Preserving Issues for Appeal

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What are your goals?

- 1. Preserve issues that are important to your client
- 2. Challenge bad law, advocate for change
- 3. Set up appellate issues
- 4. Keep me from calling your ineffective
  - Hint: give it a try

I. Think of issues you want to preserve before trial

- Setting

  up the record

  is best done

  before trial

- Make sure to raise the issues.
- Get a clear ruling on your issues.
  - "For clarification, are you saying …"
- Correct factual misstatements
- Object timely
- Submit jury instructions that fit with your theory—spend time on them
- Submit jury instructions even if it is a court trial.
- Make specific motion challenging sufficiency of the evidence.

805.14(6) **Grounds to be stated with particularity**.

- In any motion challenging the sufficiency of evidence, the grounds of the motion shall be stated with particularity. Mere conclusory statements and statements lacking express reference to the specific element of claim or defense as to which the evidence is claimed to be deficient shall be deemed insufficient to entitle the movant to the order sought. If the court grants a motion challenging the sufficiency of the evidence, the court shall state on the record or in writing with particularity the evidentiary defect underlying the order.

HINTS:

- Look over verdict forms carefully
- Don’t have a court trial.

II. Motions in Limine

Best way

to preserve

the record for appeal.

Why?

- It’s on paper;
- You’ve framed the issue;
- You can cite the relevant law clearly.

Some possible motions

A. Challenge prior bad acts

Especially those occurring prior to dispositional order.

- ***LaCrosse County DHS v. Tara P.,***
  252 Wis. 2d 179 (Ct. App. 2002)

What did Tara P. say?

- Affirmed order (by former SPD attorney) that allowed evidence of prior bad acts from before dispositional order. Court allowed evidence of acts referred to in the CHIPS petitions that prior to the CHIPS order the mother repeatedly failed to maintain eligibility for public assistance and repeatedly failed to meet with Job Service, a an employment training program. The court found that:

"Tara P.'s long history of failing to take advantage of state-offered mechanisms to obtain housing and employment training, considered in conjunction with her current failure to meet the stable housing and employment conditions, is evidence tending to show that Tara P. is unlikely to meet these conditions in the future."

The court also said that in determining whether there is a substantial likelihood that a parent will not meet the conditions for return, the fact finder must necessarily consider the parent's relevant character traits and patterns of behavior….

However, **“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. For example, evidence may be excluded on relevancy grounds in light of the particular facts of the case.**

State v. Quinsanna D., 2002 WI App 318, 259 Wis. 2d 429.

- Nothing in sec. 904.04 precluded evidence of Quinsanna's prior offenses and sentences. They were admissible to prove that she had failed to assume parental responsibility.
- Quinsanna did not challenge evidence under Wis. Stat. §904.03.

Practice Pointers regarding prior bad acts:

- Challenge the evidence under Wis. Stat. §904.03 or relevancy grounds
- Both Quinsanna D. and Tara P. are court of appeals decisions—challenge them directly in the appropriate case.
- Challenge especially evidence occurring before the CHIPS order. In ***Tara P***. the court allowed in prior evidence listed in the CHIPS petitions only.

B. Keep out ASFA information

- In general, try to limit discussion of why the child was placed outside the home.
- In specific, A witness should never say, “We filed the petition because the law requires it whenever a child has been out of the home for 15 of the previous 22 months.”
- This is wrong, prejudicial, and irrelevant.

48.417(1)(a) requires filing when child placed out of home for 15 of 22 months:

--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).**

It’s not relevant.

- Time out of home is relevant, but the jury does not have to find that the child has been placed outside of the home for 15 of the prior 22 months.

The real reason

- County may lose money if they don't terminate, and that is not necessarily child's best interests.
- This is a good reason to depose the social worker.
- Ex. TPR appeals went up 8x following adoption of ASFA

C. Due process/ equal protection/ unclean hands.

- Challenge failure to assume or continuing CHIPS when the government has placed the child outside of the home without court order. That practice is illegal.

- 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."

3 challenges

1) Due Process violation

- It is fundamentally unfair to allow government to place child outside of the home and then say the parent failed to do what was made impossible because of placement outside of the home.

- The Wisconsin Supreme Court has said that substantive due process "protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair." ***Kenosha County v. Jodie W.***, 2006 WI 93, ¶39, 293 Wis. 2d 530, 716 N.W.2d 845. In that case, Wis. Stat. 48.415(2) was unconstitutional as applied where it allowed a finding of unfitness "based solely on the parent's failure to meet an impossible condition…." ***Id.*** at ¶19.

2) Violation of Equal Protection

- When the court places a child outside of the home, they have to follow a host of rules pursuant to Chapter 48. Informal suspension of visitation applies no rules, does not require notice or written notification, and does not require that the parent be given a chance to object. Arguably this violates equal protection of the law.

- In ***Stanley v. Illinois***, 405 U.S. 645 (1971), for example, the United States Supreme Court held that "by denying [Stanley] a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment." ***Id***. at 649. A parent's interest is "indeed more precious than any property right." ***Santosky v. Kramer***, 455 U.S. at 758-59. Therefore a parent's interest in their relationship with their children is "fundamental." ***Id***. at 753. A statutory classification that interferes with fundamental constitutional rights, such the right to parent one's child, must be examined under strict scrutiny. ***San Antonio Indep. Sch. Dist. v. Rodriquez***, 411 U.S. 1, 16 (1972). When state laws impinge on personal rights protected by the Constitution, they must serve a compelling state interest and be narrowly tailored. ***City of Cleburne v. Cleburne Living Ctr.***, 473 U.S. 432, 440 (1985).

3) Unclean hands—equity

- For relief to be denied a plaintiff in equity under the "clean hands" doctrine, it must be shown that the alleged conduct constituting "unclean hands" caused the harm from which the plaintiff seeks relief…. "It must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct."

- ***Lake Bluff Hous. v. City of S. Milwaukee,*** 246 Wis. 2d 785, ¶13, 632 N.W.2d 485 (Ct. App. 2001) *quoting* ***Security Pacifica National Bank v. Ginkowski***, 140 Wis. 2d 332, 339, 410 N.W.2d 589 (Ct. App. 1987). A court acting in equity must weigh the equities and "has the power to apply an equitable remedy as necessary to meet the needs of the particular case." ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, N.W.2d 223 (Ct. App. 1984)(addressing equitable estoppel).

- **At the very least**—you should request that the court not instruct the jury that they are to consider whether the parent has exercised "significant responsibility for the **daily** supervision, education, protection and care of the child." The County made that impossible.

D. Severance/Joinder

"They never grant severance in this county" is not the law.

Wis. Stat. § 805.05(2)

- Separate trials. The court, in furtherance of convenience or **to avoid prejudice**, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04 (2) (b), may order a separate trial of any claim, cross claim, counterclaim, or 3rd-party claim, or of any number of claims, always preserving inviolate the right of trial in the mode to which the parties are entitled.

- In a criminal case joinder is not prejudicial under Wis. Stat. §971.12 when the same evidence would be admissible. *See e.g.* ***State v. Hall,*** 103 Wis. 2d 125 (1981).

- Point out all of the different evidence that will come in and how it will be prejudicial to your client.

E. Orders to appear at all hearings

- 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.”

Following **Dane County v. Mabel K** the legislature passed Wis. Stat. § 48.23(2)(b)3 which provides:

- 48.23(2)(b)3. Notwithstanding subd. 1., a parent 18 years of age or over is presumed to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent 18 years of age or over to appear in person at consecutive hearings as ordered is presumed to be conduct that is egregious and without clear and justifiable excuse.

- Only problem—the court has no inherent powers to order a parent to appear at all hearings in violation of SCR 11.02.
- The law is clear that inherent powers are only "'those powers which must necessarily be used' to enable the judiciary to accomplish its constitutionally or legislatively mandated functions." ***State ex rel. Friedrich v. Circuit Court***, 192 Wis. 2d 1, 37, 531 N.W.2d 32 (1995)

Bottom line -

- Object to orders to appear especially if the client has always appeared before. Argue that the presumption created in 48.23 violates due process and equal protection.
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- Also object that entry of default the first time that the parent fails to show is improper because default can only be entered where a party's behavior is egregious or in bad faith, and missing court once is not egregious. Egregious behavior requires repeated violation of the court's order.

F. Object to prejudicial documents which clutter the record.

- Permanency Plans and CHIPS petitions should not be admitted, and CHIPS orders should be admitted only as proof that there existed an order placing the child outside of the home and should not be published to the jury.
- Why? It's not necessary.
- Full of prejudicial stuff.
- They lard up the record.
- Stipulate that the child was placed outside of the home pursuant to court order instead.

G. Daubert Challenges

H. Object to break in jurisdiction

- See ***Vill. Of Trempeleauy v. Mikrut***, 200r WI 79, 273 Wis. 2d 76, 94
- Loss of competency based upon noncompliance with mandatory statutory time periods cannot be waived.
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- 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."

I. Limit the County's argument to the Conditions of Return/Ask for Limiting Instruction to Conform to Facts of the Case

- Recent Case—Condition was client had to control his emotions by expressing anger and frustration in a calm, non-violent, and non-impulsive manner by using his learned coping skills.
- However, the county kept wanting to argue he failed to control his emotions because, “When he becomes frustrated with a situation, instead of being able to work through that, he kind of stops that.”
- Should have requested instruction that County had to prove instances when father reacted violently in order to find this condition was not met.

J. Object to foster parent testimony at trial and statements at disposition that they are amenable to open adoption.

- Testimony at trial sets up an inevitable comparison. Why can't they get this information in some other way and is it really that important.

- Statements of willingness to allow open adoption aren't worth the paper they're not written on. They are illusory and not binding, and savvy foster parents may try to influence the court.

- But see. ***State v. Margaret H.,*** 234 Wis. 2d 606, ¶29, 610 N.W.2d 475 (2000)
- "In it's discretion, the court may afford due weight to an adoptive parent's promises to continue the child's visits with family members, although we cannot mandate the relative weight to be placed on this factor."
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- The statement is dicta because it is unnecessary to decide the issue in ***Margaret H.*** As stated in ***Margaret H.*** that issue was a narrow one:
- This case presents essentially one issue for review: whether the court of appeals misinterpreted Wis. Stat. §48.426(3)(c) in rejecting the circuit court's assumption that the twins' relationship with Margaret H. would be severed upon the termination of parental rights. The resolution of this issue initially entails statutory interpretation, which is a question of law that we decide independently of the decisions rendered by the circuit court and the court of appeals.
- ***Margaret H***. 234 Wis. 2d 606 at ¶13.

- Wisconsin Stat. §48.426(3) lists the factors that "the court shall consider" at disposition following a finding of grounds to terminate. It does not address factors that the court cannot or should not consider.

- Not only is the statement dicta, but also it is somewhat contradictory or softening to the holding ***Margaret H.*** In that case, this court interpreted the statutes "to unambiguously require that a circuit court evaluate the effect of a legal severance on the broader relationships existing between a child and the child's birth family." ***Id*.** at ¶21. In so doing it rejected a claim based on the foster parent's willingness to allow an open adoption that termination would not lead to an "actual severance." ***Id*.** at ¶25.

III. Some cases need overturning

- 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.

- ***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…."

- The dissent by J. Abrahamson says that assumption of parental rights is a legal decision that should be made by the courts.

- Tara P.
- Quinsanna D.
-
- Any others?

IV. Other issues:

- **A. Attacking bad CHIPS orders**
- Any attack must be made in the trial court; this is not something that can be fixed on appeal.
- Address 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.

- 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.
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- 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.

- 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."
- 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.

B. Argue for criminal law rights:

- 1) 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."

2) 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."

3) 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.
- 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.

- **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.

C. Argue prejudicial spillover

- If an appellate court vacates a conviction on one or more counts when multiple counts are tried together, the defendant is entitled to a new trial on the remaining counts upon showing compelling prejudice arising from evidence introduced to support the vacated counts. ***State v. McGuire***, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996).

- If you win a count, request dismissal of the remaining count(s) based on prejudicial spillover. You will need to be specific about what evidence should not have be admitted and why it is prejudicial to the remaining count(s).
- Plan ahead and get the court to list what claim each piece of evidence is admitted to prove.

D. View the CHIPS file

- Check the orders – warnings, expiration, etc.
- Check if CHIPS counsel was improperly denied (Joni B. v State)
- If you have questions order the transcripts.
- Look for pro-se correspondence by your client to CHIPS court
- Look for exhibits previously entered at permanency plans, etc.
- Look, look, look you never know what you may find

V. If anything bugs you, talk to others, and figure out a way to raise it and preserve it for appeal.

Final Thought:

- **Who said: "If you can't win a case at trial, then a good attorney should try the case in the best possible way to win on appeal"?**

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