The Most Consequential of Acts: The Nuances of TPR Practice

Hon. Christopher Foley, Ret.
Milwaukee County Circuit Court

Most Consequential of Judicial Acts

- TPRs "are among the most consequential of judicial acts, involving as they do the 'awesome authority of the State to destroy permanently all legal recognition of the parental relationship.'"

  —*Steven V.,* 2004 WI 47 (quoting *Evelyn C.R.,* 2001 WI 110)

"Termination proceedings require heightened legal safeguards against erroneous decisions."

-*State v. Bobby G.,* 2007 WI 77

Questions About TPR Proceedings

Please pair up with someone sitting next to you to answer the following questions.

Voluntary Consent to TPR

- Methods [§ 48.41]
  1. Personal Appearance
     - ✔ If difficult or impossible to appear personally, appear before embassy or consul official, military judge or a judge of court of record in another county, state or country, or
     - ✔ Admit testimony by telephone or audio visual means
  2. ***UNADJUDICATED FATHER*** may consent by written notarized statement (unadjudicated only; not noncustodial) (JC-1636)

Voluntary Consent to TPR

- Methods (cont'd)
  3. If stepparent adoption, birthparent may consent by affidavit witnessed by two people
  4. Voluntary consent to TPR of Indian Child [§ 48.028 (5)(b)] must be:
     - Executed in writing (IW-1637)
     - Recorded before a judge
     - Judge must certify parent understood terms and consequences
     - Child must be at least 11 days old before consent

Voluntary Consent Procedural Concerns

- GAL must be appointed for child and minor parent consenting to TPR [§ 48.235 (1) and (5)]
- Adult parent may consent without counsel if knowing and voluntary waiver of counsel and consent to TPR
  - ► See § 48.422 (7) regarding waiver of counsel

Voluntary Consent Procedural Concerns

- If GAL (or any party/participant) has concerns regarding competency of parent to offer valid consent, should so inform the court
  - ► If court determines parent not capable of voluntary and informed consent, voluntary petition must be dismissed but involuntary TPR may be pursued [§ 48.41 (3)]

Voluntary Consent Procedural Concerns

- Default judgment is not available in voluntary TPR (because the consent is not secured as required under § 48.41)
  - ► However, if involuntary grounds are alleged in the alternative, involuntary grounds can be pursued by default (must take testimony!!)

"Voluntary and Informed Consent" *DLS*, 112 WIS.2D 180

- Basic information court must ascertain
  - ► Education and general comprehension
    - ✔ Literacy and English fluency (or interpreter, of course)
    - ✔ History of mental health issues or treatment
    - ✔ Medication (impact on understanding)
    - ✔ Alcohol or drug consumption

"Voluntary and Informed" Basic Information

- Understanding of nature and consequences of proceedings
  - ► "All rights, powers, privileges, immunities, duties and obligations [of parenthood] are permanently severed" [§ 48.40 (2)]
  - ► Permanently surrendering right of custody, guardianship, visitation/communication, right of inheritance and duty of support
    - ✔ Establish parent understands promise of post TPR contact not legally enforceable—*Margaret H.,* 2000 WI 42

"Voluntary and Informed" Basic Information

- Absolute right to be represented by counsel retained by parent—secure valid waiver [§ 48.422 (7)]
  - ► Right to free lawyer if it were an involuntary proceeding and indigent
  - ► Role of GAL—not "your lawyer" even if GAL is for minor parent
  - ► Right to substitution of judge (continuance to consider retaining counsel or substituting) [§ 48.422 (5)]

"Voluntary and Informed" Basic Information

- If not consenting, rights parent would have in involuntary proceeding
  - ► A ground for involuntary TPR would have to be proved to a reasonable certainty/present and subpoena witnesses/confront and cross-examine opposing witnesses/jury determination—or court determination
  - ► Even if ground proved/parental unfitness finding made [§ 48.424 (4)], right to dispositional contest and best interests determination

"Voluntary and Informed" Basic Information

- Knowledge and consideration of alternatives to TPR
  - ► Parenting child with public assistance, or adjudication of paternity and enforced child support
  - ► Voluntary or court ordered placement with relatives (with or without guardianship transfer) or foster care

"Voluntary and Informed" Basic Information

- Absence of threats or promises coercing decision
  - ► Advice, argument and persuasion do not constitute coercion if parent makes independent decision—*DLS*, 112 Wis. 2d 180
  - ► With a minor parent, particular inquiry regarding parental pressure
  - ► Determine whether an adoptive resource has been identified and if any impermissible payments have been made [§ 48.422 (7) / § 48.913]

"Voluntary and Informed" Basic Information

- If consent accepted and rights terminated, still have right to appeal
  - ► Must file notice within 30 days or "forever" lose right to appeal
  - ► Have parent sign written acknowledgement of appeal rights [JC-1644]
  - ► Parent must understand that 30 day appeal period is not a buffer to "change mind"
    - ✔ Decision is permanent and virtually irreversible

"Voluntary and Informed" Basic Information

- Sufficient time to consider decision; to consult with lawyer [if applicable], parents, spouse, GAL, counselor
  - ► Comfortable and confident they understand the proceeding and permanency of decision
  - ► Any questions based upon discussion with court
  - ► If represented, counsel concurs valid consent
  - ► If minor parent, GALs concurs [§ 48.235 (5)]

"Voluntary and Informed"

- If consent is valid/informed and voluntary, accept consent
  - ***THERE IS ABSOLUTELY NO REQUIREMENT OF A FINDING OF UNFITNESS!!!!***
  - ***Unfitness is a required finding only when "the petition is contested" and grounds for involuntary TPR is found [§ 48.424 (1) and (4)]***

"Voluntary and Informed"

- Statute suggests that if you accept consent, you will proceed immediately to disposition [§ 48.41 (1)]
- Discussion of dispositional factors in involuntary TPR section

UNKNOWN FATHERS

- Issues have arisen for failure to address interests of unknown fathers in "voluntary" proceedings
  - ► Cannot proceed with adoption without terminating unknown father's rights [§48.91]
  - ► See notice requirements in §48.423

Involuntary TPR: Some Basics

- As noted earlier, ends all "rights, powers, privileges, immunities, duties and obligations" of parent child relationship
  - ► Ends relationship between child and extended birth family relatives as well—*Margaret H.,* 2000 WI 42

Involuntary TPR: Some Basics

- Implicates a fundamental liberty interest
  - "Require heightened legal safeguards against erroneous decisions"—*State v. Bobby G.,* 2007 WI 77
  - Middle burden—reasonable certainty by clear, satisfactory and convincing at grounds phase—*Santosky*, 455 U.S. 745 (1982); § 48.31 (1)
    - See discussion of A.G., 2023 WI 61, in disposition as to burden at disposition

Involuntary TPR: Basics

- Parental unfitness must be established to warrant best interests determination—*CEW*, 124 Wis. 2d 47; *Julie A.B*., 255 Wis. 2d 170, par. 22; *Troxel*, 530 U.S. 57 (2000)
- Two phased proceedings [§ 48.424]
  - Grounds phase—parental rights paramount in this phase—*Evelyn C.R.,* 2001 WI 110, par. 22-23; *Julie A.B.,* par. 24

Involuntary TPR: Basics

- If parental unfitness established in grounds phase, unfitness finding mandated [§ 48.424 (4)]; *Julie A.B.*
- Dispositional phase---best interests of the child is controlling standard based upon consideration of § 48.426 factors - *Julie A.B.*

Involuntary TPR: Basics

- Statutory right to appointed counsel if indigent
  - ► SPD will appoint. [§ 48.23 (2) (2g-WICWA) and (4)]
- May, of course, hire counsel of own choosing [§ 48.23 (5)]
- But parent appearing in involuntary TPR must appear by counsel or knowing/voluntarily waive counsel [§ 48.23 (2)]
- Waiver by conduct now recognized [§ 48.23 (2) (b) 3]

Involuntary TPR: Basics

- Statutory right to counsel for indigent parent. Not necessarily, constitutional right—although due process may compel appointment—*Lassiter,* 452 U.S. 18 (1981)
- Court has inherent authority to appoint to "assure fair and orderly presentation of the case."—*Joni B.,* 202 Wis. 2d 1

Basics: Presumptive TPR Filing

- If child is in out-of-home care for 15 out of most recent 22 months, absent compelling reason, agency/state/county must file for TPR [§ 48.417 (1) (a) and (2) (as to compelling reasons)]
- Same is true if court determines that reasonable efforts to effect safe return are not required [§ 48.355 (2d)]

Basics - ICWA

- In instances of ICWA children, State must not only prove State law elements to a RCBCSCE, but also prove beyond a reasonable doubt that continued custody of Indian child with parent is likely to result in serious emotional or physical damage; and to a RCBCSCE active efforts have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family [§ 48.028 (4) (e)]

Basics - ICWA

- However, while other ICWA requirements still apply—notice to tribe, participation by tribe, etc.—active efforts and continued custody elements do not apply if the "parent never had physical or legal custody of the Indian child prior to any child custody proceedings." —*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013); *Kewaunee County v. R.I.,* 2018 WI App. 7

Involuntary TPR Plea Hearing

- Must be heard within 30 days of filing [§ 48.422 (1)]
- GAL must be appointed for child [§ 48.235 (1)(c)]
- Must advise parties of their rights, including right to jury trial and substitution of judge, both of which must be requested before end of plea hearing [§ 48.422 (1), (4)-(5); § 48.30; § 48.243]

Plea Hearing

- Failure to advise of right of substitution not an automatic basis for reversal, but will upon showing of prejudice—*Kywanda F.,* 200 Wis. 2d 26
- Each non-petitioning party has right of substitution [§ 48.422 (5)]; *Preston T.B.,* 2002 WI App 220

Plea Hearing

- If party admits or pleads no contest, see § 48.422(7) and discussion in voluntary TPR section regarding waiver of counsel and trial rights
  - ► Practice issue: parents challenging cases where testimony is taken in support of the allegations in petition at subsequent hearing [§ 48.422(3)]
- If parent properly served and fails to appear and "join issue," default judgment appropriate [§ 806.02 (1)]; *Kimberly B.*, No. 2009 AP 1715 (WI App., Unpublished Slip); § 48.42 (3)(c) and (4)(c)1

Plea Hearing

- Admission or no contest to grounds [§ 48.422 (7)]
  - ► Advise of mandated unfitness finding; best interests controls at disposition; and court can grant TPR or dismiss petition—*Therese S.*, 2008 WI App. 159, A.G. 23 WI 61 (TAKE TESTIMONY!!!)
  - ► Preferable, but not mandated, to discuss specific alternatives if petition not granted---guardianship, continuing CHIPS order, etc.

Plea Hearing

- Must take testimony to support a finding of grounds for involuntary TPR to a RCBCSCE in instance of default judgment, admission or no contest plea—*Evelyn C.R.*, 2001 WI 110; *Bobby G.*, 2007 WI 77, par. 4, fn. 5.
  - ► Recent dissents in petitions for review expressed need to assure parent understood "prove up" facts will be assumed to be true
- Motions to suspend visitation [§ 48.422 (1m)]
  - ► May enjoin contact during pendency if in best interests of child

Plea Hearing

- If petition is contested, fact finding hearing within 45 days [§ 48.422 (2)]
- Imperative that you order parents to appear in person for all hearings; be on time; maintain contact/communication with their lawyer; meet their discovery obligations
- Warn that failure to do so may result in default judgment

Final Pretrial

- Strongly recommend that you hold final pretrial
- Motions *in limine*, evidentiary issues and other trial issues should not await the morning of trial
- Non-appearing parent will be addressed in trial section

Final Pretrial

- Presumptively only 2 sides in trial [§ 805.08 (3)]
- If petitioner and GAL are aligned, they split preemptories (split 3 unless you are keeping an alternate [§ 805.08 (2) and (3)]; *CEW*)
- If both parents participating, they share unless adverse interests. §805.08 (3)

Final Pretrial / Motions in Limine

- Domestic violence—should you consider severance of the actions—discussed in plea hearing session [§ 803.04 (4) and § 805.05 (2)]
- Adoption and best interests evidence barred in grounds phase—*CEW*; JI-Children's 301
- But court probably needs to inquire as to adoption and foster care in *voir dire*

Final Pretrial / Motions in Limine

- Individual *voir dire* of each juror is not necessary
- However, if AODA, Mental Health, DV or Sexual Abuse are pertinent issues in trial, need to offer opportunity for individual *voir dire* to any juror for whom that issue has impacted their life or the life of someone of significance to them

Claim/Issue Preclusion

- Preclusion doctrine can preclude re-litigation of TPR claim
  - ✔ Preclusion should not be applied as strictly in TPR cases as in other cases, but absent "materially changed" facts, preclusion can bar repeated TPR proceedings—*Terrance M.*, 280 Wis. 2d 396

Summary Judgement

- Summary Judgment is permissible in TPR Grounds phase—*Steven V.,* 2004 WI 47
  - ► Not strictly limited to "paper grounds", i.e. prior involuntary TPR; Commission of Serious Felony
  - ► Must be a final judgment—appeals exhausted—to use this ground—unless appeal does not challenge guilt—*Jennifer V.,* 200 Wis. 2d 678; *Reynaldo F.,* 2004 Wi App. 106
    - ✔ But court cautions against use with "fact intensive" grounds (Pars. 36-37)

Non-Appearing Parent / Default Judgement

- "Non-appearing" parent/default judgment
  - A "non-appearing" parent may be defaulted for failure to appear at trial [§ 806.02 (5)]
  - But, a "non-appearing" parent is "appearing" if their counsel is appearing—*Evelyn C.R.,* par. 17; *Shirley E.,* par. 13, fn. 1
  - Under prior law, lawyer could not withdraw as parent "shall appear by counsel" absent a knowing and voluntary waiver—*Shirley E.*

Non-Appearing Parent / Default Judgement

- Lawyer most likely ethically obligated to move to withdraw under those circumstances [S.C.R. 20:1.1]
- Recent amendment to § 48.23 recognizes waiver of counsel by conduct and allows "discharge"/withdrawal of counsel [§ 48.23(2)(b)3.]
- If counsel is discharged (failure to appear is egregious) then DJ for failure to appear

Non-Appearing Parent / Default Judgement

- If you have ordered the parent to appear/maintain contact with lawyer/cooperate with discovery and warned of potential default judgment and noncompliant behavior is egregious and without justifiable excuse or in bad faith, default judgment is available sanction—*Evelyn C.R.,* 2001 WI 110; *Shirley E.,* 2006 WI 129, par. 13, fn. 3; § 804.12 (2) and § 805.03]

Non-Appearing Parent / Default Judgement

- REMINDER!!!
- In any default judgment (DJ) situation, you must take testimony to support the grounds finding—*Evelyn C.R.*
- Court must wait at least two days before holding the dispositional hearing after: (1) finding the parent in default for failing to appear as ordered by the court, or (2) discharging the parent's attorney based on the parent's non-appearance under § 48.23(2)(b)3
  - ► See *R.A.M, 2024 WI 26*

Trial

- Directed (and/or partial directed) verdict
- Also available in TPR—*Scott S.,* 230 Wis. 2d 460; § 805.14 (4)
  - ► Partial directed verdict when element is "undisputed and undisputable" —*Allen J.,* 2008 WI App. 137
  - ► But, make absolutely sure that the documentary evidence [warnings compliant order(s)] are in record—*Id*

Trial

- Stipulations to elements
  - ► It is recommended practice to engage the parent in a colloquy waiving the right to a jury determination on an element of a ground for TPR
  - ► Failure to do so is not reversible error if the parent agrees on the record and the element is not realistically disputable—*Andrea L.O.,* 2008 WI 46

Trial

- Once timely demanded, waiver of right to jury should be knowingly and voluntarily waived by parent after colloquy with court—*Andrea L.O.*

Trial

- Child's GAL is full participant—*CEW*
  - ► But not the GAL for an "incompetent" parent [§ 48.235 (5m)(b)]
- 5/6 verdict—*CEW*; § 805.09
  - ► To avoid inconsistent verdict issues, I recommend use of separate verdicts as to each child; each ground; each parent—Cf. *Aimee M.,* 194 Wis. 2d 282

Trial

- "Unavailable" parents (federal incarceration; deportation)
  - ► Alternatives to personal appearance must permit "meaningful participation." —*Teodora E.,* 2008 WI App 16
    - ✔ Record should establish all efforts to secure personal appearance of respondent parent

Refusal to Testify: Invocation of Right Against Self Incrimination

- Respondent parent has a right to invoke 5th amendment privilege against self-incrimination
- However, if parent does so, jury should be instructed they may, but are not required to, infer from their choice not to testify that answers the parent would give would be adverse to their interests in the litigation
- Cites would be to § 48.423; Civil J.I. 425; *Grognet v. Fox Valley Trucking Service*, 45 Wis. 2d 235 (1969) and *S.C. Johnson v. Morris*, 2010 Wi App. 6

Disposition

- If grounds are established, court "shall find the parent unfit" and the statute presumes court will proceed immediately to disposition [§ 48.424 (4)]
  - ► There are no "degrees of unfitness." —*Julie A.B.*
  - ► While it is presumed court will proceed immediately to disposition, hearing may be delayed not more than 45 days after fact finding

Disposition

- As grounds/unfitness are established, best interests of the child is the controlling standard [§ 48.426 (2)]; *Julie A.B.,* 2002 WI 95
- Any party may present evidence, including expert opinions, as to dispositional factors and alternatives [§ 48.427 (1)]
  - ► Includes a parent defaulted in grounds phase and timely reappears *Shirley E.*
  - ► Foster parent/relative caregiver has right to make oral or written statement

Disposition: Burden of Proof

- The degree of proof required at disposition remains somewhat unsettled
- In *State v. A.G.*, 2021AP1476, the COA stated "[t]here is not a burden of proof placed on the [petitioner]" at disposition and the court simply decides best interests

Disposition: Burden of Proof

- However, in a published COA decision, *S.D.S.*, 152 Wis. 2d 345, 356-57 (C.A. 1989), the court had previously determined the lowest burden (reasonable certainty by preponderance/greater weight of credible evidence) applied in **CHIPS** dispositional hearings because no burden was specified

Disposition: Burden of Proof

- A recent plurality opinion of the Wisconsin S.C. concluded it is a mistake to impose the middle burden on a petitioner as to best interests at disposition and arguably appeared to embrace the COA conclusion there is no burden of proof/persuasion as to the best interests standard - *State v. A.G.,* 2023 WI 61.
  - ► A close reading of the three opinions however, in my view, suggests that none of the justices embraced the "no burden" view

Disposition: Burden of Proof

- Most recently, the COA, again in an unpublished opinion and without mentioning the "no burden" decisions, concluded the lowest burden applied - *State v. H.C.,* 23AP1950
  - ► Curiously, however, they concluded the burden of production and persuasion was not exclusively that of the petitioner

Disposition: Burden of Proof

That conclusion is contrary the general rule of law that the party invoking the judicial process in its favor bears the burden of production and persuasion - *Richards v. First Union Securities*, 2006 WI 55, par. 16

- Justice Dallet's dissent in *A.G.* specifically noted this proposition
- **THIS IS A MESS AND THE SC NEEDS TO STRAIGHTEN IT OUT!!! Fortunately, *H.C.* is pending a decision by the Wisconsin Supreme Court**

Disposition: Burden of Proof

- As such, until further guidance from the appellate courts, the court should not advise as to the burden of proof at disposition but simply indicate the court must be satisfied termination serves the best interests of the child or the petition would have to be dismissed
  - ► See *State v. B.W.,* 2024 WI 28

Disposition: Standards & Factors

- Prevailing standard to be considered by court is best interest of the child and the following factors:
  1. Likelihood of the child's adoption after termination
  2. Age and health of the child at time of removal from home, if applicable and at the time of disposition

Disposition: Standards & Factors

3. Whether the child has substantial relationships with the parent or other family members and, if so, if it would be harmful to sever those relationships
4. Wishes of the child
5. Duration of the separation of the parent from the child
6. Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination [See § 48.426]

Disposition

- Must consider and mention each of the six factors on the record – *Margaret H.,* 234 Wis. 2d 606
- Factors are non-exclusive [§ 48.426 (3)]
- Birth relatives may not participate as parties, however, if court is aware that they have relevant information as to disposition and wish to be heard, error not to call them as witnesses—*Brandon S.S.,* 179 Wis. 2d 114
  - ► If relative files a guardianship petition in conjunction with TPR, see *B.C.L.-J*, 2016 WI App 25

Disposition

- As TPR ends relationship with all birth relatives (unless relative is adoptive resource), court must consider whether severance of relationships with extended family will be harmful—*Margaret H.,* 2000 WI 42
- Court can consider adoptive parent's unenforceable promise for post-TPR contact, but its determination cannot hinge on this – *Margaret H.* & *State v. B.W.,* 2024 WI 28
- Exclusive focus on one factor is improper – *Margaret H.*

After considering facts then:

When granting TPR of both parents/only living parent:

1. Transfer guardianship & custody pending adoptive placement
2. Transfer guardianship & custody for placement and adoption
3. Transfer guardianship to an agency and custody to an individual in whose home the child has resided for at least 12 consecutive months or to a relative
4. Appoint a guardian under § 48.977 and transfer guardianship and custody to the guardian

If, after consideration of dispositional factors, TPR does not serve best interests:

- List reasons for dismissal (don't forget to issue written order)
- Inquire into status of any CHIPS case or family court order
- § 48.368 automatically extends existing CHIPS order during pendency of TPR
  - ► If safety issues persist, order of dismissal may need to be stayed to permit filing of extension petition
- Court must reconcile dismissal with best interests of child to justify dismissal under § 48.427—*Julie A.B.,* 2002 WI 95
  - ► There are no "degrees of unfitness."

Changes in Placement [§ 48.437]

- Agency appointed as guardian, corporation counsel, or DA may request
- Notice provided to court and case participants:
  - ► 10 days prior to proposed change in placement
  - ► 48 hours after emergency change in placement
- Within 10 days, judge must decide whether to approve change in placement or schedule hearing

Post-TPR Resources

- Post-TPR Permanency Hearing Checklist
- Public Adoption Guide

https://wicciptraining.com/Resources
(under Guides & Checklists)

Questions or Comments?