PRO SE LITIGANTS
IN
CHILD WELFARE COURTS
AND THE DANGERS THEY CAN CREATE FOR
THE BEST INTEREST OF CHILDREN

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A) Typical Types of Cases:

It is not infrequent for a Pro Se Litigant to file litigation in a Child Welfare Court. This paper/topic will not include any discussion of the rights of indigent parents to be represented by counsel in suits filed by a governmental entity in which termination of the parent-child relationship or the appointment of CPS as a conservator for a child is requested. (see Tx. Fam. Code 107.013) Because of the mandatory appointment of attorneys for parents in CPS cases, the likelihood of Pro Se litigation in termination cases is not great (though not unheard of). Pro Se representation is much more likely to be encountered in the Child Welfare Court scenario as it pertains to attempts to modify a final order previously entered at the conclusion of a CPS case. For example, a final order granting Sole Managing Conservatorship of a child to a mother might become the subject of a Motion to Modify filed by a biological father who was previously excluded as a managing conservator; or by a father who may have been purposely and severely limited as to his possession and access. Another example which is often encountered involves final orders which have granted relatives or fictive kin managing conservatorship, to the exclusion on the biological parents. It is not uncommon for such parents to, "after the dust has settled a bit", return to court to make another run at gaining custody. Sometimes this is factually justified, sometimes it is not.

B) Why is this a yellow-marker- moment for the Child Welfare Court?

It is always hoped that any final order in CPS litigation, short of termination of the rights of the parents, is one that has carefully addressed the following:

1. Does the final order address, and protect the child from, the bad acts of the parent or parents?
2. Does the final order select the managing conservator who truly has the ability to protect the child from abusive or neglectful parents?
3. Does the final order set out appropriate limitations to possession and access by the parent or parents?
4. Does the Sole Managing Conservator (relative or kinship) have the wherewithal to protect the child/ren from abusive or neglectful parents, on a long term basis?

A final order in a CPS case typically results only after a long and thoughtful process. The extremely complex CPS case normally includes input/action from prosecutors, attorney/guardian ad litems for the children, attorneys for each of the parents, CASA representatives, and CPS workers. In addition, the Child Welfare Court Judge has monitored the progress of the case, from the removal, through Status and Permanency Hearings, and finally as the approving authority for the final resolution. All of the stakeholders hope that a final order is in the best interest of the child, and one which will stand the test of time.

Therefore, when a Child Welfare Judge spots a Motion to Modify a final order (filed by a Pro Se litigant) on his/her docket it truly is a "yellow marker moment". No longer can the judge rely on prosecutors, whose job it is to insure that justice is served. No longer can the judge rely on court appointed attorneys to insure that rules of evidence and that proper procedures are followed. No longer can a judge rely on a court appointed (and county paid for) attorney/guardian ad litem to advocate for the best interest of the child. No longer can the judge rely on reports/input from CASA.

What can the judge do to insure that the protections for the children built into the final order are not erroneously nullified, while at the same time providing a fair and just hearing for the movant? The following thoughts might be useful to assist in achieving that result.

C) How can the Court Coordinator assist?

To insure that the best interest of the children is served, the judge of a Child Welfare Court is best served by a coordinator who gives advance notice regarding upcoming Pro Se Litigation. Since the judge cannot be, and is not a litigator, a certain level of creativity is called for. This starts with good dialogue between the judge and the coordinator. The coordinator of the 323rd District Court prepares its CPS weekly dockets one week in advance. The Court is able to see all of the cases which are scheduled. All pro se litigation is clearly marked as such, and is therefore easily recognizable by the judge as a "heads up matter". (See Attachment 1)

Formal weekly docket checks: The 323rd has, in the past, utilized weekly docket checks. Attendees included the coordinator, elected District Judge, and the prosecuting attorneys for CPS. These weekly docket checks were an opportunity for Court and the prosecutors to insure that their calendars were accurately synchronized, and that no CPS case would inadvertently run afoul of the one year dismissal date. These weekly docket checks also provided a good opportunity for both the Judge, as well as prosecuting attorneys to be fully aware that Pro Se Litigation, which might affect the safety of a child formerly in CPS care, is on the horizon.

D) Proceed with caution: Code of Judicial Conduct Canon 3

As a judge considers what, if any, his/her preparation will be for an upcoming pro se hearing the Court must not consider ex parte communications, but should likewise be ready to protect the best interest of the children.

Canon 3: Performing the Duties of Judicial office Impartially and Diligently

B) (8) A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. This subsection does not prohibit:

(e) considering an ex parte communication expressly authorized by law

A thorough reading of the court's file is a starting point for the judge.
Which pieces of the Court file qualify as "ex parte communications expressly authorized by law:

1. The supporting affidavit attached to the Original Petition to Terminate, which generated the original removal. This is the critical storyline, explaining to the Court what parental conduct was responsible for the abuse or neglect which caused the original removal from the parents. CPS may present evidence to justify a removal, **in an ex parte fashion and by affidavit—without any actual presentation of evidence.** Tx Fam Code 262.101, 262.106 (b)

2. Status Review Documents. Service Plans, pursuant to Tx Fam Code 263.101 are to be filed with the Court no later than 45 days after CPS was named Temporary managing conservator. Pursuant to Tx Fam Code 263.105 the **Court is to review those filed documents.** Additionally, the Court is expected to, at the Status Review, approve of the service plan filed with the court and make the service plan an actual order of the Court. A re-reading of the Status review report and the Service Plans filed at Status review will allow the Court to revisit the original "game plan" which was put in place to alleviate the abusive/neglectful conduct of the parents.

3. Permanency Plans, Permanency Hearing Reports and Service Plan Evaluations: Pursuant to Tx Fam Code Sections 263.3025, 263.303, and 263.306 are documents required to be filed with the court ten days prior to permanency hearings. The Court is required to review these documents prior to the Permanency Review hearings to, among other things, assess the progress of the parents as it relates to their service plans. These documents are loaded with information about the children, the parents, and the progress of the parents, if any, in alleviating the abuse/neglect issues.

While none of these various documents represent evidence which can be used by the Court in "newly filed litigation" following a final order, they are :

i. Ex Parte communications allowed by law
ii. Documents which can paint a nice story line for the judge relating to this family, the child/ren, and the Managing Conservator previously approved by the Court as the "safe harbor" for the child/ren.

A thorough review of these documents will prepare the Court to be well aware of what to be watchful for in any upcoming hearings, and to insure that the Court can be protective of the "best interest of the children".

E) APPOINT AN AMICUS ATTORNEY

One of the built in safeguards in the previous litigation was the presence of the Attorney/Guardian Ad Litem. Tx Fam Code, Sections 107.011, 107.012, 107.0125 are the provisions which require this appointment, and which go a long way toward protecting the best interest of the children in CPS litigation. The Court can rely on the general fund of the county to pay for this vital role. (Tx Fam Code 101.015) No such luxury exists once a final order is entered and the case is being re-litigated by a Motion to Modify filed by a Pro Se litigant. However, one option of insuring that information pertaining to the best interest of the children makes its way to the judge is to appoint an Amicus Attorney.

Tx Fam Code 107.001 defines an Amicus Attorney as :
one appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services to assist the court in protecting a child's best interests rather than to provide legal services to the child.

Tx Fam Code 107.003 lists the numerous duties of an Amicus, which includes interviewing the children, the parents, and anyone who has history of the child's history and condition.

Remember, the Pro Se Litigant is not entitled to any free legal representation, and nothing prevents a court from demanding that the movant pay for a reasonable fee for an Amicus. This fee can be ordered to be paid directly to the Amicus, or into a court registry. (See Attachment 2 for a sample Amicus Order)

There is nothing that will prevent the court from prohibiting the payment of a reasonable Amicus fee before allowing a hearing to occur. A court could consider appointing the previously appointed Attorney/Guardian Ad litem. This would insure continuity, be helpful for the child and Managing Conservator as they would be familiar with this attorney, and might keep costs lower as this attorney will already be familiar with the case. In lieu of waiting for payment of an amicus fee, which might never occur, this might be a good time to reach out to an attorney on the court's approved appointment list and ask for a favor. Most of the attorneys on the 323rd appointment list are very committed to helping children. Most of them would be willing to do a little pro bono work.

F) SCHEDULING ORDERS

Once the Court is aware that a Pro Se Hearing is looming, setting the matter for a scheduling hearing might be in order. This would be an opportunity to bring the litigants into the courtroom to discuss many important matters. The judge will have an opportunity to require the parties to define the issues which are intended to be litigated, to advise the court of the expected length of time needed, to require witness lists to be filed with the court, and to further refine procedural issues which might prepare all parties for a contested hearing.
Several advantages can be gained from such a scheduling hearing. First, without violating Judicial Canon 3, all parties can in open court advise the court of what they intend to prove in court, and how long they intend to take in doing this. Second, the court has a better feel for issues such as the need for an Amicus. Third, the court can consider additional resources which might be helpful, such as mediation, or possibly a need for a CPS referral (more on that below).

While most courts have their own scheduling orders, a sample is included, which is a "revised-for-this-paper" scheduling order from the 325th District Court, Tarrant County. (See Attachment 3)

The Court should also consider including on such a scheduling order a declaration that the case is set in front of an Associate Judge. All parties are to be held accountable to the Rules of Evidence and Procedure. Tx Fam Code 201.005 gives the parties 10 days to object to an Associate Judge. The Pro Se Litigants will likely be unaware of this, and this might be a nice gift to the District Judge---not having to hear this case. While the scheduling order could, of course, include a waiver of a hearing in front of the District Judge, my experience has been that when you ask a Pro Se Litigant to waive something, they think they are being tricked, and won't waive anything—regardless of the merits of waiving.

G) A CPS REFERRAL

These cases might well bring to the attention of the Child Welfare Judge that the children involved in these cases are once again poised to be the victims of abuse or neglect. For example, the Movant seeking conservatorship may well be the perpetrator of the original abuse which resulted in his/her exclusion as a conservator in the final order. A Modification which would send the children back into the hands of that perpetrator might well meet the definition of abuse or neglect. Another example might include a situation where the PMC Relative/Fictive Kin placement has reached a point that they are willing to give the children back to the parents. While it might seem silly to think that the Child Welfare Judge would allow such a thing to happen, such a result might occur. The judge must make his/her decision on the facts presented at the Motion to Modify hearing. If the judge is limited to evidence which ultimately does not reflect the true circumstances of the children, the judge might well be making a decision which does not reflect the true best interest of the children. Tx Fam Code 261.101 requires professionals to report cases of abuse or neglect. The potential for children returning to an abusive/neglectful environment would certainly trigger a required report by the judge. Judges should remember that the **only mechanism for generating**

a CPS investigation is for a referral to be made. If a judge expects for a CPS investigator to become involved with the family and children in question, a referral must be made. This can be done by the judge himself/herself. Most Child Welfare Judges have a good working relationship with the prosecutors who represent CPS, and these prosecutors will likely be willing to handle the procedural details of generating the referral. Regardless of the mechanism used to generate a referral, this option is a very good way to get valuable information to the Court. CPS Investigators are obligated to inform the Court of its findings, and will be critical participants at these Pro Se hearings. Sometimes these investigations result in removal of the subject children even before the hearing on the Motion to Modify. Sometimes they result in CPS being in support of the Motion to Modify. Sometimes they are not helpful. Regardless of the investigative outcome, the investigative process is one more tool which can provide valuable information to the court, without running afoul of Judicial Canon 3.