

**Committee for Public Counsel Services
Children and Family Law Division**

**Child Welfare Proceedings
Legal Overview**

Children and Family Law Cases

- Care and protection/TPR petitions
- Probate court child welfare cases
- CRA (child requiring assistance)
- Guardianship of Minor proceedings
- Private TPR/adoption cases
- Mary Moes

Policy & Purpose of Child Welfare System

Protect children from harm caused by the absence, inability, inadequacy or destructive behavior of their parents

(G.L. c.119, §1)

Policy & Purpose of Child Welfare System

• First, strengthen and encourage families to care for their children (G.L. c.119, §1)



Assist and encourage families to use all available resources (G.L. c.119, §1)



Policy & Purpose of Child Welfare System

- Only, remove children when the family cannot provide the necessary care and protection (G.L. c.119, §1)



Reasonable efforts to prevent removal and to return child home (G.L. c.119, §29C)



Reasonable Efforts

“The department’s obligation to make reasonable efforts does not end once the department takes emergency custody of a child, but the purpose of those efforts shifts from preventing the need for removal from the home to making it ‘possible for the child to return safely to his parent or guardian.”

-Care and Protection of Walt

-citing MGL c. 119 sec. 29C and 26 (b),
Adoption of Ilona, 459 Mass. 53, 60 (2011)

Policy & Purpose of Child Welfare System

PERMANENCY (G.L. c.119, §29B)

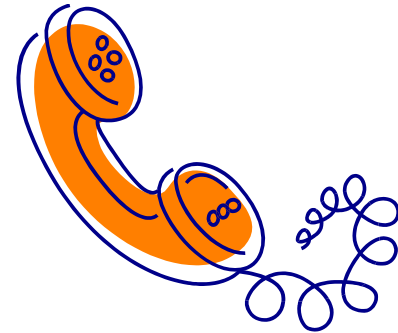
If child cannot be returned home, child should be placed in a stable, permanent home as expeditiously as possible

- ❖ Reunification
- ❖ Adoption
- ❖ Guardianship
- ❖ Permanent Foster Care with Kin
- ❖ Another planned permanent living arrangement



"51As"

- Begins with report of abuse or neglect
- G.L. c. 119, sec. 51A
- 51B investigation
 - Unsupport
 - Support/substantiate
- Options following investigation
 - Close case
 - Offer voluntary services
 - File care & protection petition



Care and Protection Petitions

- G.L. c. 119, § 24
- Juvenile Court
- Petition may be filed by any person (almost always DCF)
- Alleges child in need of care and protection



Care and Protection Petitions

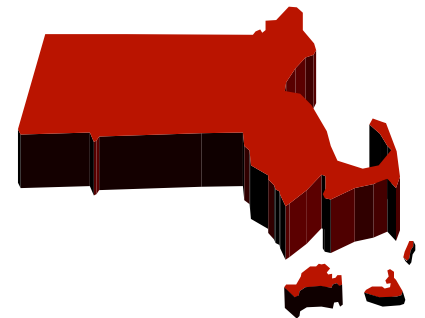
GROUNDINGS FOR FILING

- Without necessary and proper physical or educational care and discipline
- Conditions or circumstances damaging to character and development
- Lacks proper attention of parent
- Parent is incompetent, unwilling or unavailable



Venue

- Governed by G.L. c. 119, sec. 24
- Venue is proper:
 - Where the child is located, or
 - Where the parent or guardian resides



Mass Child Custody Jurisdiction Act (G.L. c. 209B)

- Consider whenever child has lived in another state prior to Massachusetts
- Three questions
 - Had child lived in Massachusetts for less than 6 consecutive months prior to filing?
 - Are their custody proceedings pending in another state?
 - Is there an outstanding custody order from another state?



Mass Child Custody Jurisdiction Act (G.L. c. 209B)

- Exceptions
 - No other state has jurisdiction
 - Other state declines jurisdiction
 - Emergency to protect child from abuse or mistreatment
- Jurisdiction cannot be waived



Notice and Summons

- G.L. c. 119, sec. 24 & Juv. Ct. Rule 3
- Summons and petition must be served on both parents
- Summons includes notice to parent to show cause why child should not be committed to DCF
- Also includes notice that court may terminate parental rights

Care and Protection Petitions

- Right to counsel (G.L. c. 119, § 29)
 - Children
 - Parents, if indigent



Role of Child's Counsel

- Attorney, not guardian ad litem, not social worker
- Same duties of zealous advocacy, loyalty and confidentiality as are owed an adult client
- Client-directed
- May diverge from normal attorney-client relationship only in very limited circumstances
- Advocate, counselor, advisor

Emergency Removal

- Standard for removal: reasonable cause to believe
 - Child is suffering from or is in immediate danger of serious abuse or neglect, and
 - Immediate removal is necessary to protect the child from serious abuse or neglect



72-Hour/Temporary Custody Hearing



- Notice and opportunity to be heard
- Court must determine whether temporary custody order should continue
- Fair preponderance of the evidence (*Care and Protection of Robert*, 408 Mass. 52 (1990))

Care and Protection Petitions

- DISPOSITION AT 72-HOUR HEARING
 - Dismiss
 - Return child home, subject to conditions
 - Continue DCF custody
 - Temporary custody to noncustodial parent
 - Temporary custody to qualified individual [[Care and Protection of Manuel](#), 428 Mass. 527 (1998)]

Appointment of Court Investigator

- Investigate and file a report “into conditions affecting the child”
- Report automatically part of record (but judge should advise parties if relying)
- Hearsay, opinion and recommendations in report are admissible (with exceptions)
- Presumed expert in 'pathological family dynamics' [Custody of Michel, 28 Mass. App. Ct. 260 (1990)]

DCF Custody

- G.L. c. 119 § 21: “custody” is the power to:
 1. Determine child’s place of abode, medical care and education;
 2. Control visits to the child;
 3. Consent to enlistments, marriages, and other contracts otherwise requiring parental consent.

DCF Placement of Child

- Preference for placement with kin
- Place siblings together unless contrary to child's best interests
- DCF has discretion to determine where and with whom child shall live
- Challenges to placement decisions subject to "abuse of discretion" standard



Parent-Child Visitation

- Right to visit unless DCF shows by clear and convincing evidence that visits harmful to child. G.L. c. 119, sec. 35; *Custody of a Minor* (No. 2), 392 Mass. 719, 725-726 (1984)
- Visits must be “regular and frequent” 111 CMR sec. 7.128

Sibling & Grandparent Visitation

- See G.L. c.119, §26B
- DCF must make reasonable efforts to provide sibling visitation. 110 CMR sec. 7.101(4)



Services

- DCF must provide services promptly and on a fair, just and equitable basis. G.L. c. 18B, sec. 3; 110 CMR 1.04 & 1.05
- DCF has considerable discretion to make decisions about how to allocate resources.

Services

- DCF is obligated to:

Provide accommodations to child (or parent) with a disability under the American with Disabilities Act and Adoption of Gregory, 434 Mass. 117 (2001).

Not discriminate against child or parent based on race or national origin, including ensuring access to services for client whose first language is not English (Title VI of Civil Rights Act)

Give preference to placement with Native American family (ICWA)

Not discriminate against child or parent based on sexual orientation or gender identity (state statutes and executive order)

Trial & Disposition

- G.L. c.119, §26
- Burden of proof on DCF (or other petitioner)
- Standard of proof - clear and convincing evidence of parental unfitness
- Subsidiary findings – preponderance of the evidence



Termination of Parental Rights Trial

Typical Exhibits

- DCF's initial affidavit (filed at removal)
- 51As & 51Bs
- DCF service plans & FCR Reports
- Court Investigator Report
- DCF Social Worker reports to Court
- Medical/Mental Health Records
- CORIs
- Records from service providers

Termination of Parental Rights Trial

Typical Exhibits

- Medical/Mental Health Records
 - Confidential and privileged
 - Procurement is governed by statute. Subpoena is required.

- CORIs – convictions

- Records from service providers
 - Business Records
 - Official Records

Termination of Parental Rights Trial

Typical Witnesses

- Parents
- DCF
 - Ongoing Worker
 - DCF Adoption Worker
- Service providers
 - Therapists
 - Sponsors (if AA/ NA)
 - Program leaders
- Court Investigator (rarely called)
- Experts

Testimony of Expert Witness

Guide to Evidence: Article VII: Opinion and Expert Evidence, Section 702

- A witness who is qualified as an expert by knowledge, skill, experience, training, education may testify in the form on an opinion or otherwise

Testimony of Expert Witness

Inquiry on Appeal

- Voir Dire: Did the trial attorney properly challenge the expert?
- Did the lower court properly qualify the witness as an expert?

Termination of Parental Rights Trial

Burden and Standard of Proof

- DCF has the Burden of Proof
- G.L. c.119, §26
- Standard of proof:
 - Subsidiary findings: must be supported by preponderance of the evidence
 - And clearly and convincingly prove . . .



Termination of Parental Rights

Standard of Proof

- CURRENT parental unfitness; and that
- Termination furthers child's best interests

Santosky v. Kramer, 455 U.S. 745 (1982)

Termination of Parental Rights

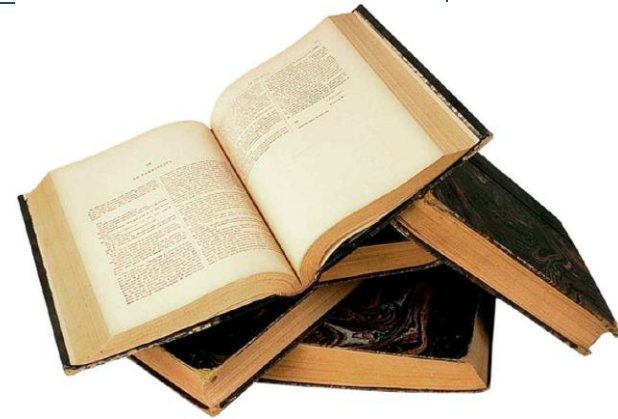
1st Prong: Parental Unfitness

Defined by

Statute: G.L. c. 210, s. 3 and

Case law: Custody of Eleanor, 414 Mass. 795;(1993) Custody of a Minor, 392 Mass. 719(1984); Adoption of Carlos, 413 Mass. 339(1992) (to name a few)

Must be grievous shortcomings or handicaps (i.e. Dangerous parenting/unable to provide minimally adequate care and supervision)



Termination of Parental Rights

G.L. c.210, §3: Of the 14 statutory factors you might see the lower court address these 7 most often:

- i. abuse/neglect
- ii. failure to maintain contact
- iii. length of time in care
- iv. bonds with substitute caretaker
- v. parental conditions
- vi. parent unavailable
- vii. failure to remedy problems

Termination of Parental Rights

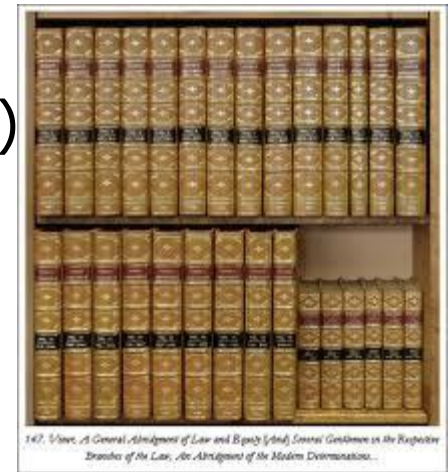
Parental Unfitness: Principles from case law

- Focus on current unfitness
- Past conduct has prognostic value

Custody of Two Minors, 396 Mass. 610 (1986)

- Required nexus between parental conduct and harm to child

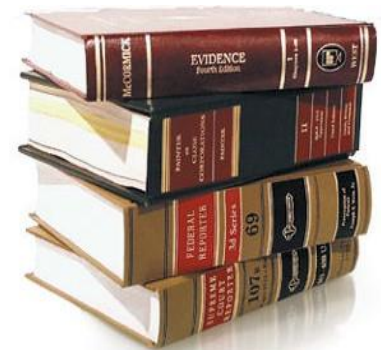
Adoption of Katherine, 42 Mass App Ct 25 (1997)



Termination of Parental Rights

Parental Unfitness: Principles from case law

- May be fit to parent one child, but not another
- Parental unfitness and best interests are interrelated
- Not contest between parent and substitute caretaker



Termination of Parental Rights

2nd Prong: Best Interests

- Future fitness of parent
- Whether permanent plan requires termination decree
- Relationship with parent
- Relationship with other caretakers
- Need for stability/finality
- Child's wishes

Termination of Parental Rights

At a termination trial, the parties may also litigate:

- Competing permanency plans
- Post-termination & post-adoption parent-child visitation
- Post-termination & post-adoption sibling visitation

Alternative Permanency Plans

- Anyone can propose a permanency plan (e.g. adoption by recruitment, adoption, guardianship)
- The lower court gives no extra weight/ no presumption in favor of any competing plan.
- Pure “best interests” analysis
- Adoption of Hugo, 428 Mass. 219 (1998)

Trial & Disposition

- If DCF meets its burden, child will be “adjudicated” a child in need of care and protection
- If DCF does not meet its burden, case must be dismissed. (Transition plan implemented).
- Stay involved!



Trial & Disposition

If child is in need of C&P the court can order:

- Conditional Custody, subject to transition plan
- Permanent custody to DCF
- Permanent custody to noncustodial parent or other qualified person
- Terminate parental rights (with additional findings)
- A guardianship if petition is filed separately

Termination of Parental Rights

- Decree dispenses with parent's right to receive notice of or consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child



Post-Termination Parent-Child Visits

- Timing: After termination of parental rights but before adoption is finalized.
- LC Standard: The lower court has “equitable authority” to order post-termination parent-child visits. (Primary, but not sole, consideration will be child’s best interests -not DCF’s opinion!)
- AC Standard: Abuse of discretion

Post-Adoption Parent-Child Visits

- Standard: Lower court has “equitable authority” to order limited post-adoption parent-child contact, if in child’s best interests
- Necessity: Not necessary in all cases
- Frequency: 4 visits annually is considered extremely generous. More typically, you may see an order of 1-2 visits per year.

Post-Termination Sibling Visits

- Authorized: Required under G. L. c. 119, §26B(b)
- Standard: Must be ordered if reasonable and practical and in child's best interests. No presumption that sibling visits are in the child's best interests. (Care and Protection of Jamison, 467 Mass. 269 (2014)).
- Frequency: lower court must be clear on the frequency of visits

Periodic Administrative & Judicial Reviews (Pre- and Post-Trial)

- Foster Care Reviews (110 CMR 6.12)
- Utilization Reviews (110 CMR 7)
- Permanency Hearings (G.L. c.119, §29B)
- Reviews and Redeterminations [G.L. c.119, §26]

Guardianship of Minor Proceedings

- Who can file? Anyone
- Venues:
 - Juvenile Court (Disposition of Care and Protection)
 - Probate and Family Court (Private Proceeding)
- Right to Counsel
 - Children: G.L. c. 190B, sec. 5-106
 - Parents: [Guardianship of V.V.](#), 470 Mass. 590 (2015)
 - Guardian has powers of a parent regarding minor's support, care, education, health and welfare.

Guardianship of Minor Proceedings

- Petition to Appoint Guardian
 - Standard of Proof
 - Clear and convincing evidence of parental unfitness;
and
 - Guardianship in child's best interests
 - Burden of Proof: Petitioner
- Petition to remove guardian

Private Adoption Proceedings

- Could be a be a step-parent adoption, or a guardian who is now seeking to adopt child
- Right to counsel for children and parents – Adoption of Meghan
- Standard/burden of proof: same as termination of parental rights

Care and Protection Flow Chart

3
days

45
days

60+
days

90
days

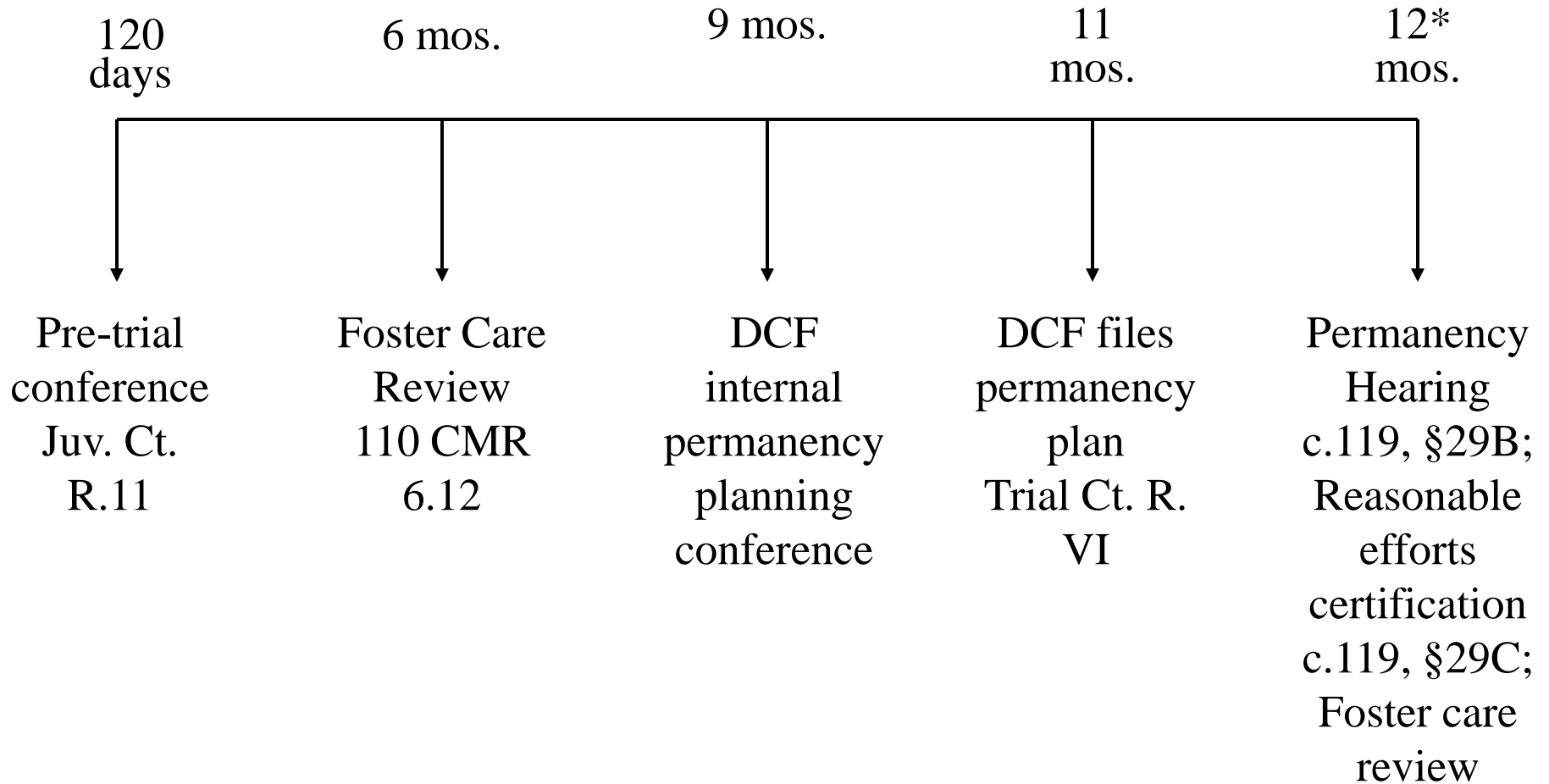
Filing C&P
Emergency/
Ex Parte
Hearing
c.119, §24;
Reasonable
efforts
certification
c.119, §29C

72 hr.
hearing
c.119, §24;
Reasonable
efforts
certification
c.119, §29C ?

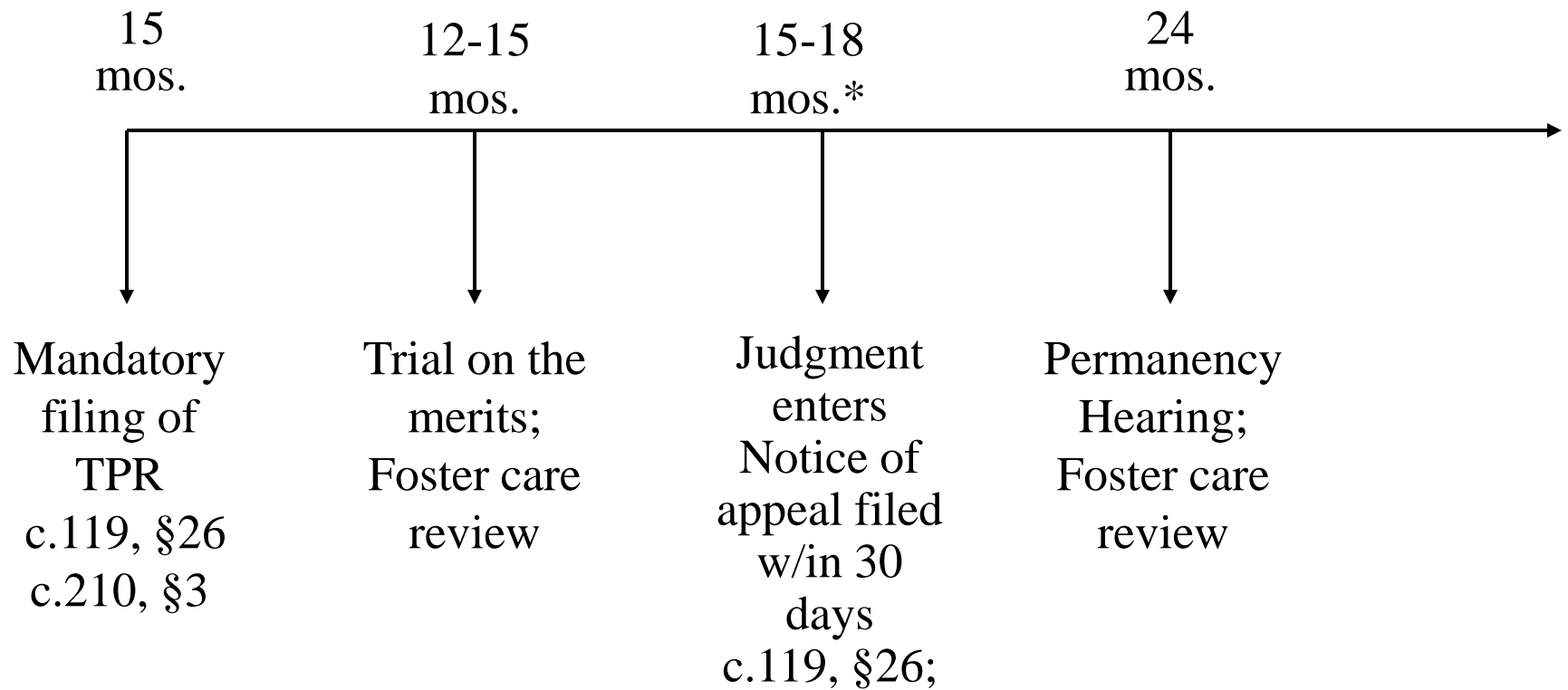
Service
Plan
110 CMR
6.01-.09

Court
investigator
report filed
Juv. Ct. R.7
(60 days
from appt.)

Motion
status
conference
Juv. Ct.
R.10



*Except hearing must be held 30 days from court determination that no reasonable efforts required



*§26 requires final order of adjudication and disposition w/in 15 mos., with one 3-month extension.

**Committee for Public Counsel Services
Children and Family Law Division**

Appellate Resources

1. www.publiccounsel.net
 - Attorney and Vendor Resources → Training Resources
 - Child and Family Law Resources → Appellate Resources
2. Your mentor ← Put this person on speed dial!
3. Administrative Support Unit
 - Ann Narris: annaris@publiccounsel.net
 - Andy Cohen: acohen@publiccounsel.net