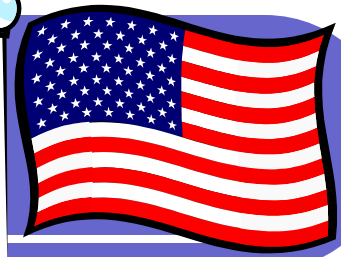


Let's get moving:
BRING ON THE MOTIONS

Amanda Skorr
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Why I do TPRs: This is 'Merica, after all.



- The **fundamental liberty interest** of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state ... When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” SANTOSKY v. KRAMER, 455 U.S. 745, 752-754 (1982).
- Congress: “Removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty.” H.R. Rep. No. 95-1386, pg.22 (1975)
- Severing the parent-child relationship in a TPR is “tantamount to imposition of a civil death penalty.” Matter of Parental Rights to K.D.L and S.P.K., 58 P.3d 181 (2002).

Know Thy Enemy

- DA's office
- Contract Attorneys for Petitioner
- Corp Counsel
- Private
- Pro-Se



On What Grounds....

- **Different Grounds mean different Issues**

- 1. Abandonment**

1M. Relinquishment

- 2. Continuing CHIPS**

3. Continuing Parental Disability

- 4. Continuing Denial of Periods of Physical Placement**

5. Child Abuse

- 6. Failure to Assume Parental Responsibility**

7. Incestuous Parenthood

8. Homicide of Solicitation to Commit Homicide of Parent

9. Parenthood as a Result of Sexual Assault

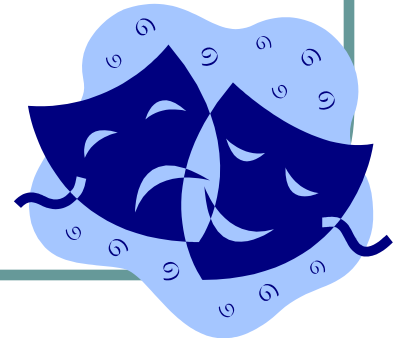
9m. Commission of a Felony Against a Child

10. Prior Involuntary Termination of Parental Rights to Another Child



Play to your Audience

- What works in front of one Judge may not work in front of the next one.
- Talk to your mom, your best-friend's grandma, your college roommate and your administrative assistant (without using names or giving away anything confidential, of course). Run your arguments by your potential jury.



Wis. Stat. 48.297 Motions before trial. (note (2) is the time-limits).

- (1) Any motion which is capable of determination without trial of the general issue may be made before trial.
- (2) **Defenses and objections based on defects in the institution of proceedings, lack of probable cause on the face of the petition, insufficiency of the petition or invalidity in whole or in part of the statute on which the petition is founded shall be raised not later than 10 days after the plea hearing or be deemed waived. Other motions capable of determination without trial may be brought any time before trial.**
- (3) Motions to suppress evidence as having been illegally seized or statements as having been illegally obtained shall be made before fact-finding on the issues. The court may entertain the motion at the fact-finding hearing if it appears that a party is surprised by the attempt to introduce such evidence and that party waives jeopardy.
- (4) Although the taking of a child or an expectant mother of an unborn child into custody is not an arrest, that taking into custody shall be considered an arrest for the purpose of deciding motions which require a decision about the propriety of taking into custody, including motions to suppress evidence as illegally seized, motions to suppress statements as illegally obtained and motions challenging the lawfulness of the taking into custody.
- (5) If the child or the expectant mother of an unborn child is in custody and the court grants a motion to dismiss based on a defect in the petition or in the institution of the proceedings, the court may order the child or expectant mother to be continued in custody for not more than 48 hours pending the filing of a new petition.
- (6) A motion required to be served on a child may be served on his or her attorney of record. A motion required to be served on an unborn child may be served on the unborn child's guardian ad litem.
- (7) Oral argument permitted on motions under this section may be heard by telephone under s.807.13 (1).

History: 1977 c. 354; 1979 c. 300,331,359; Sup. Ct. Order, 141 Wis.2d xiii (1987); 1995 a. 77; 1997 a. 35,292.

INEFFECTIVE ASSISTANCE OF COUNSEL.

Service/ Notice

Wis. Stat. 48.27 and 48.273

- Prison Service Statute: Wis. Stat. 302.025—requires that prison inmates be served by the warden, superintendent or someone appointed thereby.
- Make sure not just mailed, or handed to inmate by Joe Schmoo.
- Notice is HUGE in TPRs



State your case, Petitioner

- Notice—HUGE. MUST BE SUFFICIENT...think perfection (dates, names, statute—they actually mess this up a lot, believe it or not—in particular, the change in the law from likely to meet conditions of return within 9 months as opposed to 12 months).
- Venue- Wis. Stat. 48.185(2),49.837: Generally county where the birth parent or child lives at time petition is filed. Can be transferred upon finding of good cause.—Consider filing motions to change if a different place could be better for your client.
- Jurisdiction-Children’s Court. Check Chapter 822-Uniform Child Custody Jurisdiction Act.
- ICWA-supersedes Chapter 48 in TPRs—see Wis. Stat. 48.028—make sure petition alleges whether or not child is subject to ICWA.
- Look over things with a fine-toothed comb.
- SIDE NOTE: You can substitute Judges...and then so can the other parent. Then so can the petitioner. Talk with other lawyers in your jurisdiction about “stragery” on this issue.

Legally Sufficient Petition

- Sec. 48.255 (1) (e): The Petition must allege reliable and credible information which forms the basis of the allegations necessary to invoke the jurisdiction of the court and provides reasonable notice of the conduct or circumstances to be considered by the courts. See Courtney E., 184 Wis. 2d. 592, 516 N.W. 2d 422 (1994).

Constitutional challenges

- fall under the 10 day time-limit.
- Remember to give notice to the Attorney General's office (Wis. Stat. 806.04(11)).



Examples of Constitutional Challenges:

- Incest involuntary TPR constitutional as applied to parent who was victim of incest. (Monroe County Department of Human Services v. Kellie B., 2004 WI 48, 271 Wis. 2d 51).
- Due Process challenges when your parent wasn't represented in CHIPS or family court.
- Kenosha County v. Jodie W. 2006 WI 93, 293 Wis. 2d 530, 716 N.W. 845 —think beyond just prison cases. Remember the basis for Jodie W. is that the conditions were impossible. Are your conditions impossible?
- Prior Involuntary – Consider a Due Process Challenge if the prior involuntary occurred because the parent was not competent to voluntarily consent. Sec. 48.41(3).
- (4) grounds. Family Court order verses Juvenile Court order. Kimberly S.S. And Ponn P. Higher courts are practically begging someone to argue unconstitutional as applied.

Motion to Sever

- Your parent has a bad case and wants other parent to at least have a shot.
- Mom has restraining order against dad.
- Your client is victim of other parent.
- Other parent has multiple children being TPR'd, but that aren't all your client's children also.
- Any ideas???

Cleaning up after the fact: attacking the underlying CHIPS case.

- You are not the lawyer for the CHIPS case, but do not let that stop you from using the CHIPS case to help in the TPR. (note: if your client is represented in the CHIPS case, you must work through/with that attorney to revise or change anything in the CHIPS case.)
- File a motion to compel case managers to continue providing court ordered dispositional services: visitation, AODA treatment, counseling, etc. Wis. Stat. 48.069
 - Benefits: potentially expose lack of reasonable efforts and hopefully, obtain additional support for client.
- Revise the CHIPS Dispo. Order Wis. Stat. 48.363
 - Many conditions of return are boilerplate. This does not mean that they are appropriate, possible, and/or measurable.
 - The cleanest place to address these problems is in the CHIPS case.
 - Also consider asking the court to revise the services the department is ordered to provide.
- Consider a Change in Placement Hearing- Wis. Stat. 48.357: If parent(s) are doing what they are supposed to be doing, why can't kid go home?

Summary Judgment—Oh Crap, now what do I do?

- Summary judgment is permitted under Chapter 46. Wis. Stat. 802.08
- The Wisconsin Supreme Court has concluded that partial summary judgment may be granted in the unfitness phase of a termination of parental rights case. Steven V. v. Kelley H., 2004 WI 47, ¶ 6, 271 Wis. 2d 1, 678 N.W. 2d 856. See also Wis. Stat. 48.31(1) and 48.415.
- Summary judgment is only appropriate when there are no genuine issues of material fact, entitling the moving party to judgment as a matter of law. Wis. Stat. § 802.08(2).
- The Court hears the motion for summary judgment on the pleadings, depositions, answers to interrogatories, admissions and affidavits. Section 802.08 (2).
- When the motion is made and supported, the adverse party may not rest on mere allegations or denial, it must set forth specific facts showing there is a genuine issue for trial. Sec. 802.08 (3)

More Summary Judgment

- The Wisconsin Supreme Court has emphasized the use of caution when applying summary judgment to the grounds phase of termination of parental rights proceedings, partly because of their powerful consequences: the permanent destruction of the relationship between a parent and a child. See, e.g., Steven V. v. Kelley H., 2004 WI 47, ¶ 21, 271 Wis.2d 1, 678 N.W.2d 856.
- The grounds for unfitness most likely to form the basis of a successful motion for partial summary judgment in a termination of parental rights case are those that are sustainable on proof of court order or judgment of conviction, the reliability of which is generally readily apparent and conceded. *Id.* at ¶ 41.
- Also from Steven V.,
 - In many TPR cases, the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing, because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child. See Wis. Stat. § 48.415(1) (abandonment); Wis. Stat. § 48.415(2) (child in continuing need of protection or services); Wis. Stat. § 48.415(3) (continuing parental disability); Wis. Stat. § 48.415(5) (child abuse); Wis. Stat. § 48.415(6) (failure to assume parental responsibility); Wis. Stat. § 48.415(7) (incestuous parenthood). Summary judgment will ordinarily be inappropriate in TPR cases premised on these fact-intensive grounds for parental unfitness. *Id.* at ¶ 36 (emphasis added). See also *State v. Bobby G.*, 2007 WI 77.
- Note: prosecutors can and do file summary judgment motions even in cases where one of these fact-intensive grounds for parental unfitness is alleged. This case is a good starting point for responding, but does not guarantee that summary judgment will be denied. See e.g., Nathan Y. v. Tarik T., Appeal No. 2010 AP 992

It's called "practicing law" for a reason.

- Keep updated on the case law—TPRs are an appellate hot bed.
- Just because you can, doesn't mean you should.
- Licensed to Plagiarize.
- Talk to other attorneys. Use the practice coordinators. Ask other Judges (key is "other" judges—let's not lose our law licenses for ex parte communications).

