

Families First: Understanding the Harm of Removal, the Reasonable Efforts Requirement to Prevent Foster Care, and Attorney Ethics in Pre- Removal Representation

TN Court Improvement Program's First Friday Series:
Building Bridges in Tennessee Child Welfare: Session 1
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Session Agenda

With a focus on the professional responsibility to be both competent (*Tenn. Sup. Ct. R. 8, RPC 1.1*) and diligent (*Tenn. Sup. Ct. R. 8, RPC 1.3*), this session will:

- I. Provide information on the impact of removal from the perspective of children and parents;
- II. Focus on the legal requirements related to removals into foster care under federal and state law; and
- III. Focus on the importance of and strategies for effective communication with parent clients and child clients (*Tenn. Sup. Ct. R. 8, RPC 1.4*), while navigating diminished capacity among minor clients or clients with disabilities (*Tenn. Sup. Ct. R. 8, RPC 1.14*).

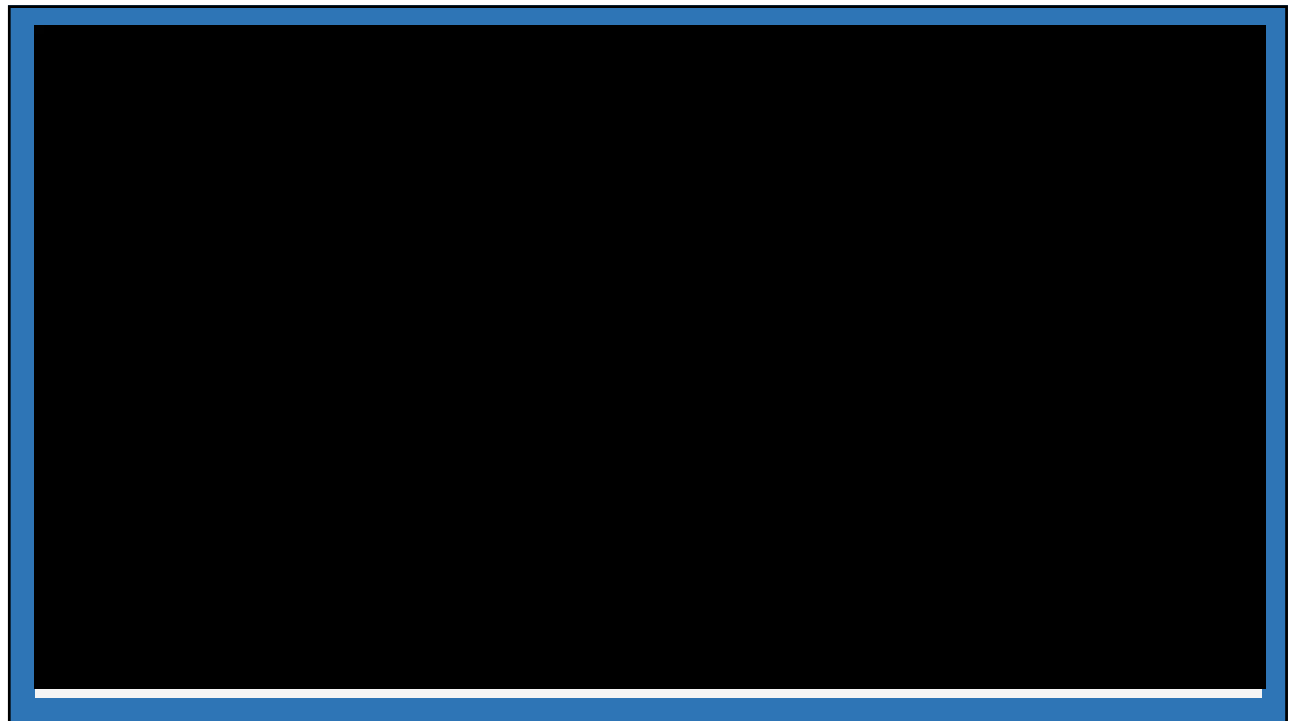


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Understanding the Impact of Removal



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Understanding the Impact of Removal and the Requirement to Avoid Removal When Possible

Tenn. Sup. Ct. R. 8, RPC 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Tenn. Sup. Ct. R. 8, RPC 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client. [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances . . . the client's legal position may be destroyed.



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Understanding the Impact of Removal

Removal should only be used when it is:

- necessary to protect the child;
- the least drastic alternative; or
- contrary to the child's best interests to remain with the parent or guardian.

T.C.A. § 37-1-166



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Understanding the Impact of Removal

Vulnerability to the negative long-term effects of removal will vary across children and circumstances (e.g., known caregivers, supportive caregivers, parental visitation and ongoing attachment, length of separation, placement stability in care, etc.).

- Short term separation can flood stress hormones throughout the child's brain and body.
- Long term separation can lead to long term effects if not mitigated:
 - difficulty sleeping, developmental regression, heart disease, hypertension, obesity, diabetes, and decreased longevity.
 - permanent architectural changes in the brain, including lower IQs.
 - depression, more suicide attempts, and more problems with alcohol abuse and gambling.



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Long Term Outcomes of Removal

- Studies are mixed - but quality and length of out of home placement matter.
- Foster care as a necessary intervention may have improved over time.
 - American Bar Association, 2022. *Trauma Caused by Separation of Children from Parents A Tool to Help Lawyers*.
 - Gross and Baron, 2022. *Temporary Stays and Persistent Gains: The Causal Effects of Foster Care*. *American Economic Journal: Applied Economics*, 14 (2): 170–99.



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Why Do Tennessee Children Come into Foster Care?

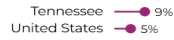
Parental substance abuse



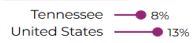
Child behavior problem



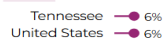
Abandonment



Physical abuse



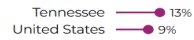
Other



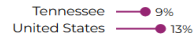
Neglect



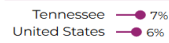
Inadequate housing



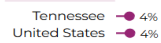
Inability to cope



Parental incarceration



Sexual abuse



State: Tennessee

Profile: Foster care FY2021



Data obtained from the National Data Archive on Child Abuse and Neglect and used in accordance with its Terms of Use Agreement license.



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The DCS Child Protection Process



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Child Protective Services Referral: *T.C.A. § 37-1-403; DCS Pol. § 14.1*

Any person with knowledge of [abuse or neglect] shall report it, by telephone or otherwise, to the following:

- the judge having juvenile jurisdiction over the child;
- the department, either by contacting a local representative of the department or by utilizing the department's centralized intake procedure;
- the sheriff of the county where the child resides; or
- the chief law enforcement official of the municipality where the child resides.



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Child Protective Services Referral: *DCS Admin. Pol. & Proc., § 14.3*

- The child abuse hotline receives reports of suspected abuse and neglect. These reports are screened to determine the need for a timely investigation, assessment, or resource linkage case within the appropriate jurisdiction.
- Priority response for all reports begins at intake creation date/time. Priority responses are assigned to reports to determine the timeframe in which the alleged child victim must be seen, as follows:
 - Priority 1: Face-to-face contact with child within 24 hours (immediately if the CPS supervisor deem necessary). Children may be in imminent danger.
 - Priority 2: Face-to-face contact with child within 2 business days. Priority 2 reports allege risk of that is not imminent, and a 2-business day delay will not compromise the investigative effort or reduce the chances for identifying the level of risk to the child.
 - Priority 3: Face-to-face contact with the child within 3 business days. Priority 3 reports allege situations/incidents considered to pose low risk of harm to the child where 3 business days will not compromise the investigative effort or reduce the chances for identifying the level of risk to the child.
- Hotline staff shall inquire if there is any Native American lineage or ancestry that might make the child/family eligible for membership in any Native American Tribe.



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Child Protective Services Investigation: T.C.A § 37-1-406

- All representatives of the child protective services agency shall, at the initial time of contact with the individual who is subject to an investigation, advise the individual of the complaints or allegations made against the individual.
- The investigation shall include the following:
 - ✓ the nature, extent, and cause of the harm, including a determination of whether there exists a threat of harm, and the nature and extent of any present or prior injuries or abuse;
 - ✓ the identity of the person responsible for it;
 - ✓ the nature and extent of any previous allegations, complaints, or petitions of abuse or dependency and neglect against the parent or person responsible for the care of the child;
 - ✓ the names and conditions of the other children in the home;
 - ✓ an evaluation of the parents or persons responsible for the care of the child, the home environment, and the relationship of each child to the parents or persons responsible for such child's care;
 - ✓ the identity of any other persons in the same household;
 - ✓ the identity of any other children in the care of any adult residing in the household; and
 - ✓ All other pertinent data.



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Child Protective Services Investigation: DCS Pol. § 14.14

The DCS Case Manager documents thorough reasonable efforts to secure culturally sensitive, appropriate and available services to meet the needs of the family **and** child/youth to prevent removal.

Reasonable efforts never take precedence above the immediate safety of the child/youth.



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Child Protective Services Investigation: DCS Pol. § 14.14

Exigent circumstances may exist for an emergency custodial removal to take place. The following circumstances may lead to an emergency custodial removal:

- **Exigent circumstances:** There is reasonable cause to believe that the child/youth is in imminent danger of serious bodily injury and that custodial removal is reasonably necessary to avert that specific injury. A DCS Case Manager may remove a child/youth that has been abandoned without a court order even if there are not exigent circumstances.
- **Imminent danger:** There is an immediate threat to the child/youth's health or safety, and there is reasonable cause to believe that the child/youth is likely to experience specific, serious, or irreparable physical harm in the time that would be required to obtain and enforce a court order.
- **Specific threat of harm:** There is a particular injury or condition endangering the child/youth.
- **Serious threat of harm:** Threat of harm is serious in situations including, but not limited to, conditions constituting severe child abuse as defined at *Tenn. Code Ann. § 37-1-102(b)(23)*.



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Removals

- If exigent circumstances do not exist, a court order is required before removing the child/youth from the home.
 - If there is reasonable cause to believe that delay for a hearing would result in severe or irreparable harm, an **emergency ex parte order** may be requested before physical removal of the child/youth.
 - A CFTM is held prior to an emergency removal, when possible, but it must be held prior to the seventy-two (72) hour court hearing to consider placement options for the child/youth with input from the family.
- A **non-emergency removal** is a legal proceeding in which DCS petitions to remove a child/youth from the home but does not ask for the child/youth to be removed immediately. This type of action is appropriate when the immediate safety of the child/youth is preserved due to Immediate Harm Factors being addressed through an IPA.



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Initial Hearings in Dependency and Neglect



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Taking Child into Custody Prior to Preliminary Hearing: *T.C.A. § 37-1-117(b)(1)*

When the court finds, based upon:

- a sworn petition, or
- sworn testimony containing specific factual allegations,

that there is:

- probable cause to believe that the conditions warranting removal of the child exist, and
- the child requires the immediate protection of the court,

the court may order that the child be removed from the custody of the child's parent, guardian, legal custodian, or the person who physically possesses or controls the child and be placed in the custody of a suitable person or agency pending further investigation and hearing for a period not to exceed three days, excluding weekends and legal holidays.

If the child is not returned within such three-day period, a preliminary hearing must be conducted.



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Probable Cause Finding: *T.C.A. § 37-1-114; TRJP 302*

Purpose:

To determine if there is probable cause to believe that the child is dependent, neglected, or abused AND an immediate threat to child's health or safety exists that is likely to result in severe or irreparable harm AND that there is no less restrictive alternative to the removal.



Timing:

Within 48 hours of custody if no prior written order authorizing custody.



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Preliminary Hearing: *T.C.A. § 37-1-117; TRJP 302(d)*

Purpose:

To determine if there is probable cause to believe that the child is dependent, neglected, or abused AND there is an immediate threat to child's health or safety likely to result in severe or irreparable harm AND that there is no less restrictive alternative to the removal.

Question:

Does probable cause exist to remove a child or keep a child in shelter status pending further investigation of the case?

Can removal be avoided through reasonable (or active efforts, see ICWA) efforts by the child welfare agency?



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Preliminary Hearing: *TRJP 302; T.C.A. §§ 37-1-114 & 37-1-117*

- Standard of Proof at Preliminary Hearing is ***probable cause***.
- For removal must find there was probable cause that:
 - Child was abused/neglected; AND
 - Child subject to immediate threat to health & safety and severe or irreparable harm or child may abscond or be removed from Court's jurisdiction; AND
 - No less drastic alternative to removal.
- Same probable cause determination for removal of child shall be made for *continued* removal of child.
- Indian Child Welfare Act (ICWA) – Requires that inquiry be made in all cases to see if child is of Native American descent and covered under ICWA.



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Reasonable Efforts



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Reasonable Efforts Overview: *T.C.A. § 37-1-166*

- Relevant to each hearing type.
- Reasonable efforts means the ***exercise of reasonable care and diligence*** by the department to provide services related to meeting the needs of the child and the family.
- ***Reasonable efforts shall be made to preserve and reunify families.***
- **Reasonable efforts to prevent removal** finding **must** be made **within 60 days** of the child entering custody; (*45 C.F.R. § 1356.21(b)(1)*).



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Reasonable Efforts Must be Made:

1. To prevent the need for removal of the child from the child's family;
2. To make it possible for the child to return home;
3. To place the child in a timely manner in accordance with the Permanency Plan; and
4. To complete whatever steps are necessary to finalize the permanent placement of the child if continuation of reasonable efforts is determined to be inconsistent with the Permanency Plan for the child. (*T.C.A. § 37-1-166*)



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Reasonable Efforts: *T.C.A. § 37-1-166(g)*

In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, the child's health and safety shall be the paramount concern.



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Reasonable Efforts to Prevent Removal

Question: Were reasonable efforts made to prevent or eliminate the need for removal?

Considerations:

- ✓ What were the specific safety risks leading to removal?
- ✓ What services were considered and offered to allow the child to remain at home?
- ✓ Were these services rationally related to the safety threat?
- ✓ What was done to create a safety plan to allow the child to remain at home or in the home of another person without court involvement?
- ✓ Have non-custodial parents and paternal and maternal relatives been identified and explored? What is the plan to do so?
- ✓ Were there any pre-hearing conferences or meetings that included the family? Who was present? What was the outcome?
- ✓ How has the agency intervened with this family in the past?

(From National Council of Juvenile and Family Court Judges, 2008)



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Assessing Safety



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Assessing Safety in Child Protection

Threats

Are there insufficient protective capacities to protect from threats to which the child is vulnerable?

Vulnerabilities

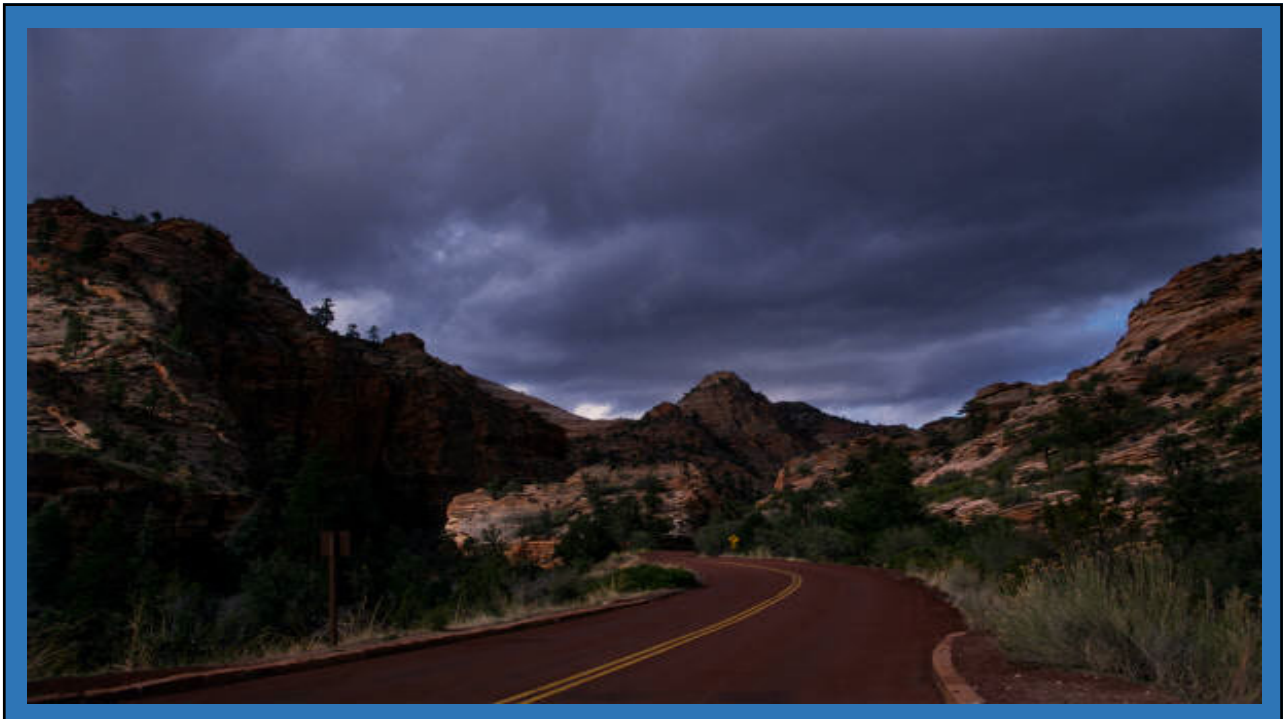
Protective Capacities



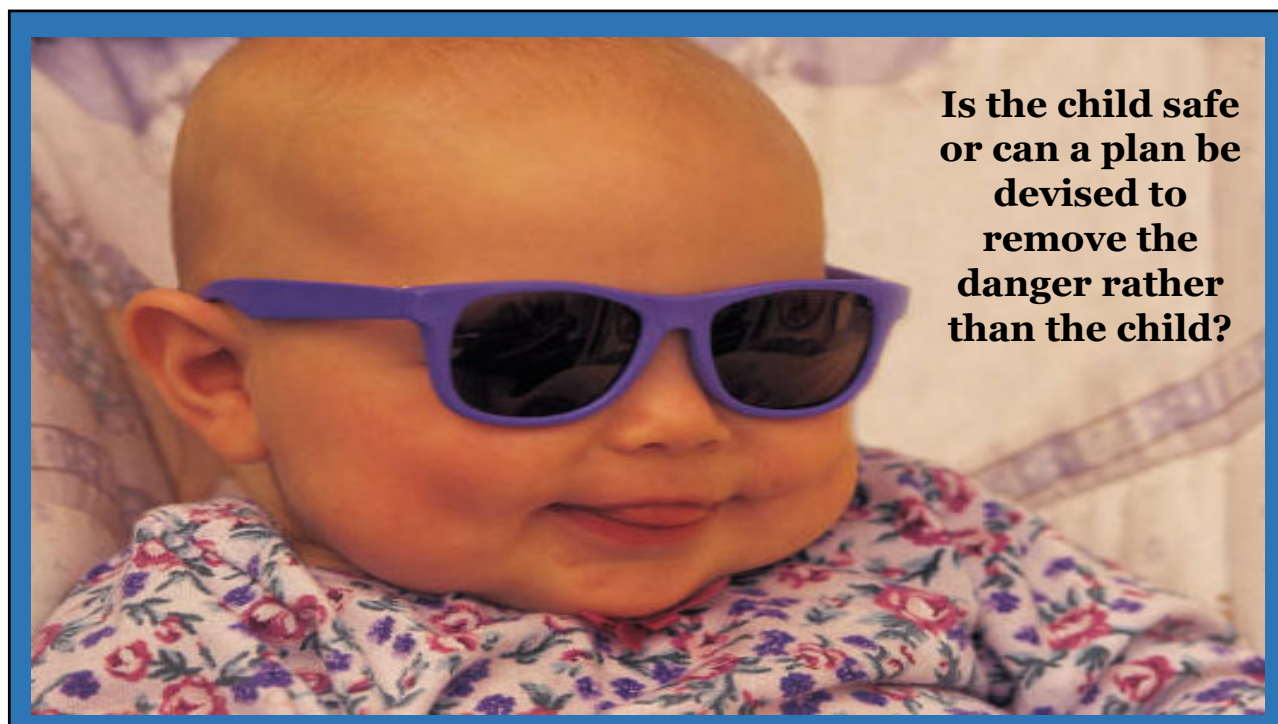
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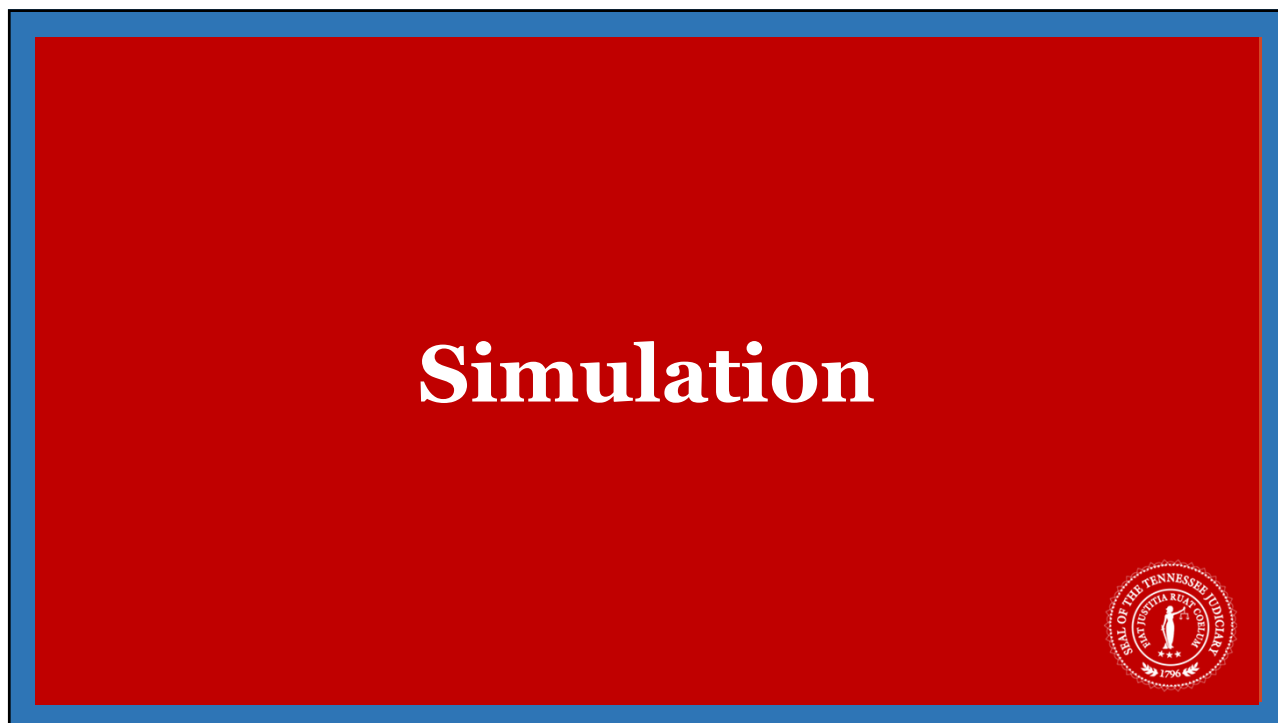
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Simulation

Decision Framework

Each group will discuss the scenario and answer the following questions:

Immediate Safety Risk:

- Are Liam and Ava in immediate danger such that removal is necessary?
- What specific safety concerns are present, and how serious are they?

Least Drastic Alternatives:

- What supports or services could address the safety concerns while keeping the children in the home?
- Could Ella's coworker, a childcare referral, or other community resources provide a viable safety net?

Decision and Rationale:

- Based on the available information, should the children be removed or remain at home?
- If removal is recommended, how should DCS mitigate the trauma of separation?
- If removal is not recommended, what specific safety measures should be put in place to support the family?



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Pre-Removal

- Ella (age 29) is a single mother to twins, Liam and Ava, who are 5 years old.
- A neighbor calls DCS after hearing prolonged yelling and crying coming from Ella's apartment late at night.
- During a home visit, the caseworker finds the children alone, unsupervised, and frightened.
- The apartment is cluttered but not hazardous.
- Ella (Mother) arrives home 20 minutes later, visibly upset and smelling of alcohol. She explains she had gone to the store to get food after working a double shift and admits to drinking "a couple of beers" to relax.
- Mother expresses regret for leaving the children alone, claiming it was a one-time mistake.
- Mother has no prior history with DCS and maintains steady employment but admits she struggles with stress and lack of childcare.
- During interviews, Liam and Ava appear healthy but share that they often put themselves to bed and sometimes go without dinner.
- They also describe nights when Mother is "sad" and sleeps all day.
- Mother has no close family nearby but mentions a coworker who occasionally helps with childcare.
- The caseworker finds no signs of physical abuse, but the children's emotional needs appear unmet.
- Mother agrees to work with DCS to address her challenges and expresses a willingness to cooperate with services.

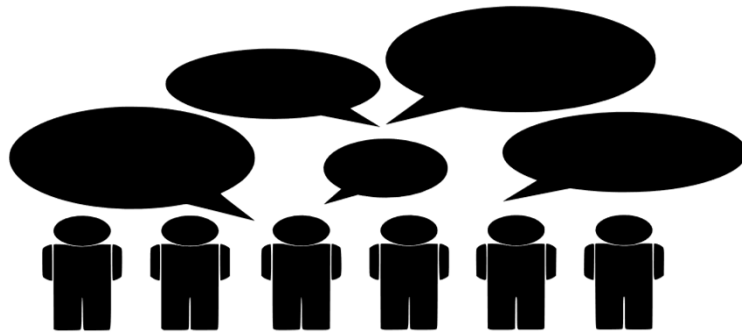


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Large Group Discussion

Each group will summarize their recommendations and reasoning.

1. What was your group's decision regarding removal?
2. What was the rationale behind your decision?
3. Did you consider alternative measures to address safety concerns?



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Ethical Considerations for Attorneys



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Representation Pre-Removal: Communication

Tenn. Sup. Ct. R. 8, RPC 1.4: COMMUNICATION

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



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The Guardian ad Litem

Tennessee Rule 40

- (1) The child is the client of the guardian ad litem. The guardian ad litem is appointed by the court to represent the child by *advocating for the child's best interests* and ensuring that the child's concerns and preferences are effectively advocated.

The child, not the court, is the client of the guardian ad litem.



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Communicating with Your Child Client

Tenn. Sup. Ct. R. 8, RPC 1.14

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.



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What, So What, Now What?

Breakouts:

“WHAT? What did you notice, what facts or observations stood out?”

“SO WHAT? Why is that important? What patterns or conclusions are emerging? What hypotheses can you make?”

“NOW WHAT? What actions make sense?”



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Works Referenced

- American Bar Association, 2022. Trauma Caused by Separation of Children from Parents A Tool to Help Lawyers. https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf
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Questions?

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