

Nuts & Bolts of TPRs



Todd Ziegler
Circuit Court Judge
Monroe County

IMPACT

- 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

Two types of TPRs

Wis. Stat. §48.41 – Voluntary TPR

Wis. Stat. §48.415 – Involuntary TPR

Filed Privately (typically step-parent adoption)

Filed Publicly by DA/Corporation Counsel representing the interests of the public (children in out of home care)

WHO CAN FILE

- Parent
- Agency – County Dept, DCF, Licensed Child Welfare Agency
- DA/Corp Counsel
- GAL or counsel for child, relative, parent or guardian or other appropriate person designated by the court
- Relative with whom child placed by parent for adoption

WHO CAN FILE

- Stepparent with whom child and child's parent reside
 - May only file petition to TPR noncustodial parent
- Guardian of child from foreign jurisdiction
 - Must file with 60 days of arrival of child in WI
 - May file adoption petition with TPR
 - Must file adoption petition within 60 days after TPR order

INDIAN CHILD WELFARE ACT (ICWA)

- Indian tribe has exclusive jurisdiction over Indian child involved in TPR proceeding who resides or is domiciled within reservation
- "Indian child" means any unmarried person under 18 who is either:
 - A member of an Indian tribe, or
 - Eligible for membership in an Indian tribe and the biological child of an Indian tribe member
- When Ct knows or has "reason to know" of child's Indian heritage, Ct must make further inquiry

ICWA

- If parent, Indian custodian, or child's tribe requests, court must transfer TPR proceeding of Indian child not domiciled or residing within reservation to tribe unless:
 - Indian child is 12 years or older and objects to transfer,
 - Undue hardship to present evidence at tribal court and tribal court unable to mitigate hardship, or
 - Child's tribe received notice of TPR proceeding and has not indicated to court intent to request transfer, and petition for transfer filed more than 3 months after notice

ICWA

- Notice requirements:
 - 10 days written notice to tribe, parent, and Indian custodian if any
 - if identity or location of parent, Indian custodian, or tribe unknown, 15 days written notice to US Secretary of Interior

ICWA

- If involuntary TPR proceeding:
 - Notice by registered mail
 - Parent, tribe, or Indian custodian has right to intervene
 - Indigent parents or custodians of Indian children have right to counsel (Public Defender)

VENUE

- County where child or birth parent resides when petition filed. §48.185(2)
- County where proposed adoptive parent(s) reside when petition filed only if petition for adoption or adoptive placement filed at same time. §48.83 and §48.837

CONTENTS OF PETITION

- Forms: JC-1630; IW-1630 (ICWA)
- Name and address of Petitioner and how interested
- Child's name, address, dob, and whether has been adopted
- Whether the child is a marital child and status of father listed – adjudicated, presumed, alleged, biological (nonadjudicated) or unknown

CONTENTS OF PETITION

- Whether consent will be give by parent
- If involuntary, the grounds for termination with statement of facts which support the grounds
- Whether child subject to ICWA
- Attach UCCJEA affidavit

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

Manner of Serving Summons & Petition

- Personal Service: at least 7 days prior to the court hearing – service not required if party submits to jurisdiction of court
- ICWA cases: In addition, notice via registered mail to parents and tribe required at least 10 days prior to the hearing. 15 days if to US Secretary of Interior
- Saturdays, Sundays and holidays excluded in computing time period of less than 11 days

Manner of Serving Summons & Petition

Constructive Notice: Publication (JC-1635)

- If with reasonable diligence a party cannot be personally served, service shall be made by publication
- Published in newspaper that is likely to give notice
- Must be published once
- If identity of father is not known, petitioner can request that constructive notice be waived

Hearings Generally

- Must be conducted by a Judge, not Court Commissioner
- Shall be closed to public
- Persons who may be present
 - Parties
 - Counsel/GAL/CASA
 - Foster parent or physical custodian
 - Anyone requested by party and approved by Court

Hearings Generally

- Persons who may be present (continued)
 - Witnesses
 - Anyone court finds to have proper interest in case or work of the court (including attorneys or person engaged in research, monitoring or evaluation activities)
 - Press if proper interest in case or work of court subject to court's discretion

Hearings Generally

- Persons that divulge information that would identify child or family subject to contempt of court
- Persons who may not be present
 - Father of child conceived as a result of sexual assault

Initial Appearance – §48.422

- Initial Appearance shall be held within 30 days after TPR petition is filed with the court
- Ask each party whether know or have reason to know child is an Indian Child
- 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

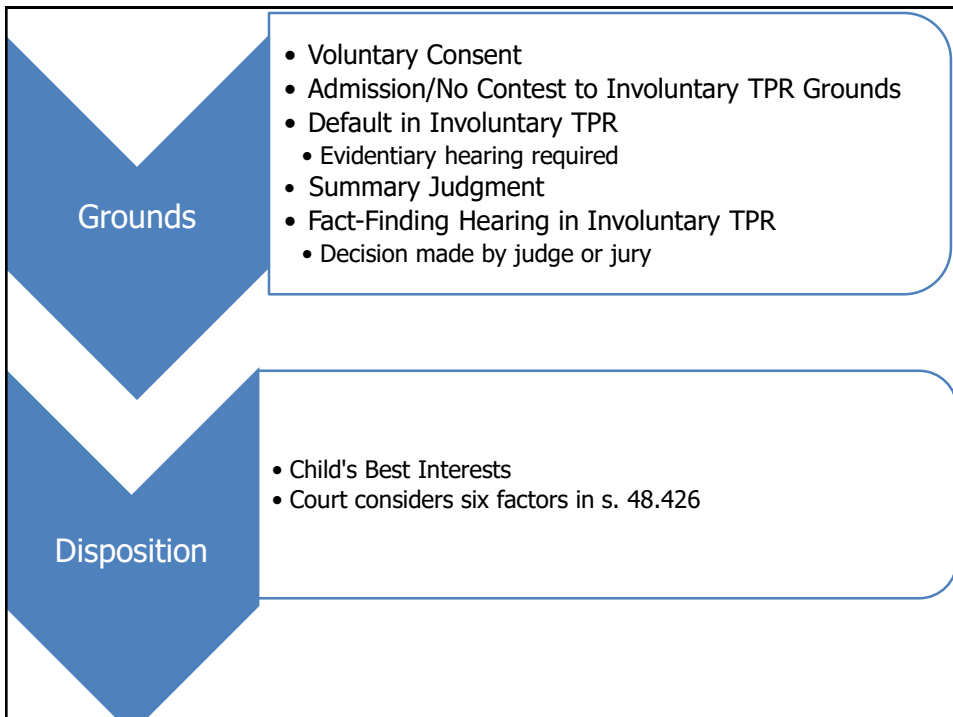
Phases of TPRs

Two phases to TPRs:

- Grounds – does the court have a legal reason to TPR
- Disposition – 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



Voluntary TPR – §48.41

- Parent is asking the court to TPR (Don't adjourn)
- Parent is waiving his/her right to contest both grounds and best interests phases
- GAL must be appointed for minor child (JD-1798A)
- GAL must be appointed for minor parent consenting (JD-1798A)
- Adult parent may consent without counsel (Need valid waiver)

Voluntary TPR – §48.41

- Methods (§48.41)
 1. Personal Appearance
 - Testimony may be admitted by telephone or audio visual means at request of the parent
 2. Appear before embassy or consul official, military judge or a judge of court of record in another county, state or country if difficult or impossible to appear personally (JC-1637)
 3. Consent by written notarized statement only for unadjudicated father (JC-1636)
 4. If before step-parent adoption (or before adoption in which child's birth parent is resident of foreign jurisdiction) by affidavit witnessed by 2 persons (JC-1636)

Minimum requirements: Voluntary TPR plea colloquy

Court must ask all parties whether they know or have reason to know that child is a member of a tribe or eligible for membership in a tribe and has a parent that is a member (Does ICWA apply)

Judge can accept parent's consent only after:

- the effects of and alternatives to TPR are explained to parent
- Attorney and/or judge has questioned the parent
- Court is satisfied that parent has freely, voluntarily and knowingly consented. If accepted, proceed straight to disposition and need written order (JC-1638)

If ICWA applies: consent in writing, before a judge, and certified by the judge (IW-1637) (IW-1638 for Order)

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)

Involuntary TPR §48.415

- Petitioner is asking the court to TPR parent(s)
- GAL must be appointed for minor child (JD-1798A)
- Counsel required if parent age 17 or younger (May not waive)
- Counsel required for adult parent (May waive provided competent)

Involuntary TPR §48.415

- Methods to establish grounds
 1. Admission/no contest plea
 2. Default
 3. Summary Judgment
 4. Jury Trial
 5. Court Trial

Involuntary TPR §48.415

- Basic Procedure
 - Initial Appearance/Plea Hearing
 - Adjourned Plea Hearing (For all notices of hearing use JD-1724 or IW1724 if ICWA)
 - May be admission/no contest
 - Default, set for default or summary judgment
 - If not set for trial (jury or court) (scheduling order)
 - Motion Hearing(s) (Default, Summary Judgment, Pretrial Motions in Limine)
 - Fact-Finding (Jury or court trial on grounds)

Initial Appearance – Involuntary

- Court must ask all parties whether they know or have reason to know that child is a member of a tribe or eligible for membership in a tribe and has a parent that is a member (Does ICWA apply)
- Court must advise parent(s):
 - Right to contest the petition
 - Right to attorney – SPD to appoint (§48.23)
 - Rights to jury trial & substitution of judge – requests must be made by the end of the plea hearing or be waived

Initial Appearance – Involuntary

- 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
- Best practice to order parents to appear in person for all hearings unless excused by the court and failure to do so may result in default judgment
- May find good cause to extend time limits to next hearing date pursuant to §48.315(2). All such findings throughout case must be made in open court or during a telephone conference on the recorded and only so long as necessary

Admission/No Contest Plea

Involuntary TPR Method 1: Admission/no contest plea

Court must:

- Address the party & determine that the plea 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: take valid waiver of counsel
- Make such inquiries as satisfactorily establish that there is a factual basis for the admission
- Hear testimony in support of the allegations in the petition
- Find parent to be "unfit"

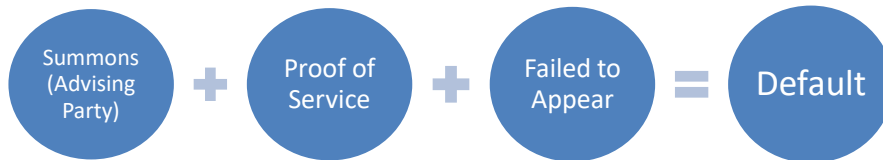
Default Judgment

Involuntary TPR Method 2: Default Judgment

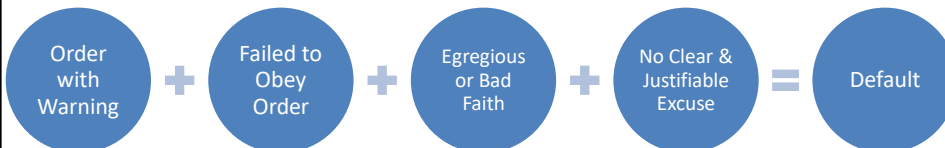
- Failure to appear in response to Summons if properly served, failure to appear at trial, or failure to appear at other court hearings provided order to appear and failure to appear is egregious and without justifiable excuse
- Court must conduct evidentiary hearing to establish TPR grounds exist – §48.422(3)
- Find parent to be “unfit”
- 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

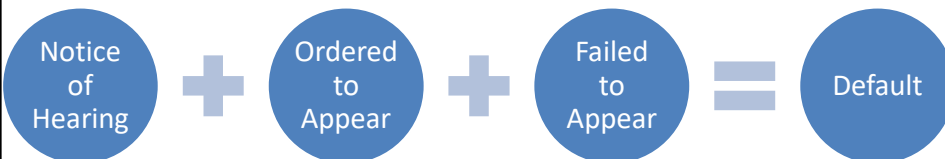
1. Failure to obey a summons – §806.02(1)



2. Failure to obey a court order – §805.03



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



Summary Judgment

Involuntary TPR Method 3: Summary Judgment

- Summary Judgment is permissible in TPR Grounds phase. Steven V., 2004 WI 47
- Petitioner must submit motion with supporting affidavit(s) at least 20 days before the scheduled hearing. Parent(s) must serve opposing affidavit(s) at least 5 days before hearing.
- Court to grant only if no material issues of fact and proponent entitled to judgment as matter of law on a specific ground for TPR. §802.08, Stats.
- Not strictly limited to “paper grounds”, i.e. prior involuntary TPR; Commission of Serious Felony. Jennifer V., 200 Wis. 2d 678; Reynaldo F., 2004 Wi App. 106
- If full summary judgment granted as to ground(s), find parent to be “unfit”

Fact-Finding Hearing §48.424

Involuntary TPR Method 4 and 5: Jury or Court Trial

- Court trial unless jury trial demanded by the end of the plea hearing process
- Once timely demanded, waiver of right to jury must be knowingly and voluntarily waived by parent after colloquy with court.
- If jury trial, it is a 12 person unless lesser number is agreed upon. 5/6 verdict is required.
- Fact finding hearing (trial) shall be set within 45 days of the Initial Appearance
- Court has the ability to extend time limits for good cause - §48.315
- Court or jury only determines whether “grounds” exist to TPR at fact finding hearing.
- Petitioner has burden to prove allegations of petition by clear and convincing evidence – exception: ICWA cases (beyond a reasonable doubt that placement of child with parent or Indian custodian is likely to result in serious emotional or physical damage) (clear and convincing evidence that ongoing vigorous efforts were made to prevent breakup of Indian family and these efforts were unsuccessful)

Fact-Finding Hearing §48.424

- Court may grant directed verdict on one or more elements of a particular ground when element is “undisputed and undisputable.” Allen J., 2008 WI App. 137
- Parent(s) may stipulate to certain elements. Court should engage the parent in a colloquy waiving the right to a jury determination on an element of a ground for TPR. Best practice to have stipulation in writing along with colloquy.
- Court may exclude child from hearing
- GAL has full role as child’s counsel including jury selection and challenges, opening and closing arguments, calling witnesses, etc. Represents “interests” of child(ren) and shares preemptory strikes with side he/she aligns with.
- ICWA: whether the additional requirements under Wis., Stat. §48.42(1)(e) have been proved

Fact-Finding Hearing §48.424

- Basic Procedure (Jury trial)
 - Hearing outside presence of jury
 - Court welcomes jury and clerk administers oath to jury panel
 - Jury Selection (Voir Dire)
 - Clerk administers oath to jurors selected
 - Preliminary Instructions from court
 - Opening Statements
 - Petitioner’s case
 - Motions at close of Petitioner’s case
 - Respondent(s)’ case
 - Petitioner’s rebuttal
 - Motions at close of evidence
 - Instructions conference
 - Jury Instructions
 - Closing Arguments
 - Jury deliberates (questions)
 - Jury verdict (verdict read in court)
 - Motion(s) after verdict
- Basic Procedure (Court trial)

Unavailable Parents

- “Unavailable” parents (federal incarceration; deportation)
 - Whether physical presence is necessary is required must be determined on a case by case basis but record should establish all efforts to secure personal appearance
 - Alternatives to personal appearance must permit “meaningful participation
 - Court found that father could not meaningfully participate by telephone as he claimed that he could not hear the proceedings. *State v. Lavelle W.* 2005 WI App 266, 288 Wis.2d 504
 - Father was deemed to be able to meaningfully participate in the TPR proceedings although he appeared via webcam from Mexico. He was able to see and hear the proceedings and confer with his attorney. *Waukesha County Dept. of Health & Human Services v. Teodoro E.*, 2008 WI App 16, 307 Wis2d 372

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 Hearing

Any party may present relevant evidence

Expert testimony may be presented

Any party may make alternative dispositional recommendations

Foster parent/relative caregiver has right to make oral or written statement.

Disposition Standard & Factors §48.426

Standard: best interest of the child

Factors: 6 must be considered – others may be considered

- Likelihood of the child's adoption after TPR
- Age & health of child – now & at the time of removal
- 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

- Wishes of the child
- Duration of the separation of the parent from the child
- 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

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 the State/county department authorized to accept guardianship/child welfare agency authorized to accept guardianship or to a kinship relative with whom the child resides or appoint a guardian under Wis. Stat. §48.977
- Order TPR & sustaining care

Court shall:

- Enter one of the dispositions authorized by law within 10 days of the dispositional hearing (JC-1639) (IW-1639)

Upon Disposition

Court must:

- Inform TPR birth parent(s) of statutory provisions regarding access to medical and genetic information with identifying information deleted
- Inform TPR birth parent(s) of statutory provisions regarding access to identifying information about parents
- Inform birth parents of statutory provisions regarding release of identifying information by an agency when authorized

Upon Disposition

If parent(s) present in court, the court must provide to parent(s):

- Written notice of time periods for appeal, which parent(s) must sign and counsel must file (JC-1644)

Court may:

- Inform parent(s) orally and in writing that prior involuntary TPR is grounds for future TRP under §48.415(10) (If was involuntary)

Court must furnish certified copy of TPR order to:

- Agency given guardianship for adoptive placement, or
- Person appointed as child's guardian under §48.977(2), and
- Upon request, furnish certified copy of child's birth certificate and transcript of testimony in TPR hearing to above

Upon Disposition

Court must forward to DCF:

- Name and date of birth of child
- Names and current addresses of child's birth parents, guardian, and legal custodian
- Medical and genetic information obtained from birth parents or court report
- Information related to child membership or eligibility for membership in Indian tribe, if court knows or has reason to know that child is an Indian child

Post Disposition Proceedings

Relief from judgment

- Parent who contested TPR may petition for rehearing on ground that new evidence has been discovered affecting advisability of original adjudication
 - Generally must be filed within one year after order
 - However, if order for adoption is entered within one year, must be filed before adoption order or within 30 days after TPR, whichever is later
- Parent who consented or did not contest TPR may move for relief from judgment on grounds specified in §806.07(1)(a), (b), (c), (d) or (f) within 30 days after TPR

Post Disposition Proceedings

Appeal

- Shall be initiated by filing a notice of intent to appeal within 30 days after the date of entry of the TPR judgment or order appealed from
 - Must be signed by appellant and appellant's attorney (if any)

Post Disposition Proceedings

Appeal continued

- Within 5 days of notice of intent being filed, clerk must:
 - If person filing requests public defender:
 - Send to SPD appellate intake office:
 - Copy of notice of intent that shows date notice was filed
 - Copy of judgment or order specified on notice showing date entered
 - List of court reporters for each proceeding in actions, and
 - List of proceedings for which transcript has already been filed
 - If no requests for public defender:
 - Send to person or attorney if one has been retained:
 - Copy of judgment or order specified on notice showing date entered
 - List of court reporters for each proceeding in actions, and
 - List of proceedings for which transcript has already been filed

Post Disposition Proceedings

Appeal continued

- Within 30 days of request, clerk must serve a copy of the case record on appellant and shall indicated in the case record the date and manner of service
- Once notice of appeal filed, clerk must:
 - Transmit record to Court of Appeals as soon as record prepared but no later than 15 days after filing of notice of appeal

Post Disposition Proceedings

ICWA

- Parent of Indian child may petition to invalidate any TPR on showing consent to TPR was obtained by fraud or duress within 2 years after order granting adoption
- Parent of Indian child that voluntarily terminates may withdraw consent at any time before entry of final decree of termination or adoption.

Post Disposition Proceedings

Parent in Military Service

- If a default judgment entered against a parent while in military service (or within 60 days after termination of or release from such military service) judgment may be reopened provided that parent:
 - Appears to have been materially affected by military service in making defense, AND
 - Appears to have a meritorious or legal defense to all or part of the action, AND
 - The application to reopen is filed within 90 days after termination of or release from service

Post Disposition Proceedings

DCF petition to transfer custody to County department

- Only if DCF is guardian and custodian
- Only if permanent adoptive or subsidized guardianship placement not in progress 2 years after entry of order
- Only if not a parent that relinquished custody under §48.195
- If petition meets the requirements, court must transfer custody but DCF remains the child's guardian

Post Disposition Proceedings

Change in Placement §48.437

- Request may be made by agency appointed as guardian, corporation counsel, or DA
- 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
- If hearing scheduled, at least 3 days before hearing, court to provide hearing notice to agency appointed guardian, DA or corporation counsel, child, child's counsel or GAL, legal custodian, foster parent or other physical custodian, operator of facility child is living, agency responsible for securing adoption or permanent family setting, Indian child's Indian custodian and tribe
- Order to change placement must be provided to those listed above

Post Disposition Proceedings

Change in Placement §48.437

- Contents of written notice:
 - Name and address of new placement
 - Reasons for proposed change
 - Statement why new placement preferable
 - Statement how satisfied treatment objectives
 - If Indian child, statement of compliance with §48.028(7)(b), (c), or (e)
- Sent to child's counsel or GAL, legal custodian, foster parent or other physical custodian, operator of facility child is living, agency responsible for securing adoption or permanent family setting, Indian child's Indian custodian and tribe
- Notice to be file with court same day sent

Post Disposition Proceedings

- ADOPTION

Summary

- TPR is a drastic, though sometimes “necessary” government intervention in a family’s life
- TPR is not a case where anyone wins. Can be devastating to parents and the child. Also difficult on social workers, clerks, juries, judges, and other court personnel
- If granted, hopefully leads to much more enjoyable proceeding of adoption