WHEN PARENT COUNSEL
SEIZE THE
LEGISLATIVE NARRATIVE

SUCCESS STORIES FROM GEORGIA & ARKANSAS
The Glossary

**AALs**: Attorneys *Ad litem*; appointed to each child in every case pursuant to statute; required to dually represent child’s wishes and child’s best interests.

**AOC**: Administrative Office of the Courts; State agency operated by and for the benefit of the Arkansas appellate and trial courts.

**CACD**: Crimes Against Children Division; a division of the Arkansas state police tasked with operating the child abuse hotline and abuse investigations that entail allegations of physical abuse, sexual abuse, or for cases involving DHS actors.

**CASA**: Court Appointed Special Advocates; same as your CASA; generally opposed changing legislation and efforts to promote family reunification.

**CHILD MALTREATMENT**: Administrative process by DHS or CACD resulting in a finding of True or Unsubstantiated; True findings result in placement on the Central Registry, used for background checks in specifically targeted employment applications and licensures.

**DN**: dependency-neglect; the condition the State is required to prove existed to justify its removal of parental custody.

**Department**: Department of Human Services (DHS), Division of Children and Family Services (DCFS); the agency of State government authorized to remove children from the custody of their parents.

**PC**: probable cause hearing; required to be held within five calendar days of Court’s execution of emergency order removing custody; classified as a miscellaneous hearing where the rules of evidence are not in effect.

**PPH**: Permanency Planning Hearing; statutorily required at one year mark of case; designed to produce a permanent result of case; governed by numbered preferential list of outcomes.

**Parent Counsel**: court appointed attorneys who represent indigent parents whose children were removed from the parents’ custody.

**Stakeholders**: *Ad hoc* committee chaired by Senator Clark; invited attendees include DHS, Parent Counsel, AALs, Juvenile Judges & AOC, CASA, Attorney General staff attorneys, and interested legislators.

**TPR**: termination of parental rights; hearing where State seeks to terminate the family relationship in order to provide “permanence”; one of nine enumerated grounds required to be proved by clear and convincing evidence; required findings of best interest, risk of harm if child returned to parental custody; likelihood of adaptability.
The Time Line

2015: Arkansas holds biannual substantive legislative sessions in odd numbered years. In the 2015 session, the Department sought sweeping DN statutory changes. Included in their package were proposals that would have replaced AALs with what was described as Guardian Ad litems - without a requirement to be attorneys, replaced judicial review hearings with an administrative review hearing by a panel whose composition was not described by the legislation, replaced the judiciary’s ability to order cash assistance by DHS, and would have required parent counsel to file formal responsive pleadings.

The DCFS Director in 2015 came to the position from the accounting side of the agency. Consequently, the Director’s primary objective was to eliminate court ordered expenditure of funds for which no budget was provided. It was impossible to have a 10 minute conversation with the Director that did not include the story of the foster child who was selected to the prestigious Olympic Development Program for youth soccer players and whose juvenile judge ordered DHS to pay the $10,000 cost, as well as the story of the judge who ordered DHS to pay for a female foster child’s braces and the braces of her mother in order to help their self esteem.

The ultimately self professed strategy of the DHS sweeping changes was to focus the stakeholders’ attention on the area specific objectionable provisions and to gain approval of the cash assistance restriction. For the first time in recent history, the Juvenile Judges revolted against DHS’s proposals, working diligently to defeat them. The Juvenile Judges, CASA, AALs, and the AOC were all represented in the legislative process by an AOC Department Director. Not only was that employee successful in defeating DHS’s proposals, but both the Judges and AALs offered and passed legislation of their own.

2017: In the interim year between the ‘15 and ‘17 sessions, Senator Clark co-chaired the interim Joint Performance Review Committee. JPRC focused its hearings and solicitation of testimony on performance in both DN and Child Maltreatment cases. Senator Clark and JPRC became a focal point for all complaints, both real and imagined, about DHS and CACD abuse and misfeasance. In no small part, JPRC instigated a gubernatorial task force designed to examine the explosion of foster care removals and languishing foster care placements. The Governor commissioned an external study of the DN system, which resulted in multiple recommendations for change.

By the conclusion of the 2017 session, significant personnel changes occurred. A new DCFS Director was in place, along with a new chief attorney for the agency. During the course of the Session, the AOC employee representing juvenile judges, AALs, CASA, and AOC was replaced by a newly elected Chief Justice of the Supreme Court. In no small part, these changes resulted in significant progress toward decreasing removals and increasing reunifications post removal.

The 2017 session saw the introduction of the formal Stakeholders Legislative meetings, chaired
by Senator Clark. Legislative proposals were introduced as a result of the Stakeholder meetings. Separate legislative proposals were introduced by AALs, as well as by parent counsel. Senator Clark introduced his own package. Significant changes were made, though no single entity got the entire package passed, including Senator Clark.

The Session came to be known by parent counsel representatives as the Dead Baby Session. Whenever Legislative Committees heard proposals that were opposed by AALs, CASA, or AOC, their representatives would sit at the end of the Committee table and testify that, “This legislation will lead to an increase in child deaths at the hand of the foster care system.”

The 2017 session improved visitation and promoted unsupervised visitation, initiated a protection plan regimen to prevent removal, reduced the court involved role of foster parents, increased the role of non-custodial parents, promoted relative custody outcomes, and added a Reinstatement of Parental Rights post termination.

2019: At the time of this writing, the 2019 Legislature is still in session. Adjournment may not occur by the time of today’s presentation. Nevertheless, significant progress has already been achieved by parent counsel in the current session.

All legislation introduced in 2019 either originated in Stakeholders or was vetted by the group. Stakeholder sessions commenced with an examination of 15 proposals presented by parent counsel. Discussion, compromise, additions, deletions, and corrections took place prior to the commencement of the Session. Senator Clark, unknown to all of the Stakeholders, took the proposals and filed them as Senate Bills 82 through 91 at the commencement of the Session.

Two of the bills were an effort to address the situation where a parent’s custody was removed and parallel criminal charges resulted. Stakeholders sought to maintain the confidentiality of the DN proceeding so that a parent’s defense and statements in the DN hearings could not be used against the parent in the criminal proceeding. Ultimately deciding that legislation would never defeat rules of evidence regarding prior inconsistent statement or impeachment, the effort was abandoned. Interim work with the Prosecuting Attorney’s Association will be the result.

As of this writing, the eight remaining bills are law, have passed both houses and await the Governor’s signature, or have passed both Senate and received Do Pass recommendations from House committees. At the conclusion of the session, it is expected all eight bills will become law.

We will have substantive statutory improvement regarding pre-hearing court filings of hearsay documents, PC hearings being used as judicial inquisitions, a presumption for four hour weekly supervised visits, the first ever remedy for missed statutory deadlines, eliminating the prohibition against considering 11th hour efforts, a revamped preferential list at PPH, an affirmative defense to the TPR ground of a prior involuntary termination, and a Judicial waiver to the three-year waiting period of the 2017 reinstatement statute. One bill is a technical change in our Commission and funding formula regimen.
While parent counsel are pleased with this progress, it is not all of what we wanted. The progress is the result of a lot of hard work to build consensus and the compromises attendant with that. At the end of the day, parents who run afoul of the State of Arkansas have an easier lot in life than they did before the 2019 session.

THE DISCUSSION GROUP - arkansas portion

Glen Hoggard, Arkansas Parent Counsel since 2004, will introduce the Arkansas portion and moderate. He will briefly outline the historical background and present the code changes.

Senator Alan Clark will discuss his interest and involvement in child maltreatment. He will outline the steps needed to affect real legislative change.

Jerry Sharum, Senior General Counsel DHS, will discuss the efforts at compromise and elaborate on the DCFS Director’s initiative to both reduce removals and to increase reunifications.

THE CODE

Actual code section changes will be handed out at the conference and updated on the ABA Section web site.
VISITATION:

2015
9-27-325: [no specific language addressing visitation; statewide standard was an hour per week supervised.]

2017
9-27-325(p) et seq: (all new language)
(1) If the Court determines that the health and safety of the juvenile can be adequately protected and it is in the best interest of the child, unsupervised visitation may occur between a juvenile and a parent.
(2)(a) A petitioner has the burden of proving that unsupervised visitation is not in the best interest of a child.

(b) If the court determines that unsupervised visitation between a juvenile and a parent is not in the best interest of the child, visitation between the juvenile and the parent shall be supervised.

9-27-325(q). When visitation is ordered between a juvenile and the parent:
(1)(A) A parent’s positive result from a drug test is insufficient to deny the parent visitation with the juvenile.

(B) If at the time that visitation between the parent and a juvenile occurs a parent is under the influence of drugs or alcohol, exhibits behavior that may create an unsafe environment for a child, or appears to be actively impaired, the visitation may be canceled; and
(2) A relative or fictive kin may transport a juvenile to and from visits with a parent if:
(A) it is in the best interest of the child;
(B) the relative or fictive kin submits to a background check and a child maltreatment registry check; and
(C) the relative or fictive kin meets the driving requirements established by the Department.

2019
Senate bill 83; now Act 558 of 2019:
A petitioner has the burden of proving at every hearing that unsupervised visitation is not in the best interest of the child.

9-27-325(p)(2)
(C)(I):
A rebuttable presumption that unsupervised visitation is in the best interest of the juvenile applies at every hearing.
(C)(ii):
The burden of proof to rebut the presumption is proof by a preponderance of the evidence.
(D)(I):
If the court orders supervised visitation, the parent from whom custody of the juvenile has been
removed shall receive a minimum of four (4) hours supervision per week.

(D)(ii):
The court may order less than four (4) hours of supervised visitation if the court determines that the supervised visitation:
(a) is not in the best interest of the juvenile; or
(b) will impose an extreme hardship on one of the parties.

PLACEMENTS:

2015
9-27-355(b)(1):
A relative of a juvenile placed in the custody of the Department of Human Services shall be given a preferential consideration for placement if the relative caregiver meets all relevant child protection standards and it is in the best interest of the juvenile to be placed with the relative caregiver.

2017
9-27-355(b)(1)(A):
When the Department of Human Services takes custody of a juvenile under § 12-18-1001, or when the court determines that a juvenile shall be removed from his or her home under this subchapter, the department shall conduct an immediate assessment to locate:
(I): a noncustodial parent of the juvenile
(ii): recommended relatives of the juvenile, including each grandparent of the juvenile, and all parents of the juvenile’s sibling if the parent has custody of the sibling; and
(iii): fictive kin identified by the juvenile as one (1) or more persons who play or have a significant positive role in his or her life.

(b)(1)(B): Safety check requirements.

(b)(1)(C): if the court has not transferred custody to a noncustodial parent, relative, or other individuals, or the department has not placed the juvenile in provisional relative placement or fictive kin placement, the department shall continue its assessment under subdivision (b)(1)(A) of this section and subdivision (b)(1)(B) of this section throughout the case.

(b)(1)(D): Requires record of efforts made to locate non-custodial parent, relatives, fictive kin, or other identified persons for potential placement.

(b)(1)(E):
(I): A relative or fictive kin identified by the department under subdivision § (b)(1)(A) of this section shall be given preferential consideration for placement if the relative or fictive kin meets all relevant protective standards and it is in the best interest of the juvenile to be placed with the
relative or fictive kin.

(ii): In all placements, preferential consideration for a relative or fictive kin shall be given at all stages of the case.

(iii): If the court denies placement with a relative or fictive kin, the court shall make specific findings of fact in writing regarding the consideration given to the relatives or fictive kin and the reasons the placement was denied.

(iv): The court shall not base its decision to place the juvenile solely upon the consideration of the relationship formed between the juvenile and the foster parent.

(B)(1)(F): The court may transfer custody to any relative or any other person recommended by the department, the parent, or any party upon review of a home study, including criminal background and child maltreatment reports, and a finding that custody is in the best interest of the child.

**PROBABLE CAUSE HEARINGS**

2015

9-27-315(a)(1)(B):

(I): The [probable cause] hearing shall be limited to the purpose of determining whether probable cause existed to protect the juvenile and to determine whether probable cause still exists today.

(ii): However, the issues as to custody and delivery of services may be considered by the court and appropriate orders for that entered by the court.

2017

(iii): No further evidence shall be presented at the probable cause hearing regarding issues agreed to by the parties if the court accepts a stipulated agreement by the parties that specifies the facts and findings of law supporting the probable cause order that are agreed to by the parties.

(iv): If a stipulated agreement under subdivision (a)(1)(B)(iii) of this section is accepted by the court, testimony or evidence specifically addressing the allegations in the petition shall be reserved for adjudication and the petitioner has the burden of proving the allegation during the adjudication hearing.

2019

Senate bill 90; now Act 559 of 2019:

9-27-315(a)(1)(B):

(ii): However, the issues as to custody and delivery of services may be considered by the court and appropriate orders for custody and deliver of services entered by the court.

(iii): If the defendant stipulates that probable cause exists, the only evidence that is presented at the probable cause hearing shall be:

(a): evidence pertaining to visitation; and

(b): evidence pertaining to service delivered to the family.
(iv): A parent shall not be compelled to testify under any circumstances.
(v): For the sole purpose of the probable cause hearing, the stipulation of a parent that probable cause exists shall also serve as a stipulation to the introduction of the affidavit of the plaintiff.

PERMANENCY PLANNING HEARING

2015
9-27-338(c)
At the permanency planning hearing, based upon the facts of the case, the circuit court shall enter one (1) of the following permanency goals, listed in order of preference, in accordance with the best interest, health, and safety of the juvenile:
(1) placing custody of the juvenile with a fit parent at the permanency planning hearing;
(2) returning the juvenile to the guardian or custodian from whom the juvenile was initially removed at the permanency planning hearing;
(3) authorizing a plan to place custody of the juvenile with a parent, guardian, or custodian only if the court finds that:
   (3)(A)(I) the parent, guardian, or custodian is complying with the established case plan and orders of the court, making significant measurable progress toward achieving the goals established in the case plan and diligently working toward reunification or placement in the home of the parent, guardian, or custodian.
   (3)(A)(ii) A parent’s, guardian’s, or custodian’s resumption of contact or overtures toward participating in the case plan or following the orders of the court in the months or weeks immediately preceding the permanency planning hearing are insufficient grounds for authorizing a plan to return or be placed in the home as the permanency plan.
   (3)(A)(iii) The burden is on the parent, guardian, or custodian to demonstrate genuine, sustainable investment in completing the requirements of the case plan and following the orders of the court in order to authorize a plan to return or be placed in the home as the permanency goal.
(4) Authorizing a plan for adoption with the Department’s filing a petition for termination of parental rights unless:
   (4)(A) the juvenile is being cared for be a relative;
   (4)(B) the Department has documented in the case plan a compelling reason why filing such a petition is not in the best interest of the juvenile and the court approves the compelling reason as documented in the case plan; or
(5) Authorizing a plan to obtain a guardian for the juvenile;
(6) Authorizing a plan to obtain a permanent custodian, including permanent custody with a fit and willing relative; or
(7) APPLA.
The court shall consider all relevant factors that may include without limitation whether the parent, guardian, or custodian maintained consistent contact with the department, participated in the case plan, followed the orders of the court, and visited the juvenile for a substantial period of time before the permanency planning hearing.

Senate bill 84; having passed both Houses of the General Assembly and awaiting the Governor’s signature:

The court shall consider all relevant factors that may include without limitation whether the parent, guardian, or custodian maintained consistent contact with the department, participated in the case plan, followed the orders of the court, and visited the juvenile for a substantial period of time before the permanency planning hearing;

Regardless of when the effort was made, the court shall consider all evidence of an effort made by the parent, guardian, or custodian to remedy the conditions that led to the removal of the juvenile from the custody of the parent, guardian, or custodian, and give the evidence appropriate weight and consideration in relation to the safety, health, and well-being of the juvenile.

A parent’s, guardian’s, or custodian’s resumption of contact or overtures toward participating in the case plan or following the orders of the court in the months or weeks immediately preceding the permanency planning hearing are insufficient grounds for authorizing a plan to return or be placed in the home as the permanency plan.

At the permanency planning hearing, based upon the facts of the case, the circuit court shall enter one (1) of the following permanency goals, listed in order of preference, in accordance with the best interest, health, and safety of the juvenile:

1. placing custody of the juvenile with a fit parent at the permanency planning hearing;
2. returning the juvenile to the guardian or custodian from whom the juvenile was initially removed at the permanency planning hearing;
3. authorizing a plan to place custody of the juvenile with a parent, guardian, or custodian;
4. Authorizing a plan to obtain a guardianship or adoption with a fit and willing relative
5. Authorizing a plan for adoption with the Department’s filing a petition for termination of parental rights unless:
   (A) the juvenile is being cared for be a relative; or
   (B) the Department has documented in the case plan a compelling reason why filing such a petition is not in the best interest of the juvenile and the court approves the compelling reason as documented in the case plan; or
6. Authorizing a plan to obtain a guardian for the juvenile;
7. Authorizing a plan to obtain a permanent custodian, including permanent custody with a fit and willing relative
TERMINATION OF PARENTAL RIGHTS

2015
The parent is found by a court of competent jurisdiction ... to”
(4) have had his or her parental rights involuntarily terminated as to a child;

2019
Senate bill 85; having passed both Houses of the General Assembly and awaiting the Governor’s signature:
(4)(a) have had his or her parental rights involuntarily terminated as to a child;
(4)(b) It is an affirmative defense to the termination of parental rights based on a prior involuntary termination of parental rights that the parent has remedied the conditions that caused the prior involuntary termination of parental rights;