How to be ineffective in a TPR in 8 easy steps

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I. TAKE A TPR CASE

- There's good news and bad news….
- BAD NEWS – you will be called ineffective
- GOOD NEWS – you will not be found ineffective
- BONUS – the Court and the DA will say the nicest things ….

II. FAIL TO GET THE CHIPS RECORD

- Parents have a right to “all records” that are “relevant to the subject matter of a proceeding under this chapter” including copies with permission of the custodian or the court. Wis. Stat. §48.293(2)

II. FAIL TO GET THE CHIPS RECORD

- Why do you want CHIPS file:

II. FAIL TO GET THE CHIPS RECORD

- 1) Check for jurisdiction.
- Despite Wis. Stat. § 48.315, loss of jurisdiction cannot be waived.
- See ***Vill. Of Trempealeau v. Mikrut***, 200r WI 79, 273 Wis. 2d 76, 94
- Loss of competency based upon noncompliance with mandatory statutory time periods cannot be waived.

II. FAIL TO GET THE CHIPS RECORD

- What does it mean?
- ***State v. Michael S.,*** 2005 WI 82, ¶3, 282 Wis. 2d 1, 698 N.W.2d 673.
- "[T]he circuit court could not act with respect to Michael S. once the one-year dispositional order expired."

II. FAIL TO GET THE CHIPS RECORD

- Bottom line: if there is a break in jurisdiction the court has no authority to enter a subsequent CHIPS order and there may be no authority to file TPR petition.

II. FAIL TO GET THE CHIPS RECORD

- 2) Check if there is a statutory basis for the charge.

- Example: Prior involuntary termination of parental rights to prior child, Wis. Stats. § 48.415(10), requires that the court have jurisdiction under 48.13(3), or (10) which require abuse or neglect of the present child—not abuse or neglect of other children as allowed by 48.13(3m) and (10m).

Bottom line—abuse or neglect must have been of the child in question not a sibling. Parent must be given a chance to parent this child.

II. FAIL TO GET THE CHIPS RECORD

- 3) Sticky notes/judge's notes.

- Sometimes you find some very interesting notes in the file.

II. FAIL TO GET THE CHIPS RECORD

- 4) Putting the Department on Trial

- Part of the trial almost always needs to be about the failure of the department to provide sufficient services to overcome the known deficiencies of your client.
- The file allows you to document: a) your client's good deeds and the department's recognition of them; or b) the department's bad faith and act of merely going through the motions.

II. FAIL TO GET THE CHIPS RECORD

- 5) Proof of less than reasonable efforts
- 48.415(2)(a)2 in reverse order. The County must prove:
- **b.** That **the agency** responsible for the care of the child and the family or of the unborn child and expectant mother **has made a reasonable effort to provide the services ordered by the court.**
- **a.** In this subdivision, "reasonable effort" means an earnest and **conscientious effort** to take good faith steps to provide the services ordered by the court **which takes into consideration the characteristics of the parent** or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.

II. FAIL TO GET THE CHIPS RECORD

- 6) Make sure you get the whole file

- --sometimes you don't get everything.
- Or sometimes the record changes without a hearing.
- Ex. 48.13(10m) became 48.13(10).

II. FAIL TO GET THE CHIPS RECORD

- 7) Find evidence that the Department is biased or your client isn't so bad.

III. TREAT YOUR CASE AS A CRIMINAL CASE, FAIL TO USE CIVIL PROCEDURE

- TPR's are civil not criminal, and you're doing it wrong if you treat it like a criminal case.

- M.W. v. Monroe County Dep't of Human Servs., 116 Wis. 2d 432, 442 (1984) "Although serious human rights are implicated in the termination-of-parental rights proceedings, the proceeding is civil in nature."

III. TREAT YOUR CASE AS A CRIMINAL CASE, FAIL TO USE CIVIL PROCEDURE

- A) Biggest mistake—plea to grounds. **Why? Why? Why?**
- If your client insists on doing it, I suggest you read something like this:
- There are two stages to a TPR trial. At the first stage, the jury is to consider only whether the grounds for termination have been proven by clear and convincing evidence. They may not consider the child's best interests. Once the grounds have been proven--and an admission has the same force as a jury trial—the court must find you to be unfit. At the second stage the best interests of the child are paramount (all that really matters) and the Judge can use his or her discretion (can do whatever he or she thinks is best) to decide whether to terminate your rights. Basically, therefore, your admission makes it easier for them to terminate your rights. If you want to fight it, we should fight it at trial (fact-finding). IF YOU ENTER AN ADMISSION, YOU ARE ADMITTING THAT YOU ARE AN UNFIT PARENT AND YOU ARE THROWING YOURSELF ON THE MERCY OF THE JUDGE TO NOT TERMINATE YOUR RIGHTS ANYWAY. WHAT DO YOU THINK THE ODDS OF THAT ARE**?**
- (See In Interest of C.E.W., 124 Wis. 2d 47, 368 N.W.2d 47 (1985)).

III. TREAT YOUR CASE AS A CRIMINAL CASE, FAIL TO USE CIVIL PROCEDURE

- Never give something for nothing….
- If you plea to grounds, get a hold open or other benefit for the plea….

- If you believe there is no arguable defense, a voluntary termination may be better than a plea to grounds because of Wis. Stats. 48.415(10)

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- B) Fail to do discovery—always depose social worker-- and establish bias, lack of reasonable efforts, or change of position

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- 3 reasons to do discovery:

- 1) Learn the record;
- 2) It annoys the hell out of them (which often leads them to make mistakes and makes them leery of TPR petitions); and
- 3) You can legitimately run up your SPD bill
- (Four words: 4:00 on last day.)

III. TREAT YOUR CASE AS A CRIMINAL CASE, FAIL TO USE CIVIL PROCEDURE

- I do discovery on appeal: Wis. Stat. §48.293(4) "the discovery procedures permitted under 804 shall apply in all proceedings under this chapter."

III. TREAT YOUR CASE AS A CRIMINAL CASE, FAIL TO USE CIVIL PROCEDURE

- Some questions you should ask:
- 1. Could you have done more?
- 2. Does parent love child?
- 3. Did removal make it impossible to provide daily care and supervision?
- 4. What characteristics does this parent have and how did you make special efforts to accommodate them
- 5. Have you been trained that the County loses money if you don't terminate after 15 months? (Careful with this one)
- Others: ….

III. TREAT YOUR CASE AS A CRIMINAL CASE, FAIL TO USE CIVIL PROCEDURE

- C) Accept CHIPS file as final

- You should also be addressing mistakes in the CHIPS file with the use of 806.07. You have a year to address mistake, inadvertence, surprise, or excusable neglect and fraud, misrepresentation, or other misconduct of an adverse party and newly discovered evidence.

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- There is no time limit on claims that the CHIPS judgment is void, there has been satisfaction, the prior judgment has been reversed is no longer equitable or there are any other reason justifying relief.

III. TREAT YOUR CASE AS A CRIMINAL CASE, FAIL TO USE CIVIL PROCEDURE

- If an order lists impossible conditions of return—challenge it and move to dismiss the termination petition or request a new trial pursuant to Wis. Stat. 805.15.

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- But see, ***Oneida County Dep't of Social Servs. v. Nicole W***.(Brianca M.W.) 2007 WI 30, 299 Wis.2d 637, 728 N.W.2d 652.
- "[W]e need not determine whether the prior Waukesha County termination of rights order may be collaterally attacked due to a violation of the right to counsel because Nicole made no prima facie showing that she was denied the right of counsel in the termination of rights proceeding regarding Rockey."

III. TREAT YOUR CASE AS A CRIMINAL CASE, FAIL TO USE CIVIL PROCEDURE

- Some take the position that this means you can't collaterally attack chips dispositional order without proving prima facie case of denial of right to counsel. The problem—in a civil case there is no right to counsel.
- But ….
- § 806.07 is not a collateral attack.
- And right to counsel applies even if it is a statutory right
- See State v. Shirley E., 2006 WI 29, 298 Wis. 2d 1 (Reversed due to denial of right to counsel following default in TPR case).

IV. TREAT YOUR CASE AS IF IT WERE A CIVIL CASE

- The seriousness of the deprivation can be used to argue for criminal-like rights.

- "Due to the severe nature of termination of parental rights, termination proceedings require heightened legal safeguards against erroneous decisions." ***Evelyn C.R. v. Tykila*** *S.*, 2001 WI 110, ¶21, 246 Wis. 2d 1, 629 N.W.2d 768.

IV. TREAT YOUR CASE AS IF IT WERE A CIVIL CASE

- The courts have agreed that criminal law applies to TPR's, but you have to look carefully.

- Right to present a defense.

- Fn. 49 of ***Brown County v. Shannon R.*** 2005 WI 16, 286 Wis. 2d 278, 706 N.W.2d 269.
- "Although ***St. George*** does not control cases decided under the due process clause of the Fourth Amendment, **it informs our discussion** in the present case."

IV. TREAT YOUR CASE AS IF IT WERE A CIVIL CASE

- Pleas.

- ***Waukesha County v. Steven H.*** 233 Wis. 2d 344, 607 N.W.2d 607.
- "In prior cases the analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986), relating to a circuit court's acceptance of a guilty plea in a criminal case, has been used to evaluate a challenge to the proceeding mandated by Wis. Stat. 48.422."

IV. TREAT YOUR CASE AS IF IT WERE A CIVIL CASE

- Due Process applies and prohibits impossible conditions.
  Kenosha County Dep't of Human Servs. v. Jodie W., 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845.

IV. TREAT YOUR CASE AS IF IT WERE A CIVIL CASE

- Plea was not knowing, intelligent and voluntary where conditions of return were impossible because Jodie was incarcerated. "We further conclude that a parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit." ¶49.
- ¶51. We therefore conclude that in cases where a parent is incarcerated and the only ground for parental termination is that the child continues to be in need of protection or services solely because of the parent's incarceration, Wis. Stat. §48.415(2) requires that the court-ordered conditions of return are tailored to the particular needs of the parent and child.

IV. TREAT YOUR CASE AS IF IT WERE A CIVIL CASE

- Bottom line: if criminal law allows a defense, then the rights involved create a basis to argue for a similar defense in your TPR trial.

- At the very least the criminal law "informs" how the right should apply.

V. DON'T OBJECT TO IMPROPER EVIDENCE

- 1) Permanency Plans—almost always reams of inadmissible hearsay, prejudicial information.

- Also because burden of proof at permanency plan hearing is different than at TPR fact-finding, collateral estoppel would not apply. You can challenge every assertion in the plan and every finding by the court.

V. DON'T OBJECT TO IMPROPER EVIDENCE

- 2) Prior bad acts—prior to CHIPS order
- Bad cases:

- Tara P., 252 Wis. 2d 179 ("In closing, we stress that just as there is no blanket prohibition on evidence of events prior to a dispositional order, our present holding does not provide blanket authority for its admission.";

- Quinsanna D., 259 Wis. 2d 429 ("…evidence of all the offenses and sentences was introduced to prove that she had failed to assume parental responsibility for [children]. That was fair.")

- Anything not related to the conditions for return—request a Whitty ruling on prior bad acts.

V. DON'T OBJECT TO IMPROPER EVIDENCE

- 3) ASFA—my pet peeve
- 48.417(1)(a) requires filing when child placed out of home for 15 of 22 months:

V. DON'T OBJECT TO IMPROPER EVIDENCE

- --BUT NOT IF:
- Child cared for by fit and willing relative; or
- Permanency plan indicates termination is not in the best interests of the child; or
- Agency has failed to provide timely services necessary for return
- 48.417(2)(a-c).

V. DON'T OBJECT TO IMPROPER EVIDENCE

- Real reason—County may lose money if they don't terminate, and that is not necessarily child's best interests.

- Ex. TPR appeals went up 8x following adoption of ASFA

VI. FAIL TO ADDRESS SPECIAL ISSUES

- 1. Fail to warn of possibility of 48.415(10), prior involuntary termination, can be used to terminate subsequent children.
- 2. Don't object/do a motion in limine to social worker testimony under Daubert
- 3. Don't object to delays—they can be extremely prejudicial at disposition
- 4. Don't object to ASFA

VI. FAIL TO ADDRESS SPECIAL ISSUES

- 5. Don't object to orders to appear—SCR 11.02
- "Every person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defend the proceeding in person."

- Legislature cannot change this—it would be a violation of separation of powers doctrine.

VI. FAIL TO ADDRESS SPECIAL ISSUES

- 6. Don't talk to GAL

  Ex. Dryer case: GAL agreed that unsubstantiated question created unfair trial
- 7. Don't object to prior bad acts—especially before dispositional order
- 8. Don't prep your client for trial
- 9. Don't talk to other parent's counsel about trial/disposition

VI. FAIL TO ADDRESS SPECIAL ISSUES

- 10. Don't seek severance—"They never grant it in this county," is not the law.
- 11. Don't fight for contact until appeal is over.
- 12. Always accept the court's interpretation of the law:
- Ex: "The rules of evidence don't apply at prove up." But prove ups are not one of the exceptions where the rules of evidence don't apply listed in Wis. Stat. § 48.299(4)(b).

VI. FAIL TO ADDRESS SPECIAL ISSUES

- 13. Don't object to illegal suspension order.
- What is the County's authority to suspend visits even temporarily?
- See 48.355(3): "Except as provided in par. (b), if, after a hearing on the issue with due notice to the parent or guardian, the court finds that it would be in the best interest of the child, the court may set reasonable rules of parental visitation."
- 14. Fail to advise them that finding of grounds means that they will be found to be unfit.

V. DON'T OBJECT TO IMPROPER EVIDENCE

- 15. Think there is no issue:

- There is always an issue. The worse your client is, the more it helps to think of this question:
- Given the client's obvious needs, wouldn't it have been reasonable for the department to do more to reunify this family?

VII. DON'T QUESTION THE LAW

- A) Don't read the JI critically—
- Example: Wis JI Children 313: Abandonment
- "Certain questions in the verdict ask that you answer the questions 'yes' or 'no'. The party who wants you to answer the question 'yes' has the burden of proof as to those question. This burden is to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that 'yes' should be your answer to the verdict questions."
- Since the state wants the jury to answer questions 1 and 2 yes, what is the state's burden of proof?
- Answer: It's not greater weight; it's clear and convincing.

VII. DON'T QUESTION THE LAW

- B) Accept the law as listed by Wisconsin courts:

- Ex. ***Tammy W.G. v. Jacob T***. says fundamental relationship may not exist if parent has "exposed the child to a hazardous living environment."
- But the U.S. Supreme Court in ***Lehr v. Robertson***, 463 U.S. 248, 261 (1983) sets the bar much lower. A father establishes a fundamental relationship where he "demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child…."

VII. DON'T QUESTION THE LAW

- C) Some rulings are just wrong:

- Ex.: Wisconsin Stat. § 48.415(4)(a) requires proof that the parent has been denied periods of physical placement by a court order "containing the notice required by s. 48.356(2)…." However, Wis. Stat. § 48.415(4) does not require similar warnings for family court orders that place a child outside of the home. See ***Kimberly S.S. v. Sebastian X.L.,*** 2005 WI App 83, ¶¶7-9, 281 Wis. 2d 261, 697 N.W.2d 476.

- --An equal protection violation? You bet.

VII. DON'T QUESTION THE LAW

- D) Be creative:
- Ex. --County should not be able to file failure to assume petition.
- --Due Process and Equal protection violation to take child and then claim failure to assume because they haven't provided "daily" care and supervision of the child
- --The doctrine of unclean hands disallows the County from suspending visits and then claiming abandonment.

- Other ideas: Think of the law as it should be, not as it is….

VIII. WORK ALONE AND LOSE MOTIVATION

- These cases are hard. The courts are not your friend; your client can't get their act together; there are two attorneys on the other side; and the County has professional witnesses who control the creation of the record. You will get burned out unless you find something that motivates you. I work best when I'm mad, and I've become skilled at making myself angry over a case.

- I also highly recommend you find a partner. Work with the other parent's attorney if at all possible. Two are much smarter than one, and the reinforcement is invaluable.

VII. Work Alone and Lose Motivation: postscript

- Last Word:
- Justice Oliver Wendell Holmes once wrote that, "Men must turn square corners when they deal with the Government," ***Rock Island, A. & L. R. Co. v. United States,*** 254 U.S. 141, 143 (1920), and the same should apply with equal force when the government seeks to terminate a parent's parental rights permanently. The government should also turn square corners and follow the law.