

APPELLATE RESPONSIBILITIES OF TRIAL COUNSEL, PRESERVING  
THE RECORD FOR APPEAL AND CASE LAW UPDATE

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A. APPELLATE RESPONSIBILITIES OF TRIAL COUNSEL AFTER  
ENTRY OF TPR ORDER

1. Client had right to direct appeal from order terminating his/her parental rights -- TPR appeals are governed by 809.107, et seq.
2. Trial counsel must continue representing the parent until the notice of intent is filed. § 48.43(6)(a) and 809.107(2).
3. Appeal is initiated by filing a notice of intent to pursue post dispositional relief – deadline is 30 days of the entry of the judgment. Wis. Stat. § 809.107(2)(bm).
4. Notify client of right to appeal
  - i. Must discuss the right and any potential merit of appeal.
    1. ultimately it is the client's decision whether to pursue an appeal
  - ii. If client fails to appear at dispositional hearing, must timely notify in writing of right to appeal and 30-day deadline for filing notice of intent.
5. Notice of Intent - § 809.107 (2)(bm)
  - i. Required contents of notice Wis. Stat. §809.107(2)(bm) 1-5
    1. verify current address with client
    2. inform client that they must inform SPD Appellate Intake of any changes in their address.
  - ii. File original notice of intent with the clerk of circuit court where judgment was entered
  - iii. Must be filed within 30 days of entry of order
    1. If filed before written order entered, will be treated as though filed on date of the entry of the order - § 809.107(c).

- iv. You must serve a copy of the notice of intent on the other parties (i.e., the D.A. or corporation counsel, the guardian ad litem, and social services).
6. Send a copy of the file-stamped notice of intent to SPD Appellate Division Intake Unit, P.O. Box 7862, Madison, WI 53707.
- i. Include a completed SPD Appellate Questionnaire
  - ii. Include any transcripts obtained during your representation (e.g., depositions or motion hearings) – the Intake Unit will forward these transcripts to appointed appellate counsel.
7. TPR appeals are subject to an accelerated process.
- i. Inform client to contact their appellate attorney when they receive the appointment order.
    - 1. Inform the client that if they do not receive an order appointing counsel within 25 to 30 days of filing notice of intent they should call SPD Intake at 608/266-3400.
    - 2. Inform client that they must
  - ii. Deadline for appointment of counsel and ordering transcripts is 15 days from receipt of the order and a list of each proceeding in the case. § 809.107(4)(a).
  - iii. Deadline for court reporter to provide the transcripts and the clerk to provide the record is 30 days. § 809.107(4m).
  - iv. Appellate counsel has 30 days from service of last transcript and court record to file notice of appeal. § 809.107 (5).
  - v. Postdisposition motions and briefing can take several more months.
8. Wisconsin State Public Defender minimum attorney performance standards require trial counsel to fully cooperate with appellate counsel, as they are “successor counsel” when a client decides to appeal. Supreme Court rules and ethics opinions say that the file you maintained during trial representation belongs to the client, and you

must provide it to appellate counsel if appellate counsel asks for it.

9. Motion to vacate default judgment on grounds phase
  - i. Court can enter a default finding against the parent on the grounds phase as a sanction for failing to comply with court-ordered discovery, fails to appear at their deposition and fails to comply with court orders – including orders to appear in court.
  - ii. Entry of default requires a finding of egregious conduct by the client and requires the state to prove grounds at an evidentiary hearing by clear and convincing evidence.
  - iii. If the court enters a default judgment on grounds phase:
    1. must notify the client of the default judgment and their right to appear and present evidence at the dispositional hearing
    2. Client's right to counsel continues to dispositional hearing even if the parent is defaulted at the grounds phase. *See State v. Shirley E.*; 2006 WI 129, 298 Wis. 2d 1
      - a. This means your representation continues during the dispositional hearing. You can object, cross-examine and present testimony if you can determine what your client's objective are.
  - iv. If a default judgment is entered for your client's failure to appear in court and client contacts you soon after the court hearing –
    1. if there are factual grounds, file a motion to vacate default finding as soon as possible
    2. if client notifies you before disposition hearing or before notice of intent is filed – as counsel of record, it is your responsibility to file a motion to vacate default judgment

## B. PRESERVING THE RECORD FOR APPEAL

1. Objections
  - i. Make your objections as specific as possible – tell the trial court what you want it to do and explain why the error matters to your client’s case.
  - ii. If there are multiple grounds for objecting,
    1. argue each grounds specifically
    2. insist on a ruling on the record on each one
    3. “Continuing objections” – be wary of these!! If the problem becomes worse than you originally foresaw, reraise and reargue the objection based upon the additional impact.
  
2. Try to keep everything on the record.
  - i. Supreme Court Rule 71.01(2) provides that “[a]ll proceedings in circuit court shall be reported,” with only limited exceptions.
  - ii. Request and insist that all sidebars be contemporaneously recorded. Later recitations of off-the-record sidebars tend not to be as detailed or sharp, and sometimes are forgotten altogether.
  - iii. A lot of things happen in a courtroom that are nonverbal – put those nonverbal matters of importance on the record. E.g., describe for the record a judge’s or witness’s tone or facial expression.
  
3. Motions
  - i. In writing where possible
    1. state all grounds with specificity and include statutory grounds and common law grounds with caselaw if applicable.
  - ii. It is your responsibility to assure that the court issue a decision on each of your motions
  - iii. Thoroughly review the record, including the CHIPS file (if Continuing CHIPS TPR or otherwise relevant) to determine if there any grounds for the motion:
    1. Did the court order place child outside of home

2. Does the order contain requisite TPR warnings
3. Does the order include specific court ordered services?

iv. Research:

1. On Point: <http://www.wisconsinappeals.net/> - search by topic
2. Case Summaries on SPD website (<http://www.wisspd.org/html/980case/casesum/casesum2.asp>) for cases before 2/11/10
3. Subscribe to On Point

4. Offers of proof

- i. Use an offer of proof if the judge excludes your proffered testimony or other evidence.
- ii. Need to be as detailed and factually specific as possible, and preferably in writing – but even handwritten on a legal pad is fine if you're in court and don't have access to a computer.
- iii. You can then submit the document to the court for the record as an offer of proof to preserve the issue for appeal.

6. Ineffective Assistance of Trial Counsel

- a. Many issues, if missed or not argued by trial counsel or if trial counsel make missteps, must be brought by post disposition motion claiming ineffective assistance of trial counsel otherwise the issues are deemed to be waived for purposes of an appeal
- b. Everyone makes mistakes or misjudgments – be honest about what you did and why.
- c. Avoiding an ineffective assistance claim is largely a matter of knowing the legal choices (and whose choices they are); doing any necessary research and a thorough investigation; making deliberate strategic choices; consulting with your client and documenting what you did and why in your file.
- d. Explain things as clearly as possible in language your client can understand.

- e. Keep file notes of major strategic decisions that you make, even if you have to sit down and write them out later.
- f. Make your own file record of major decisions you make with clients and date these. Send written confirmation of major decisions to the client by letter.

### C. RECENT TPR CASELAW YOU SHOULD KNOW ABOUT

*Sheboygan Co. DHHS v. Tanya M.B. / William S.L.*, 2010 WI 55, 324 Wis. 2d 524 (6/29/10)

Permits TPR on continuing CHIPS grounds even though CHIPS dispositional order did not contain specific services that Department was to provide. § 48.355(2)(b)1 does not require a CHIPS dispositional order to separately list each individual service that the Department is to provide so long as the Department is ordered to provide “supervision,” “services” and “case management” and the order also provides detailed conditions that the parents must complete in compliance with the dispositional order.

*Monroe County DHS v. Luis R.*, 2009 WI App 109, 320 Wis. 2d 652: Indian Child Welfare Act, 25 U.S.C. § 1912(f) (“ICWA”)’s applicability is not limited to physical custody and therefore applies to a TPR initiated after the client has resided in a foster home for three years. Therefore, the county was required to prove beyond a reasonable doubt, by evidence that included the testimony of a qualified expert witness, that returning the child to his father was likely to result in serious emotional or physical harm to the child. The record did not support a conclusion that the county social worker who testified at the hearing was a qualified expert witness under 25 U.S.C.S. § 1912(f). While the social worker likely had specialized knowledge as a result of her degrees in criminal justice, that knowledge did not relate to the showing required by 25 U.S.C.S. § 1912(f), which required the assessment of the likelihood of serious emotional or physical harm to the child if he were returned to his father's care. Further, while the witness was an experienced social worker, her experience in monitoring the conditions imposed upon parents for the return of their children did not suggest something beyond normal social work qualifications or functions and did not suggest any familiarity with Indian culture.

*Walworth Co. DHHS v. Andrea L.O.*, 2008 WI 46, 309 Wis. 2d 161: Stipulation to a TPR elements did not constitute withdrawal of the demand for a jury trial, where the element was submitted to, and found by, the jury under the instructions and special verdict form. Even if the stipulation had been a withdrawal of the jury trial demand on the element, it was not error for the circuit court not to hold a personal colloquy with the defendant where the defendant personally agreed to the stipulation in open court, the stipulation was to a single, undisputed, paper element, and there was ample uncontroverted evidence to support the stipulated element.

Manitowoc County HSD v. Allen J., 2008 WI App 137, 314 Wis. 2d 100: Facts are sufficiently distinguishable from *Andrea L.O.* to warrant reversal. First, the court, not the jury, answered the verdict question on the stipulated element. Further, Allen did not agree to the stipulation in open court and although the element in consideration is a “paper” element, the required documentary evidence is missing from the record, and the evidence adduced is not so “ample” as to make the element “undisputed and undisputable.”

Oneida Co. DSS v. Therese S., 2008 WI App 159, 314 Wis. 2d 494: When accepting a no contest plea to the termination of parental rights petition, courts must determine on the record that, among other things, the parent understands that as a result of the petition the court will enter a finding of parental unfitness and that the parent understands the potential dispositions. Informing the parent of potential “dispositions in a general sense” is not enough to satisfy § 48.422(7)(a).

Waukesha Co. DHHS v. Teodoro E., 2008 WI App 16, 307 Wis. 2d 372: A deported father’s participation in the TPR proceeding by a webcam system was “meaningful,” given that he could see and hear witnesses, be seen by the court, and communicate privately with counsel and with aid of an interpreter and conditions imposed for non-termination of a deported parent’s children weren’t impossible, notwithstanding parent’s inability to return to country.

State v. Bobby G., 2007 WI 77, 297 Wis. 2d 319: in determining whether clear and convincing evidence establishes that a biological father has failed to assume parental responsibility under Wis. Stat. §48.415(6), a circuit court must consider efforts that a biological father has undertaken to establish a relationship with the child after he discovers that he is the father, but before the circuit court adjudicates the grounds in the termination proceeding.

Kenosha County v. Jodie W., 2006 WI 93, 293 Wis. 2d 530: circuit court erred in terminating parental rights based solely on incarcerated biological parent’s failure to meet an “impossible condition of return.” Where a biological parent is incarcerated, and the only ground for TPR is that the child continues to be in need of protection of services solely because of the parent’s incarceration, involuntary termination under Wis. Stat. §48.415(2) requires that the court-ordered conditions of return be tailored to the particular needs of the parent and child.

State v. Shirley E., 2006 WI 129, 298 Wis. 2d 1: biological parents who appear in a TPR proceeding, but are later found in default as a sanction for failing to obey the court’s order to personally attend the court hearings, maintain their statutory right to counsel during both the fact-finding and dispositional hearings in TPR cases.

Brown County v. Shannon R., 2005 WI 160, 286 Wis. 2d 278: circuit court's exclusion of expert witness testimony critical to the biological parent's defense in a TPR case violated parent's constitutional due process right to present a defense.

State v. Robert K., 2005 WI 152, 286 Wis. 2d 143: continuance of the fact-finding hearing beyond the 45-day time limit of §48.422(2) may be properly granted under §48.315(2), where the record establishes good cause for the continuance due to lawyer and litigant scheduling problems.

Oneida County v. Nicole W., 2007 WI 30, 728 N.W.2d 652: permits partial summary judgment under Wis. Stat. §48.415(10), which establishes as a ground to terminate parental rights the prior involuntary termination of parental rights to another child within the previous three years.

Steven V. v. Kelley H., 2004 WI 47, 271 Wis. 2d 1: permits partial summary judgment in the grounds phase of a TPR case under Wis. Stat. §48.415(4), which establishes as a ground to terminate parental rights the denial of physical placement and visitation by court order for more than one year.

#### Wisconsin Supreme Court Pending Cases

*Tammy W-G v. Jacob T.*, 2009AP2973 (oral argument 10/1/10)

Does Wis. Stat. § 48.415(6) require a parent "assume and maintain" a parental relationship, and to allow value judgments about the quality of parenting and if so, does such an interpretation violate a parent's right to substantive due process?

*Brown County Dept. of Human Services v. Brenda B.*, 2010AP321, (Rev granted 9/13/10)

Did the trial court correctly exercise its discretion in denying a parent's motion to withdraw a no contest plea that grounds existed for termination of parental rights without an evidentiary hearing?