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Decision-Making Processes of Judges in Family Court: An Investigation of Salient Features Relating to Termination of Parental Rights Hearings

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DECISION-MAKING PROCESSES OF JUDGES IN FAMILY COURT:
AN INVESTIGATION OF SALIENT FEATURES RELATING TO TERMINATION
OF PARENTAL RIGHTS HEARINGS

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DEDICATION

To Jim

Your high expectations and encouragement moved me to live up to them.

To Gus and Charlie

You are my greatest inspiration.

ACKNOWLEDGEMENTS

Isaac Newton once said, “If I have seen farther, it is because I have stood on the shoulders of giants.” While there are a myriad of differences between myself and Newton, we do share this in common. Without a network of generous giants, I would never have seen farther into the field of educational psychology. Completing this dissertation has been the most intimidating challenge of my life thus far. I will forever be grateful to the giants in my life who supported and assisted me throughout this process.

I most heavily relied on my husband, Jim, and my son, Gus, to keep me motivated and grounded while completing this work. It is because of them, that I want to achieve my goals and grow to become a better person. It is because of them, that I intend for these goals will make the world a better place for someone in it. My parents also served as constant supporters of this work. My dad, who always ensured that I had everything I needed to achieve, and my mom who encouraged me constantly. They are models to me both in my life as a parent, in my career, and I am truly grateful for them now and always. My sister Hailey, whose work ethic and attention to detail are a model for me in all I do. Thank you to Carol for her encouragement, support, and acknowledgement of my struggles. I have appreciated your generosity and perspective during this time. Thank you to John and Emmie, for checking in, wishing me well, and following along throughout all my years as a doctoral student.

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Without the support from the Richardson family, particularly Matthew and Jay, I could never have earned the trust of any family court judges to collect data. They are the champions of this research and I will be forever grateful to them for their help.

Finally, I am eternally thankful to my dissertation committee. Dr. Kellah Edens, my chair, who guided me through multiple topics and ideas, and shared her knowledge and perspective freely. Dr. Rhonda Jeffries, who generously gave of her time to become a mentor on qualitative research methodology. Drs. Kelly Lynn Mulvey and Matt Irvin, who participated in my dissertation work and provided feedback and perspective that strengthened this work and sharpened me as a researcher.

ABSTRACT

This qualitative study uses Corbin and Strauss' approach to the Grounded Theory method of analysis to determine the salient features of decision-making in termination of parental rights (TPR) hearings. Specifically this study addresses: what information is used to make decisions in a TPR case; what training or systemic improvements are needed; the role of intuition, prior experience or other stores of knowledge; how judges prioritize sources of information; and how "best interest of the child" is interpreted by family court judges. A theory of judicial decision-making relating specifically to TPR hearings is proposed.

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CHAPTER ONE

Introduction

We are not to be pitied . . . we just need a family . . . we're not going to fall apart . . . people get used to many things . . . they adapt . . . we should be treated special . . . but not too special.

Anonymous Interview conducted January 1980 (Festinger, 1983)

The Experience of “Aging Out” of Foster Care

When children are not cared for, are neglected or abused, it is in their best interest that protection is provided to the family unit. In the United States, when abuse or neglect occurs, when a family cannot or does not protect a child, the community must.

Professionals in child protection are charged with the task of keeping children safe from harm and locating the resources needed to thrive. When children cannot return safely to their home, other family members, foster families or group homes must assume physical custody of children to ensure their safety. Children cannot, by legal statute or ethical obligation, remain in an unsafe home environment. In some cases, children will return home to their families. In other cases, the child will remain in placement outside of their family home, or in multiple placements for extended periods of time. When this happens for a prolonged period of time, the child does not experience stability or consistency and ultimately “ages out” of foster care when they turn 18 or in some cases 21 without a legal family. Many challenges result in virtually every aspect of development for children who have experienced trauma of abuse or neglect, and multiple foster care placements only to

age out of foster care without a legal family. Emotionally, children may struggle with feelings of rejection or low self worth as a result of not having a family (Festinger, 1993).

When we were arguing, I asked her, 'Since I've been here in your home, have you ever looked upon me as a son?' And she didn't answer. That hurts me the most, that I know she didn't look at me as a son. Yet I'm Sam and Michael's brother, and she looks at them as sons . . . Even with all that's happened to me in my life, I hardly ever cry. But that day . . . I was crying. ~Child who lived with his biological brothers and their adoptive mother after aging out of foster care (Shirk & Stangler, 2004).

Children who age out of foster care often require additional supports to set goals and work towards them, adhere to workplace rules and norms, pay bills, save money or maintain a clean and healthy household. These life skills, typically taught to and practiced with children in families, can be difficult for children who have aged out of foster care to master before they are linked to serious consequences. (Festinger, 1983)

Whenever something good happens to her, she does something to make it fall apart. I told her when she left that she needs to find out why she's sabotaging her life. ~manager of a group home for homeless youth (Shirk & Stangler, 2004).

Children who age out of foster care have limited supports for healthy decision-making, low education, and few relationships with protective adults. With this combination of risk factors, children can find themselves in dangerous situations.

"He was dirty and had gotten really skinny. He told me he was selling himself on the gay loop by the river, and I told him that wasn't a healthy

choice he was making. I talked to him about AIDS. But Reggie couldn't really grasp what I was saying." (Three weeks later Reggie was found dead. An autopsy report showed that he had drowned in a river and he was found naked from the waist down). (Shirk & Stangler, 2004).

Societal Cost of Aging Out

In addition to these harrowing individual experiences, there are also great societal costs when youth age out of foster care and transition to adulthood without adequate supports. The aging out process has negative long-term effects on the child, the community and the state. National data show that of all youth aging out of the foster care system: 56% are unemployed and face poverty within four years, 40% do not graduate from high school and 60% of the teenage girls will have a baby within 2 years (Adopt SC, n.d.). Additionally, youth who age out of foster care constitute 70% of all homeless youth and 88% of incarcerated youth and young adults (Adopt SC, n.d.). While it is a goal for many social workers, psychologists, educators, child advocates, pediatricians and policy leaders to ensure that children grow up in optimal environments, it also becomes an issue of financial and public health for the entire state.

Reducing the number of children who age out of foster care and become legal orphans is important for individual children, for families and for communities. Sadly, there is not a simple solution to this challenge. While preventative treatments for families can limit the number of children who come into foster care, older children who have been in foster care for years face a particular set of emotional and behavioral challenges that must be acknowledged so that potential adoptive families can address them. If additional support is not available to adoptive families of children and

adolescents who have experienced the compounding trauma of unstable placements, adoptions may be disrupted and children will experience further trauma (Casey Family Programs, 2006).

A multi-disciplinary approach aimed at reducing the number of children who enter care, protecting fragile families, and locating adoptive families quickly for children who are legally free for adoption would reduce the number of children who age out of foster care. Each of these strategies for reducing the number of children who age out of foster care has a number of best practices and interactions with associated child serving agencies and systems. Many of these are beyond the scope of this paper, but provide avenues for future research on decision-making and expediting permanency for children who have experienced maltreatment.

Context of the Present Study

According to data reported by Casey Family Programming in 2011, there were 28,000 children nationally who aged out of foster care without a permanent family (Casey Family Programming, 2011). South Carolina contributed 366 children to this national number in 2011, and 114 of those were in care since before their twelfth birthday (Administration of Children and Families, 2013). Each state independently sets the legal requirements for terminating parental rights and there are variances in child welfare systems across the country. As a result, the number of children aging out of care in one state cannot be compared to another state in a meaningful way.

South Carolina Department of Social Services and the Family Court system make decisions in “the best interest of the child” (New Judges’ Training Manual, 2013). This standard is not defined in statute and by its very nature, changes on a case-by-case basis

in different contexts and requires the interpretation of many involved in child protection. In South Carolina, parental rights are terminated by a family court judge using information presented by DSS attorneys, guardians ad litem, attorneys for the parents, case workers, and in some cases the child (New Judges' Training Manual, 2013). This decision is commonly referred to as "the death penalty" in family court, because of the gravity of its consequences. By terminating biological parents' rights, the child is a legal orphan. As a legal orphan, the child does not have a permanent or legal family, is not entitled to any child support, and the state assumes responsibility for the child until an adoptive family is located (Termination of Parental Rights, 2007). An adoptive family can be difficult to find, so simply terminating parental rights, does not ensure permanency for a child. Quite the contrary, it may sever emotional ties with the biological family and further extinguish hope of family stability.

If a child is not and will not be safe in the family home, but a judge does not terminate parental rights, DSS cannot spend limited resources to locate a 'forever family' for the child. A 'forever family' is the term given to what most people consider a family, whether by blood relation, marriage, or choice. The people who will always support you and help you, those who would miss you dearly if you were absent from holiday dinners and family events, are your 'forever family'. This means there is no permanent plan for the child (Hanick-Coulter, 2013 Palmetto Power). The task becomes increasingly unenviable, as family court judges are expected to weigh child safety, and well-being within the confines of statute and case law, while assessing available information and considering unknown resources to make a decision (New Judges' Training Manual, 2013). This decision will impact the life and development of a child and the stewardship

of state resources. A child who is the subject of a termination of parental rights (TPR) hearing has already experienced trauma and discontinuity of placement, and continued indecision regarding his/her future has an impact on development, therefore these high stakes decisions surrounding a child's legal family must be made swiftly and intentionally.

Purpose of the Study and Research Questions

Until now, little research has been conducted to determine how family court judges determine if parental rights should be terminated. How do they negotiate this high stakes decision-making process? What information is needed so for them to make informed decisions? How should information be presented so that the best interest of the child is reflected in the outcome? Navigating this process is challenging, with severe impacts on children and the state. By better understanding the experience of family court judges in this role, systemic changes and expanded trainings can make the judicial decision-making level of the complex process of TPR more efficient, ultimately reducing the number of children in South Carolina who are legal orphans.

Judicial decision-making is a complex cognitive process, and the same piece of information can be interpreted differently by family court judges. This makes family court rulings somewhat inconsistent despite efforts to encourage consistency within the system (Children's Law Center, Best Legal Practices in Child Abuse and Neglect Cases). When gaps in information exist, the statutory definition of their role, mandates judges to act using available information to decide what is in the best interest of the child (SC Children's Code, SECTION 63-7-1640). The "best interest of the child" is not defined in statute and therefore is open to interpretation by the attorneys, guardians ad litem, family

court judges and other adults involved in determining where this child will make their home and find their family. Additionally, the outcomes of a TPR hearing are not easily predictable, and when an outcome is foreseeable, it may not be ideal, further obscuring the working definition of “best interest.”

In this multifaceted context, the key determinants of decision-making, are complex, and require an examination of many aspects of TPR hearings, the decision-making involved, and the judicial belief systems that guide a judge’s actions. To obtain evidence that suggests a theory of TPR judicial decision-making, this study is guided by the following research questions:

1. What are the pathways to child protection that may eventually lead to TPR?
2. What are judges’ thoughts and beliefs about TPRs in general?
3. What are the salient features of decision-making in TPR cases?
 - a. What information is used to make decisions in a TPR case?
 - b. What, if any, improvements to systems and training are needed?
 - c. What role do intuition, prior experience, and other stores of knowledge play in decision-making?
4. How is “the best interest of the child” interpreted by family court judges, since it is not defined by statute?
5. How do judges prioritize sources of information?
6. What steps does a judge take during a TPR hearing?
7. Are there any particular enabling or inhibiting factors when judges hear a TPR case? If so, what are they and how should they be changed or preserved?

Study Significance

The aim of this study is to obtain and qualitatively analyze data about how judges make decisions in TPR cases to develop a model for this decision-making processes. By using Strauss and Corbin's approach to the grounded theory method to collect and analyze qualitative data, and using this data to determine the full content of literature review, a theory of judicial decision-making as related to termination of parental rights hearings will be generated. Grounded theory refers to the method of data analysis in which a theory develops from data instead of the data being analyzed to test a hypothesis or theory (Walker & Myrick, 2006). Additional information relevant to attorneys, case workers, guardians ad litem can support judges in this difficult task, and how information should be conveyed in court will become apparent. Trainings, professional development and improved practice will be the result of this study and by understanding how judges make decisions related to TPR cases, children long-term involvement with DSS will ultimately benefit.

Definition of Terms

This study will use the following definitions:

Age Out- turning the "age of majority" 18 or 21 and no longer remaining eligible for foster care and related services.

Legal Orphan- a child who has no legal family because parental rights have been terminated, and the child has not yet been adopted.

TPR Hearing- Termination of Parental Rights Hearing, a hearing to strip parents of parental rights and a legal demarcation that a child is eligible for adoption, and the biological parents have no legal rights concerning the child.

Forever or Permanent Family- a family that will always exist for a child who has been in foster care.

GALs- Guardians ad litem, adults assigned in a voluntary or legal capacity to speak for the child in family court.

DSS- Department of Social Services. For this study, refers to DSS in South Carolina.

Summary

This chapter introduces the societal problem of children aging out of foster care, and the integral role a family court judge has in facilitating permanency for the child. Surviving abuse and neglect, and subsequently growing up without a protective family has deep psychological impacts on children, putting them on a trajectory of educational failure, crime, poor health outcomes, and high risk behavior. The plight of children aging out of foster care has social and economic implications of remarkable proportion. This qualitative study examines the decision-making processes of family court judges as a means of identifying training or systemic changes needed to efficiently locate permanent families for children who have survived abuse and neglect.

CHAPTER TWO

Review of Relevant Literature

As preliminary data analysis was completed, several concepts for further investigation through literature review became apparent. These topics for further exploration and literature review emerged from the data. Family court judges' decision-making in TPR cases relates to moral and ethical views of the family and parenting, and the application of law. The central constructs of this study include general theories of decision-making, moral and ethical decision-making, gender differences in approaches to making decisions, intuition, predictions, and motivation.

General Theories of Decision-making

Based on several theories of decision-making across multiple disciplines, the following assumptions hold true of decision-makers (Shubik, 1958):

1. A decision is a conscious choice of action from among a variety of alternatives, both well and ill defined.
2. The decision-maker must assign value to the outcome that results from any set of actions.
3. The individual decision-maker is motivated to act in a manner such that the expected value of the outcome is as high as possible.

A decision is a choice that is actively made by an individual between well-defined and easily identifiable outcomes, or ill-defined, ambiguous alternatives. The decision rests in the intentional action taken, not a result that is an unintended consequence of a

separate action or lack of action (Shubick, 1958). Within the context of this study, decision is an intentional announcement made in court to terminate or not terminate parental rights. Continuing the case, so that functionally, parental rights have not been terminated, but never making a choice between terminating or not terminating parental rights is not a decision. Although the decision-maker (the judge in this case) must decide between well-defined alternatives (i.e. termination of parental rights), if the alternatives are ill-defined (i.e. unknown outcome), the decision-maker must prescribe meaning to them. Making meaning of ambiguous or ill-defined alternatives and assigning value to these alternatives is imperative so that judges have enough information with which to make a decision. Additionally, the assumption of decision-making is that the individual making the decision will choose the best one. This means that the outcome selected is the one interpreted to have the best results available, without sabotaging behaviors or lack of consideration of the results.

Boulding suggests that decision makers assume an orientation, either the heroic man or the economic man (1958). The heroic man relies on an ethical code, which calls for action of the “best interest” without calculation of cost. The economic man considers cost and calculates a rational course of action. Boulding posits that the heroic man trumps the economic man, but that these two orientations that guide decision-making must operate in conjunction with each other. Because “without the heroic, man has no meaning. Without the economic, he has no sense,” (Shubick, 1958).

Ethical Decision-Making As the heroic man relies on an ethical code, individuals making high stakes decisions must have a process for being ethical and moral. General ethical imperatives require three tasks to be completed for actions to be

considered ethical (Newton, 2013):

1. It promotes the maximum social welfare obtainable.
2. It enforces justice, by promoting an even-handed compromise.
3. It insists on the dignity, worth, and conscience of every individual.

Maximum social welfare obtainable refers to the good of the group in general and prevents harm to individuals as much as is possible. In this study, this refers to the health of communities, prevention of violence in homes, and the connection between children and protective factors. Enforcing justice through promotion of even-handed compromise refers to consistency in the treatment of others. In the context of this study, that refers to allowing attorneys from both sides to present information, call witnesses, and have the same opportunity to be heard in court. It also refers to equity across different cases. In the absence of different information or alternatives, a judge's decision will remain constant regarding termination of parental rights across families. This is very difficult to measure, given that every case is different with complex and unique factors worthy of consideration.

Social-Cognitive Domain Theory Turiel (1983, 1998) posited that morality, a distinct domain of social knowledge, is created from the mutual interaction between individual and environment (Smetana, 2006). Social-cognitive domain theory positions morality as a conceptual system that is distinct from judgments or evaluations about societal/group or psychological/personal considerations (Mulvey et al, 2013). Central to this theory is the tenet that morality includes issues of justice, fairness, rights, welfare, and, central to this study, prevention of harm to others. Additionally, moral development is just one strand of cognitive development that occurs and operates

simultaneously with others (Smetana, 2006). For example, evaluations of justice and fairness coexist with conceptualizations of societal norms such as authority and hierarchy as well as personal issues and preferences. Social Domain Theory is not a stage theory, meaning that knowledge of morality is developed through interaction with the environment and attention to the social knowledge domains of moral issues, social conventional issues, and personal issues. Particularly relevant to this study, moral justifications refer to intrinsic consequences of acts concerning others and social-conventional justifications refer to authority, social expectations, and social order or law relating to the treatment of others (Smetana, 2006). When considering the termination of parental rights, there are both moral and social conventions in addition to judges' personal issues. For example, making a child a legal orphan requires a judge to eliminate the right of the parent to the child. However there are also social conventions such as the cost to the state that make termination of parental rights a multifaceted moral event.

From a social-cognitive perspective, issues of morality and moral behavior regarding others' welfare, equality, and fairness are complex in most situations including the consideration of societal norms and awareness of intention of others (Mulvey et al, in press). Social factors that are particularly important when examining moral decision-making include understanding intentionality, and intergroup attitudes. These two factors are central in understanding the complexity of moral decision-making in contexts as Mulvey et al posit. A lack of information regarding future parent actions, and community resources limits family court judges' ability to read social cues and make accurate predictions. Similarly, judicial perception of a parent or witness' intentionality or mental state depends on what is presented in court in a limited amount of time, and often by

attorneys, guardians ad litem or other professionals who work in family court. As a result, judges may misinterpret intention, however family court judges likely have a vast amount of social knowledge and practice interpreting intention making these errors less likely, however similarly complex. Multifaceted contexts include individual's struggles to take intentionality into account while making a moral decision (Mulvey et al, in press; Mulvey, Hitti, & Killen, 2013). Social-cognitive domain theory focuses on the cognitive, affective, and behavioral components in context, therefore conceptualizing morality as a constructive process that relies on a multifaceted interaction between the individual and the environmental context in which the individual develops an understanding of 'what is right and moral' based on social interactions (Mulvey et al, in press).

An Approach to Moral Decision-making Lisa Newton created an acronym, ADAPT (Attention, Dialogue, Assumptions, Proposal, Test) to illustrate the approach to moral decision-making that takes place in people who want to do good and avoid harm (Newton, 2013). *Attention* alerts the decision-maker to conditions that require concern or cognitive action. For this study, the conditions in need of consideration are a child's home and family life, and the court system calls judicial attention to the child's welfare. *Dialogue* provides an opportunity for these conditions to be discussed. For the purposes of this study, dialogue occurs in family court following the evidentiary rules and procedures that govern the environment. Dialogue also occurs between colleagues as judges seek help during complex cases. During this discourse, an opinion is formed within the legal community. *Assumptions* guide individual lives without conscious attention to them, and these are so ingrained in our way of viewing the world that it becomes impossible to extract them from ourselves. Assumptions are implicit, situated

knowledge that judges maintain about the legal world around them. An example of the tacit views a decision maker in the legal community might hold include “children must be kept safe by family.” Assumptions are the moral rules with which people run their lives. *Proposals* for alternative courses of action become apparent and value is assigned to them. From this point a more informed decision can be made. In this study the proposals are a dichotomous choice: to terminate or not terminate parental rights. Finally, the results of the action are *tested* against the expected outcome. Family court judges in South Carolina do not typically learn the outcome of a decision, unless they seek this information from legal professionals or an appeal of their decision not to terminate parental rights. Despite this intermittent feedback on outcomes, judges can locate information about a decision if they are so inclined, therefore testing and reflection upon these actions does occur in family court.

Confronting Complexity Newton maintains that in a moral problem the “right” course of action is known, although may be difficult to carry out, but an ethical dilemma is different in that the right course of action is not necessarily known (2013). Family court judges occasionally have moral dilemmas, however, given the ambiguous definition of “best interest of the child.” Additionally, they frequently face ethical dilemmas in their decision-making because of unpredictable future circumstances surrounding families and children.. Confronting complexity and making meaning of ambiguous, unpredictable conditions requires that judges engage in cognitive and affective work. First the judge (decision-maker) must organize his/her options and determine the likely outcomes only to the extent the information is available and the extent of the ambiguity. This process illustrates available as alternative courses of action (Newton, 2013).

Making meaning and assigning value to these allow for the elimination of undesirable options and consequently looking to the means that will produce the most valuable outcome. This requires the judge to review the legal rights of all participants (parents, grandparents, children and tax payers) in the case (Children's Law Center Publication, New Judges Training Manual). This adherence to ethical obligation or deontological reasoning means that a course of action that violates a rule or the legal rights of participants is prohibited regardless of the outcomes (Newton, 2013). This is a position that family court judges must give great care to, as their priority is to uphold the law. Once the alternative courses of actions are defined and the rights are taken into consideration, the judge can determine a decision, evaluate the effects as much as possible given systemic and time constraints, and reflect on the decision (Newton, 2013).

Emotion and Decision-making

After interviews were completed, data illustrated that it was important to consider the role emotion plays in making high stakes decisions. Making decisions relating to the well-being of children who have experienced abuse and/or neglect is understandably an emotional task. As such, defining emotion, and its impact on decision-making and attention is relevant to this study. Frijda (1986), along with Oatley and Jenkins (1996) state that emotion is "readiness to act and the prompting of plans." This simple definition suggests that fear is felt due to the act of running away, but does not explain why some stimuli or events cause us to run while others do not (Rolls, 2014).

Intuition

Regulating attention and behavior can be more difficult when the task is ambiguous than when it is clearly defined. Stanovitch and West (Stanovitch & West,

2000) conceptualized two systems in the mind; system 1, which operates quickly, unintentionally, and with little effort or sense of control, and system 2, which allocates attention, and completes effortful mental activities (Kahneman, 2013). Kahneman expanded on this work to hypothesize how these systems work together to process information and make judgments. Intuition, or the gut instinct that people have regarding the trustworthiness of information, is the work of system 1. Decision-makers often rely on both systems and reconcile any feelings about the decision-making context with themselves.

System 1 processes information quickly, relying on background knowledge and prior experience, while system 2 processes with great control of attention. Judges rely on both systems to make an informed decision about a case, however when they use their intuition this is largely a system 1 activity. System 1 has been refined by evolution to conduct continuous assessment of the main problems before a person (Kahneman, 2013). An example of persistent evaluation includes asking ‘How are things going? Is there a threat or a major opportunity? Should I approach or avoid this?’ As such, system 1 consistently monitors the quality of information that answer these questions. Oosterhoff and Todorov found that people judge competence by assessing elements of strength and trustworthiness (Oosterhoff & Todorov, 2008). Elements of strength and trustworthiness elicited positive emotions and system 1 found the information from these sources to be more worthy of attention.

Kahneman found that individuals who were “ego depleted” or those who had depleted cognitive attention due to excessive demands on attention or elevated cognitive load, were more likely to make a mistake during an intuitive decision (2013). Kahneman

specifically defines ego depletion as the absence of short term working memory space as a result of consecutively evaluating one's own performance and regulating the emotional response to this evaluation. For the purposes of this study, this means that if a judge feels as though they are not adequately performing their role in protecting children, they experience a negative emotional response to this evaluation that consumes limited cognitive resources and thus are more likely to make intuitive errors. This may become a self-fulfilling prophecy if judges consistently provide themselves with negative self-evaluations, making them ego-depleted and sabotaging the existing intuitive capacity. The emotional response a judge experiences at their own reflection of decisions and their impact on children is therefore important to their future decision-making.

Kahneman posits that an efficient cognitive task that facilitates decision-making is “answering an easier question” (2013). If an acceptable answer to a complex question is not readily available, intuitive opinions are generated and system 1 will answer an easier or heuristic question (Kahneman, 2013). This substitution facilitates decision-making, and while errors can be introduced as the target question is replaced by a heuristic question, typically this has a clarifying effect. Slovic coined the term affect heuristic to facilitate complex decision-making (Slovic & Vastfjall, 2010). Affect heuristic refers to the emotional attitude about a condition or outcome that drives decision-making actions toward. For the purposes of this study, an affective heuristic would be if a family court judge believes aging out of foster care is the most damaging outcome possible for a child, his/her emotional attitude toward this would drive an estimation of high risk, and action that could result in aging out of foster care being less beneficial (Kahneman, 2013; Slovic & Vastfjall, 2010). When affective impressions, feelings, or inclinations generated by

system 1 are endorsed by system 2 they become beliefs, attitudes and intentions (Khaneman, 2013).

Intuitive predictions are central in decision-making when evaluating possible outcomes. Some intuitive predictions are the result of automated skills and expertise born from repeated experience, while others are built heuristics (Kahneman, 2013). Occasionally, intensity matching can be used to compare situations but at times, this heuristic can lead to non-regressive intuitions. Extreme predictions can be made that provide faulty information upon which to make decision. While having accurate information to make decisions is ideal, extreme predictions are not always detrimental. At times, this facilitates decision-making and clarifies priorities. For example, a potentially extreme prediction that a child will be horribly, gruesomely mistreated, or age out of foster care and be alone and isolated presents the two worst case alternatives. These alternatives may in fact be accurate predictions, however if they are extreme and an element of judicial decision-making, judges prioritize safety and support. System 2 corrects intuitive predictions, and is important to evaluate decisions made with intuitive predictions.

Summary

To understand the psychological underpinnings of a judge's decision-making a varied source of theoretical concepts was explored in this chapter. Because decision-making is inconsistent, even by experts in a given field, and intuition is context specific there are a great deal of theoretical constructs used to make predictions, process information and adhere to a process of decision-making. Theories of decision-making,

the role emotion plays in the process, and the cognitive and motivational constructs that are involved in making decisions are outlined in this chapter.

CHAPTER THREE

Methodology

Overview of Research Design

This study was conducted using Strauss and Corbin’s approach to the grounded theory method. Grounded theory refers to the method of data analysis in which a theory develops from data instead of the data being analyzed to test a hypothesis or theory (Walker & Myrick, 2006). Data were collected via one-on-one interviews with family court judges, review of curriculum that trains family court judges, and the handbook of “Best Legal Practices in Child Abuse and Neglect”. From this data collection and analysis, a comprehensive literature review of central themes and concepts driven from the data was then conducted to create a model of judicial decision-making when considering a DSS termination of parental rights hearing (Merriam, 2002; Merriam, 1998).

This case study of family court judges from South Carolina determined commonalities of individual processes of deciding to terminate parental rights. A cross-case analysis illustrating patterns and similarities across judges and contexts is presented in chapter four so that the reader may draw conclusions as to how and why decisions are made. The ultimate result is a theory of judicial decision-making as related to DSS TPR hearings. The inclusion of multiple cases increases generalizability of findings and therefore the external validity of the research design (Merriam, 2002).

Subjectivity and Positionality It is essential that I acknowledge what I believe and what assumptions I bring to the data and analysis. Sound qualitative research requires the investigator to reflect on the assumptions and filter through which she will analyze data (Glesne, 2004; Glesne, 2006). By acknowledging the subjective lens that I view the world with, I realize my perspective is one of many completely conflicting ideologies, and some hypocrisies that are the result of unquestioning, blind faith and a lucky life full of support.

As the mother of a healthy, happy, little boy who is supported by two parents, five grandparents, a pediatrician, and a team of teachers at a premier child care center I am grateful and vigilant in mapping a course for his continued happy, healthy, safe, and optimal development. I have been fortunate enough to ensure that his needs are met since I learned I was pregnant. This is not because I have done anything remarkable, but rather the happy result of a lucky circumstance. I believe that a healthy, happy child who is supported so that they might reach their full potential is the goal of almost all parents. I also believe that not all parents have the emotional, familial, community, financial, medical, social or cognitive resources to achieve this goal. When these resources are not available and the child is maltreated or abandoned, I believe that this injury does not reflect solely on the parents, but also on the larger community. I believe in second chances and growth across a lifetime. I also believe in being proactive when the safety and well-being of children are concerned. While these two values are not mutually exclusive, in practice they can become somewhat contradictory and I anticipate the tension between them will become central in my interpretation of the salient features relating to terminating parental rights.

I identify myself as a person who cares about the well-being of children. As a former special education teacher I enjoyed my students, watched them grow and change, and felt protective of them because they were more vulnerable than their same-aged peers. My instinct to protect has only grown stronger since having a child myself. I now, more than ever before, feel a sense of panic and despair thinking about a child without a protector or a family to love them and shield them from adult problems and guide them through the normal problems of growing up. I feel anger and terror thinking about the experiences and trauma that maltreated or neglected children must live with. These feelings, personality traits and core values certainly shape my motivation for conducting this study and will impact my interpretation of data. In my heart, I want to reduce barriers to children finding forever homes and families. I believe that learning from family court judges is an important place to start this work.

While working as a special education teacher in elementary school, I learned that supporting a child's development can be draining. I learned that despite efforts and intentions to break through systemic barriers in the best interest of children, things may not change. After some graduate work to hone my research skills, I became a mitigation investigator for a capital trial, where my role was to get to know a person accused of heinous crimes, and learn about his life and how it took this trajectory. From this experience I learned that an adoptive family does not guarantee positive outcomes for a child. I learned that an act that harms others is often the manifestation of a history of trauma, and lack of support. Currently, I work at a legal resource center and interact frequently with professionals in the family court system, agency leaders, and policy makers. I believe whole heartedly that the people who make up these systems want ideal

outcomes for children and will work hard to ensure that all children in South Carolina have a chance for a healthy, happy future.

I believe that family court judges have good and noble intentions and knowledge of both systems and statutes that affect the outcome of proceedings in their courtroom. I also know they are human and interpret situations with their own emotions, subjective lens, and positionality that is likely unknown from others. I believe that their perspective is largely unexplored by researchers because they are in a position of power so their voice is heard through their actions, but their process and perspective are ignored. This means that an opportunity to support family court judges and improve the process that finds children languishing in foster care a permanent family is lost.

I want to believe that there are purely good, noble and effective programs and systems within our world, yet upon evaluation, I have no reason to believe this is possible. I believe that DSS workers, GALs and attorneys have good intentions for a individuals in the TPR system. I also believe that burn-out occurs and that individuals, despite their best efforts, can be overextended to the detriment of children. I also believe people make mistakes, bad decisions, and that the system itself can create problems that it cannot remediate. I believe that professionals in child protection and family court system try and that circumstances will improve for children who have been abused or neglected. I also know that their work can lead to secondary trauma, requiring professionals to dissociate from a case as a mechanism for self-protection.

I can look to my supportive family and my wonderful childhood for my largely optimistic view of the world, but feel subsequently guilty for my safe and healthy childhood, anxious to protect my son's, and somewhat guilty as I compare my good fortune to that of others. As John F. Kennedy said, "to whom much is given, much is

expected.” My past has fueled obligation, pressure, and responsibility to seek answers to essential questions that might better the lives of children. I find myself educated, yet because I am not a practitioner, I must utilize my research skills to contribute to knowledge that will make a positive difference in the lives of children. In an effort to conduct a rigorous study that *might* help children find families, it is imperative that I acknowledge my subjectivity and what role it will play on data collection, analysis, and presentation.

Document Collection

An examination of existing documents and artifacts is critical to understanding the historical, cultural and institutional context in which a phenomenon occurs. In this study, family court judges training, DSS handbooks and policy manuals have been collected to provide understanding of this context. These items were found online, from agency libraries, and from the individual participants as required. This information provided an illustration between expectations of how decisions are made and how judges are legally required to navigate the process, therefore enabling systemic change if it is needed.

In addition, to delineate pathways to child protection, documents delineating the state statute and case law that outlines the grounds for which a termination of parental rights action may be brought to family court were collected for this study. To understand the systemic constraints in which children in foster care grow and develop, and judges make decisions that affect their lives, it is important to study training manuals and handbooks to understand the process of being taken into foster care, being eligible for termination of parental rights, becoming a legal orphan and ageing out of foster care.

The processes provide a context for this study and its importance and impact on children in society.

Data Collection

Data were collected through interviews. Interviews were semi-structured in an effort to collect similar data across cases, and open ended questions were ordered in a strategic fashion so less threatening questions were asked first as trust and rapport is built, then more political and complicated questions as the conversation becomes more authentic and comfortable (Merriam, 2002). Feedback from gatekeepers, those connected to the legal community who introduced me to potential participants and advised me on protocol that would make judges feel comfortable, suggest that interviews that feel too much like a conversation are perceived by family court judges as unprofessional and unimportant. Therefore, some structure and formality in the mixture of high and less structured questions was important in building and maintaining relationships with participants. Appendix A reflects probes for demographic and decision-making information during interviews.

Other sources of data were considered to answer these research questions. The use of a survey for data collection was not viable for this study. First, a survey would not allow for semi-structured or flexible probing for more information, nor would a sufficient relationship with judges be built which would limit access to participants for member checking. In addition, the internal validity of the study would be compromised by relying on survey data, because my guiding research questions cannot fully be answered through survey data because of the previously listed limitations. Finally, it was suggested by gatekeepers that unless sent to them by court administration, a survey would have very low response rate due to the busy schedule that family court judges keep.

Interviews were recorded with a digital recorder, and then transcribed for analysis using NVivo Qualitative Software. Analysis began upon collection of data and codes were first developed using broad categories, and then through an iterative, “looping” process of continued coding to complete a constant comparative analysis of data collected until a theory of decision-making emerged (Merriam, p. 160, p. 191). Data were collected via one-on-one interview as suggested by a gatekeeper judge, who advised me on sensitive issues related to this study and connected me with participants. Professionals who work with family court judges have suggested that participants would not be comfortable completing a cognitive task analysis via simulation of a potential TPR case. The benefit of conducting a cognitive task analysis is that it is designed to examine thinking of experts in a field. The limitations for using a cognitive task analysis for this study are that it would create tension as the case would be built from the courtroom experiences of their peers and a point for personal bias to rule in accordance with peers might negatively impact data collection and obscure findings.

Recruitment of Participants

This study relied on the recruitment and retention of engaged family court judges. All judges who participated received a letter in the mail (Appendix A) introducing the researcher, the study, and alerting the judge to a call the following week. At this point some judges decided to participate and a meeting was set to discuss the study in more detail and collect data. The judges who declined to participate were thanked for their consideration, and then the researcher identified judges who met the desired characteristics and mailed them a letter inviting them to participate. Some participants were recruited using the snowball technique, where one family court judge who participated in the study introduced me to others who may be willing to participate.

Other participants were recruited at the introduction of a gatekeeper in the legal community.

These judges were selected for participation using theoretical sampling, therefore data were collected from people, places, and events that to maximize opportunity to develop concepts and identify relationships between concepts (Corbin & Strauss, 2008). An important part of theoretical sampling for this study included recruiting family court judges from a variety of places in South Carolina (rural, urban settings), a variety of experiences before taking the bench, and a variety in the number of years they have served on the bench. Both male and female judges were recruited for this study. As central themes emerged from early interviews, these influenced the type of judge who would next be targeted for recruitment using gatekeepers and the snowball technique. When saturation occurred, there was a clear delineation of relationships between concepts, so sampling and data collection was completed.

Demographic Overview of Participants

Five family court judges from across the state were recruited to participate in this study. These judges were targeted for recruitment and participation based on their characteristics such as gender, time on the bench, and location of chambers. (See table of demographics below for specifics).

Interviews with judges lasted between one hour and ten minutes, and two hours and forty-five minutes. Interviews began with welcoming small talk, then the study and data collection process were described more completely. Judges were encouraged to ask questions and were invited to sign the Informed Consent form (see Appendix B) and were given a copy. If the judge agreed to participate and have our interview audio recorded,

they were considered part of the study sample, and the recorder was turned on as the interview began.

Table 3.1: Demographic Information of Participants

Attribute	Number of Judges
Gender	
Female	3
Male	2
Years on the Bench	
0-5	2
6-10	0
11-20	1
>20	2
Status in Family Court	
Active	3
Active-Retired	2
Home	
Upstate	2
Midlands	1
Pee Dee	1
Low Country	1
Marital Status	
Married	4
Divorced	1
Number of Children	
1	0
2	2
3 or more	3
Grandchildren	
Yes	3
No	2

Data Analytic Approach

Study Context

This study takes place in South Carolina; a place where reducing the number of children who age out of foster care has become a priority of DSS leadership (Hanick-Coulter, 2013 Palmetto Power, Annual Accountability Report FY 2012-2013). The Annie E. Casey Foundation has awarded a grant to the South Carolina Department of Social Services to further study the context of aging out of foster care in addition to common characteristics and patterns among children most likely to age out. The grant is

focused on efforts within the agency to find forever families for children, while this study aims to further understand the family court judge's role in and ability to reduce the number of legal orphans in South Carolina and will complement the current agency efforts.

Cross-Case Analysis

The analytic process began by looking at the data and developing a preliminary code book across individual cases. Coding was a continuous and progressive process (Glesne, 2006) so the codebook evolved throughout the analysis. Using NVivo, codes were grouped as Nodes and Tree nodes. Tree nodes are most central to understanding the experience and impact of judicial decision-making in TPR cases, and have related sub-codes within in them. After preliminary coding, interpretations of connections between nodes were applied allowing for central theories to emerge. During this interpretation, more literature review was required focused on the constructs that arise from the data.

Cross-case analysis offers an understanding across individual participants experience to determine similarities and uniqueness, thus potential points of impact to inform policy and practice aimed at reducing the number of legal orphans. This process of generalizing and comparison requires data from each case to be organized according to a uniform framework so that key constructs and themes are more readily identified.

Analytic Tools:

As data were collected, a variety of analytic tools were employed to analyze data in a rigorous manner and build a theory of judicial decision-making in TPR cases. According to Corbin and Strauss (2006,) analytic tools are strategies used by researchers to facilitate coding, stimulate the inductive process and protect against participant and researcher bias (p. 67). Analytic tools are used to explore data, and to analyze for

context, process and theoretical integration. The primary analytic tools I employed while exploring data was the use of questioning, comparisons, and considering other meanings of words.

Questioning as an Analytic Tool: Corbin and Strauss (2008) acknowledge that although the type and structure of questions used in this type of study to analyze data may change over time, they can be grouped by: sensitizing, theoretical, practical, and guiding questions (p. 72). Sensitizing questions orient the researcher to what the data is indicating and provide insight into questions such as: what is going on in this situation? How do judges define a situation? How do definitions differ? When, how and with what consequence are they acting? Sensitizing questions were of central importance understanding the judges' position in TPR cases and how they perceive their actions to impact families, children, systems and the state. Theoretical questions provide connections between concepts, illustrate the cognitive and emotional processes behind TPR cases and variations across contexts and judicial characteristics (p. 72). Practical questions directed theoretical sampling and guiding questions shaped interviews, and analysis of data (p. 72).

Comparing as an Analytic Tool: Making constant comparisons between judicial experiences related to decision-making in TPR cases allowed for development of different categories or themes and also illustrated differences and relationships between these categories (Corbin & Strauss, p. 73). Making theoretical comparisons, or comparing concepts in terms of properties or dimensions, lead to rich descriptions, concept analysis and theory development (Corbin & Strauss, p. 73).

Other Analytic Tools: Given the disparate perspectives of a social scientist and a family court judge, acknowledging the different meanings of a word used in an interview

was an important step to protect against providing my interpretation of what is said and assigning meaning without careful interpretation of all possible meanings (Corbin & Strauss, p. 78). By acknowledging the perspective and positionality that I bring to data collection and analysis, as well as considering the various meanings of words, and utilizing member-checking strategies, a rigorous analysis of data has been conducted.

Analyze Data for Context, Process and Theoretical Integration:

This study used Corbin and Strauss (2008, p. 88) definition of context, meaning the “sets of conditions in which problems and/or situations arise and to which persons respond with some form of action/interaction and emotion (process) and in doing so, it brings about consequences that in turn might go back and impact upon conditions.” It is impossible to explore the decision-making related to TPR hearings without addressing the context in which judges must make these decisions. The paradigm used to identify contextual factors and link them with process has the following components: conditions, inter/actions and emotions, and consequences (Corbin & Strauss, 2008). A conditional/consequential matrix provides a framework to sort through conditions and consequences in which events take place and are responded to (Corbin & Strauss, 2008). While not every possible relationship is included in this research, the matrix provides insight into patterns of connectivity between actors, emotional responses, events and consequences over time (Corbin & Strauss, 2008).

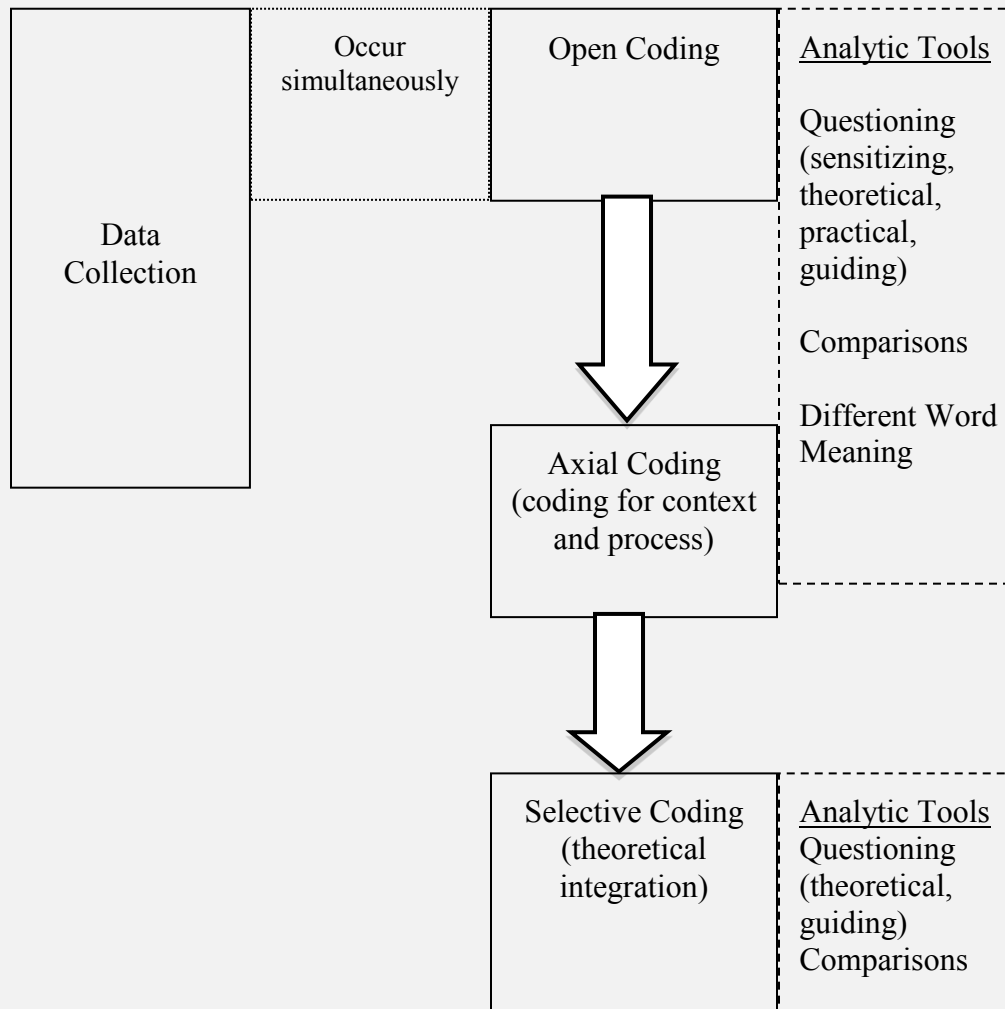
Corbin and Strauss (2008) describe process as ongoing action/interaction/emotion in response to situations or problems with the goal of solving the problem. Process is variable in nature, and to conceptualize judicial decision-making in TPR cases, data will be analyzed for sub processes at both micro and macro levels as well as the formal theory

level (Corbin & Strauss, 2008). Memos and diagrams were used to facilitate analysis of data for processes and were updated throughout data collection and analysis.

Coding Structure:

Three interconnected coding loops were conducted in accordance with Corbin and Strauss model of the grounded theory method of analysis: open, axial, and selective coding with constant comparison and questioning within these phases (Corbin & Strauss, 2008; Walker & Myrick, 2006). Open coding, per Strauss, is the analytic process in which “concepts are identified and their properties and dimensions are discovered in the data” (Walker & Myrick, 2006). Providing dimensions for the categories properties is a central task during open coding (Walker & Myrick, 2006). The use of specified analytic tools previously identified enhances theoretical sensitivity (Walker & Myrick, 2006). Axial coding puts fractured data identified in the open coding phase, together in new ways by making connections between categories, processes, and contexts (Walker & Myrick, 2006). Selective coding per Strauss and Corbin is the process of integrating and defining the theory (Walker & Myrick, 2006). This phase builds from the relationships identified in axial coding by integrating concepts and processes at an abstract level (Walker & Myrick, 2006). See table 3.2 for a description of the methodological process.

Table 3.2: Diagram of Methodological Process



Validity

Internal validity was enhanced through member checking, triangulation, and clarification of the researcher's biases, positionality and reflexivity (Glesne, p. 125; Merriam, p. 204). Member checking was extremely important in this study so that the researcher could ensure that participants' identities were not compromised, but also because this study is focused on the judicial perception of how decisions are made. For this reason, checking findings against judicial perception ensures fidelity. To complete member checking, after data were collected and analyzed, findings were shared with participants for examination of plausibility and a critique of accuracy and fairness of representation (Merriam, p. 204). To develop a "holistic understanding" of decision-making in this context, triangulation of handbooks of best practices, judges' training curriculum, DSS systems, common practices in the courtroom, and interviews with family court judges were used (Mathison, 1988). The best practice handbooks and training manuals provided information about what court systems typically do and how they should operate. The interviews with judges provided additional information within this context.

Limitations and Generalizability

This study was conducted in one state and therefore only reflects the decision-making that occurs in one specific political climate and culture. There is no solution to control for the unique impact that time and space have on agents within this context. Additionally, this study relies on self-report data from family court judges, which is impacted by the memory and comfort of the subject to disclose their decision-making processes with the researcher. Both of these aspects introduce limitations to the study and its use across different areas, even within the Southeastern United States.

Summary

This chapter outlined the research design, methodological choices and contextual influences of the research design. Semi structured interviews were conducted with a theoretical sample of five family court judges in South Carolina. A gatekeeper in the legal community assisted in identifying participants, as did participants themselves. The data were analyzed utilizing the constant comparative method with open, axial, and selective coding structure. Data were categorized and explored to the point of saturation to ensure that all themes and relationships were thoroughly explored.

CHAPTER FOUR

Findings

Context and Pathways to Child Protection

Document analysis showed that despite the impact that maltreatment and the subsequent trauma have on children and adolescents, there are multiple pathways to child protection in our communities to both prevent and stop child maltreatment when it occurs. South Carolina training manuals were used to provide insight into the pathways of child protection and the context in which family court judge decisions rest. When children are not cared for by their families, it is the duty of the community, law enforcement and government structures to remove the child from harm and to access the resources the child needs to thrive. The mission of the South Carolina Department of Social Services is to efficiently and effectively serve the citizens of South Carolina by ensuring the safety of children and adults who cannot protect themselves and assisting families to achieve stability through child support, child care, financial and other temporary benefits while transitioning into employment (SCDSS, About DSS). As such, DSS and the family court system have the following complimentary processes in place related to child protection, as depicted in Figure 4.1.

Investigation and Intake If child abuse or neglect is suspected by a member of the community, or a mandated reporter such as a teacher or pediatrician, a call to DSS is made to report a possible case of child maltreatment. The “screener” at DSS determines if all the information provided is true, would the child be at risk of abuse or neglect. If

the answer is yes, then a formal investigation begins (Children's Law Center Publication, New Judges Training Manual). This investigation conducted by DSS caseworkers will determine if the child is at risk or if they are safe in their familial home. Within 24 hours of receiving a report that a child is in danger, DSS must begin a child protective services (CPS) investigation to determine whether the report should be substantiated or unsubstantiated (Children's Law Center Publication, New Judges Training Manual). A substantiated report means that DSS believes there is a preponderance of evidence to support a determination that the child has been abused or neglected. During the investigation DSS may interview the child or petition the family court for the issuance of an inspection warrant. An inspection warrant may authorize DSS to inspect the child's condition, home, and obtain medical or other records pertaining to the child in addition to interviewing the child. DSS has 45 days to complete the investigation, unless there is good reason to extend the investigation, in which case an additional 15 days may be granted (Children's Law Center Publication, New Judges Training Manual).

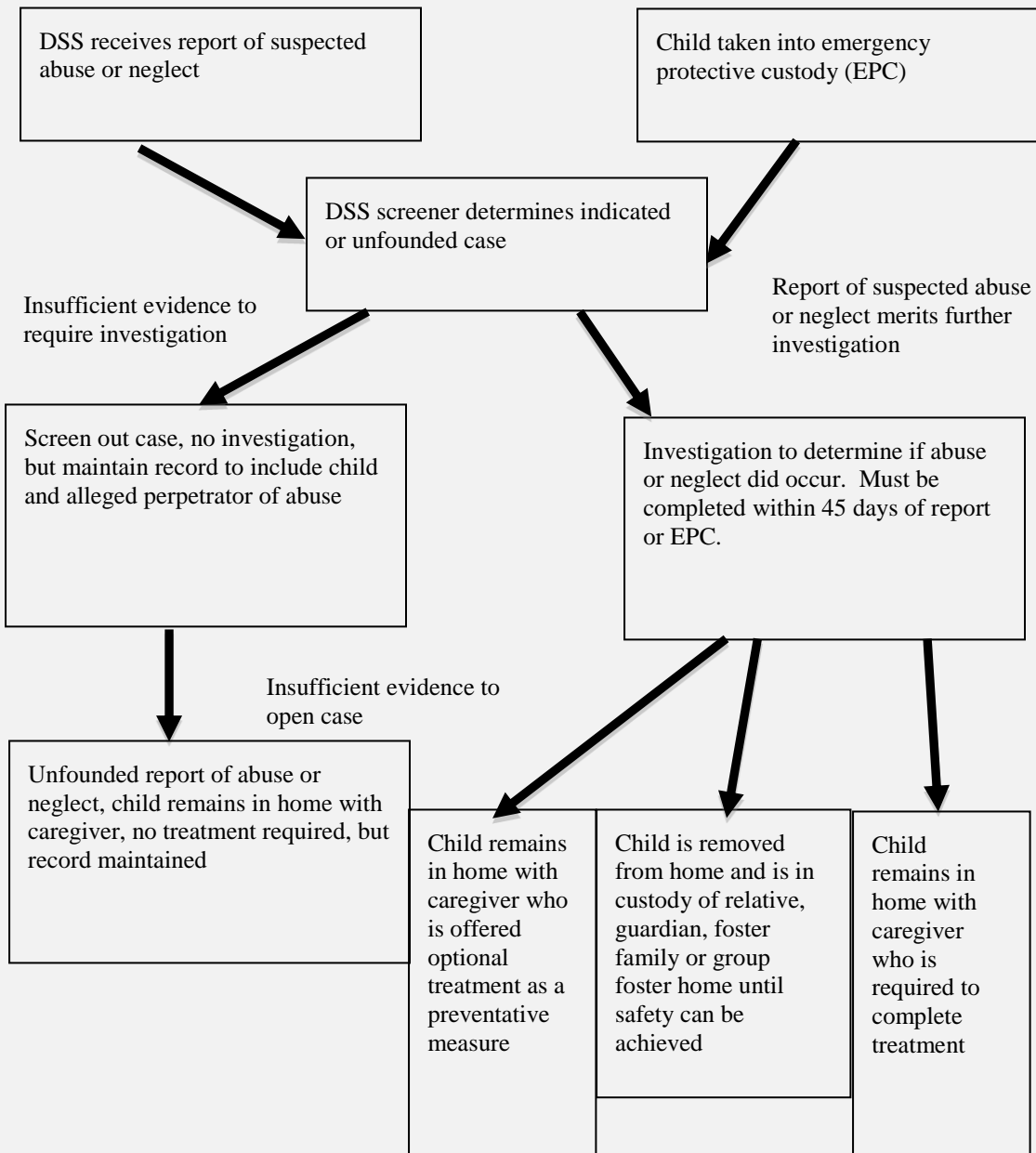


Figure 4.1. Intake and Investigation¹

¹ To determine child abuse or neglect per SC Code 63-7-20

Emergency Protective Hearings (EPC) A child may be taken into emergency protective custody (EPC) by law enforcement or ex parte order of the family court judge if the officer of the court has reason to believe that the child's life, health or physical safety is in imminent danger (Children's Law Center Publication, New Judges Training Manual). When a child is taken into EPC for excessive corporal punishment, the other children in the home are not to be taken into EPC unless there is an indication that those children are at risk as well. A child may also be placed in EPC if their primary guardian is arrested and does not give written consent for another parent or adult to assume care of the child. If a child is lost and law enforcement cannot locate a parent or guardian, the child will be taken into EPC (Children's Law Center Publication, New Judges Training Manual). If the child needs medical care, law enforcement must take the child to the health care facility. Figure 4.2 describes the process of EPC.

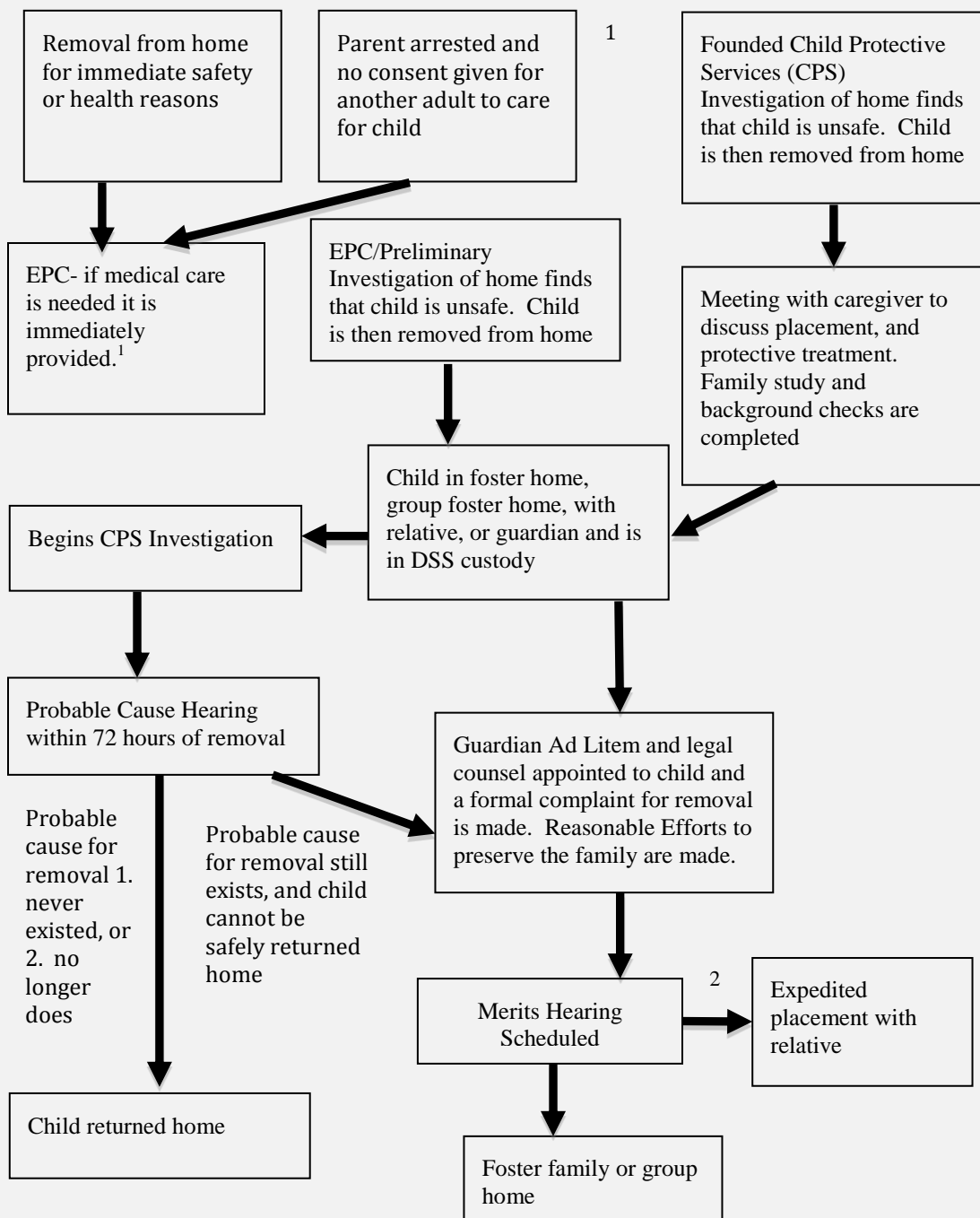


Figure 4.2. Emergency Protective Custody

¹ Upon removal, a preliminary investigation needs to occur within 24 hours of removal. A family meeting must also occur to discuss EPC, corrective action and placement. A family study and background check is completed.

² Merits hearing must be scheduled within 35 days of initial removal.

Removal Proceedings and Merits Hearings If the investigation determines that the child was maltreated or in response to a child being placed in EPC and there is a preponderance of evidence that the child will not be safe without removal, DSS may file a complaint for removal or petition the court for removal of a child (Children's Law Center Publication, New Judges Training Manual). The complaint for removal may or may not contain a petition for termination of parental rights (TPR). The parents must be notified that the removal proceeding may terminate parental rights and must be aware that any objections to the placement plan must be raised at the removal proceedings (Children's Law Center Publication, New Judges Training Manual).

The court must schedule a removal (merits) hearing within 35 days of filing a complaint for removal. DSS must make reasonable efforts to reunify the child with his/her family when it is not adverse to the welfare of the child. State statute authorizes DSS to forego efforts of reunification unless there is reason to believe that TPR would be contrary to the best interest of the child, a petition for TPR must be included for any of the following reasons (Children's Law Center Publication, New Judges Training Manual):

1. The parent has subjected the child or another child while residing in the parent's domicile to one or more of the following aggravated circumstances: a. severe or repeated abuse; b. severe or repeated neglect; c. sexual abuse; d. acts the judge finds constitute torture; e. abandonment.
2. The parent has been convicted or plead guilty or nolo contendere to murder of another child, or an equivalent offense.

3. The parent has been convicted or plead guilty or nolo contendere to voluntary manslaughter.
4. The parent has been convicted or plead guilty or nolo contendere to aiding, abetting, attempting, soliciting, or conspiring to commit murder or voluntary manslaughter of a child while residing in the parent's domicile.
5. Physical abuse of a child resulted in the death or admission to the hospital for inpatient care of that child.
6. The parental rights of the parent to another child were involuntarily terminated.
7. The parent has a diagnosable condition unlikely to change within a reasonable time and the condition makes the parent unable or unlikely to provide minimally acceptable care for the child.
8. Other circumstances exist that the court finds make continuation or implementation of reasonable efforts to preserve or reunify the family inconsistent with the permanent plan for the child.

If the court authorizes DSS to forego efforts of reunification, it must make specific, written findings as to why this is in the best interest of the child (Children's Law Center Publication, New Judges Training Manual). The court must not consider adoptive resources or availability of adoptive parents as a reason to deny the request to forego reasonable efforts. In any manner in which the court authorizes DSS to forego reasonable efforts, the department must file a petition to TPR within 60 days unless there are compelling reasons why the TPR would be contrary to the best interests of the child (Children's Law Center Publication, New Judges Training Manual).

DSS must first and foremost consider safety, but there is a movement among those who work in child welfare to consider what a child needs not only to be safe, but also to thrive (Palmetto Power Meeting, 2013). Educational psychology, social work, public policy and legal issues become intertwined as the well-being of abused and neglected children is examined critically. Public policy, the court system, and social work are the areas commonly associated with protecting abused and neglected children. An educational psychological lens, however, provides another important perspective. Unlike policy and legal research, educational psychology investigates cognitive processes, and how individuals make sense of the world around them. This important perspective illuminates how children who have survived mistreatment and isolation from a supportive family system are impacted, and also how those in a position of power and make decisions for them interpret information and act on it.

Interview Data

Document analysis provided a framework with which to understand how the family court system is intended to function. Interview data juxtaposed how the family court system should work, with the judicial perception of how it does work, and how judges must make decisions within it. Without knowledge of the court system or the grounds for termination of parental rights, all context for decision-making is lost.

Interviews were recorded and then transcribed immediately upon completion. After transcription, coding and analysis began immediately. At times, data analysis, participant recruitment, and data collection were occurring simultaneously. This process is unique to qualitative, grounded theory studies, but allows for data to inform the researcher and direct recruitment so meaningful data can be collected. After data

transcription, open coding of broad themes commenced, followed by axial and selective coding for theoretical integration. For a diagram of the process, see chart 1.

Open Coding

Per Strauss, open coding is the analytic process in which broad concepts are identified within the data and their characteristics (Walker & Myrick, 2006). This preliminary coding step provides the foundation for subsequent, increasingly sophisticated coding that ultimately builds theory. After an interview was conducted, it was transcribed, and then open coding began. After saturation occurred and all data were collected, the codes were revisited and the iterative process continued. The sections below outline the broad themes and characteristics identified in this phase of coding.

Affective Predisposition to TPR Hearings: Judges shared their emotional reaction to upcoming TPR hearings and the intensity with which they approach this action. This provides a context for decision-making, illustrating the importance of these cases and the gravity with which decisions are made. Among family court professionals in South Carolina, termination of parental rights hearings are referred to as “the death penalty”. In family court, terminating parental rights is the only action that permanently severs the legal rights or connection between people, metaphorically “killing” the family.

(TPR hearings) are our death sentence, and I hated them. Especially the ones where nobody was adopting ... Think about that you’ve terminated rights, and there is nobody stepping in to be a parent and you have a 2 year old with no parents and no one is responsible for this child except DSS ...

While judges typically viewed their role in court to facilitate closure for a family going through a troubling time, and TPRs are a necessary part of child protection, they are very serious cases with no recourse or appeal process once rights are terminated.

(When I see I have a TPR on the docket my reaction is) Ugggh because it's a very natural reaction, because I know I'm making a decision about whether to sever ties on a permanent basis between a parent and his child. That's not a fun thing, no matter what the circumstance.

Despite the severity of the act of terminating parental rights, judges are able to think beyond the current situation for a child to what this action allows for in the future. The opportunity for a healthy family in the future and protection against an abusive family is what provides value for the action when rights must be terminated.

I'm not going to tell you it's not difficult (to terminate parental rights).

It's very difficult. But when I do that I'm going to tell you I do get a feeling of relief because I'm giving a child hope. So I do that and I look at that.

Background Experience and Beliefs: Judges' responses indicate that the background of the person who is making the decisions is of central importance in their analysis and their ability regulate their emotions during a hearing. Background experience also played a role in how judges interacted with the parties that are before them and responded emotionally to the cases before them and the tasks they are faced with during TPR hearings and all other matters in family court.

(Being a parent impacts how I am on the bench) ... in any case involving kids.

Just personal life experience and common sense helps. Being a judge in a way is

kind of like being on a jury. Because you make the factual decisions...in family court you're kind of like the jury and you have to have your common sense with you and call "false" when it's "false"! You know—so having kids and having childhood experiences when I was growing up...I bring all that with me.

All judges reported that being a parent was a powerful characteristic in how judges approach TPR hearings and viewed the ultimate goal of protecting children and acting according to their best interest.

It's not like we decide we want to terminate their rights, but... you won't do what you're supposed to do. We give you treatment plans, and you won't complete them. So I have no choice. I tell people when I wear this robe, or even when I'm not wearing this robe, my job is to protect children. What I do for these children is what I would want somebody to do for my child if it were my baby sitting there. And that's just the way it is and that's just the way I am. I like my job.

Despite acknowledging that their background experience impacts the way they process information on the bench, judges did not perceive their own personal background making a difference in their ultimate decision. For example, the judges' status as being a parent was acknowledged as a part of their life that impacts how they process information from children in the courtroom. However, the simple fact that the judge is a parent does not influence their decision to terminate or not terminate parental rights. This decision is influenced by their previous career experience on the bench or in family court.

Additionally, their personal background did impact the information they attended to more carefully or differently. For example, poverty is commonly present in DSS TPR cases and a judge's childhood and their personal belief in human resilience against economic

hardship does impact how the judge interacts with individuals before them in court. This belief about poverty also impacts the judges' interpretation of information presented by those of a different socio-economic status of the family in the TPR case. A judge will listen to information from the perspective of a person with comparatively greater economic means than the family in the TPR case about an impoverished home, however a judge will interpret this information through their own belief structure about what economic hardship can be survived and overcome. Judges reported that this belief structure is the direct result of childhood experiences, and a moral structure about equity and social justice that they were raised to uphold.

All family court judges interviewed for this study indicated they feel an obligation to protect children that is central to their own identity and sense of self. These beliefs are reflected in their motivations to become a family court judge.

I will tell anybody that I look out for children. And I am able to look out for children in this position...And I never kept any numbers but I can assure you that most of those cases that come in as juvenile delinquents are the result of a broken relationship with a parent, a missing parent. When the parent is missing other factors can come in and take control. I have a great desire to help children and I'll tell the parents in there (family court) "you can deal with whatever, but these children can't" and I feel like my job is to protect them so that is what I find myself doing. And I like it. I am blessed with children who are good children, but they were raised well and when I look at children I have to look at the whole picture because everybody didn't come from the 'Leave it to Beaver' homes. So that's why I do what I do.

Motivation to Become a Family Court Judge

The position of family court judge is a prestigious and respected one in the South Carolina legal community. These positions are highly scrutinized by the public through the media throughout the course of a judge's career and are difficult positions to qualify for and secure. Becoming a family court judge is an intense process, and while the circumstances surrounding the election of each of the participating judges differ slightly, all completed a qualification process and were then elected by members of the legislature. A family court judge's motivation to undergo this rigorous process, comes from his/her background and beliefs. Additionally, a judge's decision to remain in family court as a judge and not try to move to general sessions, return to trial law, or to retire in certain cases is explained by their "best moments" on the bench.

All of the judges who participated in this study reported that they were encouraged to run to be a family court judge by either members of the legal community in their hometown, family court judges in their community, or both. The future judges' background, demonstrated work ethic, and the need for a new family court judge sparked this support. This encouragement was empowering as they began the arduous process of qualification and election. To persist through these rigors of election and scrutiny on the bench, judges view their work as central to the safety of children in the community. When asked about their most satisfying moments on the bench, judges told stories about changing the lives of families and having a lasting, positive impact on those who were vulnerable before them.

The best adoption I ever did was for a family who had many children, several were previous adoptions. There was a family of 6 children from another state

whose parents were killed in a car accident. They adopted all of them! They kept all 6 together! I asked what they drove they said a 15 passenger van! ...My friend was coming to meet me for lunch that day and was walking down that hall and this child came racing... and she had never seen him before in her life and the child raced into her arms and yelled "I got (a)dopted!! I got (a)dopted!!"

Judges illustrated that the most rewarding part of their jobs included being considered a part of the lives of the people in court before them. Being part of the community and supporting families who needed structure and support going through a difficult time was consistently reported as the most rewarding part of being a family court judge.

(A child came before me and) I ordered him an evaluation and put him on probation and I ordered that he wrestle—that he join a wrestling team at school. He had never wrestled, but he told me he wanted to be a professional football player. I said, "OK, have you tried wrestling?" he told me no, so I ordered that part of his probation include wrestling... Because I knew if they wrestled they would be too tired in the afterschool time to get into trouble. They had somebody watching them, the opportunity for a mentor, and they were a part of a team, and you don't want to let down your team... But anyway—he came in front of me and I put him on probation and ordered that he join the wrestling team and told him I would watch him for the rest of his life...now he wrestles in college and he's graduating and student teaching this fall! He wants to be a principal... If he ever gets married then I'm going to walk him down the aisle!...and he's the first one in his family to ever go to college, and I was invited to his graduation party! I LOVE that kid!

Member of the Community: An integral part of maintaining effort at being a good family court judge was the judges' connection to the community. All judges interviewed attended college and law school in South Carolina, and considered themselves to be members of the community in which their decisions were made. This allowed for ownership in the outcome, and an interest in the best possible outcome for all individuals in the case. This connection to the case and people in the case ensures that careful consideration of the impact the outcome will have on the group directly affected by the decision as well as the community around them. Where the judge grew up, attended law school, and makes their home all contributed to the connection judges feel to the community. Judges often viewed themselves as advocates or champions for children in their home state. When a judge feels as though they are a pillar in the community, more resources to support children become apparent, more connections to protective factors become obvious, and the judge is personally invested in the success of those who have passed through their courtroom. By knowing the community well, the people and resources available, judges can more readily connect children and families to needed supports. Judges who have a history with the community see former litigants in stores, parks, and community events, making the impact of their role more visible, and encouraging reflection on their decisions.

...I was at the ballpark the week before last, and this lady comes up to me and asks my name and I introduced myself and she said "that's so and so" and I remembered it was the sibling of one of the ...cases (I terminated parental rights), and they adopted him. She said "you know we adopted him!"... But those are the kind of things, when you get these children free---this little boy was happy,

handsome, at the park with his family, a life that he would not have had if he stayed with his mom.

Salient Features of Decision-making The information that judges attend to while deciding if parental rights should be terminated depends on each case. The source of the information, however is relatively stable across cases. Judges listen openly to all evidence provided in court. Most judges read the case to provide context and background information before the hearing begins. This context is helpful for more efficient processing of events, patterns of behavior, and the likelihood that a child will be safe and cared for in the future. The information provided by the case files cannot be considered instead of witness testimony offered in court to make the ultimate decision.

Knowledge of TPR grounds Terminating parental rights is only a legal, rational or ethical action to take if the case meets one of the grounds for termination outlined at the beginning of this chapter. Judges must have knowledge of the grounds, and apply that knowledge to the case. The TPR grounds are the framework within which all decisions are made, therefore knowledge of the grounds and training to recognize and apply this knowledge in cases is a salient piece of decision-making.

The way our law works is that it's a two-pronged test. You have first to meet the statutory requirements and even though you meet that threshold, it doesn't mean you should terminate. You have to go to the second step and see if it's in the child's best interest.

Attention to Information During a TPR hearing information is presented and the judge weighs it differently in each TPR case, using different signals. All TPR hearings must meet the legal grounds for a termination to occur, but the judge will rely more on

different sources of information as a result of processing cues and directing attention. For example, judges reported that certain sources, such as grandparents, were likely to have positive testimony for parents, if this source provided negative testimony regarding the parents' capability to care for their child, judges attended to this more carefully.

You don't read grandmothers or aunts or sisters (comments in the case file) because they all say, "oh he's a wonderful father" you know what they are going to say so you just sort of look real quick. Unless the other side gives you the grandmother... then you really think about that and see what's wrong there.

Individual Cases Judges reported that while they have typical behaviors such as reading the file before the hearing occurs, or listening to the testimony of all witnesses before making a decision, that each case in family court is unique and therefore it is difficult to describe a uniform process for making decisions. A complex and ever changing interaction between characteristics, events, and resources direct attention differently in each case.

In a particular case something might stand out as more important. I might put more weight on one factor than others, but nothing as a rule. For example, maybe the kid has good grades where he is, but at the same time maybe he's getting sexually abused or maybe abusing other kids and so in that particular case I'd look at mental health, how his abuse is affecting him in behavior rather than educational sphere. But in another case, there might be another factor that sticks out as something really important to me. There is no one factor in every case--- there is no "oh well I'm seeing that so I _____" because some cases may not even have that fact.

Making Meaning of Subjective Information One of the challenges reported throughout this study, was the process of discerning the truth and making meaning of subjective information needed to make a decision. The source of the information plays a large role in how it was interpreted. Judges reported “wrestling” with cases that were emotionally or cognitively difficult to make. The most challenging cases were not those of abuse or neglect due to malice, but rather lack of capacity to parent effectively due to a parent’s low IQ, drug addiction, or other issues despite great love for their children and desire to care for them. The intention of the parent to care for their child is subjective and difficult to measure. Intention, a separate construct from capability to care for a child, complicated the judges’ task. While motivation to be a good parent is not in the statute to consider when deciding a TPR case, it does directly relate to the child’s best interest.

Sexual abuse, or beats the kids... that’s easy to know what to do. But the ones where they try and they just can’t do it are the ones that rip your heart out...I really think where you come from has an impact on 1. How easy it is do it and 2. Your perspective.

When judges were faced with terminating parental rights for parents who succeeded or almost succeeded in completing their treatment plan, the question judges had to answer became more difficult. Instead of answering “have one of the nine grounds for termination of rights been met and proven in court?”, the question changed in the heart and mind of the judges to “how can I terminate rights of a parent who loves and wants their child, but cannot take care of him/her?” This complicated question became more stressful on the judge from an affective, cognitive, and ethical perspective. Judges

reframed the question yet again, to remove intention and answer “have one of the nine grounds for termination of rights been met and proven?” From a cognitive perspective this question is comparatively simple, however the judge’s emotions often made it difficult to answer.

(DSS) brought an action to terminate parental rights because she couldn’t rehabilitate (due to low IQ). She could never be able to, in the different grounds and one is a condition that could not be remedied, and so this was a condition that couldn’t be remedied and she couldn’t parent. They gave her two or three different parenting classes, they gave her an individual parenting class and she couldn’t do it, and what was so sad is that every week she would walk all the way to DSS to do her visitation. She would bring him presents...And she got up on the witness stand and testified how much she loved her little boy...It took me (some time to) issue my order to terminate parental rights. It just.... I knew I had to do it. I knew it was the right thing, but it was killing me because I knew how much she loved him. But you had to sit back and say I’ve got to think of him...That was just, that was THE worst one I ever did. It was just really really hard, because 1, she’s poor, and 2, because she wanted to be a good parent, she just couldn’t.

Despite the challenges and difficulty associated with terminating the rights of a well-intentioned, but “unfit” parent, judges found ways to make sense of the ambiguous facts of the case, and appropriately apply the nine grounds for terminating parental rights.

...that wasn’t an easy decision, not to grant it... So the case came 18 months after the treatment plan was put in place and it should have been completed in 6

months. There were several delays. One on their part, one on DSS's part and by the time the case came back up they were looking a lot better and their picture was looking better, the home was clean, the guardian said the house was clean but the guardian wasn't for reunification. She was against reunification. Nobody was really for them (reunifying). But by the time the case came to court, luckily for them—because if they had come up even 6 months earlier they would not have completed the treatment plan. It was finished long after the deadlines had passed...I said I'm not going to terminate their rights, they had made progress and the kids wanted to go home...So I spoke to them and then came around by saying that "I do find that you've made efforts, made strides and have completed your plan at this time, although late." Then I put on some restrictions and I didn't close it by any means...

By answering the comparatively simple cognitive question "have the parents' satisfied their treatment plan?" the judge was able to answer the question and make a decision. However, because the initial lack of effort to complete the treatment plan and recommendations from other professionals engaged the judge's emotions, thus making the decision to return the children home more difficult.

Best Interest of the Child Because best interest of the child is not defined in statute, nor is there an instrument that judges can use to determine best interest, the definition is ambiguous yet central to understanding TPR decisions. When judges were asked what "best interest" means to them, all judges paused for a moment to consider their answers before speaking. The answer required introspection, not because the judges couldn't define or explain best interest, but rather because best interest is so deeply

engrained in their role and identity as a family court judge who protects children, that articulating a definition for best interest is far more complicated than identifying what is not best interest.

It's in here (points to heart), you can't define it. It's just how you feel about it.

You know it when you see it, sort of like a reasonable man... It's in the eye of the beholder. A lot of experience comes into it, and being a parent—which is an interesting thing being a parent and a judge...

Access to resources and poverty complicate the definition of best interest. A child's heritage is grounded in biology, and knowing his roots and where he came from. Judges viewed this as central to the child's identity and believe it to be important. However, judges made a clear delineation between "better off" and "best interest". Best interest is more robust, deals more with the emotional, psychological, and even existential identity of the child. Better off refers to access to material items, which is also important but not how judges define their statutory obligation to children.

Best interest is different than "will the child be better off with the foster parents?"

Because better off---if that's the way, then we'd just 'sell' children everyday!

Really. Because these foster parents really could provide more resources, so that alone is not the best interest. Best interest (involves) visiting, was bonded and bonding with these children... You have to look at the whole picture and look at all the facts. You can't pick and choose which facts will apply to this case. You have to take all of them. You've got the mama doing everything in the plan and wanting her children, I thought it would be more detrimental to terminate. Like I said, don't confuse it with better off.

Because South Carolina state law requires judges to consider nine statutory grounds for terminating rights in addition to the best interest of the child, best interest negates the presence of one of the nine grounds. This means that if legally a judge can terminate parental rights based on the presence of one (or more) of the grounds for TPR, but does not attribute termination to be in the best interest of the child, they should not terminate parental rights. This framework requires that judges develop a practical definition for best interest as well.

It's a catch-all. It is kind of a morphed gray area. You use best interest when you have those children who can't be adopted. That's when you use it, because at that point it's not in their best interest not to have a financial support or the chance of financial support.

Cognitive Process of Decision-making Judges' comments revealed that making a decision in a termination of parental rights hearing requires multiple decisions within that context. When defining best interest, it became clear that judges apply the statutory grounds for termination to a case and best interest, and in doing so they determine the likelihood that a child will be adopted and take that into consideration as part of best interest. Sometimes it was as simple as determining what pre-adoptive resources exists, but for some judges it was more complex requiring predictions about the likelihood of an adoptive family being located. This likelihood of adoption is related to the characteristics of the child.

There are some kids who just aren't going to be adopted. They may have physical, psychological, emotional issues, it may be age, it might have been who knows what, but they are just not going to be adopted.

Judicial Intuition All judges reported their intuition or “gut” played some role in directing attention, determining the trustworthiness of testimony, making predictions regarding child safety and likelihood of adoption, and therefore judicial intuition facilitates decision-making in TPR cases.

You’re bound by the law, and I’m bound by the evidence that I receive in court, but I don’t think you can deny that there is a feeling of the way the thing goes. And a lot of times, the evidence is so close and you’ve got conflicting evidence, you’ve got to judge the credibility of witnesses, that when you have pondered it and made your decision, there are enough facts there that you can substantiate your decision and whether you used your gut to do that or not do that, but it does come into play.

I’m sure it (my intuition) plays a fair part because you don’t know! You can’t know unless you can read minds or truly read hearts or see the future. You just can’t know if the people are lying, so I’m sure it plays a part.

All judges were rational and intentional decision-makers and weighed evidence carefully before deciding, but some judges also used intuition more so than did others. Judges reported that intuition was the result of upbringing, prior experience, belief structures, and the ability to judge character.

(My intuition) it’s based on my life, my training, and my spirituality and things of that nature. I do think that God helps those who can’t help themselves and sometimes I can’t help myself. The Wisdom of Solomon has to come in, and you look at people and watch their demeanor. You’ve got to wear your common sense too!

So the decision comes down to what you think. I try my best to do it right. I have to go with my gut a lot of times and I depend upon that and I do interject my life experiences from dealing with my children and other children throughout the years into the decisions I make. I think the challenge is just being mindful and recognizing that I'm human, but I need to try to get it right for the sake of the people before me.

While all judges were cognizant of using their intuition in some capacity during their decision-making, three valued it very highly. Intuition was reported to be a very valuable in processing information for some judges and determining how they view a witness and his/her testimony.

The gut is BIG. The gut is more important than being smart. (Your intuition is made up of) where you came from, how your family is...a lot of things. (how witnesses hold themselves in court) Body language, eye contact, facial expressions, and sometimes you just have to trust, if something doesn't make you feel right, you're probably right. You may not know why, but you know you don't feel right.

Enabling and Inhibiting Factors to Decision-making Several factors were identified that either facilitated decision-making or made it more difficult.

Challenges A variety of internal and external factors that inhibited efficient decision-making were identified. The most commonly noted challenges related to time management on the bench. Judges have a short amount of time to hear all cases, and are required to rapidly process information in order to maintain the docket schedule.

I would say time management. Over the years it has grown so much---where there are so many institutional type cases, or cases coming through the state system that it cuts the ability to deal with the private litigants, and the Department of Social Services has just mushroomed, not only with the paternity cases, but the abuse and neglect and then the support cases and when they are not paying support ruling those in, and the juvenile docket has grown and I'm sure you're aware the family court judge wears those 2 hats with all the criminal cases if they are under 17 years of age. So that has grown and there are so many state days that you have to set aside to handle those because those have priority over others, and then these private cases where you're dividing custody and determining how many days or hours a parent is going to be able to see their child, or they may have a million dollar estate and they're trying to divide those up.

Supports Judges identified several supports that helped them make difficult decisions. The most important was the community of colleagues they created with other judges. Judges have email access to all other family court judges in the state, and reported using the instant message feature to ask questions, phone calls and in larger counties where multiple family court judges had chambers in the same courthouse face to face meetings. Judges created personal relationships and friendships with others on the bench, and could call on their friends for feedback on difficult cases.

You get to know people and get to be friends and if you had a hard decision you'd call and say "let me run these facts by you---what do you think?"

Axial Coding Corbin and Strauss define making connections between broad categories of raw data as axial coding (Corbin & Strauss, 2008). By making connections between

contexts and processes, the researcher delves deeper into the data, understanding it in new ways (Walker & Myrick, 2006).

Primed to Terminate Throughout data collection and preliminary analysis, sensitizing questions were designed to investigate judges' position in TPR cases and how they perceive their actions to impact families, children, systems and the state. To illustrate these concepts, the researcher first needed to understand if judges were primed to terminate parental rights. In other words, what impact did the case coming before them have on their perceptions and evaluations of child safety and the family home? Did the fact that an action was filed to terminate rights prepare the judge to terminate more so than the witness testimony and individual application of the child's best interest? Was the judge's decision a foregone conclusion by the time a TPR action had been filed?

Investigating the data surrounding decisions to terminate parental rights, and the family court system illustrated a noteworthy finding. Because judges do not typically follow a case from start to finish, it is not uncommon that a TPR hearing is the judge's first interaction with that family. As a result, the judge is prepared for the legal elements that will take place during the hearing, but did not indicate they are primed to terminate rights simply because DSS filed an action to do so. In fact, judges reported that if one of the nine grounds were met for termination but there was not an adoptive family identified, their perception would be that it is not in the best interest of the child to terminate rights.

Because a particular judge is not attached to a case as it moves through the system, judges do not readily know the outcome of cases in a systematic fashion. Many ask members of the legal community how things are going with a particular litigant, but

unless the judge seeks to know the outcome of their decisions, this feedback is not readily available to them. While this system does not facilitate reflection, or modification of practice for family court judges, it does allow for the prevention of bias to develop for or against particular litigants in a case. For example, because judges do not follow cases in South Carolina, they will meet with a family during a termination of parental rights hearing for the first time. While they have access to the history of this family and information from previous hearings, they do not have the experience of being in court with them multiple times. This limits the opportunity for a judge to offer counsel, but it also limits the opportunity for a judge to become connected so that the final TPR decision is not based on grounds and best interest, but rather relational dimensions that complicate decision-making.

The training that family court judges have completed also prevent against a priming effect during TPR hearings. In law school, judges are taught to rely on evidence to meet statutory requirements and critically attend to data to make a decision that is sound according to the confines of the law. This training in law school, judges training and conferences, and mentoring opportunities with colleagues primes a judge to question information rather than to terminate parental rights. The inclination to assume that “the parents are unfit because they have made it to the TPR hearing” is far too simplistic for a trained judge to utilize in court.

TPR at 17 “What are we doing?!” Several judges reported that they could not reconcile terminating the parental rights of an older adolescent, or 17 year old with their personal definition of “best interest”. Judges thought critically about these TPR cases for older children without a pre-identified adoptive placement. Older children are less likely

to want to be adopted or to find an adoptive home before they age out of foster care. As part of their search for what action is in the best interest of the child, several judges asked themselves “what are we doing?!” to put this decision in context of the child’s real life.

I’ve had cases where they’ve wanted to terminate parental rights of children whose parents-- children who are age 17 who don’t want the rights terminated...you’ve got to serve the child over age 14, (and) if you have a 17 year old, what’s being accomplished—what benefit do we have by terminating that child’s rights? None! The statute says that they’ve been here so long that you have to go with this plan of action. Well, I don’t care! You went with the plan of action, well guess what we’re not doing that (terminating).

Judges also consider the resources to serve children and the state when deciding a TPR case for an older child.

It’s wasting court time to terminate a 17 year olds parental rights. Why are you wasting all that time when you’ve got other things you should be doing? A 17 year old? Just let them be in foster care! I don’t know why we terminate parental rights when there is nobody there for them. It doesn’t make a difference (for the child)! We still have to support them and still put them up, the permanent plan is still foster care. Why do we take a courthouse and waste court time, terminating rights of children that are not going to be adopted?

Even though judges are occasionally more likely to terminate if an adoptive family has already been identified, from a systems perspective, DSS must bring an action to terminate before efforts have been invested in identifying an adoptive family for several reasons. The first is to preserve limited resources and staff time. If a child’s parental

rights are not terminated, the time spent locating an adoptive family has been wasted, when it could have been invested elsewhere. Next, bonding with a pre-adoptive family is challenging in the best of situations, but can be seriously inhibited, if the family knows that the child still has legal parents. Judges understand this perspective, however it is more distal in their courtroom than the desire to keep a child in a stable, safe environment and preserve state and county resources.

I realize the premise is that nobody's going to take a child who has "I haven't had parental rights terminated" hanging over them. I know what their argument is, "but we can't realistically find a place for them, if we don't have them freed for adoption", and that's fine 60% of the time, but 40% of the time there is no realistic expectation for adoption anyway.

Poverty Judges recognized poverty as an impediment to parents completing treatments plans, and despite acknowledging the challenges that parents in poverty might face regarding transportation, paying for psychological evaluations, etc. parents were still held to high expectations for good treatment of their children. When judges saw a parent in poverty, who was able to meet the rigorous demands of a treatment plan, it was powerful for the judges when they considered the child's best interest.

This mama who has a job at the waffle house is ordered to pay child support (to DSS for children in foster care), do a psychological, DSS visits with the child, and she does everything on her own. She even pays for her psychological. She doesn't have a car so she walks to the visits. They didn't file the TPR... She has paid her child support working at the waffle house. She's fallen behind before, but she caught it up.

Judges indicated that poverty is a problem in South Carolina, but that there is a difference between poverty and abuse or neglect, meaning that poverty is a sub-optimal condition that children can not only survive, but engage on a trajectory of success as they mature. It is a condition that demands attention and sensitivity in the courtroom, but not one that determines the outcome of a TPR hearing.

Attorney Practice The judges interviewed for this study began their careers practicing law in the courtroom and have had extensive experience in family court. At times judges would report their decision-making depended greatly on what witnesses presented in court, which is directly related to attorney practice. Attorney practice dictates the information available to judges as they attempt to make decisions. All judges reported an interesting dichotomy of respecting the work of attorneys, while occasionally believing they would have “done things differently.” It is inappropriate for a judge to counsel an attorney on how to practice, and despite a difference of opinion regarding how a case was handled, judges are only able to use the information presented in court to make decisions.

Many, many times through excellent attorneys cases get settled and don't come before us.

But I just think of so many that the defense lawyers don't ask us to look at the videos (of interviews for witness testimony). They just go forward...And you can't tell lawyers how to practice.

Answer an Easier Question When judges decide to terminate parental rights, they are answering the simple, yet very broad question “Should parental rights be terminated? Should these family ties be severed permanently?” Given the variety of

information sources, and individual characteristics in TPR hearings, sub-questions are raised so that the judge can process this information to make their ultimate decision. As previously discussed, the parents' intent to care for their child, obscures seemingly straightforward questions of safety and justice. Judges generate questions for themselves to facilitate answering the question "Should parental rights be terminated?" Some of these easier questions include considering the child's situation if parental rights are terminated. By projecting this potential outcome, the judge predicts the child's future and asks him/herself "What (good) have we done?" If the answer to this question reflects the child in a comparable or worse situation, the judge relies heavily on this answer and decides not to terminate parental rights.

Selective Coding Selective coding is similar to axial coding, in that relationships are still explored and categories are developed from these properties, however selective coding is the beginning of theoretical integration (Walker & Myrick 2006, Corbin & Strauss, 1990). Various categories, relationships and constructs are selected and integrated into the theory grounded in data. Considering all the information, individualities, conditions and contexts that exist in TPR hearings, some data are of central importance to theory development while other data are crucial to practical understanding, but do not perpetuate the development of a theory of decision-making.

The development of a theory of judicial decision-making as related to DSS TPR cases was constructed using data centered around focusing attention, weighing information to determine priorities, predictions, characteristics of cases and contexts, and best interest of the child. Information related to training and systemic supports or improvements was not selected for theory development. Findings related to systemic or

training supports have functional value as trainings for family court professionals are developed, improved and offered. Changes to the family court system or pathways to child protection will take longer to implement if considered valuable, but this study offers the first structured analysis of judges' perspectives of systemic issues in need of modification.

Summary

This chapter presented data collected during in depth interviews and presented the findings of the study categorized by type of data analysis. Findings illustrate the nuances of decision-making and the cognitive constructs that judges utilize to answer complicated questions of "best interest." A discussion of the findings and significance can be found in the following chapter.

CHAPTER FIVE

Conclusions and Implications

The final chapter of this dissertation examines conclusions and recommendations developed from findings of this study. This chapter provides an overview of the study, an illustration and discussion of a theory of decision-making as related to termination of parental rights in DSS cases, connections between findings and research questions, implications of findings for training and systemic modifications, and directions for future research.

Overview of the Study

The purpose of this study was to describe the process of judicial decision-making relating to DSS TPR hearings, the judicial perception of best interest of the child, and the impact their work has on children and families in the community. In depth interviews with five family court judges in the state of South Carolina were conducted using semi-structured protocols and produced the data of this study. Findings were presented as coded narratives to illustrate the judicial experience and thinking during decision-making, but also to apply cognitive psychology constructs needed to develop a theory.

Theory of Judicial Decision-Making as Related to TPR

The personal background of a judge is the first foundational element in decision-making. The life lessons and meaning a judge makes from her own personal experiences impact how a judge makes sense of information in the family court, applies case law, statute and best interest of the child. How the judge perceives complex issues such as

poverty and drug addiction and ultimately how the judge connects with and dissociates emotionally from cases are also the result of foundational background experiences. The context of family court in South Carolina is another important foundational element of judicial decision-making. The judge can only act within the confines of the law to make decisions. Knowledge of and effective application of the law are vital to effective decision-making.

How judges interpret and process information in court is related to directing attention to salient features, making meaning of subjective information, predicting and evaluating the quality of outcomes, asking questions, regulating emotions, and considering multiple variables including: age, pre-adoptive resources, state and community resources. The most salient features of decision-making in DSS TPR hearings are those related to making meaning of the subjective term “best interest of the child.” While judges are expected to apply nine grounds for termination of parental rights in hearings, the best interest of the child trumps these grounds for family court judges. While judges consider the best interest of the child, they take into account the intention and capability of the parent to raise their children. Intention makes the decision more or less simple. If a parent is believed to be “well-intentioned” due to a pattern of behaviors that indicates they are working to improve their parenting skills, judges’ affective decision-making engaged and the decision became increasingly complicated. This interplay of context and multifaceted features of decision-making illustrates the application of the social-cognitive domain in the morality of judicial decision-making. Judges’ regulated these emotions, reframed their cognitive task to answer an easier question and sought support from a community of colleagues if needed. Although

arduous, judges “wrestled” with these cases to systematically and rationally make a decision grounded in law that serves best interest, not simply “better off.”

Judicial intuition played a large role in judges rapid processing of cues to make meaning during TPR hearings. Response to body language, communication styles, demonstrated patterns of behavior, and the individualized context of the case all are rapidly processed by the judge to make sense of information in the court and use it for decision-making.

While memory generally affects decision-making, because of the structure of South Carolina family courts, it is related but not central to decision-making. Because family court judges often review the case for the first time during or shortly before the TPR hearing, processing the information is more central than long-term memory of information relating to the case. The judge must know the legal statute and grounds for termination of parental rights, however there are supports in the form of training manuals, reference books, and other colleagues to facilitate maintaining this information.

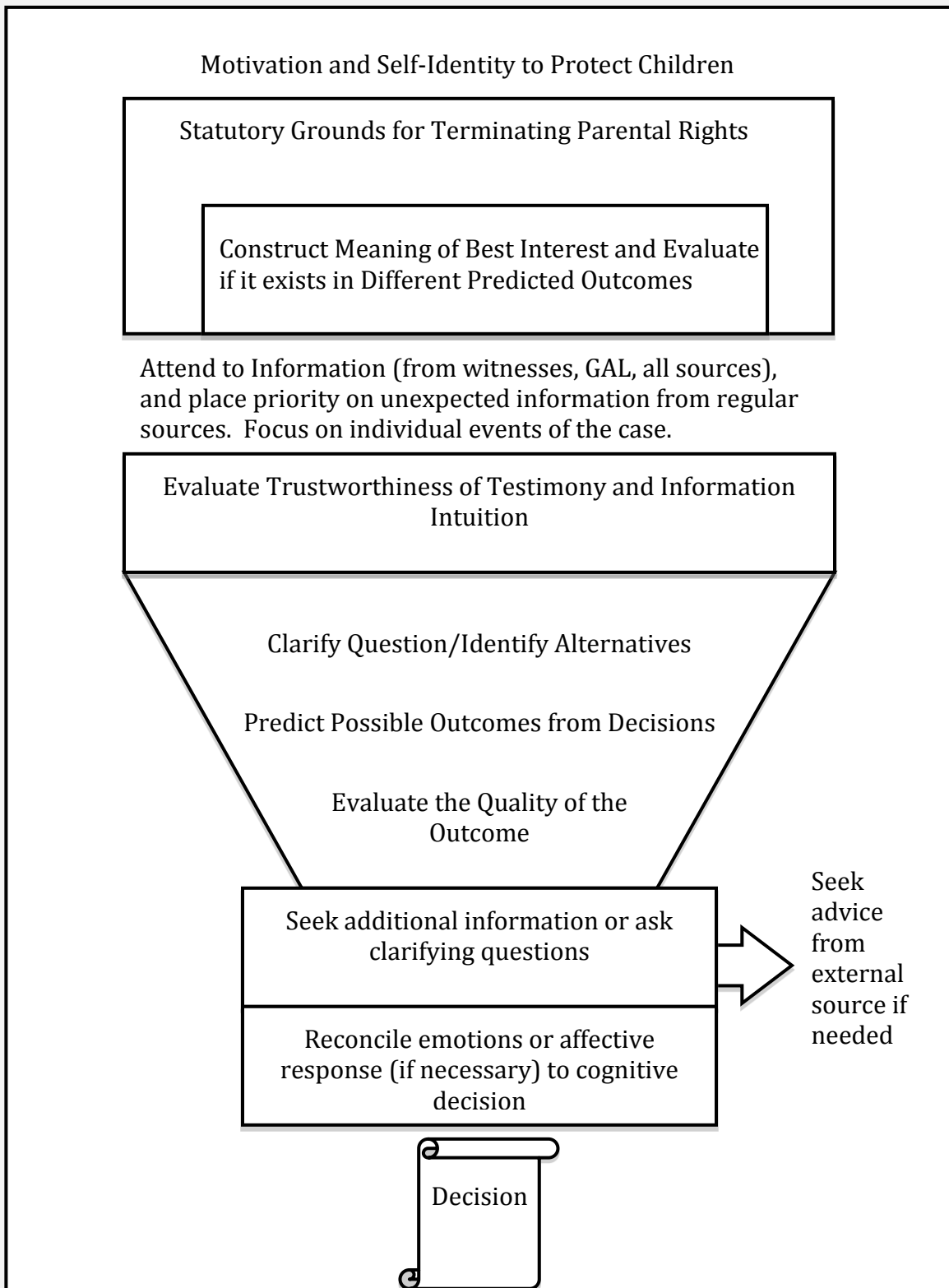


Figure 4.3: Theory of Judicial Decision Making as Related to Terminating Parental Rights

Research Questions Addressed in This Study: This study does address seven main questions that guided this research, and provided feedback that can inform trainings, systemic reform of the family court system, while illustrating the judicial experience of making these high stakes decisions.

What are the pathways to child protection that may eventually lead to TPR?

The pathways to child protection are multifaceted and lined with points for various individuals such as mandated reporters, law enforcement, intake workers, case workers, and supervising social workers to make decisions. These decision points and the process and legal grounds that shape decision-making are described in Chapter Four.

What are judges' thoughts and beliefs about TPRs in general? Judges' affective predisposition to TPR hearings include an initial instinct to avoid the case, followed by the need to prepare themselves for a difficult decision making process. Regardless of the circumstances surrounding the case, judges view the TPR hearing as a permanent dissolution of the family unit and commonly referred to TPRs as the “death penalty” of family court. Judges also reported relief at the conclusion of a TPR hearing, regardless of the outcome, after they did everything in their power to make a decision that is fair to all parties and in the best interest of the child.

What are the salient features of decision-making in TPR cases? Data collection and analysis allowed for a theory of judicial decision-making to be constructed that illustrates the salient features of decision-making in this particular context. This theory is described in detail earlier in this chapter, and findings include: knowledge of the grounds for TPR, attention to information presented in court, cognitive flexibility to process findings in individual cases, meaning-making of subjective information, and evaluation of the quality of potential outcomes.

What information is used to make decisions in a TPR case? Family court judges are required to consider all testimony and evidence presented in court, but report that they used information from a case file to provide context and shape questions for individuals before them. The source becomes important as judges consider the quality and trustworthiness of information presented to them. Information presented by reputable Guardians ad litem and caseworkers were viewed as very important as was testimony presented by parents to determine intention to care for a child.

What, if any, improvements to systems and training are needed? Judges' recommendations for training and system improvements are described in detail in the previous section, but generally include: judicial training opportunities centered around the impact of trauma on children and mental health needs for children and caretakers. Additionally, while judges reported they have ample opportunity to practice decision-making at judicial conferences and with mentors, instructional best practices suggest that this learning activity could be provided more frequently. Judges reported that equitable access to resources to serve children and families across counties would improve the system in general, and also recommended that more time could be created in the family court system by placing some tasks (i.e. paternity testing) in the jurisdiction of other child-serving agencies.

What role do intuition, prior experience, and other stores of knowledge play in decision-making? All judges reported that intuition and prior experience play a large role in how they make decisions. Intuitive knowledge based on the perception of families, intention of caregivers, and knowledge of the foster care system all impact how the family court judges interpreted information and ultimately made their decisions.

How is “the best interest of the child” interpreted by family court judges, since it is not defined by statute? The best interest of the child is subjective and depends on the individual child, case, and judge. Judges reported when defining and determining the best interest of the child they rely on intuition, emotion, and a review of all facts of the case to make a prediction for the future based on information available in the present.

How do judges prioritize sources of information? Judges attend to all information that can be obtained during a TPR hearing, including case notes and children’s files, however they cannot use this information as evidence when making their ultimate decision. They must rely on evidence presented in court to determine if TPR is in the best interest of the child, and as a result judges reported that information from GALs with a good reputation is very important, and unexpected evidence from grandparents, or siblings of the parent are most telling.

What steps does a judge take during a TPR hearing? Judges reported that there is not a template for making a decision in a TPR hearing because the facts and evidence in each case are different. There were however patterns of judicial behavior that became apparent after all analysis was completed. Judges listen to the evidence, question as needed, make sense of subjective information and answer “easier” questions as a scaffold to making their ultimate TPR decision.

Are there any particular enabling or inhibiting factors when judges hear a TPR case? If so, what are they and how should they be changed or preserved? Judges reported that while TPR decisions are difficult, having a supportive network of peers to call on when needed enables both effective decision-making and emotional processing of these decisions. Judges also found training manuals and resources from

conferences to be helpful. Despite the challenges that can result from making sense of evidence and determining the truth in family court, judges rely on their intuition and “people skills” to mitigate these inhibiting factors. Aside from the training and systemic recommendations, judges did not offer any needed changes to the current system.

Implications for Practice

A number of implications for practice became apparent after speaking with family court judges. Many recommended a variety of training opportunities they would like to have available, but not required for them to participate in. Other recommendations were related to the interaction between DSS and family court.

Recommendations for Training Practice: Judges undergo intensive two week training before taking the bench. In addition to this orientation to issues and best practice, conferences and training opportunities are available throughout the year and satisfy the annual requirement that family court judges take continuing education units. Judges reported that these trainings and the take-away materials from them are helpful in both preparing them and making them more effective at doing their job. While the intensive structure of some trainings does not allow for reflection on what is learned, the materials that judges take with them were considered very valuable.

Despite judicial feedback that there are ample opportunities to apply knowledge learned in training and receive feedback from peers, best practices of instructional design for adult learners suggest that providing more opportunities for practice and feedback, or at the very least maintaining peer review of practice at conferences is necessary. When four models of instructional design for adult learners that range from instructor driven to learner collaboration with instructor were compared for learner preference, and found that

many adult learners over the age of 30 preferred a “consumer” mindset for learning (Tracy & Shuttenberg, 1986). Despite this preference, more efficient learning occurs in educational settings where adults are self-directed and actively engaged with the material (Tracy & Shuttenberg, 1986). Feedback from judges aligned with these findings.

Judges reported specific topics not related to the law about which they would appreciate more formal training opportunities. This ‘needs assessment’ of information would enable a judge to better understand difficult problems addressed in family court which include mental health issues for children and family members, and the long-term impact of trauma and toxic stress on children.

I would love to know more about mental health. I would love to know more about the effects of trauma on children. Long term effects. I would like workshops on adolescent development. I think that would be a great thing.

As discussed in Chapter Three, judges reported that they have formal and informal mentoring opportunities within their community of colleagues and that this network is particularly helpful. They did not request more formalized or structured mentoring opportunities, and believe that the technological supports systems of email and chat functions on their computers provide an informal network of learners that is valuable.

Judges offered suggestions for other professionals who work in the family court system.

School resource officers need to know how to deal with kids who have ADD and ADHD. They can’t stop, so you have to step back and approach it in a calmer manner, it diffuses and they’ll respond to you.

I think workshops to help pro se litigants through the divorce proceedings would be very helpful.

Recommendations for Systemic Reform The family court system is multifaceted and very closely related to other agencies and systems. As practices in DSS change and evolve, the volume of cases or types of cases changes in family court. Experienced judges offered concrete changes to child welfare systems in the state of South Carolina with hopes that modifications would alleviate tensions between obligations of the family court judge. These recommendations are described in narrative form below, so that the lived experience can be understood.

For years I've pushed to try to take a lot of...the DSS cases out of our system, and let them be handled internally at the Department of Social Services. As an example, the industrial commission on workers comp is a separate entity. When people get hurt on the job they go before the workman's comp commission and they have these hearings and trials and if somebody doesn't like that decision then they can appeal it to the circuit court. Well we could take internally and have hearing masters in DSS that would hear these paternity cases, gosh you've got DNA now and child support guidelines they could establish child support, some of the review cases we hear in abuse and neglect it says by statute we have to review them annually, well they're having them reviewed every 3 or 6 months and it's almost using the judge as the whip to make sure or stay on top and see that they're doing what they're supposed to be doing. THAT could be heard by hearing officers. Then if you got to the stage of termination of parental rights, that would come to family court judge. Just taking some of that away from us to free up time that you could hear the private cases would be helpful.

Additional recommendations were made to restructure "client-attorney" relationships between DSS and the family court system.

Because then the lawyers who represent DSS don't have a way to be disconnected...They couldn't look at their clients and go "that course of action has problems, I'm not doing that" but now they represent a client who is in control of their salary. So even if they feel like what they are doing isn't going to work, they have no client control. It's like a solicitor--a solicitor doesn't have to do what the victim wants. They look at the facts and follow the law and they can look at the victim and say we're not going to do that. If the solicitors had abuse and neglect, they could have a different relationship with DSS. They could take their advice, and listen to them, but you need a really good separation between the lawyer and the client...If you disagree with your client and you're the DSS attorney, you could lose your job!

Some judges had interesting thoughts on more structured mentoring on the bench, or "apprenticeship" before a new family court judge takes the bench.

New judges would benefit from a longer training year. I think they need to sit with a judge on the bench more than they do. I think 2 weeks of training isn't enough. So I think it's probably, to me I think it needs to be more like 2 months. It's really scary when you're sitting with someone who's never been a judge and they train under you and they've never done all the areas...

Future Research

The pathways to child protection and becoming a legal orphan are riddled with decision points made by various individuals. This study explores the role of the family court judge whose responsibility it is to decide if parental rights are terminated or not. This study begins to address training and systemic needs so that more children can find loving, permanent families, but this study does not explore all decision points. Without

systemic, rigorous exploration of DSS case worker and attorney decision-making processes relating to child protection and filing TPRs, all possible areas for modification to facilitate children in foster care finding forever families are not discovered. Leaving these changes undiscovered allows for more children aging out of foster care and living without even hope of a stable, caring family.

Future studies with participating family court judges could be conducted to test and further refine the theory hypothesized in this study. For example, with permission from the clerk of court's office and family court judges, case files could be reviewed and judges could explain their decision-making processes throughout the case and the researcher would compare this process with the proposed theory. Additionally, reviewing cases and decisions to terminate or not terminate parental rights and comparing these decisions to the judges' stated process would also provide additional information worthy of consideration in a theory.

Conclusions

Judges viewed themselves first and foremost as members of the community who serve children and families and protect them to the best of their ability within the context of family court. As such, the best interest of the child is the primary element used to make decisions in DSS TPR cases. The cognitive processes associated with making decisions in DSS TPR cases are interrelated and complicated involving attention, making meaning of subjective elements, and predicting outcomes. By studying these processes, training and systemic modifications became apparent that would facilitate decision-making in family court.

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APPENDIX A

Invitation to Participate

A Theory of Decision-making Processes of Judges in Family Court: An Investigation of Salient Features Relating to Termination of Parental Rights Hearings

Dear Judge,

My name is Jenny May. I am a doctoral candidate in the Educational Psychology Department at the University of South Carolina. I am conducting a research study as part of the degree requirements, and I would like to invite you to participate. You are being asked to participate in this study because you are a family court judge in South Carolina.

I am studying judicial decision-making in termination of parental rights (TPR) hearings. If you decide to participate, I will meet with you at a location of your convenience for an interview about what steps you take to make decisions in TPR hearings. In particular, we will discuss what information you use to make decisions in TPR cases, and what trainings for professionals who work in your courtroom might be helpful.

The interview will take place at your office or place of your choosing at a time most convenient for you. The interview should last about an hour and a half and will be audio taped so that I can accurately reflect on what we discussed. I will be the only person to review and analyze the tapes. They will then be destroyed. Participation is confidential, so while the results of the study may be published or presented at professional meetings, your identity will not be revealed.

During the interview, you do not have to answer any questions that you do not wish to or that make you uncomfortable. Taking part in the study is your decision and if you decide to participate, you may also quit being in the study at any time or decide not to answer any question you are not comfortable answering. Although you probably won't benefit directly from participating in this study, we hope that others in the community will benefit by increased understanding of judicial decision-making as related to TPR cases as well as increased knowledge of what and how information should be presented in court.

I will be happy to answer any questions you have about the study. You may contact me at (803) 466-7362 or jennymay@sc.edu or my faculty advisor, Dr. Kellah Edens at (803) 777-2856 or kedens@mailbox.sc.edu if you have study related questions or problems. If you have any questions about your rights as a research participant, you may contact the Office of Research Compliance at the University of South Carolina at

803-777-7095.

Thank you for your consideration. I will call you within the next week to see if you are willing to participate.

With kind regards,
Jenny May

APPENDIX B

Letter of Informed Consent

Dear Judge,

My name is Jenny May, and I am a doctoral candidate in the Educational Psychology program in the College of Education at the University of South Carolina. In partial fulfillment of my degree requirements, I am conducting a dissertation study. The purpose of this study is to generate a theory of judicial decision-making as related to terminating parental rights (TPR). In particular, I am interested in what cognitive steps you take to make decisions in TPR hearings, what information you use to make decisions in TPR cases, and what trainings for professionals who work in your courtroom might be helpful. I believe that your experience as a family court judge in South Carolina will bring a valuable perspective that will lead to greater understanding of how decisions are made. Therefore, I am inviting you to participate in this study.

If you choose to participate in this study, you will be asked to complete an individual interview with me. The interview will take place at your office (or other place of your choosing) at a time most convenient for you, and should last about an hour and a half. Your words are data for this study, therefore the interview will be audio taped so that I can accurately reflect on what we discuss. I will be the only person to review and analyze the tapes. They will then be destroyed. The data that I gather during the study will be kept in a secure location in my private office. Participation is confidential, so while the results of the study may be published or presented at professional meetings, your identity will always remain concealed in all presentations of this work. You will not be required to answer any questions with which you are uncomfortable. If you decide to participate in the study, you may quit at any time during the research process. Your choice to participate, not participate, or withdraw from this study will also remain confidential. I am always happy to answer any questions you have about my study or your participation.

Thank you for your consideration. Please do not hesitate to contact me at any time if I can provide more information for you.

With kind regards,

Jenny May
Doctoral Candidate, Educational Psychology
Wardlaw College of Education
(803) 466-7362
jennymay@sc.edu

I have read (or had read to me) the contents of this consent form and have been encouraged to ask questions. I have received answers to my questions. I give my consent to participate in this study. I have received (or will receive) a copy of this form for my records and future reference.

Signature of Study Participant

Date

Printed Name of Study Participant

Date

Signature of Person Obtaining Consent

Date

Printed Name of Person Obtaining Consent

Date

APPENDIX C

Interview Protocol

Demographics:

1. Are you originally from SC? Where did you grow up?
2. Where/what state went to law school
 - a. Practice in places other than SC? Differences in child welfare system and TPR statute?
3. Before taking the bench I _____ (professional background---personal if comes up)
4. How long on the bench?
5. How long in practice before taking the bench---“resume”
6. How decide to become a family court judge?
7. Do you have a family? (kids, siblings etc.)
8. Favorite/best part of being a family court judge?
9. Biggest challenge of being a family court judge? What supports do you wish you had? Any infrastructure or systemic changes that would make your job easier/would result in you being able to do it more efficiently?
10. Most memorable moment on the bench?
 - a. One you wish you could forget?

Decision-making

11. How do you decide to/not to TPR?
 - a. What info do you use?
 - b. How do you define “best interest”--not in statute
12. Walk me through how you think about a TPR case.
13. When deciding to/ not to TPR and you don’t have enough information, what do you do?
 - a. What are the results?
 - i. Get at how orders are followed, and timing of kids in court etc. (how long child has to wait before next court date and additional info)
 - b. What is your default? (rephrase, but get at action in absence of enough info)
 - i. What are the results?
14. Has your process changed since you first became a family court judge?
 - a. How?
 - b. How do you use prior experiences when making TPR determination?
15. Describe a time when it was really difficult to know what to do?
 - a. Why?
 - b. How did you decide?

- c. Outcome? Are you satisfied? Would you do the same again?
 - d. How do you think that impacts how you make TPR decisions now?
 - e. Do you remember how you felt during that time?
16. Do you follow a child throughout all of their child protective hearings? Do you think that impacts your decision-making? How?
 17. Does your intuition/gut play a role in TPR decisions? Can you describe a situation when you had to trust your intuition in a TPR decision? What happened? Satisfied with result?
 18. What are your feelings on completing a TPR? How do you feel when you decide to TPR? How about when you don't?
 19. What is the best way for attorneys to present information to you during TPR cases?