

**IN PRACTICE**

## Making the Most of Pretrial Procedures in Child Welfare Cases

*by Cristina Ritchie Cooper*

- Are you ever frustrated by last-minute requests for continuances or adjournments on the eve of trial?
- Do you spend the days before trial either rushing to provide promised discoverable material or tracking down requested discovery items from opposing counsel?
- Do you wish attorneys had more time in their busy court schedules to discuss ways to settle dependency cases or to agree on stipulated facts that could save time during TPR trials?
- Have you ever scrambled to reach a client last minute to confirm or even learn what his or her position at trial will be?

Pretrial procedures can go a long way in addressing these concerns common to judges and practitioners in child welfare cases.

Pretrial procedures, such as pretrial hearings and conferences, can bring parties together before a contested trial in a less adversarial setting to discuss possible settlements or engage in early efforts to ensure that trial time is more efficiently spent. Hearings or conferences scheduled before trials:

- allow parties to exchange information and discuss possible settlements or stipulations,
- require attorneys to consult with clients and prepare ahead of trial, and
- allow courts to resolve some disputed matters before the trial date.

Regular use of pretrial procedures often reduces the time needed for a contested hearing and provides more

opportunity to resolve a child protection case (or at least some elements of a case) through settlement rather than trial.

Pretrial conferences are a routine practice in federal civil matters,<sup>1</sup> and often are outlined in states' court rules of civil procedure.<sup>2</sup> The use of pretrial procedures in child welfare cases—dependency adjudications, termination of parental rights (TPR) trials, and other hearings—is less uniform across jurisdictions, but the advantages to the practice have long been recognized and recommended.<sup>3</sup>

Courts use pretrial procedures at various stages in child welfare proceedings. While proceedings may look different across counties, jurisdictions share similar goals of resolving critical issues earlier and in a less adversarial manner, as well as streamlining and focusing trials.

### Understanding Pretrial Procedures

*Types.* Pretrial procedures may be offered in a range of formats, including:

- **formal hearings** overseen by a judge, often the judge who will hear the adjudication or TPR hearing;
- **informal hearings** moderated by another judicial official, such as a magistrate judge or master who will not hear the contested hearing;
- **off-the-record, at times confidential conferences** facilitated by non-judicial court personnel or other neutral entities; and
- **forms of alternative dispute resolution**, such as mediation

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or family group meetings (a full discussion of those options is beyond the scope of this article).

No matter who is conducting the pretrial proceeding, attorneys for all parties are notified of the hearing or conference and should be present. In fact, the relevant ABA Standards of Practice for attorneys representing children, parents, and agencies in abuse and neglect cases direct attorneys to participate in pretrial hearings and conferences, among other

issues that could delay trial. If the proceeding occurs later, the court also has the opportunity to resolve any pending pretrial motions.

In pretrial hearings that precede initial dependency or TPR hearings, the court also can confirm whether all parties have retained or been assigned counsel. If not, the court can assign counsel then, as allowed by local rules.

*Pretrial Statements.* In pretrial hearings conducted by a judge and more informal conferences facilitated by court or other personnel, attorneys often must

jurisdictions require that a pretrial hearing or conference be scheduled a certain number of days or weeks before the adjudication of dependency or abuse/neglect proceeding, several weeks before a trial on a petition to terminate a parent's rights, or before other child protection hearings, such as shelter care or initial removal hearings to determine custody and placement of the child.

In states in which the period between a child's removal from home and the adjudication hearing may extend months, pretrial proceedings can be useful to compel parties and the court to examine the status of a case and make at least temporary decisions about placement, visitation, and services.

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Early efforts to bring parties together to exchange information and prepare them can enhance a parent's or youth's comprehension of the case and relevant allegations.

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settings.<sup>4</sup> The most effective pretrial proceedings also involve the parties, including the parent and caseworker, and when appropriate, the child.

*Legal Basis.* Pretrial hearings or conferences are outlined in juvenile court rules in many jurisdictions. In others, the proceedings may be conducted more independently at the level of a local court system or even an individual judge. Requirements for formal pretrial proceedings could also appear in state law.

*Protocols.* During pretrial hearings, attorneys must at minimum share witness lists and perhaps a brief explanation of what each witness's testimony will be, exhibit lists, and the expected length of trial time each will need. (Most jurisdictions require parties to update the information provided at the pretrial hearing as the case nears the trial or hearing date, and most allow adding other witnesses or exhibits, as long as opposing parties are notified.)

If the proceeding occurs early in the case, soon after a petition is filed, the court may schedule a trial and other dates, set a discovery schedule, and hear any outstanding service is-

complete a pretrial statement or memorandum to be submitted by the time of the hearing or conference or earlier. The statements generally seek information to be exchanged at the hearing/conference, such as:

- status of service on all parties,
- status of discovery,
- witness and exhibit lists,
- identification of pending motions,
- stipulations or agreed-upon facts or allegations,
- novel or unusual legal issues that may arise.

At times, pretrial statements must be jointly made by parties and submitted to the court before the conference. Pretrial statements require attorneys to prepare for the hearing or conference, thereby preparing for trial early as well. Completing the statements ensures each party shares information and allows the pretrial proceeding to be a useful exercise. And by preparing for the pretrial proceeding and consulting with clients, attorneys are better able to negotiate possible settlements.

*Timing.* Timing of pretrial procedures in child welfare cases varies. Some

## Benefits of Using Pretrial Procedures in Child Welfare Cases

*Boosts chances of settling outside court.* A significant advantage to scheduling pretrial hearings or conferences is the opportunity they create for parties to settle a child welfare matter, or to agree on stipulations to certain facts or underlying allegations. Meeting outside the standard adversarial process—particularly in jurisdictions in which someone other than a judge facilitates the pretrial proceeding (or where attorneys and parties meet informally on their own)—provides a less-pressured setting for parties to hear and consider their options and for attorneys to discuss possible resolutions.

Even if the pretrial hearing is a formal setting monitored by a judicial officer, requiring attorneys to meet before trial encourages earlier preparation and discussions with clients. This can lead to settlement and avoid last-minute conversations on the eve of trial.

*Limits trial time to contested issues.* These settings also provide attorneys and parties the opportunity to consider what stipulations may be entered.

While stipulations will not remove the need for a contested hearing or trial, they do allow trial time to be devoted solely to contested issues and reduce the overall length of the trial. They should therefore be seriously considered before and during the pretrial proceeding.

*Streamlines trial time.* Even if no settlement or stipulations are reached, pretrial procedures can make trial time more efficient by potentially resolving service, discovery, and other issues before the actual trial. By the trial date, the court can focus exclusively on substantive issues at the heart of that child welfare proceeding. Trials proceed more smoothly and quickly, with fewer interruptions since witness and exhibit lists have already been exchanged and relevant objections prepared (if not already resolved).

Additionally, requests for continuances or adjournments will have been made at the pretrial hearing or conference, rather than last minute. Avoiding this common practice saves the time of the court, attorneys, and parties and prevents delays in the child welfare case.

*Helps parties understand proceedings.* Another advantage to pretrial procedures in child welfare cases is the effect such proceedings can have on the parties involved, particularly parents. Early efforts to bring parties together to exchange information and prepare them can enhance a parent's or youth's comprehension of the case and relevant allegations.

In pretrial proceedings before an adjudicatory hearing, that improved comprehension can better equip a parent to engage with his or her attorney and with the child welfare agency early on. At the TPR stage, a parent may garner a better understanding of the case against him or her and why others believe it's in his or her child's best interest for the child to find permanency elsewhere. Those understandings could lead to voluntary relinquishment of parental rights or settlement of

## Best Practices Checklist

- Judges or courts should **schedule pretrial procedures** as soon as a petition is filed or parties are served, so that all parties have as much notice as possible of the date. If a pretrial hearing or conference is only scheduled when the presiding judge considers it appropriate in the context of a specific case, that decision should be made as soon as possible, perhaps at an initial hearing held soon after the petition is filed, so the case is not overly delayed.
- **Prepare your client** for pretrial proceedings by consulting with him or her before the actual conference or hearing, explaining the purpose of the proceeding and what may happen, identifying any client priorities, and developing your position.
- **Encourage your client to participate** in the proceeding, especially if it is an informal setting. Parties – particularly parents and older children – who are able to ask questions or feel “heard” are more likely to engage in the child welfare case as it begins and comprehend the case's future legal resolution.
- **Prepare for and attend the pretrial proceeding!** Complete any required pretrial statement by the deadline provided. Know your client's position on relevant issues. Be able to negotiate items in contention. Coming prepared ensures pretrial hearings and conferences are most useful.
- **Recognize that negotiated settlements come in different forms.** Your client may be willing to resolve the adjudication or TPR during or soon after the pretrial proceeding, removing the need for a contested hearing altogether. Parties can also reach agreement on discrete allegations or can enter into stipulations of fact. The resulting trial can then focus exclusively on issues that remain in contention, which saves everyone time and shortens the overall child welfare case.
- **Remember that settlements are not the only positive outcomes** of pretrial proceedings. By exchanging information, including witness and exhibit lists, ahead of the trial date, all parties can better prepare for trial. Seeing the strength of an opposing party's case certainly can lead to an admission or other nonadversarial resolution, but that information also allows attorneys to prepare objections, research novel legal issues that will come into play at trial, and even secure additional evidence, as needed.

initial dependency allegations. Or, a party may have more realistic expectations of possible trial results and a better understanding of the court and agency processes.

Plus, any pretrial setting gives parents a chance to consult their attorneys (before the conference), which often is not available for various reasons.

## Common Approaches to Pretrial Procedures

Courts across the country have

incorporated pretrial procedures at different points in child welfare proceedings. Some only use pretrial hearings before termination of parental rights trials. Others use such hearings or conferences before the initial dependency adjudication. Still others use pretrial hearings even earlier, before shelter care or similar hearings. Many jurisdictions use a mix of pretrial proceedings. Examples of common approaches follow.

## Adjudication Hearings

Juvenile or Family Court rules in Minnesota and Arizona, among other states, outline how pretrial proceedings before adjudication hearings should be held. New York City's approach similarly incorporates conferences to be held before an adjudication—or "fact-finding"—hearing. (See article, p. 74.)

Minnesota's Juvenile Protection Rules require that a pretrial hearing be

for trial, and other appropriate issues.<sup>11</sup>

## Termination of Parental Rights Trials

Florida is one of many states in which courts regularly hold pretrial hearings or conferences before contested TPR trials. Florida courts may engage in multiple proceedings before a TPR trial:

- an *advisory hearing* is scheduled soon after a petition is filed and

judicial officer.<sup>15</sup>

## Other Hearings

Attempts to reach agreement or to "iron out" certain issues before trial are not limited to adjudication and TPR proceedings. Arizona and Nebraska, among other jurisdictions, either require or allow pretrial proceedings before shelter care or similar hearings that determine whether a child should be removed or remain removed from the parents' home.

For example, in Arizona, a pre-hearing conference may be held before the preliminary protective hearing (or shelter care hearing) to determine whether consensus can be reached on topics including custody and placement of the child, visitation, and services.<sup>16</sup> Although these proceedings are informal since they are not supervised by a judicial officer, the conference discussions are not confidential.<sup>17</sup>

In Nebraska, an initial prehearing conference is commonly held after a petition has been filed, but before the protective custody (i.e., shelter care) hearing.<sup>18</sup> Attorneys, parties, and others attend those conferences, which are moderated by a trained facilitator rather than by a judicial officer.<sup>19</sup> As in Arizona, the focus of the prehearing conference includes the child's placement, visitation, and frontloaded services.<sup>20</sup>

## Incorporating Pretrial Procedures into Your Child Welfare Practice

If courts in the jurisdiction in which you practice do not conduct pretrial procedures at all or at every point of a child welfare case that you think would be helpful, consider taking the following steps:

- **Talk to the juvenile court judge(s)** hearing dependency and TPR matters. A conversation could gauge the judge's interest in the process and could allow you to make suggestions about the timing, style, and/or purpose of

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held at least 10 days before the adjudicatory hearing,<sup>5</sup> and clearly outline the purposes of a pretrial hearing.<sup>6</sup> Those hearings are designed to explore opportunities for settlement, resolve outstanding issues that could delay trial, and "identify and narrow issue of law and fact for trial," among other goals.<sup>7</sup> As formal hearings before a judge, these pretrial proceedings are designed to shorten trial length and minimize the need for multiple adjournments.<sup>8</sup>

Arizona similarly allows settlement conferences to be held before the dependency adjudication hearing.<sup>9</sup> The state juvenile court rules require an attorney to meet with his or her client before the conference and submit a confidential settlement conference memorandum at least five days before the conference date.<sup>10</sup> If no settlement is reached and the dependency case will proceed to an adjudicatory hearing, the option of a pretrial conference is available to share the status of discovery, the scheduling of witnesses, the time attorneys anticipate needing

allows the judge to appoint counsel to parents and a guardian ad litem, as appropriate, and hear whether the parent will consent to the TPR petition (among other actions the court may take);<sup>12</sup>

- a *pretrial status conference* scheduled at least 10 days before the TPR trial provides an opportunity for the court to organize and prepare for the trial itself by determining the order of witnesses and other matters.<sup>13</sup>

Family Court rules in the District of Columbia also provide opportunities for parties to settle or streamline issues before the TPR hearing date. A prehearing conference must be held within 30 days of service of a TPR motion to attempt to resolve issues including discovery, stipulation, witness lists, special needs of witnesses such as interpreters, issues of law and fact, and more.<sup>14</sup> Additionally, mediation and/or case conferencing may be scheduled before the hearing date at the agreement of the parties and

### How Do You Use Pretrial Procedures?

Does your jurisdiction use helpful or innovative pretrial procedures? Tell us about them by writing *Child Law Practice*. Send an email to [Claire.Chiamulera@americanbar.org](mailto:Claire.Chiamulera@americanbar.org). We'll share them in a future issue.

new (or modified) pretrial procedures.

- **Make a verbal request at an early hearing or file a written motion** requesting that the judge hearing the child welfare case schedule a pretrial hearing before the trial date in a particular case. A proposed order accompanying the motion could even outline the goal of the pretrial hearing, what attorneys must do to prepare (e.g., submit a pretrial statement or memorandum), and/or what information will be discussed or exchanged at the pretrial hearing. Remember, a pretrial hearing could be requested on a case-by-case basis before becoming a common practice in a jurisdiction, if it ever does.
- **Seek amendments to juvenile court rules** through the usual channels in your jurisdiction that would address pretrial hearings or conferences. Address whether to require them before certain child welfare proceedings or to articulate that a judge has discretion and authority to schedule them when needed or requested by a party. The option for pretrial procedures likely already exists in civil court rules of procedure, and those rules could be replicated or modified to fit juvenile court rules of procedure. (Since many civil procedure rules apply to juvenile court proceedings, check those rules first!)
- **Request a statutory change** in your state to reflect the importance of pretrial procedures in child welfare cases, according to the process available in your state.

## Conclusion

Pretrial procedures play an important role in child welfare proceedings. Hearings or conferences provide parties and attorneys opportunities to meet, consider possible resolutions, and better prepare for trial in advance. Trial or contested hearings held after pretrial proceedings can be much more efficient by focusing only on relevant,

outstanding issues of fact and law. That streamlined approach serves the interests of the court and attorneys. Most importantly, it serves the needs and interests of children in foster care.

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### Endnotes

1. Fed. R. Civ. P. 16.
2. *See, e.g.*, Id. R. Civ. P. 16; N.Y. Comp. Codes, R. & Regs., tit. 22, § 202.26; Tex. R. Civ. P. 166.
3. National Council of Juvenile and Family Court Judges. *Child Dependency Benchbook*, 1994, 165-66 (addressing advantages of pretrial conferences before adjudicatory phase of dependency proceeding); National Council of Juvenile and Family Court Judges. *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, App. B, 131-33 (1995); National Council of Juvenile and Family Court Judges. *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, 2000, 27-28 (addressing pretrial settlement conferences before termination of parental rights hearings). *See also* Edwards, Judge Leonard P. "Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process." *Juvenile and Family Court Journal* 58, spring 2007, 14-15.
4. *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 1996, B-1(2); *American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, 2006, 32; *American Bar Association Standards of Practice for Attorneys Representing Child Welfare Agencies*, 2004, 10. Find the standards at [http://www.americanbar.org/groups/child\\_law/tools\\_to\\_use.html](http://www.americanbar.org/groups/child_law/tools_to_use.html)
5. Minn. R. Juv. Protect. P. 36.01.
6. Minn. R. Juv. Protect. P. 36.02.
7. Minn. R. Juv. Protect. P. 36.02(g).
8. 13 Minn. Prac., Juv. Law & Prac. R 36 (3d ed.), Authors' Comments to Rule 36.01.
9. Ariz. R. P. For Juv. Ct. 53.
10. Ariz. R. P. For Juv. Ct. 53(A), (B).
11. Ariz. R. P. For Juv. Ct. 54(B).
12. Fla. R. Juv. P. 8.510(a).
13. Fla. R. Juv. P. 8.510(b).
14. D.C. SCR-Neglect 37.
15. D.C. SCR-Neglect 37(4), (5).
16. Ariz. R. P. for Juv. Ct. 49.
17. Ariz. R. P. for Juv. Ct. 49(C).
18. *Through the Eyes of the Child Initiative: A Nebraska Supreme Court Initiative*, ADR/5-.25
19. *See Through the Eyes of the Child Initiative: A Nebraska Supreme Court Initiative, Pre-Hearing Conference Protocol*, 1-3, available at [www.throughtheeyes.org/files/phc\\_standardized\\_protocol.pdf](http://www.throughtheeyes.org/files/phc_standardized_protocol.pdf).
20. *Ibid.*

(In re. M.C., cont'd from p. 73)

mother's attorney was still able to conduct expert cross-examination despite not having a witness list, including that she apparently had detailed factual knowledge of the case at her disposal.

Dismissal, or effective dismissal, is a drastic remedy, the court noted. In a neglect case that remedy for a discovery violation could result in children being harmed. Given the above, the court found the juvenile court did not abuse its discretion in not granting these drastic remedies. Whether other remedies such as continuances would have been warranted, was not addressed by the trial court.

As to the sufficiency of the evidence of neglect, the court noted that unsanitary home cases should be held to the standard of a serious health or safety risk, not merely what a general person in the community might find unpleasant. Here, however, the trial court did not err in concluding the home was unsafe given the numerous issues presented.

Also, regarding the mother's use of marijuana, the facts in the record were distinguishable from a case where a parent uses an illegal drug away from their child. The mother's open use led to her son's use and likely contributed to other problems in the home.