

TERMINATION OF PARENTAL RIGHTS



Polling Questions – Part 1



1. Termination of Parental Rights proceedings touch on a constitutionally-protected privacy interest. (True or False)
2. The grounds for Termination of Parental Rights must be proven by a preponderance of the evidence. (True or False)

Termination of Parental Rights is:



AN ORDER WITHOUT LIMIT AS TO DURATION AND WHICH DIVESTS THE PARENT AND CHILD OF ALL LEGAL RIGHTS, POWERS, PRIVILEGES, IMMUNITIES, DUTIES, AND OBLIGATIONS WITH RESPECT TO EACH OTHER.

TPR HAS APPROPRIATELY BEEN CALLED "THE CIVIL DEATH PENALTY".

The Civil Liberty Interest

There is a “fundamental liberty interest of natural parents in the care, custody, and management of their child”. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

“The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

The Civil Liberty Interest

"A parent has a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution to make decisions regarding the care, custody, and control of his or her child. Before a parent can be deprived of his or her right to the custody, care, and control of the child, he or she is entitled to the due process of law. ...[T]he right to be the legal parent of a child is a fundamental right, which cannot be abrogated except for compelling reasons. [cits. omitted]" *In re: I.H.H-L.*, 45 Kan. App. 2d 684, 698 (2011).

Safeguards: Not Just Civil Hearings

There is an **enhanced burden of proof**: Clear & Convincing Evidence.

“The factfinder must be persuaded, on the basis of all the evidence, that the moving party has proved his factual allegations *to be true to a high probability*. [cits omitted]” *In re: B.D.-Y.*, 286 Kan. 686, 697 (2008).

Safeguards: Not Just Civil Hearings

Parents and children have a **right to counsel**.

- Children may have both a best-interest and a directed-interest advocate (K.S.A. 38-2205 (a));
- Parents must waive counsel on the record or in writing. (K.S.A. 38-2205 (b));
- Even parents who fail to appear must be appointed an attorney. (K.S.A. 38-2267 (d))

Permanency Plans

The statutory goal of the permanency plan is to get the child into a **permanent placement**:

1. Reintegration (reunification) with the parents;
2. Placement for adoption;
3. Placement with a permanent custodian (permanent guardianship); or
4. For certain children 16 y/o or older, Another Planned Permanent Living Arrangement (APPLA) [not truly a permanent placement].

K.S.A. 38-2264

Permanent Placements

Termination of Parental Rights is **not** a permanency plan and does not, by itself, result in a permanent placement.

The Drive to Adopt

The Adoption and Safe Families Act of 1997 (ASFA) created a hierarchy of preference among permanency options: Reunification, adoption, and permanent guardianship ("permanent custodian" in KS) (this hierarchy is reflected in K.S.A. 38-2264 (b)).

It provided extra funding for adoptions.

It required the filing of a TPR petition (absent compelling reasons) when a child had been in foster care for 15 of the most recent 22 months.

The Drive to Adopt

A federal requirement for permanent guardianship is a finding that TPR and adoption is not in the best interest of the child.

"Courts are authorized to appoint permanent custodians [guardians] ... when termination of parental rights is not in the best interests of the child but placement of the child in the parental home is also not in the child's best interests."
Matter of Guardianship of B.H., 309 Kan. 1097, 1102 (2019)

KS Discharges from Foster Care (2019 & 2020)

	2019	2020
Reunification	52.2%	55.5%
Adoption	30.2%	27.2%
Guardianship	5.4%	4.2%
Emancipation	12.3%	13.1%

KS Discharges from Foster Care (2019 & 2020)

Exits to Emancipation (%):	2019	2020
Age 12 or younger at entry	12.5	14.5
Older than age 12 at entry	87.5	85.5

TPR PROCEDURE - FILING

Any party or interested party may request termination of parental rights in an original petition filed under the Kansas Child in Need of Care Code, or by subsequent motion or petition.

The pleading, whether motion or petition, must be very fact-specific, including times, dates, and locations.

K.S.A. 38-2266

TPR PROCEDURE - TIMING

The hearing must be held within 90 days of the of the request for TPR.

A continuance requires a specific finding by the court that the continuance is in the best interests of the child.

K.S.A. 38-2267 (a)

TPR PROCEDURE - SERVICE

Service must be made upon:

- Parties
- Interested Parties
- Grandparents (or closest relative to child's parent whose address is known or who can be located)
- Nearest locatable relative of any parent who cannot be located
- Foster parents, preadoptive parents, or relative caregivers

Service must be made by mail with return receipt, at least 10 business days before the hearing.

K.S.A. 38-2267

TPR PROCEDURE - SERVICE

Publication for parents is available in cases where service is not possible in the exercise of due diligence.

The request for publication must be supported by an affidavit detailing the due diligence used to ascertain the names, residences, or both of the persons to be served.

K.S.A. 38-2237, 38-2267.

TPR PROCEDURE - SERVICE

Issues with service will derail permanency. Documenting compliance with these requirements is of utmost importance. **Actual notice does not cure defects with statutory service.**

See *ITIO S.R.*, 34 Kan. App.2d 202 (2005)

GROUNDS FOR TPR

A child previously adjudicated as a child in need of care may have parental rights terminated when the court finds by clear and convincing evidence that:

- The parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child;
- The conduct or condition is unlikely to change in the foreseeable future; and
- Termination is in the best interests of the child.

K.S.A. 38-2269

GROUNDS FOR TPR – UNFITNESS FACTORS

- (1) Emotional illness, mental illness, mental deficiency or physical disability of the parent, of such duration or nature as to render the parent unable to care for the ongoing physical, mental and emotional needs of the child;
- (2) conduct toward a child of a physically, emotionally or sexually cruel or abusive nature;
- (3) the use of intoxicating liquors or narcotic or dangerous drugs of such duration or nature as to render the parent unable to care for the ongoing physical, mental or emotional needs of the child;
- (4) physical, mental or emotional abuse or neglect or sexual abuse of a child;
- (5) conviction of a felony and imprisonment;
- (6) unexplained injury or death of another child or stepchild of the parent or any child in the care of the parent at the time of injury or death;
- (7) failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family;
- (8) lack of effort on the part of the parent to adjust the parent's circumstances, conduct or conditions to meet the needs of the child; and
- (9) whether, as a result of the actions or inactions attributable to the parent and one or more of the factors listed in subsection (c) apply, the child has been in the custody of the secretary and placed with neither parent for 15 of the most recent 22 months beginning 60 days after the date on which a child in the secretary's custody was removed from the child's home. (K.S.A. 38-2269 (b))

GROUNDS FOR TPR – UNFITNESS FACTORS

In addition to the foregoing, when a child is not in the physical custody of a parent, the court, shall consider, but is not limited to, the following:

- (1) Failure to assure care of the child in the parental home when able to do so;
- (2) failure to maintain regular visitation, contact or communication with the child or with the custodian of the child;
- (3) failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home; and
- (4) failure to pay a reasonable portion of the cost of substitute physical care and maintenance based on ability to pay.

In making the above determination, the court may disregard incidental visitations, contacts, communications or contributions.

K.S.A. 38-2269 (c)

FOUNDATIONS FOR TPR – ABANDONMENT

A finding of unfitness may be made as provided in this section if the court finds that the parents have abandoned the child, the custody of the child was surrendered pursuant to K.S.A. 38-2282, and amendments thereto, or the child was left under such circumstances that the identity of the parents is unknown and cannot be ascertained, despite diligent searching, and the parents have not come forward to claim the child within three months after the child is found.

K.S.A. 38-2269 (d)

Polling Questions – Part 1



1. Termination of Parental Rights proceedings touch on a constitutionally-protected privacy interest. (True or False)
2. The grounds for Termination of Parental Rights must be proven by a preponderance of the evidence. (True or False)

Polling Questions – Part 2



1. In cases where a presumption of unfitness has been established, the court may terminate parental rights without further findings. (True or False)
2. The Court plays an active role in determining whether the Agency has documented compelling reasons not to pursue TPR at the 15-month mark. (True or False)

PRESUMPTION OF UNFITNESS

- (1) A parent has previously been found to be an unfit parent in proceedings under K.S.A. 38-2266 et seq., and amendments thereto, or comparable proceedings under the laws of another jurisdiction;
- (2) a parent has twice before been convicted of a crime specified in article 34, 35, or 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or articles 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 21-6104, 21-6325, 21-6326 or 21-6418 through 21-6421, and amendments thereto, or comparable offenses under the laws of another jurisdiction, or an attempt or attempts to commit such crimes and the victim was under the age of 18 years;
- (3) on two or more prior occasions a child in the physical custody of the parent has been adjudicated a child in need of care as defined by K.S.A. 38-2202(d)(1), (d)(3), (d)(5) or (d)(11), and amendments thereto, or comparable proceedings under the laws of another jurisdiction;
- (4) the parent has been convicted of causing the death of another child or stepchild of the parent;
- (5) the child has been in an out-of-home placement, under court order for a cumulative total period of one year or longer and the parent has substantially neglected or willfully refused to carry out a reasonable plan, approved by the court, directed toward reintegration of the child into the parental home;

PRESUMPTION OF UNFITNESS

(6)(A) the child has been in an out-of-home placement, under court order for a cumulative total period of two years or longer; (B) the parent has failed to carry out a reasonable plan, approved by the court, directed toward reintegration of the child into the parental home; and (C) there is a substantial probability that the parent will not carry out such plan in the near future;

(7) a parent has been convicted of capital murder, K.S.A. 21-3439, prior to its repeal, or K.S.A. 21-5401, and amendments thereto, murder in the first degree, K.S.A. 21-3401, prior to its repeal, or K.S.A. 21-5402, and amendments thereto, murder in the second degree, K.S.A. 21-3402, prior to its repeal, or K.S.A. 21-5403, and amendments thereto, voluntary manslaughter, K.S.A. 21-3403, prior to its repeal, or K.S.A. 21-5404, and amendments thereto, human trafficking or aggravated human trafficking, K.S.A. 21-3446 or 21-3447, prior to their repeal, or K.S.A. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, K.S.A. 21-6422, and amendments thereto, or comparable proceedings under the laws of another jurisdiction or, has been adjudicated a juvenile offender because of an act which if committed by an adult would be an offense as provided in this subsection, and the victim of such murder was the other parent of the child;

(8) a parent abandoned or neglected the child after having knowledge of the child's birth or either parent has been granted immunity from prosecution for abandonment of the child under K.S.A. 21-3604(b), prior to its repeal, or K.S.A. 21-5605(d), and amendments thereto; or

(9) a parent has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;

PRESUMPTION OF UNFITNESS

(10) a father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;

(11) a father abandoned the mother after having knowledge of the pregnancy;

(12) a parent has been convicted of rape, K.S.A. 21-3502, prior to its repeal, or K.S.A. 21-5503, and amendments thereto, or comparable proceedings under the laws of another jurisdiction resulting in the conception of the child; or

(13) a parent has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition. In making this determination the court may disregard incidental visitations, contacts, communications or contributions.

K.S.A. 38-2271 (a)

PRESUMPTION OF UNFITNESS

Presumptions of unfitness must be established by **clear and convincing evidence**.

The burden of proof is on the parent to rebut the presumption of unfitness by a **preponderance of the evidence**. In the absence of proof that the parent is presently fit and able to care for the child or that the parent will be fit and able to care for the child in the foreseeable future, the court shall terminate parental rights in proceedings pursuant to K.S.A. 38-2266 et seq., and amendments thereto.

K.S.A. 38-2271 (b)

RESIDUAL EFFECTS

Prior to adoption, the TPR order does not terminate:

- Right of the child to inherit
- Sibling relationships
- Relative placements still considered relatives

K.S.A. 38-2269(g), 38-2202(cc)

When TPR May Be Avoided

TPR may not be in the best interest of the child when:

(1) Such child is being cared for by his or her relative;

(2) The case plan documents a compelling reason for determining that filing such a petition would not be in the best interests of such child.

(3) The agency has not provided to the family of such child services deemed necessary for his or her safe return to his or her home, consistent with the specific time frames for the accomplishment of the case plan goals.

ASFA (42 U.S.C.A. § 675 (5) (E))

Practice – Compelling Reasons

If the court finds reintegration is no longer a viable alternative, the court shall consider whether:

- (1) The child is in a stable placement with a relative;
- (2) services set out in the case plan necessary for the safe return of the child have been made available to the parent with whom reintegration is planned; or
- (3) compelling reasons are documented in the case plan to support a finding that neither adoption nor appointment of a permanent custodian are in the child's best interest.

K.S.A. 38-2264 (i)

Practice – Compelling Reasons

Compelling reasons not to TPR include:

(A) A parent of such child is successfully participating in services that will make it possible for his or her child to safely return home;

(B) Another permanency plan is better suited to meet the health and safety needs of such child. Documentation that another permanent plan is better suited to meet the health and safety needs of such child may include documentation that:

(i) Such child is 14 years of age or older and objects to termination of parental rights. Prior to accepting a child's objection, the court shall personally question such child in chambers to determine whether the objection is a voluntary and knowing choice;

(ii) Such child is 16 years of age or older and specifically requests that emancipation be established as his or her permanent plan;

(iii) The parent of such child and such child have a significant bond, but such parent is unable to care for such child because of an emotional or physical disability and such child's caregiver has committed to raising such child to the age of majority and facilitating visitation with such disabled parent; or

(iv) Such child is in a residential treatment facility that provides services specifically designed to address his or her treatment needs and the court determines that his or her needs could not be served by a less restrictive placement;

Practice – Compelling Reasons

Compelling reasons not to TPR include (continued):

- (C) Such child is living with his or her relative who is unable or unwilling to adopt such child, but who is willing and capable of providing such child with a stable and permanent home environment and the removal of such child from the physical custody of his or her relative would be detrimental to such child's emotional well-being;
- (D) The court or judicial citizen review panel, in a prior hearing or review, determined that while the case plan was to reunify the family, DFCS did not make reasonable efforts; or
- (E) Such child is an unaccompanied refugee or there are international legal obligations or foreign policy reasons that would preclude terminating parental rights...

OCGA § 15-11-233 (Official Code of Georgia Annotated)

Practice – Post-TPR Disposition

After termination of parental rights, the court may authorize:

- Adoption;
- Permanent custodian; or
- Continued permanency planning

If the court does not terminate parental rights, the court may authorize:

- Permanent custodian; or
- Continued permanency planning.

K.S.A. 38-2269 (g) (2), (3)

Practice – TPR Disposition

If the court enters an order terminating parental rights to a child, or an agency has accepted a relinquishment pursuant to K.S.A. 59-2124, and amendments thereto, the requirements for permanency hearings shall continue until an adoption or appointment of a permanent custodian has been accomplished. If the court determines that reasonable efforts or progress have not been made toward finding an adoptive placement or appointment of a permanent custodian or placement with a fit and willing relative, the court may rescind its prior orders and make others regarding custody and adoption that are appropriate under the circumstances. Reports of a proposed adoptive placement need not contain the identity of the proposed adoptive parents.

K.S.A. 38-2264 (j)

**When evaluating a potential TPR,
Consider the likelihood of post-TPR
permanency.**

Ask yourself:

Is there an adoptive placement ready?

**Has the agency done all the paperwork
necessary to allow the change to
adoptive placement as soon as TPR is
completed?**

RETHINKING PERMANENCY



Much of our philosophy regarding termination of parental rights and adoption is based on flawed assumptions and practices.

1. Relational Permanency is more important than legal permanency.

KANSAS TPR RATES (BOTH PARENTS) PER CALENDAR YEAR PER CHILD IN THE POPULATION

2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
8.4	9.2	9.2	9.1	10.3	12.1	12.8	12.7	13.9	12.9

2. We decry the “instability” of foster care while contributing to it.

PLACEMENT STABILITY

IN CARE <12 MO	2019	2020
2 OR FEWER PLACEMENTS	73.6%	79.0%
3 OR MORE PLACEMENTS	26.1%	20.7%

IN CARE 12-24 MO	2019	2020
2 OR FEWER PLACEMENTS	55.4%	59.7%
3 OR MORE PLACEMENTS	44.6%	40.2%

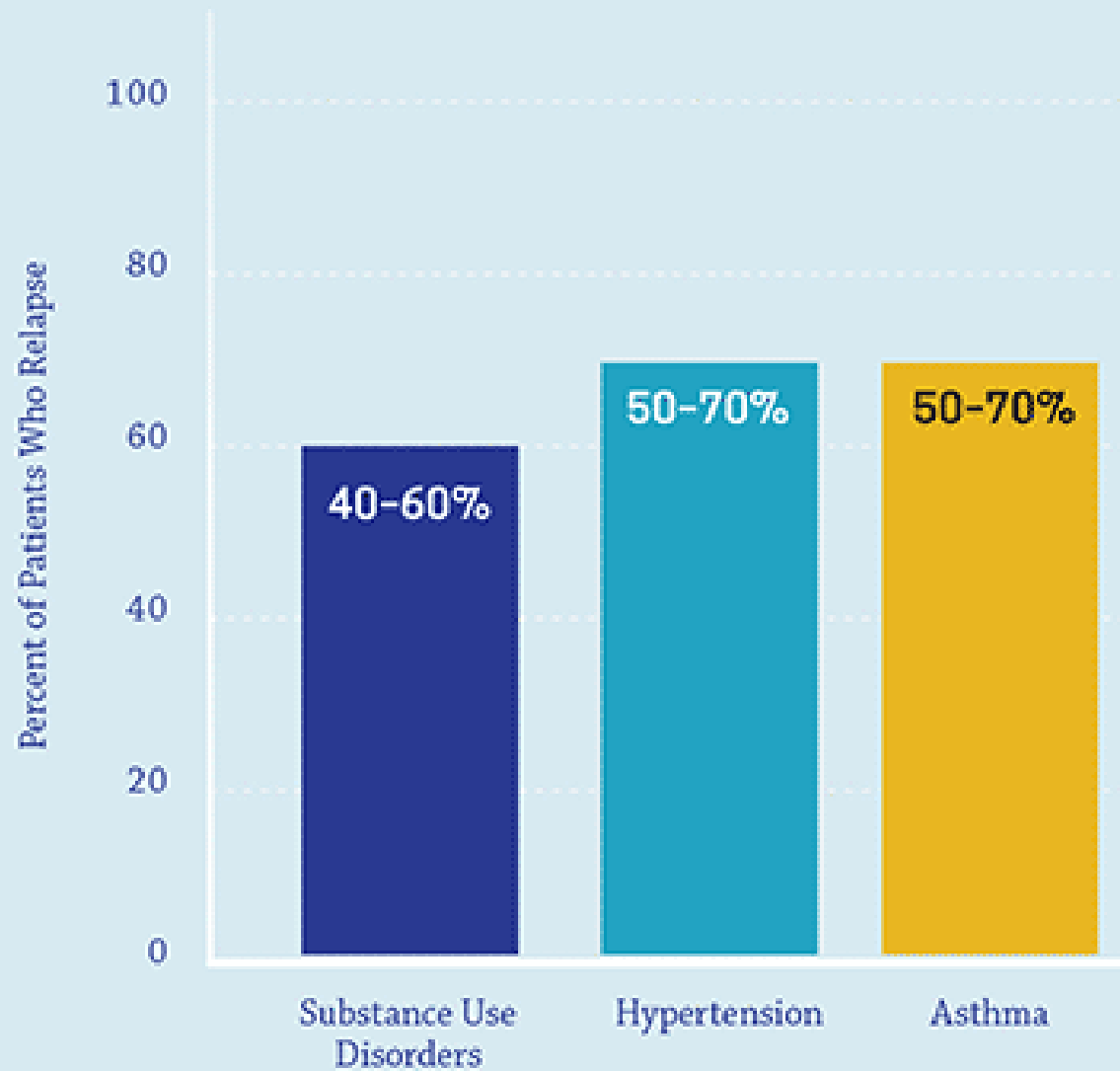
IN CARE 24+ MO	2019	2020
2 OR FEWER PLACEMENTS	41.2%	39.0%
3 OR MORE PLACEMENTS	58.8%	61.0%

3. We do not uniformly require evidence-based reunification services.

Well-supported scientific evidence shows that substance use disorders can be effectively treated, with recurrence rates no higher than those for other chronic illnesses such as diabetes, asthma, and hypertension. With comprehensive continuing care, recovery is now an achievable outcome.

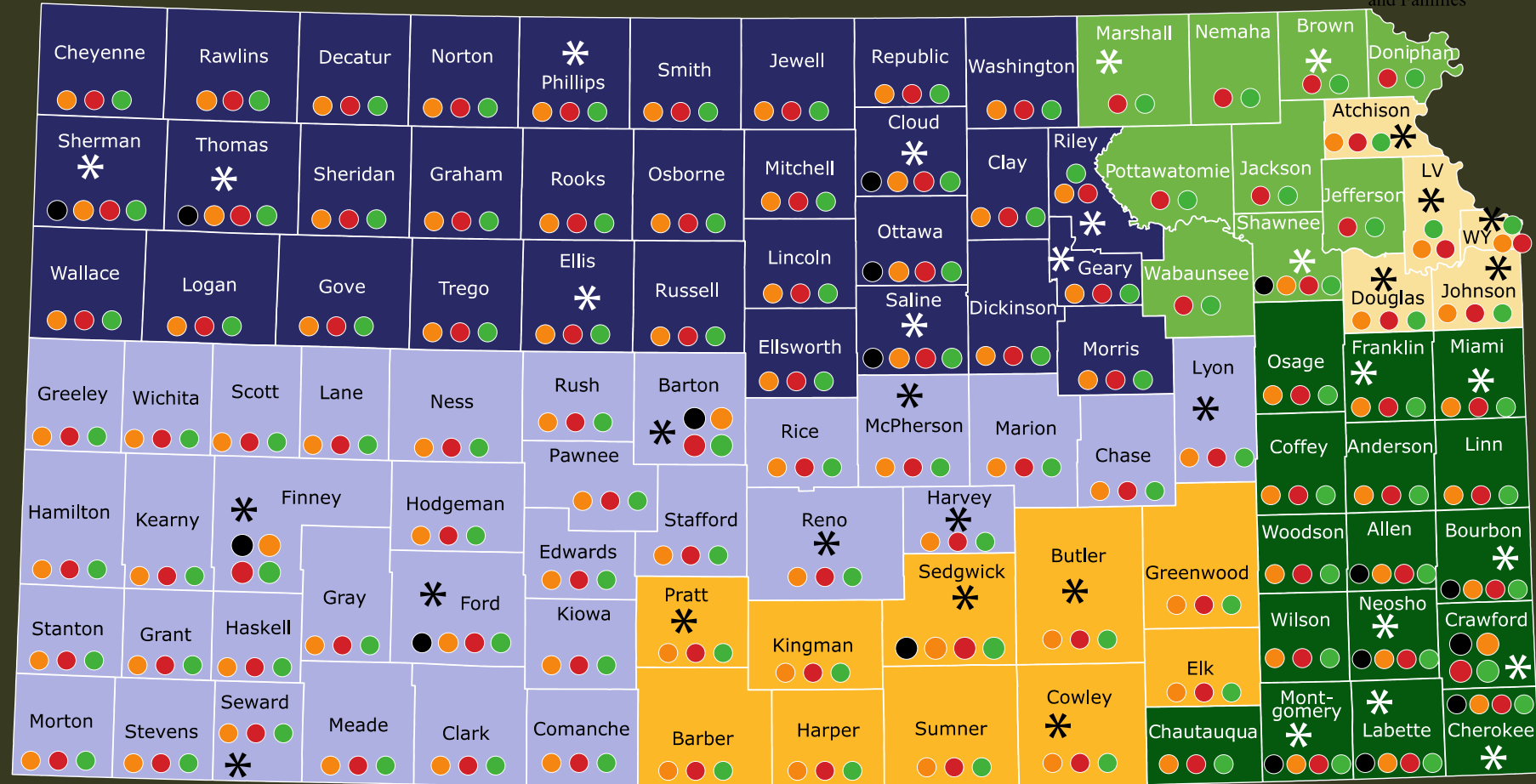
Surgeon General's Report on Alcohol, Drugs, and Health
(2016).

Comparison of Relapse Rates Between Substance Use Disorders and Other Chronic Illnesses



NIH Natl. Inst.
On Drug
Abuse, March
2022

Family First Prevention Services Act Programs



* DCF Service Center

	Northwest		Northeast		Wichita		Mental Health		Substance Use Disorder
	Southwest		Southeast		Kansas City		Parent Skill Building		Kinship Navigator

4. Significant "foster care drift" occurs after termination of parental rights.

Does TPR Prevent Foster Care Drift?

Nationally, children spend an average of **20 months** in foster care following TPR.

TIME TO ADOPTION (once legally free for adoption)

	2019	2020
<12 MO	1.0%	0.8%
12 -24 MO	16.3%	17.6%
24 -36 MO	34.3%	36.2%
36 - 48 MO	23.2%	21.8%
48+ MO	25.2%	23.6%

April 2019 - March 2020	Kansas	U.S.
In Care with Both TPRs on March 31, 2019, Perm. within 12 Months	43%	55%
In Non-Relative Care Over 24 Months on Mar. 31, 2020	24%	22%
In Non-Relative Care Over 24 Months with both TPRs on Mar. 31, 2022	61%	43%

When necessary, TPR should not be delayed, but all steps should be taken at the earliest possible time to ensure that post-TPR permanency is expedited.

TPR should always be an option of last resort for the worst cases of abuse and neglect where it is clear that the continuation of the parent-child relationship is not beneficial to the child.

TPR should not occur where parents have not been provided evidence-based services (unless reasonable efforts were not required).

Polling Questions – Part 2



1. In cases where a presumption of unfitness has been established, the court may terminate parental rights without further findings. (True or False)
2. The Court plays an active role in determining whether the Agency has documented compelling reasons not to pursue TPR at the 15-month mark. (True or False)

Scenario 2



Marsha is a 16-year-old who has been in foster care for two years. Marsha's mother has always maintained that she does not know who the father is, and DNA tests on two possible candidates identified by her eliminated both of them. The Court has previously found that the Agency has used diligent efforts to identify and locate the father.

Marsha's mother has been in court-ordered substance-abuse treatment since the inception of the case. Her substance use habits consisted of weeks of parental incapacity due to methamphetamine use, often followed by several weeks or even months of apparent sobriety. She has failed drug screens during these periods of claimed sobriety, but her meth use on these "one-off" occasions does not appear to interfere with her ability to parent Marsha. It is the consistent periods of extended relapse that have been of the greatest concern.

Marsha is happy in her foster placement, but her current placement, though her longest, is her fourth since coming into care. Her current foster parents are willing to adopt Marsha, but Marsha remains in almost-daily contact with her mother on social media, as well as enjoying regular visits when her mother is not in relapse. Visits between Marsha and her mother are appropriate and both seem to enjoy their time together. Marsha's mother's most recent relapse was triggered by a temporary suspension of visits due to a positive drug screen, and Marsha's reaction to the suspension created behavior problems that required the foster parents to request respite care. Marsha states very strongly that she does not want to be adopted.

A bonding assessment noted that despite the difficulties in their relationship, both Marsha and her benefit from continued contact, and especially from in-person contact.

Marsha's mother had a recent substance-abuse assessment that recommended in-patient treatment, but she has not yet enrolled in an in-patient program. The assessor opined that without in-patient treatment, the mother's likelihood of continued relapse was very high.

The Agency has had no success in finding relatives or others willing to become permanent custodians, and has not located other adoptive resources, though efforts are ongoing.

The Agency has announced its intention to file a TPR petition.

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