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§ 13.1 INTRODUCTION

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This chapter is devoted to the planning, preparation, and execution of trial strategy. The chapter begins by addressing a number of preliminary considerations, including deciding whether to go to trial, developing a theory of the case, and preparing for the pretrial conference. It then focuses on document and witness preparation and conduct of the trial itself, including opening and closing statements, stipulations, dispositive motions, objections, and proposed findings of fact and rulings of law. Please note that the name of the Department of Social Services (DSS) was changed to the Department of Children and Families (DCF) in 2008. Both designations may appear in this chapter; they are interchangeable.

Many stages of a care and protection case require a considerable amount of attention, creativity, and competent representation by counsel. However, no stage of the case routinely demands a combination of top-quality, zealous, and organized advocacy quite like the trial. With proper preparation and execution, trial advocacy can be exhilarating for counsel and, more importantly, beneficial to the client. Without it, a trial can be a disaster for both counsel and the client. Even for seasoned litigators, a care and protection trial can be a challenging experience.

One of the many unique and frustrating challenges of a care and protection trial is that the facts of the case are likely to evolve during the course of the proceeding. Unlike a car accident, criminal case, or contested estate matter, in which the facts are largely static, the subject matter of a care and protection case--the fitness of the parents and best interests of the child--is fluid and ever changing. A parent might stabilize with services, get arrested, relapse, separate from an abusive boyfriend, or find housing. Children might get sick, run away, develop behavioral problems, or become attached to their foster parents. DSS might decrease visits, change a child's placement, or make new demands on a parent. Counsel must be prepared to address each new development in the case as it arises.

Another peculiar aspect of care and protection trials is the tendency of many courts to not assign consecutive trial days, which results in trials often proceeding on a piecemeal basis over weeks or even months. Given the busy dockets of most juvenile courts, it is unusual to have an entire day devoted, uninterrupted, to a trial. Managing one's

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own calendar, scheduling and preparing witnesses, and dealing with clients upset by delays can be difficult for counsel. It can also be challenging to summon the energy and motivation needed to try a case over multiple, disconnected trial dates. More recently, some courts have been making a greater effort to schedule consecutive trial dates. Counsel should request consecutive dates whenever possible.

Despite court rules, standing orders, and a large body of case law, different courts across the state employ different practices in the conduct of trial. Even for seasoned litigators, simply trying a case in a court in which one has never previously practiced is likely to be an educational and, at times, daunting experience. Regardless of the court or local practices, effective trial advocacy in care and protection cases requires mastery of a wide variety of substantive legal areas, including parental fitness, evidence, procedure, privilege, and ethics, as well as mastery of more clinical or scientific subject matters, including medicine, psychology, and education. Effective trial advocacy also requires that counsel not acquiesce to local practices that are inappropriate or wrong simply because doing so is the normal course of business in that court.

A trial can occur at a number of different procedural stages in a care and protection case, with any number of possible substantive outcomes, including permanent custody to DSS, termination of parental rights, guardianship, or even dismissal of the case. Trial preparation and execution will depend on the procedural stage of the case and the substantive remedies sought by the parties. A trial in which DSS is seeking permanent custody of a child is likely to require a different strategy than a trial in which DSS is seeking to terminate parental rights. Likewise, trial strategy may be markedly different where the relief sought by a parent or child is something other than reunification. For example, counsel may concede that the parent is unfit, but propose guardianship instead of termination of parental rights, propose an alternative adoption plan to DSS's plan, or propose postadoption visitation or sibling visitation. The trial tactics and strategies discussed in this chapter apply to trials in any of these contexts.

Effective trial advocacy is impossible without proper preparation. Indeed, trial preparation could probably be the subject of its own chapter. However, the planning, preparation, and execution of trial strategy are inextricable; therefore, these topics are discussed together. Counsel preparing for trial must also carefully review other chapters in this manual, including Chapter 14, The Adjudication and Disposition of Care and Protection and Termination of Parental Rights Proceedings; Chapter 8, Evidence in Care and Protection and Termination of Parental Rights Cases; Chapter 9, Privilege and Confidentiality; and Chapter 10, Experts. Although rare, counsel may occasionally find himself or herself trying a state intervention case in the Probate and Family Court. Much of the discussion in this chapter applies equally to those cases. For cases pending in the Probate and Family Court, counsel should also review Chapter 16, Child Welfare Proceedings in the Probate and Family Court, for further information about practice and procedure in that court.

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