

TERMINATION OF PARENTAL RIGHTS COURT'S RULINGS ON STANDARD MOTIONS IN LIMINE

USURPATION OF RIGHTS/PROTECTING PARENTS RIGHTS

This motion is granted in part and denied in part. Defense counsel is/are directed not to assert that the rights of the parent/s are being usurped. However, defense counsel is at liberty to argue to the jury that the respondent parent's parental rights should be protected in the context of an argument/assertion that the State has failed to prove grounds for involuntary termination of parental rights.

ADOPTION/BEST INTERESTS

Generally, adoption and best interests are clearly not appropriate areas of inquiry in the grounds/unfitness phase of these proceedings. I will make gentle inquiry regarding adoptee/adoptive/foster parent status of any potential juror during voir dire in order to assure impartiality. If counsel for a respondent parent asserts that inquiry in this area is appropriate in regard to credibility issues, a specific offer of proof is to be made on the morning jury selection begins.

All lawyers are to admonish any witness they are calling immediately prior to their testifying that they are to make absolutely no reference to potential adoption of the child/children who are the subject of the proceeding or any reference to adoption, transfer of guardianship or termination of parental rights of any birth sibling of the subject/s of the petition during grounds/unfitness phase testimony without explicit authorization of the court.

APPROPRIATE TIME TO TERMINATE PARENTAL RIGHTS

No lawyer (State, GAL or Defense) is to state or imply to a jury that their function is to terminate parental rights in instances in which the ground alleged is continuing need of protection and services, timeliness is clearly an appropriate area of inquiry and argument as to meeting the conditions of return by the statutory deadline.

SEQUESTRATION

If any party seeks sequestration of witnesses the motion will be granted. The lawyers are to admonish witnesses not to discuss their testimony with anyone other than the lawyers pending the outcome of the trial. If requested, the State will be allowed to have the assistance of a designated representative of BMCW to assist in the prosecution of the matter in spite of the fact that person may testify as a witness in the trial. Wisconsin Statute sec. 906.15 (2).

FAMILY PLACEMENT OF THE CHILD

The issue of family placement is generally speaking a dispositional issue. However, if the defense asserts, with a supporting offer of proof, that BMCW failed to pursue a fit and willing relative that they knew of should have known was available, this evidence is likely relevant and admissible as to BMCW's reasonable effort obligation.

In instances in which the child has been removed from that relative's home with approval of the court after a contested hearing or a change of placement to that relative's home has been denied after a contested hearing, the evidence is likely barred on the basis of issue preclusion and relevancy. This will be decided on a case by case basis.

STATUTORY GROUNDS ARE UNFAIR

"Unfairness" of the grounds for termination of parental rights is the purview of the judiciary only in the context of a motion challenging the constitutionality of the statute. Hence, fairness or unfairness of the statutory grounds is not an appropriate subject of evidentiary inquiry or argument in front of the jury.

FOSTER PARENT/ SUBSTITUTE CAREGIVER MISCONDUCT

Generally speaking, the conduct of foster parents or substitute caregivers has no tendency to prove or disprove a fact of consequence in the grounds phase of a termination of parental rights proceeding.

However, if the alleged misconduct is asserted to have interfered with a parent's ability to meet the conditions of safe return; maintain contact with their child; establish a substantial parental relationship with their child or some other element of a ground plead, the misconduct may be directly relevant. Defense counsel seeking to present evidence in this regard should be prepared to make a specific offer of proof at the final pretrial and the issue will be addressed on a case by case basis.

TARA P. AND QUINSANA D. ISSUES

These issues will be addressed on a case by case basis. Lawyers should be prepared to address the specifics of the nature of the parent's prior criminal behavior and/or misconduct and how it tends to prove or disprove a fact of consequence in the litigation. They should also be prepared to address the balancing of any probative value as opposed to undue prejudice, confusion of issues, etc.

JURY STRIKES

If the State (Petitioner) and GAL are aligned, they will share the peremptory strikes. As, almost invariably, an alternative juror will be kept, the sides will be entitled to 4 strikes. Absent a showing of a appreciable adverse interest, if both parents are litigating parties, they too will share strikes. 805.08 (3). If the State (Petitioner) and GAL are not aligned in interest, this issue will be addressed on a case by case basis.

HEARSAY; BUSINESS RECORDS EXCEPTION; RELEVANCY

If a proper foundation is established, the State (Petitioner) can avail themselves of the use of the business records exception or public records exception. Such information must also meet the relevancy standards of 904.01 (1) and (3). Screened out referrals are not admissible. If the information is insufficient to trigger any further investigation by the agency, the information has no tendency to make the existence of a fact of consequence in the litigation, i.e. child(ren) safety, more or less probable. In addition, the uncorroborated allegations of an unidentified and wholly unavailable source would raise significant constitutional concerns. Unsubstantiated referrals are not barred as a matter of course. If the records indicate that the allegation was investigated and the investigation corroborated in some appreciable manner the safety concerns raised even if the report was unsubstantiated, the information may be admissible if an individualized assessment of the 904.03 factors weighs in favor of admission. As a respondent parent has the ability to pursue discovery and, if deemed appropriate, subpoena the author of the investigative notes, they have a full opportunity to "confront and cross examine" a source of the information. While the initial reporter remains anonymous to facilitate the compelling state interest in assuring that child safety issues are promptly reported, as noted, they have the full opportunity to question the primary source of the evidentiary information and the jury, upon request, will be instructed that the anonymous reporter information is only admitted to show why the investigation was undertaken in the first place (and not to prove the truth of the facts asserted in the initial report).

SUPPLEMENT TO COURT'S RULINGS ON STANDARD MOTIONS IN LIMINE

(TPR) WITNESSES AND DISCOVERY DOCUMENTS

No party is to proffer a witness not listed/disclosed in compliance with the scheduling order and discovery requests. If demanded, the criminal record of any proffered witness is to be disclosed in the discovery process and before testimony. No party is to offer in evidence documents or other materials not disclosed in compliance with a timely and valid discovery demand. If a party can establish good cause for noncompliance with these requirements, the issue will be addressed on an individual basis.

FOSTER PARENT WITNESSES

Foster parents are not barred as witnesses as they often times have information directly relevant to claims of FTAPR, Abandonment and CNPS. However, that information needs to be presented directly, concisely and without explicitly or implicitly inviting "comparisons" between the life circumstances of the parent and foster parent. Best interest comparisons of that nature are constitutionally and statutorily impermissible until parental unfitness is established through relevant evidence. Prosecutors and GAL's proffering such witnesses are to prepare and emphatically caution such witnesses to listen to the question asked and answer it directly and concisely. Questions are to elicit and answers are to provide solely factual information without reference to any opinions of the witness explicitly or implicitly referencing best interests of the child. While it is impossible to define a strict boundary, I would caution that the conscious and intentional disregard of those limits by a foster parent witness resulted in a mistrial on the 8th day of a past trial in this court.

SOCIAL WORKER OPINION TESTIMONY

Social workers/OCMs will be permitted to offer opinion testimony with respect to the 4th element of CNPS pursuant to Wisconsin Stats. 907.01. Such an opinion is rationally based upon the perceptions of the witness; while this issue falls well within the "ken" of a reasonable juror (and hence expert testimony is not necessitated) the lay opinion may be of significant assistance to the fact-finder in assessing that element as the witness typically is most familiar with the parent's history, behaviors and other factors affecting their ability to parent, and; the opinion, while informed by their education, experience and training, is primarily based on personal knowledge and interaction with the client.