).
 - Parental lack of contact and support for two years during guardianship. (f).
 - Parent fails to provide proper care and custody and no reasonable expectation the parent will be able to do so within reasonable time considering child's age. (g).

More Specific Statutory Grounds

- MCL 712A.19b(3)
 - Parent imprisoned:
 - Child will be deprived of a normal home for a period exceeding 2 years;
 - Parent hasn't provided for proper care and custody; and
 - No reasonable expectation that parent will be able to provide for proper care and custody within reasonable time considering child's age. (h).
 - TPR regarding 1 or more siblings due to serious and chronic neglect/abuse and prior rehabilitation efforts have failed. (i).
 - Reasonable likelihood, based on parent's conduct or capacity, that child will be harmed if returned to parent's home. (j).
 - Serious abuse to child or sibling – aggravated circumstances. (k).

Still More...

- MCL 712A.19b(3)
 - Prior termination? (was subsection l). NO. Discussed below.
 - Prior voluntary termination if aggravated circumstances in that prior case. (m).
 - Parent convicted of certain assaultive offenses, or violation of statute that includes element of use or threat of force, AND parent sentenced as repeat offender. (n).

Three Procedural “Types” of TPR

- TPR at initial disposition. MCR 3.977(E).
 - Aggravated circumstances cases.
 - Can be attempted in non-aggravated circumstances cases, but there may be reasonable efforts implications.
 - Specifically, given short timeframe, can efforts be deemed reasonable?
- TPR on the basis of different circumstances. MCR 3.977(F).
 - New issues have arisen over the course of the case.
- TPR “other.” MCR 3.977(G).
 - Failure to rehabilitate/rectify conditions.

TPR at Initial Disposition

- MCR 3.977(E).
- Still need a jurisdiction finding by a preponderance of the evidence under MCL 712A.2(b).
 - Statutory grounds finding must be by clear and convincing evidence.
- Can hear jurisdictional and TPR evidence simultaneously.
- Technically, TPR then gets decided as a dispositional matter.
- Statutory grounds must be proven with legally admissible evidence. In other words, the Michigan Rules of Evidence apply.

TPR Based on Different Circumstances

- MCR 3.977(F).
- Child already under court jurisdiction.
Supplemental petition alleging one or more circumstances new or different than adjudication allegations.
- Rules of Evidence apply to statutory grounds.
- Hearing within 42 days of filing supplemental petition.
 - May be extended by 21 days for good cause.

TPR “Other”

- MCR 3.977(H).
- Child already under court jurisdiction.
- Supplemental petition requesting TPR for failure to rectify problems already adjudicated.
- Rules of Evidence do not apply.
 - All relevant and material evidence may be received and relied upon.
 - Parties allowed to examine received written reports and cross-examine reporters.
- Hearing within 42 days of filing supplemental petition.
 - May be extended by 21 days for good cause.

About Those Rules of Evidence...

The basic idea is that respondents enjoy the protection of the rules of evidence regarding a given allegation at some point in the case.

- TPR at initial disposition: first hearing on the allegations, so rules apply.
 - Proofs may be combined for adjudication and TPR at initial disposition, though separate orders of adjudication and termination must be issued based on proper standards of proof.
- TPR based on different circumstances: the fact that these are new allegations means that rules of evidence apply.
- TPR other: failure to rectify previously-adjudicated issues. Rules applied at jurisdiction. Their protections are not extended again when considering what amounts to the same allegations.

Best Interests of the Child

- After statutory grounds are decided, the court must determine whether termination is in the child's best interests. If so, the court shall order TPR. MCL 712A.19b(5).
- Rules of Evidence do not apply.
- Evidence for best interests is often—but not always—taken at the same time as evidence for statutory grounds.
- The best interests decision is based on the whole record of the case. *In re Trejo*, 462 Mich. 341, 353 (2000).

In re Moss (Best Interests: Std. of Proof)

- 301 Mich. App. 76, 836 N.W.2d 182 (2013)
- The best interests determination in TPR decisions uses the preponderance of the evidence standard, not clear and convincing evidence standard.
 - Differs from decision about statutory grounds for TPR.
- Court engaged in a due process analysis.
 - At statutory ground stage, parent and child share a vital interest in preventing erroneous termination.
 - At best interests stage, parental unfitness has been proven, and child's interest in safety aligns with the state's interest.
 - No need for heightened standard of proof. If heightened standard of proof, an error is more likely to keep child with unfit parent.
 - Focus at best interests stage is on the child, not the parent.

In re White (Best Interests: Findings)

- 303 Mich. App. 701, 846 N.W.2d 61 (2014)
- Clarified *In re Olive/Metts*, 297 Mich. App. 35 (2012), which held that each child requires an individual best interests analysis at TPR.
- If best interests of individual children differ significantly, the court should address those differences in determining best interests. But no need for redundant findings.
- For best interests, court should consider parent-child bond, parent's parenting ability, child's need for permanency, stability, and finality, advantages of foster home over the parent's home, domestic violence history, compliance with service plan, visitation history, child's well-being in foster care, possibility of adoption.

Reasonable Efforts and TPR

- Reasonable efforts to reunite parent and child are required in most cases.
- The failure to make reasonable efforts may render TPR premature because the failure leaves a “hole in the evidence.”
 - *In re Mason*, 486 Mich. 142, 782 N.W.2d 747 (2010).
 - Court noted that reasonable efforts serve two purposes. One is to rectify the identified parenting problems in the case. Another is to determine whether they can be rectified. If reasonable efforts are made and problems persist, that provides evidence for TPR.

Update to Aggravated Circumstances

- As of June 12, 2018, a prior termination of parental rights will only be considered an aggravated circumstance if the parent “has failed to rectify the conditions that led to the prior termination of parental rights.”
 - Public Act 59 of 2018 modifies MCL 722.638(1)(b)(i)&(ii).
 - Public Act 58 of 2018 modifies MCL 712A.19a(2), which addresses when reasonable efforts are not required.

Update to TPR Statutes

- Public Act 58 of 2018, effective June 12, 2018.
- MCL 712A.19b(3)(g): The parent, ~~without regard to intent,~~ **although, in the court's discretion, financially able to do so**, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
- MCL 712A.19b(3)(i): Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and ~~prior attempts to rehabilitate the parents have been unsuccessful~~ **the parent has failed to rectify the conditions that led to the prior termination of parental rights.**

More TPR Statutory Updates

- MCL 712A.19b(3)(k): The parent abused the child or a sibling of the child, ~~and~~ the abuse included 1 or more of the following, **and there is a reasonable likelihood that the child will be harmed if returned to the care of the parent**: [lists abandonment of a young child and serious abuse].
- MCL 712A.19b(3)(l) (prior involuntary termination) is repealed.
 - Responds to *In re Gach*, 315 Mich. App. 83, 889 N.W.2d 707 (2016) (finding this statutory ground unconstitutional).
- MCL 712A.19b(3)(m) re-numbered to (l) and will include failure to rectify conditions leading to prior voluntary termination. Prior TPR must also have included aggravated circumstances.
- MCL 712A.19b(3)(n) re-numbered to (m).

In re Yarbrough (Funding for Experts)

- 314 Mich. App. 111, 885 N.W.2d 878 (2016)
- Courts must give respondents reasonable funds for expert consultation if there's a nexus between the respondents' request and the issues presented and there is a reasonable probability that an expert would be of meaningful assistance.
- Seriously ill infant ended up comatose.
- Radiologists at one hospital found no sign of trauma on MRI and CT of brain.
- Radiologists at another read same scans and found signs of prior trauma.
- TPR petition filed. Parents moved for funds for expert given conflict between doctors. Trial court denied. TPR.

Yarbrough continued

- Here, petitioner's case rested entirely on expert testimony.
- *Mathews v. Eldridge*, 424 U.S. 319 (1976), analysis of DP.
 - Private interest of parents here is commanding. And state even shares parents' interest in an accurate and just decision.
 - Risk of error is very high if parents are not allowed funds for expert given complexity of evidence.
 - Government's interest in saving money is not substantial enough given the stakes to deny these funds to parents.
- Again, conflict between doctors about complex evidence made expert witness funds necessary. Not always the case. Must use *Mathews v. Eldridge* analysis because "due process is flexible and calls for such procedural protections as the particular situation demands."

In re K.H. (Putative Fathers)

- 469 Mich. 621, 677 N.W.2d 800 (2004)
- You cannot terminate the parental rights of a putative father, because he has no parental rights.
 - Must establish legal paternity first.
 - Deal with putative fathers under MCR 3.921(D), which provides procedures for notice, hearing, and declaring that no father can be identified and no further notice is needed.
- Also worth noting in this context:
 - “Parent” and “father” are terms of art defined in MCR 3.903(A), and a putative father fits neither definition.
 - “Respondent” is defined in MCR 3.903(C) and 3.977(B), and neither definition encompasses putative fathers.
 - Therefore, putative fathers are not properly respondents in child protection matters.

Advocacy Points

- Parents' attorneys, don't suggest that client plead to jurisdiction in TPR at initial disposition cases unless TPR request is being dropped.
 - Too many facts go to both jurisdiction and TPR grounds.
 - May leave you only best interests argument for defense.
 - Lower standard of proof than statutory grounds.
 - No protection of the rules of evidence.
 - Instead, force agency to meet its burden.
- Everyone, use the *In re White* factors to argue best interests.
 - Helps structure your closing argument.
- Enforce the rules of evidence through objections. Make a good record.

Appeals

- MCR 3.977(J):
 - Respondents get an appeal by right. Also MCR 3.993(A)(2).
 - Respondents can get appointed counsel.
 - Request an attorney in the circuit court within 14 days.
 - Attorney appointment shall be made within 14 days after request.
 - Transcripts are free if respondent cannot pay for their preparation.
- MCR 3.977(K): TPR decisions are reviewed for clear error.
 - “...decision to terminate parental rights is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *In re JK*, 468 Mich. 202, 209-210 (2003).
- MCR 7.204(A): File claim of appeal within 14 days.

Post-Termination Review Hearings

- These are held every 91 days during the first year following TPR. Every 182 days thereafter.
 - Can be accelerated.
- Foster parents and any pre-adoptive parents must be given notice and opportunity to be heard.
- Reasonable efforts must be made to achieve permanency. Key focus of these hearings.
- A juvenile guardian can be appointed with MCI consent.
- Continue until adoption placement order or juvenile guardian appointed and one last review hearing held.
- See MCL 712A.19c and MCR 3.978.