

NUTS & BOLTS OF TPRS



Mary M. Hart

Kenosha County
District Attorney's Office

Two types of TPRs

Wis. Stat. §48.41 – Voluntary TPR

Wis. Stat. §48.415 – Involuntary TPR

Phases of TPRs

Two phases to TPRs:

- Grounds – does the court have a legal reason to TPR
- Best Interest – is it in the child's best interest to TPR

Focus at phases:

- Grounds – parent's rights are paramount
- Best Interest – child's rights are paramount

<p>Grounds</p>	<ul style="list-style-type: none"> • Voluntary Consent • Admission/No Contest to Involuntary TPR Grounds • Default in Involuntary TPR <ul style="list-style-type: none"> • Evidentiary hearing required • Fact-Finding Hearing in Involuntary TPR <ul style="list-style-type: none"> • Burden of clear and convincing evidence (beyond a reasonable doubt in WICWA cases) • Decision made by judge or jury
<p>Disposition</p>	<ul style="list-style-type: none"> • Child's Best Interests • Court considers six factors in s. 48.426

Voluntary TPR – Wis. Stat. §48.41

- Parent is asking the court to TPR
- Parent is waiving his/her right to contest both phases

Voluntary TPR – Wis. Stat. §48.41

Parent appears by telephone:

- At the request of the parent, unless good cause to the contrary is shown, admit testimony on the record by telephone or live audiovisual means

Voluntary TPR – Wis. Stat. §48.41

Alleged father of **non-marital** child:

- Can terminate any parental rights he may have to the child without appearing in court
- Alleged father may provide a written, notarized statement in lieu of appearing in court
- Notarized statement must recite that the alleged father has been informed of, and understands, the effect of an order to terminate parental rights and that he voluntarily disclaims any rights that he may have to the child, including the right to notice of proceedings

Minimum requirements: Voluntary TPR plea colloquy

Judge can accept parent's consent only after:

- the effects of TPR are explained to parent
- Judge or attorney has questioned the parent
- Court is satisfied that the consent is informed & voluntary

Written plea form is not required; however, it is advisable

If ICWA applies: consent in writing, before a judge, and certified by the judge

- **Circuit Court Form IW-1637**

Involuntary TPR grounds Wis. Stat. §48.415

Abandonment – §48.415(1) – 5 types

Relinquishment – §48.415(1m)

Continuing CHIPS – §48.415(2) – 2 types

Continuing Parental Disability - §48.415(3)

Continuing Denial of Periods of Physical Placement/Visitation – §48.415(4)

Involuntary TPR grounds

Wis. Stat. §48.415

Child Abuse - §48.415(5)

Failure to Assume Parental Responsibility - §48.415(6)

Incestuous Parenthood - §48.415(7)

Homicide or Solicitation to Commit Homicide of Parent - §48.415(8)

Parenthood as a Result of Sexual Assault - §48.415(9)

Involuntary TPR grounds

Wis. Stat. §48.415

Commission of Felony Against a Child - §48.415(9m)

Prior Involuntary TPR - §48.415(10)

ABANDONMENT

Most common examples

3 months: child has been adjudicated CHIPS, placed outside the home of a parent pursuant to a court order which contained the TPR warning, and has failed to visit or communicate with the parent for a period of 3 months or longer

ABANDONMENT
Most common examples

Six months: child has been left by the parent with any person the parent knows or could discover the whereabouts of the child and the parent fails to visit or communicate with the child for a period of six months or longer

- CHIPS finding is not required
- TPR warnings are not required

ABANDONMENT
Most common examples

Incidental contact by the parent with the child shall not preclude the court from finding that the parent has abandoned the child

ABANDONMENT:
Affirmative defenses

Affirmative defense – “good cause” for failing to visit/communicate for 3/6 months

- Burden is on **PARENT** to prove “good cause” for failing to visit or communicate
- Burden of proof – **preponderance of evidence**

ABANDONMENT:
Affirmative defenses

1st: did parent have "good cause" for failing to visit with the child?

If no, then inquiry is done & parent has not proved affirmative defense.

If "good cause" is found for failing to visit with the child, then go to 2nd inquiry.

ABANDONMENT:
Affirmative defenses

2nd: did parent have "good cause" for failing to communicate w/child?

Good Cause for failing to communicate can be based on evidence that the child's age or condition would have rendered any communication with the child meaningless

If no, then inquiry is done & parent has not proved affirmative defense.

If "good cause" is found for failing to communicate with the child then go to 3rd inquiry

ABANDONMENT:
Affirmative defenses

3rd: if good cause exists for the parent's failure to visit or communicate with the child, then the parent must show either of following:

- Parent communicated about the child with the child's physical custodian or with the agency responsible for the care of the child;
- OR
- Parent had "good cause" for failing to communicate about the child with the physical custodian or with the agency responsible for the care of the child.

ABANDONMENT Ground

See *Odd S.G. v. Carolyn S.G.*, 194 Wis.2d 366, 533 N.W. 2d 794 (1995) regarding the burden shifting to parent to prove "good cause" for failing to visit or communicate

It is possible to file a TPR petition, pursuant to the 6 month abandonment grounds, for periods of time prior to the biological father's legal adjudication as the child's father.

[See *State v. James P.* 2005 WI 80, 281 Wis.2d 685]

ABANDONMENT Ground

Whether the parent visited or communicated with the child prior to or following the abandonment ground is not relevant at the "grounds" phase

Allege as large a time frame as possible – not just 3 months if you have 8 months

Multiple periods of abandonment can be alleged

ABANDONMENT Ground

- One verdict form can be submitted for a continuous period of time (eg. January 1, 2018 – August 1, 2018)
- Separate verdict forms should be submitted if you have multiple abandonment periods that are separated by non-abandonment periods (eg. January 1, 2017 – August 1, 2017 and February 1, 2018 – July 1, 2018)
- Abandonment period does not need to immediately precede the filing of TPR petition

Continuing CHIPS ground

2 Types of Continuing CHIPS

- Typical CHIPS case
- On 3 or more occasions child was found CHIPS and removed from the home

Elements are not the same

Typical Continuing CHIPS ground

Element 1

- Child found to be CHIPS pursuant to any CHIPS ground
- Placed/continued to be placed outside the home of a parent pursuant to one or more CHIPS orders for a cumulative total period of six months or longer
- CHIPS orders contain the written TPR warnings required by Wis. Stat. §48.356

Typical Continuing CHIPS ground

Element 2:

- Agency has made a "reasonable effort" to provide the services ordered by the court

Element 3:

- Parent has failed to meet the conditions established for the safe return of the child to the home (as of the date the TPR petition was filed)

Typical Continuing CHIPS ground

Element 4 – OLD LAW

- There is a substantial likelihood that the parent will not meet the conditions established for the safe return of the child to the home within the nine month period following the fact finding hearing.

NEW CHANGE IN LAW AFFECTING ELEMENT 4

Typical Continuing CHIPS ground

- Change immediately effective on 4/6/18 –
- Element 4 is eliminated if:
 - At time of TPR petition filing: child has been placed outside the home for 15 of 22 months
 - At time of TPR fact finding hearing: child has been placed outside the home of the parent for 15 of 22 months

Typical Continuing CHIPS ground

- Element 4 continues until the 15th month of out of home placement.
- If TPR fact finding hearing occurs prior to the 15th month, the jury is required to consider:

is there a substantial likelihood that the parent will not meet the conditions established for the safe return of the child to the parent's home within 15 months of the child's out of home placement

Element 4 – What do we do now?

Questions: based on the immediately effective date

- Parents have been warned only under the “old” law & TPR petition has been filed or will be filed prior to being given the “new” warning?
- Parents have been given the “new” warning but the TPR fact finding hearing is within 9 months of the new warning?

Continuing Denial of Periods of Physical Placement or Visitation ground

Elements:

- Denied periods of physical placement (family court order) or visitation (CHIPS/JIPS case)
- Written TPR warning must be attached to court order
- At least one year has elapsed
- The court has not modified the order so as to permit periods of physical placement or visitation

Continuing Denial of Periods of Physical Placement or Visitation ground

It is important for the court to set pre-conditions for visitation - Pre-conditions should be very concrete & specific to the individual circumstance

At the time the court denies a parent the ability to visit with the child, the court should read the Denial of Visitation termination of parental rights ground

Denial of Visitation TPR ground & pre-conditions for visitation should be read at each subsequent hearing

Continuing Denial of Periods of Physical Placement or Visitation ground

Pre-conditions for visitation: Example

- Parent must meet with the assigned worker for four consecutive weeks
- Parent shall write letters to the child on a weekly basis for four consecutive weeks and forward the letter to the assigned case worker

Continuing Denial of Periods of Physical Placement or Visitation ground

Pre-conditions for visitation: Example

- Parent must submit urine for testing which is free of alcohol, illegal drugs and prescription drugs that have not been prescribed for the parent for four consecutive weeks
- Parent shall attend parenting education classes for four consecutive weeks
- There shall be a hearing prior to the re-instatement of visitation (this avoids a dispute between the parent & case worker regarding completion of the pre-conditions).

Continuing Denial of Periods of Physical Placement or Visitation ground

- It is possible to have a denial of visitation ground AND an Abandonment ground – if the parent is permitted to communicate with the child either through letters or phone calls
- See Dane County Department of Human Services v. P.P., 2005 WI 32, 279 Wis.2d 169.

Child Abuse ground

Child Abuse – 3 elements

- 1st: Parent has exhibited a pattern of physically/sexually abusive behavior
- 2nd: Behavior is a substantial threat to the health of the child who is subject of TPR petition
- 3rd : Either of the following:
 - parent caused death or injury to a child or children resulting in a felony conviction **OR**
 - a child has been previously removed from the parent's home pursuant to a CHIPS dispositional order after a CHIPS finding under 48.13(3) OR (3m)

Child Abuse ground

- Felony "conviction" – **appeal as of right must be completed** [see *Monroe Co. v. Jennifer V.* 200 Wis.2d 678; 548 N.W. 2d 837 (Ct. App. 1996)].
- However, an appeal not related to guilt or innocence is still considered a felony conviction [see *Reynaldo F. v. Christal M.* 2004 WI App 106, 272 Wis.2d 707] – this was a Commission of a Serious Felony ground but is probably applicable to this ground.

Failure to Assume Parental Responsibility ground

Failure to Assume Parental Responsibility – 2 Elements

- 1st: You are the parent or you may be the parent
- 2nd: You have not had a substantial parental relationship with the child

Failure to Assume Parental Responsibility ground

"Substantial parental relationship"

- Acceptance & exercise of significant responsibility for
- Daily supervision, education, protection and care of the child

Failure to Assume Parental Responsibility ground

In evaluating whether the parent has had a substantial parental relationship, the fact finder may consider:

- Did the parent express concern for or interest in the support, care or well-being of the child
- Did the parent neglect or refuse to provide care or support for the child
- Did the (alleged) father express concern for or interest in the support, care or well-being of the mother during her pregnancy

Failure to Assume Parental Responsibility ground

List is not exclusive – fact finder is not limited by the factors enumerated in the statute

In determining whether a biological father has failed to assume parental responsibility, the fact finder must consider the father's efforts to assume parental responsibility after he discovers he is the father but before the fact finding hearing.

See State v. Bobby G., 2007 WI 77, 301 Wis.2d 531

Commission of a Serious Felony Against a Child ground

Serious Felony ground – 3 elements

- 1st: A child of the person whose parental rights are sought to be terminated
- 2nd: Was the victim of a serious felony
- 3rd: Evidenced by a final judgment of conviction

Prior Involuntary Termination of Parental Rights ground

Prior Involuntary Termination of Parental Rights – 2
Types

- Child adjudicated CHIPS
- Child born after a TPR petition under this section was filed

Prior Involuntary Termination of Parental Rights ground

Child was adjudicated CHIPS:

- Was adjudicated CHIPS pursuant to Wis. Stat. §48.13(2), (3), or (10)
- That, within 3 years prior to the date the child was adjudged to be CHIPS under 48.13(2), (3), or (10), a court has ordered the termination of parental rights with respect to another child of the parent pursuant to one or more grounds for TPR

Prior Involuntary Termination of Parental Rights ground

The prior TPR ground must be an involuntary TPR ground

It does not matter which involuntary TPR ground formed the basis for the prior TPR. [See Oneida County Department of Social Services v. Nicole W., 2007 WI 30, 299 Wis.2d 637]

Prior Involuntary Termination of Parental Rights ground

Child born after TPR granted under this statute

- That, within 3 years prior to the date of birth of the child who is the subject of the TPR petition, a court has ordered the termination of parental rights with respect to another child of the parent pursuant to Prior Involuntary TPR ground
- This would be the 3rd child – 1st child Invol TPR, 2nd child – TPR granted under Prior Invol TPR ground & now third child born within 3 years of 2nd TPR

Suspension of Visitation and Contact Wis. Stat. §48.42(1m)

- Can file a petition to suspend visitation and contact with the child
- Petition to suspend visitation/contact is filed at the time TPR petition is filed
- Must allege facts sufficient to show that prohibiting visitation or contact would be in the child's best interest

Suspension of Visitation and Contact

Wis. Stat. §48.42(1m)

- Court may issue a temporary ex parte order prohibiting the parent from visiting or communicating with the child if the court believes it is in the child's best interest
- Court hearing is held on the request for an injunction prior to or at the Initial Appearance on the TPR petition
- The order prohibiting visitation in TPR applies to the underlying CHIPS case

Suspension of Visitation and Contact

Wis. Stat. §48.42(1m)

- Some courts require the suspension of visits to be filed in the CHIPS case – if you don't believe the parent should visit or communicate with the child, file your request in the CHIPS case – not the TPR case
- **What does your county require?**

WHO MUST BE SUMMONED –

Wis. Stat. §48.42(2)

- Mother
- Adjudicated or presumptive father
- Guardian
- Guardian ad Litem for Child
- Legal custodian
- Indian custodian of the child
- Child, if 12 years or older
- Any other person to whom notice is required to be given under Chapter 822 – UCCJA

WHO MUST BE SUMMONED –

Wis. Stat. §48.42(2)

Alleged father(s), unless waived right to notice:

- Person who filed a declaration of paternal interest
- Person(s) alleged to the court to be the father of the child, or who may, based on the statement of the mother or other information presented, may be the father of the child
- Person who has lived in a familial relationship with the child and who may be the father

Note: Adoption cannot occur unless the parental rights of the parent, whether known or unknown, have been terminated. See s. 48.91(2).

Manner of Serving Summons & Petition

- Personal Service: at least 7 days prior to the court hearing – if in state
- Service on a person with a disability shall be as set forth in Wis. Stat. §801.11
- Serving a Wisconsin State Prison inmate: Wis. Stat. §302.025
- ICWA cases: In addition to notice requirements above, notice via registered mail to parents and tribe

Manner of Serving Summons & Petition

Constructive Notice: Publication

- If with reasonable diligence a party cannot be personally served, service shall be made by publication
- Published in newspaper that is likely to give notice
- Must be published once
- If identity of father is not known, petitioner can request that constructive notice be waived

Initial Appearance – Wis. Stat. §48.422

- Initial Appearance shall be held within 30 days after TPR petition is filed with the court
- If ICWA – then Initial Appearance shall not occur until at least 10 days after receipt of the notice of the hearing if the tribe is known or until at least 15 days after receipt of the notice by the U.S. Secretary of the Interior
- If ICWA – Indian child’s parent, Indian custodian, or tribe may request an additional 20 days to enable the requestor to prepare for the hearing – the court shall grant such request

Initial Appearance – Wis. Stat. §48.422

Rights of Party:

- Contest the petition
- Jury trial & Substitution of judge – must be made by the end of the Initial Appearance or be waived
- Continuance to consult with an attorney on the request for Jury Trial or substitution of judge
- If a person appears and claims to be the father of the child, court shall set a date for hearing on the issue of paternity

Initial Appearance Procedures – Wis. Stat. §48.422

Before accepting admission to TPR petition, the court shall:

- Address the party & determine that the admission is made voluntarily & with understanding of the nature of the acts alleged in the petition & potential dispositions
- Establish whether any threats or promises were made
- Unrepresented parties: alert the party to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them

**Initial Appearance Procedures –
Wis. Stat. §48.422**

Before accepting admission to TPR petition, the court shall:

- Make such inquiries as satisfactorily establish that there is a factual basis for the admission

**Initial Appearance Procedures –
Wis. Stat. §48.422**

If the petition is not contested, the court shall:

- Hear testimony in support of the allegations in the petition
- Address the parties in the same way as when taking an admission

**Acceptance of Admission or
No Contest Plea**

The court must ensure that the parent understands:

- that he/she will be found to be an “unfit” parent
- AND**
- that, at the time of the dispositional hearing, the court will decide whether to TPR or to dismiss the TPR petition based on what is in the child’s best interest

Oneida County Dept. of Social Services v. Therese S.,
2008 WI App 159, 314 Wis.2d 493

Default Judgment – Involuntary TPR

- Court must conduct evidentiary hearing to establish TPR grounds exist – s. 48.422(3)
- Parent entitled to notice of future hearings, if any
- No default for failing to obey a summons or failing to appear at trial if attorney appears
- Attorney must be allowed to participate unless discharged after finding parent waived counsel by conduct – s. 48.23(2)

Types of Default

1. Failure to obey a summons – s. 806.02(1)



2. Failure to obey a court order – s. 805.03



3. Failure to appear at trial – s. 806.02(5)



Fact-Finding Hearing – Wis. Stat. §48.424

If the TPR petition is contested:

- Fact finding hearing shall be set within 45 days of the Initial Appearance
- Court has the ability to toll time limits - §48.315
- Hearing is to determine whether “grounds” exist to TPR
- Jury only determines “grounds” – not disposition

Fact-Finding Hearing – Wis. Stat. §48.424

Fact-Finding Hearing:

- ICWA: whether the additional requirements under Wis., Stat. §48.42(1)(e) have been proved.
- If “grounds” are found, the court shall find the parent “unfit”
- Burden of Proof: Clear & convincing – exception: ICWA cases

Standard & Factors – Wis. Stat. §48.426

Standard: best interest of the child

Factors: 6 must be considered – others may be considered

- Likelihood of the child’s adoption after TPR
- Age & health of child – now & at the time of removal
- Whether the child has substantial relationships with parent or family members & whether it would be harmful to the child to sever the relationships

Standard & Factors – Wis. Stat. §48.426

Factors

- Wishes of the child
- Duration of the separation of the parent from the child
- Whether the child will enter into a more stable and permanent family relationship as a result of TPR, taking into account the conditions of the child’s current placement, the likelihood of future placements & the results of prior placements

Disposition

Any party may present relevant evidence

Expert testimony may be presented

Any party may make alternative dispositional recommendations

After receiving any evidence, the court shall enter one of the dispositions authorized by law within **10 days** of the dispositional hearing

Disposition – Foster parent's statement

The foster parent/physical custodian has a right to make a statement relevant to the issue of disposition

Statement may be oral or written

Statement may be made at disposition or a written statement may be submitting prior to disposition

Disposition

Court may:

- Dismiss the petition if the court finds that the evidence does not warrant TPR
- Order TPR & transfer custody & guardianship pending adoption to the State/county department authorized to accept guardianship/child welfare agency authorized to accept guardianship or to a kinship relative with whom the child resides or appoint a guardian under Wis. Stat. §48.977
- Order TPR & sustaining care

Meaningful participation

A parent has a right to meaningfully participate in the court proceedings

Whether physical presence is necessary is required must be determined on a case by case basis
In the Interest of Christopher D. 191 Wis.2d 681, 530 N.W.2d 34 (Ct. App. 1995).

Meaningful participation

An alternative to physical presence must be the functional equivalent to personal presence – unless the parent waives his/her appearance or the ministerial nature of the proceedings makes the physical presence unnecessary. The parent must be able to assess the witnesses, confer with his/her lawyer and hear everything that is going on.
State v. Lavelle W. 2005 WI App 266, 288 Wis.2d 504

Court found that father could not meaningfully participate by telephone as he claimed that he could not hear the proceedings.

Meaningful participation

Father was deemed to be able to meaningfully participate in the TPR proceedings although he appeared via webcam from Mexico. As he was able to see and hear the proceedings and confer with his attorney.

The father had been deported to Mexico. Options to secure his physical presence were unsuccessful.

Waukesha County Dept. of Health & Human Services v. Teodoro E., 2008 WI App 16, 307 Wis2d 372

Stipulation by a parent to an element of a TPR ground

Frequently, there is no dispute regarding one or more elements of a Continuing CHIPS ground, such as:

Whether the child has been placed outside the home of a parent pursuant to one or more court orders which contained the written TPR warnings

Or

That the parent, as of the date the TPR petition was filed, had failed to meet the conditions of return.

Stipulation by a parent to an element of a TPR ground

Have the parent (rather than the attorney alone) confirm the stipulation on the record – verbally & in writing

Courts are urged to engage the parent in a colloquy regarding the effect of the stipulation and to ensure that the stipulation is knowingly and voluntarily given. Walworth County DH&HS v. Andrea L.O., 2008 WI 46, 309 Wis.2d 161

See also: Manitowoc Human Services Department v. Allen J., 2008 WI App 137, 314 Wis.2d 100

Parent's criminal history & relevance at trial

A parent's criminal history & sentences may be relevant to the TPR trial – information could assist the jury in determining whether:

- the parent has had a substantial parental relationship with the child. State v. Quinsanna D., 2002 WI App 318, 259 Wis.2d 429

Parent's criminal history & relevance at trial

A parent's criminal history & sentences may be relevant to the TPR trial – information could assist the jury in determining:

- The likelihood of the parent meeting the conditions of return in the next 9 months. LaCrosse County Dept. of Human Services v. Tara P., 2002 WI App 84, 252 Wis.2d 179

Parent's prior criminal history

A parent's prior convictions are not so prejudicial so as to outweigh the probative value to the jury if it assists the jury in understanding the reasons the child was removed from the home

Reynaldo F. v. Christal M., 2004 WI App 106, 272 Wis.2d 816.

Parent's prior history

Events prior to the CHIPS dispositional order may be relevant in predicting the parent's chances of completing the conditions of return within the 9 months following the TPR fact finding hearing.

LaCrosse County Dept. of Human Services v. Tara P., 2002 WI App 84, 252 Wis.2d 179
