COURTS CATALYZING CHANGE

PRELIMINARY PROTECTIVE HEARING BENCHCARD©

Courts Catalyzing Change Preliminary Protective Hearing Benchcard[i]

(Courtesy of the NCJFCJ; adapted with permission of NCJFCJ)

Reflections on the Decision-Making Process to Protect Against Institutional Bias

Ask yourself, as a judge:

- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or how might it influence) my decision-making process and findings?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?

KEY INQUIRIES, ANALYSES AND DECISIONS THE COURT SHOULD MAKE AT THE PRELIMINARY PROTECTIVE HEARING

Persons who should be Present:

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
- Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents –all possible parents
- Parent partners
- Relatives – relatives with legal standing or other custodial adults, including adult half- siblings

- Paternal and maternal relatives
- Non-related extended family, fictive kin (someone who is known and trusted by the families; godparents)
- Assigned caseworker
- Agency attorney
- Attorney for each parent (if conflict exists)
- Legal advocate for the child
- Guardian ad Litem (GAL)
- Court Appointed Special Advocate (CASA)
- ICWA expert (if ICWA applies)
- Tribal representative/tribal liaison
- Treatment and/or service providers, parent mentors if assigned/available, substance abuse coach, DV advocate
- All age-appropriate children
- Foster parents
- Cultural leaders, cultural liaisons, religious leaders
- Court-certified interpreters or court-certified language services
- Education liaison/school representative
- Court reporter
- Court security

COURTS CAN MAKE SURE THAT PARTIES AND KEY WITNESSES ARE PRESENT BY:

- Ensuring that the judge, not the bailiff or court staff, makes the determination about who is allowed to be in the courtroom.
- Asking the youth/family if there is someone else who should be present.
- Requiring quick and diligent notification efforts by the agency.
- Requiring both oral and written notification in a language understandable to each party and witness.

- Requiring service/tribal notice to include the reason for removal, purpose of the hearing, and availability of legal assistance in a language and form that is understandable to each party and witness.
- Requiring caseworkers and/or protective service investigators to facilitate attendance of children, parents, relatives (paternal and maternal), fictive kin, and other parties.
- Facilitating telephonic or video conferencing appearance at hearings.

REVIEWING THE PETITION

- A sworn petition or complaint should be filed prior to the preliminary protective hearing and served/provided to the parents.
- The petition should be specific about the facts that bring the child before the court.
- The petition should not be conclusory without relevant facts to explain and support the conclusions.
- Petitions need to include allegations specific to each legal parent or legal guardian if appropriate.
- If the petition does not contain allegations against a legal parent or legal guardian, the child should be placed with or returned to that parent or legal guardian unless it is determined that there is a safety threat to the child.
- Petitions/removal affidavits need to include specific language clearly articulating the current threat to the child's safety.

ENGAGE PARENTS

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about?
- What family members and/or other important people should be involved in this process with us?
- Do you understand the petition? (review petition with parties)

DUE PROCESS

- Who are the child's parents and/or guardians?
- How was paternity determined?

- What were the diligent search efforts for all parents?
- Have efforts to identify and locate fathers been sufficient? What has been done?
- How were the parents notified for this hearing?
    - was the notice in a language and form understandable to parents and/or guardians?
- Do the parents understand the allegations?
- Are the parents entitled to representation? Are there language issues to consider when appointing attorneys?
- Are there issues in the case that are covered by the Americans with Disabilities Act?

LEGAL THRESHOLD FOR REMOVAL

- Has the agency made a prima facie case or probable cause showing that supports the removal of the child?
- Have the family's cultural background, customs and traditions been taken into account in evaluating the event and circumstances that led to the removal? Have the parent(s) cultural or tribal liaison/relevant other(s) been asked if there is a culturally-based explanation for the allegations in the petition?

REASONABLE EFFORTS (TO PREVENT REMOVAL)

- Were there any pre-hearing conferences or meetings that included the family?
    - who was present?
    - what was the outcome?
- What services were considered and offered to allow the child to remain at home? Were these services culturally appropriate? How are these services rationally related to the safety threat?
- What was done to create a safety plan to allow the child to remain at home or in the home of another without court involvement?
    - have non-custodial parents, paternal and maternal relatives been identified and explored? What is the plan to do so?

- How has the agency intervened with this family in the past? Has the agency's previous contact with the family influenced its response to this family now?

WHAT IS PREVENTING THE CHILD FROM RETURNING HOME TODAY?

- What is the current and immediate safety threat? Has the threat diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
- What is preventing the child from returning home today? What type of safety plan could be developed and implemented in order for the child to return home today?
    - what specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
    - will the removal or addition of any person from or in the home allow the child to be safe and be placed back in the home?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family and child, and are you satisfied that they understand these conditions?

APPROPRIATENESS OF PLACEMENT

- If child is placed in foster care/shelter, have kinship care options been fully explored? If not, what is being done to explore relatives? If so, why were the relatives deemed inappropriate?
- If child is placed in kinship care, what steps have been taken to ensure the relative is linked with all available training, services, and financial support?
- How is the placement culturally and linguistically appropriate?
    - from the family and child's perspective, is the current placement culturally and linguistically appropriate?
- How does the placement support the child's cultural identity? In what way does the placement support the child's connection to the family and community?
- How does the placement support the family/child's involvement in the initial plan?
- What are the terms of meaningful family time with parents, siblings and extended family members?
    - do the terms of family time match the safety concerns? Is it supervised? Specifically, why must it be supervised?

- is the time and location of family time logistically possible for the family, and supportive of the child's needs?

REASONABLE EFFORTS TO ALLOW THE CHILD TO SAFELY RETURN HOME

- What services can be arranged to allow the child to safely return home today?
- How are these services rationally related to the specific safety threat?
- How are the parents, extended family, and children being engaged in the development and implementation of a plan for services, interventions, and supports?
- How will the agency assist the family to access the services?
  - does the family believe that these services, interventions, and supports will meet their current needs and build upon strengths?
  - has the family been given the opportunity to ask for additional or alternate services?
- How are the services, interventions and supports specifically tailored to the culture and needs of this child and family?
  - how do they build on family strengths?
  - how is the agency determining that the services, interventions, and supports are culturally appropriate?
- What evidence has been provided by the agency to demonstrate that the services/interventions for this family have effectively met the needs and produced positive outcomes for families with similar presenting issues and demographic characteristics?

CLOSING QUESTIONS TO ASK PARENTS, CHILDREN, AND FAMILY MEMBERS

- Do you understand what happened here today?
- Do you understand what the next steps are?
- Do you have any questions for the court?

[i] Located at http://www.ncjfcj.org/sites/default/files/CCC%20Bench%20Card%20Insertsfinal.pdf. Last visited October 13, 2017.