

nuts and bolts of a tpr case



- Some background
- Review of the path of a case
- What is required of us as trial judges
- Review of recurring issues
- Identification of how to make getting to a ruling “easier”
- Post-trial life of the child and case





October 21, 2016

C.A.N.D.O.

language soon not to be foreign

180 Days

ASFA

APPLA

Conditional Consent

Deemed Consent

Exceptional Circumstances

Guardianship

Reasonable Efforts

Unfit

TPR

Adoption and Safe Families Act

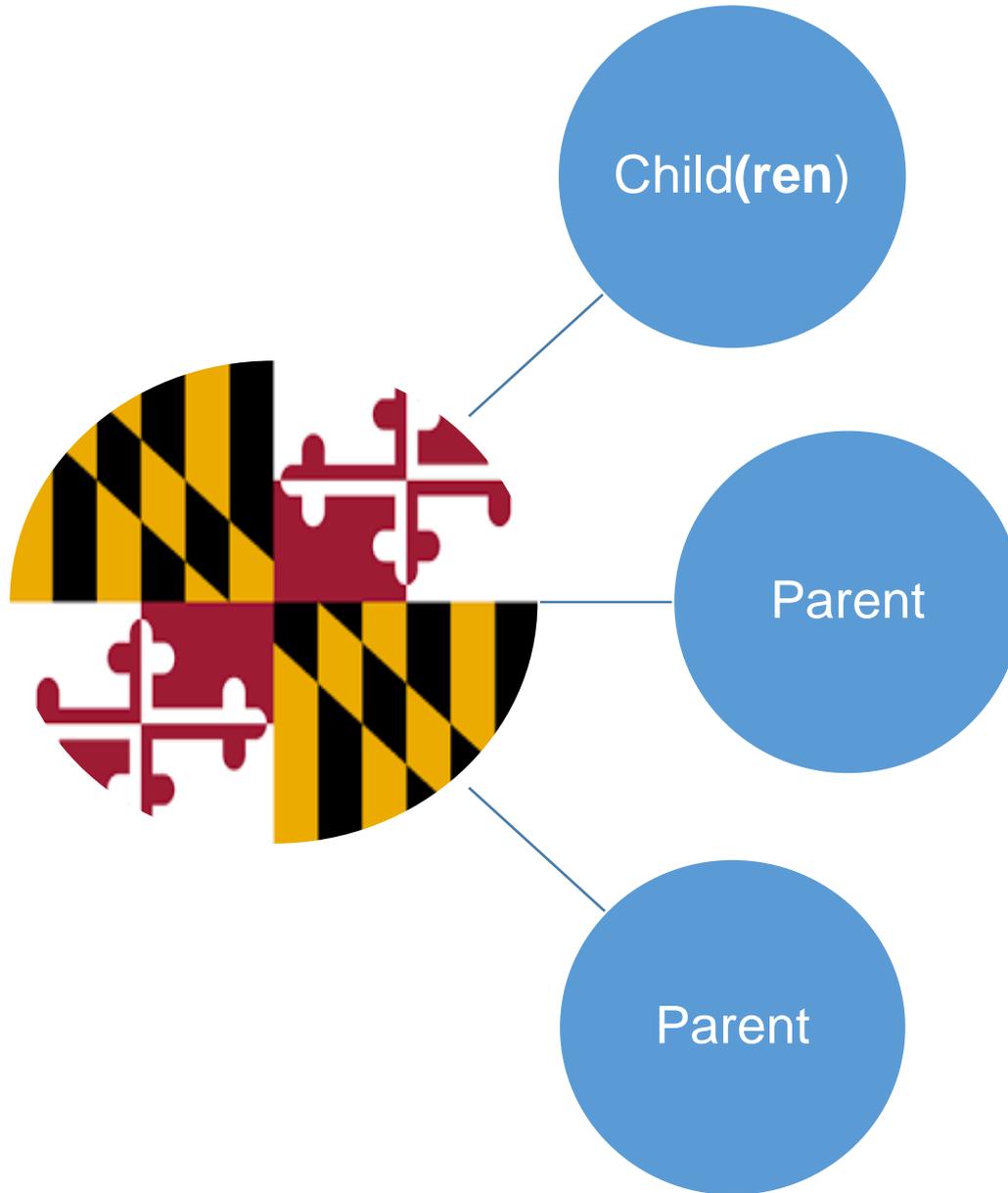
- Signed into law on November 19, 1997
- Purpose: to remedy chronic problems with the child welfare system
- ASFA amended the federal foster care law Titles IV-B and IV-E of the Social Security Act
- Made safety and permanency the primary focus of the law
- Driving force for Maryland's child dependency statutes
- Section IV-E Funding Implication is **HUGE**



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PARTIES





- Each child has a statutory right to counsel (DHR Legal Services Program)
- Indigent parent has a statutory right to counsel provided through the Office of the Public Defender
- Various bases for appointment of conflict counsel
- Right is to **effective counsel**



exercise care if parent decides to discharge counsel

Record should reflect: Specific inquiry of parent before permitting discharge; clearly established desire to discharge; and weighing akin to Rule 2-132(b) (may deny withdrawal if “would cause undue delay, prejudice, or injustice”)

In re Alijah, 195 Md. App. 491 (2010)

who's the daddy?



resolve paternity
in CINA proceedings
as **early** as possible



continuing obligation

- local department to use reasonable efforts to **locate absent parents** and for the clerk of the court to be kept current as to each parent's address
- a **search for kin** should also continue



NICWA

National Indian Child Welfare Association

Culture Matters
Protecting Our Children. Preserving Our Culture.



Culture Matters
Protecting Our Children. Preserving Our Culture.



does the case
concern
an Indian Child?

resolve eligibility
in CINA proceedings
as **early** as possible



Indian Child Welfare Act

U.S.C., Title 25, Chapter 21

applies to foster care and adoptive proceedings

Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe” 25 U.S.C. 1903(4)



**make certain
record shows
inquiry has been made**

- **federally recognized** tribes
- Federal Register listing of tribal contacts
- notice to tribe

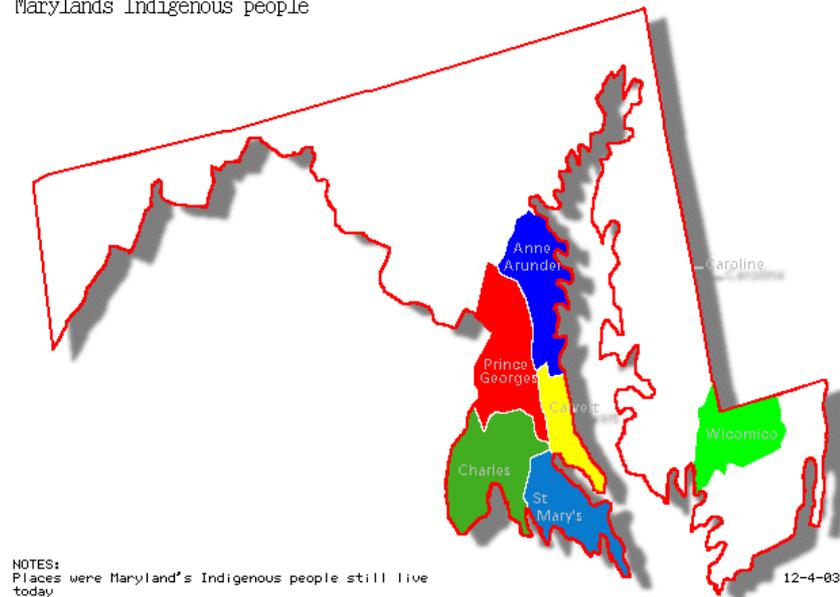


- Right of tribe to intervene
- Tribe can take jurisdiction
- “Active”, not “Reasonable Efforts, required
- Placement preference is with the tribe
- Failure can undo everything

Maryland Recognized Tribes (January 9, 2012 Executive Order)

- Piscataway Indian Nation
- Piscataway Conoy Tribe

Maryland's Indigenous people





- Maryland Commission on Indian Affairs
- National Council of Juvenile and Family Court Judges
- National Indian Child Welfare Association:
<http://www.nicwa.org>



is parent in the military?





Under Service Members Civil Relief Act, **50 U.S.C. App. 501 *et seq.***, in order for adverse ruling, attorney must be appointed





- 90 day stay mandated upon submission that satisfies requirement of Act with an additional stay within judge's discretion
- Consult the Act and *A Judge's Guide to The Servicemembers Civil Relief Act* by Mark E. Sullivan

A CHANGE OF FOCUS



- **CINA and TPR Proceedings are Distinct**

Judge Adkins: “Two intricately connected, yet separate legal mechanisms, come into play in this case. CINA proceedings are governed by sections 3–801 through 3–830 of the Courts and Judicial Proceedings Article . . . , and TPR proceedings are governed by sections 5–313 through 5–328 of the Family Law Article”

In re Jayden G., 433 Md. 50, 54 (2013).

“CINA proceedings are designed “[t]o provide for the care, protection, safety, and mental and physical development of” children found CINA; “conserve and strengthen the child’s family ties;” ensure that parents and local departments work together to “remed [y] the circumstances that required the court’s intervention;” and “achieve a timely, permanent placement for the child consistent with the child’s best interests.” CJP § 3–802(a).” 433 Md. at 75

“In contrast, when the Department initiates TPR proceedings, it ‘seek[s] to terminate the existing parental relationship.’ *Rashawn H.* 420 Md. at 496...It files the TPR petition when it believes a child’s welfare will be best served in the care and custody of others, rather than the natural parents.” 433 Md. at 75

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- “...in these two types of proceedings, courts consider **different factors**.” 433 Md. at 75
 - “TPR proceedings require a ‘clear and convincing’ **standard of proof**, but CINA adjudications are made based on the lesser ‘preponderance of the evidence’ standard.” 433 Md. at 77
 - “Furthermore, in a permanency plan review hearing, strict **application of the Maryland Rules of Evidence** is not required....It is, however, required in a TPR proceeding.” 433 Md. at 77



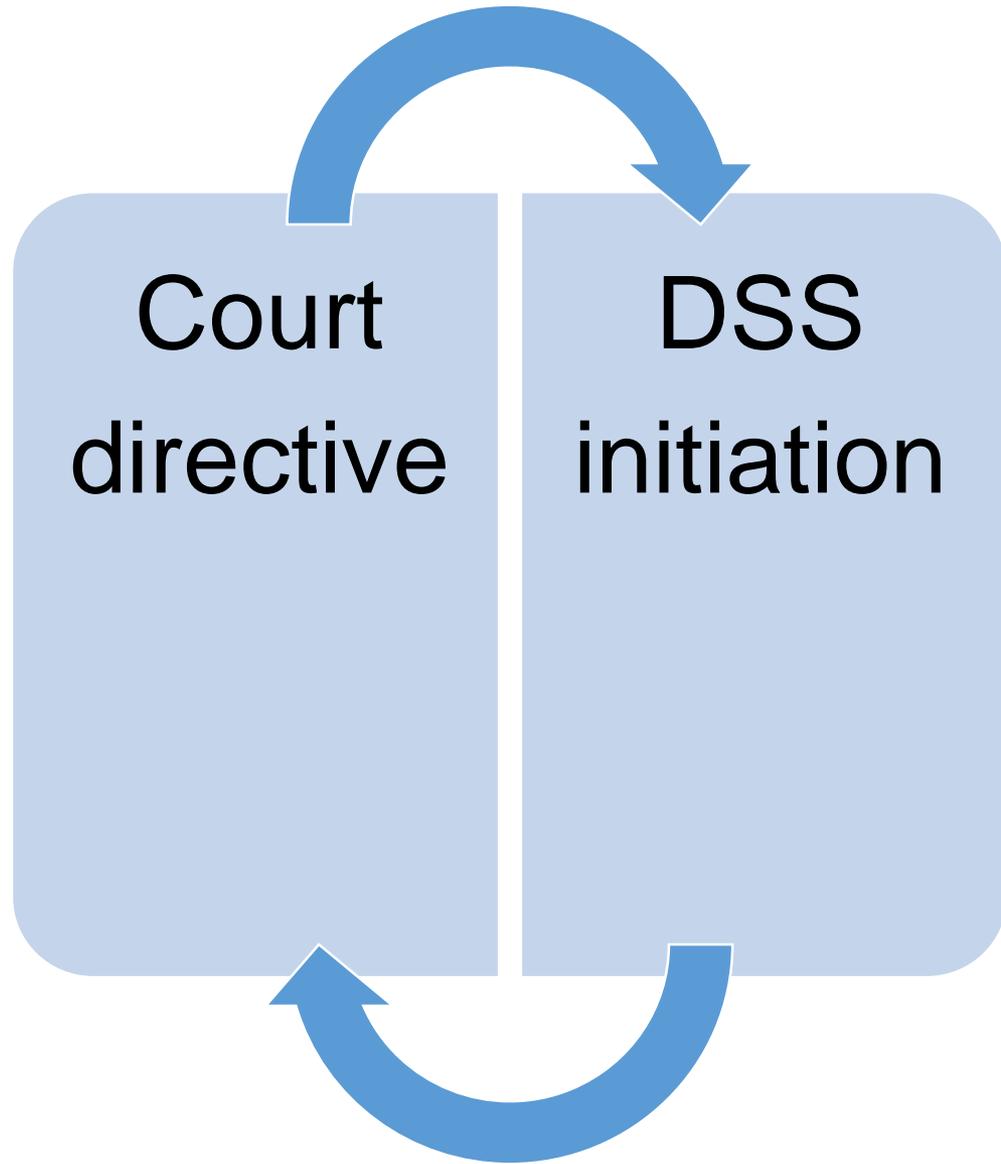
in order for **a child in care** to be **free for adoption**

- the legal relationship between a child and the child's parents or parent must be terminated
- cannot terminate rights of one parent and not the other
- remember that the modern family can look different

Changing the Permanency Plan to Termination of Parental Rights and Adoption

“...the changing of the permanency plan to adoption is not a prerequisite to the filing of a TPR petition.”

In re Adoption of Jayden G., 433 Md. 50, 78 (2013)



if you determine that **the permanency plan is changed to adoption** you are to

- Order the local department to file guardianship petition within 30 days
- If local department does not support the plan, order department to file petition within 60 days
- Schedule the next 6-month hearing to be the trial of the guardianship petition **but**



Local Department Initiation

F.L. 5 – 525.1(b)

required to file
if

- the child has been in an **out-of-home placement for 15 of the most recent 22 months;**
- a court finds that the child is an **abandoned infant; or**
- A **parent has been convicted of any of certain crimes of violence related acts** involving child, parent or sibling of the child

LOCAL DEPARTMENT INITIATION



Make a Note of THIS!

EXCEPTIONS!!

- child is in **kinship care**;
- local department has documented in the case plan ... a **compelling reason** termination of parental rights would not be in the child's best interests; or
- local department has **not provided services to the family consistent with the time period** in the local department's case plan that department considers **necessary for the safe return of the child to the child's home.**

**Adoption can occur
without prior TPR
proceeding**

F. L. Title 5 Part III

allows one to go directly
from CINA to adoption
but
requires adoption petition



Section 5 - 331

- Consent of Department required to file petition
- Allowed where no contact with Department within 180 days of filing or Department unable to locate after reasonable efforts to locate
- **Not** sooner than the later of 30 days after birth of child, the expiration of any period for revocation of consent or time to file an objection. F.L. 5 – 336

- if a child is 10 or older, consent necessary
- if younger, must not object.

F.L 5 – 538

Involuntary/Contested Guardianship /TPR Proceedings



Notice by show cause order to

- each parent; and
- last attorney of record for child
- last attorney of record and for each parent

F.L. 5 – 316



- Failure to give notice to last attorney of record in CINA proceeding is **fatal**, even if the attorney's appearance was stricken. *In re Adoption/ Guardianship No. 6Z000045*, 372 Md. 104 (2002).
- Service on the office of the prior attorney who no longer is at the office is **ineffective**. *In re: Adoption/ Guardianship of Genara A.*, 152 Md. App. 725 (2003)



- If local department is unable to identify an address for parent and serve at address **after reasonable good faith efforts** (F.L. 5- 316 (e)) to do so
- **F. L. 5- 316 (f)** specifies publication by newspaper **and** via website





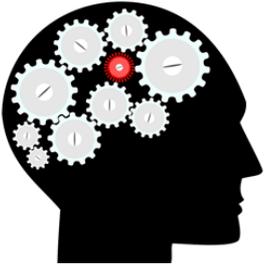
➤ **TPR Status** to be held within 60 days

Rule 9 – 104(b)

➤ **Ruling** to be made **within 180 days after petition filed and within 45 days** after consents or trial

F.L. 5 – 319(a)





Rule 9-103 (b)(1)(K)



- Petition for guardianship or adoption is to include
“Facts known to ... petitioner that may indicate that a party has a **disability that makes the party incapable of consenting or participating effectively in the proceedings**, or, if no such facts are known to the petitioner, a statement to that effect”



Disability of Parent



- Disability hearing required - Rule 9-105(b)
- If disability finding, parent is entitled to representation by Office of Public Defender F.L. 5 – 307(a)



What Is A Disability



- For purposes of TPR proceedings, definition seems to be *functional*
- The “mental impairment or deficiency” and “intellectual functioning” elements of the definition in F. L. 5-525 would seem to be more helpful

F. L. 5 - 307(a)(2)



“To determine whether a disability makes a parent incapable of effectively participating in a case, a juvenile court, on its own motion or motion of a party, may order examination of the parent.”

Objection

Triggers Parent's Right to Counsel in TPR Proceedings

- Office of Public Defender
- Attorney cannot object on behalf of client who has not authorized the filing. *In re Darjal*, 191 Md. App. 505 (2010)



Public Defender Policy

If there is no dispute as to disability and parent is still represented by the Office of the Public Defender in the CINA proceeding (eligibility, continued desire to be so represented and no basis for disruption of the relationship) the Office will enter its appearance and file an objection on behalf of its client. A Consent Notice or similar filing by local department would be expected.

Right to Effective Assistance of Counsel



In re: Adoption of Chaden M.
422 Md. 498, 501 (October 25, 2011)

Guardianship might become consensual

F. L. 5-318, 320-322

may be
actual or deemed
and
may be
conditional

F. L. 5-320 (b)

A governmental unit or person:

(1) may condition consent or acquiescence on **adoption into a specific family that a local department approves for the placement;** but (2) may not condition consent or acquiescence on any factor other than placement into a specific family.



Consents



Actual

- Written - Form 9 – 102.1 with an attorney's affidavit if represented by counsel
- If Oral – Follow F. L. 5-321

Deemed (Statutory)

- Despite proper notice, a child or parent has failed to file a timely objection



the oral consent

- Consent must be entered on the record before the judge in the language of the parent
- Must include **waiver of revocation**
- Must be knowingly and voluntarily given
- Oral examination is recommended, especially if not represented by counsel



no revocation of parent's deemed consent

“As a matter of statutory construction ... we conclude that **there is no right to revoke a statutory consent** That is a consent, as we have said, arising by operation of law, not by volition, and it is not within the power of the parent to revoke it.”

In re: Adoption/Guardianship No. 9332 1055/CAD 344 Md. 458, 486 (1997); also, see, In re: Adoption of Sean M. 430 Md. 695 (2013) (Independent Adoption)



“We recognize that there **may be extreme circumstances that justify providing the child in a TPR case with an opportunity to revoke a statutory consent.**” *In re Adoption/Guardianship No. T0002005, 141 Md. App. 570, 602 (2001)*

However, there it was held that **maturation of a child is not extreme circumstance** that would cause it to be an abuse of discretion for a judge to refuse request of child to revoke consent.



perfunctory grant with child's deemed consent?

“To the extent that the court below failed to permit John to withdraw his deemed consent, we conclude that the court neither erred nor abused its discretion. We hasten to add, however, that our conclusion does not alter the paramount principle in cases of this kind; **even if the child is deemed to have consented, and cannot withdraw that consent, the court may not grant a TPR petition unless it is satisfied, by clear and convincing evidence, that such a ruling is in the child's best interest.**”

In re Adoption/Guardianship No. T0002005, 141 Md. App. 570, 603



With Consensual Grant

- **F.L. 5-322** – Issue order granting petition
- **F.L. 5-324** – Issue separate order addressing termination of CINA case, reasonable efforts findings and notice, among other things



if conditional consent and placement occurs other than specified?

- F.L. 5-327 governs
- Hearing to be within 30 days after notice of failed conditional placement filed with court
- May have to vacate guardianship decree and revive CINA case pending guardianship merits trial



if parent seeks to revoke consent because
**post-adoption contact agreement
breached?**

- “...not a ground for revoking consent to, or setting aside an order for, an adoption or guardianship.” **F.L. Article, 5-308 (d)**
- Court can order mediation; enforce or modify
- **No caselaw**

effect of appeal of permanency plan?





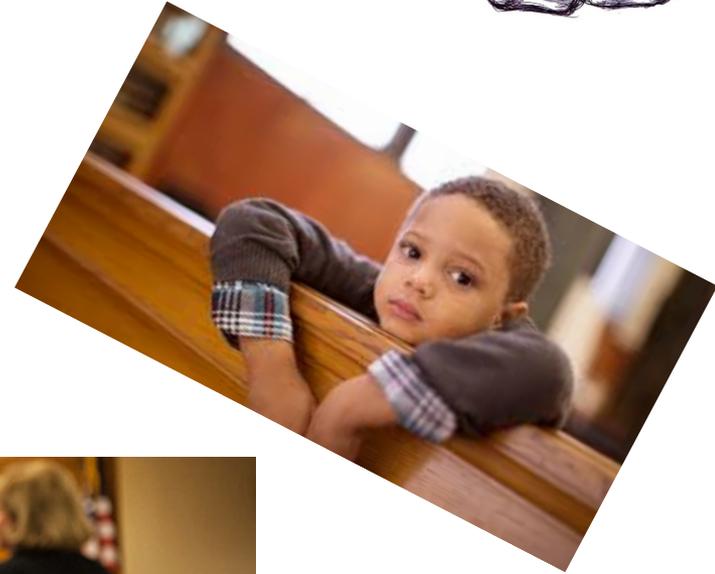
In re Adoption/Guardianship of Jayden G.,
433 Md. 50, 69 (2013)

“The parent does have the right to appeal a permanency plan of adoption, but that right is not absolute. By the same token, the 180-day provision is not to be used as a sword against all motions to stay. **The paramount concern here is the child’s best interests. Neither automatic stays nor routine denials of motions account for that. Only the exercise of sound discretion does.”**

Nonconsensual Guardianships



**F.L. 5-323
Governs**





Managing the Trial

- Strict Application of Rules of Evidence
- Judicial Notice
- Stipulations
- Be receptive to experienced counsel pointing to something missed as to a required finding
- Proposed Findings and Conclusions

The Parties

- Make certain to identify the parties and their representatives
- As to any absent party, confirm proof of service of show cause order (parent and prior counsel) and notice of trial
- **Make certain that self-represented is not in that status by fault of “the Court”**
- **The Court is charged with knowing what the Clerk of the Court knows**



remember
embrace the model order

The model order has been drafted to ensure that you address all the issues required by F. L. 5-323 and that the TPR and CINA cases are in the proper status once you have ruled on the TPR Petition



F. L. 5–323.

(b) If, after consideration of factors as required in this section, a juvenile court finds by **clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests**, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection.

Ruling on The Merits

- You must make a finding as to **each factor in F.L. 5-323** *In re Victor A.*, 386 Md. 288, 319 (2005)
- The **clear and convincing evidence** requirement applies to the **weighing of all the 5-323 factors as a whole**, not as to each factor individually. *In re Adoption/Guardianship No. 94339058/CAD*, 120 Md.App. 88, 105 (1998)

***In Re Ta'Niya*, 417 Md. 90 (2010)**

- The Best Interest of the Child prevails
- **Before answering the exceptional circumstance or unfitness question**, you must have considered all of the other statutory factors
- Decision must be **individual as to each child.**
- Fact that other children are in parent's custody does not preclude finding of exceptional circumstances.

Unfitness OR

Exceptional Circumstances

On appeal, though the trial court found parent unfit, parent challenged termination of rights where the trial court did not also find exceptional circumstances.

The trial court's decision was affirmed.

In re Adoption of Jasmine D., 217 Md. App. 718 (2014)



- **Lack of adoptive resource** is improper basis for denial. *In re Victor A.*
- Child's has **special developmental needs** does not allow different treatment. *In re Victor A.*
- Long-term, as opposed to short-term, **imprisonment**, may be given significant weight. *In re No. J970013*, 128 Md. App. 242 (1999)

- Time in foster care alone is not sufficient.

In re Alonza D., Jr., 412 Md. 442 (2010)



- But, where most meaningful relationship and only stability has been with foster family, time in foster care, exceptional circumstances may be found.

In re Cadence B., 417 Md. 146 (2010)

if the department decides to dismiss petition but child objects

In re Adoption/Guardianship No T97036005, 358 Md. 12 (2002): “The primary issue we must decide in each case is whether the **trial court violated the constitutional and/or statutory rights of the children by granting the petition** of BCDSS to terminate parental rights when both parents either affirmatively consented or were statutorily deemed to have consented, **without first providing the children with a meaningful opportunity to be heard on the merits of the petition.** We shall hold these children had this right, and accordingly, we shall reverse.”

Must
be
ar-tic-u-lat-ed



*In re Adoption/Guardianship
of Rashawn H.
402 Md. 477 (2007)*



In Re: Amber R., 417 Md. 701 (2011):

Great on issue of finding of “unfitness” and the sufficiency of the statutory factors

In Re: Adoption/Guardianship of L.B., 2016 WL 4570460:

Great on importance of articulation of findings on factors where articulation of how the weighing establishes exceptional circumstances or unfitness is challenged as not sufficient

However, any case that concerns grant is a good guide.



Oh, my. It's past 180 days!

Dismissal inappropriate

“ We disagree that the 180-day ruling time ... is in the nature of a statute of limitations or a trial deadline, such as those addressed in *James S. and Hicks...*”

In re: Abigail C. 138 Md. App. 570, 584 (2001)

if petition granted



A separate order accompanying the order granting or denying the petition must include **“a specific finding on whether reasonable efforts have been made to finalize the ... permanency plan”**



- **Schedule first guardianship review**
to occur not later than 180 days
- In the **separate order** direct termination
CINA case

if petition denied



Make certain that the reasonable efforts determination in the TPR proceeding is made a part of the record in the CINA case, particularly if there is not a CINA review already scheduled to occur within the regular 6-month review cycle for the CINA case.



Review Hearings

F.L. 5 – 326 and Cts & Jud Proc 3 – 816

- At least once each year; however, first is to be within 180 days of grant of guardianship
- Towards Adoption
- Specific factual reasonable efforts finding
- Specific Placement may be ordered

- 
- If **lack of reasonable efforts**, notice has to go to certain persons and reasonable efforts hearing should be scheduled if not already remedied
 - If determined that appropriate plan is other than Adoption or Custody and Guardianship, then it is Another Planned Permanent Living Arrangement (**APPLA**) and **compelling reason for plan must be articulated**
 - **APPLA is prohibited for youth under 16 years of age** (Strengthening Families Act)



child consultations

Cts. & Jud. Proc. 3-823(j) (CINA)
F. L. 5-326(c) (Guardianship)

- At least every 12 months
- On the record
- If away from the court – parties have right to be present
- To be in “age-appropriate manner to obtain the child's views on permanency.”



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thank you