

Termination of Parental Rights

Hon. Christopher Foley
Milwaukee County Circuit Court
Milwaukee

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

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 [see § 48.422 (7)]
 - ▶ Right to free lawyer if it were an involuntary proceeding
 - ▶ 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!!!! No matter what the BB says!!!***
 - ▶ ***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

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—*Santosky*, 455 U.S. 745 (1982); [§ 48.31 (1)]

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

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.*

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]

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 BRD 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
[see § 48.422 (7)]
 - ▶ Advise of mandated unfitness finding; best interests controls disposition; and court can grant tpr or dismiss petition—
Therese S., 2008 WI App. 159
(TAKE TESTIMONY!!!)
 - ▶ Preferable, but not mandated, to discuss specific alternatives if petition not granted---g'ship, 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
- A sample scheduling order is contained in the materials

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

- Motions in limine—see sample motions and written rulings on motions in materials
- 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

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

Final Pretrial / Motions in Limine

- Pre-birth, pre-CHIPS finding and criminal history of parent(s)
 - ▶ *Tara P.*, 252 Wis. 2d 179: “It is readily apparent that a history of parental conduct may be relevant to predicting a parent’s chances of complying with conditions in the future....” (CNPS)
 - ✓ But if predictive element is not in play and CNPS is only ground alleged...
 - ▶ *Tammy W-G*, 2011 WI 30: A fact finder may consider whether a parent exposed the child to a hazardous living environment (FTAPR)

Final Pretrial / Motions in Limine

- Pre-birth, pre-CHIPS finding and criminal history of parent(s)
 - ▶ *Quinsanna D.*, 259 Wis. 2d 429: fact finder may consider “why” a parent was not exercising responsibility of care for children (both legitimate and illegitimate); that roadblocks to establishing parental relationship were caused by the parents themselves without considering likely impact on parental relationship (FTAPR)

Final Pretrial / Motions in Limine

- Foster parent testimony in grounds phase
 - ▶ Can clearly be relevant as they have direct personal knowledge that parent has not exercised significant responsibility for daily parental care
 - ▶ But they have a significant tendency to wade into best interests; adoption; “beauty contest” testimony even when question does not come close to suggesting it—Strong cautions from both the lawyers and court!!! Mistrial!!!

Final Pretrial / Motions in Limine

- Social worker opinion regarding “substantial likelihood” parent will not meet conditions within 9 months (CNPS)
- Court has already implicitly acknowledged SW is competent to offer opinion—*Shannon R.*, 2005 WI 160, par. 48
- I don’t agree it is an expert opinion (as *Shannon R.* seems to imply) as it is not an esoteric or complex issue

Final Pretrial / Motions in Limine

- Social worker opinion on substantial likelihood
 - ▶ If you believe it to be expert opinion, it most likely is Daubert admissible—*State v. Smith*, 2016 WI App. 8
 - ▶ Whether lay opinion or expert opinion [§ 907.01/02], the opinion must be helpful to or assist the jury in determining a fact in issue
 - ✓ I generally admit it as the SW is most familiar with the parent’s history

Final Pretrial / Motions in Limine

- Opportunity to Parent—YIKES!!!
- The Wisconsin S.C. has been a bit schizophrenic on this issue and don't really know what they are talking about!!!
- In 1993, the court affirmatively stated that a “person’s parental rights may be terminated without proof [they] had the opportunity ... to establish a substantial parental relationship”
—*Ann M.M.*, 176 Wis. 2d 673

Opportunity to Parent

- ▶ They were wrong as the U.S. Supreme Court had established that a father has a constitutional right to the opportunity to parent—*Lehr*, 463 U.S. 248 (1983)
- ▶ Then in *Bobby G.*, 2007 WI 77, they unanimously agreed (see par. 3) that the statute required that the parent have an opportunity to develop a relationship

Opportunity to Parent

- ▶ But by the time we get to *Tammy W-G*, 2011 WI 30, we are back to “lack of opportunity to establish a substantial parental relationship is not a defense” to FTAPR (par. 38)
- ▶ So here is what I think we know....

Opportunity to Parent

- ▶ Petitioner must be able to establish FTAPR after the father knew or had reason to know he was a parent—*Bobby G.*
 - ✓ There is a jury instruction applicable to the claim of “I did not know” — JI-Children 346A
 - ✓ Incarceration does not establish a lack of opportunity to assume parental responsibility—*Ann M.M.* and *Tammy W-G*; JI-Children 346B
 - ✓ Consider how a visitation order affects the parent’s rights and avoid implementing procedures that potentially create impediments to the establishment of a substantial parental relationship—*M.K.S. v. R.J.F.*, No. 2021AP1839 (Wis. Ct. App. Aug. 16, 2022)
 - Case remanded where father was only allowed email contact with potential adoptive parents

Opportunity to Parent

- ▶ Limitations on a parents ability to parent occasioned by CHIPS order does not deprive of opportunity to parent—*Id.*
- ▶ Parent who knows or has reason to know he is a father has affirmative duty to assume parental responsibility, including efforts to eliminate doubt—JI-346B; *Lehr*; *Quilloin*, 434 U.S. 380; [§ 48.42 (2m)(b)]

Opportunity to Parent

- ▶ Have not seen; do not anticipate seeing circumstances in which I would allow a parent to testify they did not have the opportunity to parent
- ▶ Allow “I did not know”; “I did not know how to find out”; I did not know I could file declaration of paternal interest; “she hid from me without justification....”

Claim/Issue Preclusion

- **Opportunity for Parent**

- ▶ 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)

Break

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 default judgment 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 DJ 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 situation, you must take testimony to support the grounds finding—*Evelyn C.R.*
- If the default/prove up is pursuant to discharge of lawyer for egregious/bad faith conduct of parent, disposition must be delayed for 2 days [§ 48.23 (2)(b)3]

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

Grounds Issues Abandonment

- May have 3 applicable burdens in abandonment: middle burden as to elements; preponderance as to parent's showing of good cause; BRD as to WICWA issue (continued custody endangering child) [§48.31 (1), §48.028 (4)(d)(1), § 48.415 (1)(c)]
- Abandonment ground applicable to unadjudicated father—*James P.*, 2005 WI 80

Grounds Issues: TPR Warnings

- Warnings (CNPS/Abandonment)
 - ▶ Warnings in underlying CHIPS order as to all statutory grounds is ok—*Cynthia E.*, 172 Wis. 2d 218; § 48.356 (2).
 - ▶ *Steven H.*, 2000 WI 28, held that last order, issued 6 months before filing of TPR, must be “warnings compliant”
 - ▶ *Matthew D.*, 2016 WI 35, “clarifies” that if any order (original CHIPS, Extensions, etc.) is warnings compliant, noncompliance of other orders does not bar CNPS claim

Grounds Issues: CNPS

- Reasonable efforts (CNPS)—services ordered by court can be implicit—*Tanya MB*, 2010 WI 55
- Conditions of Safe Return (CNPS)—conditions cannot be “impossible” and should be individually tailored to the child and parent—*Jodie W.*, 2006 WI 93

Grounds Issues: CNPS

- 2017 Wisconsin Act 256
 - ▶ Modified last element of the CNPS ground:
 - ✓ For a child placed outside the home for more than 15/22 months, removes element that requires showing that there is a substantial likelihood that the parent will not meet conditions of return within 9 months following fact-finding
 - ✓ For a child placed outside the home for less than 15/22 months, changes 9 months to the date the child will have been placed outside the home for 15/22 months

Grounds Issues: CNPS

- In re K.T. (*Dane County v. J.R.*), 2020 WI App. 5
- Statute requires allegation of current CNPS ground, even in older cases
 - ▶ County cannot allege old CNPS ground (will not meet conditions within 9 months from trial) because that element no longer exists in current law
- Application of the “new” ground does not deprive parent of due process

Grounds Issues: CNPS

- In re T.L.E.-C. (*Eau Claire Co. v. S.E.*), 392 Wis. 2d 726
- Parent’s substantive due process rights were not violated when CNPS ground for TPR did not include the 9-month prospective element
 - ▶ While notification of “any grounds for termination of parental rights” necessarily includes the statutory sub-parts comprising each ground, the court must provide notice of only those grounds which “may be applicable” at the time the order is entered
 - ✓ When the parent received notice of the “old” CNPS ground in 2016 (prior to statutory amendment), it complied with this requirement
 - ✓ The parent did not need to receive notice of the “new” Continuing CHIPS ground to proceed with the TPR case under the new ground
 - ▶ Starting “15 out of 22 months” timeframe prior to change in law did not violate mother’s due process rights

Grounds Issues: Failure to Assume

- Knowledge of paternity—must consider actions of father after he knows or has reason to know he is father—*Bobby G.*, 2007 WI 77
- However, prebirth conduct of father may be considered in assessing substantial parental relationship—*LK*, 113 Wis. 2d 429; *Jl-Children* 346A; [§ 48.42 (2m)] —lack of standing of father by sexual assault

Grounds Issues: Failure to Assume

- FTAPR—Assessed based upon the totality of the circumstances of the child’s entire life, including whether parent exposed child to a hazardous living environment—*Tammy W-G.*, 2011 WI 30
- Criminal/Pre-birth conduct of parent—see discussion of *Quinsanna D.* and *Tara P.* in Motions in Limine section
- Parent needs to have been specifically warned that continuing denial of physical p’ment or visitation may be a ground when visitation has been suspended—*Brown Co. DHS v. J.V.* (2022AP532) (unpublished opinion, petition to WI Sup. Ct.)

Prior Involuntary TPR

- Prior involuntary TPR judgment on which a § 48.415(10) claim is premised may rely on default judgment in prior proceeding and summary judgment in grounds phase is appropriate—*Nicole W.*, 2007 WI 30

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 dispo, 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—*Julie A.B.*, 2002 WI 95 [§ 48.426 (2)]
- 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

- There is uncertainty as to the applicable burden of proof at disposition— *T.A.D.S.*, 18AP1873; *A.G. 1*, 21AP1476; *A.G. 2*, 22AP652, *N.H.*, 22AP1945
- In *A.G. 1*, the court stated “[t]here is not a burden of proof placed on the [petitioner]” at disposition and the court simply decides best interests
 - ▶ However, in a published COA decision, *S.D.S.*, 152 Wis. 2d 345, 357 (C.A. 1989), the court had previously determined the lowest burden (reasonable certainty by preponderance of credible evidence) applied in CHIPS dispositional hearings because no burden was specified
 - ▶ WI Supreme Court has heard arguments in March 2023; decision pending
- In that unfitness has been established, it is highly likely error to advise petitioner must meet middle burden
- Until further guidance, respondent parents should simply be advised disposition will be decided based on best interests of child

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
 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

Disposition: Standards & Factors cont'd

3. Wishes of the child
4. Duration of the separation of the parent from the child
5. 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
- Exclusive focus on one factor is improper
See *Darryl T.-H. v. Margaret H.*, 2000 WI 42

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

Disposition

- Adoption of foster child cannot occur until child has resided in the home of the adoptive parent(s) for 6 months [§ 48.90 (2)]
- Recent amendment of § 48.83 allows court in which TPR was ordered to conduct adoption proceedings even if it is not the county of residence of the child and adoptive family

Disposition: Notifications

- If a person whose parental rights are terminated is present in court when TPR granted:
 - ▶ Access to medical/identifying information (JC-1631)
 - ▶ Time periods for appeal. The person shall sign the written notification (JC-1644) [See § 48.43(6m)]
 - ▶ May want to inform parents that involuntary TPR creates TPR ground to another child [§ 48.427 (7)]

After considering facts then:

- 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

Appellate Issues

- Appellant must personally sign (in addition to any attorney):
 - ▶ Notice of Intent to Pursue Post-disposition Relief
 - ▶ Notice of Appeal
 - ▶ Petition for Review
- Appellant must file an affidavit in support of motion for remand stating with specificity the reasons that post-judgment fact-finding is necessary

Post-TPR Resources

- Post-TPR Permanency Hearing Checklist
- Public Adoption Guide

www.wicourts.gov/courts/offices/ccip.htm

(Also included in online materials.)