

# APPELLATE REVIEW OF A TPR

Practice Fundamentals and Case Law Update

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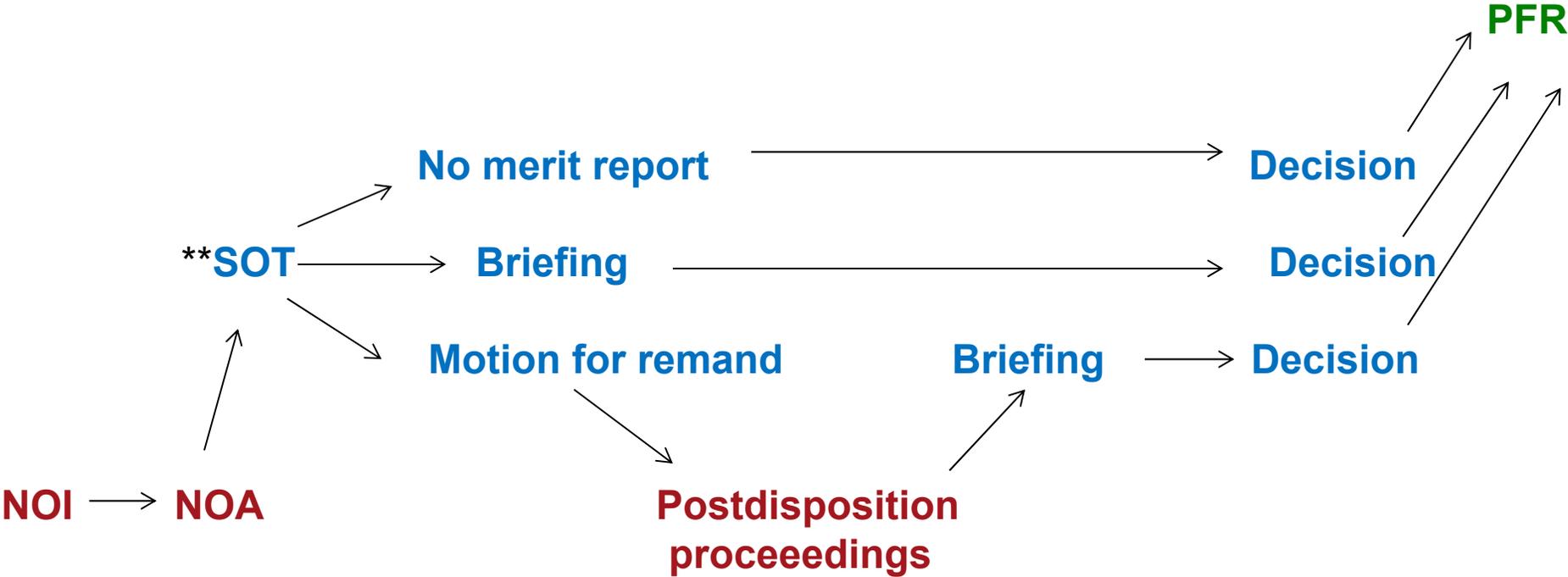
# Unique features of a TPR appeal (809.107)

- Shorter deadlines
- Postdisposition motion requires court of appeals approval
- Generally no risk to appeal
- Parent must **personally sign** various appellate documents
- Confidential
  - Use initials or pseudonym
  - Redact appendix carefully



# 809.107 Overview

(See appellate timeline for deadlines)





- Practice note:

- If your client filed a notice of intent, you must notify the circuit court if your client later tells you they don't want to appeal.
  - 809.107(5)(am) (“notice of abandonment”)



- Practice note:

- You must always serve copies of the court record and transcripts on your client in a no merit appeal, either before or at the time you file the no merit report.
  - 809.107(5m)

## 2017 Wisconsin Act 258 (effective 4/6/16)

- Notice of intent/ Notice of appeal in a private TPR now extendable for good cause



808.04 **(7m)** An appeal from a judgment or order terminating parental rights or denying termination of parental rights shall be initiated by filing the notice required by s. 809.107 (2) within 30 days after the date of entry of the judgment or order appealed from. ~~Notwithstanding s. 809.82 (2) (a), this time period may not be enlarged unless the judgment or order was entered as a result of a petition under s. 48.415 that was filed by a representative of the public under s. 48.09.~~

809.82 **(2)** (b) Notwithstanding par. (a), the time for filing a notice of appeal or cross-appeal of a final judgment or order, other than in an appeal under s. 809.107 ~~of a judgment or order that was entered as a result of a petition under s. 48.415 that was filed by a representative of the public under s. 48.09~~ or an appeal under s. 809.30 or 809.32, may not be enlarged.

## 2017 Wisconsin Act 258 cont. . . .

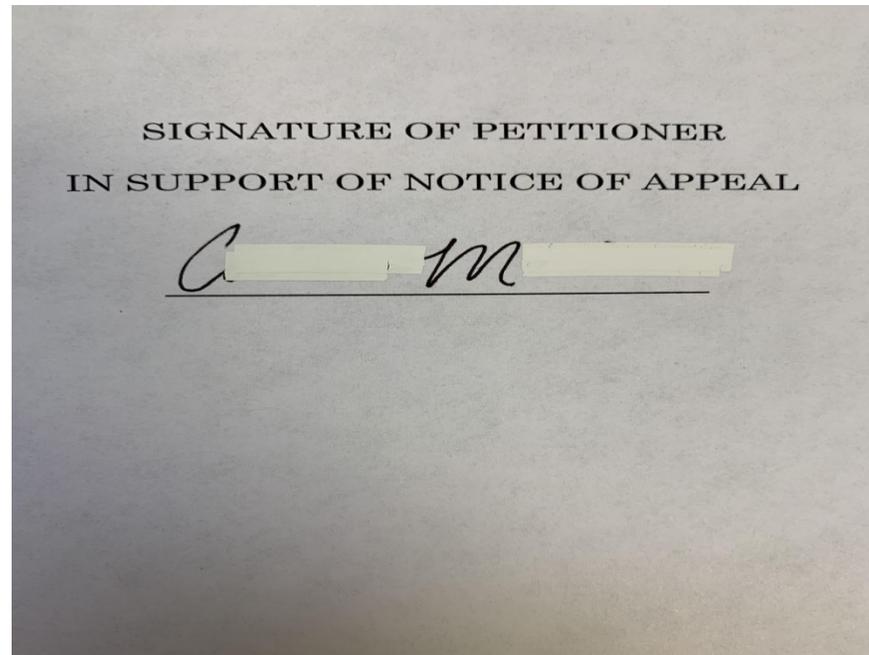
- Parent must **sign** certain appellate documents
  - Notice of Intent
  - Notice of Appeal
    - including No Merit notice
  - Petition for Review

A handwritten signature in black ink that reads "John Doe". The signature is written in a cursive style with a large, looping "J" and "D".

- Practice note:



- Contact parent early on to obtain signatures



- Remember to redact the signature.

- Practice note



- Keep un-redacted copy in your file.
- Add footnote to explain redaction

## 2017 Wisconsin Act 258 cont. . . .

- Requires counsel for appellant (or appellant, if pro se) to file **affidavit** along with remand motion.
- **809.107(6)(am)**
  - “The appellant's counsel or, if the appellant is not represented by counsel, the appellant, shall file an affidavit in support of the motion stating with specificity the reasons that postjudgment fact-finding is necessary.”





## 2017 Wisconsin Act 256 (effective 4/6/18)

- Amendment to 48.415(2)(a)3. “Continuing CHIPS” ground
- Eliminated the 9-month prediction element
  - Regarding future substantial likelihood of meeting the conditions
- Replaced with more limited 15-of-22 months element
  - 48.415 (2) (a) 3. That the child has been placed outside the home for a cumulative total period of 6 months or longer pursuant to such orders an order listed under subd. 1., not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under s. 48.424; and, if the child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

# Dane Ct'y DHS v. J.R., 2019AP000821

(interlocutory appeal)

1. Whether applying the amended continuing CHIPS ground to a parent whose children were placed out of home under CHIPS orders prior to the amendment violates the presumption against retroactivity.
2. Whether applying the amended continuing CHIPS ground to a parent whose children were placed out of home under CHIPS orders prior to the amendment violates due process.

*Decision pending. Converted to 3-judge panel.*

## 2018 Wisconsin Act 369 (effective 12/16/18)

- Amends 803.09(2m) (intervention)
- In addition to the AG, you now must serve the speaker of the assembly, president of the senate, and the senate majority leader, when you challenge the constitutionality of a statute.
- You must now also serve these parties if the “construction or validity of a statute is otherwise challenged.”
- Remember to redact carefully.



**REDACTED**

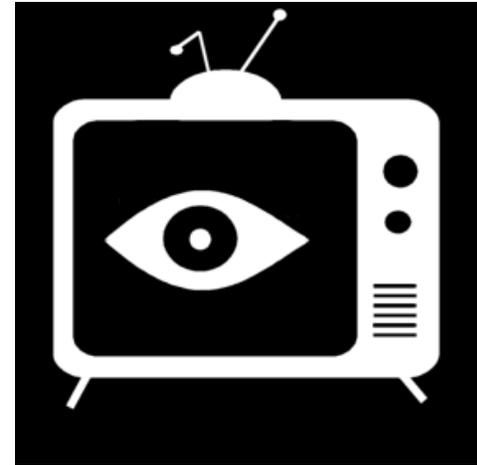
# State v. C.L.K. 2019 WI 14

- State called C.L.K. as its only witness.
- But C.L.K. did not get to present his own case before the circuit court directed a verdict.
- On appeal, parties agreed this was error, but disagreed as to whether it was structural or subject to harmless error analysis.
- SCOW found it was structural error that C.L.K. did not get to present his case-in-chief.
- Rejects argument that the reviewing court can borrow from the disposition phase of the trial to supply any deficit in the grounds phase.



Adams County Health and Human Serv. Dep't. v. D.J.S.  
2019AP506, District 4, 6/20/19 (unpublished)

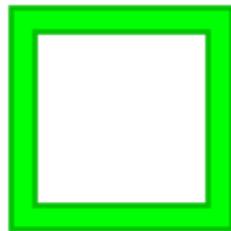
- Judge cannot appear by video at dispositional hearing.
- Court of Appeals determined that this error was structural and granted a new disposition hearing.
- Relevant to pending case: Court of Appeals assumed without deciding that the continuing CHIPS ground should have been dismissed because the current version of the CHIPS statute was used instead of the version in effect at the time the county filed the petition.



## State v. B.D.S.

2017AP1770, District 1, 8/27/18 (unpublished)

- The court of appeals granted remand hearing pursuant to 809.107(6)(am).
- The circuit court denied B.D.S. an evidentiary hearing.
- Case analyzed using *Bangert* framework so B.D.S. must make prima facie case.
- Court of Appeals upheld denial of evidentiary hearing.



Yes



No

## Brown County Human Services v. B.P. and T.F. 2019 WI App 18

(a) Abandonment...shall be established by proving *any of the following*

48.415(1)(a)2	48.415(1)(a)3
That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s.48.356(2) or s.938.356(2) and the parent has failed to visit or communicate for 3 months or longer.	The child <i>has been left</i> by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.

Court of Appeals decides that the Department can petition under any abandonment prong when the child is out of home subject to CHIPS order.

But, COA finds grant of summary judgment was error – genuine issue as to whether T.F. had good cause for failing to visit and communicate with daughter.



S.D. v. A.V.  
2018AP1150, District 4, 3/7/19 (unpublished)

- Circuit court must hold separate disposition hearing where it considers the mandatory factors listed in Wis. Stat. 48.426(2).
- Here, the court simply terminated A.V.'s rights at the end of the grounds hearing without discussing the statutory factors.

*Brown County DHHS v. L.F.H., Sr.* 2019AP145,  
District 3, 4/23/19  
(unpublished)



- Department moved for summary judgment under 48.415(4) – continuing denial of periods of physical placement or visitation.
- 48.415(4)(a) requires *written CHIPS dispositional order* providing parent with notice that his visits were suspended and explaining what the parent must do to regain visitation or the child’s return.
- The County argued that a “suspension order” that was entered before the CHIPS order should suffice. The Court of Appeals disagreed.
- Similar holding in *Jackson County DHS v. R.H.H.*

## Permissive appeals from non-final orders (§ 809.50 “interlocutory”)

- Immediate review will:
  - Materially advance the termination of the litigation; or clarify further proceedings therein;
  - Protect a party from substantial or irreparable injury; or
  - Clarify an issue of general importance in the administration of justice
- Procedural requirements (14 days; written order)
- If filing a petition for permissive appeal, let us know
- Guidance available on SPD website:

