

Impact of Court Commissioners in Child Welfare Cases

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Introductions

- Name and county.
- Years of experience.
- Part-time or full time court commissioner?
- What type of hearings do you conduct?
- Are you assigned to juvenile cases?
- What do you want to ask the other commissioners here about?

Court Commissioner Powers

Allowed in Juvenile Matters

1. Issue summonses and warrants.
2. Order the release or detention of children or expectant mothers of unborn children taken into custody.
3. Conduct detention and shelter care hearings.
4. Conduct preliminary appearances.
5. Conduct uncontested proceedings under § 48.13 (CHIPS), § 48.133 (UCHIPS), § **48.9795** guardianships, § 938.12 (delinquency), § 938.13 (JIPS), or § 938.18 (waiver hearing).
6. Enter into consent decrees or amended consent decrees under § 48.32 or § 938.32.
7. Exercise the powers and perform the duties specified in par. (j) or (m), whichever is applicable, in proceedings under § 813.122 or § 813.125 in which the respondent is a child. [Child Abuse and Harassment Restraining Orders & Injunctions]

Allowed in Juvenile Matters

8. Conduct hearings under § 48.21, § 48.217, § 938.21, or § 938.217 and thereafter order a child or juvenile held in or released from custody. [TPC Hearing and Pre-Disposition Change in Placements]
9. Conduct hearings under § 48.213 or § 48.217 and thereafter order an adult expectant mother of an unborn child to be held in or released from custody.
10. Conduct plea hearings.
11. Conduct prehearing conferences.
12. Issue orders requiring compliance with deferred prosecution agreements.
13. Conduct all proceedings on petitions or citations under § 938.125.
14. Conduct permanency reviews under § 48.38 (5) or § 938.38 (5) and permanency hearings under § 48.38 (5m) or § 938.38 (5m).
15. Conduct emergency in-home to out-of-home changes in placement hearings under § 48.357 (2)(b) or § 938.357 (2)(b).

Prohibited from Conducting

1. Conduct fact-finding or dispositional hearings except on petitions or citations under § 938.125 and except as provided in sub. (1)(g) 5.
2. Make dispositions other than approving consent decrees, ordering compliance with deferred prosecution agreements and ordering dispositions in uncontested proceedings under § 48.13 (CHIPS), § 48.133 (UCHIPS), § 938.12 (delinquency), or § 938.13 (JIPS).
3. Conduct hearings for the termination of parental rights or for adoptions.
4. Make [post-disposition] changes in placements of children, of juveniles, or of the expectant mothers of unborn children, or revisions or extensions of dispositional orders, except pursuant to petitions or citations under § 938.125, in uncontested proceedings under § 48.13, 48.133, 938.12, or 938.13, or as permitted under sub. (1) (g) 6., 8., 9., and 15.

Prohibited from Conducting

5. Conduct hearings, make findings, or issue orders in proceedings under § **48.977** guardianship or § 48.978 standby guardianship.
6. Conduct waiver hearings under § 938.18, except as provided in sub. (1)(g)5.
7. Make any dispositional order under § 938.34 (4d), (4h), or (4m).
[Type 2 Residential Care Center, SJOP, or Correctional Placement]

Case Law

- The powers and duties of court commissioners are set forth in § 757.69, but there is the ability to make other logical decisions not set forth in the statute.
- While the power to perform a specific act cannot be predicated upon a mere inference or implication, the statute will not be construed to prohibit additional acts merely because they are not particularized.
- See *State v. Evans*, 187 Wis. 2d 66 (1994) & *Perry v. Wolke*, 71 Wis. 2d 100 (1976).

Which holidays are excluded from the TPC Hearing calculation?

- TPC Hearing must be held within 48 hours of custody decision (24 hours end of the day in Ch. 938 cases)
- § 48.21(1)(a) and § 938.21(1)(a) only exclude “legal holidays” from the calculation.
- § 995.20 defines legal holidays as:
 - ▶ New Year’s Day, Martin Luther King Jr. Day, Presidents Day, Memorial Day, Juneteenth Day, 4th of July, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and certain election days.
 - ▶ The day after Thanksgiving, Christmas Eve, New Year’s Eve, courthouse closures, and additional county holidays are **NOT** excluded from the calculation.
 - ✓ AB249/SB264 would also include days clerk’s office closed due to weather or other unforeseen emergency in Ch. 938 cases

Hearing Delays & Continuances

- Court cannot exclude time or grant continuance if it would result in delay in making the contrary to the welfare finding (at removal), reasonable efforts to prevent removal finding (within 60 days of removal), or reasonable efforts to achieve goal of the permanency plan finding (every 12 months).
- See § 48.315(2m) and § 938.315(2m)

Out-of-Home Placement Findings

(i.e., ASFA Findings or Title IV-E Findings)

Out-of-Home Placements

- A child/juvenile is considered to be in an out-of-home placement for purposes of the findings and permanency planning when placed with anyone except a parent
 - ▶ Exceptions for placements in secure detention under certain circumstances
 - ▶ See §§ 48.38(2) & 938.38(2)

In-Home vs. Out-of-Home Examples

- If a child is removed from the mother and placed with an adjudicated or presumed (marital) father = in-home placement
- If a child is placed with a non-adjudicated father = out-of-home placement until adjudication under § 48.299 (6) or a paternity action
- Placement with a relative other than a parent (e.g., grandparent) = out-of-home placement
- Placement with a guardian = out-of-home placement

Contrary to the Welfare

- “A finding that continued placement of the child in his or her home would be contrary to the welfare of the child.”
- Required at multiple hearings (see Judicial Requirements for Out-of-Home Placements handout)
- Must be made at hearing authorizing child’s removal, or Title IV-E funding cannot be claimed for entire stay in out-of-home care

Reasonable Efforts to Prevent Removal

- A finding that the agency has “made reasonable efforts to prevent the removal of the child from the home”.
- Required at multiple hearings (see handout)
- If good cause shown, court can allow agency to file information relating to reasonable efforts no later than 5 days after the hearing
- Finding must be made within 60 days from the date of removal, or Title IV-E funding cannot be claimed for entire stay in out-of-home care

Reasonable Efforts Not Required

- Prior involuntary TPR
- Child relinquished within 72 hours of birth
- One of the following evidenced by a final judgment of conviction
 - ▶ Parent subjected the child to aggravated circumstances
 - ▶ Parent committed sex trafficking of a child of that parent
 - ▶ Parent committed certain crimes against a child of that parent

Documenting ASFA Findings

- “Case-by-case basis based on circumstances specific to the child and shall document or reference the specific information on which those findings are based in the court order”
- Child specific; separate order for each child
- May include attachments, as long as referenced in the order

Reasonable Efforts vs. Active Efforts (WICWA Cases)

- Two separate standards; occur concurrently.
 - ▶ Both required in WICWA case
 - ▶ Different goals: Breakup of Indian family vs. Preserving/reunifying the family (or achieving permanency goal)
 - ▶ Procedural consequence of failure to prove:
 - ✓ Reasonable=Title IV-E reimbursement
 - ✓ Active=Invalidation of proceedings
 - ▶ Exceptions exist for reasonable efforts that do not exist for active efforts

Reasonable Efforts to Achieve Permanency Plan/Goal

- “Whether reasonable efforts were made by the agency to achieve the permanency goal of the permanency plan, including, if appropriate, through an out-of-state placement.”
- Required at multiple hearings (see handout), but most importantly Permanency Hearing
- Must be made no later than 12 month after removal and within 12 months of the previous finding. If not, Title IV-E funding is only delayed until finding is made

If REPP Finding Not Made Timely

- The child receives funding until the end of the month in which the finding is due and will start receiving funding again the first day of the month in which the finding is actually made.
- Examples:
 1. REPP finding due by Aug. 10th and REPP finding is not made until Sept. 20th = no loss in reimbursement
 2. REPP finding due by Aug. 10th and REPP finding is not made until Oct. 25th = lose reimbursement for the month of September

Calculating Permanency Planning Dates

- Permanency Plan – § 48.38(3)
 - ▶ 60 days from removal
- Permanency Review – § 48.38(5)(a)
 - ▶ No later than 6 months after date of removal
 - ▶ Every 6 months thereafter
- Permanency Hearing – § 48.38(5m)(a)
 - ▶ No later than 12 months after date of removal
 - ▶ Thereafter, the earlier date of:
 - ✓ 6 months from prior permanency review, or
 - ✓ 12 months from prior hearing
- Failure to hold 6-month permanency reviews timely does not impact Title IV-E funding, but examined as part of Child and Family Services Review

WICWA Requirements

Temporary Physical Custody Hearings & Plea Hearings

Out-of-Home Care Placements Subject to WICWA

- CHIPS
- JIPS
 - ▶ Uncontrollable
 - ▶ Habitually truant from school
 - ▶ School dropout
 - ▶ Habitually truant from home
- Guardianships
 - ▶ § 48.977 & § 48.9795 (formerly Chapter 54)
- Foster care placement in family cases
- (Other proceedings: TPR and adoptions)

Inquiry

In all emergency, voluntary, and involuntary custody proceedings, **the court must:**

1. Ask each case participant whether they know or have reason to know child is an Indian child, and
2. Instruct parties to inform the court if they subsequently receive information of reason to know Indian child.

Language included on TPC Order (JD-1711), CHIPS Dispositional Order (JC-1611), JIPS Dispositional Order (JD-1746), TPR Orders (JC-1638 & JC-1639), Dispositional Orders Appointing Guardian (JG-1606 & JN-1530), and Adoption Order (JC-1647).

Reason to Know

- Under ICWA regulations, the court has “reason to know” that the case involves an Indian child if **any** of the following:
 - ▶ Any participant informs the court that child is an Indian child.
 - ▶ Any participant informs the court that they discovered information indicating that the child is an Indian child.
 - ▶ Child gives the court reason to know he/she is an Indian child.
 - ▶ The court is informed that domicile or residence of the child, a parent, or Indian custodian is on a reservation.
 - ▶ The court is informed the child is/has been a ward of Tribal court.
 - ▶ The court is informed that either parent or child possesses an identification card indicating membership in a tribe.
- Remember to use WICWA forms.

Identification Tools

- The following DCF forms available to county agency workers (in eWiSACWIS):
 - ▶ Screening for Child’s Status as Indian
 - ✓ Should be created for all children.
 - ▶ Child’s Biological Family History
 - ▶ Request for Confirmation of Child’s Indian Status
 - ▶ Documentation of WICWA Casework
 - ✓ eWiSACWIS Desk Guide

Emergency Removal

- Court must make a finding on the record that emergency placement/removal is necessary to prevent imminent physical damage or harm to the Indian child.

- Finding included on Temporary Physical Custody Order-ICWA (IW-1711), Notice of Post-Disposition Emergency Change in Placement (JD-1767), and Post-Disposition Emergency Change in Placement Order (JD-1768).
- ICWA version of Temporary Physical Custody Request form (IW-1608) includes information regarding Indian Child status.

Legal Representation

- Any indigent parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. [§ 48.028(4)(b)]
- The State Public Defender's Office will appoint counsel for qualifying parents and Indian custodians in CHIPS and JIPS cases subject to WICWA (in addition to providing representation in TPR cases).
- The circuit court has discretion to appoint counsel for any parent in a CHIPS, JIPS, or TPR case.

Advising Unrepresented Parents/Indian Custodian

- If parent or Indian custodian appears without counsel, the court must advise him/her of right to:
 - ▶ Court-appointed counsel
 - ▶ Request transfer to tribal court
 - ▶ Object to transfer to tribal court
 - ▶ Request additional time to prepare for case
 - ▶ Right to intervene (if not already a party)

Included on ICWA version Notice of Rights and Obligations form (IW-1716).

Resources

- Judicial Checklist - WICWA:
www.wicourts.gov/courts/programs/docs/ccipwicwa.pdf
- ICWA circuit court forms:
<https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=21>
- CCIP E-Learning Project: www.wicciptraining.com
- DCF Resources (e.g., Active Efforts Guide, forms):
<https://dcf.wisconsin.gov/wicwa>
- Missing Threads video:
<https://www.youtube.com/watch?v=ZCLUbS4FxWo>

Nuts & Bolts of TPR

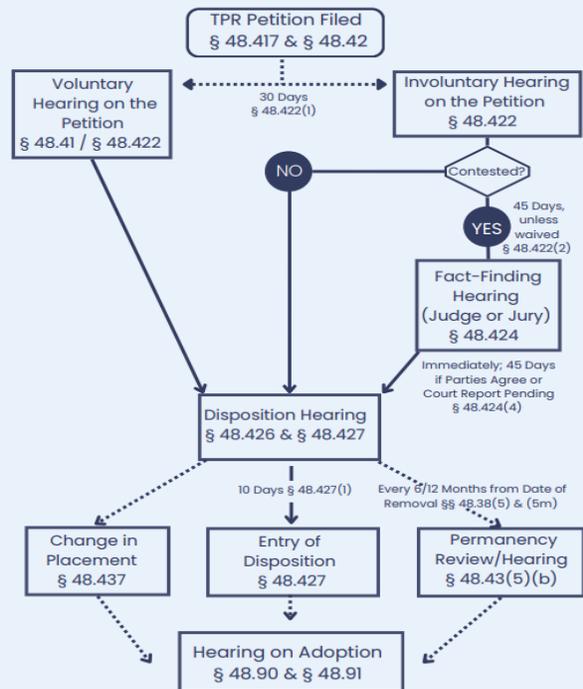


Hon. Wendy J.N. Klicko
Sauk County Circuit Court

Last Thoughts First

- TPR is a drastic, though sometimes “necessary” government intervention in a family’s life.
- The INITIAL REMOVAL from the parental home immediately starts to create a self-fulfilling prophecy toward TPR because children form attachments to their primary care providers.
- All of the procedures between TPC and TPR are designed to avoid TPR if possible.
- TPR is not a case where anyone wins. Utterly devastating to parents and, even where necessary to protect children, considered a failure by social workers and agencies.

TPR Overview (in folder)



Two Types of TPRs

Wis. Stat. §48.41 – Voluntary TPR

Wis. Stat. §48.415 – Involuntary TPR

Can be filed Privately (step-parent adoption) or Publicly by an attorney representing the interests of the public (children in out of home care)

TPR Filing Options vs Plea Options

▪ Filing Options

- ▶ Voluntary
 - ✓ Will consent to TPR
- ▶ Involuntary
 - ✓ May or will not consent to TPR

▪ Plea Options

- ▶ Voluntary Consent
 - ✓ Not contesting the grounds or Disposition phase
- ▶ No Contest
 - ✓ Not contesting the grounds phase, but contesting the Disposition phase
- ▶ Denial
 - ✓ Contesting the grounds phase and Disposition phase

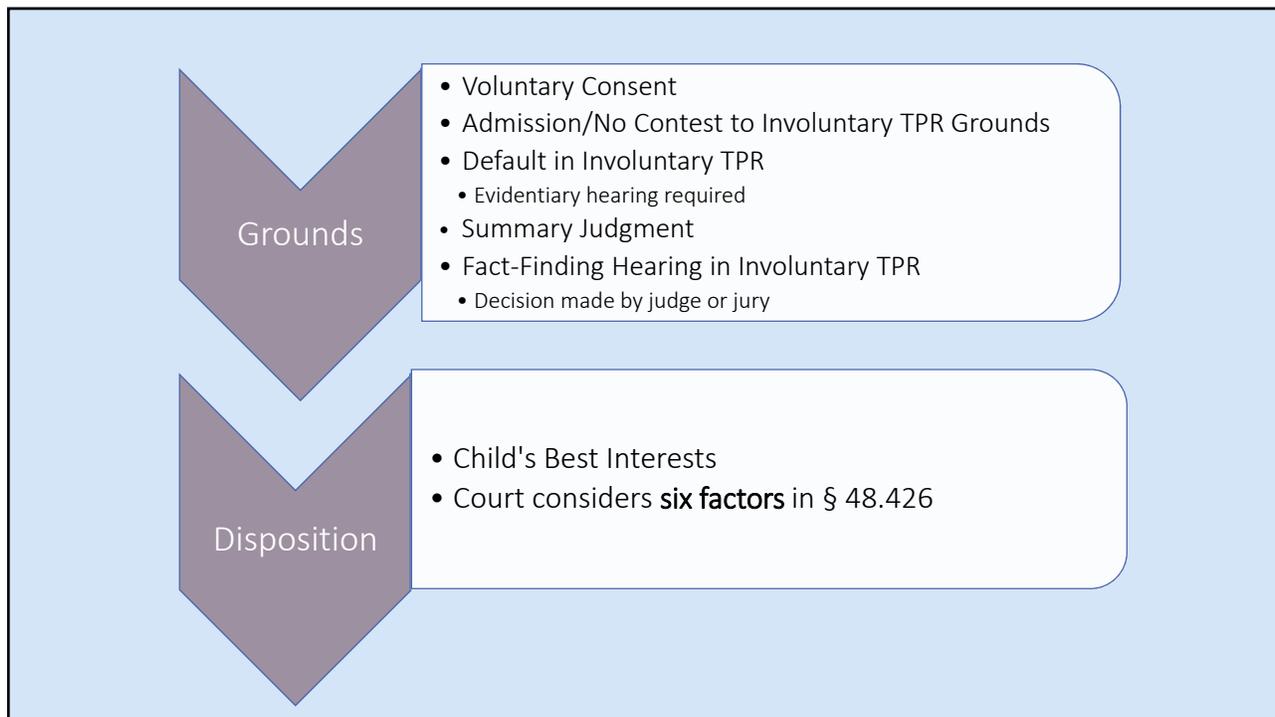
Phases of TPRs

Two phases to TPRs:

- Grounds – does the court have a legal reason to TPR
- Best Interest – is it in the child's best interest to TPR

Focus at phases:

- Grounds – parent's rights are paramount
- Best Interest – child's rights are paramount



Involuntary TPR Grounds § 48.415

Abandonment – § 48.415(1) – 5 types

Relinquishment – § 48.415(1m)

Continuing CHIPS – § 48.415(2) – 2 types

Continuing Parental Disability - § 48.415(3)

Continuing Denial of Periods of Physical Placement/Visitation – § 48.415(4)

Child Abuse - § 48.415(5)

Failure to Assume Parental Responsibility - § 48.415(6)

Incestuous Parenthood - § 48.415(7)

Homicide or Solicitation to Commit Homicide of Parent - § 48.415(8)

Parenthood as a Result of Sexual Assault - § 48.415(9)

Commission of Felony Against a Child - § 48.415(9m)

Prior Involuntary TPR - § 48.415(10)

Abandonment Most Common Examples

Three months: child has been adjudicated CHIPS, placed outside the home of a parent pursuant to a court order which contained the TPR warning, and has failed to visit or communicate with the parent for a period of 3 months or longer

Six months: child has been left by the parent with any person the parent knows or could discover the whereabouts of the child and the parent fails to visit or communicate with the child for a period of six months or longer. NB: No court order or TPR warnings required

Continuing CHIPS Grounds

2 Types of Continuing CHIPS

- Typical CHIPS case
- On 3 or more occasions child was found CHIPS and removed from the home

Elements are not the same

Typical Continuing CHIPS Ground

Element 1

- Child found to be CHIPS pursuant to any CHIPS ground
- Placed/continued to be placed outside the home of a parent pursuant to one or more CHIPS orders for a cumulative total period of six months or longer
- CHIPS orders contain the written TPR warnings required by § 48.356

Typical Continuing CHIPS Grounds

Element 2:

- Agency has made a “reasonable effort” to provide the services ordered by the court

Element 3:

- Parent has failed to meet the conditions established for the safe return of the child to the home
 - ▶ As of the date the TPR petition was filed
 - ▶ If out-of-home less than 15/22 months – use that future date

Continuing Denial of Periods of Physical Placement or Visitation Ground

Elements:

- Denied periods of physical placement (family court order) or visitation (CHIPS/JIPS case)
- Written TPR warning must be attached to court order
- At least one year has elapsed
- The court has not modified the order so as to permit periods of physical placement or visitation

It is important for the court to set pre-conditions for visitation - Pre-conditions should be very concrete & specific to the individual circumstances. Ex. Parent shall write letters to the child on a weekly basis for four consecutive weeks and forward the letter to the assigned case worker

Who Must be Summoned – § 48.42 (2)

- Mother
- Adjudicated or presumptive father
- Guardian
- Guardian ad Litem for Child
- Legal custodian
- Indian custodian of the child
- Child, if 12 years or older
- Any other person to whom notice is required to be given under Chapter 822 – UCCJA

Who Must be Summoned – § 48.42 (2)

Alleged father(s), unless waived right to notice:

- Person who filed a declaration of paternal interest
- Person(s) alleged to the court to be the father of the child, or who may, based on the statement of the mother or other information presented, may be the father of the child
- Person who has lived in a familial relationship with the child and who may be the father

Note: Adoption cannot occur unless the parental rights of the parent, whether known or unknown, have been terminated - § 48.91(2).

Initial Appearance/Hearing on the Petition – § 48.422

- Initial Appearance/Hearing on the Petition shall be
- held within 30 days after TPR petition is filed with the court
- If ICWA – then Initial Appearance shall not occur until at least 10 days after receipt of the notice of the hearing if the tribe is known or until at least 15 days after receipt of the notice by the U.S. Secretary of the Interior
- If ICWA – Indian child’s parent, Indian custodian, or tribe may request an additional 20 days to enable the requestor to prepare for the hearing – the court shall grant such request

Initial Appearance – § 48.422

Rights of Party:

- Contest the petition
- Jury trial & Substitution of judge – must be made by the end of the Initial Appearance or be waived
- Continuance to consult with an attorney on the request for Jury Trial or substitution of judge
- If a person appears and claims to be the father of the child, court shall set a date for hearing on the issue of paternity

Initial Appearance – § 48.422

Before accepting admission to TPR petition, the court shall:

- Address the party & determine that the admission is made voluntarily & with understanding of the nature of the acts alleged in the petition & potential dispositions
- Establish whether any threats or promises were made
- Unrepresented parties: alert the party to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them
- Make such inquiries as satisfactorily establish that there is a factual basis for the admission

Initial Appearance – § 48.422

If the petition is not contested, the court shall:

- Hear testimony in support of the allegations in the petition
- Address the parties in the same way as when taking an admission

Acceptance of Admission or No Contest Plea

Plea colloquy by court or counsel must include:

- Competence
- Trial rights (N/C include each element of ground to be proved)
- Alternatives to giving plea – continue to engage in services which could include....
- Consequences of plea and of TPR including that at the time of the dispositional hearing, the court will decide whether to TPR or to dismiss the TPR petition based on what is in the child's best interest *See, Oneida County Dept. of Social Services v. Therese S., 2008 WI App 159, 314 Wis.2d 493*
- No threats or promises made
- He/she will be found to be an “unfit” parent (N/C only)

Default Judgment – Involuntary TPR

- Court must conduct evidentiary hearing to establish TPR grounds exist – § 48.422(3) “Prove up”
- Parent entitled to notice of future hearings, if any
- No default for failing to obey a summons or failing to appear at trial IF attorney appears BUT SEE, § 48.23(2)(b)3. (default allowed where parental conduct is egregious)
- Attorney must be allowed to participate unless discharged after finding parent waived counsel by conduct – § 48.23(2)

Types of Default

1 Failure to obey a summons – § 806.02(1)



2 Failure to obey a court order – § 805.03



3 Failure to appear at trial – § 806.02(5)



Fact-Finding Hearing – § 48.424

If the TPR petition is contested:

- Fact finding hearing shall be set within 45 days of the
- Initial Appearance
- Court has the ability to toll time limits - § 48.315
- Hearing is to determine whether “grounds” exist to TPR
- Jury (10/12) only determines “grounds” – not disposition

Fact-Finding Hearing – § 48.424

Fact-Finding Hearing:

- ICWA: whether the additional requirements under § 48.42 (1)(e) have been proved.
- If “grounds” are found, the court shall find the parent “unfit”
- Burden of Proof: Clear & convincing – exception: ICWA cases

Disposition Standard & Factors– § 48.426

Standard: best interest of the child

Factors: 6 must be considered – others may be considered

1. Likelihood of the child’s adoption after TPR
2. Age & health of child – now & at the time of removal
3. Whether the child has substantial relationships with parent or family members & whether it would be harmful to the child to sever the relationships

Disposition Standard & Factors – § 48.426

Factors

4. Wishes of the child
5. Duration of the separation of the parent from the child
6. Whether the child will enter into a more stable and permanent family relationship as a result of TPR, taking into account the conditions of the child’s current placement, the likelihood of future placements & the results of prior placements

Disposition Hearing

- Any party may present relevant evidence
- Expert testimony may be presented
- Any party may make alternative dispositional recommendations
- After receiving any evidence, the court shall enter one of the dispositions authorized by law within **10 days** of the dispositional hearing

Disposition – Foster Parent's Statement

- The foster parent/physical custodian has a right to make a statement relevant to the issue of disposition
- Statement may be oral or written
- Statement may be made at disposition or a written statement may be submitting prior to disposition

Possible Dispositions

Court may:

- Dismiss the petition if the court finds that the evidence does not warrant TPR
- Order TPR & transfer custody & guardianship pending adoption to:
 - ▶ State/county department authorized to accept guardianship
 - ▶ Child welfare agency authorized to accept guardianship
 - ▶ Kinship relative with whom the child resides
- Appoint a guardian under § 48.977

Disposition Issues

Always to the court – emotion has less impact, but still important to consider

- Note that there is almost always a long-term emotional cost to children in severing parental ties. In and of itself, may not be enough to preclude TPR, but should be actively considered
- Consider siblings and extended family – those relationships are severed by adoption, not the TPR itself - § 48.43(2)(a)
 - ▶ Siblings are often the most enduring relationships of our lives
- Consider whether any type of visitation agreement might serve the child's best interest, even if unenforceable

Issues for Court Commissioners re TPRs

- Identify parents and relatives early on
- Removal starts the clock for TPR grounds, so decision to do so is critical
- Counsel for parents in CHIPS will assist in making sure that a TPR based upon those proceedings is solid
- Appropriate R/E and CTW findings in CHIPS provide the basis for TPR grounds and Dispositional factors

Issues for Court Commissioners re TPRs

- Safety Plans by social workers provide basis for R/E to prevent removal finding
- Safety Assessment by social workers provide basis for CTW finding
- R/E to prevent removal and CTW findings provide basis for Conditions of Return
- R/E to finalize permanency plan provides elements of TPR grounds for Continuing Need

First Thoughts Last

Only guaranteed to get the right conclusion with a TPR being granted if the case starts with protecting all parties rights and continues that way throughout the life of the case



Conclusion

Each hearing either narrows the path toward TPR or widens it back to a return to the parent.

