

Preserving Issues for Appeal in Termination of Parental Rights Cases

Initiating the Appeal

- * File notice of Intent
 - * CC:
 - * Clerk of Circuit Court
 - * Guardian Ad Litem
 - * Corporation Counsel/Opposing Counsel
 - * SPD Appellate Intake Unit
 - * Providing notice to these parties is required by statute, Wis. Stat. Sec. 809.107(2)(bm) and helps to make sure adoption is not finalized before appeal is complete

NOI Deadlines

- * Deadline for Notice of Intent
 - * 30 days from entry of the final order
 - * 809.107(2)(bm)5(c) – if turned in early, treated as filed the date of the order
- * This deadline cannot be extended in a privately filed TPR

Preparing Your Client for an Appeal

- * Discuss the possibility of an appeal prior to the dispositional hearing.
- * Client's address is necessary for Notice of Intent, but **phone numbers** and/or **email address** are most helpful to successor counsel.

Preparing Your Client for an Appeal

- * Short Deadlines (but probably not from the client's perspective)

BETWEEN	AND	TIME
Final Order	Notice of Intent	30 days
Notice of Intent	Clerk of Court transmits to SPD	5 days
SPD receives materials	SPD appoints counsel and requests transcripts	15 days
Transcripts Requested	Court Reporters Serve Transcripts	30 days
Last Transcript Served	Filing of Notice of Appeal	30 days
Notice of Appeal Filed	Record Transmitted to Court of Appeals	15 days
Record Filed	Brief or Remand Motion	15 days

Continued Visitation

- * Consider requesting that the circuit court allow your client to continue visits while the appeal is pending.
- * You have more information about your client at the time of the request
- * Can remind court that they will be updated on case status
 - * Wis. Stat. 809.107(5)(am) requires notice of abandonment of appeal if no action taken

Communicating with appellate counsel

- * Helpful to be able to review large files as soon as possible
 - * No need for a release – Wisconsin Ethics Opinion EF-16-03 “The Ethical Obligation of the Lawyer to Surrender the File upon Termination of the Representation” 12/29/16
- * Advice for best way to contact client
- * Ideas for Appeal

Making a Record

- * Object
 - * Motions in Limine and at the time of objectionable testimony
- * Put sidebars on the record
 - * Discuss how judge likes to handle objections and sidebars prior to trial
- * Offers of Proof
- * Good facts!

Issues for Appeal

- * Testimony regarding whether parent will be able to meet CHIPS conditions within next 9 months
 - * *Brown County v. Shannon R. (Daniel R.S.)* 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269
 - * County's two expert witnesses allowed to give opinion, but mom's expert not allowed. WI Supreme Court reversed. Said psychologists can opine about future behavior
 - * In re Takayla C., opinion not helpful to the parent. COA says social worker with two years experience was an expert.
- * These are pre-*Daubert* cases - so may be room for litigation

Issues for Appeal

- * Arguing the Best Interests Standard during the Grounds phase
 - * In TPR cases, the “best interest” standard does not dominate every stage of the proceeding. *Sheboygan County DHHS v. Julie A.B.*, 255 Wis. 2d 170, ¶ 22, 648 N.W.2d 402. That standard does not prevail until after finding of unfitness.
 - * May come up when GAL describes role
 - * Closing Arguments

Issues for Appeal

- * Multiple Grounds for Termination Alleged
 - * How do they impact each other?
 - * Example: Failure to Assume and Continuing CHIPS
 - * Example: Abandonment and Continuing CHIPSHow do they impact each other?
 - * Can *Jodie W.*'s impossibility standard be used or expanded into other contexts?

Issues for Appeal

- * Hearsay

- * Hearsay is inadmissible during the grounds phase of a TPR trial. Wis. Stat. 48.299(4) and 48.42
- * During adverse examination, a prosecutor cannot ask a witness to comment on a fact that is not in the record unless the prosecutor intends to introduce some evidence to support that fact. *State v. Dean*, 67 Wis. 2d 513, 534-535, 227 N.W.2d 712 (1975); *State v. DeHart*, 242 Wis. 562, 570, 8 N.W.2d 360 (1943).
- * *In re Kayla M.*, 2015 WI App 58, 364 Wis. 2d 529, 868 N.W.2d 529. Court seems to acknowledge hearsay, but does not find prejudice.

Issues for Appeal

- * Summary Judgment

- * “We heed our supreme court’s caution that while partial summary judgment is available at the grounds phase of a TPR proceeding, a grant of summary judgment must be ‘carefully administered with due regard for the importance of the rights at stake and the applicable legal standards.’ *Steven V.*, 271 Wis. 2d 1, ¶35. Accordingly, **we strongly caution against the use of summary judgment at a TPR proceeding where the parent is present and objecting.** Based on the facts presented in this case, however,...” *J.M.W. v. J.R.P.* 2017AP1390.

Issues for Appeal

- * Disposition
 - * A rare win!!
 - * T.M.H. v. A.N.W. 2016AP1981
 - * Circuit Court terminated rights but believed it could order continued contact with grandmother.