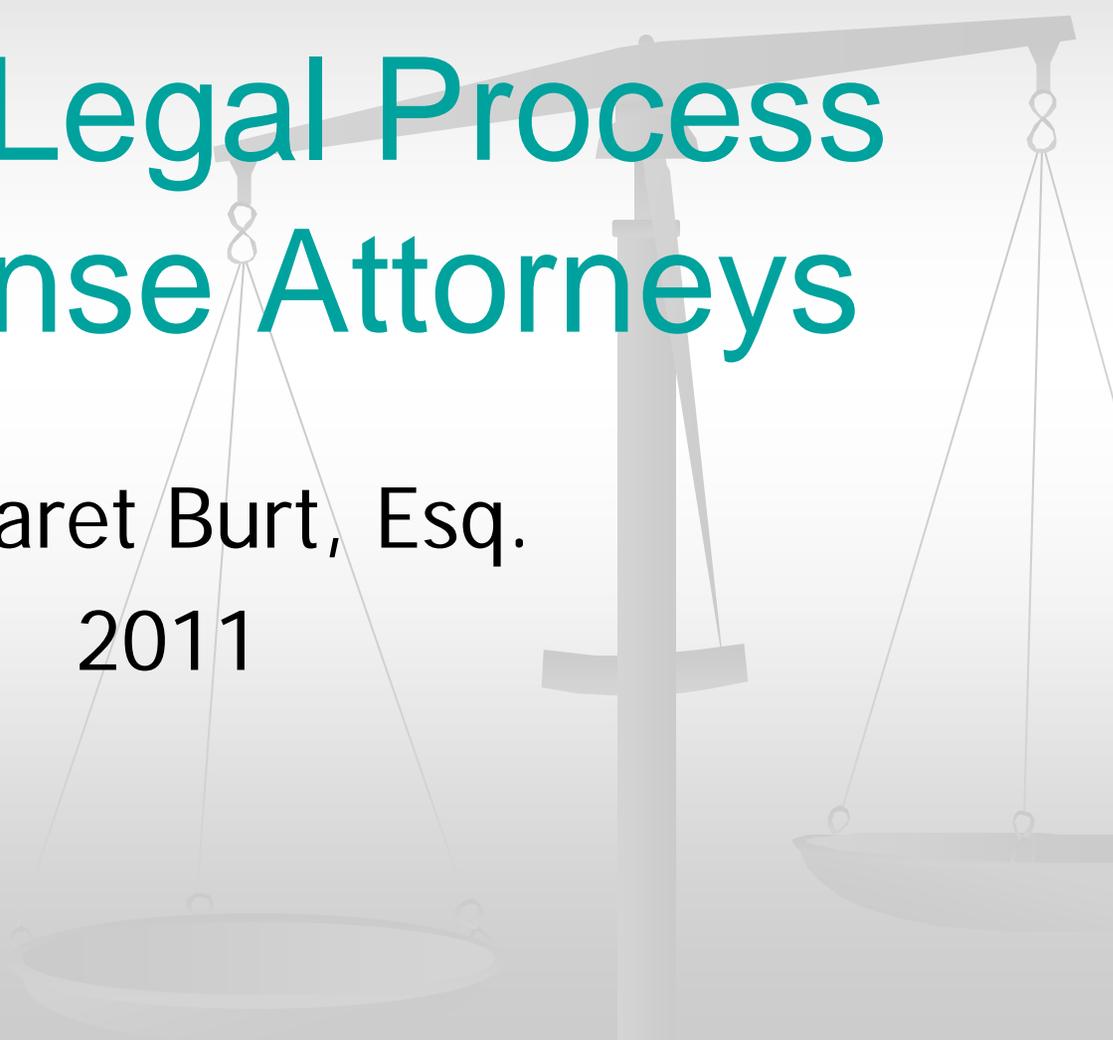


Primer on the NYS Child Welfare Legal Process for Defense Attorneys



Margaret Burt, Esq.

2011

Mandated Reporters

SCR

Everyone Else

Not Accepted

Accepted

Local CPS

max. 60 Days

“Fair Hearing”

“Unfounded and Sealed”

“indicated”

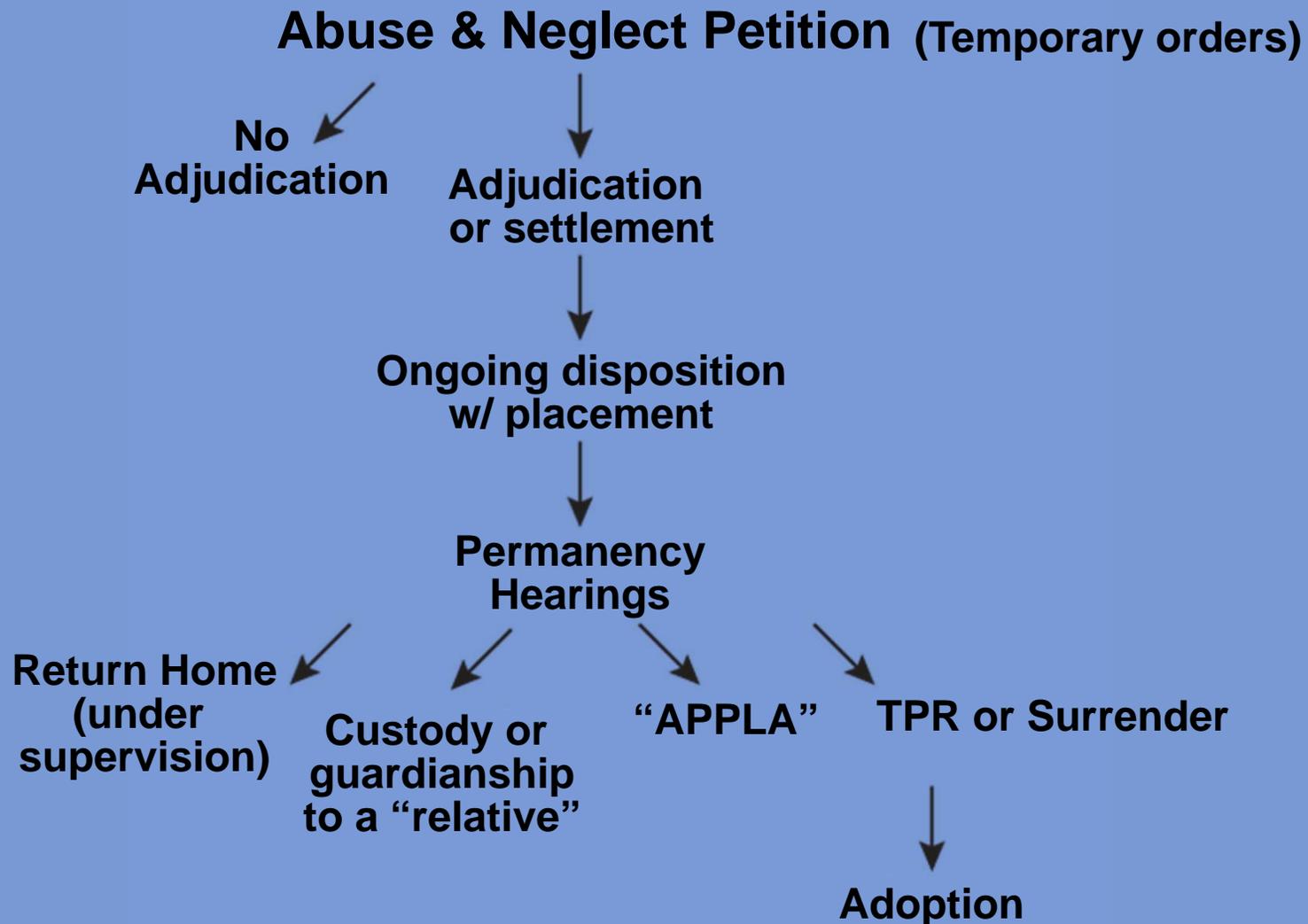
Possible Open

Closed

Open

Open and Court

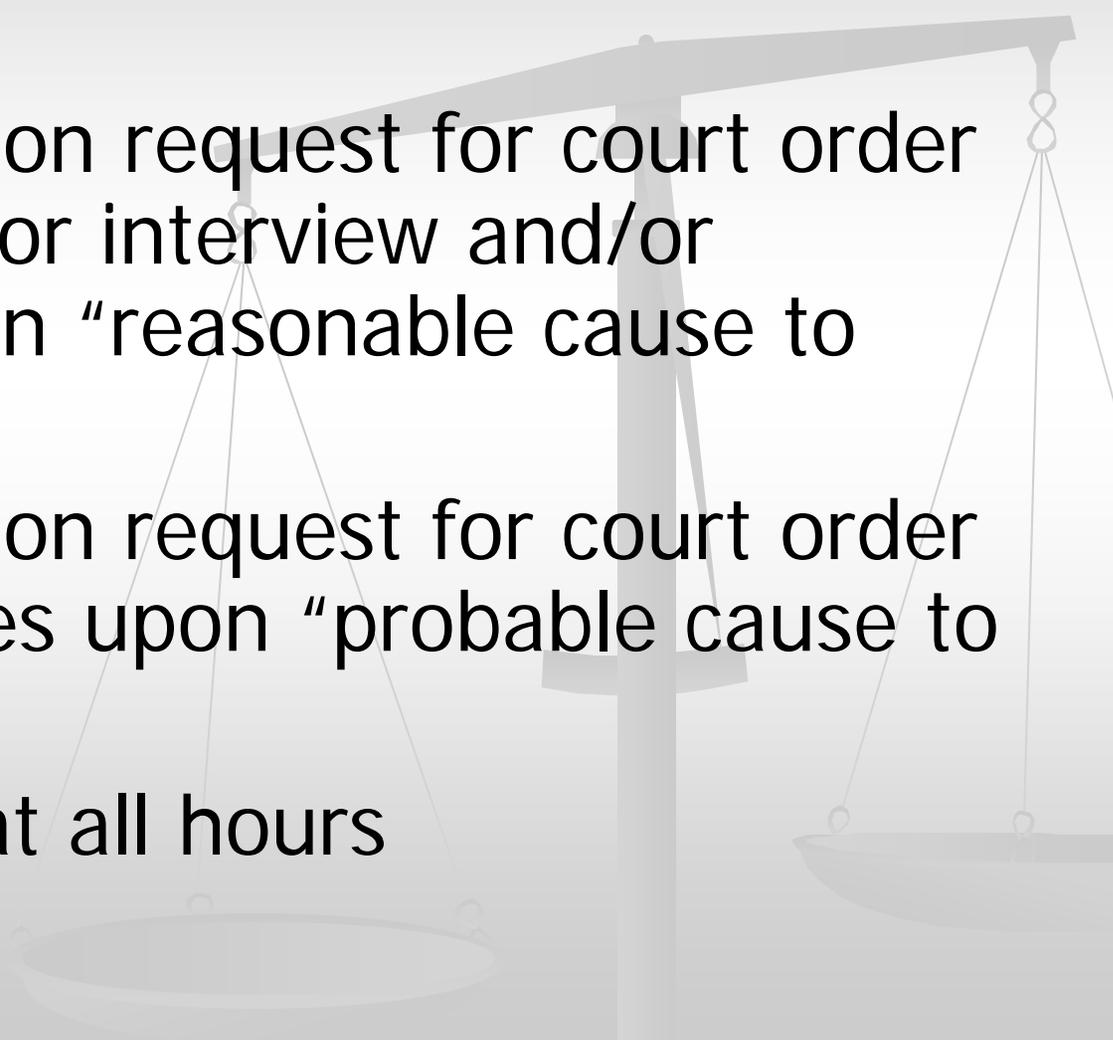
Where child placed out of the home



When no placement supervision only



Access Law



FCA§ 1034(2)

- Allows Pre-petition request for court order to access child for interview and/or observation upon “reasonable cause to suspect”
- Allows pre-petition request for court order to enter premises upon “probable cause to believe”
- Can be sought at all hours

Reasonable Efforts

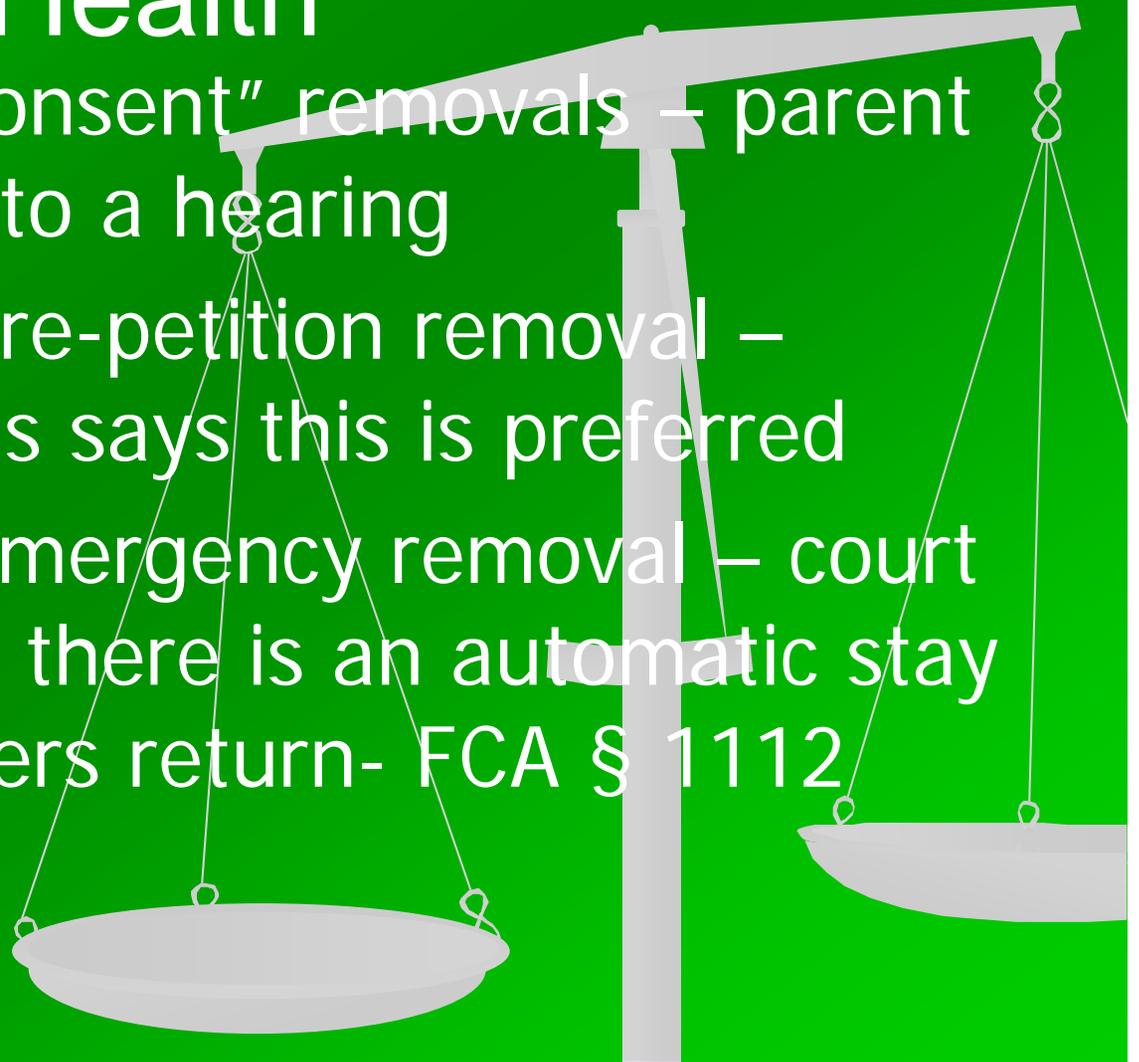


Reasonable Efforts to Prevent Placement

- The department has a duty to provide timely, reasonable efforts to prevent placement
- The court must make a finding that the department made such reasonable efforts Finding must be made within 60 days of the child's removal
- If the court does not make the finding, the agency will not receive IV-E dollars for the child's entire stay in foster care
- The finding must be detailed and child specific - not just a reference to state law

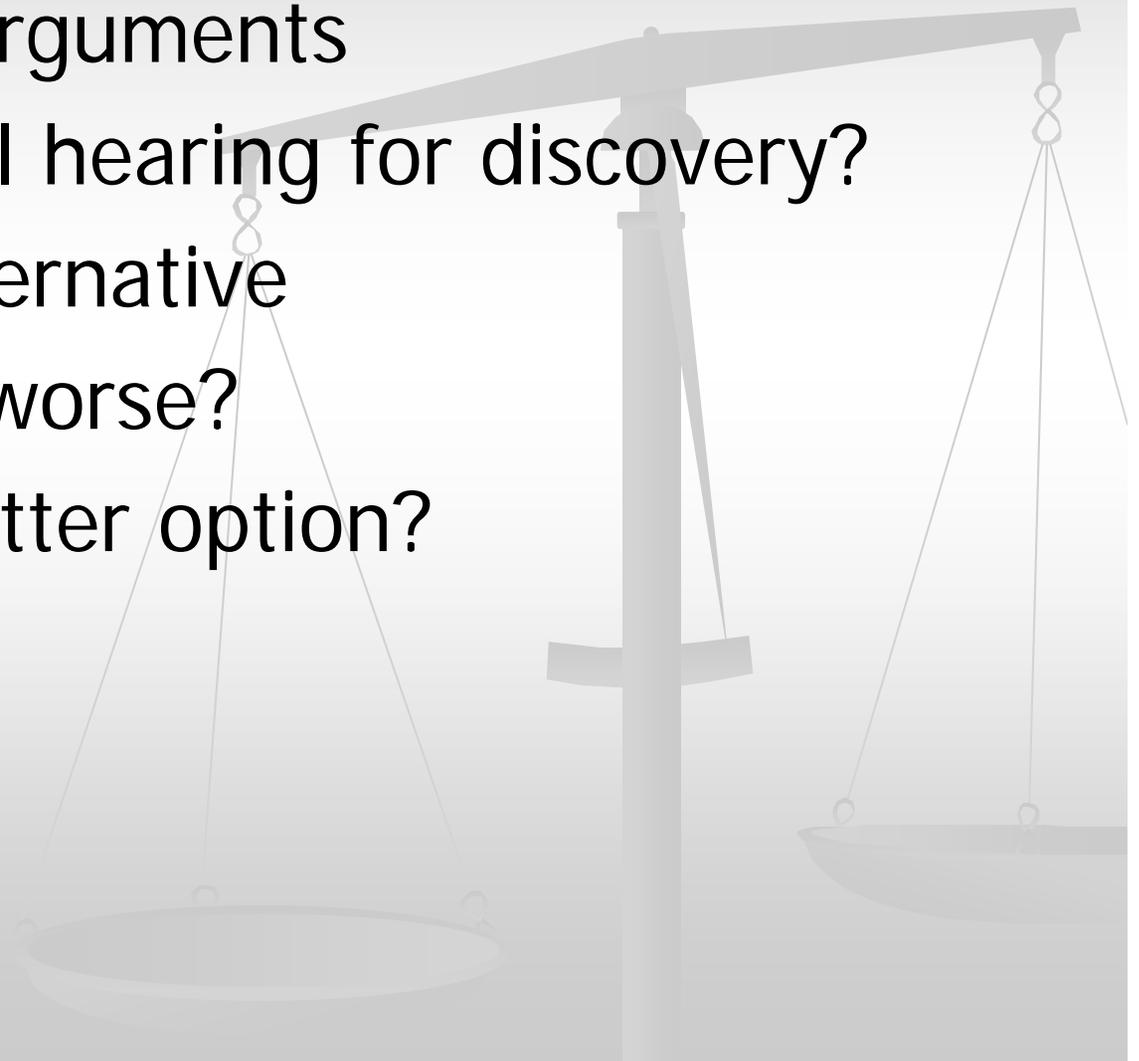
Removals out of the home: “Imminent Danger to Life or Health”

- FCA §1021 - “consent” removals – parent still has a right to a hearing
- FCA § 1022 – pre-petition removal – Court of Appeals says this is preferred
- FCA § 1024 – emergency removal – court holds hearing – there is an automatic stay if FC Judge orders return- FCA § 1112



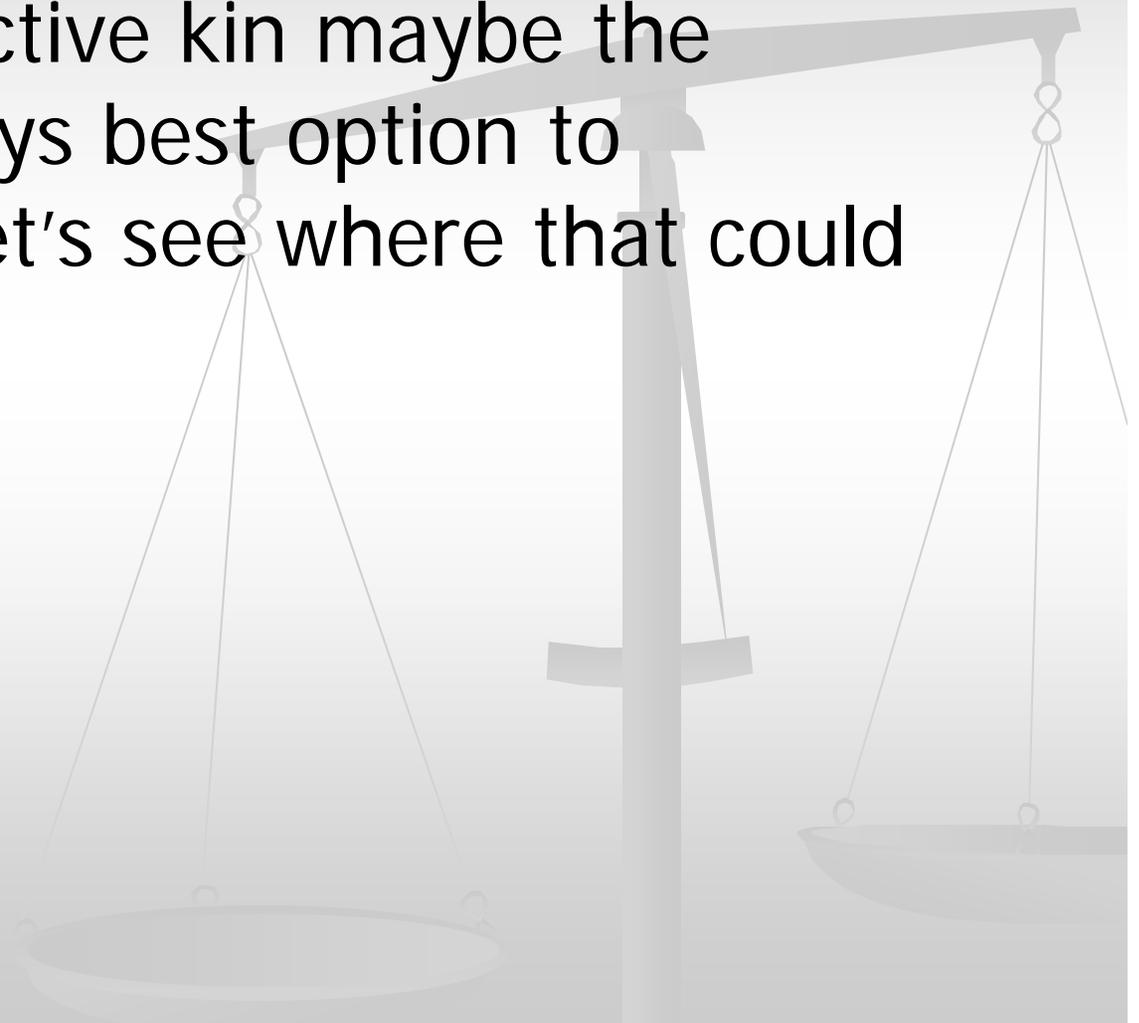
Removal Tips for Defense Attys

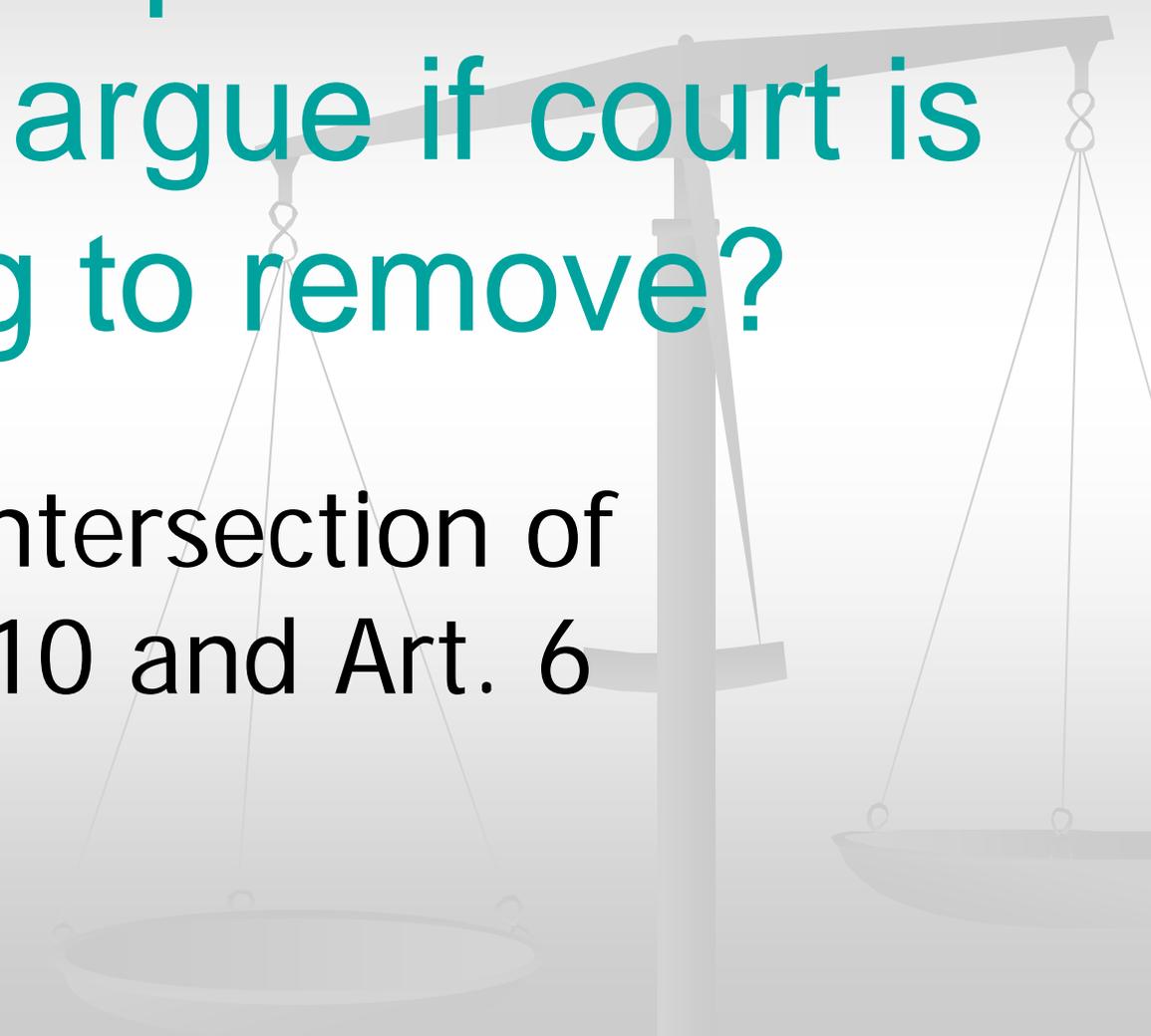
- Imminent risk arguments
- Use the removal hearing for discovery?
- Offer O/P as alternative
- NRP – good or worse?
- Relative as a better option?



Let's take some time

- Relatives and fictive kin maybe the defense attorneys best option to recommend – let's see where that could lead.....



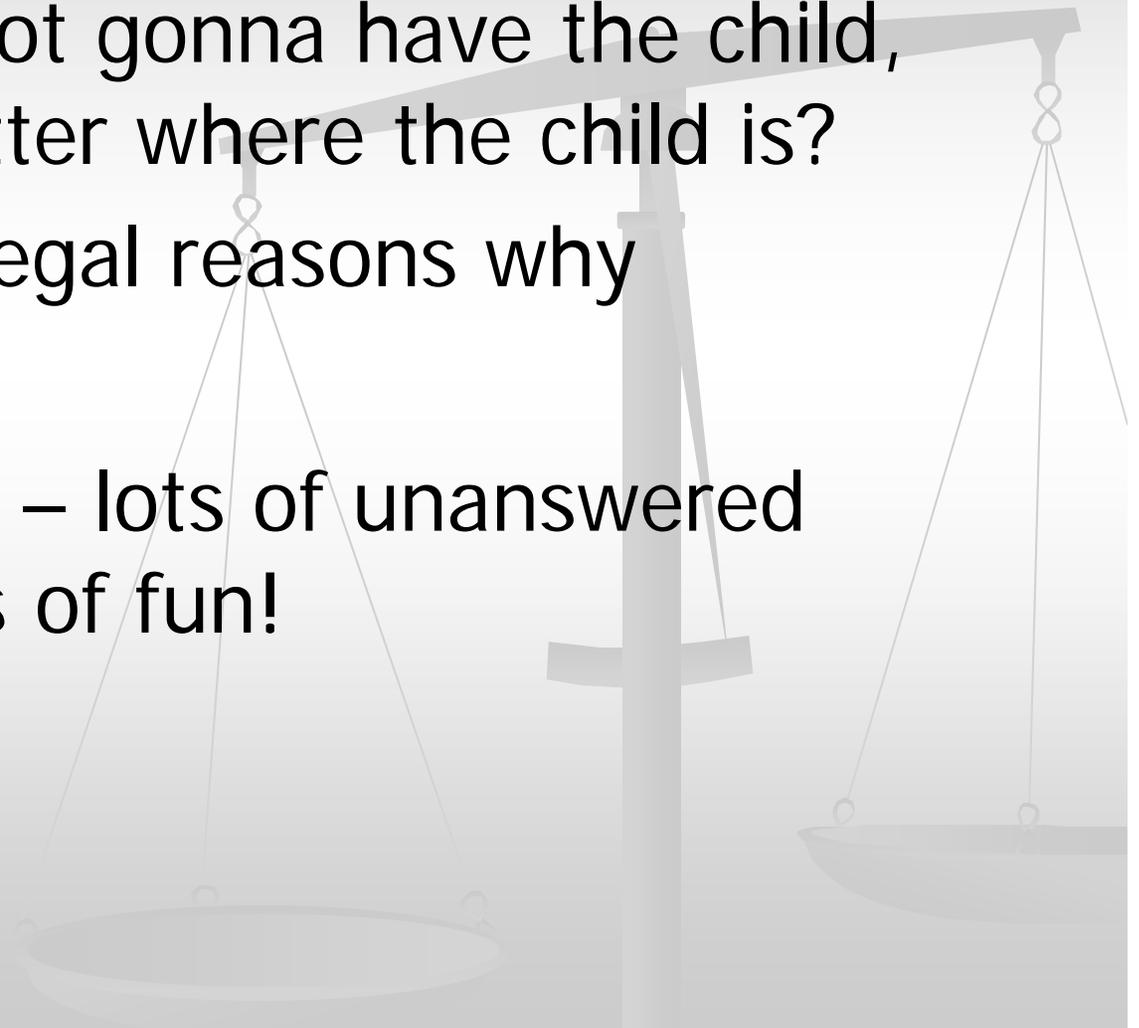


What options can
parents argue if court is
going to remove?

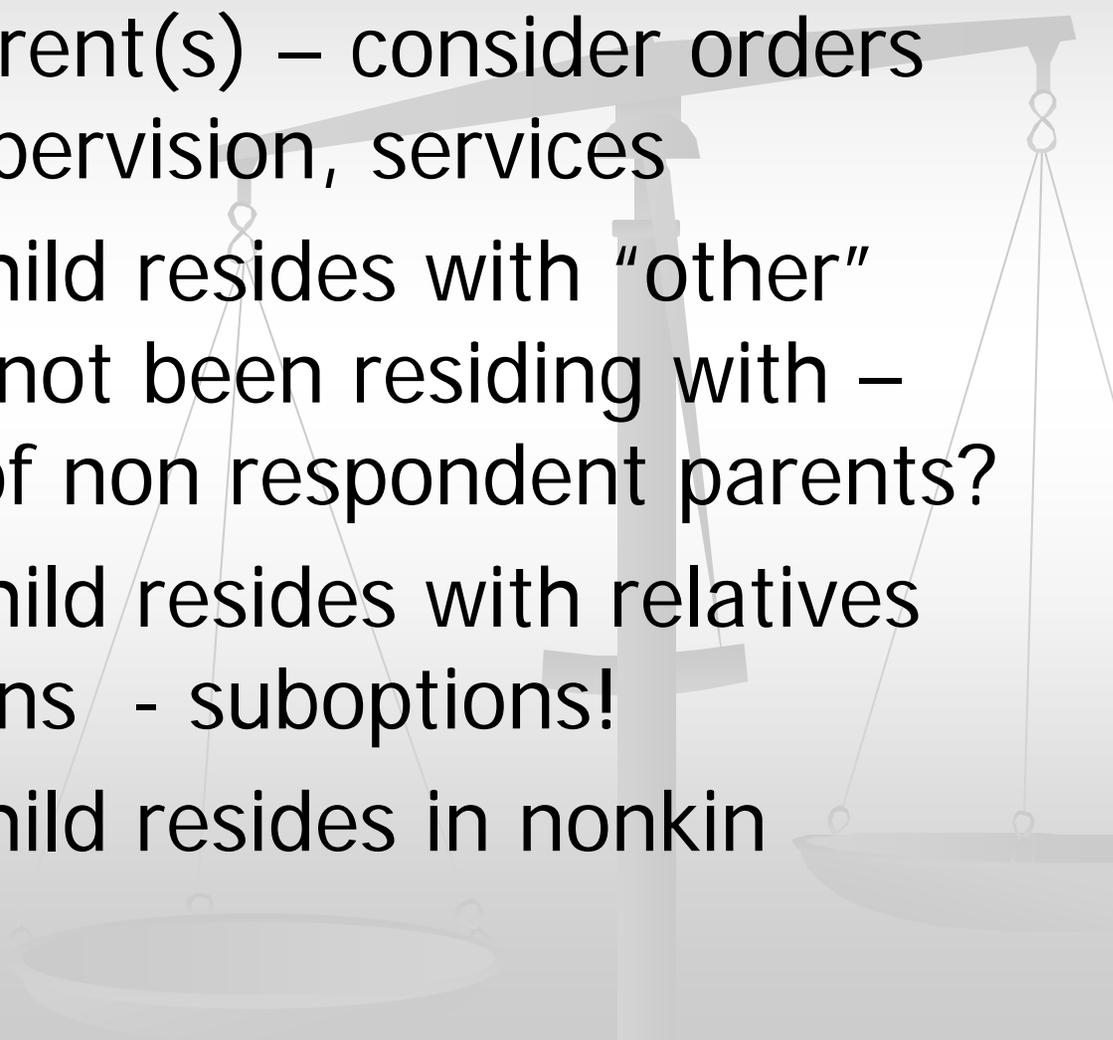
The Intersection of
FCA Art. 10 and Art. 6

Why does defense counsel care?

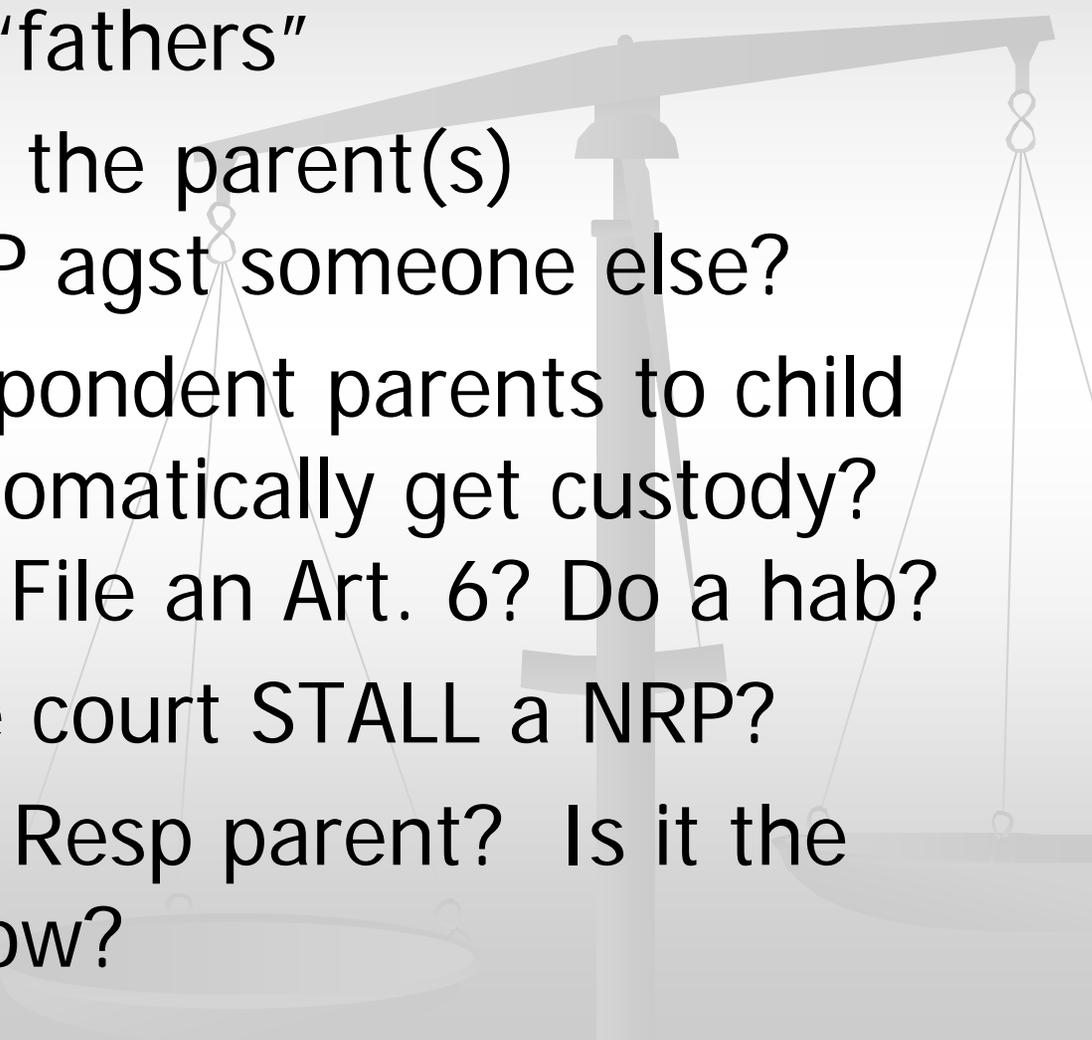
- If the client is not gonna have the child, why does it matter where the child is?
- Emotional and legal reasons why
- Lots of new law – lots of unanswered questions = lots of fun!



When child has to be removed

- Option 1 – the child resides at home with either of both parent(s) – consider orders of protection, supervision, services
 - Option 2 – the child resides with “other” parent they had not been residing with – what are rights of non respondent parents?
 - Option 3 – the child resides with relatives or suitable persons - suboptions!
 - Option 4 – the child resides in nonkin foster placement
- 

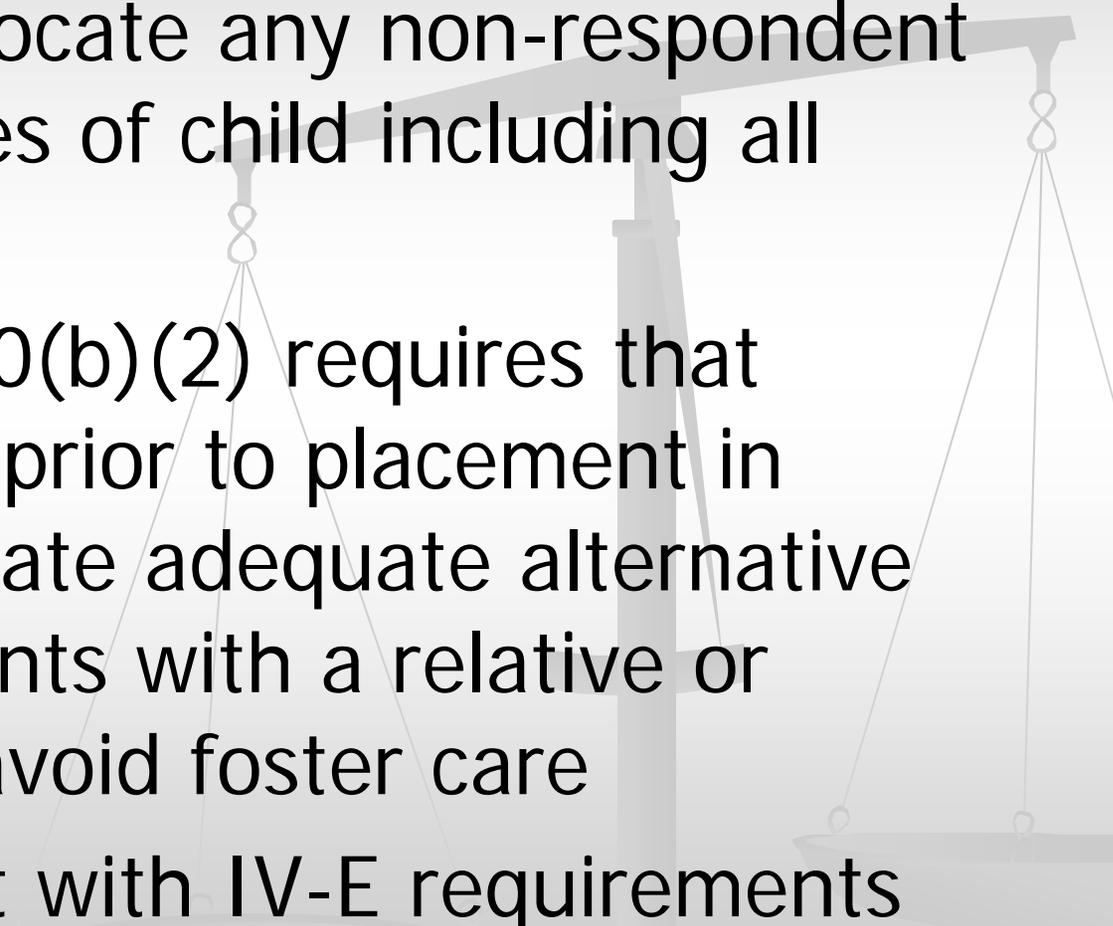
Court Must First Consider ALL parents

- Non adjudicated “fathers”
 - What could make the parent(s) suitable/safe? O/P agst someone else?
 - Rights of non-respondent parents to child – should they automatically get custody? How? Intervene? File an Art. 6? Do a hab?
 - How long can the court STALL a NRP?
 - What if you have Resp parent? Is it the devil that you know?
- 

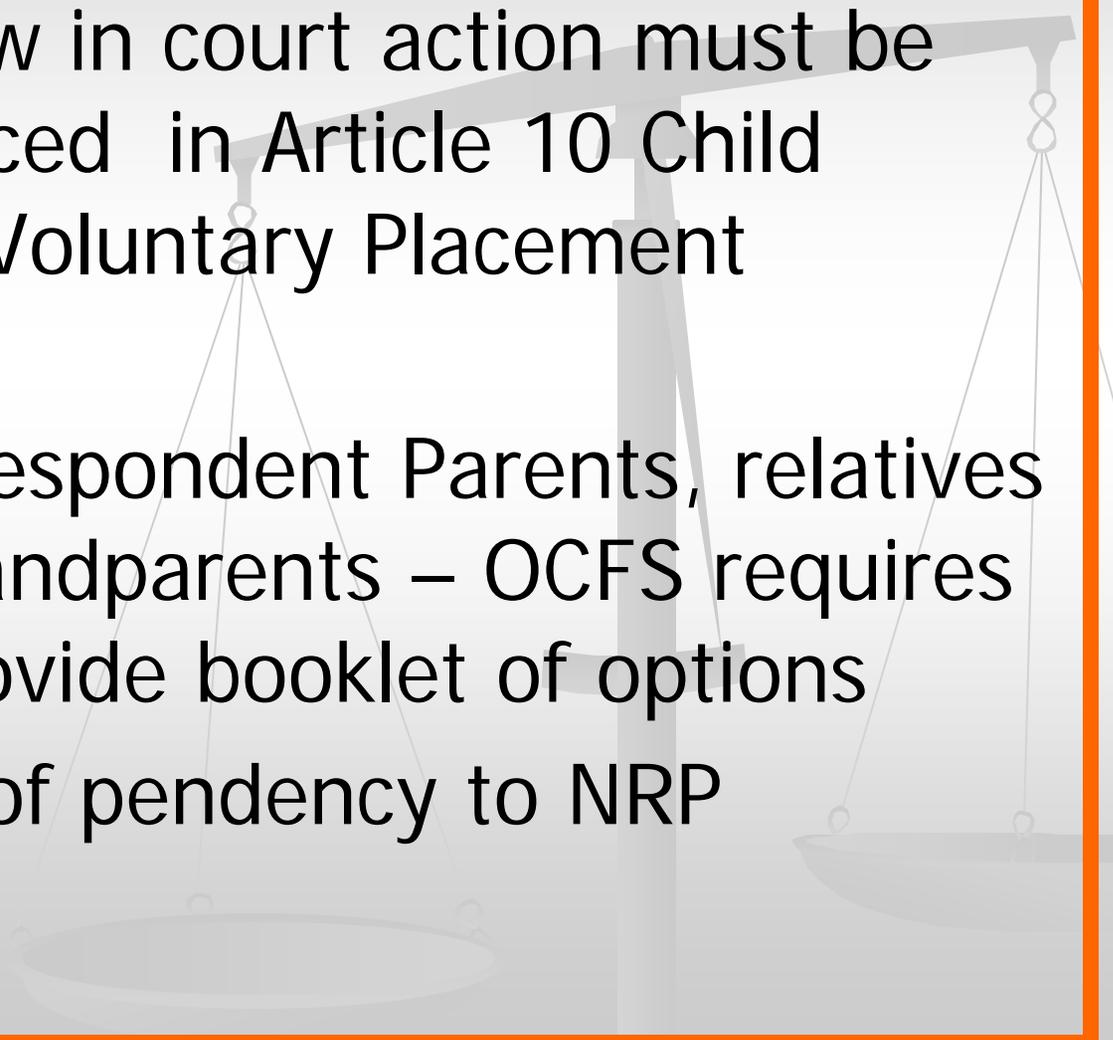
What if court says no safe parent?

- Relatives is next option – agency is to be looking for them asap – this is reasonable efforts, also they know 1017 is coming
- “Suitable persons” can also be considered along with relatives – “fictive kin” “pseudo-relatives” – godparents, best friends, neighbors - agency needs permission or court order to talk to non-relatives

Before Court

- DSS was to conduct immediate investigation to locate any non-respondent parent or relatives of child including all grandparents
 - 18 NYCRR 430.10(b)(2) requires that districts attempt prior to placement in foster care to locate adequate alternative living arrangements with a relative or family friend to avoid foster care
 - This is consistent with IV-E requirements
 - BUT must have parent's consent
- 

Legal mandate to look to relatives--FCA 1017

- Where child now in court action must be removed or placed in Article 10 Child Protective and Voluntary Placement Agreement
 - Look for Non-Respondent Parents, relatives including all grandparents – OCFS requires local DSS to provide booklet of options
 - Written Notice of pendency to NRP
- 

FCA 1017:

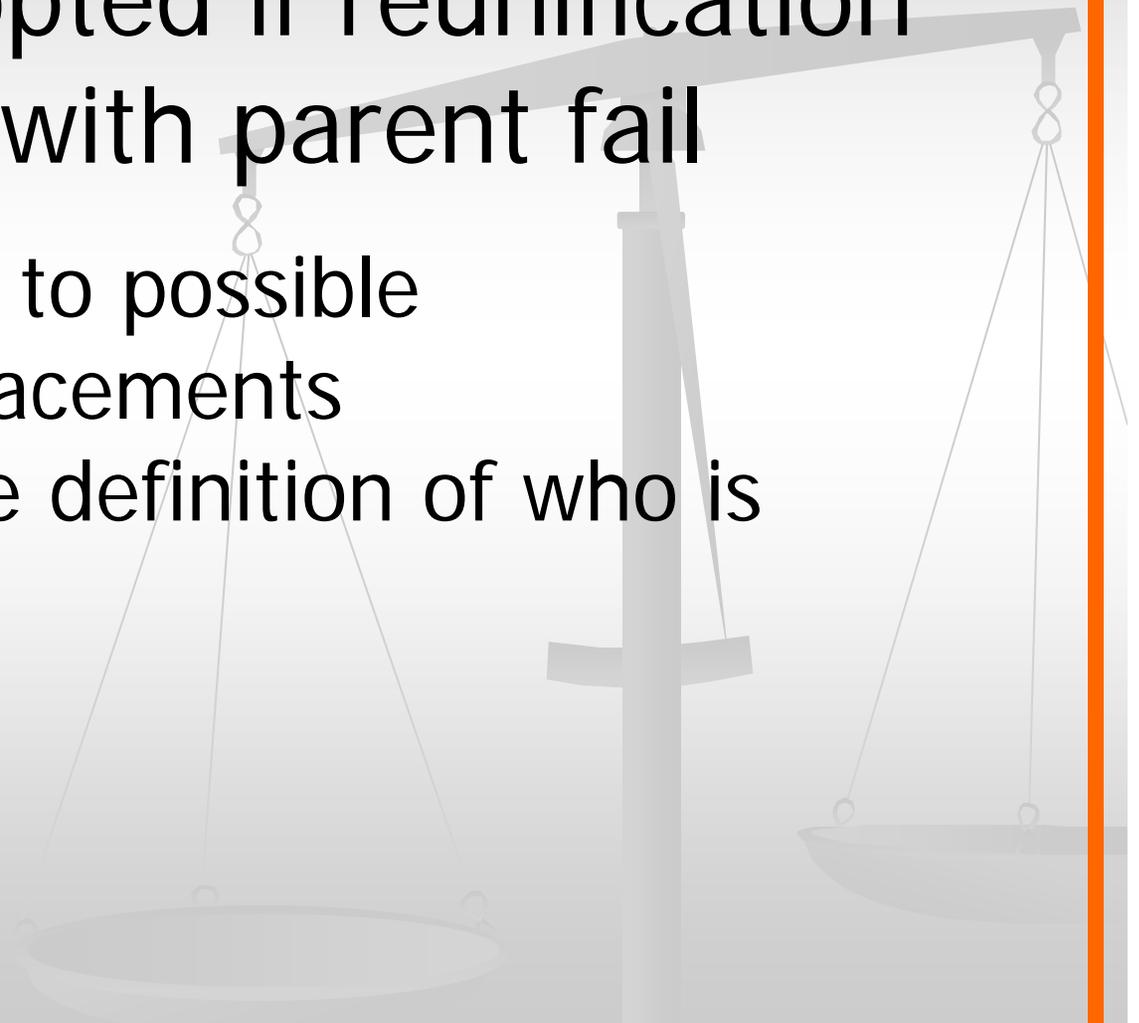
Explore all non respondent parents or suitable relatives identified as potential placement resources by

- any parent also any child over the age of five
 - inform them of the pendency of the proceeding and their opportunity to become Foster Parents or to provide free care
 - or for seeking custody or care of the child and that the child may be eligible for public assistance

OCFS Booklet to relatives to explain options

Agency is to inform them that child may be adopted if reunification efforts with parent fail

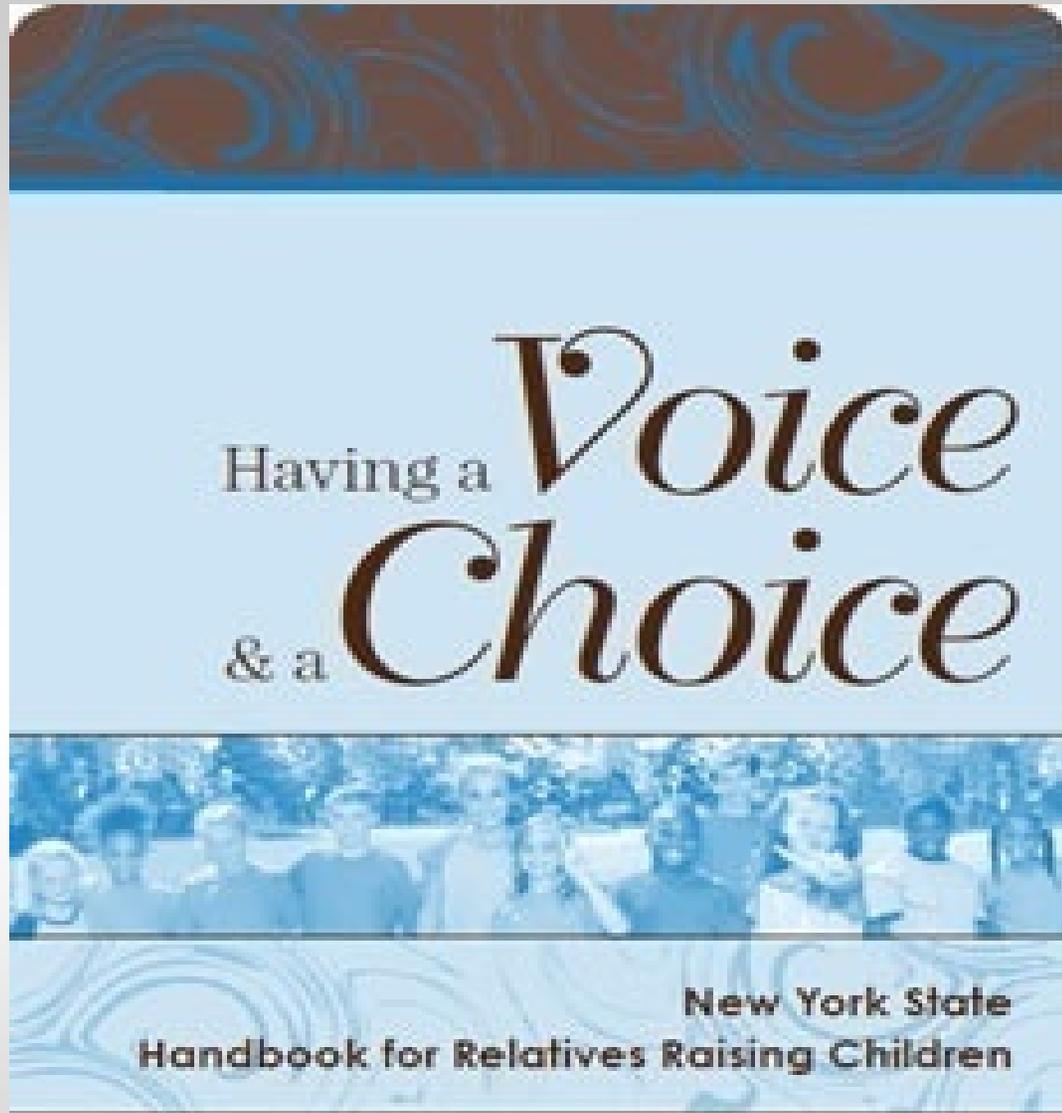
- Applies also to possible Voluntary Placements
- No complete definition of who is relative



Fostering Connections to Success and Increasing Adoptions Act of 2008

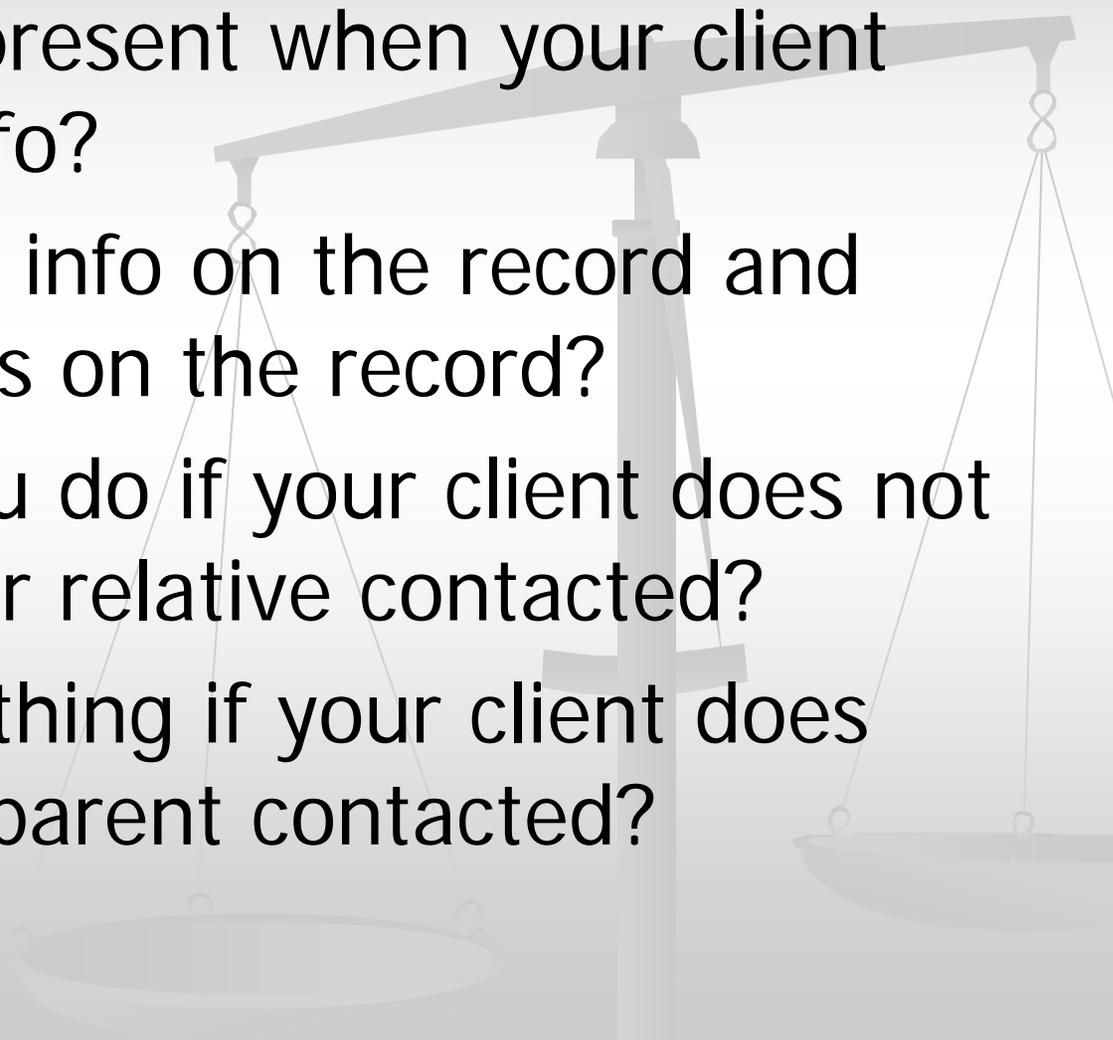
■ **Notification of Relatives**

- Within 30 days after the child has been removed from parental custody, the state shall exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child. The notice will be sent to any other adult relatives suggested by the parents, subject to exceptions due to domestic violence.



www.ocfs.state.ny.us/main/publications/Pub5080.pdf

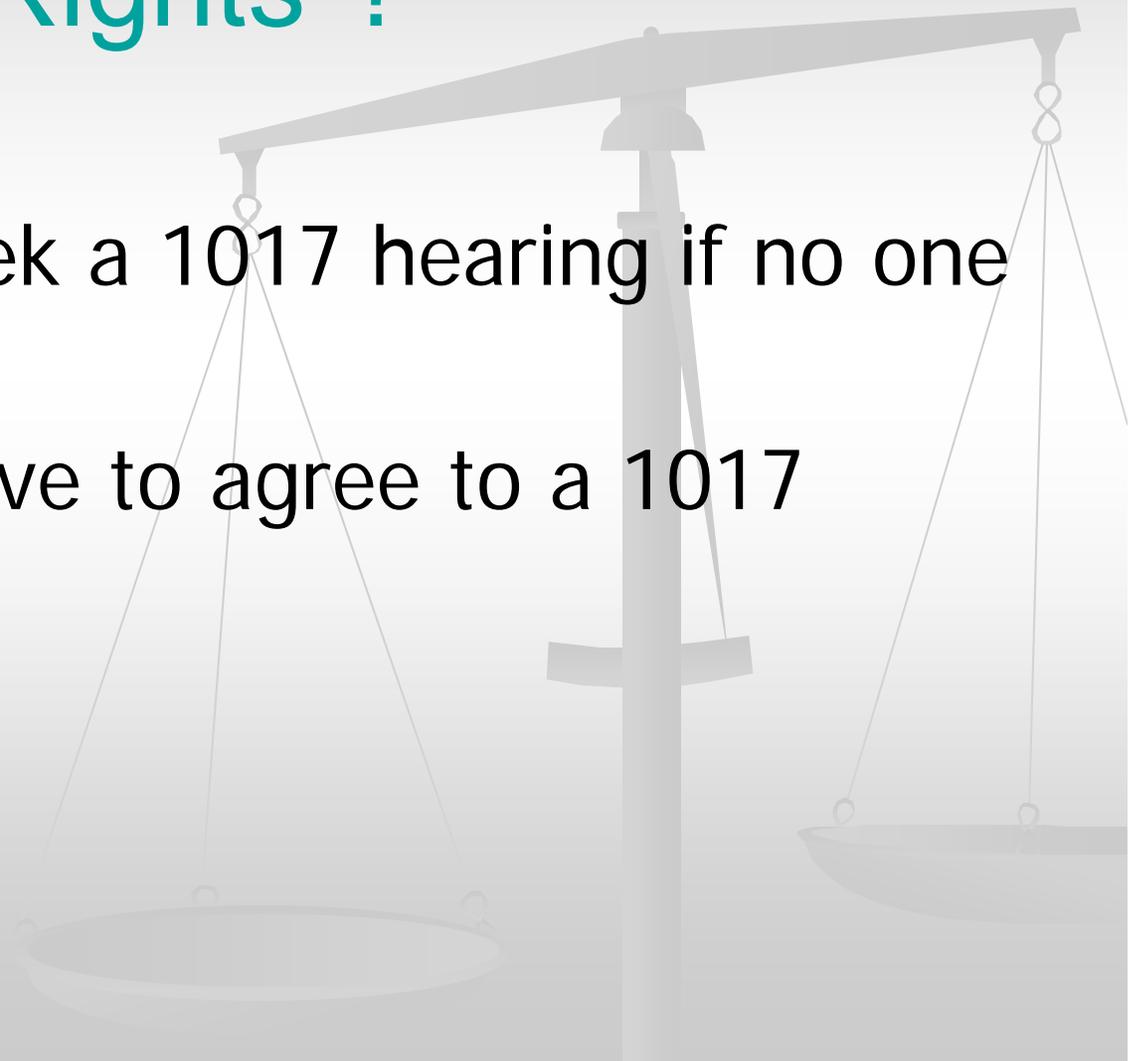
Attorney Role



- Should you be present when your client gives relative info?
- Should you give info on the record and demand answers on the record?
- What should you do if your client does not want a particular relative contacted?
- Can you do anything if your client does not want other parent contacted?

Do Relatives have 1017 “Rights”?

- Can relative seek a 1017 hearing if no one supports them?
- Does parent have to agree to a 1017 placement?



18 N.Y. Codes, Rules, and Regulations § 443.7

Regulation is optional

- Agency procedures for certifying or approving potential “emergency foster homes” and “emergency relative foster homes”
- Allowable Circumstances:
 - Child removed under 1021, 1022, 1024, or 1027 or child “removed and placed into to foster care under Article 3, 7, or 10 or SSL 384-a.
 - Child currently placed in foster care setting needs to be placed in a foster home—must document the need to approve or certify on emergency basis.

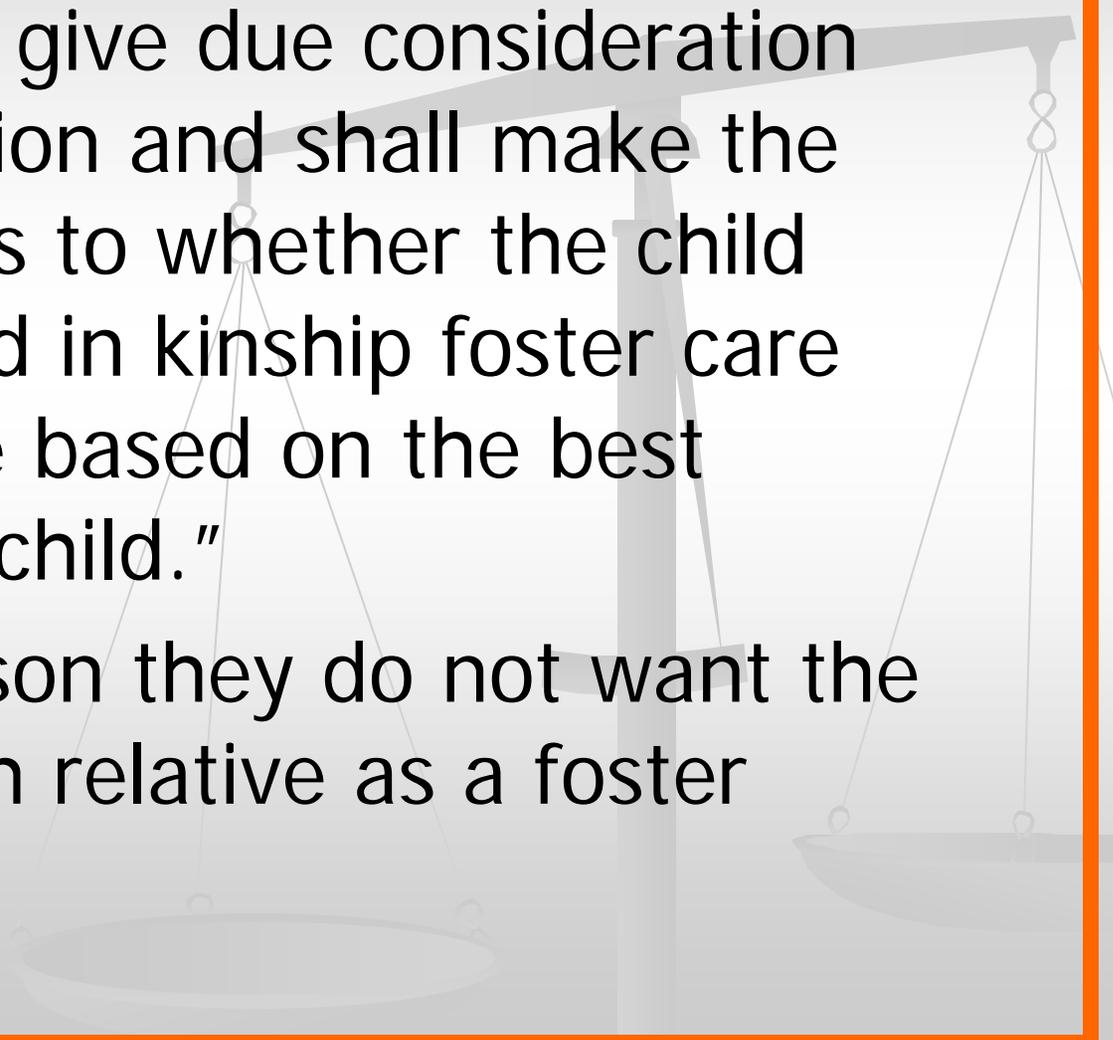
18 N.Y. Codes, Rules, and Regulations § 443.7

- Eligible relative or non-relative identified by child, parent(s), stepparent(s), court, (anyone)
- Eligible Non-relative may include but not limited to:
 - Godparent, neighbor, family friend, or “adult with a positive relationship with the child”
 - Relative within 2nd or 3rd Degree of parent or stepparent

§1028-a. Hearing to become a kinship foster parent.

- 1. Applicant is a Relative within 3rd degree
- 2. Child on temporary removal status or placed in non-relative foster care
- 3. Wants to become a foster parent
- 4. DSS has refused to place child with the relative although they qualify under the regulations
- 5. Respondent parent(s) consent to relative becoming foster parents for the child
- 6. the application is brought within six months from the date the relative received 1017 notice that the child was being removed and no later than 12 months after the removal
- 7. They did not previously "refuse"

FCA 1028-a continued

- “The court shall give due consideration to such application and shall make the determination as to whether the child should be placed in kinship foster care with the relative based on the best interests of the child.”
 - What is the reason they do not want the child placed with relative as a foster parent?
- 

Notice of Pendency to Non Respondent Parent (FCA 1035 (d))

- Court MAY order an investigation whether a petition should be filed against N R Parent
- If child removed, order investigation on whether NRP would be a suitable custodian
- If child placed and remains in foster care 15 out of 22 months agency may be required to seek a TPR even if parent was not named as a respondent in Article Ten case

Notice of Pendency to Non Respondent Parent (FCA 1035 (d))

- May participate in all fact finding and dispositional hearings
- May go to court to seek temporary or permanent custody or enforce visitation
- Serve with copy of summons and the petition
- Who is a “father” in out of wedlock situation?

What are rights of NRP at removal?

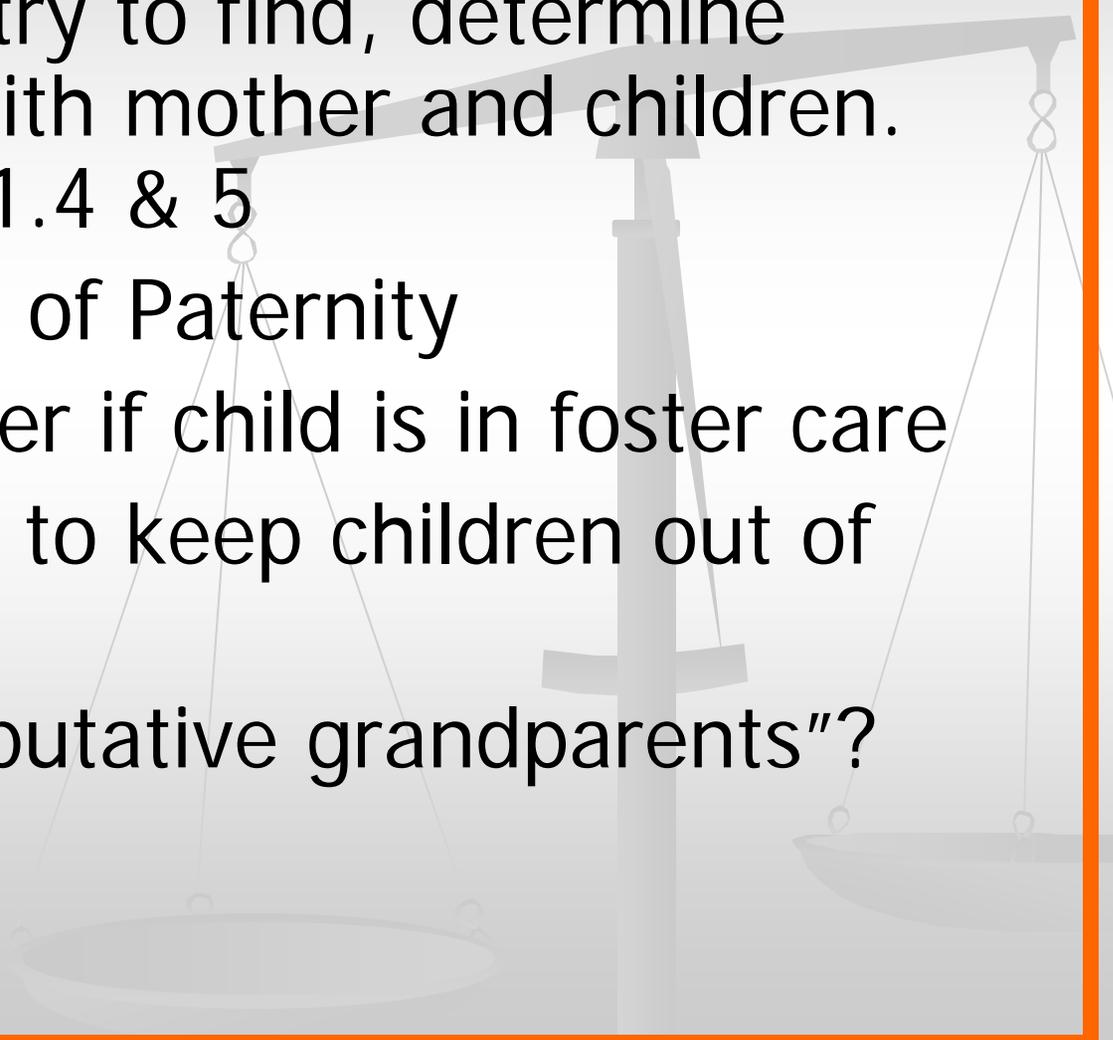
If no allegations agst parent and they are objecting to any placement, can the court legally place the child?

Does it matter if they did not have custody?

What do they file? Are they parties to the removal proceeding if they don't move to intervene?

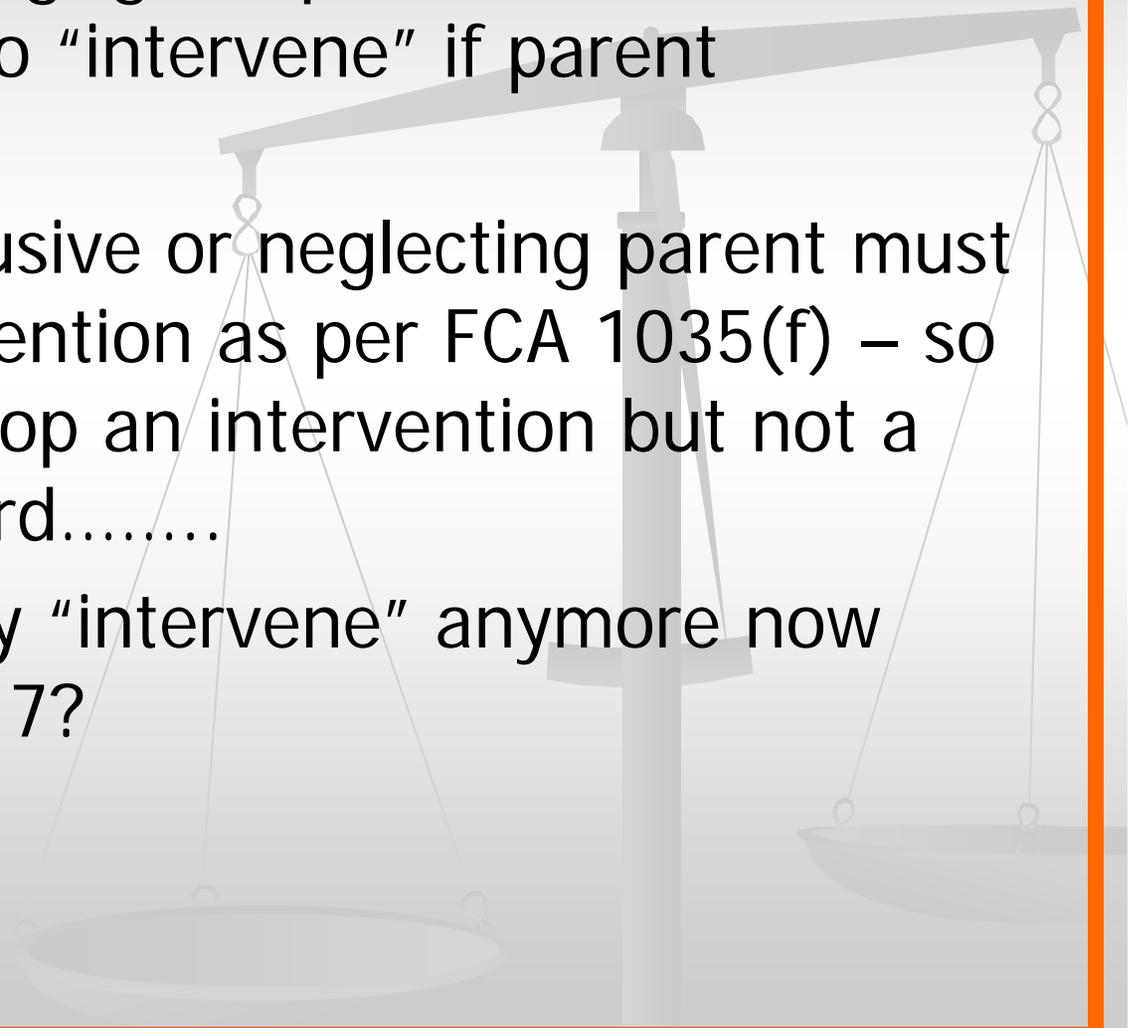
How can a respondent parent have more rights than a NRP?

DSS Obligations as to fathers

- Obligation to try to find, determine relationship with mother and children.
18 NYCRR 421.4 & 5
 - Establishment of Paternity
 - Plan with father if child is in foster care
 - May be a way to keep children out of foster care
 - What about “putative grandparents”?
- 

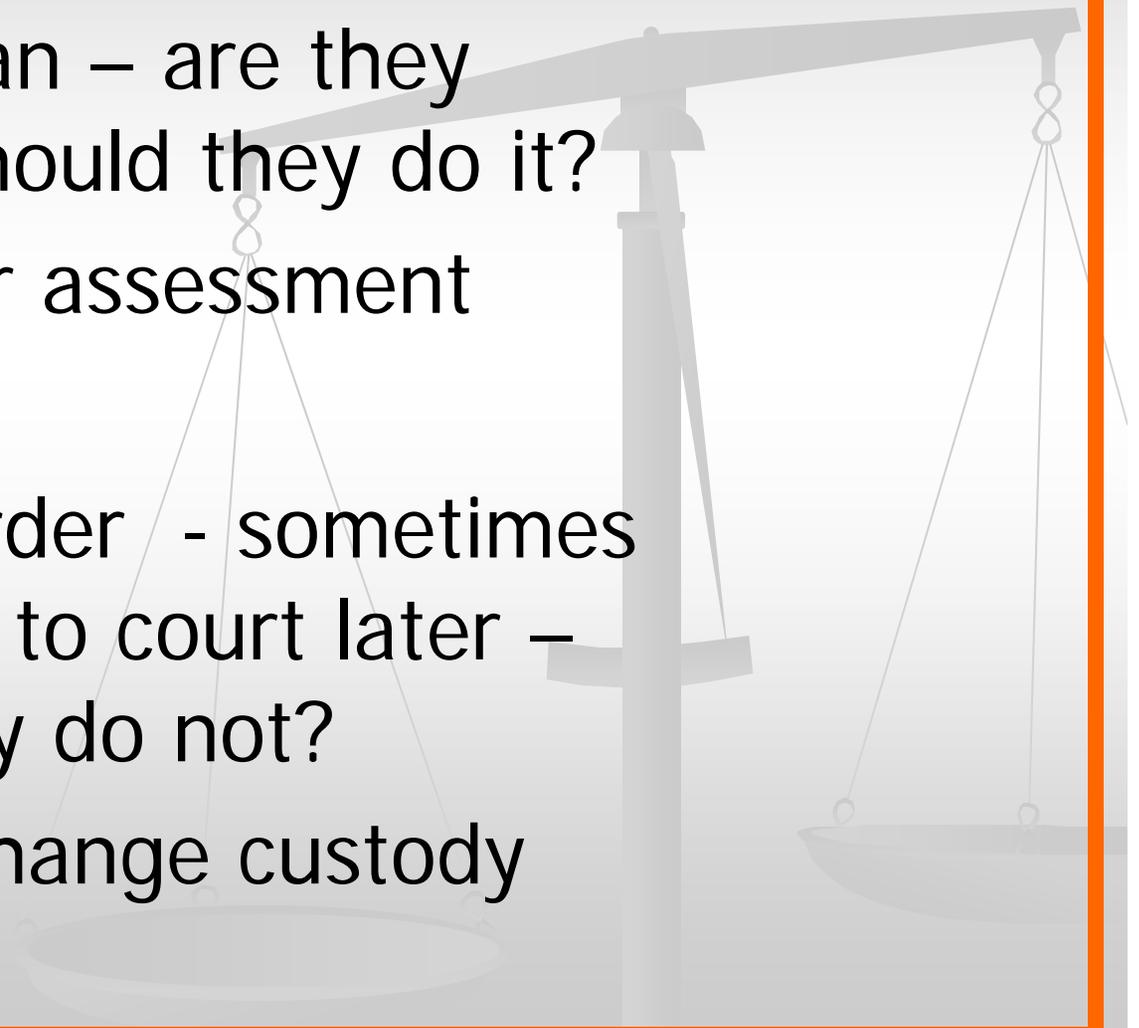
Intervention by relatives

- Child's adult sibling, grandparent, aunt, or uncle may seek to "intervene" if parent consents.
- The allegedly abusive or neglecting parent must consent to intervention as per FCA 1035(f) – so your client can stop an intervention but not a 1017? kinda weird.....
- Do relatives really "intervene" anymore now that we have 1017?

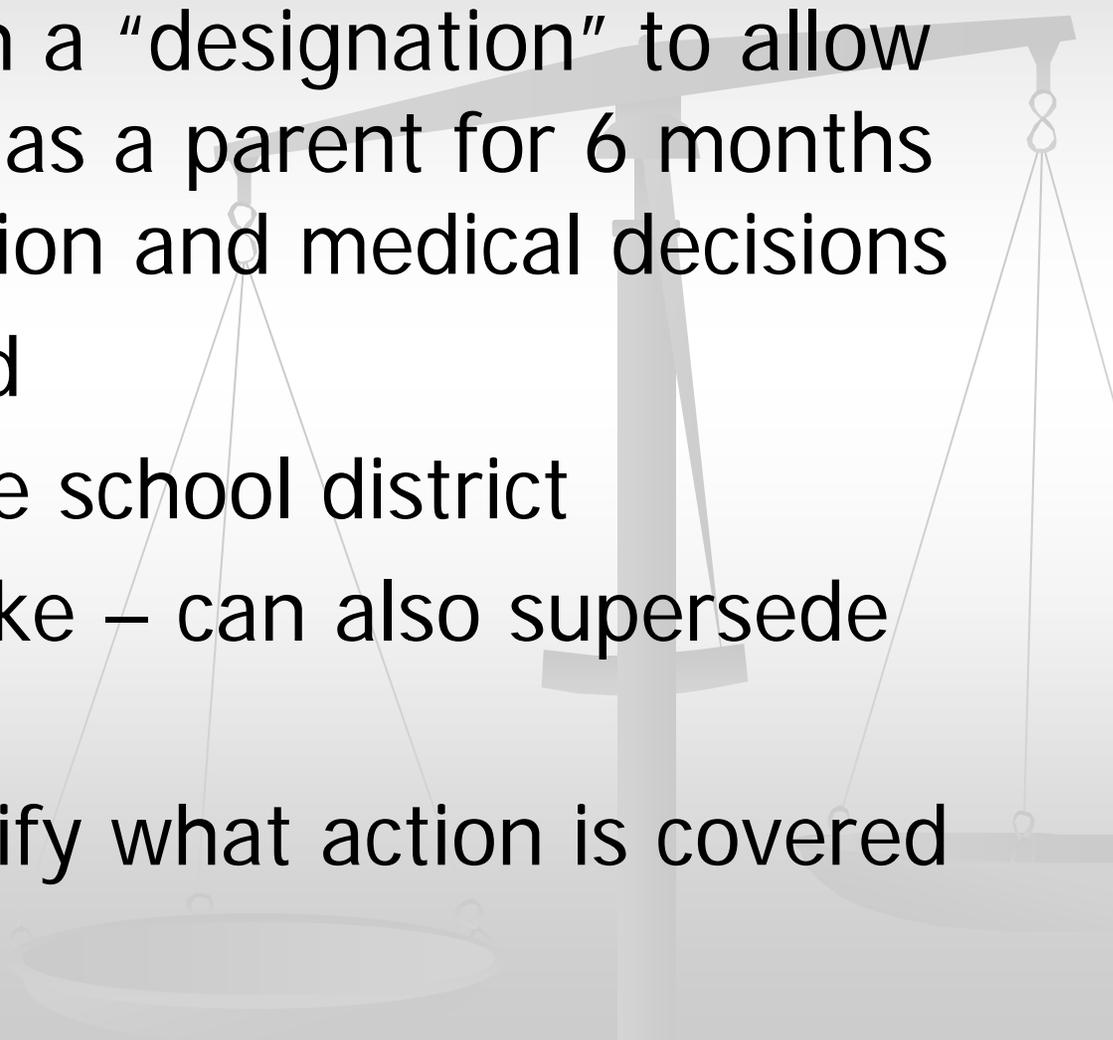


Casual- NO COURT

- Short term
- Parents' plan – are they conned? Should they do it?
- Caseworker assessment of safety
- No court order - sometimes DSS brings to court later – what if they do not?
- Does not change custody



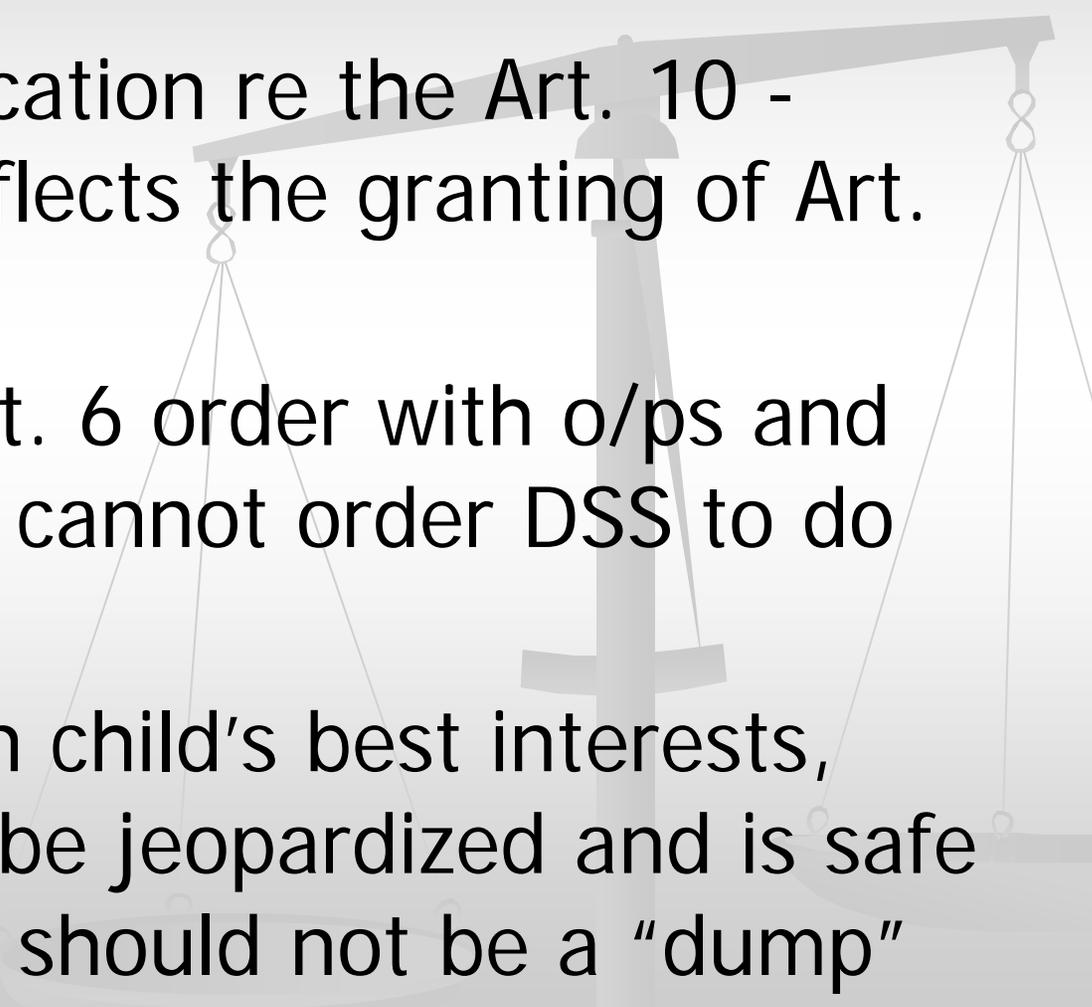
GOL § 5-1551- 5-1555

- Parents can sign a “designation” to allow someone to act as a parent for 6 months or less – education and medical decisions
 - No court needed
 - Does not change school district
 - Parent can revoke – can also supersede any decision
 - Parent can specify what action is covered
- 

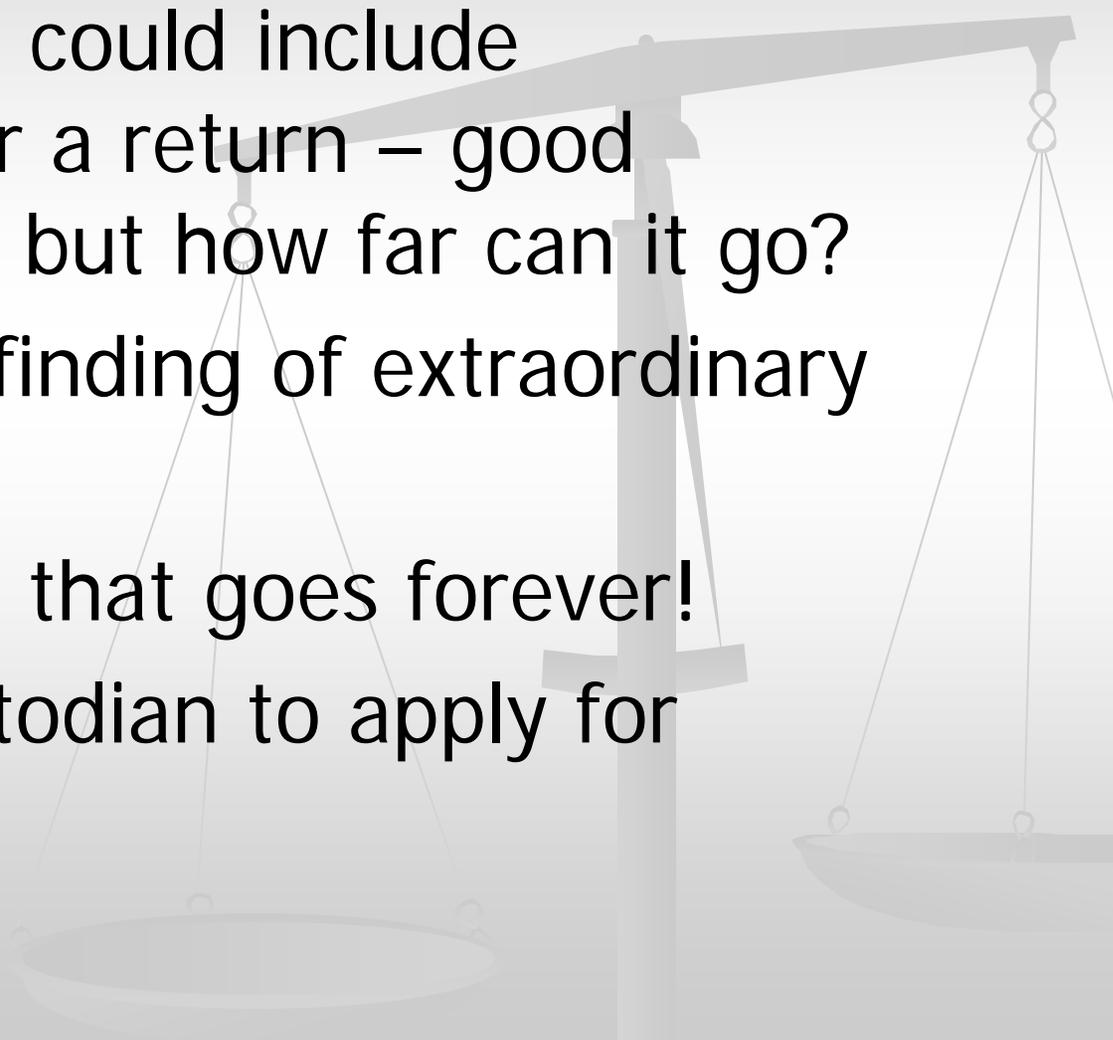
Art. 6 Custody - V docket

- Relative must file a petition, can do it at any time while Art. 10 pending – but more common as a dispo or in a perm
- DSS would be a party if child in care
- Little or no services or supervision as court cannot order DSS to provide any services or supervision
- Money may be a problem
- Non parent custodian - education, health insurance - FCA § 637

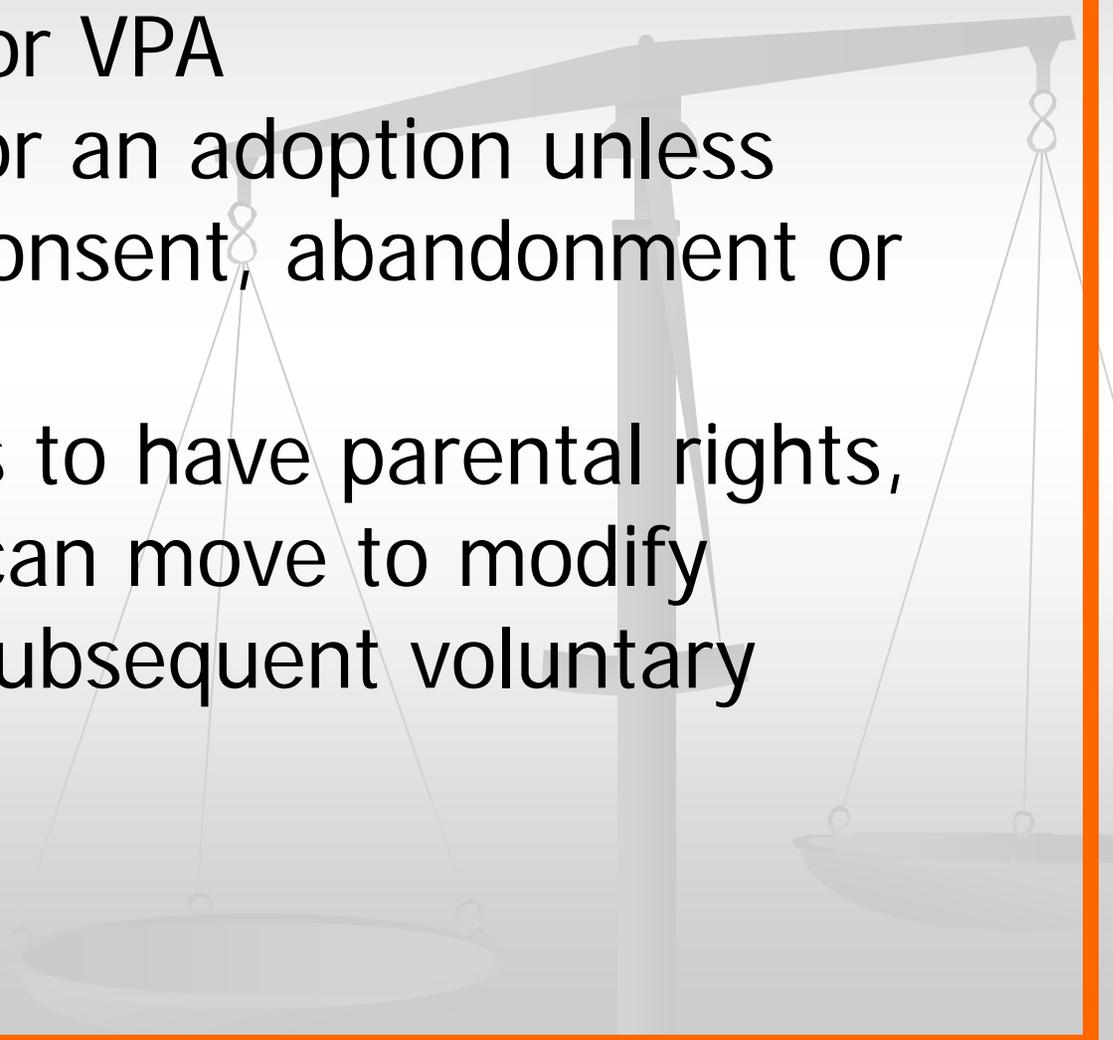
Art. 6

- Art. 6 is combined into dispo or perm hearing– if granted “ends” Art. 10 orders
 - Can be an adjudication re the Art. 10 - dispo that just reflects the granting of Art. 6
 - Can “load” the Art. 6 order with o/ps and requirements but cannot order DSS to do anything
 - Court must find in child’s best interests, safety would not be jeopardized and is safe and permanent – should not be a “dump”
- 

Art. 6

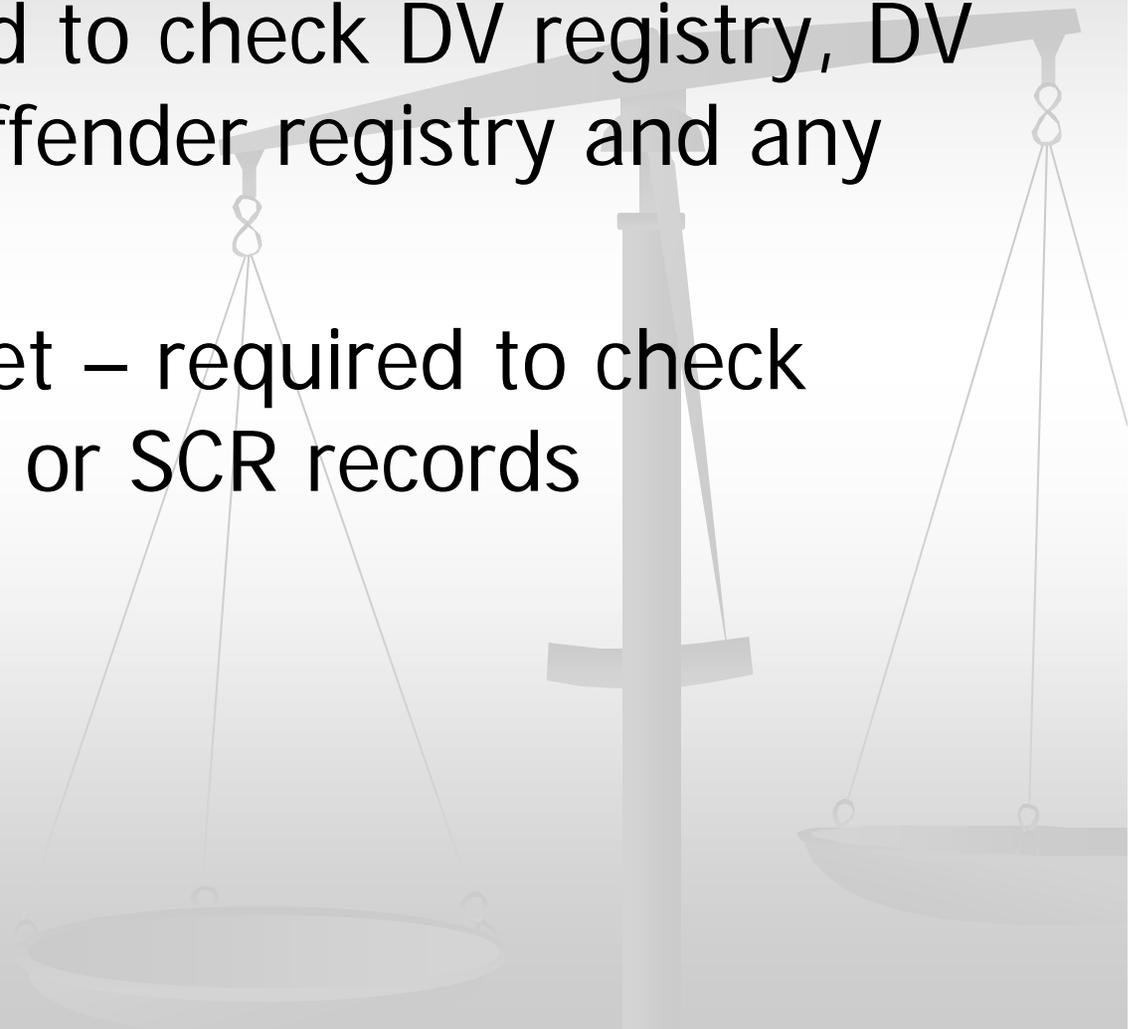
- “Loaded” orders could include requirements for a return – good settlement offer but how far can it go?
 - Can they stip a finding of extraordinary circumstances?
 - Could do an o/p that goes forever!
 - Could order custodian to apply for preventive
- 

Art. 6

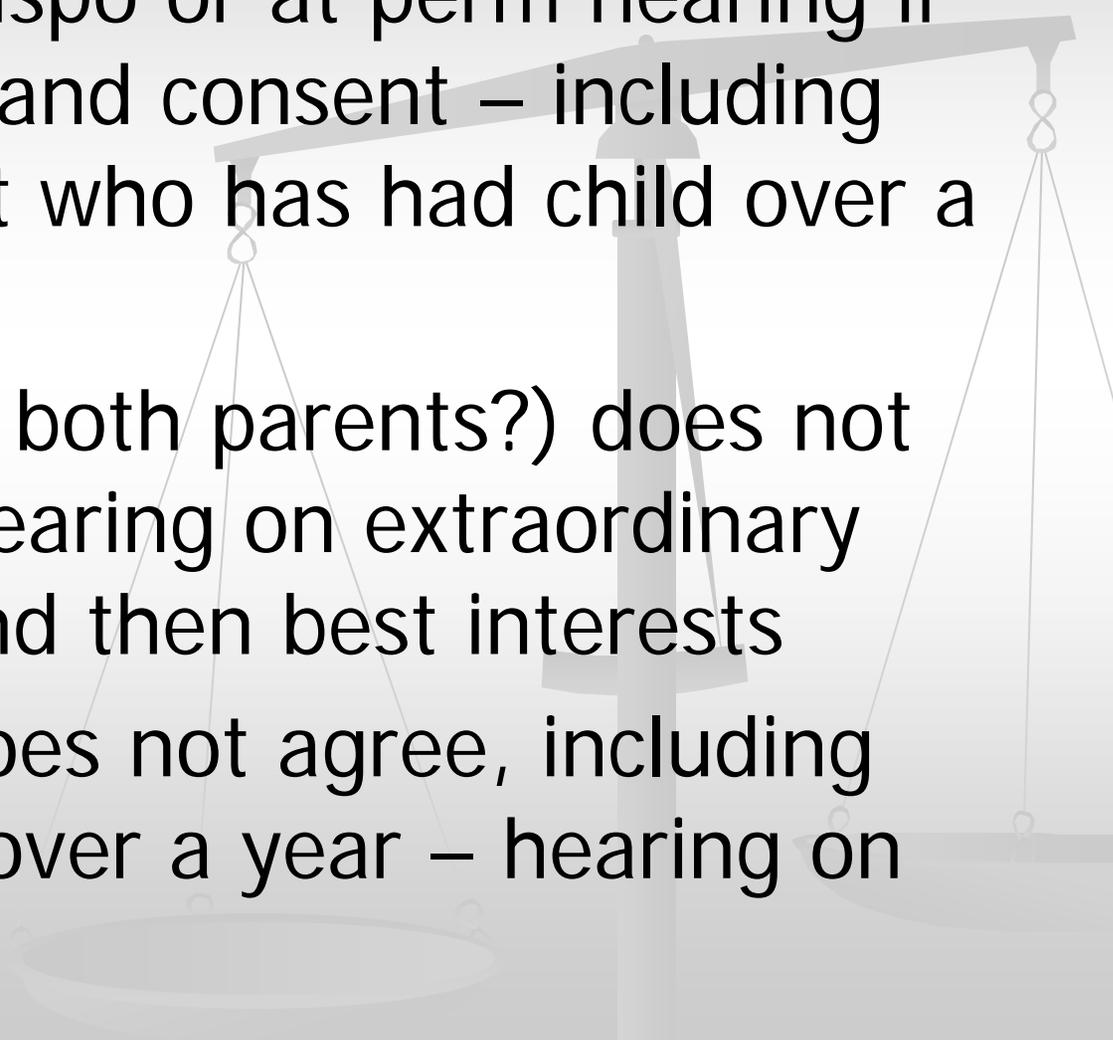
- Can't move from this back to foster care w/o new Art. 10 or VPA
 - Can't do a TPR or an adoption unless parental death, consent, abandonment or mi/mr
 - Parent continues to have parental rights, visitation rights, can move to modify
 - Problem with subsequent voluntary placement
- 

Art. 6

- Court is required to check DV registry, DV warrants, sex offender registry and any Art. 10 history
- Court is not – yet – required to check criminal records or SCR records

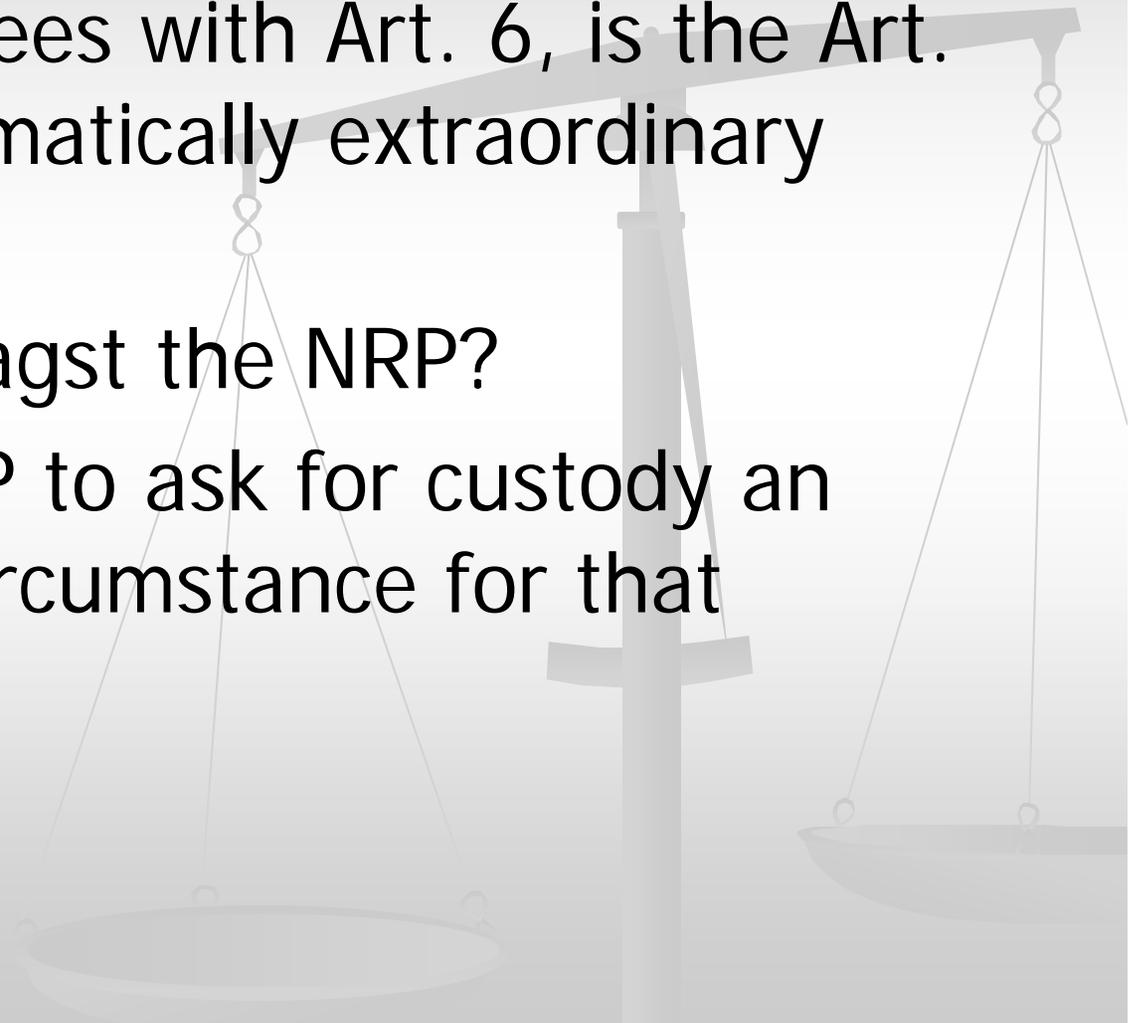


Art. 6

- Can grant as a dispo or at perm hearing if all parties agree and consent – including any foster parent who has had child over a year
 - If parent (is that both parents?) does not agree must be hearing on extraordinary circumstances and then best interests
 - If anyone else does not agree, including foster parent of over a year – hearing on best interests
- 

Art. 6

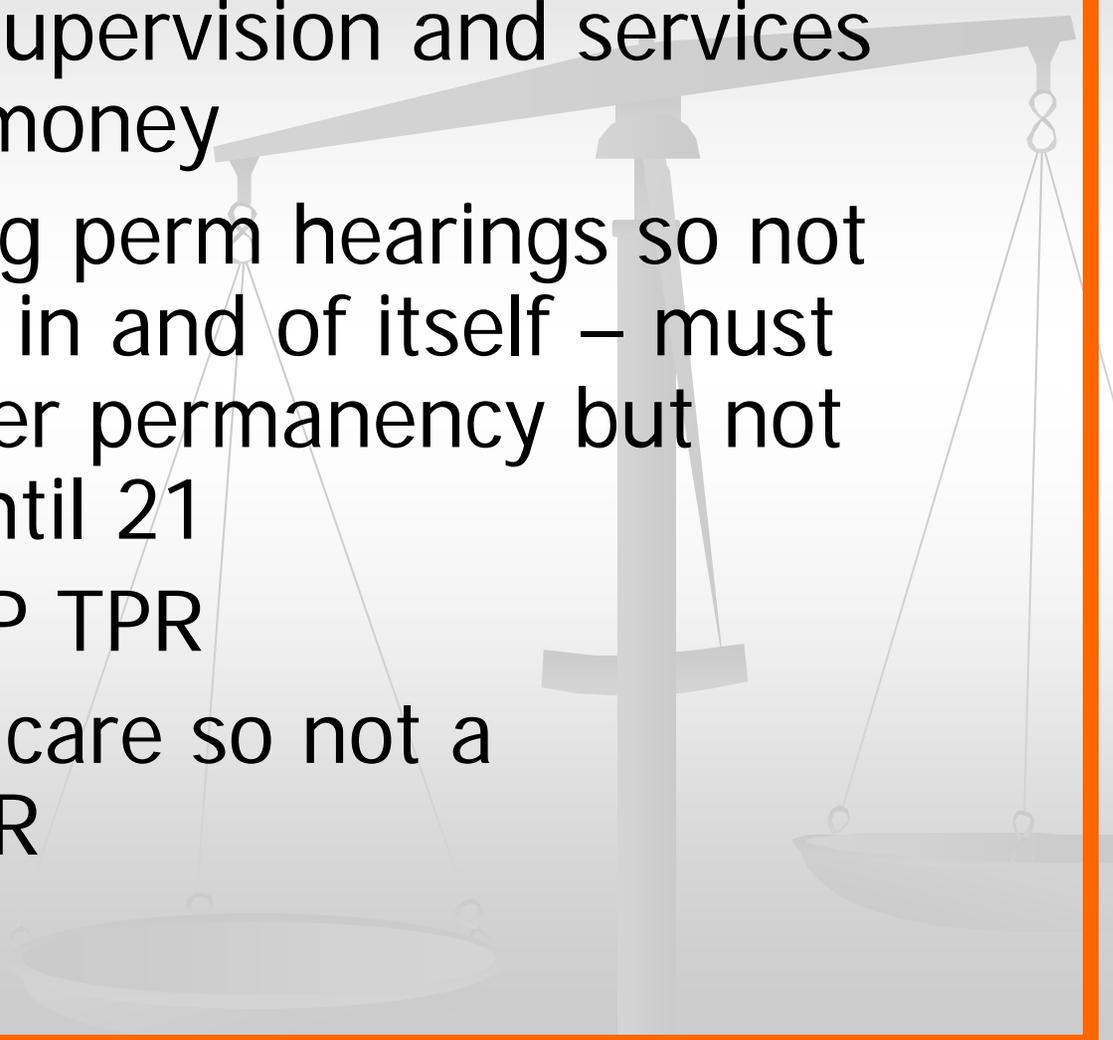
- If parent disagrees with Art. 6, is the Art. 10 finding automatically extraordinary circumstances?
- Can it be used agst the NRP?
- Is failure of NRP to ask for custody an extraordinary circumstance for that parent?



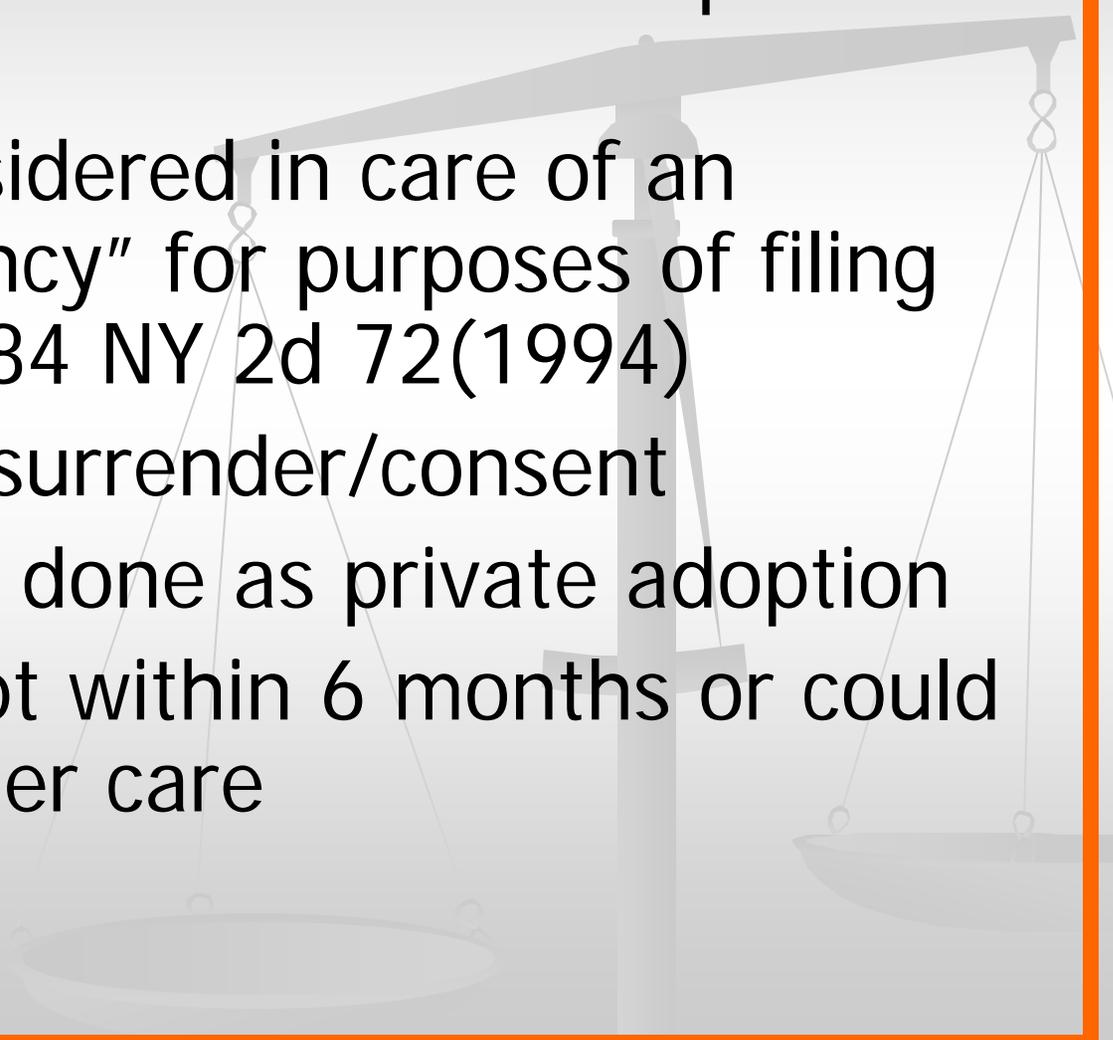
Art. 10 custody - also called- N docket, direct placement, paroled to and 1017 placement

- Court must order or do it in an O/P
- Services and supervision ordered – including custodian must submit to jurisdiction
- Can order custodian to obey court's orders re access, visits, cw interaction – how far could that go?

Art 10 Custody

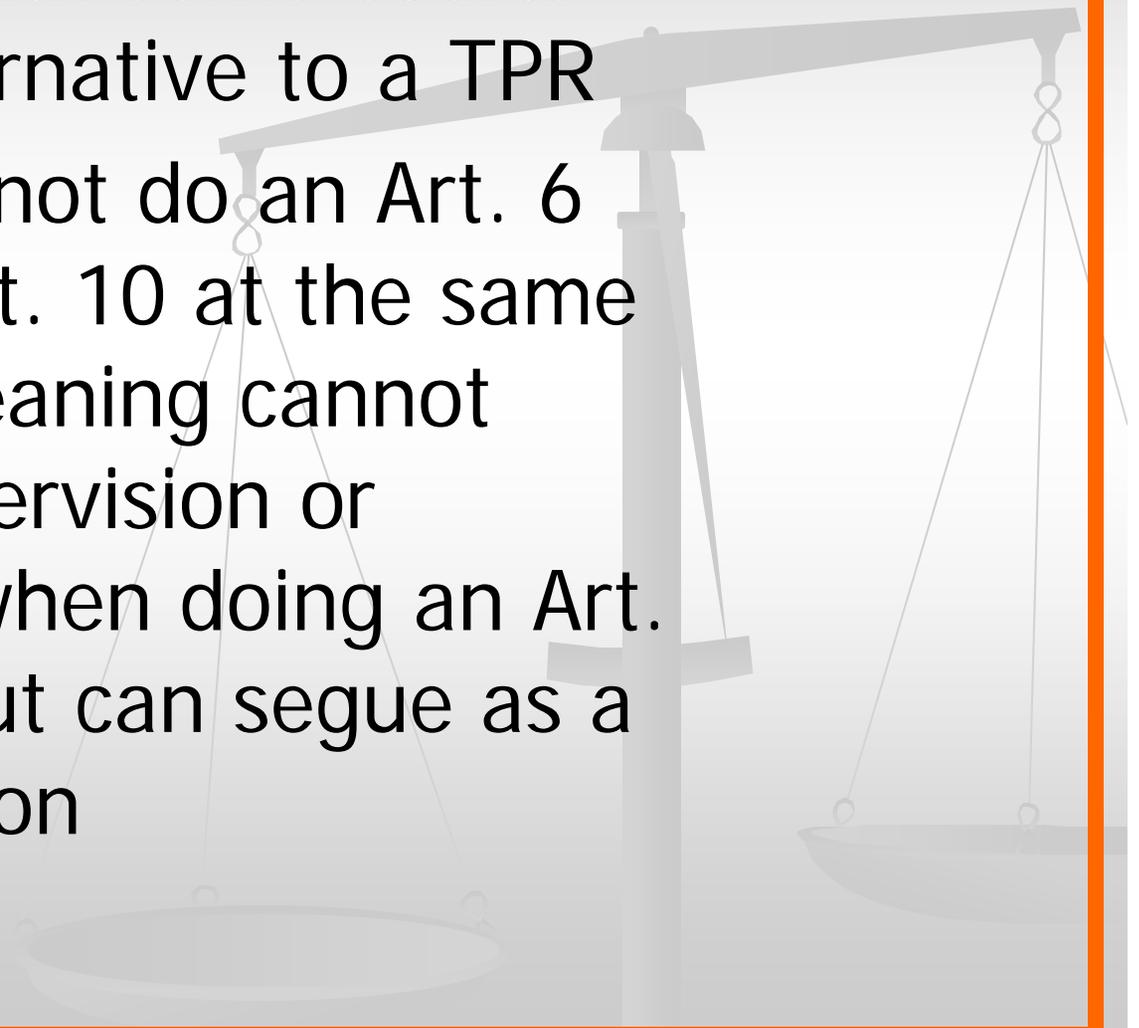
- Agency does supervision and services but no direct money
 - Will be ongoing perm hearings so not a perm option in and of itself – must achieve another permanency but not illegal to do until 21
 - Possible Dale P TPR
 - But not foster care so not a mandatory TPR
- 

Matter of Dale P

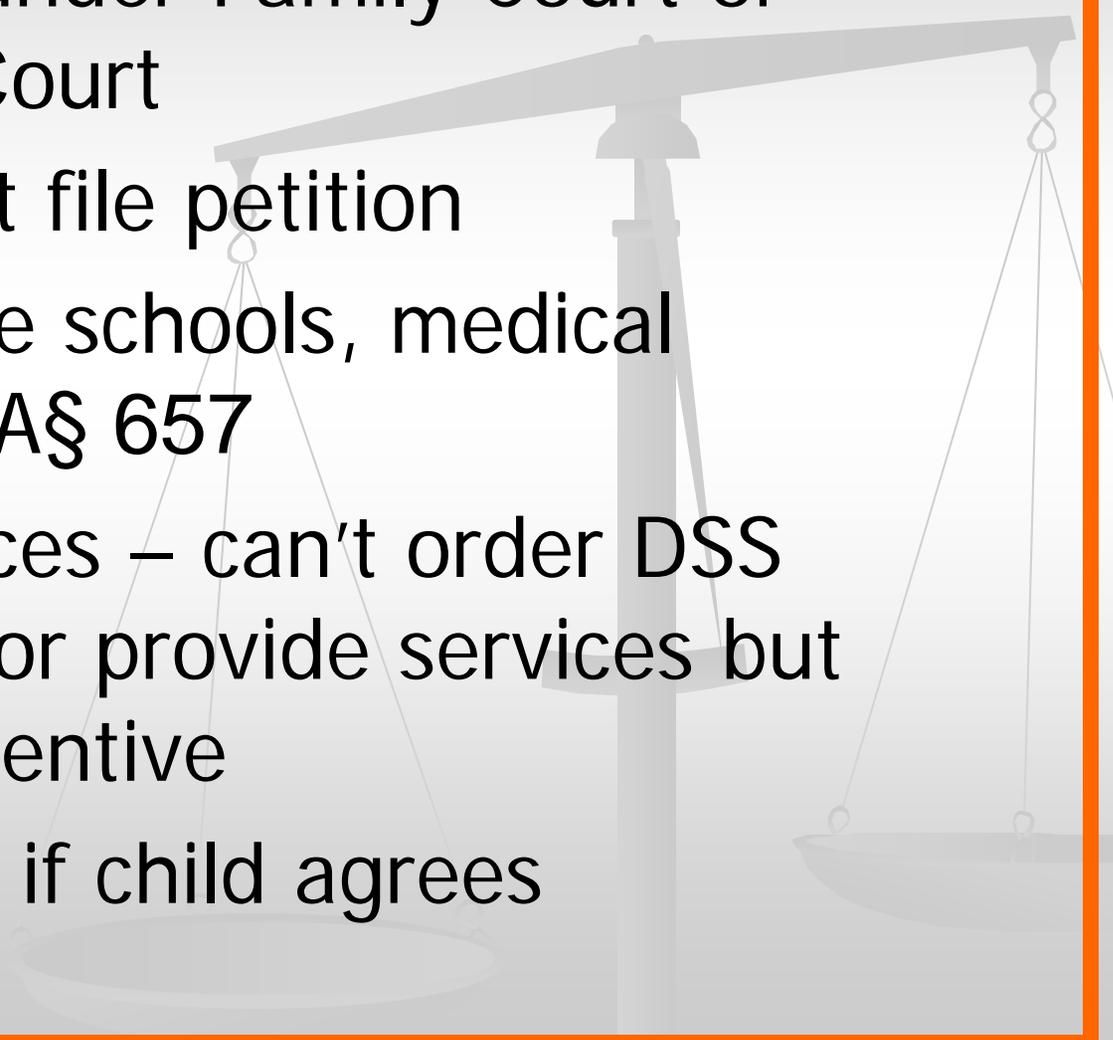
- Child directly placed with “suitable person” or relative
 - The child is considered in care of an “authorized agency” for purposes of filing a TPR - Dale P. 84 NY 2d 72(1994)
 - Could also do a surrender/consent
 - Adoption is then done as private adoption
 - Must file to adopt within 6 months or could be placed in foster care
- 

Art. 10 to an Art. 6 segue

- Popular with some courts as an alternative to a TPR
- Court cannot do an Art. 6 and an Art. 10 at the same time – meaning cannot order supervision or services when doing an Art. 6 order but can segue as a perm option

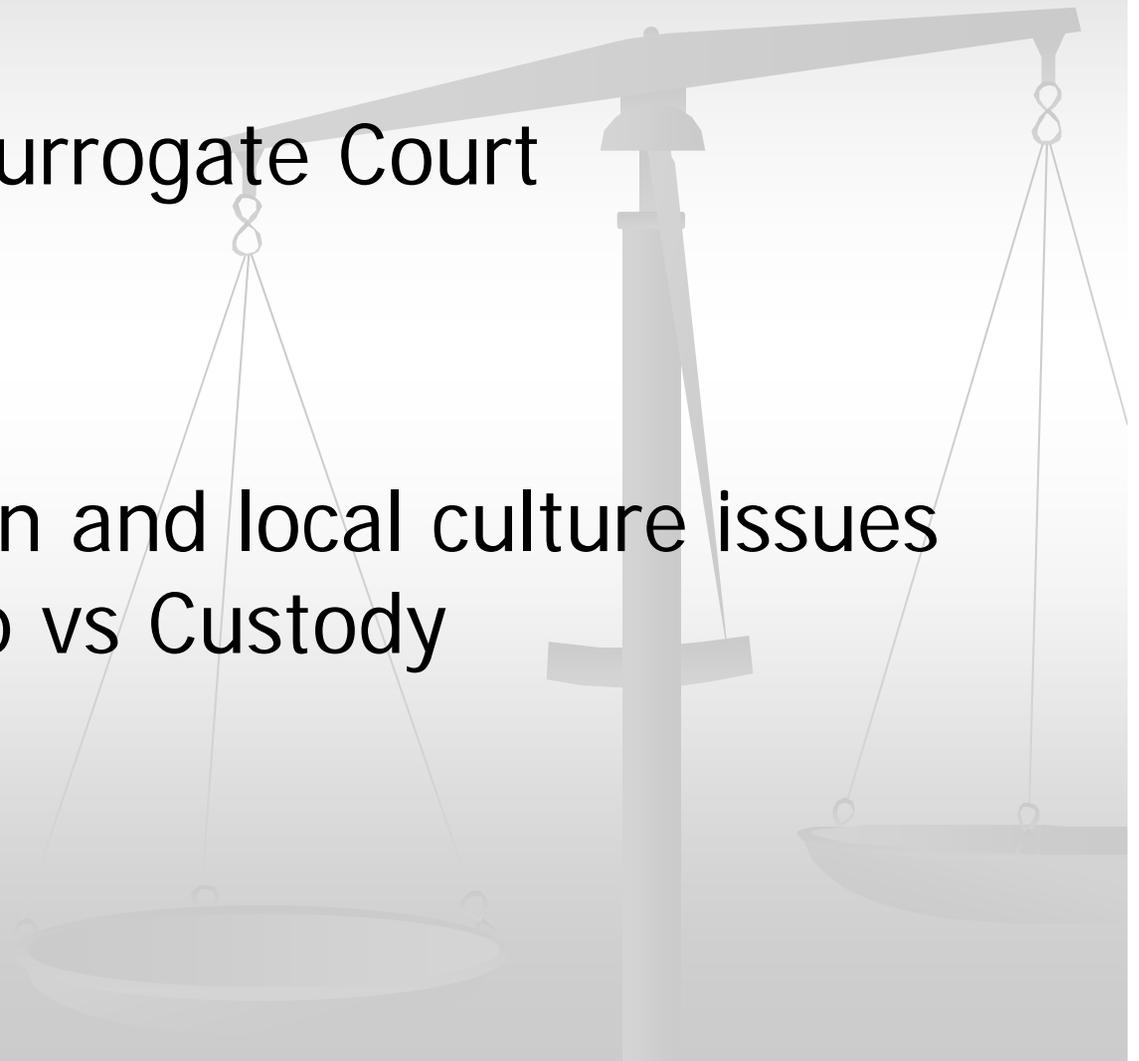


Guardianship

- Court order under Family Court or Surrogate's Court
 - Relative must file petition
 - Non-parent re schools, medical insurance FCA§ 657
 - Lack of services – can't order DSS to supervise or provide services but perhaps preventive
 - Can go to 21 if child agrees
- 

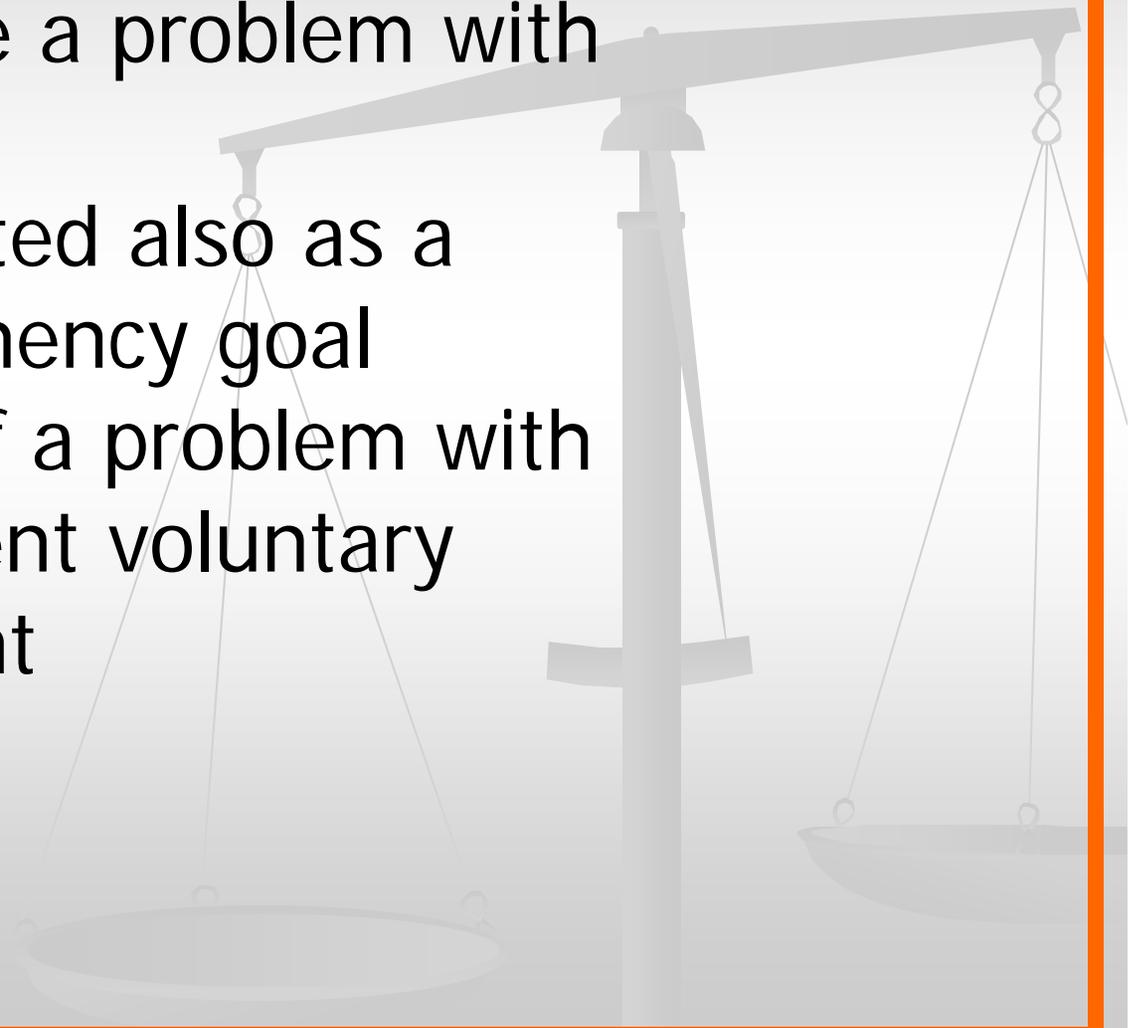
Guardianship

- SCR is checked
- Fee if done in Surrogate Court
- Lots of confusion and local culture issues on Guardianship vs Custody



Guardianship

- May be a problem with money
- Permitted also as a permanency goal
- Less of a problem with subsequent voluntary placement

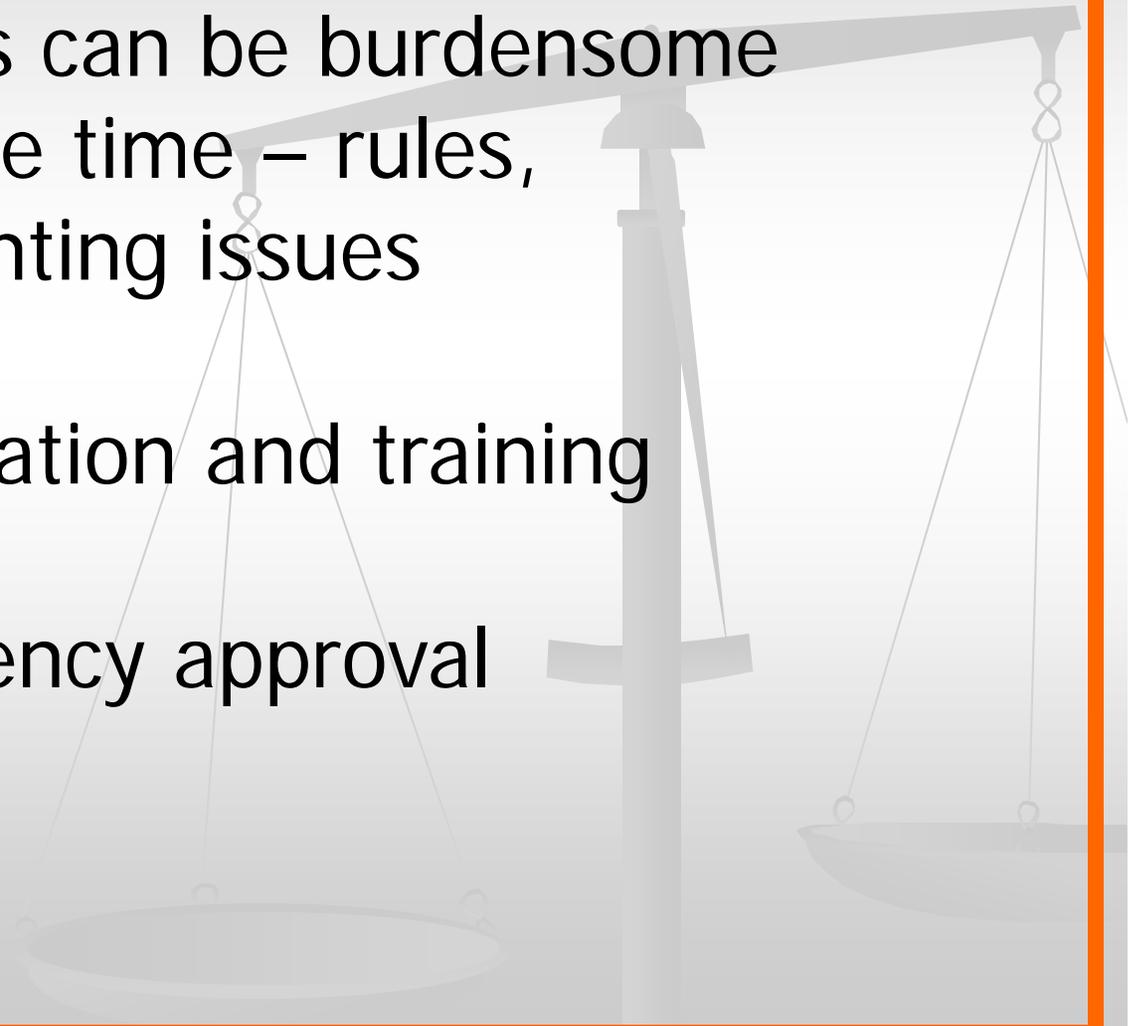


Foster Parent or “Kinship Care”

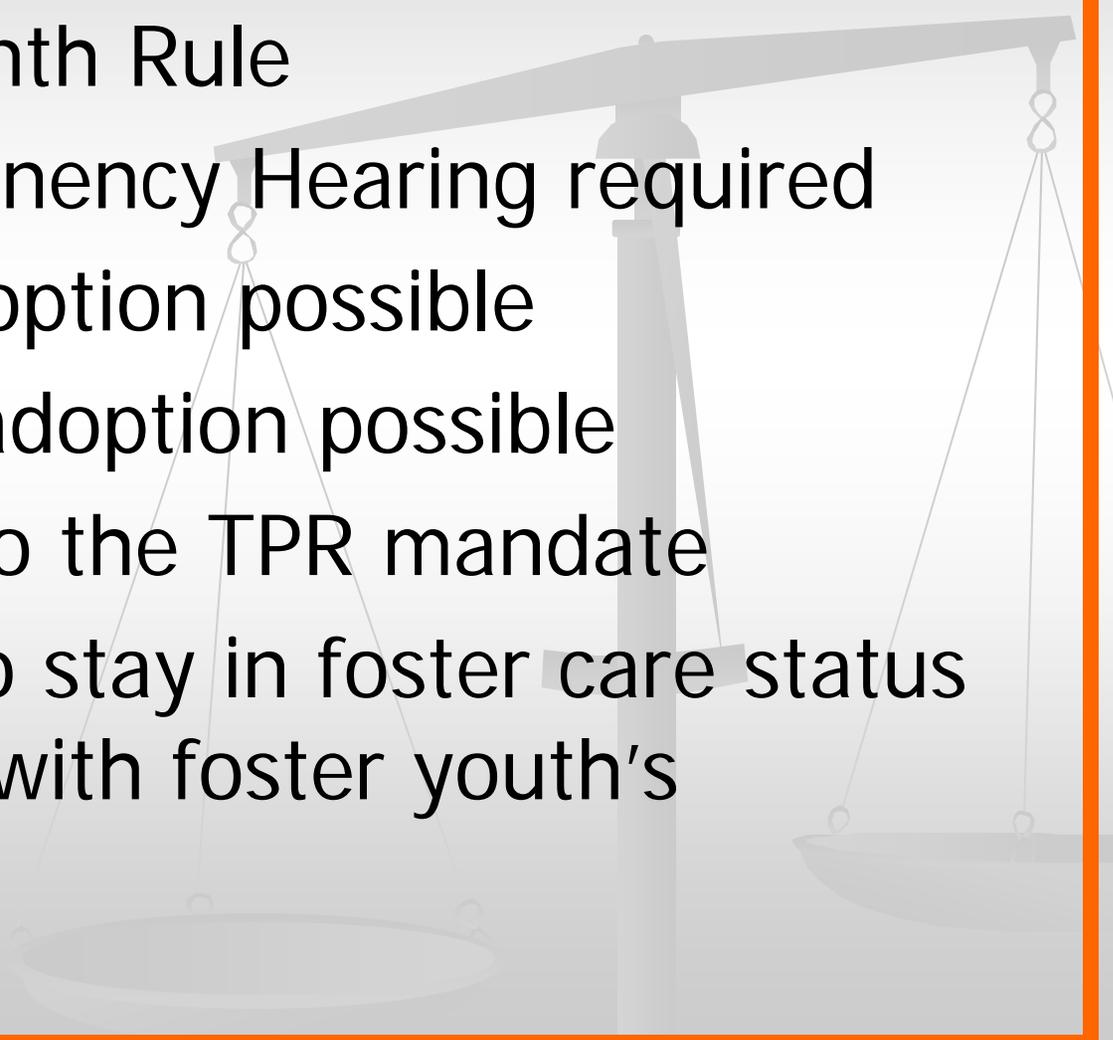
- Court order--Article Ten or Voluntary must have been filed
- Services and supervision ordered
- Money to relatives is better
- DSS has custody (also called remand downstate)
- Court can specify particular home if certified home

Foster Parents

- Process can be burdensome and take time – rules, fingerprinting issues
- Certification and training
- Emergency approval

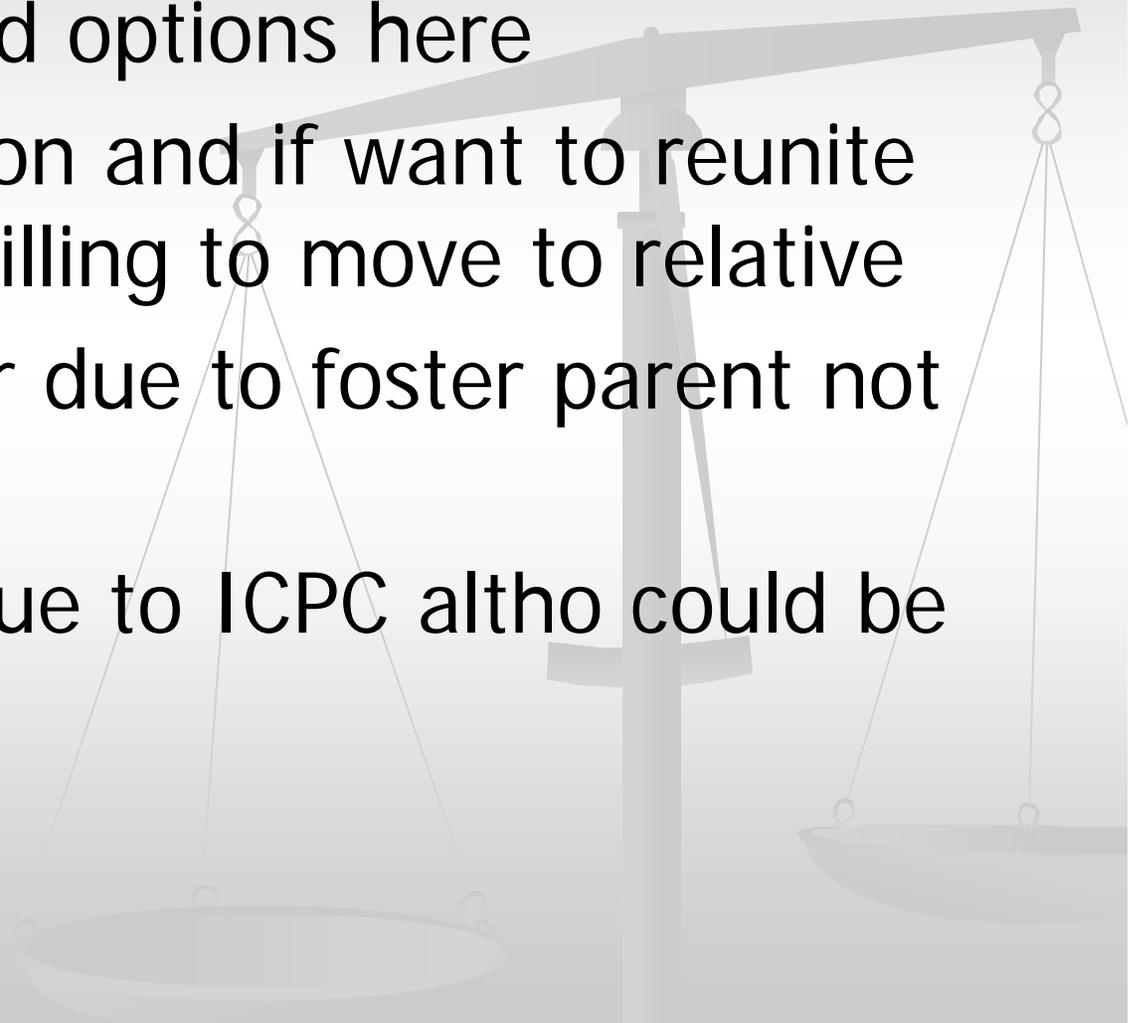


Foster Parent

- IV-E Six Month Rule
 - ASFA Permanency Hearing required
 - TPR and adoption possible
 - Subsidized adoption possible
 - Exception to the TPR mandate
 - Not illegal to stay in foster care status to 18 or 21 with foster youth's permission
- 

Out of State Relatives

- Not a lot of good options here
- Not good early on and if want to reunite unless parent willing to move to relative
- Not good if later due to foster parent not having rights
- Takes forever due to ICPC altho could be a Reg 7 one



Late Relatives

- Foster parents who have had child for one year and want to adopt can trump relatives—relatives must be told
- Case law says if child freed then relatives cannot adopt unless agency agrees
- Get that Art. 6 FILED BEFORE the TPR!!
- If after the TPR, at least argue like crazy for it as an alternative in the TPR dispo!!!

Art 10 Legal Status of Child

PRE DISPOSITION

- Release to one or both respondents under supervision— (“parole to”)
- Temporary custody to a relative or suitable person with or w/o supervision. (direct placement)
- Article 6 custody or guardianship to a relative or suitable person.
- REMAND/Removal to DSS for foster care
 - kinship
 - non kinship

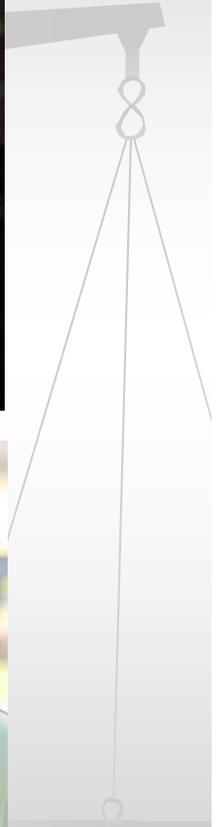
POST DISPOSITION

- Release to one or both respondents under supervision – FCA 1054
- Direct “Placement” to a relative or suitable person until end of next permanency hearing (FCA 1055)
- Article 6 custody or guardianship to a relative or suitable person (may be combined with art 10 supervision) – could include subsidized guardianship if more than 6 months and PH held
- PLACEMENT with DSS for foster care until end of next permanency hearing (FCA1055)
 - kinship
 - non kinship

What about this new thing?
Kingap?



Subsidized Kinship Guardianship



Kinship Guardianship – New SSL

§458

Will allow RELATIVES to APPLY to local districts for ongoing monetary assistance payments outside of foster care or adoption – then move the court to be appointed as a guardian

- Must be a relative who has child as a fully certified or fully approved foster parent
- Must be with relative for a minimum period of time
- Must fit the criteria for this to be the appropriate permanency for the child

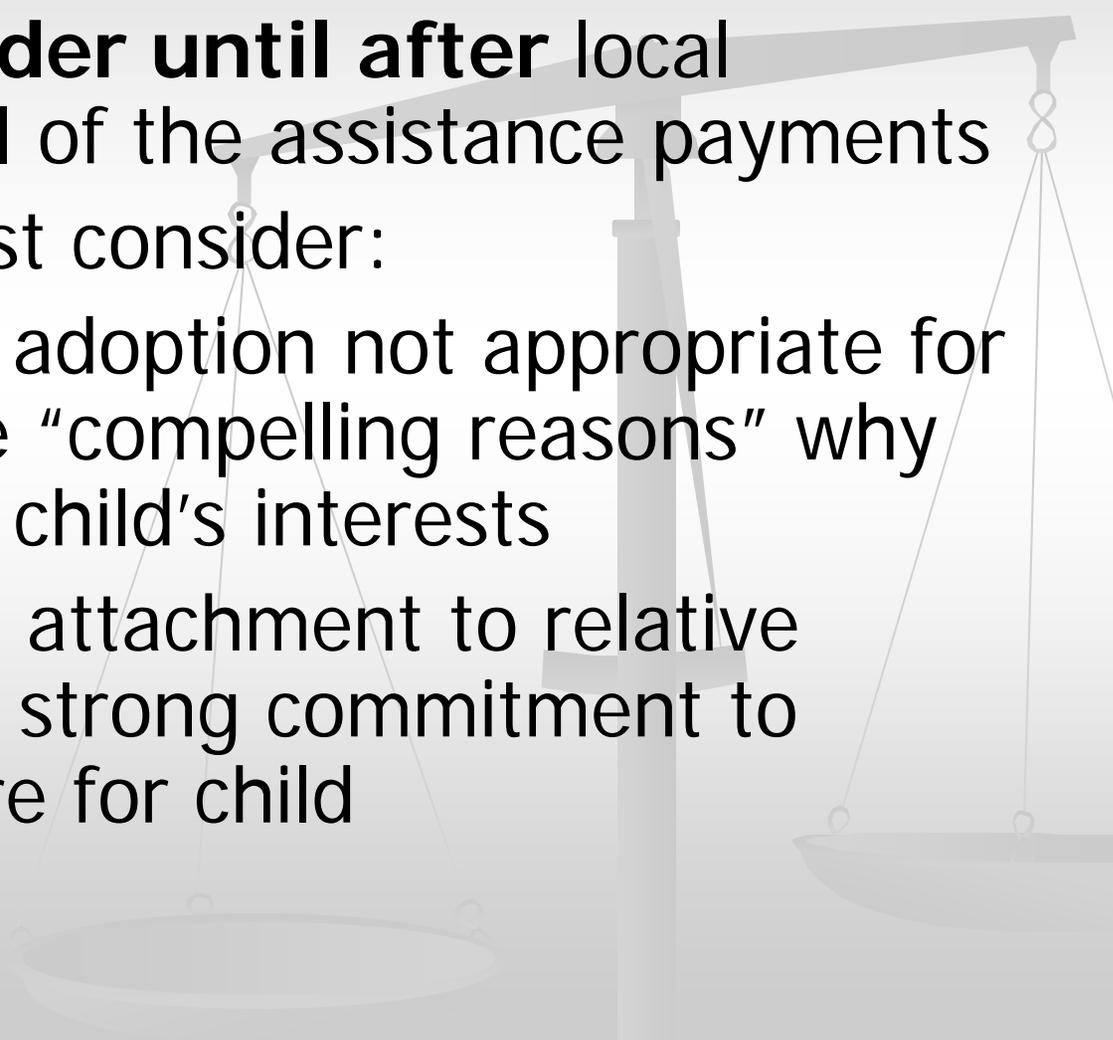
What kind of cases will have this option?

Child must be under 21 and have been placed in **foster care before 18** – must be foster care, not an Art. 6 or Art. 10 direct custody arrangement – but can be a foster care under an **Art. 10, a voluntary under SSL or a PINs or a JD placement**

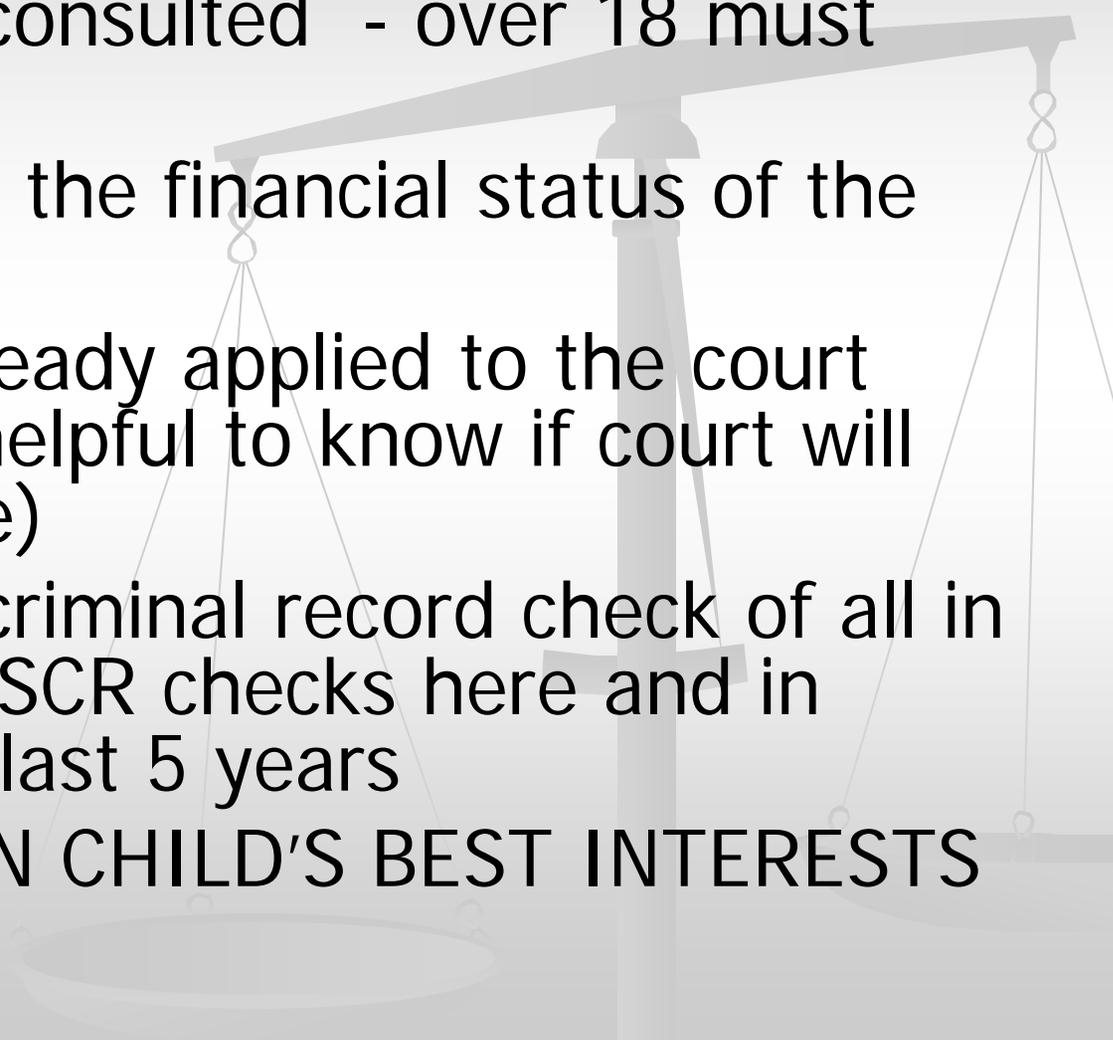
Foster parent of the child **must be related, by any degree**, to the child by blood, marriage or adoption and must be the child's **FULLY CERTIFIED or APPROVED** foster parent for over **6 months** before any application

Art. 10 - the FF and 1st PH must be completed, all others, 1st PH must be completed

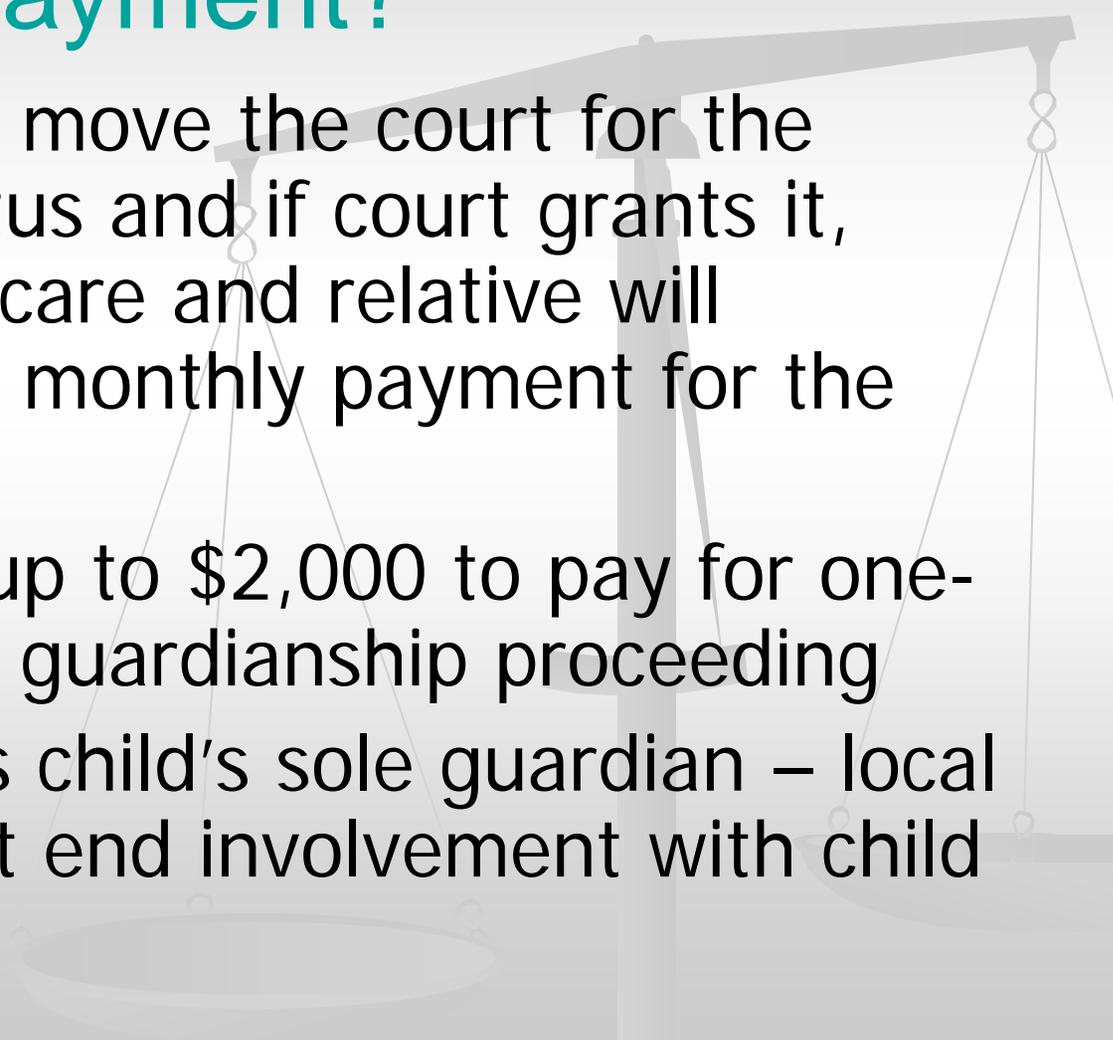
Must first APPLY to the local district

- LOCAL DISTRICT MUST APPROVE FIRST – Court **cannot order until after** local district's approval of the assistance payments
 - Local District must consider:
 - ❖ Return home or adoption not appropriate for child – there are “compelling reasons” why these are not in child's interests
 - ❖ Child has strong attachment to relative and relative has strong commitment to permanently care for child
- 

Local District :

- ❖ Child has been consulted - over 18 must consent
 - ❖ Cannot consider the financial status of the relatives
 - ❖ Cannot have already applied to the court (may be VERY helpful to know if court will eventually agree)
 - ❖ Must have had criminal record check of all in home over 18 , SCR checks here and in other states for last 5 years
 - ❖ **THAT THIS IS IN CHILD'S BEST INTERESTS**
- 

If DSS/ACS approves, what does relative “get” with this assistance payment?

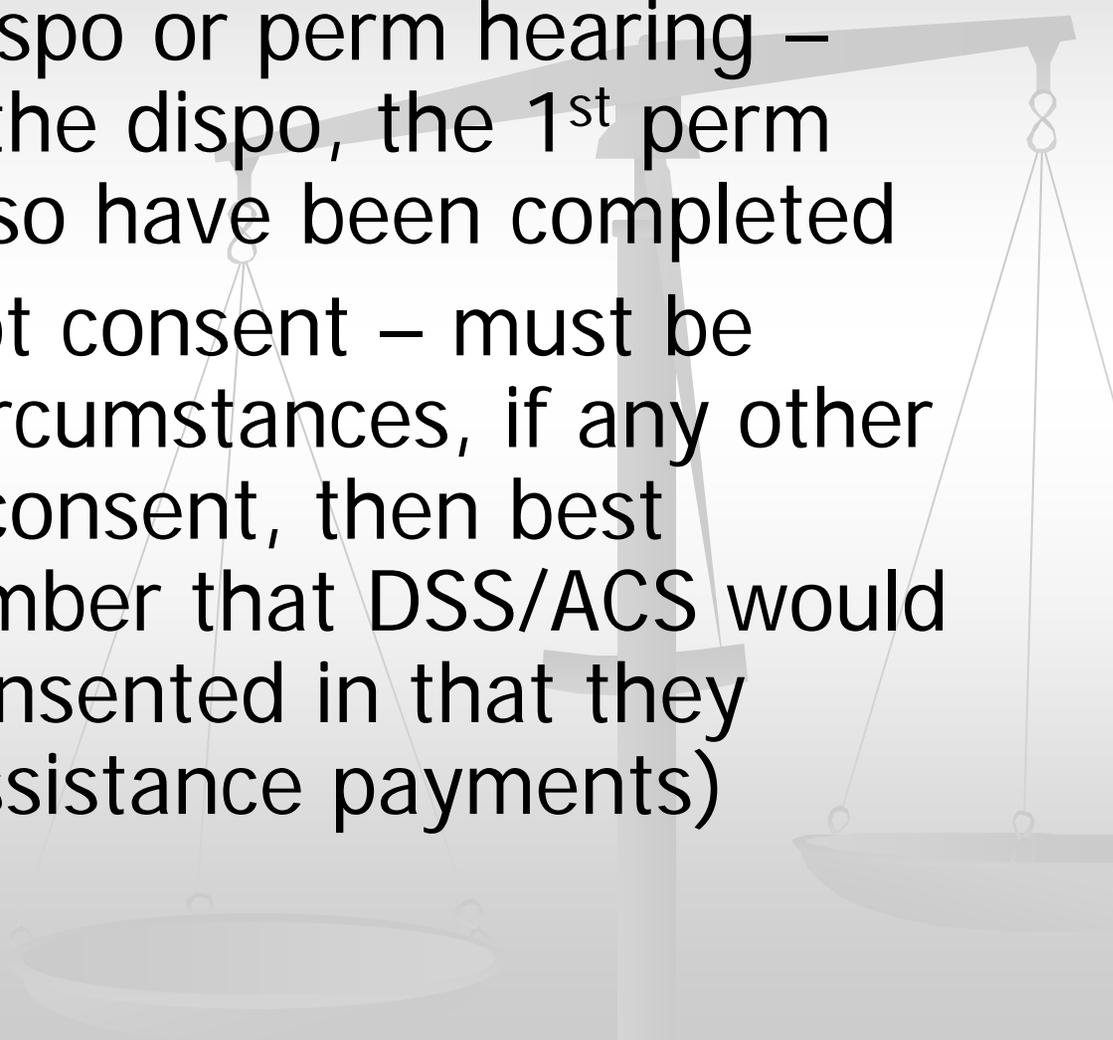
- Relative can now move the court for the guardianship status and if court grants it, child exits foster care and relative will continue to get a monthly payment for the child
 - Relative will get up to \$2,000 to pay for one-time expenses of guardianship proceeding
 - Relative becomes child’s sole guardian – local district and court end involvement with child
- 

Court decision

FCA §1055-b and FCA §1089-a will require Judge to consider child 's best interests including:

- ❖ Permanency goal of the child – that there is a compelling reason why return home and adoption are not appropriate for the child
- ❖ Relationship between child and relative
- ❖ DSS/ACS has approved guardianship assistance payments
- ❖ FF and 1st perm hearing are completed
- ❖ Will be a safe and permanent home
- ❖ Must consult with the child, if 14 or over must ask their preference, if over 18 must have their consent

Court procedure



- Can be in the dispo or perm hearing – remember if in the dispo, the 1st perm hearing must also have been completed
- If parents do not consent – must be extraordinary circumstances, if any other party does not consent, then best interests (remember that DSS/ACS would have already consented in that they approved the assistance payments)

Also in the order

- Court **MUST** order that ACS/DSS and child's attorney be notified and be made parties to any and every subsequent proceeding to modify the guardianship
- FCA §1089(a) Court **MAY NOT** order anything further under the Art. 10 – so no supervision or services can be ordered for the guardian or the parents or respondents (guardian may be eligible for preventive but court cannot order district to provide)

**THIS IS AN IMPORTANT
CONSIDERATION!**

What exactly is this new guardianship power?

- Guardian has right to physical custody of the child and the right to “make decisions, including issuing any necessary consents, regarding the child’s protection, education, care and control, health and medical needs”
- Can we do a “loaded” order like with Art. 6?
- Do parents still have parental rights? Can they still seek visitation and can they move to modify/cancel this guardianship in the future?

The answer seems to be YES to all these questions

How does it stack up against adoption?

- More money for adoptive parent in two ways- unless child over 16, guardianship payments will stop at 18 and adoption goes to 21, also adoption means the tax REFUND of \$13, 170 (per child) – this would mean lots of money if child is younger or multiple children
- Perhaps more “coverage” if caretaker dies having adopted as subsidy can be preserved – maybe this will be clarified
- Depending on circumstances, “getting to” an adoption may take a lot longer than a guardianship
- Parent still has rights with guardianship – for visitation, to petition to get child back
- Guardian gets “free” lawyer, almost always true for adoption as well

How does it stack up against Art. 6 custody?

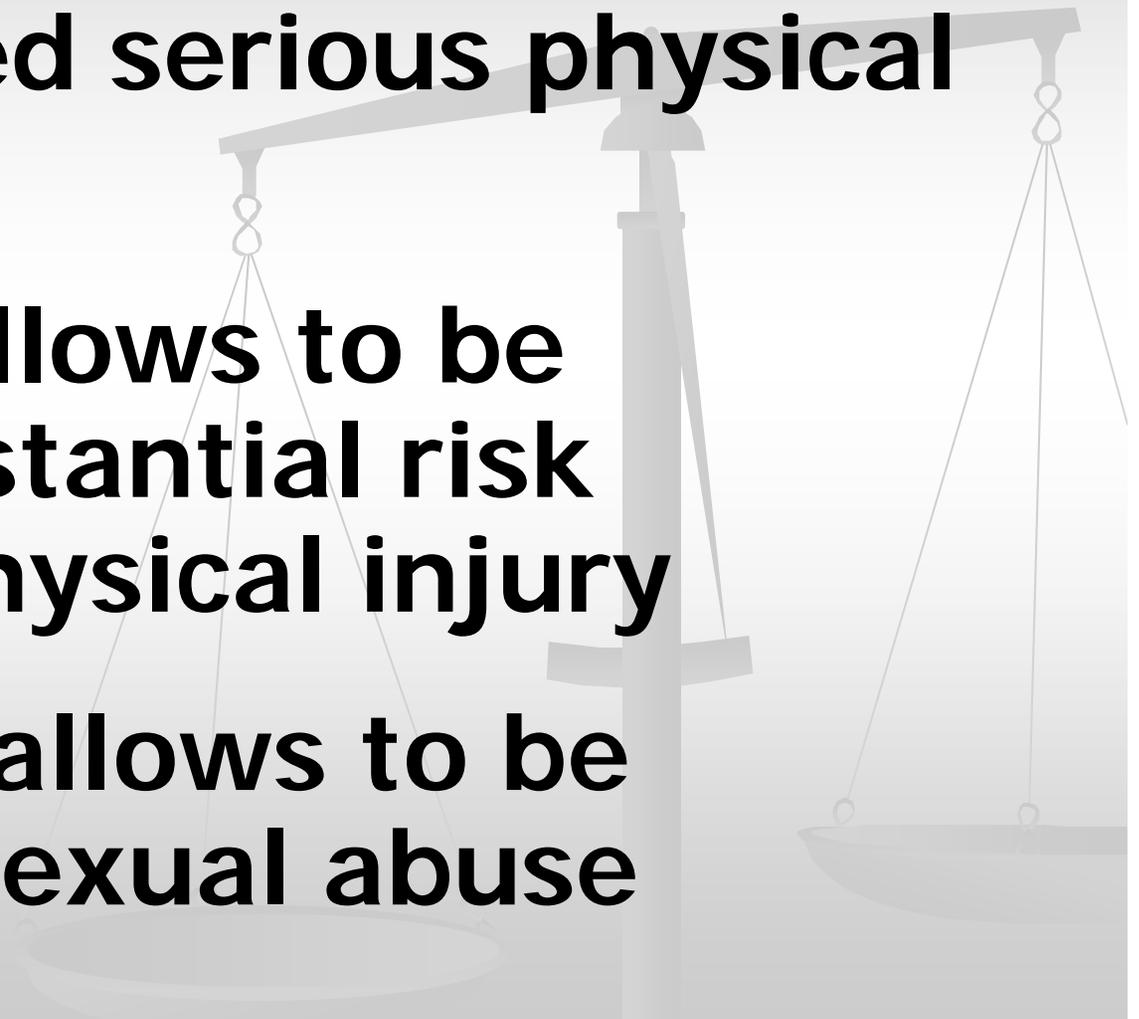
- More likely to get more money with guardianship (unless parents are well off and the custody comes with child support)
- Probably the same re the parent being able to “undo it” or to keep seeking changes in visitation
- Court must have notice, party provisions placed in all guardianship orders – only a possibility in custody orders
- Probably about the same as to what the caretaker “gets” – maybe a bit more clarity in the law about what the guardianship is - altho this could be equalized if the court order are well written
- Caretaker gets a “free” lawyer to help them do the guardianship – very likely they would have to pay for lawyer themselves or do it themselves with custody
- In both, the court cannot “order” supervision or services to anyone but both may be eligible for preventive

Back to the process

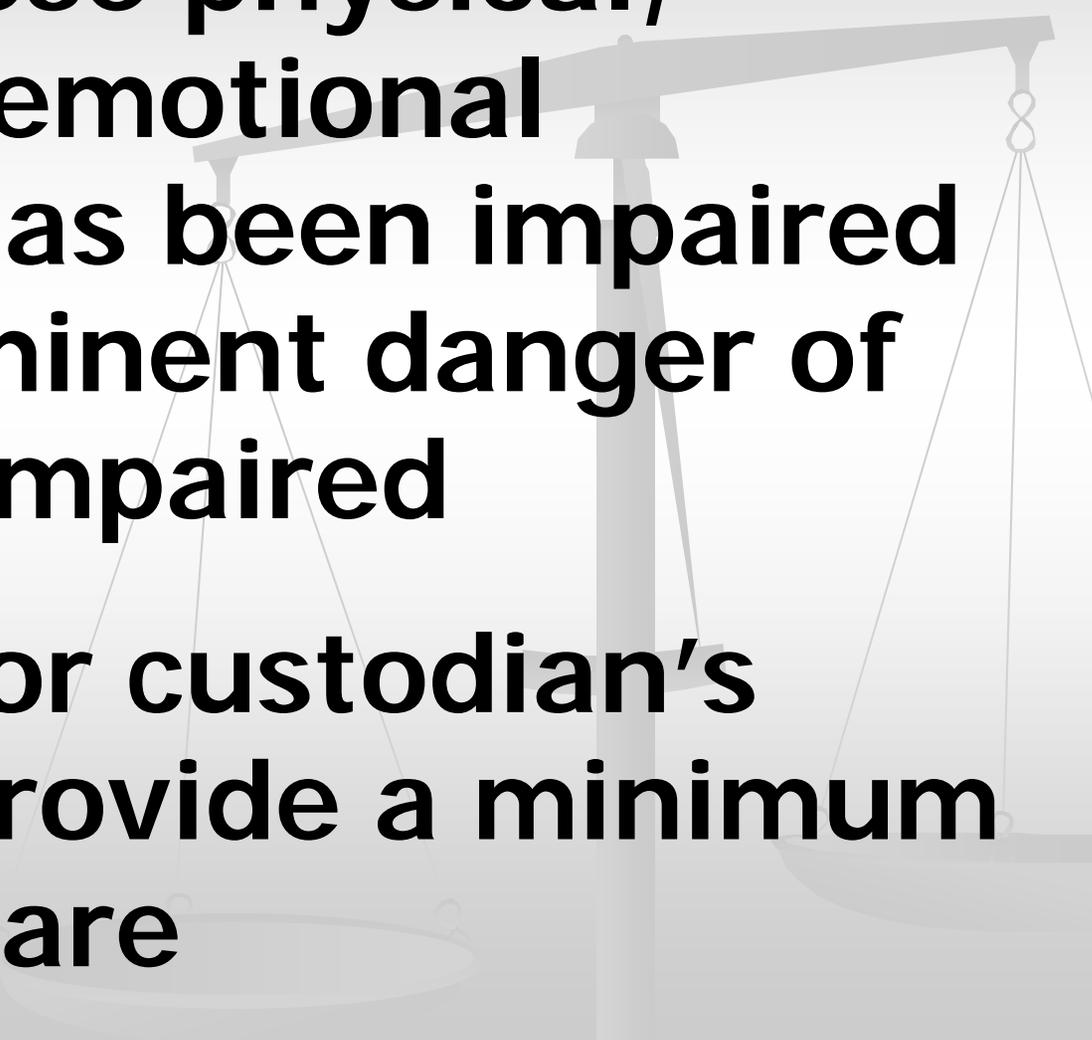


Abuse

- **Inflicts or allows to be inflicted serious physical injury**
- **Creates or allows to be created substantial risk of serious physical injury**
- **Commits or allows to be committed sexual abuse**

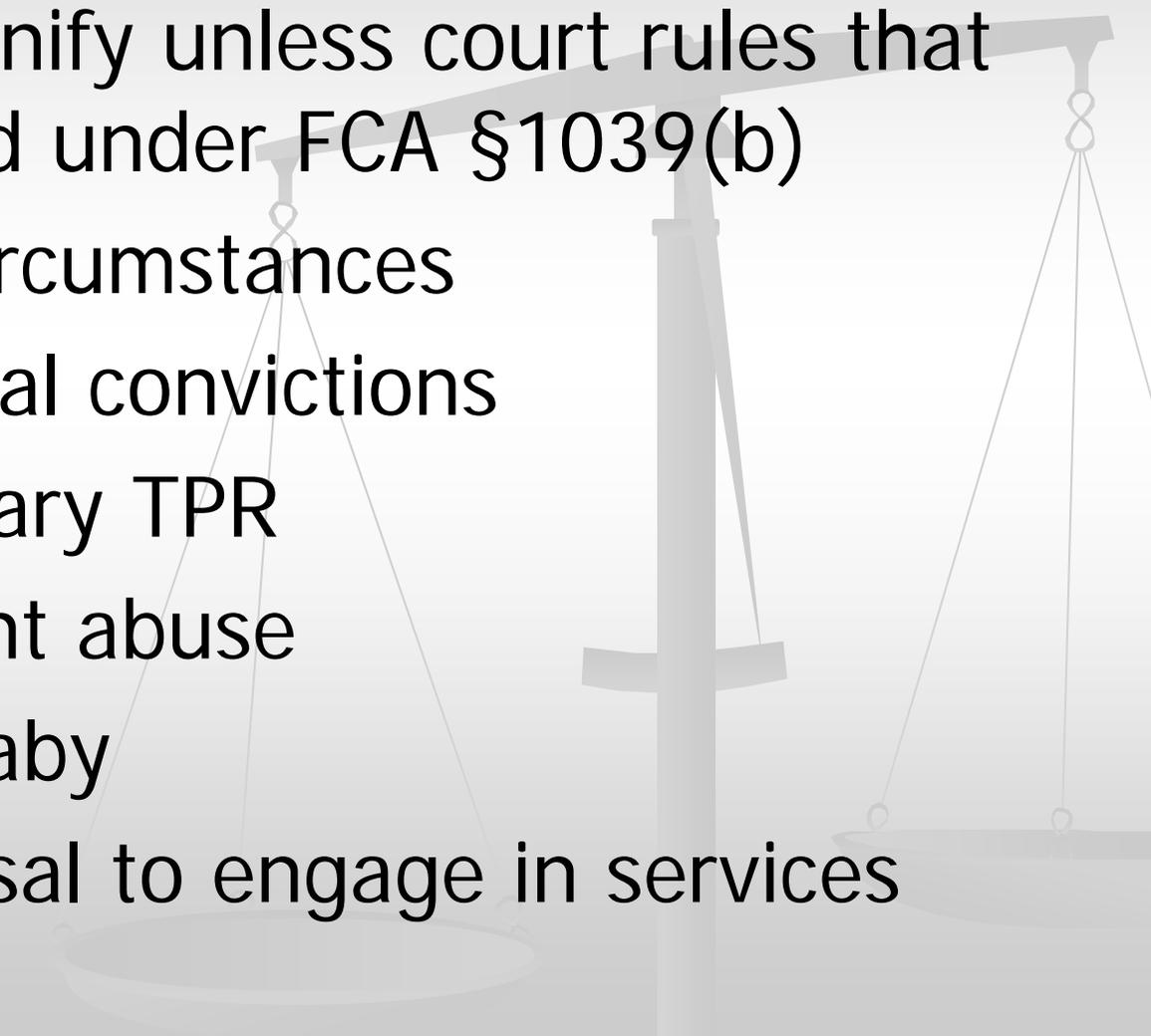


Neglect



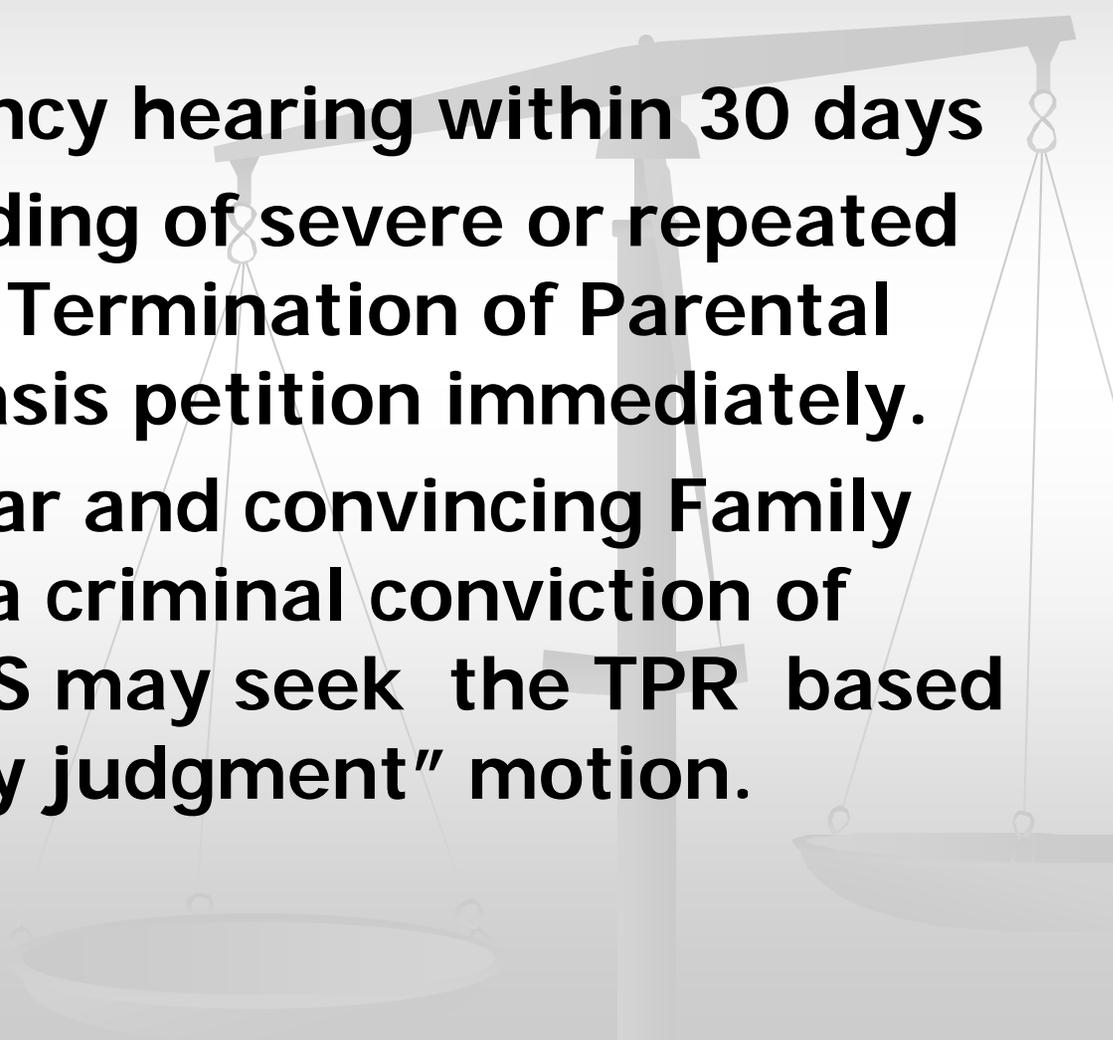
- **A child whose physical, mental, or emotional condition has been impaired or is at imminent danger of becoming impaired**
- **A parent's or custodian's failure to provide a minimum degree of care**

Must Make Reasonable Efforts



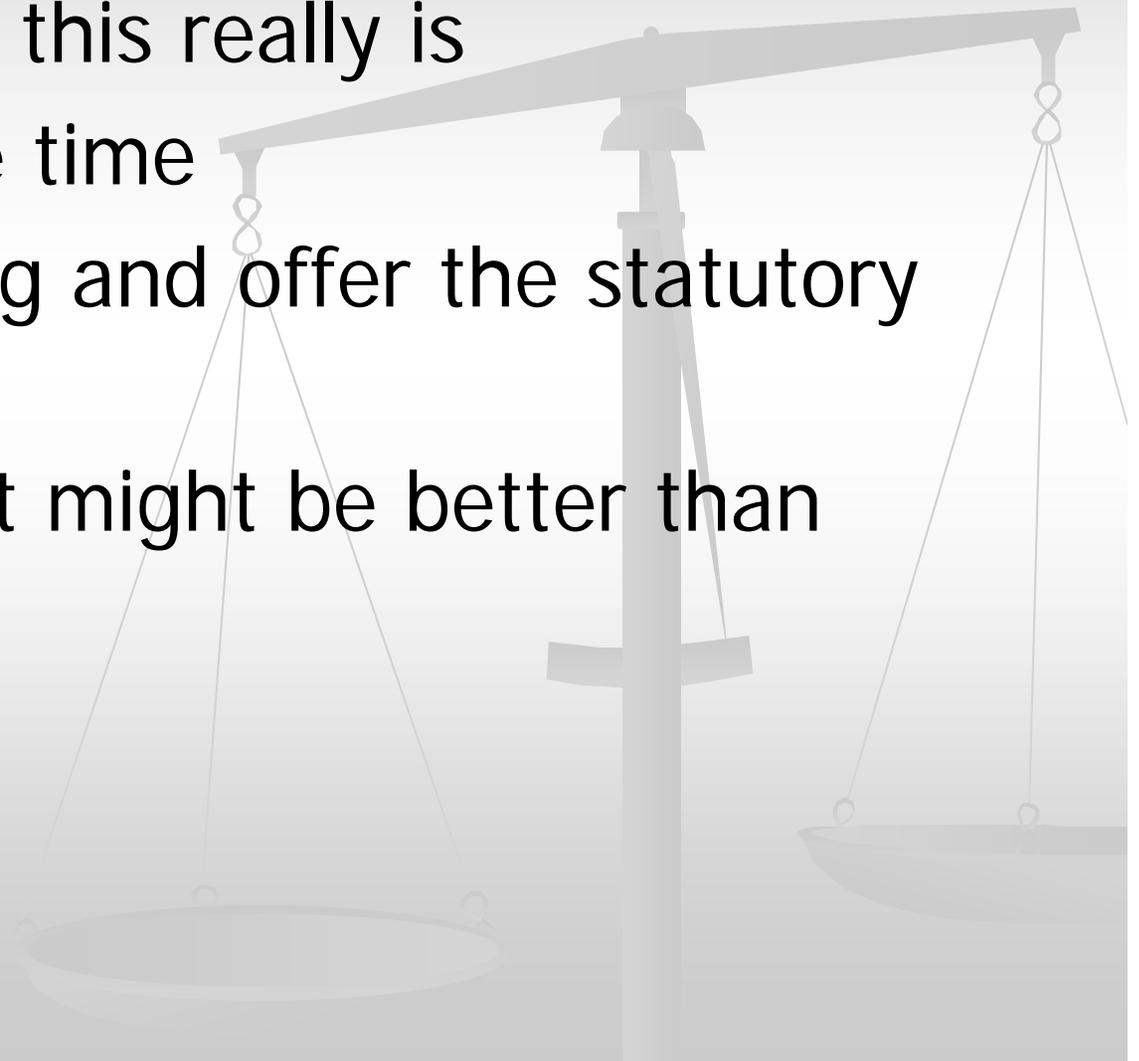
- Must try to reunify unless court rules that it is not needed under FCA §1039(b)
 1. Aggravated circumstances
 2. Certain criminal convictions
 3. Prior Involuntary TPR
 4. Post placement abuse
 5. Safe Haven baby
 6. Parental Refusal to engage in services

If court grants the “no reasonable efforts” motion

- Hold a permanency hearing within 30 days
 - If you have a finding of severe or repeated abuse - may file Termination of Parental Rights on that basis petition immediately.
 - If you have a clear and convincing Family Court finding or a criminal conviction of ASFA crime – DSS may seek the TPR based upon a “summary judgment” motion.
- 

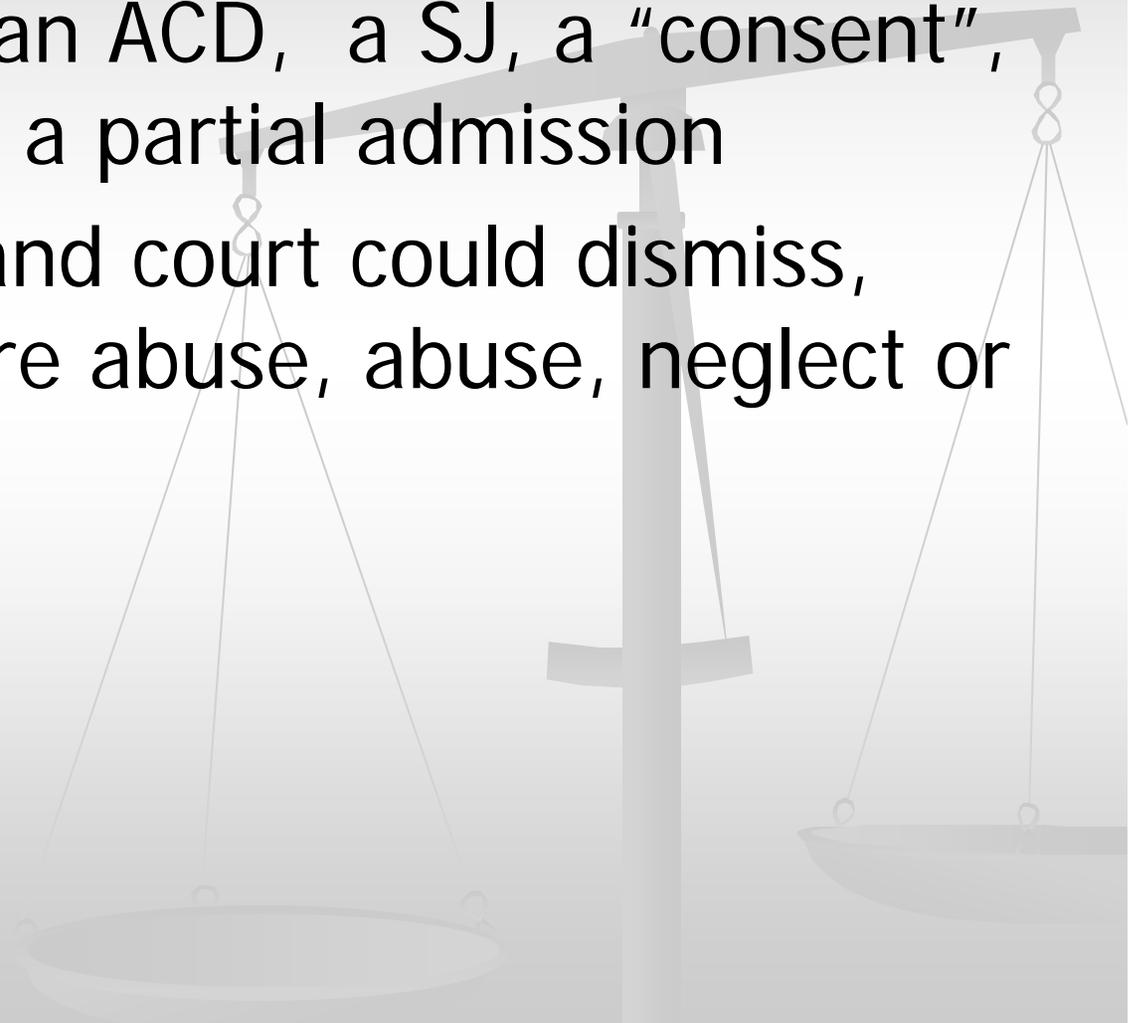
Tips for NRE motions

- Recognize what this really is
- Try to negotiate time
- Ask for a hearing and offer the statutory defense
- Alternatives that might be better than nothing



Settlement or FF?

- Can settle with an ACD, a SJ, a “consent”, an admission or a partial admission
- Can have a FF and court could dismiss, adjudicate severe abuse, abuse, neglect or combo thereof

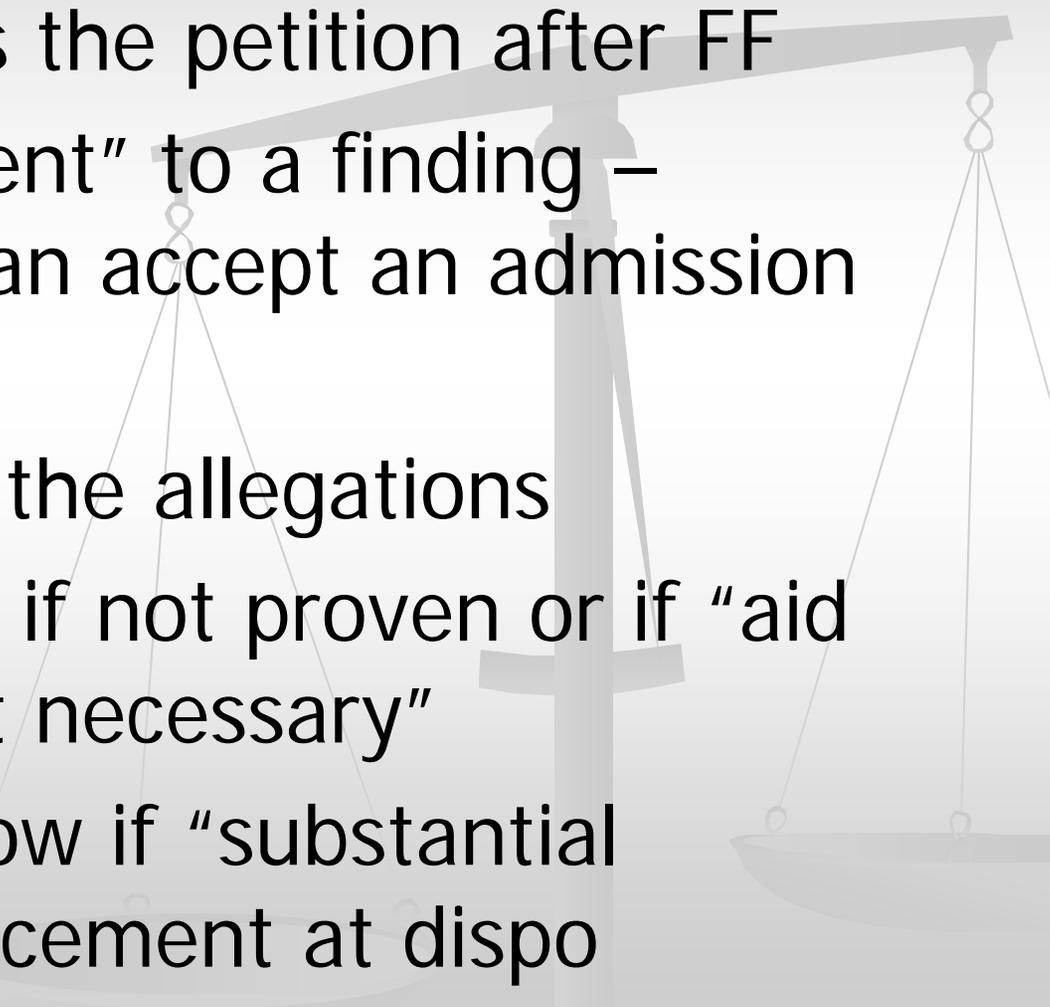


FCA § 1039

- ACD or ACoD
- Must all consent
- No placement
- Cannot be extended without consent
- Restorations
- ACDs with a “twist”

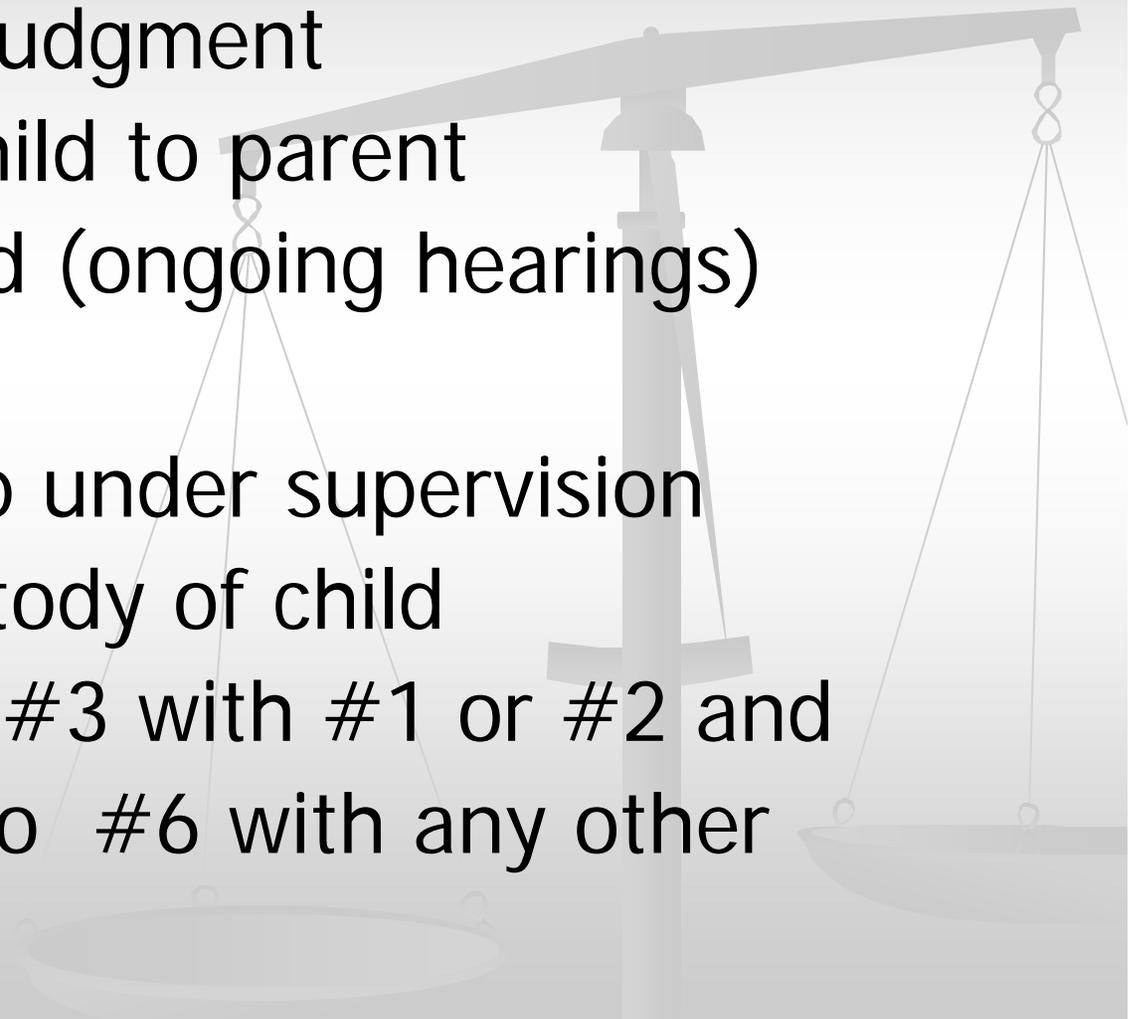


FCA § 1051

- Sustain or dismiss the petition after FF
 - Parties can “consent” to a finding – includes AFC or can accept an admission from resp
 - Court can amend the allegations
 - Court can dismiss if not proven or if “aid of the court is not necessary”
 - Can place child now if “substantial probability” of placement at dispo
- 

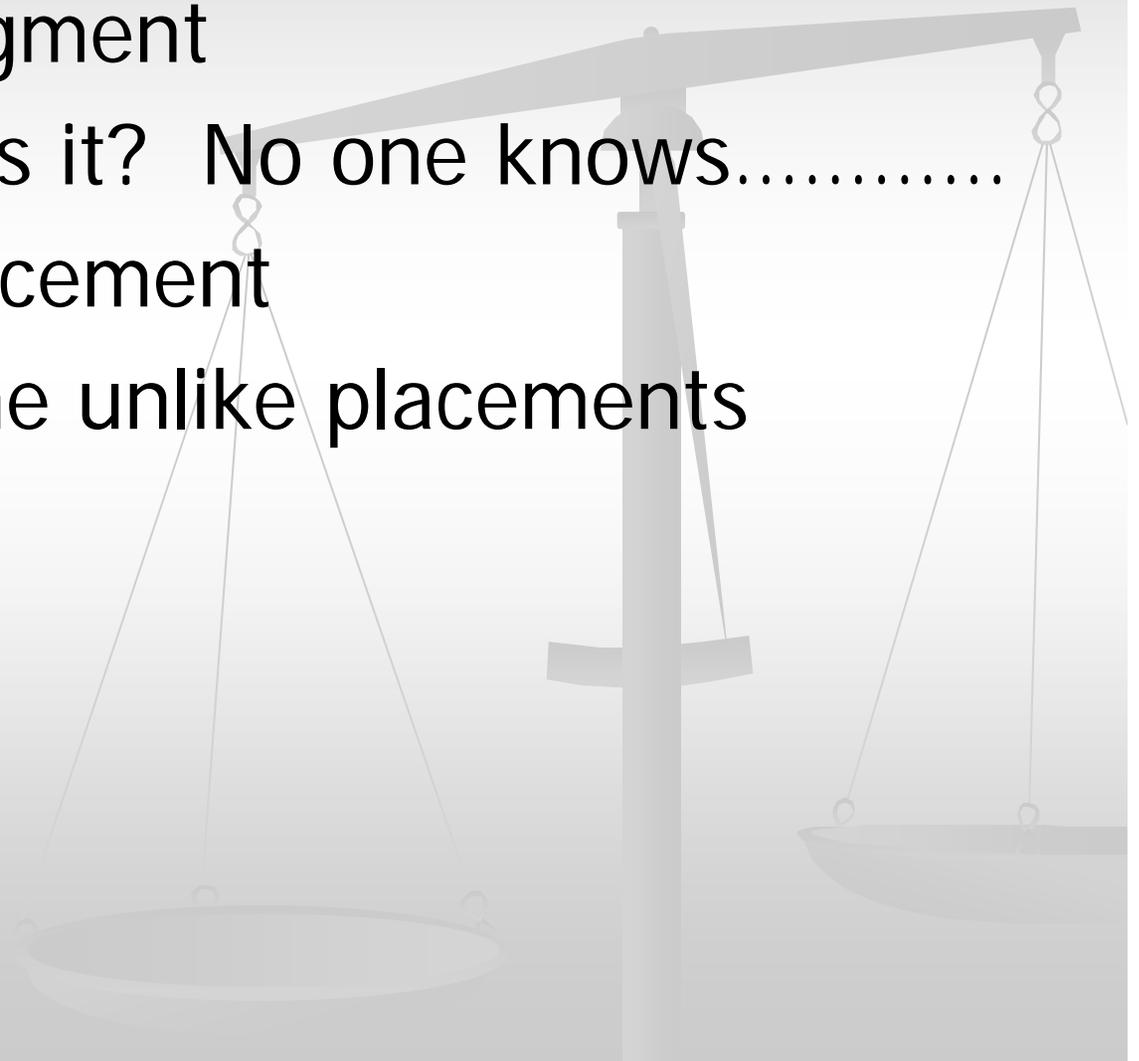
FCA §1052

- After dispo hearing can
 1. suspend judgment
 2. release child to parent
 3. place child (ongoing hearings)
 4. o/p
 5. place resp under supervision
 6. grant custody of child
- BUT – cannot do #3 with #1 or #2 and
cannot do #6 with any other



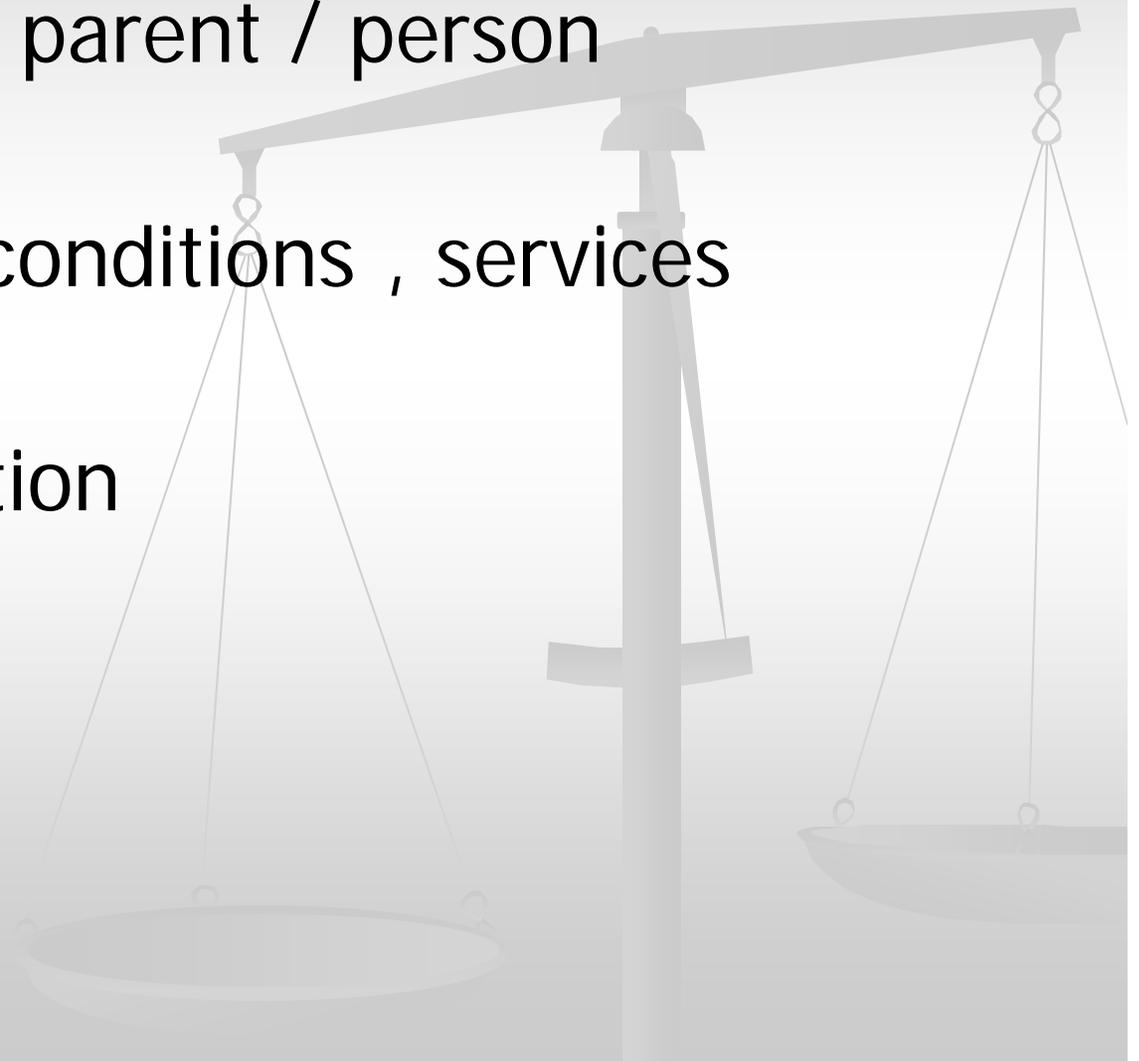
FCA § 1053

- Suspended Judgment
- What the heck is it? No one knows.....
- Cannot do a placement
- Has a time frame unlike placements

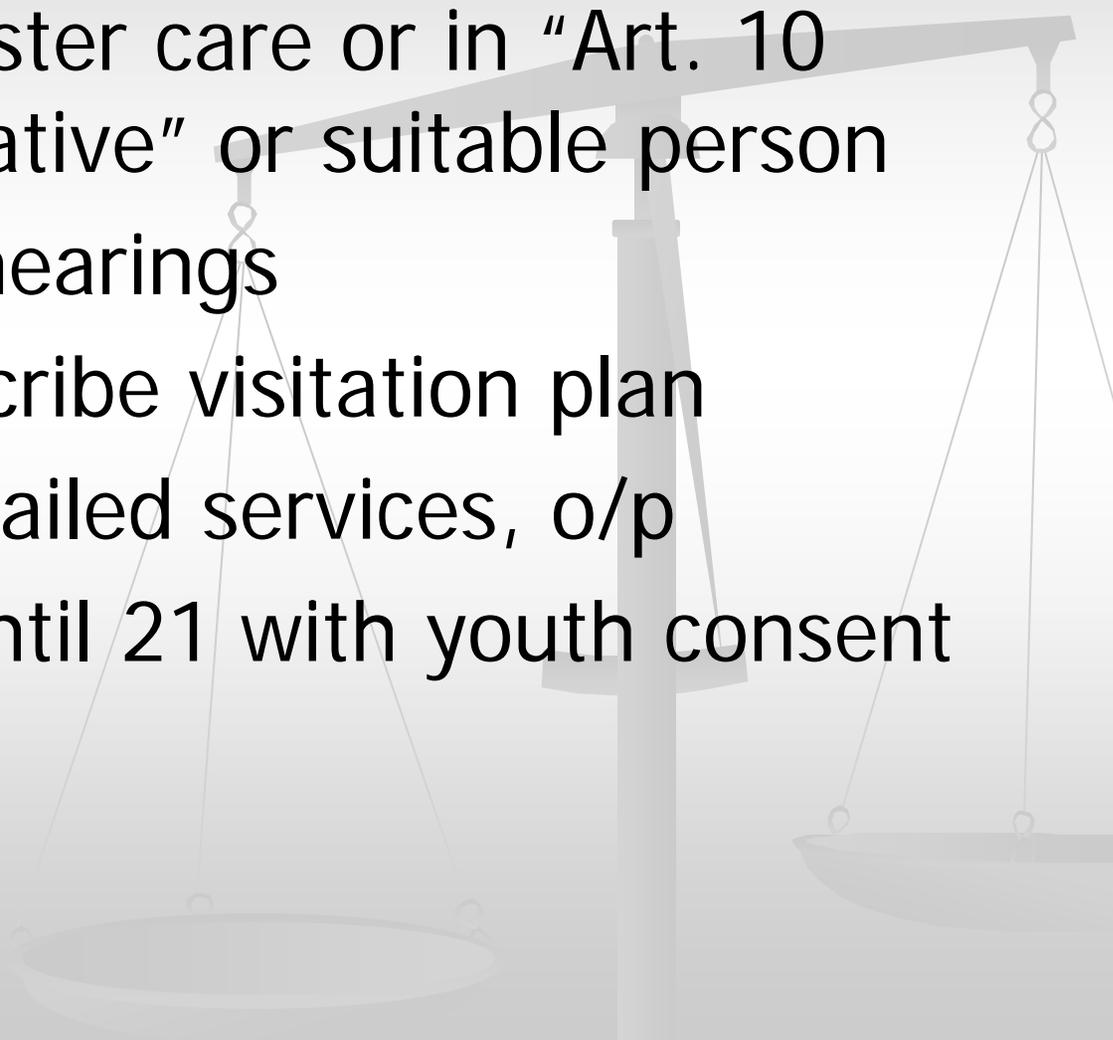


FCA § 1054

- Release child to parent / person responsible
- Supervise with conditions , services ordered
- Order of protection

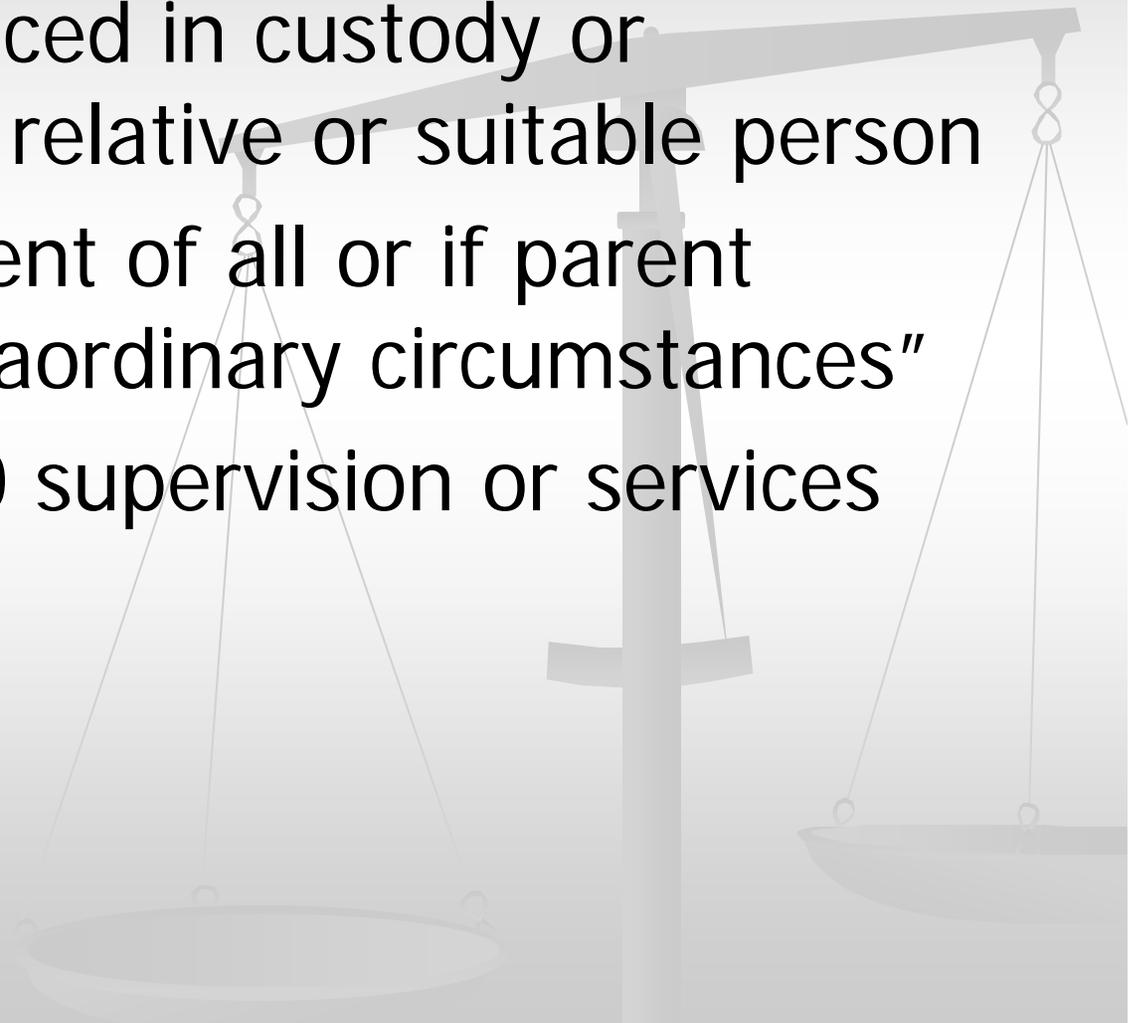


FCA§1055

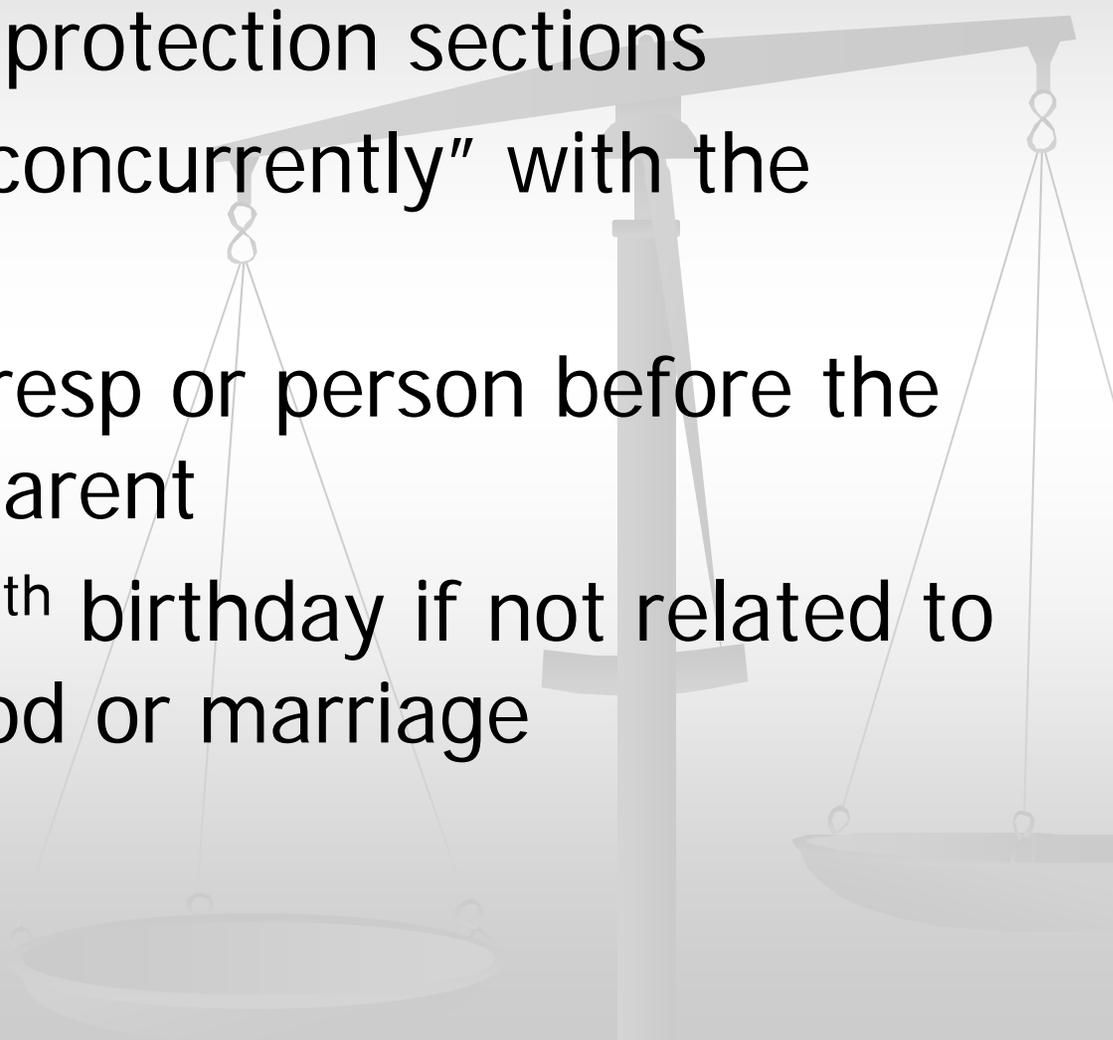
- Place child in foster care or in “Art. 10 custody” of “relative” or suitable person
 - Ongoing perm hearings
 - Order must describe visitation plan
 - Usually very detailed services, o/p
 - Until age 18, until 21 with youth consent
- 

FCA § 1055-b

- Child can be placed in custody or guardianship of relative or suitable person
- Can be by consent of all or if parent opposes – “extraordinary circumstances”
- No more Art. 10 supervision or services

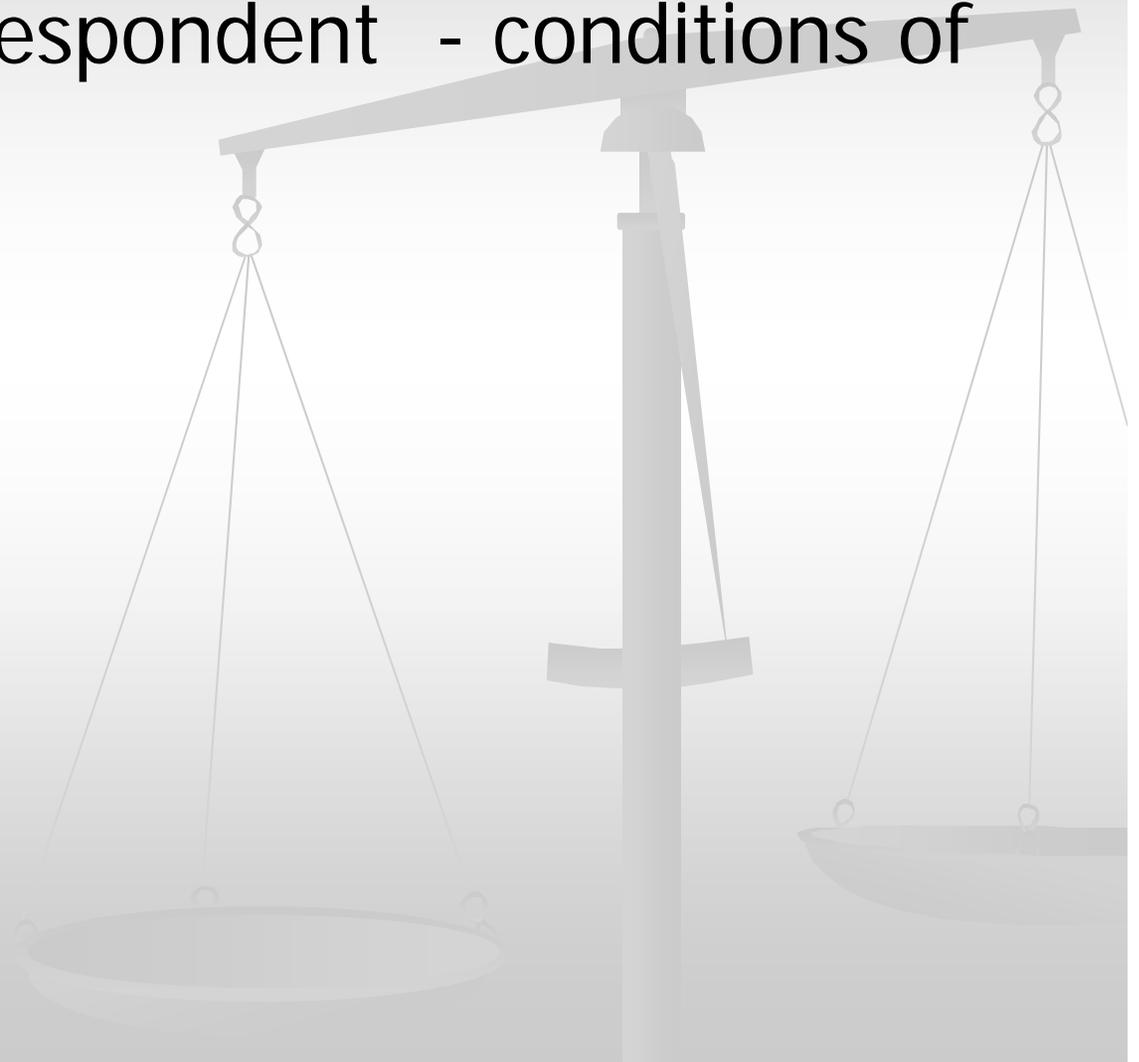


FCA§ 1056

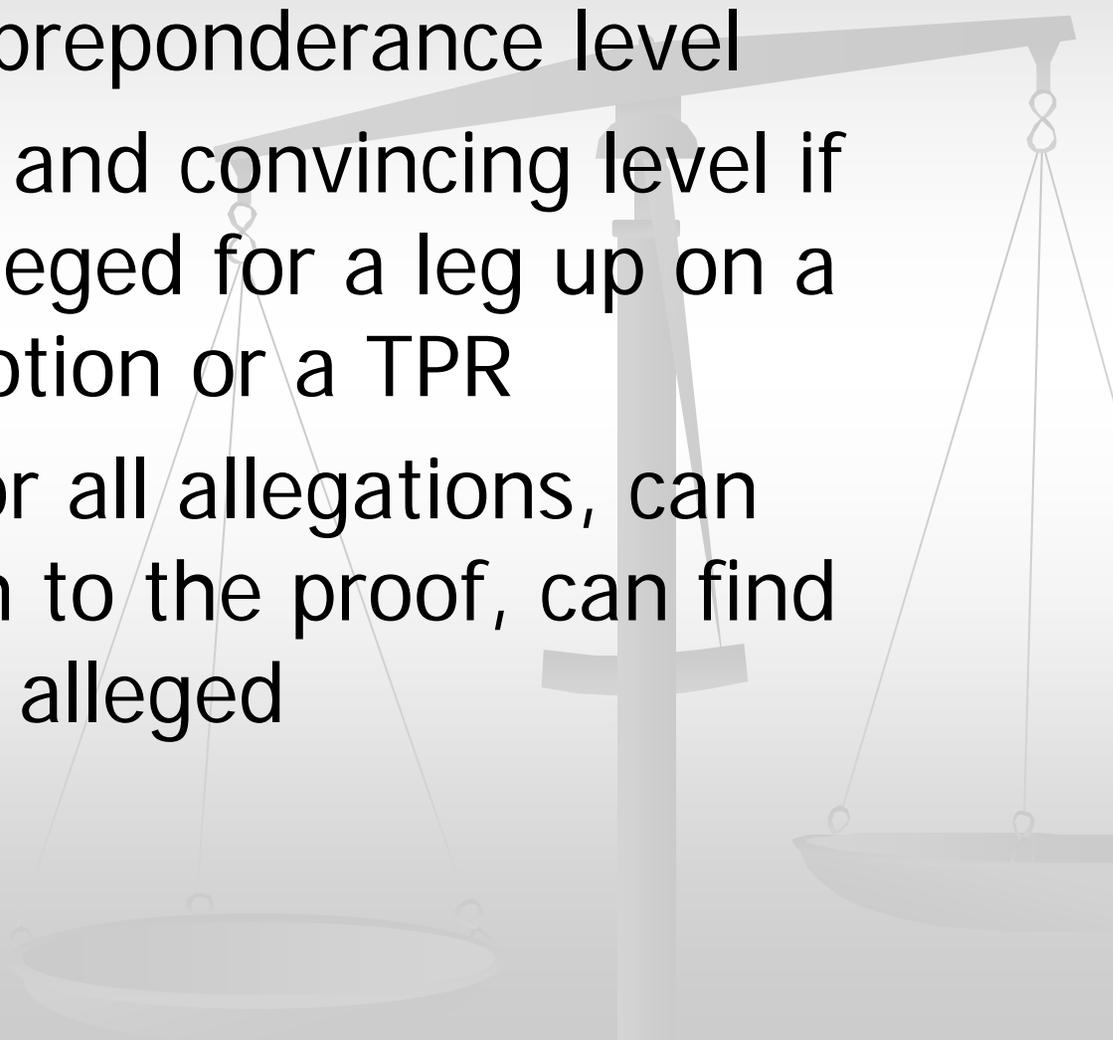
- Details order of protection sections
 - Can be issued “concurrently” with the other disp order
 - Can be against resp or person before the court who is a parent
 - Can be up to 18th birthday if not related to the child by blood or marriage
- 

FCA § 1057

- Supervision of respondent - conditions of behavior



If No Settlement

- Fact finding on preponderance level
 - Can be on clear and convincing level if severe abuse alleged for a leg up on a FCA § 1039b motion or a TPR
 - Can find some or all allegations, can conform petition to the proof, can find neglect if abuse alleged
- 

Let's talk evidence issues



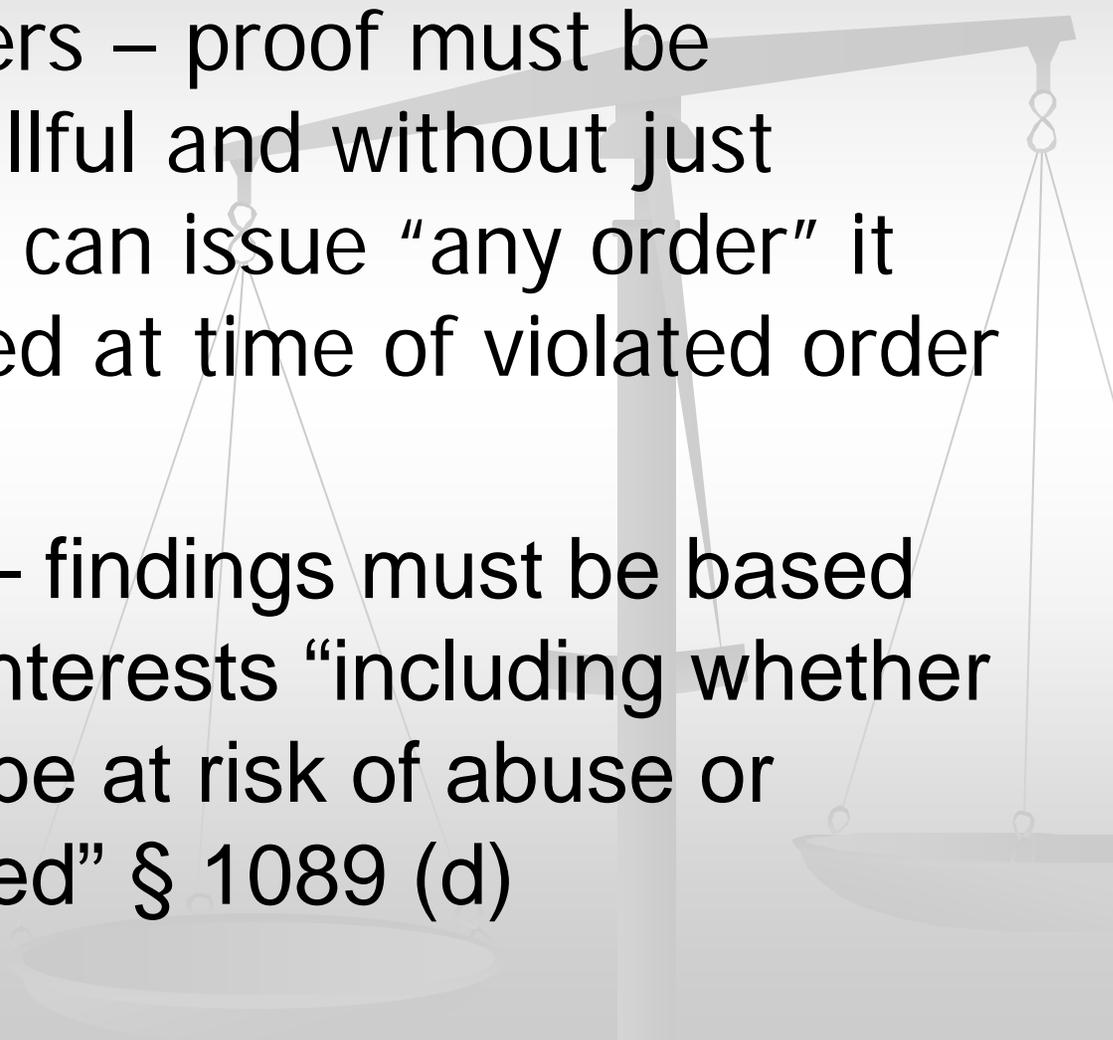
Basics

- Removal Hearings, dispo hearings and perm hearings – BOP is preponderance, must be material and relevant but need not be competent § 1046 c
- Fact findings – BOP is preponderance, must be material, relevant and competent – also can do a severe abuse on clear and convincing § 1046 b

Proof

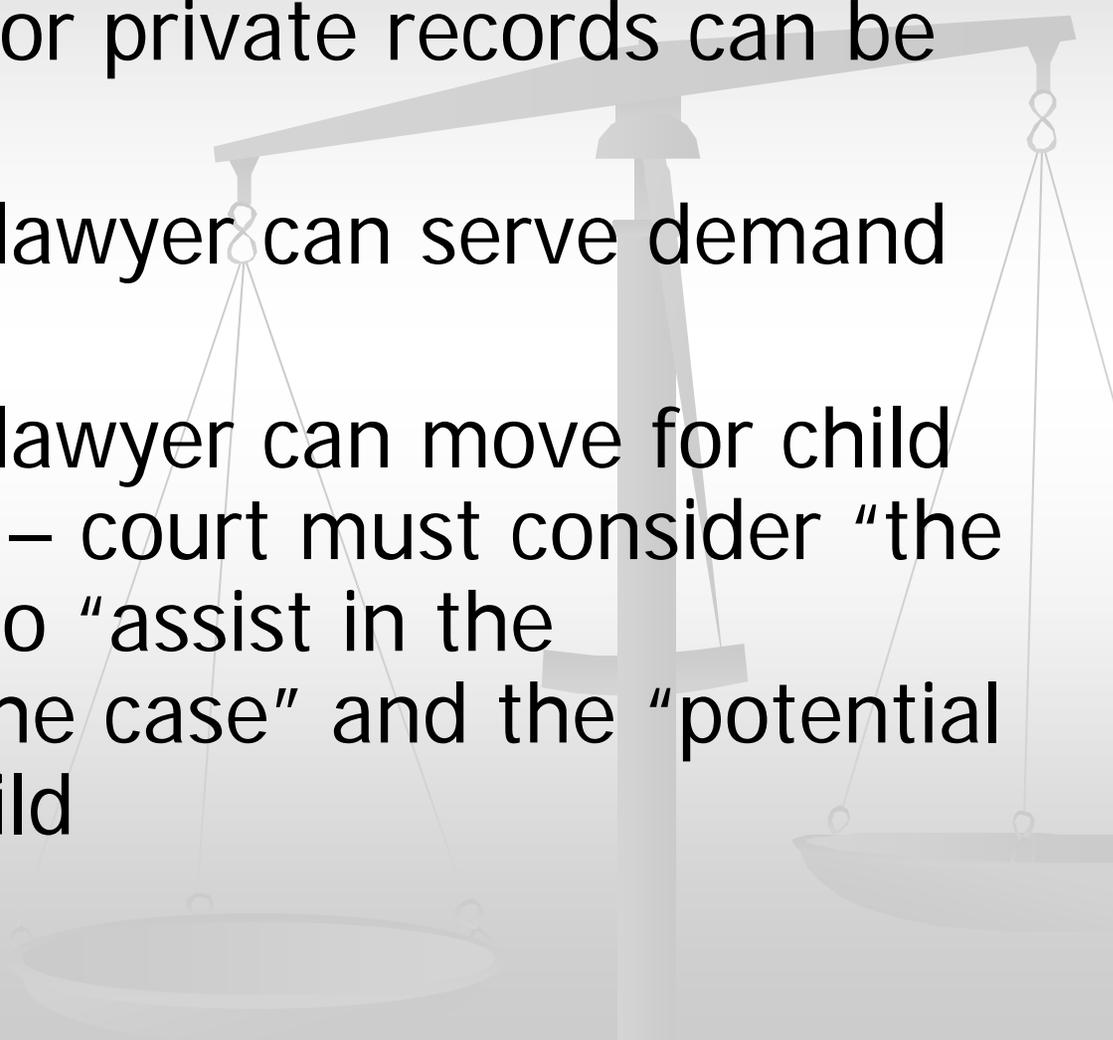
- Removal – “imminent danger/risk to child’s life or health” §1027 etc – can place child after FF if “substantial probability” that child will be placed in dispo § 1051
- O/P - “in assistance or as a condition of any other order” §1056 (1)
- Fact finding – “facts sufficient to sustain the petition” and for neglect could be dismissed if “aid of the court not necessary” § 1051

Proof



- Violation of orders – proof must be competent of willful and without just cause and court can issue “any order” it could have issued at time of violated order § 1072
- Perm hearings – findings must be based on child’s best interests “including whether the child would be at risk of abuse or neglect if returned” § 1089 (d)

§ 1038 provisions

- Hospital, public or private records can be subpoenaed
 - Defense/child's lawyer can serve demand for DSS records
 - Defense/child's lawyer can move for child to be examined – court must consider “the need” for such to “assist in the preparation of the case” and the “potential harm” to the child
- 

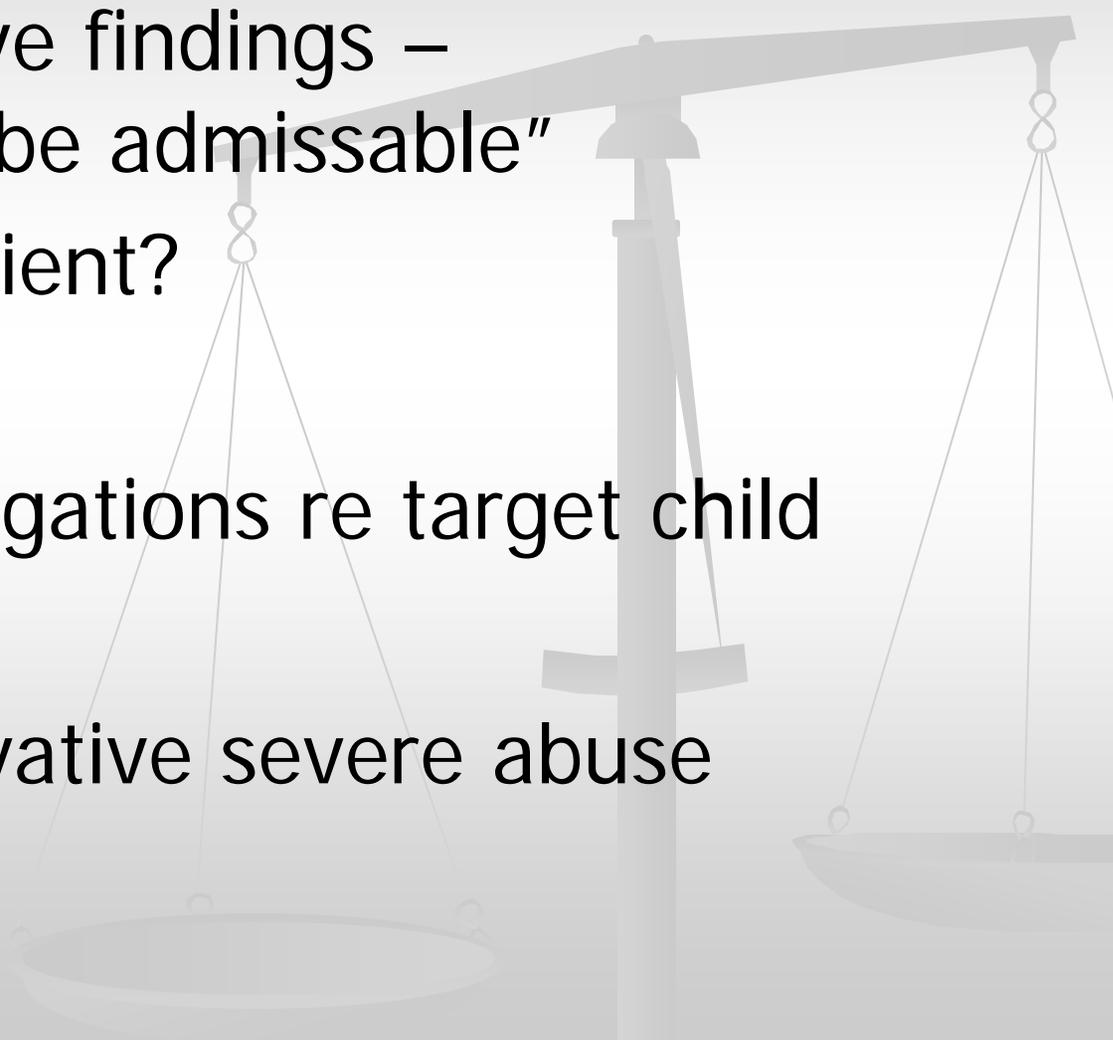
§ 1038 Provisions

- Court can order exams or interviews of child to be videotaped and should consider “effect” on the exam and its reliability, “effect on the child, and the needs of the parties
- “Unless otherwise proscribed” CPLR Art. 31 applies to Art. 10 proceedings – court can issue a protective order but shall consider the parties need for discovery and any “potential harm” to the child from the discovery

§ 1038-a

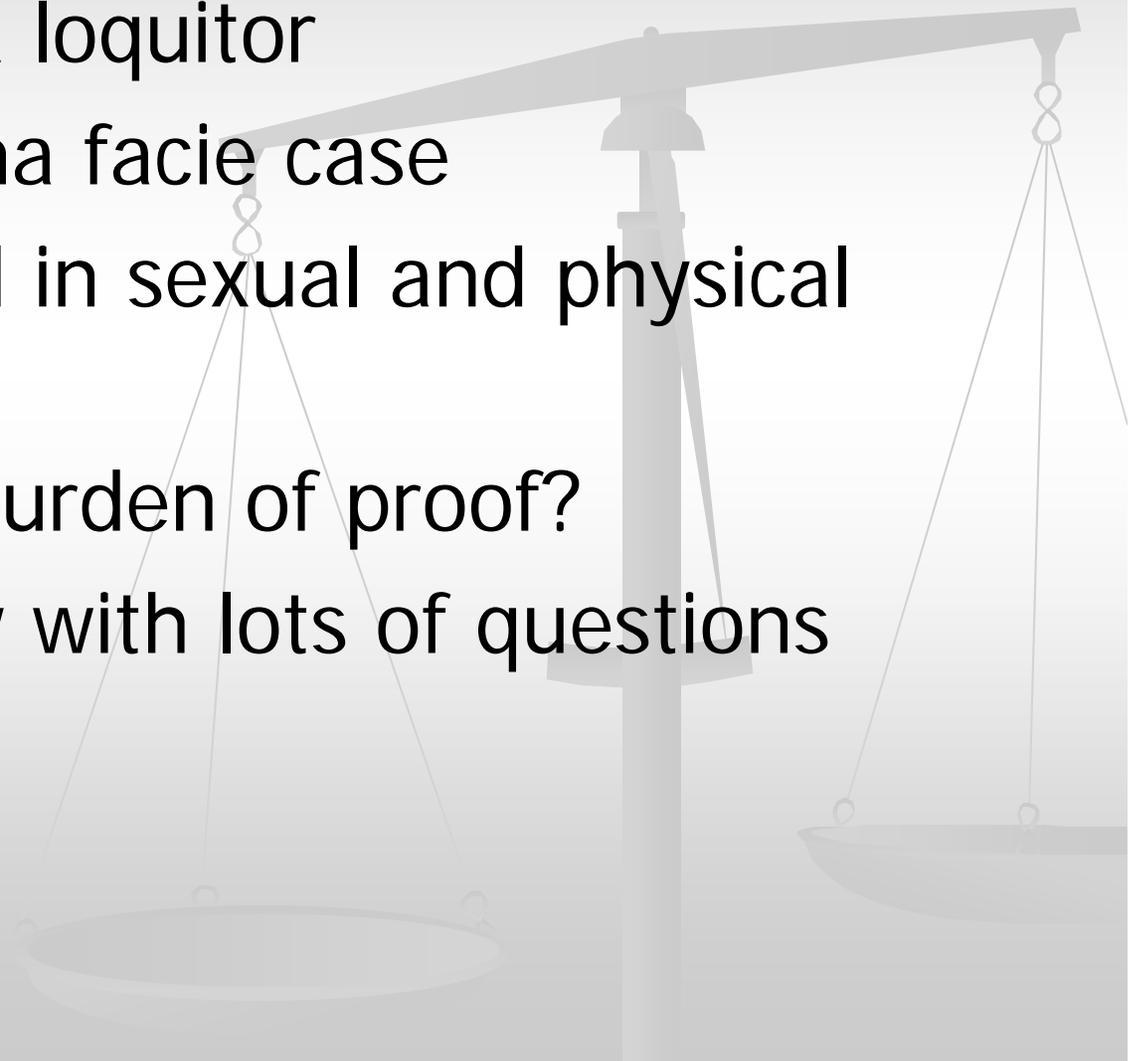
- Court can order respondent to provide “non testimonial evidence” if “probable cause” that the evidence is “reasonably related” to establishing allegations in petition
- Blood, urine, hair, DNA – “in a manner not involving unreasonable intrusion or risk of serious physical injury”

§ 1046 provisions

- (a)(i) – derivative findings – “proof.....shall be admissable”
 - When is it sufficient?
 - Lots of case law
 - Depends on allegations re target child
 - Afterborns
 - Concept of derivative severe abuse
- 

§ 1046

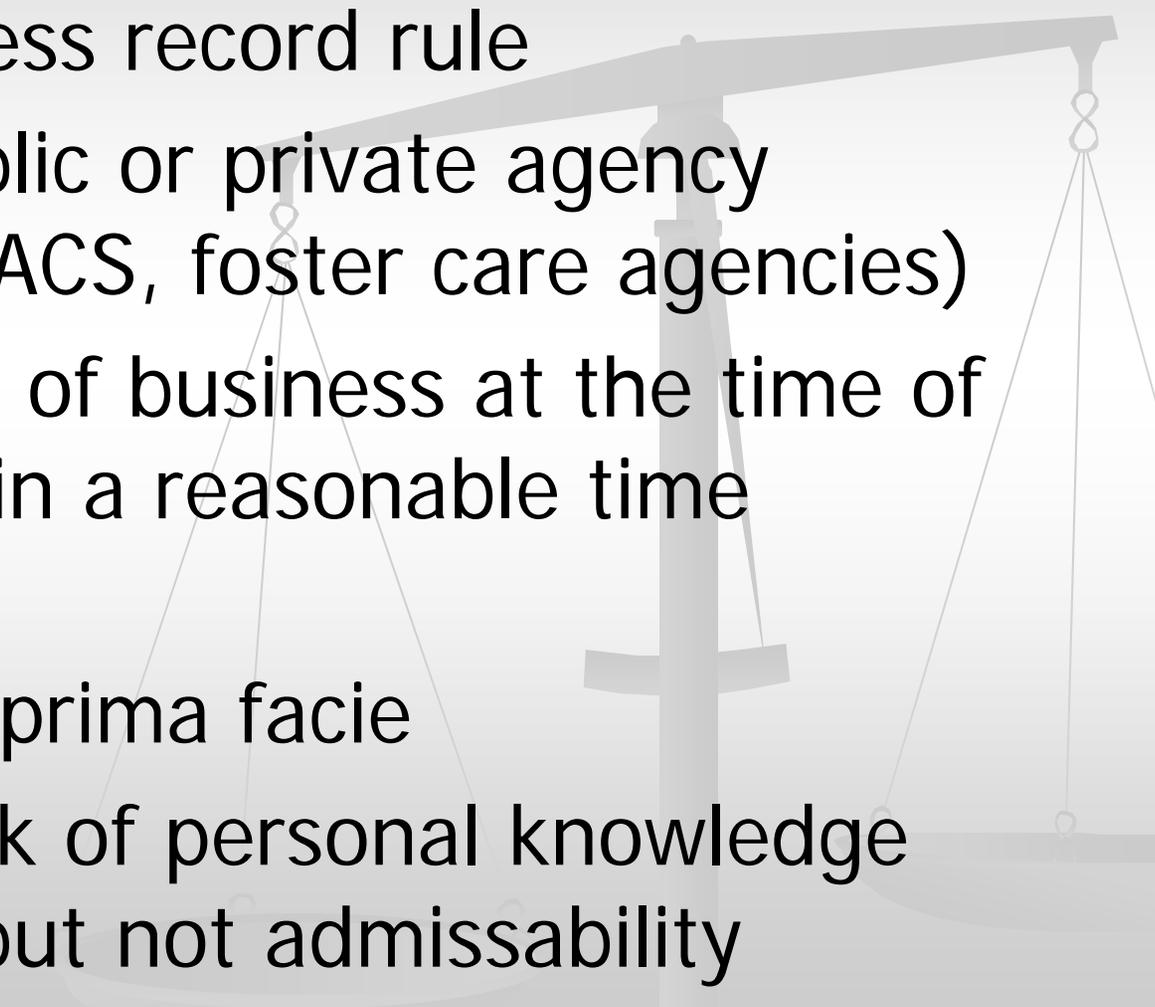
- (a)(ii) – res ipsa loquitor
- Establishes prima facie case
- Most often used in sexual and physical abuse cases
- Does it switch burden of proof?
- Lots of case law with lots of questions



§ 1046

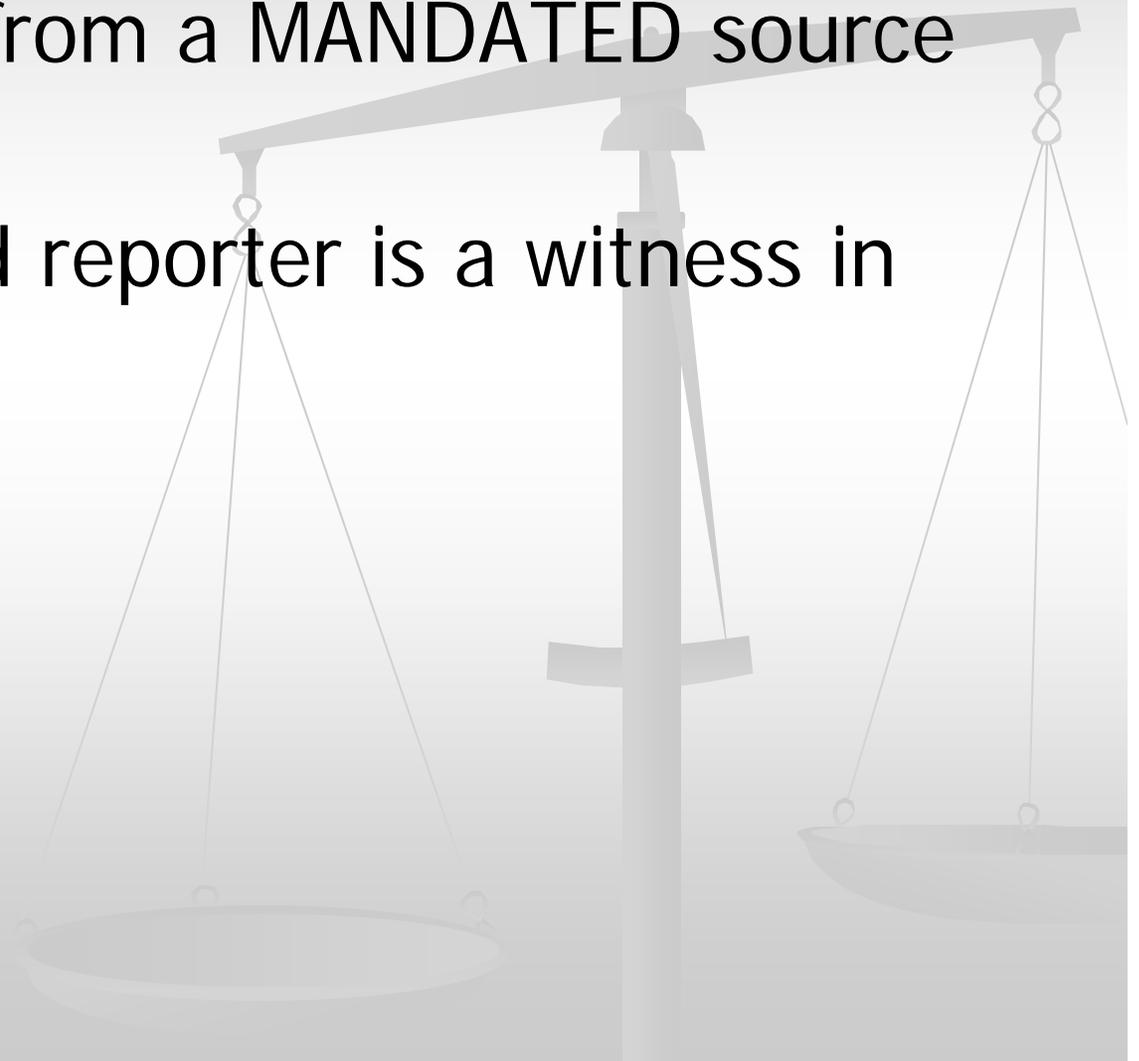
- (a)(iii) – “repeatedly misuses” of drugs or alcoholic beverages.... “to the extent that” “ordinarily have the effect”
- Prima facie neglect
- Except if “voluntarily and regularly participating in a recognized rehabilitative program”
- Exception does not prevent other proof

§ 1046

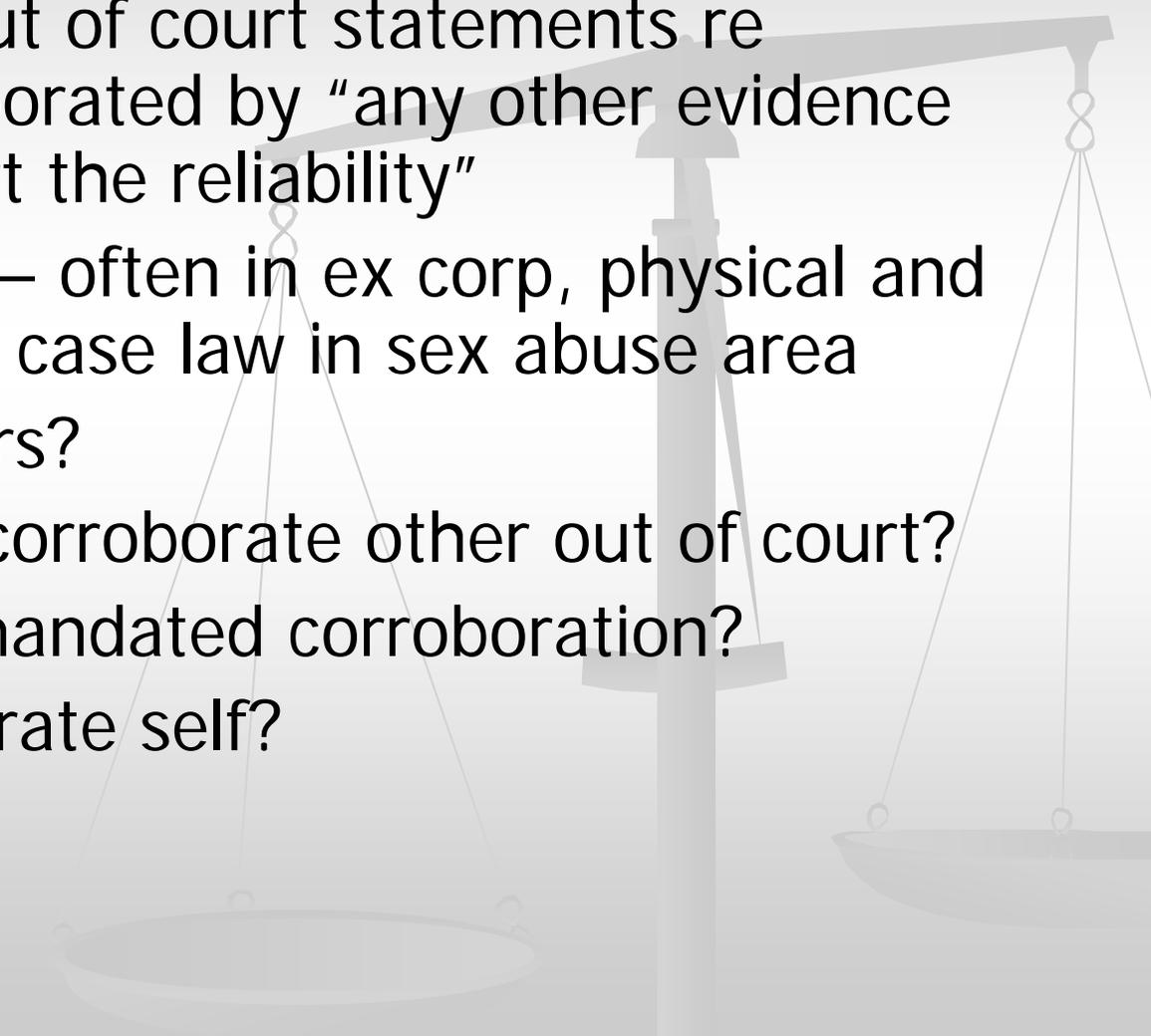
- (a)(iv) – business record rule
 - Hospital or public or private agency (includes DSS/ACS, foster care agencies)
 - Regular course of business at the time of the act or within a reasonable time thereafter
 - Certification is prima facie
 - Factors like lack of personal knowledge are to weight but not admissability
- 

§ 1046

- (a)(v) – report from a MANDATED source is admissible
- Often mandated reporter is a witness in any event



§ 1046

- (a)(vi) – child’s out of court statements re allegations corroborated by “any other evidence tending to support the reliability”
 - Used all the time – often in ex corp, physical and sex abuse – most case law in sex abuse area
 - This child or others?
 - Can out of court corroborate other out of court?
 - What is level of mandated corroboration?
 - Can child corroborate self?
- 

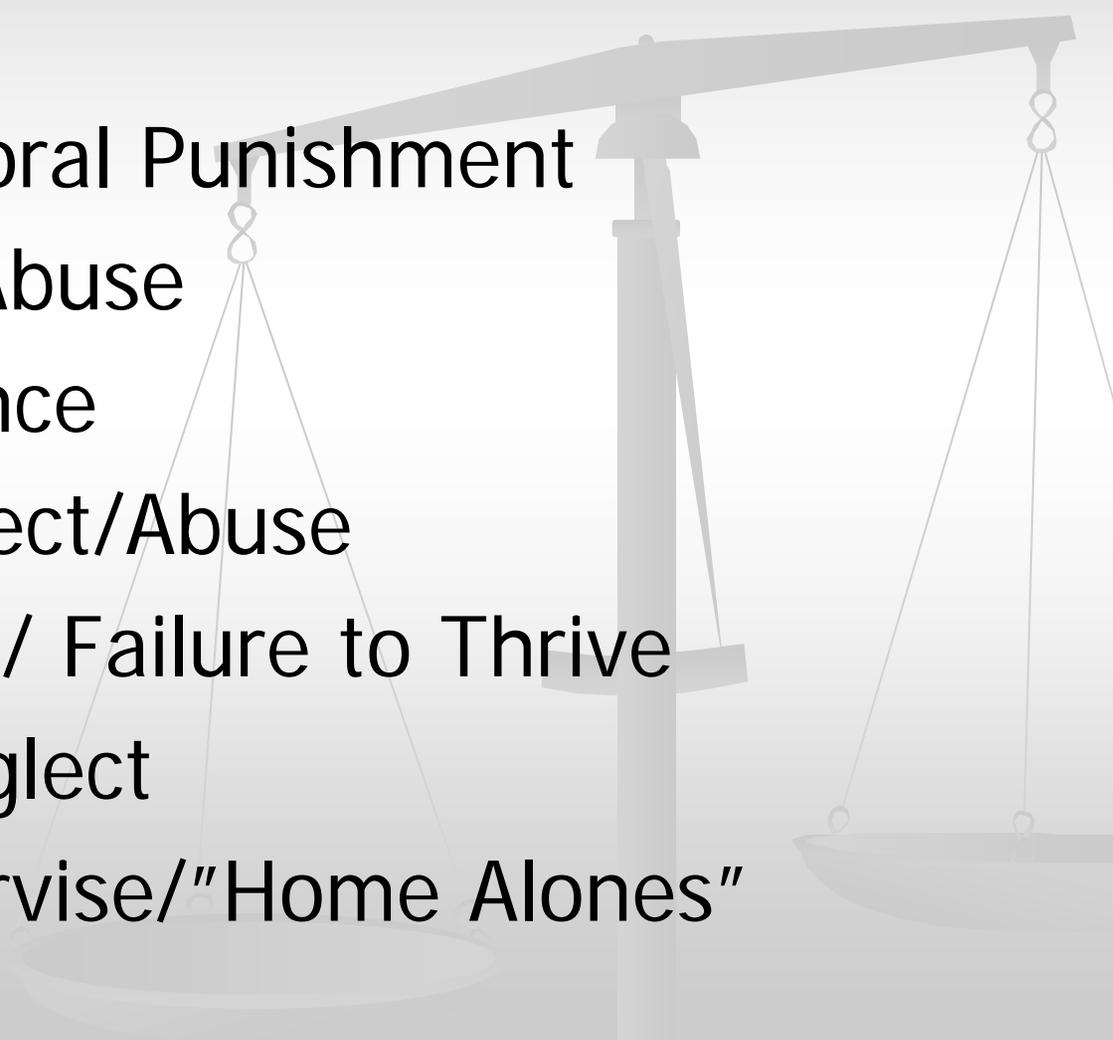
§ 1046

- (a)(vii) – no privileges from CPLR can exclude evidence – physician, psychologist, social worker, rape-crisis counselor
- What's left? – attorney, religious advisor

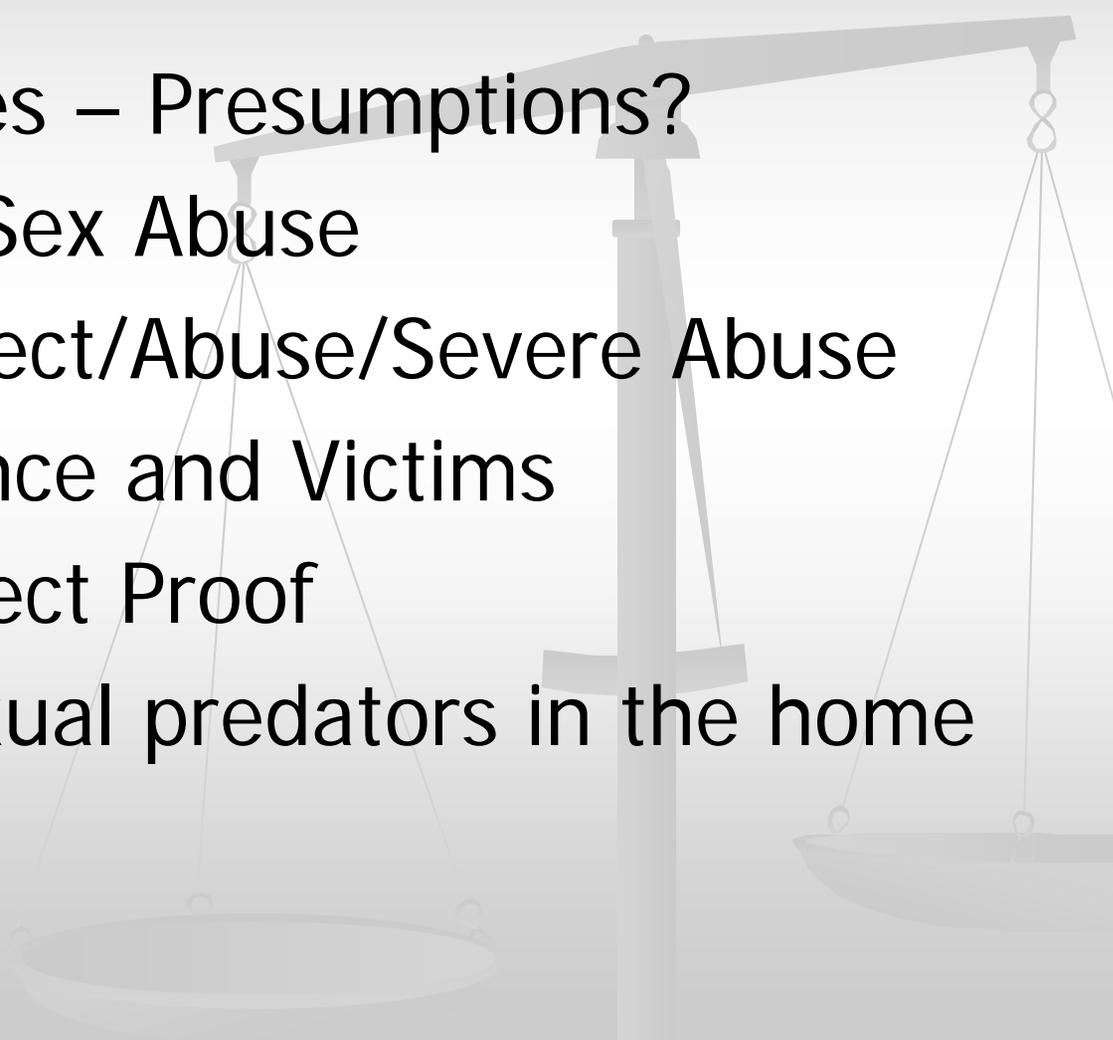
§ 1046

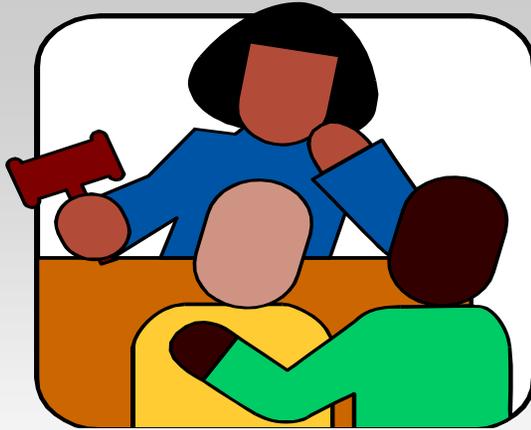
- (a) (viii) – to prove impairment of emotional, mental health or condition, can use competent opinion or expert testimony as well as “before and after” proof
- Often used in emotional neglect cases, might be used in DV cases

Types of Cases

- Physical Abuse
 - Sexual Abuse
 - Excessive Corporal Punishment
 - Parental Drug Abuse
 - Domestic Violence
 - Emotional Neglect/Abuse
 - Medical Neglect/ Failure to Thrive
 - Educational Neglect
 - Failure to Supervise/"Home Alones"
 - "Dirty house"
- 

HOT ISSUES for defense attys to consider

- Res Ipsa Injuries – Presumptions?
 - “Validators” in Sex Abuse
 - Derivative Neglect/Abuse/Severe Abuse
 - Domestic Violence and Victims
 - Emotional Neglect Proof
 - Very Hot! – Sexual predators in the home
- 

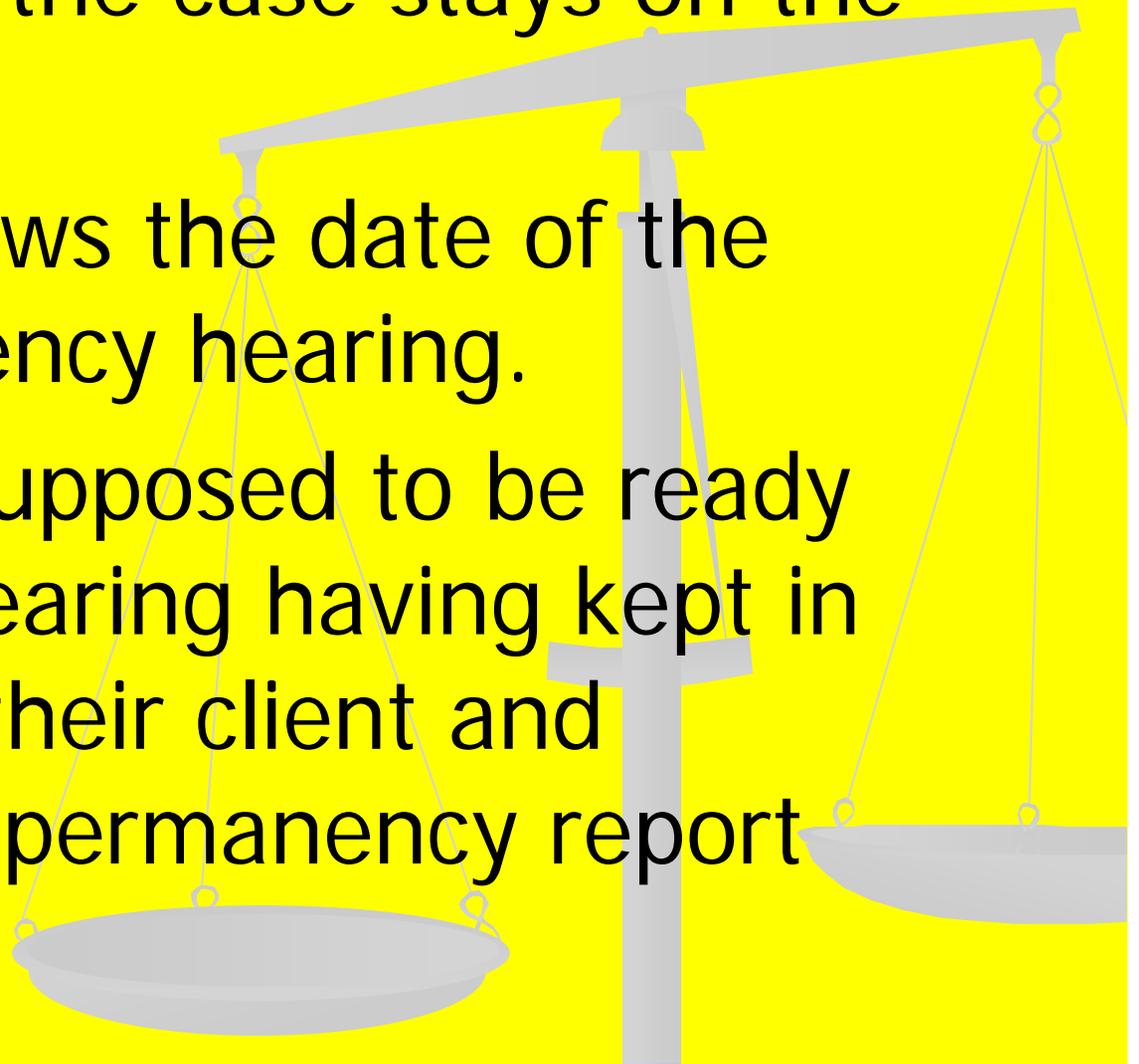


Permanency Hearings

Reasonable Efforts to Finalize the Permanency Plan

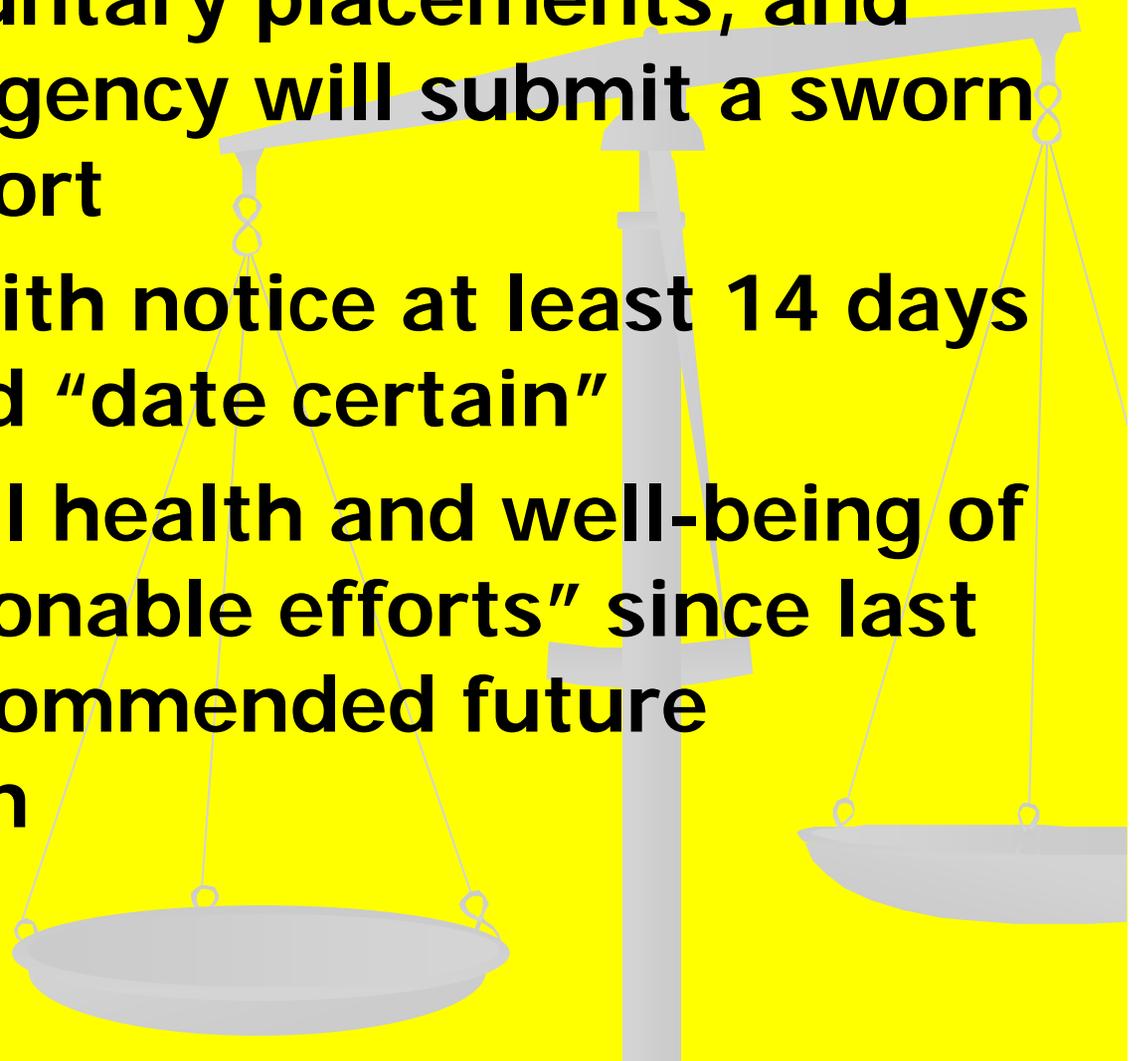
- **The court must make a finding whether the agency provided reasonable efforts to achieve a permanency goal in a permanency hearing held every 6 months**
- **A negative, late, insufficient or missing finding means the agency is ineligible for IV-E dollars until the court makes a positive finding.**
- **The finding must be detailed and child specific**

- The court maintains ongoing jurisdiction where children are out of the home -the case stays on the calendar.
- Everyone knows the date of the next permanency hearing.
- Everyone is supposed to be ready at the next hearing having kept in contact with their client and reviewed the permanency report



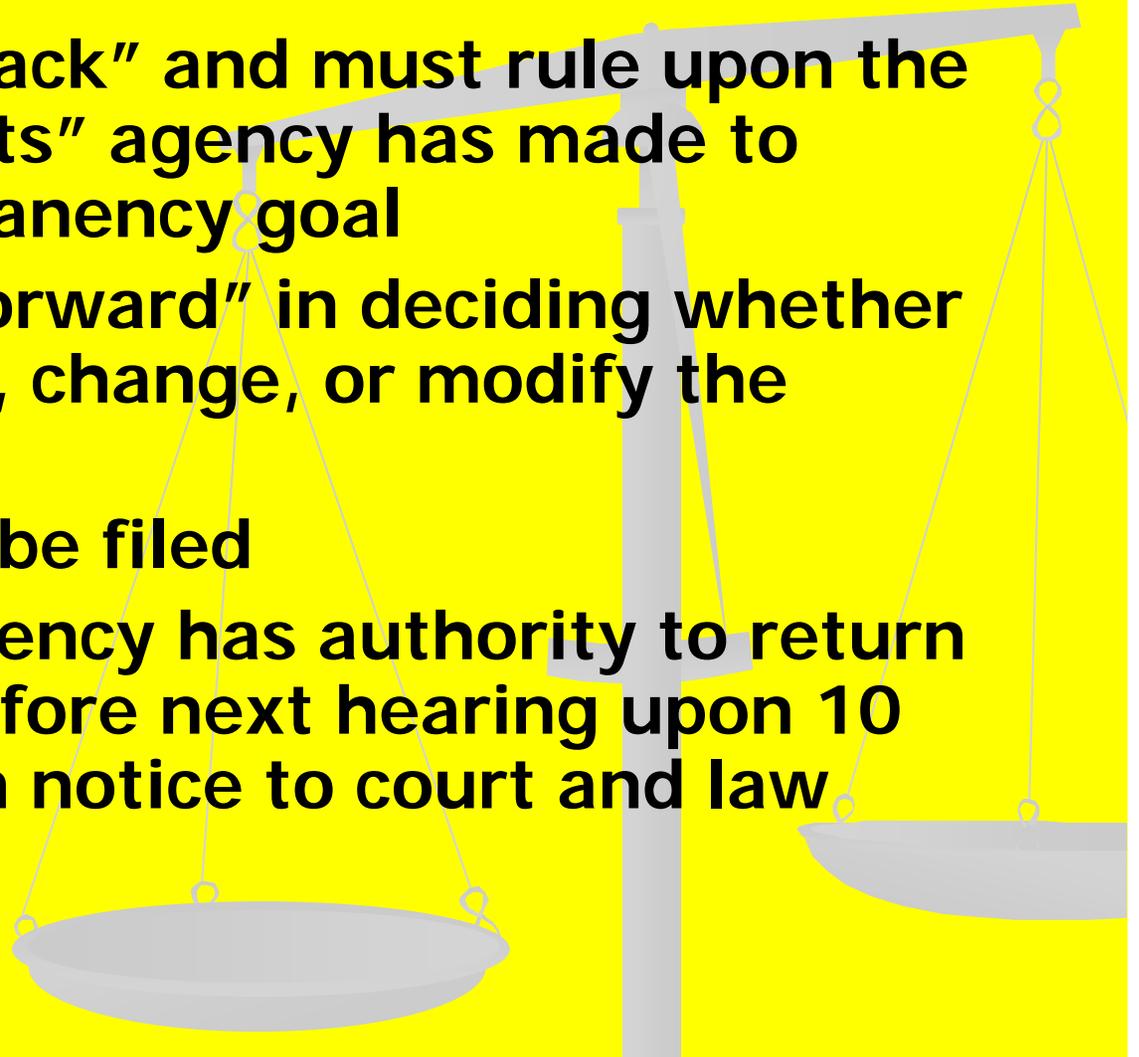
Permanency Report

- For Art. 10 placements, Art. 10 custodial placements, voluntary placements, and freed children, agency will submit a sworn permanency report
- Report mailed with notice at least 14 days before scheduled "date certain"
- Report will detail health and well-being of child, and "Reasonable efforts" since last hearing, and recommended future permanency plan



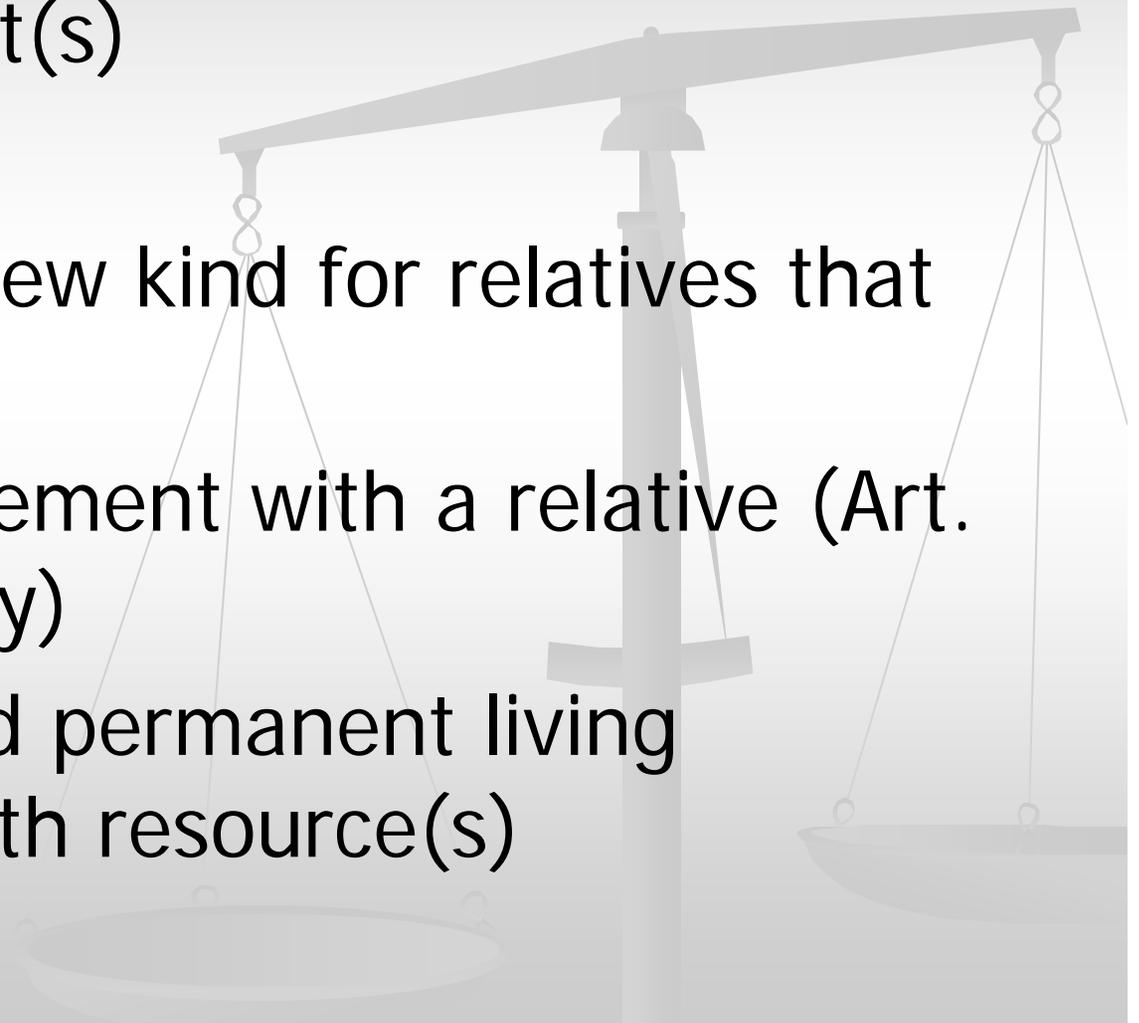
Permanency hearing court order

- Must make very specific findings on items contained in report
- Court will “look back” and must rule upon the “reasonable efforts” agency has made to achieve the permanency goal
- Court will “look forward” in deciding whether or not to approve, change, or modify the permanency plan
- Can order TPR to be filed
- Can order that agency has authority to return child to parent before next hearing upon 10 days prior written notice to court and law guardian

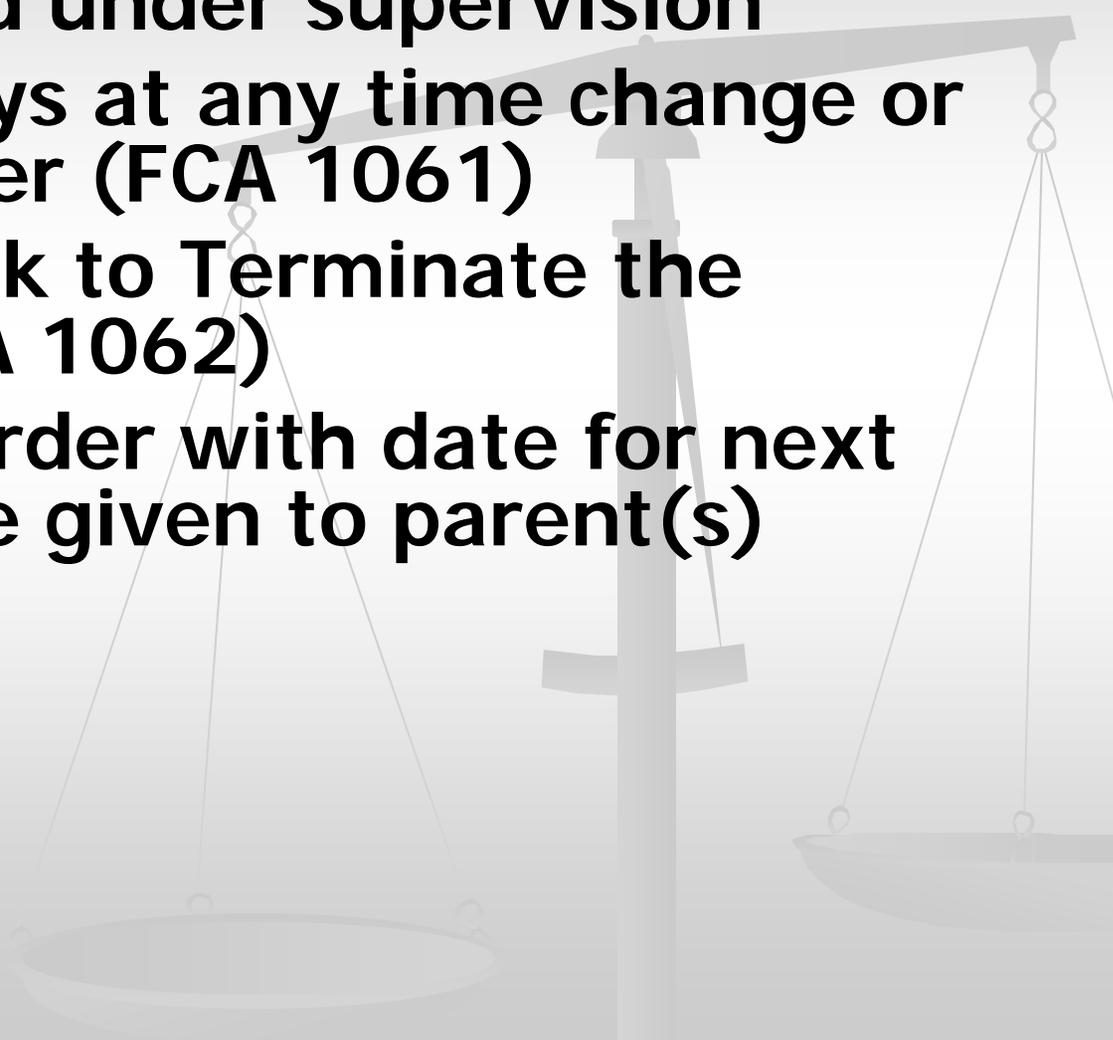


Permanency Goals

- Return to parent(s)
- Adoption
- Guardianship (new kind for relatives that is subsidized!)
- Permanent placement with a relative (Art. 6 custody mostly)
- Another planned permanent living arrangement with resource(s)



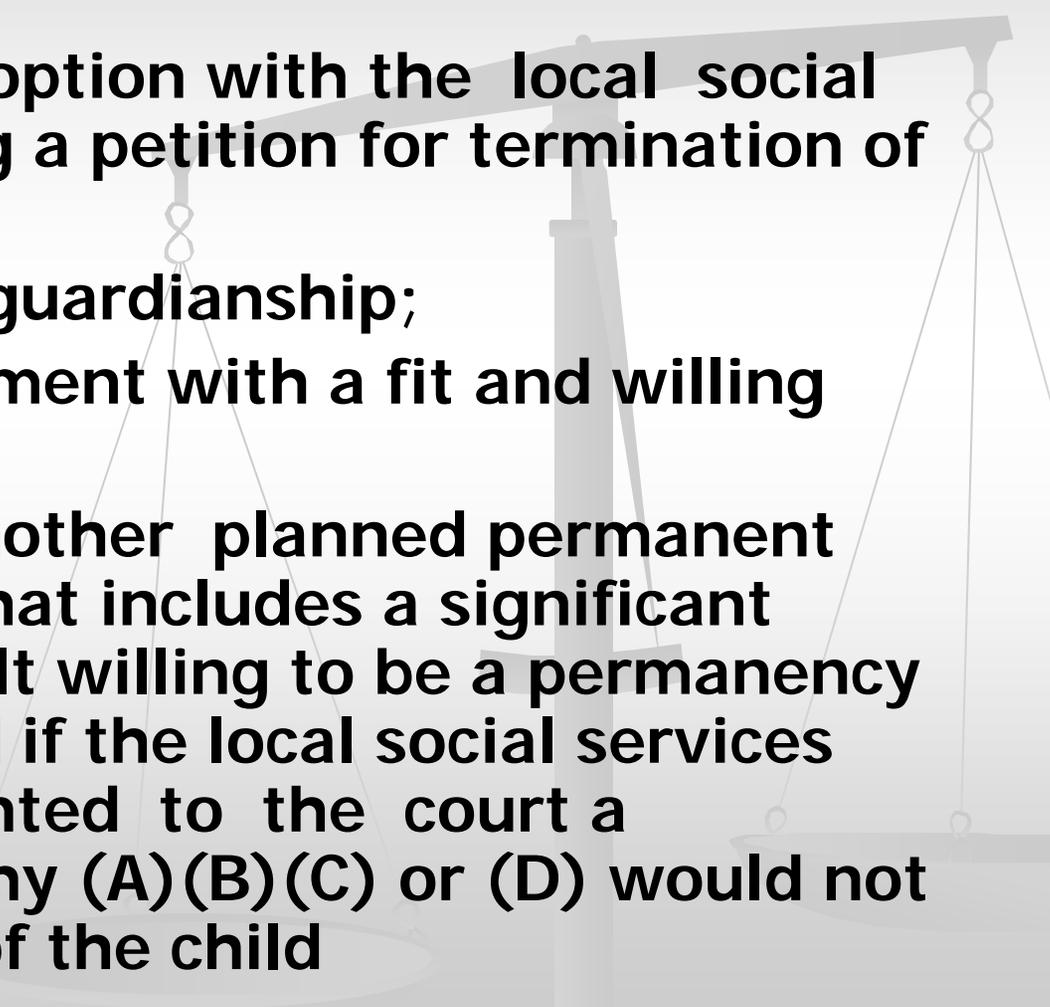
Permanency hearing court order

- Can issue or continue order of protection
 - Can return child under supervision
 - Court can always at any time change or modify any order (FCA 1061)
 - Parent may seek to Terminate the placement (FCA 1062)
 - Copy of court order with date for next hearing shall be given to parent(s)
- 

The court may:

- **RETURN OF THE CHILD:** If consistent with the child's best interests and safety, including whether the child would be at risk of abuse or neglect if returned direct that the placement of the child be terminated and the child returned with such further orders as the court deems appropriate;
- If DSS disagrees, can appeal with automatic stay
- **NO RETURN OF CHILD**
- 1. Should the permanency goal for the child should be approved or modified and
- 2. the anticipated date for achieving the goal.

The court order when no return

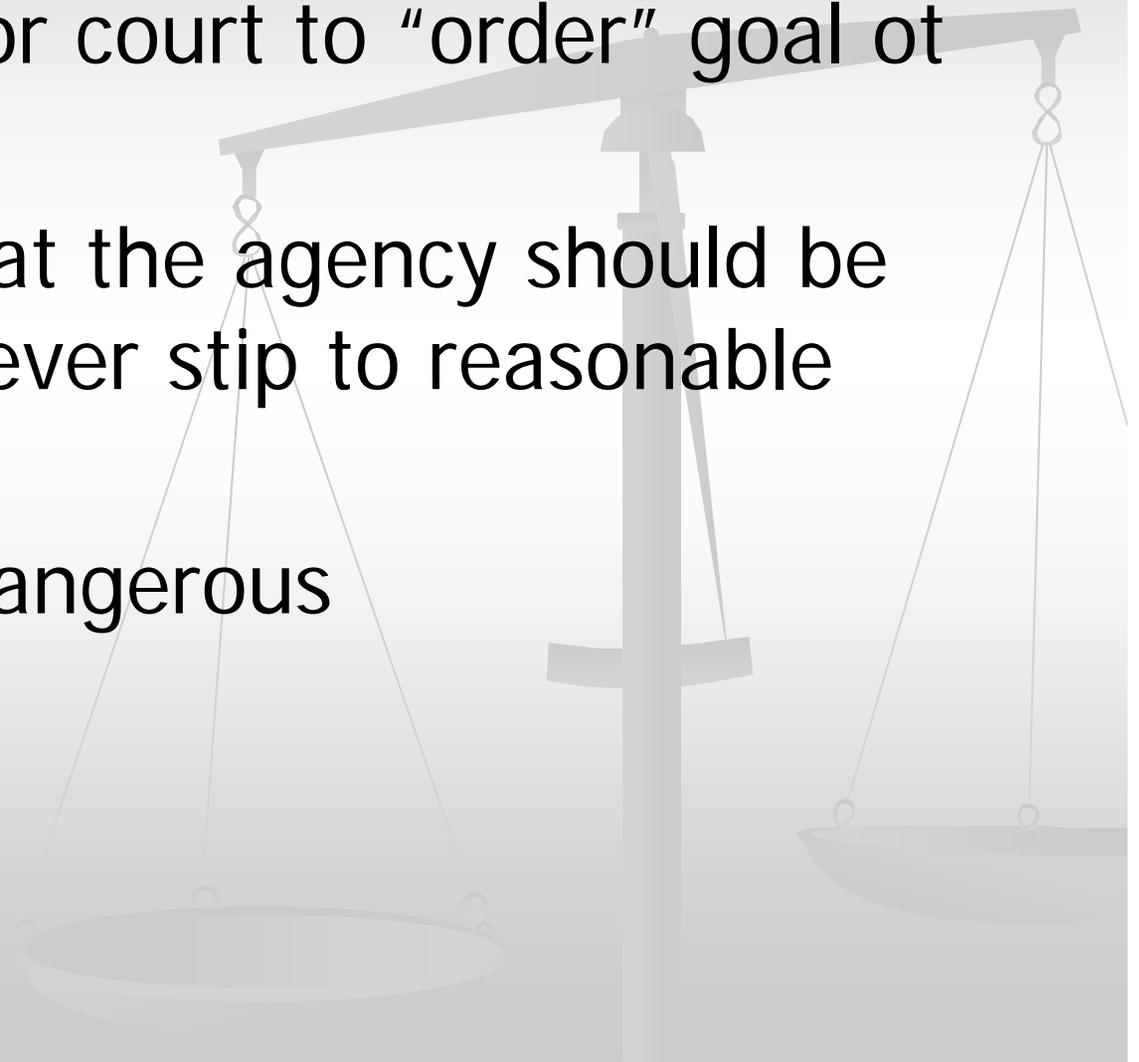
- The approved permanency goal may be:
 - (A) return to parent;
 - (B) placement for adoption with the local social services official filing a petition for termination of parental rights;
 - (C) referral for legal guardianship;
 - (D) permanent placement with a fit and willing relative; or
 - (E) placement in another planned permanent living arrangement that includes a significant connection to an adult willing to be a permanency resource for the child if the local social services official has documented to the court a compelling reason why (A)(B)(C) or (D) would not be the best interest of the child
- 

The court order when no return-con't

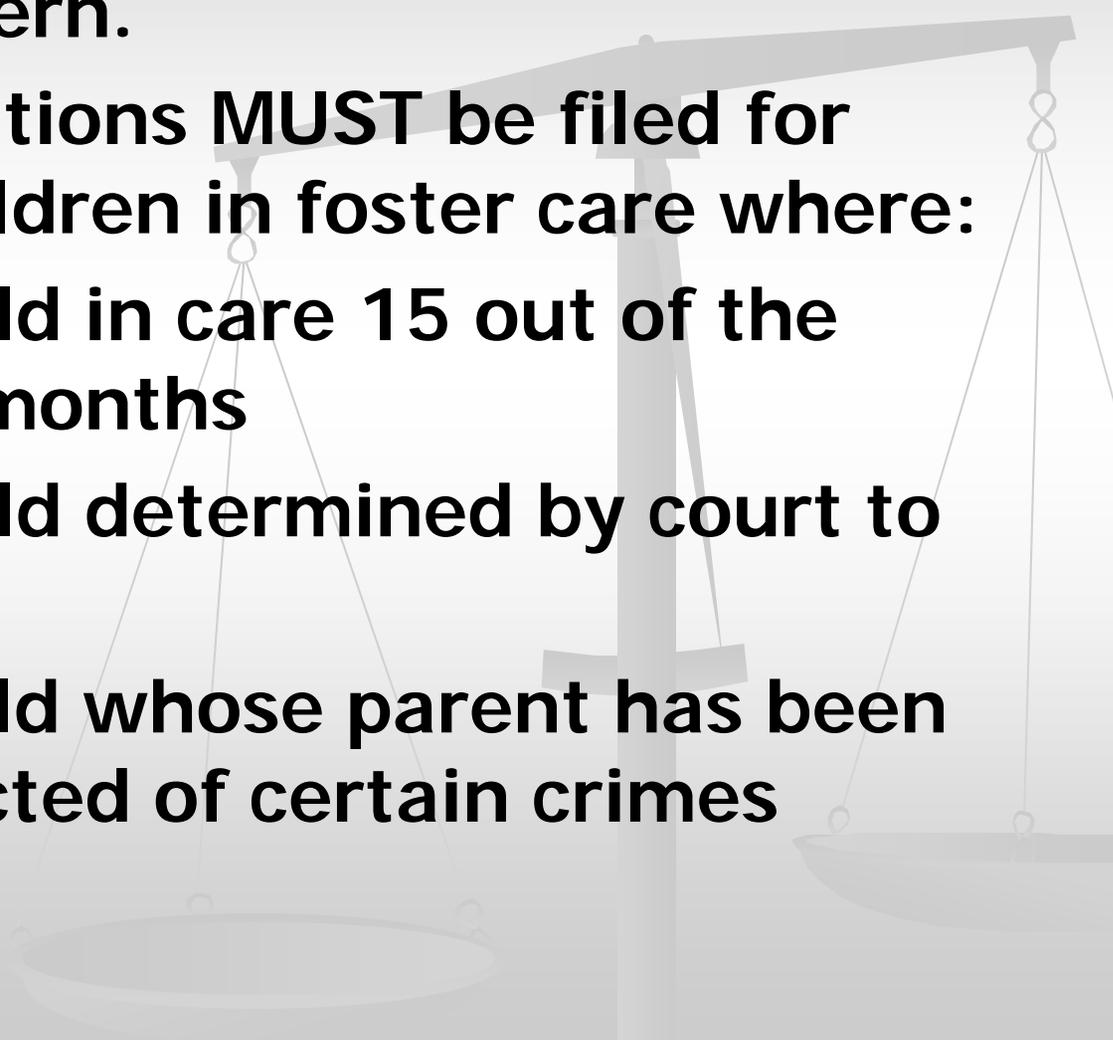
- **Alternatively, the court may place the child in the custody of a fit and willing relative or other suitable person, or continuing the placement of the child until the completion of the next permanency hearing.**
- **No placement may be continued beyond the child's 18th birthday without his or her consent and in no event past the child's 21st birthday;**

Defense Atty Tips for Perm Hearings

- Argue conflict for court to “order” goal of TPR
- Always claim that the agency should be doing more – never stip to reasonable efforts
- PH #2 is very dangerous

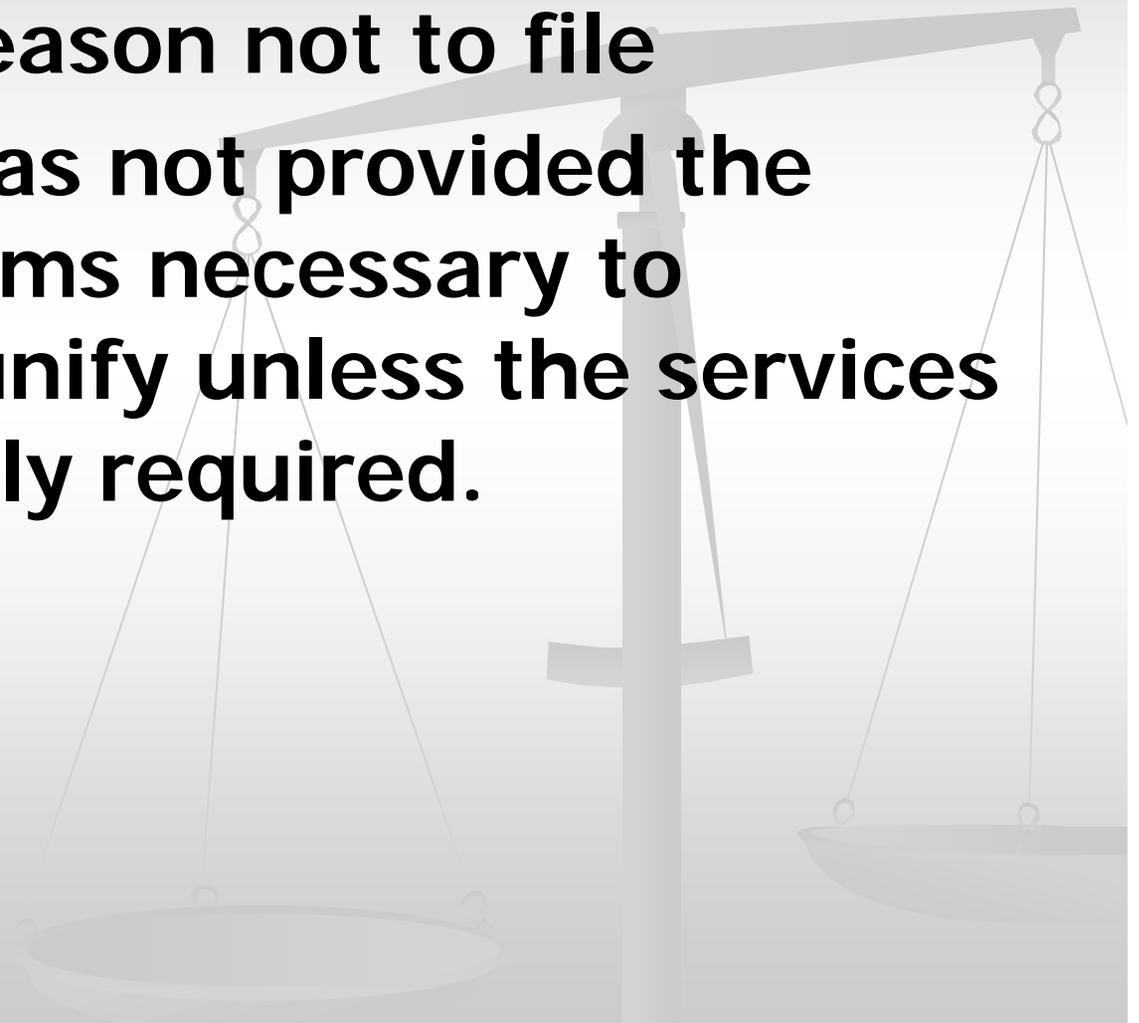


Must file TPR situations

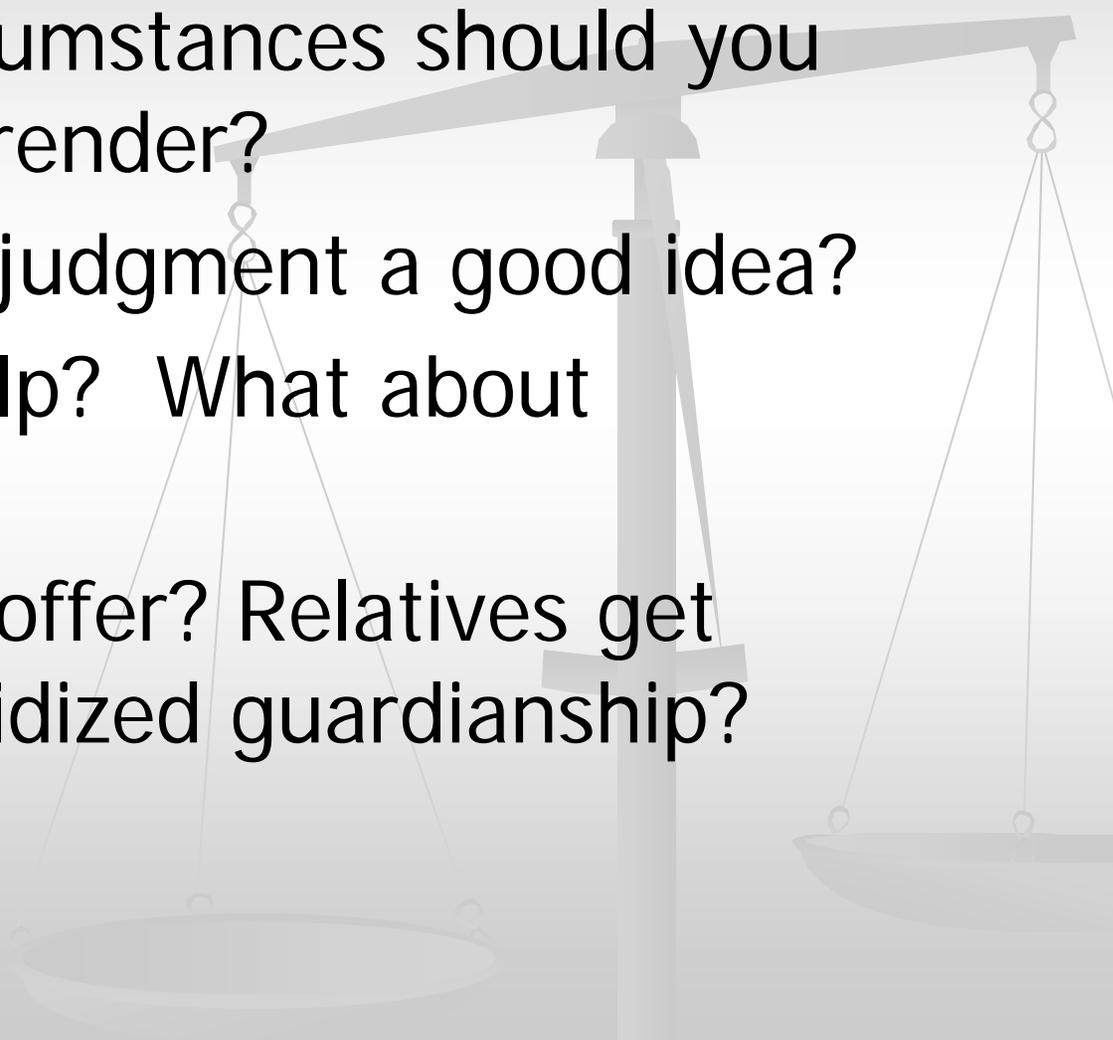
- Health and safety of child is to be paramount concern.
 - Termination petitions **MUST** be filed for regarding all children in foster care where:
 - A. Any foster child in care 15 out of the most recent 22 months
 - B. Any foster child determined by court to be abandoned
 - C. Any foster child whose parent has been criminally convicted of certain crimes
- 

Except to must file TPR situations

- A. The child is in the care of a relative or**
- B. Compelling reason not to file**
- C. The agency has not provided the services it deems necessary to attempt to reunify unless the services were not legally required.**



Is there anything to do if faced with a TPR?

- Under what circumstances should you recommend surrender?
 - Is a suspended judgment a good idea?
 - Does stalling help? What about appealing?
 - Other things to offer? Relatives get custody or subsidized guardianship?
- 

CONDITIONAL
SURRENDERS
AND
ADOPTIONS WITH
CONDITIONS

SSL 383-c

SSL 384

FCA 1055-a

DRL 112-b



Conditional surrenders, cont'd

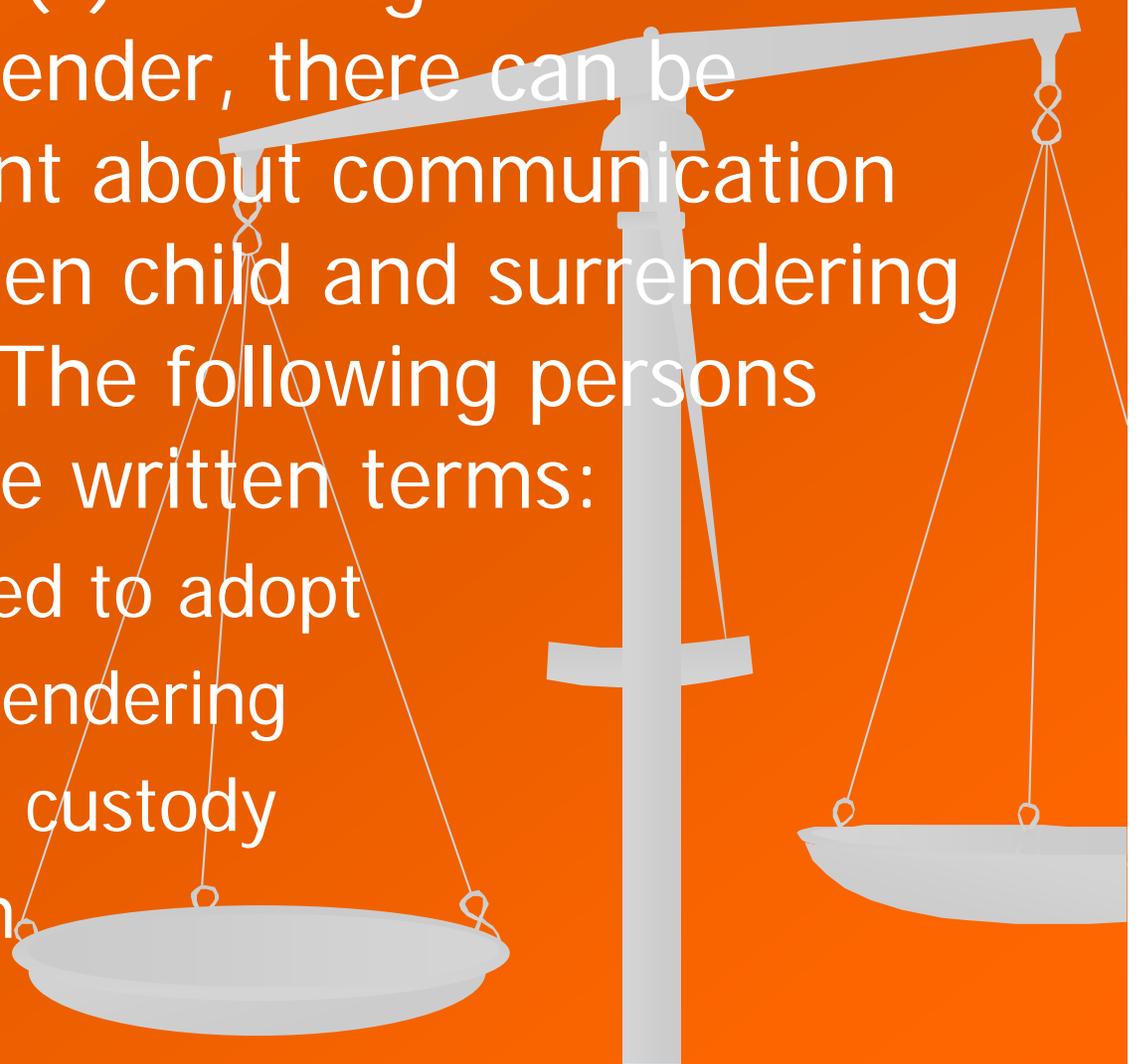
- Surrender of child in foster care to agency or surrender of any child to agency can include terms and conditions
- If conditioned upon adoption by a particular person, person must be certified or approved foster parent or “fully investigated and approved” adoptive parent



Conditional surrenders, con't

If particular person(s) is designated to adopt in the surrender, there can be written agreement about communication or contact between child and surrendering birth parent(s). The following persons must agree to the written terms:

- person(s) designated to adopt
- birth parent(s) surrendering
- agency with care & custody
- child's law guardian

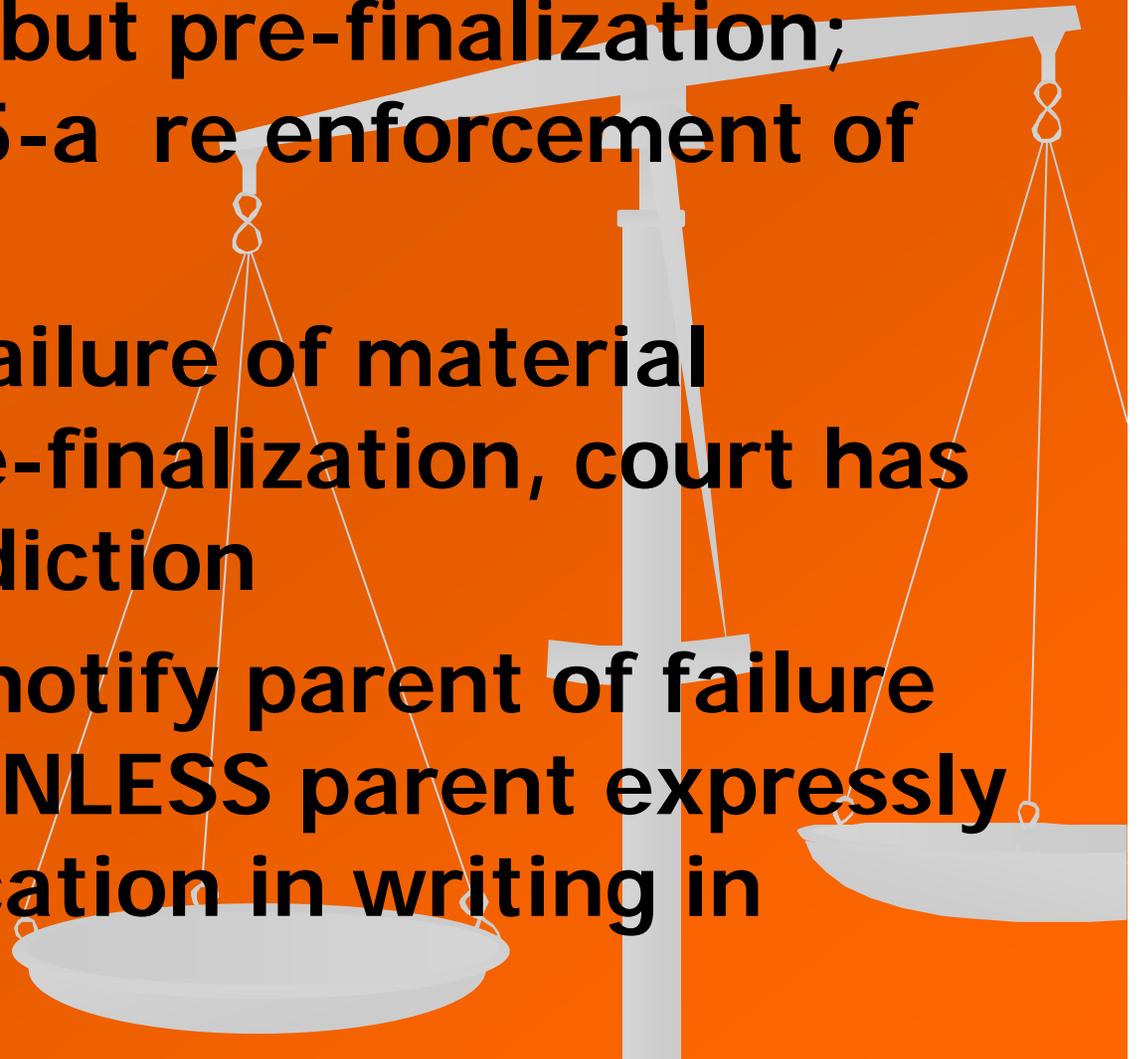


Conditional surrenders, cont'd

Enforcement of terms

**Post-surrender but pre-finalization;
new FCA 1055-a re enforcement of
terms:**

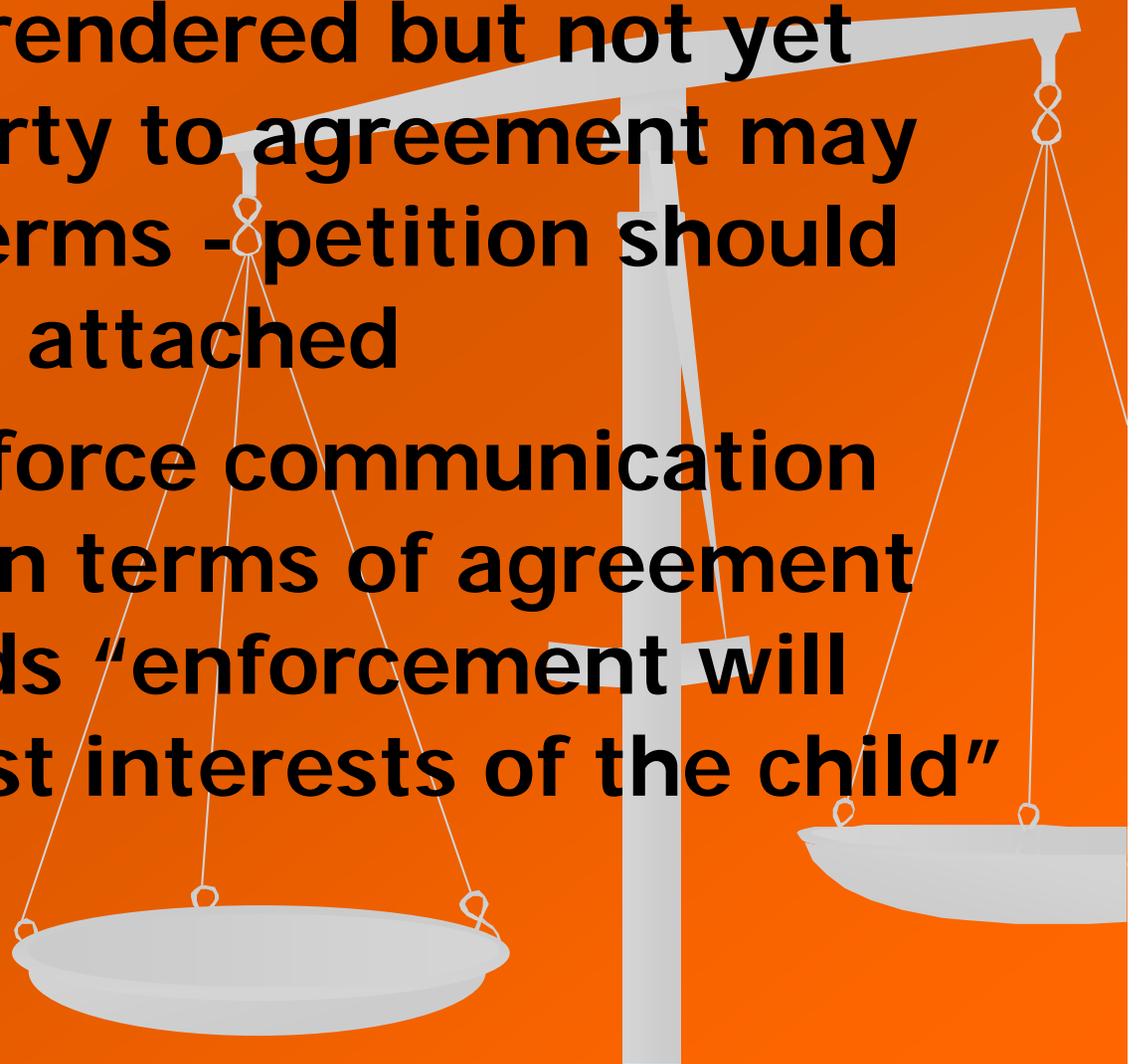
- **"substantial failure of material condition" pre-finalization, court has ongoing jurisdiction**
- **agency must notify parent of failure of condition UNLESS parent expressly waived notification in writing in surrender**



Conditional surrenders, cont'd

Enforcement of terms

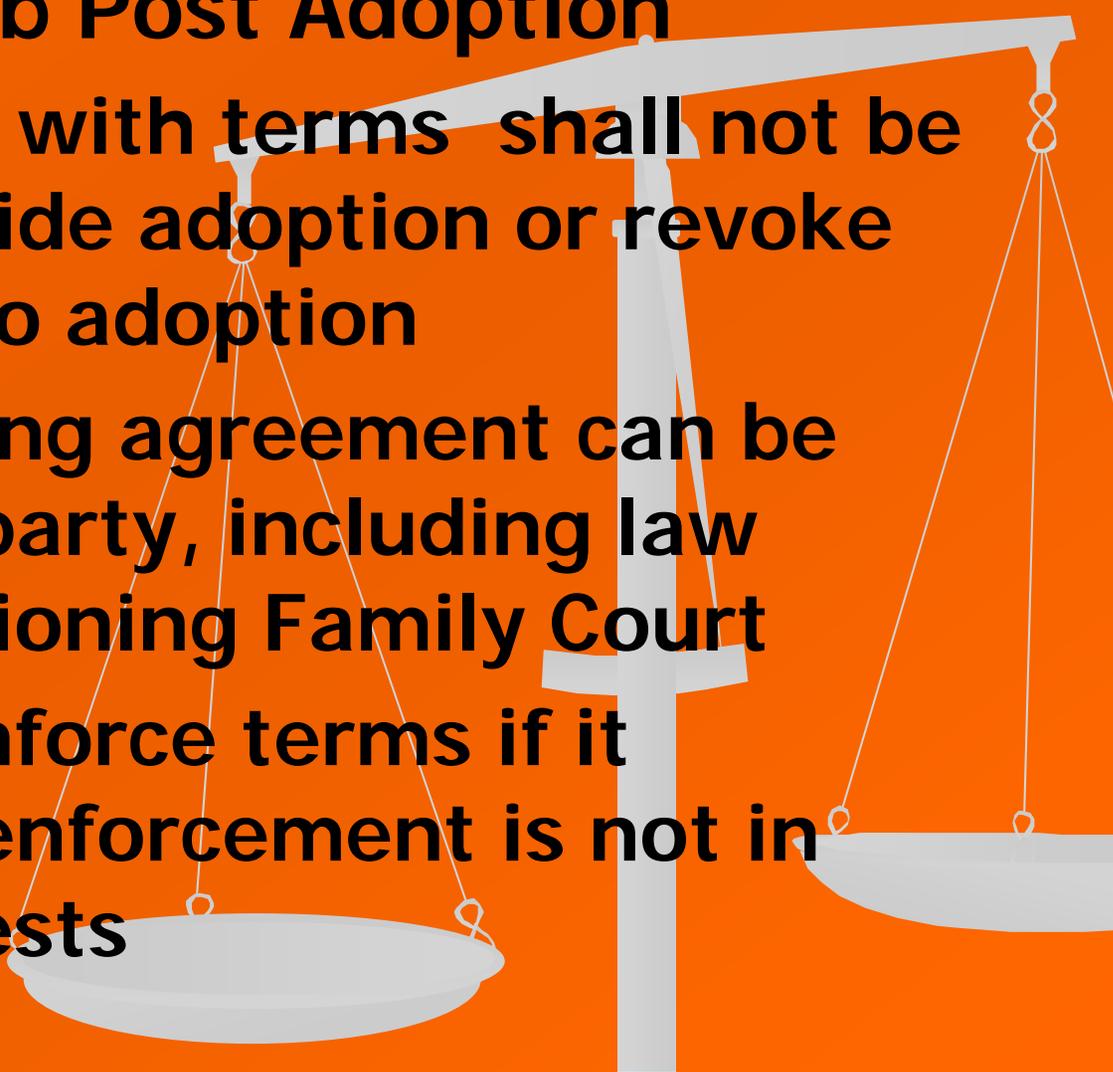
- Where child surrendered but not yet adopted, any party to agreement may file to enforce terms - petition should have agreement attached
- Court "shall" enforce communication and contact upon terms of agreement unless court finds "enforcement will not be in the best interests of the child"



Conditional surrenders, cont'd

Enforcement of terms

DRL 112-b Post Adoption

- Failure to comply with terms shall not be grounds to set aside adoption or revoke written consent to adoption
 - Order incorporating agreement can be enforced by any party, including law guardian by petitioning Family Court
 - Court shall not enforce terms if it determines that enforcement is not in child's best interests
- 

Termination – SSL§384-b

Clear & Convincing



Abandonment

Six Months In Care

Most recent 6 months:

- No visits or communication or no substantial contact
- Not discouraged or prevented visitation
- Diligent efforts doesn't have to be proved
- Dispositional hearing not required

Abandonment

Abandonment

- Child in care of county or agency for **six months immediately prior** to date of filing petition **and**
- Parent failed to visit child or failed to communicate with child or failed to contact agency

Abandonment (cont.)

- Or any such visits/communications/contacts were inconsequential (lots of caselaw on this) **and**
- Parent physically and financially able to visit/communicate/contact **and**
- Parent not prevented or discouraged from doing so by agency or court **and**
- Parent evinced an intent to abandon.

Social Services Law 384-b 5(a)(b)

- The ability to visit or communicate is legally presumed unless there is evidence to the contrary.
- The subjective intent of the parent unsupported by evidence shall not preclude a finding of abandonment.
- The court cannot require a showing of diligent efforts to encourage the parent to visit or communicate.

Permanent Neglect

One Year in Foster Care or 15 of Last 22 Months

- Parent fails to:
 - Maintain contact or
 - Plan for return

AND Agency provided diligent efforts unless court excuses

Insubstantial or Infrequent Contacts

Visits or communication which is of such a character as to overtly demonstrate a lack of affection and concerned parenthood shall not be deemed a substantial contact.



Failure to Plan

- Take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a reasonable period of time under the available financial circumstances.
- The plan must be realistic and feasible.
- Court may consider the failure of the parent to utilize medical, psychiatric psychological, and other social and rehabilitative services and material resources made available to the parent.

Diligent Efforts MUST be Proven Unless Excused:

- Visitation
- Appropriate assessment and services and transportation and funding
- Planning with parent
- Keeping parent informed



What Are “Diligent Efforts to Reunify Foster Child with Parent”?

- Diligent efforts are reasonable efforts.
- Social Services Law 384-b 7 (f) Reasonable attempts by an authorized agency to assist, develop, and encourage a meaningful relationship between the parent and child, include:
 - (1) **consultation and cooperation** with the parents in developing a plan for appropriate services to the child and his/her family;
 - (2) making suitable arrangements for the parents to **visit the child**;

What Are “Diligent Efforts to Reunify Foster Child with Parent”?

(3) provision of services and other assistance

to the parents, except incarcerated parents, so that problems preventing the discharge of the child from care may be resolved or ameliorated;

(4) informing the parents at appropriate intervals of the child’s progress, development, and health.

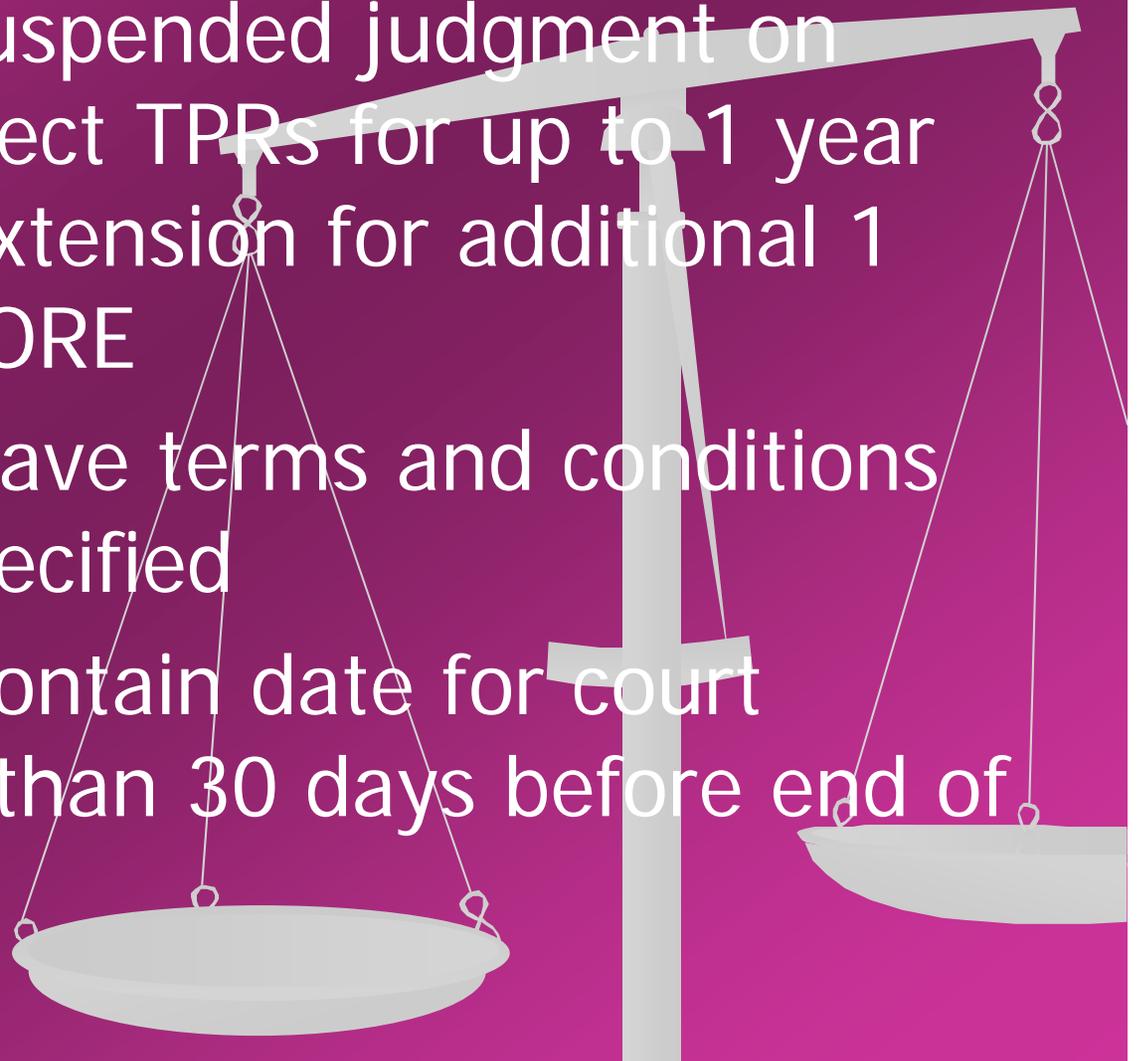
SUSPENDED
JUDGMENTS ON
PERMANENT
NEGLECT TPRS



FCA 633

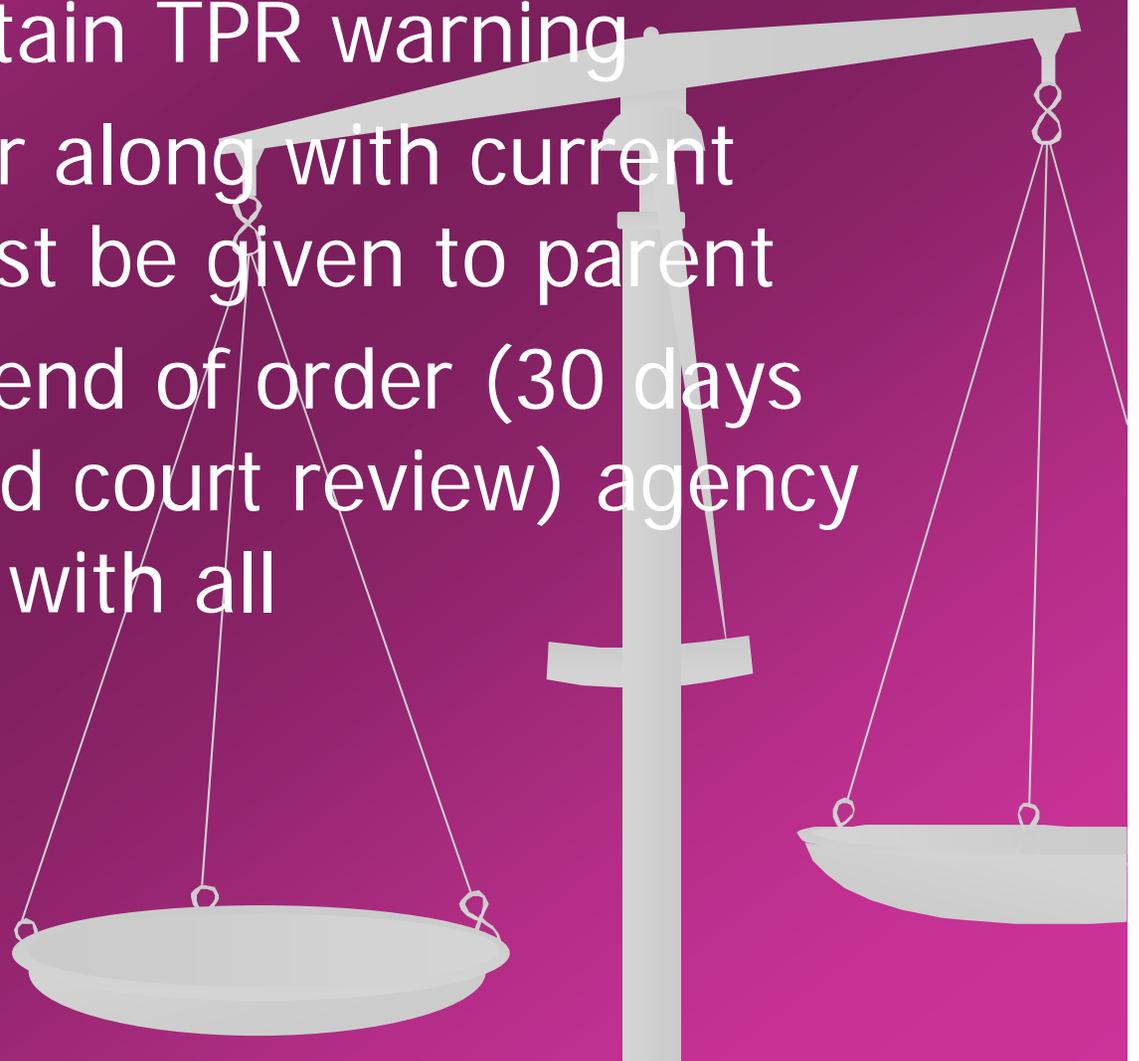
Court can issue suspended judgment on permanent neglect TPRs for up to 1 year and can issue extension for additional 1 year, but NO MORE

- SJ order must have terms and conditions and duration specified
- SJ order must contain date for court review no later than 30 days before end of order



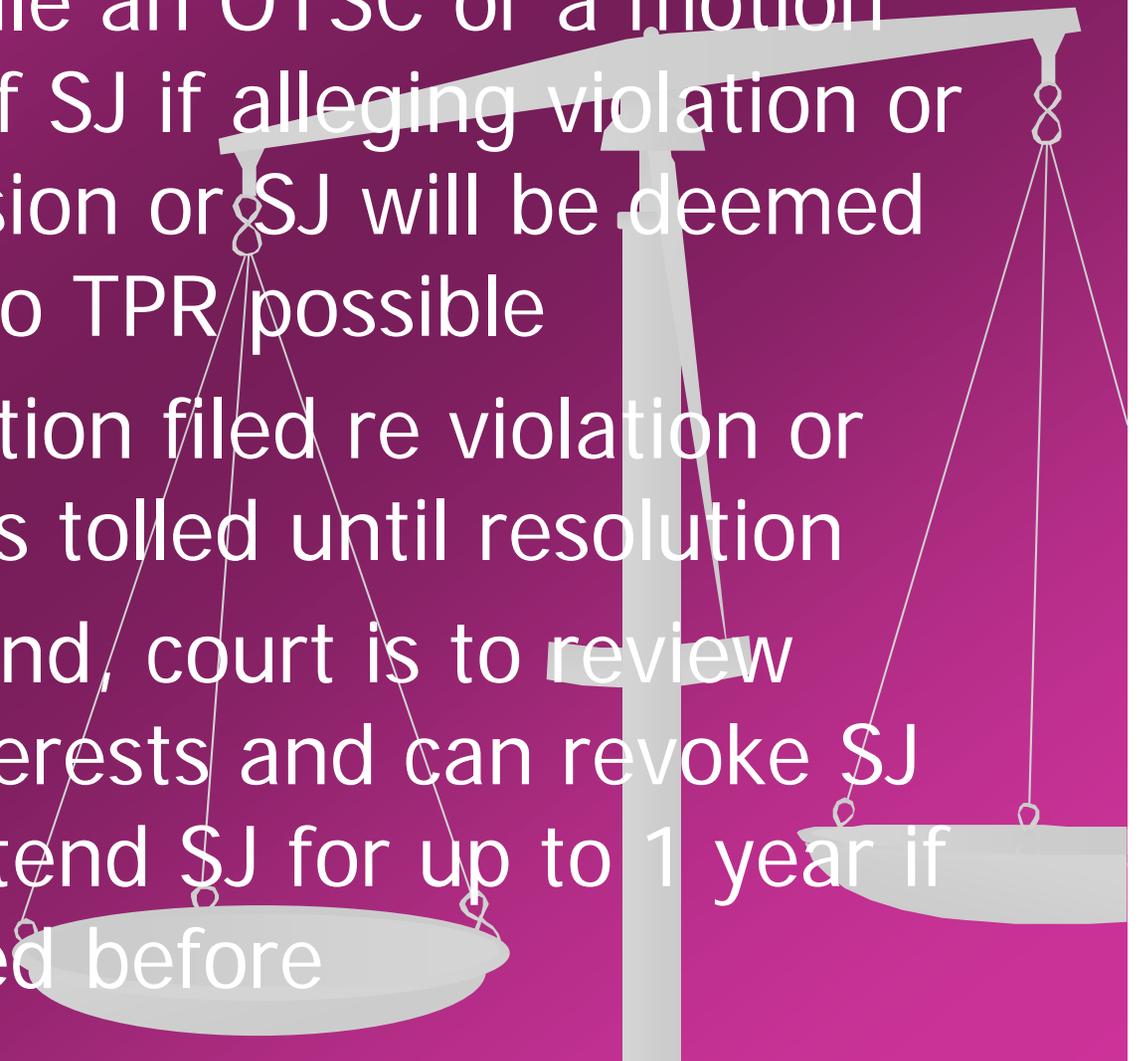
Suspended judgments, cont'd

- Order must contain TPR warning.
- Copy of SJ order along with current service plan must be given to parent
- 60 days before end of order (30 days before scheduled court review) agency must file report with all



Suspended judgments, cont'd

- Agency must file an OTSC or a motion BEFORE end of SJ if alleging violation or seeking extension or SJ will be deemed satisfied and no TPR possible
- If OTSC or motion filed re violation or extension, SJ is tolled until resolution
- If violation found, court is to review child's best interests and can revoke SJ and TPR or extend SJ for up to 1 year if not so extended before



Mental Illness/Mental Retardation

One Year In Care

Parent presently mentally ill or mentally retarded as defined by statute

- Expert examines parent and testifies
- Must not be able to parent for the foreseeable future
- Diligent efforts do not have to be proven
- Dispositional hearing not required

Mental Illness/Retardation

Mental Illness or Mental Retardation

- Child has been in care of county/agency for the **last year** prior to filing the TPR petition **and**
- Parent is mentally ill (expert evidence needed) **or**
- Parent is mentally retarded (expert evidence needed) **and**
- As the result of mental illness or mental retardation parent cannot now provide proper and adequate care for the child and such impairment is likely to remain in the foreseeable future.

Mental Illness

Mental illness means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

Mental Retardation

Mental retardation means subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

Severe Abuse/Repeated Abuse

Child in Care

- Severe abuse based on certain family court or criminal court findings
- Repeated abuse based on more than one family court abuse finding same child or sibling
- Must show diligent efforts unless court has previously ruled or finds exception
- Must have dispositional hearing

Severe Abuse (cont.)

- Diligent/reasonable efforts were made to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child **or**
- The family court previously granted a FCA 1039-b “no reasonable efforts” required to reunify order **and**
- Such diligent/reasonable efforts have been unsuccessful and are likely to be unsuccessful in the foreseeable future.

Repeated Abuse

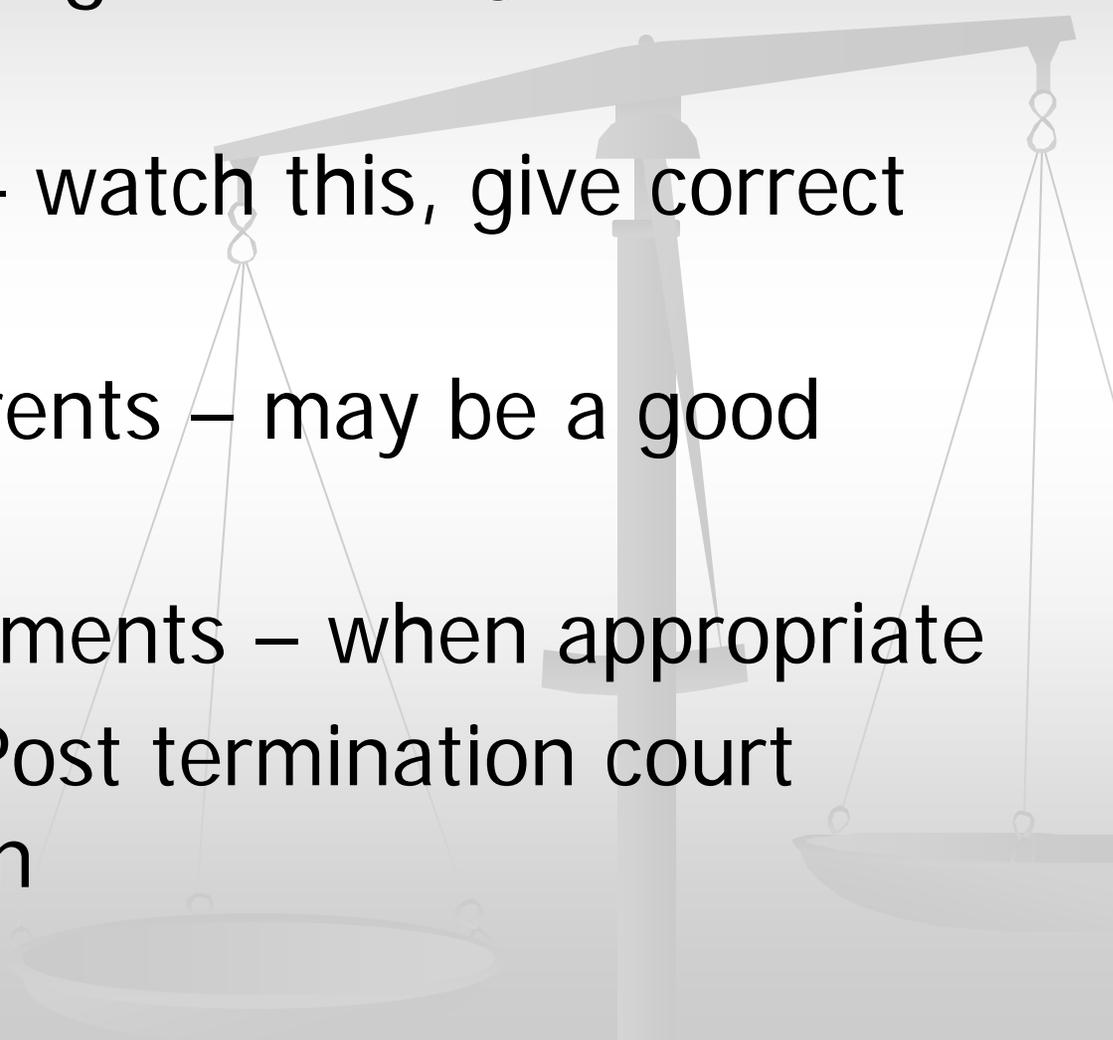
Repeatedly Abused

- Child in care of county or agency **and**
- This child has been found to be abused (case #2) [under FCA §1012 (e)(i) or (iii)] **and**
- This child and/or another child of this parent was previously adjudicated as abused(case #1) [under FCA §1012 (e)(I) or(iii)] within **5 years** of filing abuse case #2 **and**

Repeated Abuse (cont.)

- **Diligent/reasonable efforts** were made to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child or family court previously granted a FCA 1039-b “no reasonable efforts” required to reunify order **and**
- Such **diligent/reasonable efforts** have been unsuccessful and are likely to be unsuccessful in the foreseeable future.

Hot Topics

- Unwed Father's Rights – DRL§ 111 and 111(a)
 - Denier parents – watch this, give correct advice
 - Incarcerated Parents – may be a good appellate area
 - Suspended Judgments – when appropriate
 - Hottest of all – Post termination court ordered visitation
- 

As long as you are here.....

- What else is new?



TPR and Incarcerated/Inpatient Parents



Chapter 113 Laws of 2010 currently in effect!

- Provides a new reason that a local district may choose not to file a TPR at 15/22 months as well as some things court must consider if TPR filed
- Local district need not file against a parent even though the 15 month time frame has arrived if the parent is or was incarcerated or in an inpatient facility for substance abuse
- The described parent's situation is not a defense to a filed TPR, this only provides a reason for a district to choose not to file what they would otherwise be legally obligated to file

AND...

At the 15 month mark, the district can choose not to file a TPR if

- The incarceration/inpatient status is a significant factor for why child is in foster care AND
- The parent has a meaningful role in the child's life based on letters, phone calls, visits and communication with the child, has worked with the agency and other persons in the child's life to comply with the service plan and worked on the relationship and it is in child's best interests to have parent remain in child's life AND
- There is no other compelling reason

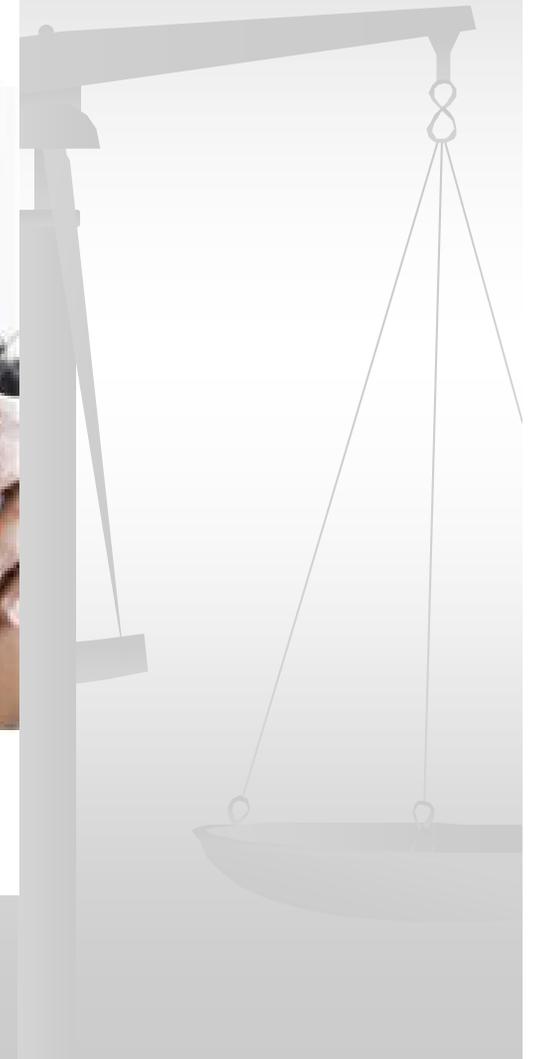
Does it change the TPR grounds?

- It does not add any new grounds or take away any old grounds

But TPR grounds of perm neglect have been affected:

- In perm neglect TPRs the court is to consider any “particular constraints” and “special circumstances” that limited the family contact or availability of services
- Also , in the context of the exception to the requirement of diligent efforts proof in perm neglect TPRs, where there is an exception when a parent has not advised an agency where they are living for a 6 months period, the court MAY consider “particular delays or barriers” that parents may have had in letting agencies know where the parent is located
- Haven't courts always done that? It may take case law to discern if this is a significant change.

Restoration of Parental Rights



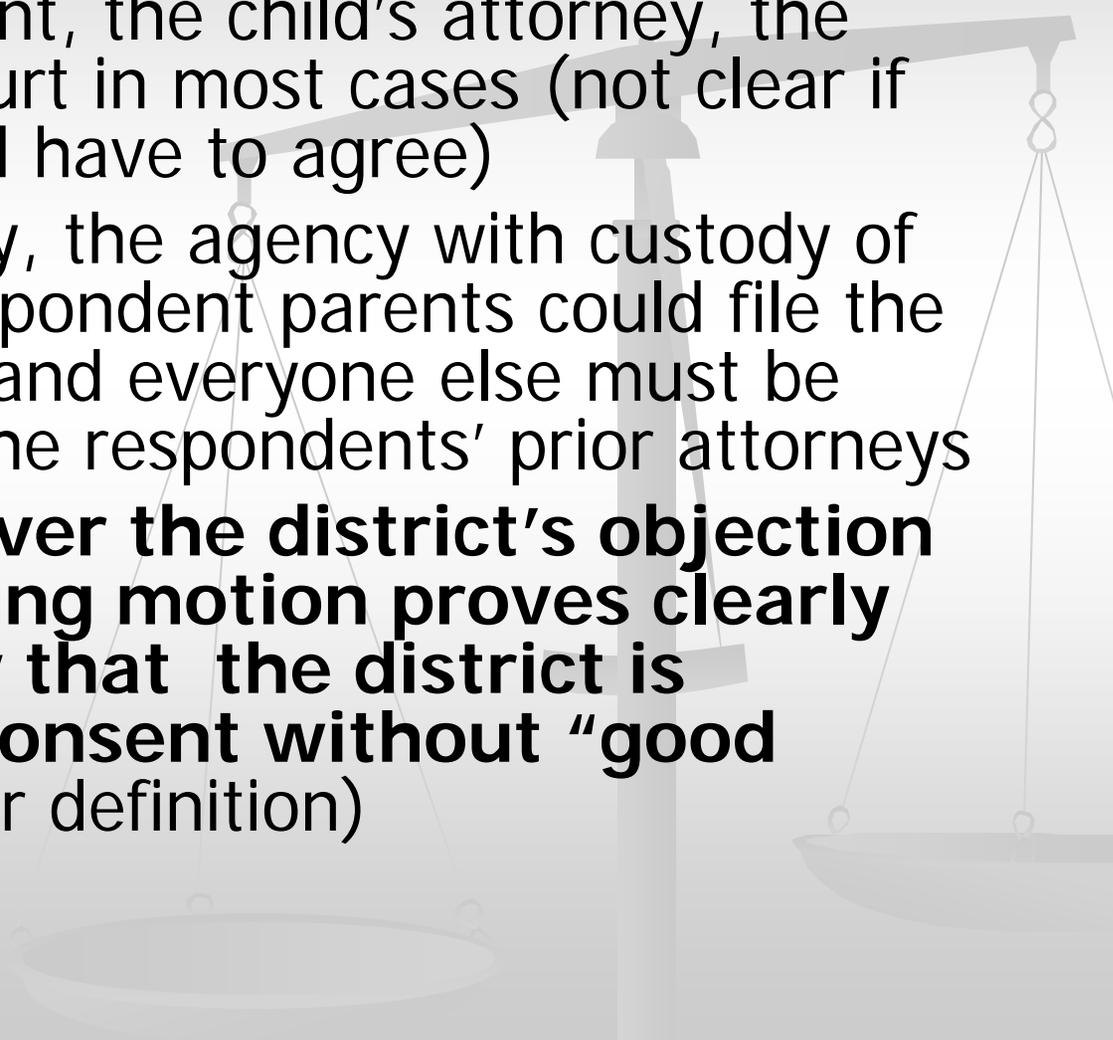
Restoration of Parental Rights

- Chapter 343 Laws of 2010 – Effective 11/11/10
- Allows Family Court to reinstate the parental rights of a parent after a TPR and return the child to the custody and guardianship of a birth parent or parents
– new FCA § 635- 637

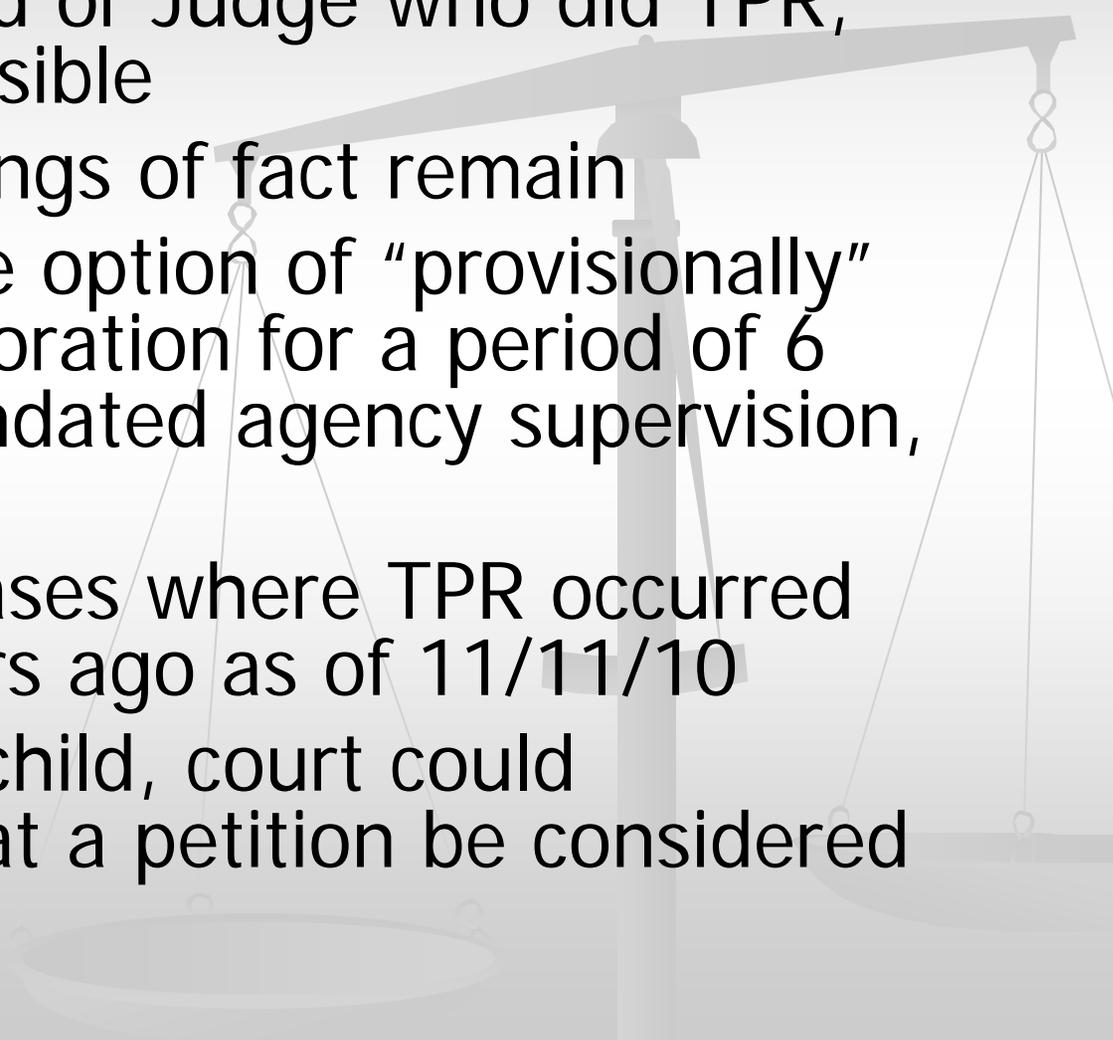
WOW! When would the court be able to do that?

- TPR was over **2 years earlier** and was on abandonment, mental illness, mental retardation or permanent neglect
- Child is **at least 14**, still in foster care and does not have a goal of adoption
- **Clear and convincing proof** that it is in the child's best interests—presented by the person petitioning for the restoration

Would everyone have to agree to such a motion?

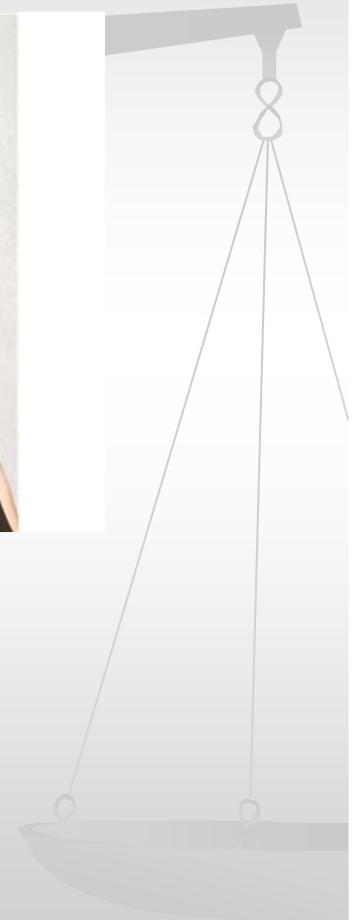
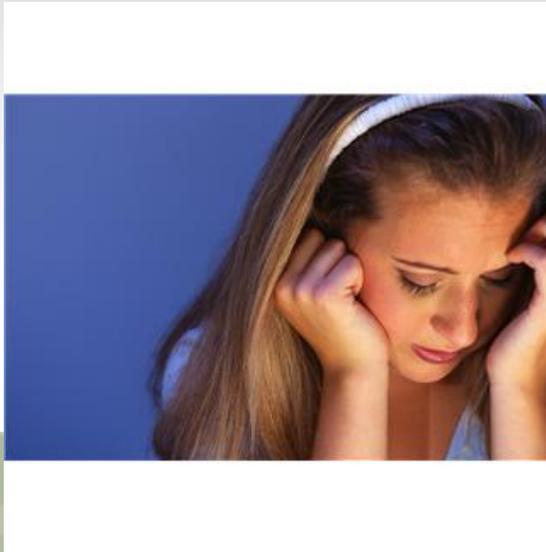
- The child, the parent, the child's attorney, the agency and the court in most cases (not clear if both parents would have to agree)
 - The child's attorney, the agency with custody of the child or the respondent parents could file the petition to restore and everyone else must be served as well as the respondents' prior attorneys
 - **Court can do it over the district's objection where person filing motion proves clearly and convincingly that the district is withholding its consent without "good cause"** (no further definition)
- 

Restoration of Parental Rights



- Case continues with the court that had been doing PHs of child or Judge who did TPR, same attys if possible
- The original findings of fact remain
- Court would have option of “provisionally” granting the restoration for a period of 6 months with mandated agency supervision, reports
- Could apply to cases where TPR occurred more than 2 years ago as of 11/11/10
- In PHs on freed child, court could “recommend” that a petition be considered

Trial discharges of youth and voluntary return to care



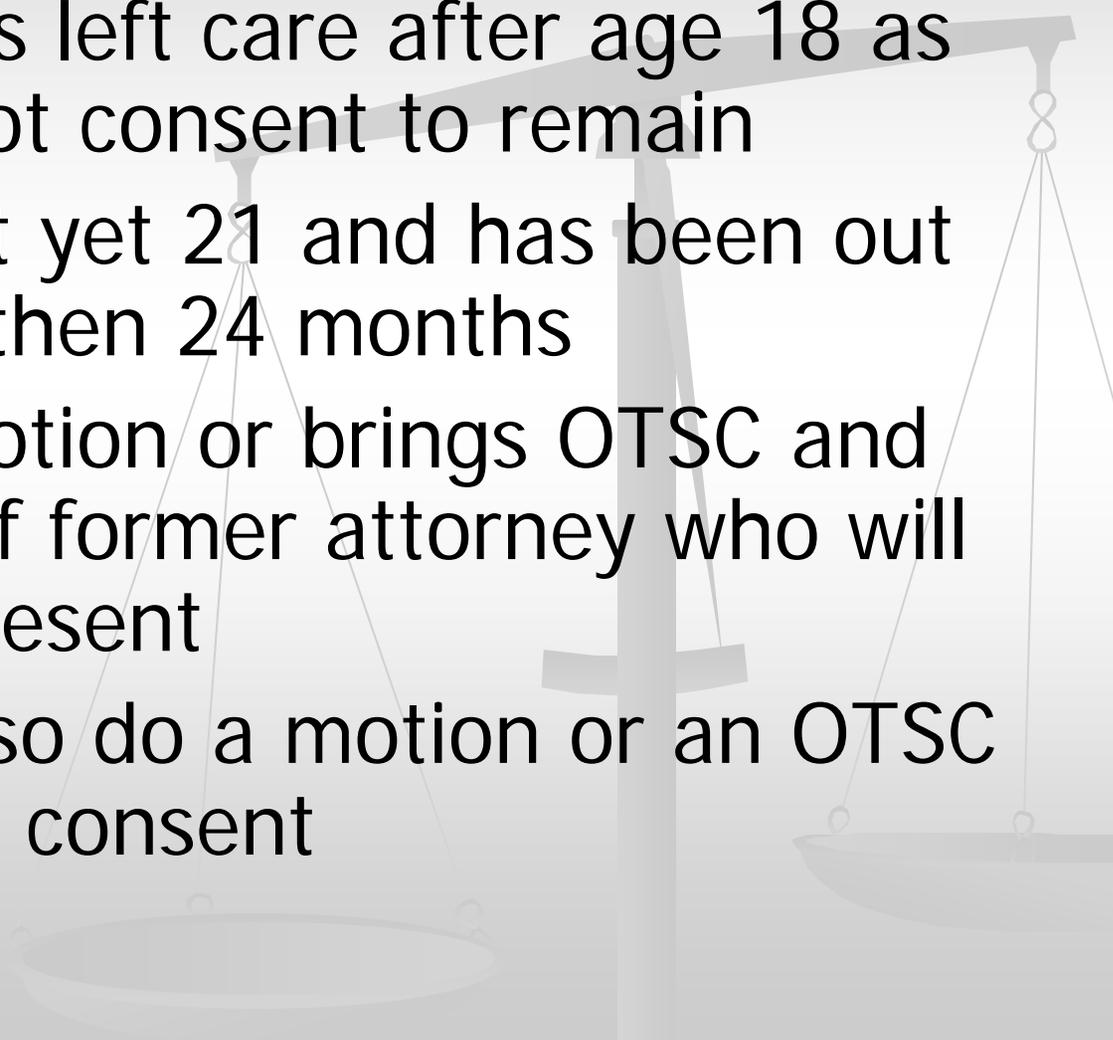
Trial discharges of youth and voluntary return to care

- Chapter 342 Laws of 2010 – effective 11/11/10
- Allows:
 - ❖ Family Court to order ongoing and repeated “trial discharges” of youth over 18 until age 21 with their consent
 - ❖ Allow youth between 18 and 21 who within the last 24 months had been discharged from foster care at their own request, to move to be returned and replaced in foster care – ACS/DSS must notify youth of this right if they do leave after 18 – NEW FCA § 1091

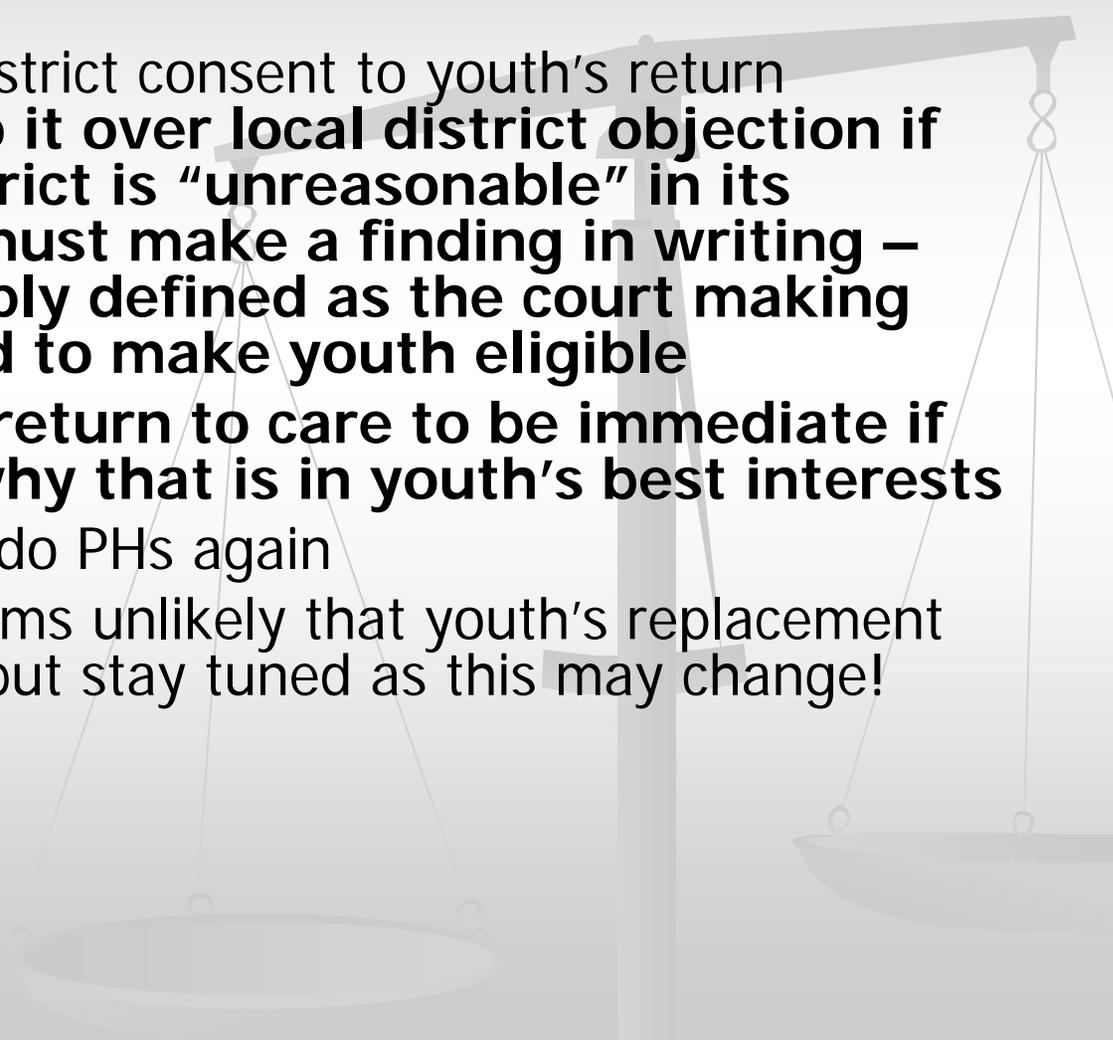
What would be the reason to do ongoing trial discharges?

- Some youth still need assistance and supervision but are not willing to actually physically stay in a foster care setting – DSS/ACS still has care and custody but child not in a foster care setting
- Keeps the door open for the youth to return to the foster care setting without any “replacement” process
- A trial discharge may maintain IV-E status in some circumstances
- Some courts have been doing these for awhile and have found them quite helpful
- Will not work if youth will not consent, can't be forced

Under what circumstances could a youth voluntarily return to care?

- A youth who has left care after age 18 as he/she would not consent to remain
 - The youth is not yet 21 and has been out of care for less than 24 months
 - Youth makes motion or brings OTSC and can have help of former attorney who will continue to represent
 - DSS/ACS can also do a motion or an OTSC with the youth's consent
- 

Voluntary return to care

- Court finds compelling reason that youth has no reasonable alternative to foster care, youth consents to go to educational or vocational program and return is in child's best interests
 - Both youth and local district consent to youth's return **EXCEPT court can do it over local district objection if court finds local district is "unreasonable" in its refusal to consent, must make a finding in writing – unreasonable is simply defined as the court making the findings required to make youth eligible**
 - **Court can order the return to care to be immediate if compelling reason why that is in youth's best interests**
 - Court must set up and do PHs again
 - NOTE – currently it seems unlikely that youth's replacement would be IV-E eligible but stay tuned as this may change!
- 

Voluntary return to care

- If youth has left and been voluntarily returned once and then leaves again, youth can make a second motion to return a second time but not again and if it is the second time, the court must make all the same findings again and must consider the youth's compliance with the court's previous order including the participation in an educational or vocational program
- Definition of "destitute child" will include a youth who has been returned to foster care
- Definitions for mandated preventive services will include a youth who has left foster care between 18 and 21 and for whom preventive services may help avoid a return to foster care

Have you had enough?

