

TPR ATTORNEY PROTOCOL 3.0:

Effective and Zealous Representation of Parents in Termination of Parental Rights Cases in Wisconsin



**WISCONSIN
STATE PUBLIC
DEFENDER**

TABLE OF CONTENTS

Introduction 3

The “Holtz” TPR Diamond..... 4

Ongoing Expectations & Ethical Considerations 6

Timeline of a Case 7

TPR Petition & Appointment..... 8

ICWA..... 11

Initial Discovery/Investigation – Existing Court Files 12

Client Interview & Establishment of Goals 14

Continued Discovery/Investigation 16

Issue Spotting..... 19

The Big TPR Cases You Need to Know 21

Develop Defenses & Theory of the Case 23

Motions..... 24

Witnesses (Work with CSS & Investigators) & Exhibits 25

Motions in Limine 26

Negotiations 28

Litigate..... 30

Disposition 33

Appeal 34

Conclusion 35

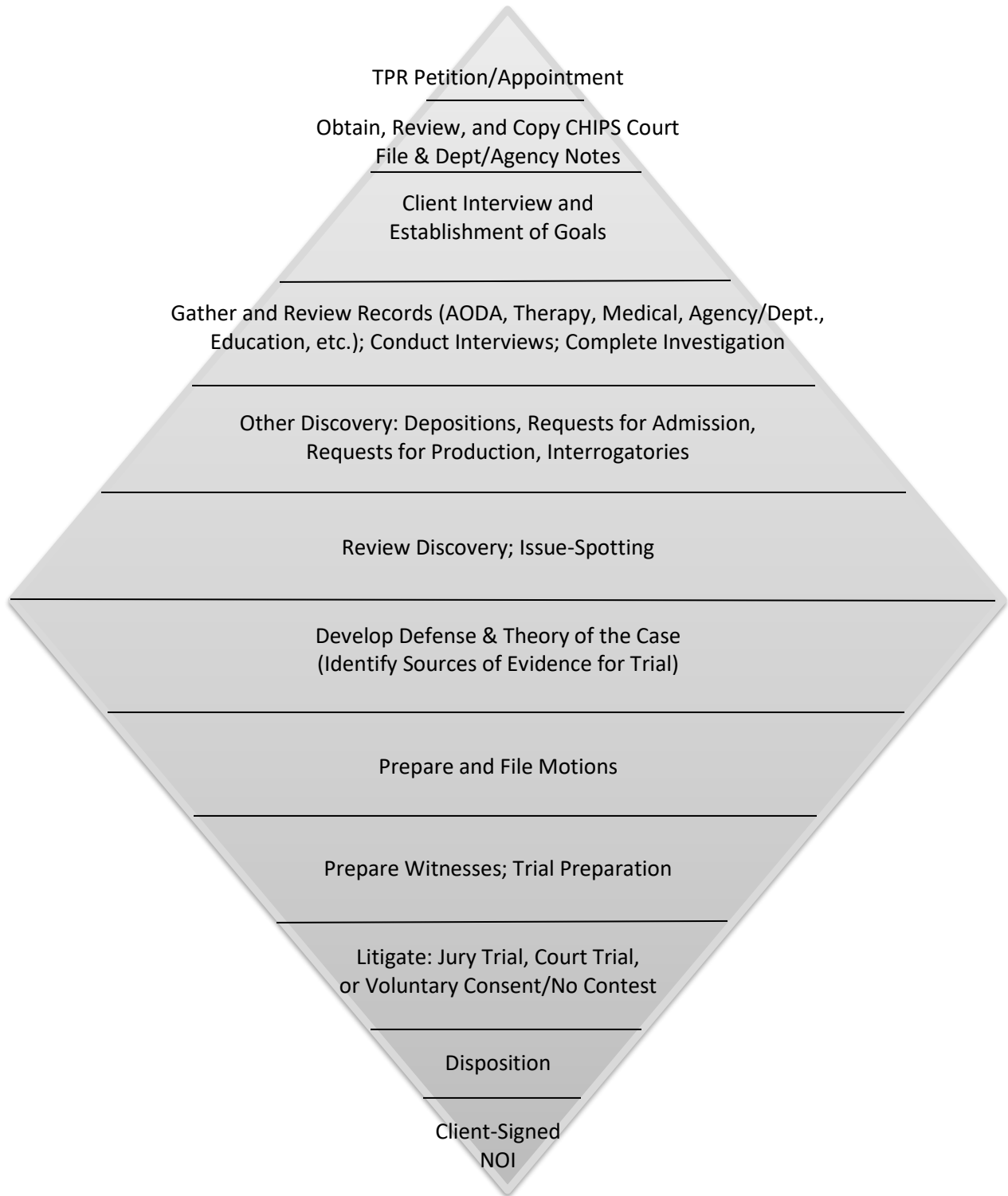
INTRODUCTION

The United States Supreme Court has recognized a parent's fundamental right to the care and custody of his or her child, and concluded that a state may not terminate this right without an individualized determination that the parent is unfit through due process of law. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). Absent a finding of unfitness, it is presumed that children are best served by remaining with their natural parents. *Santosky v. Kramer*, 455 U.S. 745 (1982). The Wisconsin Supreme Court has similarly recognized that “[a] parent's desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’” *Sheboygan County D.H.H.S. v. Julie A.B.*, 2002 WI 95, ¶ 22, 255 Wis.2d 170, 648 N.W.2d 402 (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27, 1 (1981)).

Due to the fundamental liberty interest involved in parenting, when anyone seeks to permanently sever that tie, parents must be afforded protections, including zealous, knowledgeable, and competent representation. Parents’ attorneys play a vital and essential role in safeguarding this liberty interest.

The Office of the State Public Defender (“SPD”) appoints attorneys to represent parents in Termination of Parental Rights (“TPR”) proceedings. WIS. STAT. §§ 48.23, 977.08(2)(g). This protocol is intended to promote quality representation among such attorneys representing parents in TPR proceedings. This protocol is not a comprehensive check list of every issue or consideration that may come up while litigating a TPR case, but is meant to be a starting point in representation. It should not be a substitute for seeking further education, conducting legal research, reading the statutes, or consulting with colleagues. This protocol is also focused on representation at the trial court level and does not address the specific obligations of appellate attorneys in TPR cases.

THE "HOLTZ" TPR DIAMOND



ONGOING EXPECTATIONS & ETHICAL CONSIDERATIONS

The expectations for each attorney representing a parent in a TPR proceeding include the following:

1. Advocate for the client's goals and empower the client to direct the representation, making informed decisions based on thorough and strategic counsel. *See also* WI:SCR 20:1.4.
2. Act in accordance with the duty of loyalty owed to the client – the same duty owed to *any other* client in a case involving a constitutional liberty interest.
3. Meet and communicate regularly with the client in advance of all court proceedings. Counsel the client about all legal matters related to the case. This includes specific allegations related to/against the client, the client's rights in the pending proceedings, all court orders and the consequences for failing to abide by the same. *See also* WI:SCR 20:1.4.
4. Adhere to all laws and ethical obligations concerning confidentiality.
5. If the client falls out of contact with counsel, counsel should take diligent steps to locate and communicate with the client.
6. Be familiar with WIS. STAT. § 48.23(2), which requires that parents (not children-clients) maintain contact with counsel, and failure to do so constitutes a presumed waiver of the right to counsel. Unless a client expresses a desire to waive or remove counsel, counsel should object to removal of counsel to, at least, preserve a record for appeal.
7. As far as reasonably possible, attempt to maintain a normal client-attorney relationship with a client with diminished capacity, such as a child client or a client with mental illness. Advocacy counsel does not have a duty to raise the issue of competency in CHIPS cases. *See also* WI:SCR 20:1.14, WIS. STAT. § 48.235(1)(g).
8. If the case involves the Indian Child Welfare Act or Wisconsin Indian Child Welfare Act (ICWA or WICWA), consider the impact thereof throughout the proceedings.
9. If family members or alternative placements are identified, communicate these possible placement providers to the caseworker/social worker.
10. Continually encourage the parent to remain actively engaged in services, whether or not the Court ordered the agency to provide such services.
11. Be alert to, and aware of, potential conflicts of interest that would interfere with the competent representation of the client. This is an ongoing obligation throughout the case, as conflicts may arise at any point, especially as parties conduct discovery and proceedings continue. *See also* WI:SCR 20:1.7.

12. Conduct a throughout and independent investigation at every stage of the proceedings. *See also, e.g.*, U.S. CONST., AMEND VI.
13. Notify the client of all upcoming court dates and other important meetings or appointments.

TIMELINE OF A CASE

Counsel should be aware that ch. 48 prescribes certain time periods and deadlines for the course of a TPR case, though certain time periods are subject to change by local practice and utilization of Wis. Stat. 48.315, which permits courts to extend timelines for good cause shown.

Petitioner files TPR petition →

Within 30 days of this date → Hearing on Petition (WIS. STAT. § 48.422(1))

At least 7 days before the date of the Hearing on Petition →

Summons served on respondent(s) (WIS. STAT. § 48.42(4)(a))

Hearing on Petition →

At hearing on petition → respondent must assert right to substitute and reserve right to jury trial (WIS. STAT. § 48.29, 48.422(3))

Within 10 days of this date → Any facial challenge to the petition due (WIS. STAT. § 48.297(2))

Within 45 days of this date → Fact Finding Hearing (Trial) (WIS. STAT. § 48.422(2), unless ICWA applies)

File pre-trial motions →

Before trial, unless otherwise specified by the court (WIS. STAT. § 48.297(1))

Fact Finding Hearing (Trial) →

Right away or, if all parties agree or, if no court report yet filed, *within 45 days* → Disposition (WIS. STAT. § 48.424(4))

Disposition →

Right away after evidence or *within 10 days of hearing* → Court enters order on issue of termination (WIS. STAT. § 48.427(1))

Within 30 days of an order terminating parental rights →

Parent must file any notice of intent to pursue post-dispositional relief (WIS. STAT. § 809.107(2)(bm))

TPR PETITION & APPOINTMENT

The expectations for SPD appointment to represent a party in a CHIPS case include the following:

1. Prior to being appointed to represent a parent in a TPR case, ensure that you have applied to be placed on the SPD appointment list and completed all necessary requirements to be SPD certified.
 - a. SPD requires TPR parent advocacy certification for appointment to represent a parent in a TPR proceeding. The certification requires specific CLEs and other litigation experience. For specifics, see your local SPD office or WIS. ADMIN CODE PD §§ 1.04(8)-(10).
 - b. SPD minimum performance standards are available at www.wisspd.org.
 - c. SPD offers regular training sessions to meet the certification requirements. See the SPD Family Defense Practice Coordinator and/or SPD Training Division for more information.
2. Ensure that you are knowledgeable and up-to-date on state and federal statutes and case law regarding both TPR issues and civil discovery. Examples of specific laws of which you should be aware include, but are not limited to, the following:
 - a. Wisconsin Children's Code, Ch. 48, Wisconsin Statutes.
 - b. Wisconsin Rules of Evidence, chs. 901-911, Wisconsin Statutes.
 - c. Wisconsin Rules of Civil Procedure, chs. 801-807, Wisconsin Statutes.
 - d. Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 (and corresponding regulations at 45 C.F.R. Parts 1355, 1356, 1357); and the Fostering Connections to Success and Increasing Adoptions Act, 42 U.S.C. § 622.
 - e. Family First Prevention Services Act, P.L. 115-123.
 - f. Child Abuse Prevention Treatment Act (CAPTA), P.L. 108-36.
 - g. Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963 (and corresponding regulations at 25 C.F.R. Part 23, and the Guidelines for State Courts: Indian Child Custody Proceedings at 45 Fed. Reg. 67, 584 (Nov. 26, 1979)). **See section on ICWA below.*
 - h. Wisconsin Indian Child Welfare Act (WICWA), WIS. STAT. §§ 48.028 and 938.028.

- i. Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP), 42 U.S.C. § 622(b)(9) (1998); 42 U.S.C. § 671(a)(18)(1998); 42 U.S.C. § 1996b (1998).
 - j. Interstate Compact of the Placement of Children, WIS. STAT. § 48.988.
 - k. Foster Care Independence Act of 1999 (FCIA), P.L. 106-169.
 - l. Individuals with Disabilities in Education Act (IDEA), P.L. 91-230.
 - m. Family Education Right to Privacy Act (FERPA), 20 U.S.C. § 1232g.
 - n. Health Insurance Portability and Accountability Act of 1996 (HIPPA), P.L. 104-192 § 264; 42 U.S.C. § 1320d-2.
 - o. Public Health Act, 32 U.S.C. § 290dd (and corresponding regulations at 42 C.F.R. Part 2).
 - p. Wisconsin Supreme Court Rules Chapter 20: Rules of Professional Conduct for Attorneys.
 - q. Wisconsin Actions Affecting the Family, ch. 767, Wisconsin Statutes.
3. Ensure that your current caseload will permit you to devote the time and attention necessary to represent your TPR client with the zealouslyness and competency required. See WI SCR 20:6.2.

The general steps counsel should take upon receipt of the TPR petition include the following:

1. Review the petition for potential facial defects. The petition must set forth allegations that, if true, would grant the petitioner the relief sought. *See, generally, e.g., In the Interest of: Courtney E.*, 184 Wis. 2d 592, 601, 516 N.W.2d 422 (1994). Grounds for finding children in need of protection or services are found at WIS. STAT. § 48.13. The petition must also include the name, birth date, address, and adoption status of the child; the name and address of each parent; the custody status of the child; a factual basis alleging that the child is in need of protection or services; a copy of the Uniform Child Custody Jurisdiction and Enforcement Act Affidavit; whether ICWA applies; and the name/information of the petitioner. WIS. STAT. § 48.255. Consider moving to dismiss the petition if it fails to meet facial sufficiency.
2. Review the initial filings to ensure that the petitioner filed, along with the petition, a summons to the first hearing and information about whether your client was served with a copy of the summons and the petition.

3. Determine whether your client wishes to substitute on the judge assigned, reserve the right to a jury trial, and whether he/she/they wish to contest the allegations in the petition, all of which must be addressed at plea hearing. WIS. STAT. §§ 48.29, 48.30.

ICWA

The Indian Child Welfare Act, or “ICWA,” is a federal law enacted in response to concern that nontribal public and private agencies were removing Native American children from their homes to non-tribal placements at “an alarmingly high percentage[.]” *Haaland et al. v. Brackeen*, 599 U.S. ___, slip op at 2 (2023). Wisconsin codified ICWA as state law in 2009. See WIS. STAT. § 48.028. Under both the federal and state statutes, agencies that place children out of the home (such as local child-protection agencies) must adhere to stricter requirements to remove a tribal child than they must follow to remove a non-tribal child. For example, tribes may intervene in child placement cases, and agencies seeking to remove tribal children must engage in “active efforts” to help the parents with the issue(s) that might put the child at risk. WIS. STAT. § 48.028.

TPR counsel in an ICWA case, then, must be aware of procedural and substantive differences in such cases in comparison to the non-ICWA TPR case. First, counsel must be aware of whether the tribe will intervene in the case and what position the tribe will take. The tribe may join the petitioner, likely creating a three-to-one (petitioner, GAL, and tribe versus parent) scenario; or, the tribe may side with the parent, evening the distribution of parties at opposing counsel tables. Second, counsel must be ready for the possibility that the tribe will transfer proceedings away from the circuit court to the tribal court. A parent does not have a right to counsel in the tribal court like he/she/they does/do in state circuit court. This is a significant consideration as to whether a parent would seek this transfer him/her/themself, for while the tribal court may present some advantages to the parent’s case, one disadvantage is the loss of the right to counsel.

Initial Discovery/Investigation – Existing Court Files and Agency Notes

Counsel should obtain certain information as soon as possible after appointment to gain as much background information about the client as possible. Specifically:

1. Seek and obtain a court order permitting you access to underlying Children in Need of Protection or Services (“CHIPS”) case. Depending upon local practice, this may require filing a motion pursuant to WIS. STAT. §§ 48.396, 48.78. Or, this may simply require a stipulation by the parties to grant parent’s counsel access to those underlying records. Further, be aware that the TPR and CHIPS cases may have different judges, so obtaining the CHIPS case by court order may require intervening in the CHIPS case. Upon receipt of the underlying CHIPS case records, review those records for the following:
 - a. Were all orders legally entered?
 - b. Were TPR warnings attached to dispositional or other orders?
 - c. Are there hearings for which receipt of the transcript may be beneficial?
 - d. Review any dispositional order to learn the conditions of return (those conditions that the Court imposes upon a parent for the safe return of the parent’s child) and the services to be provided by the department/agency to help the parent meet those conditions.
2. Request discovery (from the petitioner) of police reports and department/agency notes right away at the commencement of your appointment. *See* WIS. STAT. §§ 48.293, 48.295. Receipt of this information as early as possible will help you maneuver the case at its earliest stages to help your client prepare for trial (or for a plea), and to help your client and you determine how/whether to request changes in placement or review of the TPC order. *See* WIS. STAT. §§ 48.21, 48.217. Discovery is ongoing before unless/until the Court sets a particular deadline, so counsel may make multiple discovery requests over time (subject to certain quantitative limitations). *See* WIS. STAT. §§ 48.293, 48.295, ch. 804.
3. Request more specific discovery in the form of requests for admission, requests for production of documents, interrogatories, and depositions. *See* ch. 804, Wisconsin Statutes. **These cases are not criminal – so the petitioner will not simply hand over evidence; YOU have to seek and obtain it yourself!** These discovery demands should be done in consultation with your client about the facts giving rise to the allegations in the petition and any factual defenses you may have. As such, you may not necessarily seek this discovery *right away*, but you cannot wait too long, for a party receiving discovery is entitled to reasonable notice of a deposition and 30 days to respond to other discovery demands. **See Continued Discovery section, below.*
4. Seek and obtain a court order granting you permission to any existing court records. This may be another CHIPS case for another child, a family law action, a criminal case, or something else. Depending upon the type of case, you may be able to obtain such records

through a release signed by your client, but you may also need a court order. See WIS. STAT. §§ 48.293, 48.295, 48.396, 48.78, 938.396, 938.78.

Client Interview & Establishment of Goals

Counsel should take reasonable steps to maintain adequate and appropriate contact with the client throughout the proceedings to ensure that the client's goals drive the course of the attorney's representation. *See* WI SCR 20:1.2, 20:1.3, 20:1.4. Counsel should interview the client as soon as possible after appointment to identify the client's goals and make the initial plan for the case, as follows:

1. Obtain your client's contact information and preferred method of communication.
2. Schedule an initial meeting/interview. Given the sensitive nature of these cases, take care to respect your client's comfort, wishes, and situation.
3. Explain attorney-client privilege, the role of advocacy counsel, and the duty to zealously advocate for the client's stated interests. *See* WI SCR 20:1.2, 1.3, and 1.4.
4. Get to know your client. Consider such elements as:
 - a. Cultural competency/humility – know that you may not, and probably do not, have the ability or capacity to fully appreciate the client's perspective and scope of experiences.
 - b. Uniqueness and capacity – consider that your client may have unique characteristics that render him/him/them different than other clients such as competency, incarceration, mental health challenges, addictions to or use of drugs, socioeconomic disparity, domestic violence history, etc.
 - c. Incarceration requires special considerations in TPR cases, for the court may not impose conditions of return that, due to incarceration, are impossible for the client to meet. *See Kenosha Co. Dept. of Human Services v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 429, 716 N.W.2d 845. Relatedly, incarceration may be a barrier to the receipt of services, either pre- or post-disposition; counsel should be aware of these barriers to help the client maneuver various systems and to hold the court and department/agency accountable to appreciating and accommodating your client's position as an incarcerated parent.
5. Discuss with the client his/her/their goals for the course of the case – What is the ideal outcome? What outcomes are tolerable? What outcomes are worth fighting against?
6. Besides goal-setting and interviewing, counsel should also do the following at this first meeting:
 - a. Provide the client with counsel's contact information in writing and establish a preferred and regular communication system. *See* WI:SCR 20:1.4.
 - b. Provide the client with copies of the petition, any court orders, department records, or other relevant information.

- c. Explain the TPR legal process to your client, from the initial hearing on the petition to trial to disposition.
7. Sign the Notice of Intent. Unlike most other forms to file to appeal, your client's signature is required on this notice, should you file it after an adverse decision at disposition. *See* WIS. STAT. § 809.107. While the case has just started, the initial interview is the best time to obtain your client's signature on a notice of intent (NOI) to pursue post-disposition relief, for the end of a case can be emotional and difficult for respondent parents. Preparing this notice just-in-case shows your client you are prepared and protects their future potential appeal interests.

Continued Discovery/Investigation

Discovery, investigation, and other information-gathering in TPR cases are multi-faceted, complex tasks involving different statutes, different methods of requesting information, and different persons/entities from whom to request such information. The rules of civil procedure apply to litigants, but other rules/laws govern confidentiality and accessibility of records. The importance of continued discovery and investigation cannot be overstated – oftentimes, these cases require litigation of circumstances instead of single events, and the recitation, recording, and recitation of such circumstances is often shown to the court through biased (intentional or implicit) lenses of likely-well-intentioned professionals imposing a paternalistic system upon marginalized families. Plucking nuggets here-and-there from oodles of discovery will often allow defense counsel to connect-the-dots to show a bigger, client-centered picture to the jury or judge. To that end, though this is not necessarily an exhaustive list, consider the following discovery and investigation tools:

1. Utilize civil discovery with, as appropriate, *all* other parties (GAL? Another respondent parent?), not just the petitioner:
 - a. Depositions of the social worker, other parent, third parties, etc. WIS. STAT. § 804.02, 804.045, 804.05.
 - b. Interrogatories, limited to 25 unless otherwise authorized by court order or stipulation. WIS. STAT. § 804.08.
 - i. In almost any TPR case, be sure to ask the petitioner to a) produce a witness list for trial, b) explain what efforts the department/agency engaged in to prevent child removal or other formal department/agency involvement, c) explain what alternative familial or community alternatives the department/agency pursued in addition to foster care or other department intervention.
 - c. Production of documents. WIS. STAT. §§ 804.09, 804.10 (This may also require utilizing provisions of confidentiality in ch. 48. *See* WIS. STAT. §§ 48.293, 48.396, 48.78).
 - i. In almost any TPR case, be sure to ask the petitioner for a) eWisSACWIS notes, b) police reports, c) other department/agency records, d) standards of care followed by department/agency workers, e) correspondence (including emails, texts, call logs, etc.) by and between department/agency workers, f) evaluations done of any parent or child, g)
 - d. Requests for admissions. WIS. STAT. § 804.11.
2. Gather records with the permission of your client, including:
 - a. Children’s school records. *See* WIS. STAT. §§ 118.125, 120.13, and FERPA.

- b. Mental health records of the parent and/or child. *See* HIPPA, WIS. STAT. § 51.30, 42 C.F.R. Par 2.
 - c. Children’s and parent’s medical records. *See* HIPPA.
- 3. With the help of your client, engage in other investigation and witness interviewing. Your client will be the best resource to identify persons who may have helpful information to support your client’s case. An investigator should interview these people as soon as practicable to help counsel gather information, issue spot, and continue to form a theory of defense.
- 4. Obtain discovery from governmental entities. Generally, records under Ch. 48 are confidential. But, you should be able to gain access to any record you need, either from the petitioner or by way of permission from your client.
 - a. Prosecutors have access to information. Prosecutors may access agency records (under s. 48.78), for s. 48.78(2)(a) lists, as an exception to the general confidentiality rule, s. 48.981(7), which provides that any reports, notices, and “records maintained by an agency and other persons, officials and institutions” may be released to the “county corporation counsel or district attorney representing the interests of the public, the agency legal counsel and the counsel or guardian ad litem” in CHIPS proceedings (this does not authorize the same disclosure in TPR proceedings, though this is likely not an issue given that the same governmental entity in each county likely prosecutes both the CHIPS and TPR proceedings).
 - b. You can obtain law enforcement and court records. For any child 14 years of age or older subject to the records, and for any adult subject to the records, defense counsel only need to obtain written permission for the records, and upon providing such request, the law enforcement agency or court shall disseminate the records. If counsel is representing a child aged 12 or 13, then counsel must obtain the information either through a court order (WIS. STAT. § 48.396(1)) or through a discovery demand upon a parent of the child (WIS. STAT. § 48.396(2)). However, even though we *may* utilize the above-described request procedure (going through our client or our clients’ parents), defense counsel are also entitled to all law enforcement officer reports prior to the plea hearing upon request by the counsel (WIS. STAT. § 48.293(1)). The prosecutor is responsible for making these records available to defense counsel.
 - c. You can obtain agency records. Sec. 48.78 seems to authorize the agency to disclose the records/information to defense counsel only through counsel’s *clients’* written request. *See, e.g.*, WIS. STAT. § 48.78(2)(a). However, sec. 48.78 defines the agency as the custodian of the records, not the entity representing the interests of the public pursuant to sec. 48.09. Corporation counsel and district attorneys throughout the State of Wisconsin often claim to have an attorney-client relationship with the agency involved in CHIPS or TPR proceedings, but this runs afoul of applicable statutes. *See* ch. 59, Wisconsin Statutes; *see also* Wis. Stat. § 978.06. As such, it is

only the provisions of s. 48.981 that permit prosecutors to access agency records without written consent from the subject of those records. This statute, therefore, makes it clear that defense counsel have two sources from which they may obtain agency records: the agency itself or the prosecutor.

In addition to seeking information, defense counsel must be prepared to respond to discovery demands from other parties. And, unlike criminal matters, failure to respond timely or adequately may result in sanctions and adverse inferences or rulings against the client. *See* WIS. STAT. § 804.11.

Issue Spotting

Issue-spotting in TPR cases is multifaceted; unlike simply identifying defenses to criminal charges, as a defense counsel would do in a criminal case, a TPR advocate attorney should issue-spot for both *grounds* (Do grounds exist to find a parent unfit under WIS. STAT. § 48.415?) and *disposition* (Even if the parent is unfit, would it be in the child's best interests to terminate the parent's parental rights?).

1. At the *grounds* phase, consider all the statutory grounds under which a parent may be found unfit:
 - a. Did the parent abandon the child? WIS. STAT. § 48.415(1).
 - b. Did the parent relinquish the child? WIS. STAT. § 48.415(1m).
 - c. Is the child in continuing need of protection or services, as evidenced by the parent's failure to meet the conditions established for the safe return of the child to the parental home? WIS. STAT. § 48.415(2).
 - d. Is the parent subject to continuing disability and placed at an inpatient facility? WIS. STAT. § 48.415(3).
 - e. Has another court continually denied periods of placement between the parent and child? WIS. STAT. § 48.415(4).
 - f. Has the parent exhibited a pattern of physically or sexually assaultive behavior? WIS. STAT. § 48.415(5).
 - g. Has the parent failed to assume parental responsibilities? WIS. STAT. § 48.415(6).
 - h. Was the child born as a result of incest? WIS. STAT. § 48.415(7).
 - i. Has the parent committed, or solicited someone to commit, homicide of the other parent? WIS. STAT. § 48.415(8).
 - j. Was the child born as a result of sexual assault? WIS. STAT. § 48.415(10).
 - k. Has the parent committed a serious felony against one of the parent's children? WIS. STAT. § 48.415(9m).
 - l. Did the parent have parental rights to another child involuntarily terminated *and* was the subsequent child found to be in need of protection or services within three years of that earlier involuntary termination? WIS. STAT. § 48.415(10).
2. At the *dispositional* stage, a parent can present evidence and propose specific ideas for what protection/services/placement the court should order, as follows:

- a. Defense counsel may call witnesses and present evidence as to what protection/services/placement the court should consider. WIS. STAT. § 48.335(3). While the rules of evidence do not strictly apply to these hearings, defense counsel should consider the diminished weight of hearsay or other unauthenticated evidence. WIS. STAT. § 48.299.
- b. Evidence should be presented through the lens of the best interest of the child, which is what the court must consider when entering a dispositional order. The best interests of the child. WIS. STAT. § 48.345.
- c. At disposition, the court may place the child in or out of the home. WIS. STAT. § 48.345(3).
- d. At disposition, the court may enter an order placing the child under the supervision of the department/agency, impose conditions on the parents, and require the department/agency to provide certain services to the family. WIS. STAT. § 48.345.

The Big TPR Cases You Need to Know

- *La Crosse County Dept. of Human Services v. Tara P.*, 2002 WI App 84, 252 Wis. 2d 179, 643 N.W.2d 194
 - Big takeaway(s): facts that arise before the issuance of a CHIPS dispositional order may be relevant to the continuing-CHIPS TPR ground
- *Kenosha County Dept. of Human Services v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845
 - Big takeaway(s): unconstitutional to impose conditions of return that are impossible for a parent to meet
- *Steven V. v. Kelly H.*, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856
 - Big takeaway(s): partial summary judgment can be used in TPR cases
- *In re: Marquette S., State of Wisconsin v. Bobby G.*, 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81
 - Big takeaway(s): factfinder may consider facts of attempts to assume parental responsibilities after the filing of the TPR petition; the date upon which a father learns he is a parent is relevant to the failure-to-assume analysis; and the grounds most likely to form the basis for summary judgment in TPR cases are those that are sustainable on proof of court order or judgment of conviction.
- *In re: Gwenevere T., Tammy W-G v. Jacob T.*, 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854
 - Big takeaway(s): factfinder must consider totality of the circumstances through the child's entire life when determining whether parent failed to assume parental responsibilities; reasons for lack of assumption of responsibilities are relevant
- *Stacey P.*, 2012 WI APP 88, 343 Wis. 2d 680, 819 N.W.2d 563 (unpublished)
 - Big takeaway(s): agency has obligation to make reasonable efforts even after the filing of the TPR petition
- *In re: Daniel R.S., Brown County v. Shannon R.*, 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269
 - Big takeaway(s): the due process protections of the Fourteenth Amendment apply to respondent parents in TPR cases
- *In re: Adian J.M. and Trenton J.M., Portage Co. Dept. of Health and Human Services. V. Shannon M.*, 2014 WI App 120, 358 Wis. 2d 713, 856 N.W.2d 347 (Table) (unpublished)
 - Big takeaway(s): there may be issues that could taint a fact-finder's perspective/analysis of a ground of unfitness, and multiple grounds may interact in such a way as to create such taint (consider using when petitioners avoid filing under certain grounds that are not as favorable to them)
- *Dane Co. Dept. of Human Services v. J.R.*, 2020 WI App 5, 390 Wis. 2d 326, 938 N.W.2d 614 and *Eau Claire Co. Dept. of Human Services v. S.E.*, 202 WI App 39, 392 Wis. 2d 726, 946 N.W.2d 155

- Big takeaway(s): at least with regard to the continuing-CHIPS ground in Wis. STAT. § 48.415(2), it is permissible for petitioners to use an amended version of the statute even if the original CHIPS order was entered before the Legislature changed the TPR-grounds used in the TPR case
- *State v. Patricia A.P.*, 195 Wis. 2d 855, 537 N.W.2d 47 (Ct. App. 1995)
 - Big takeaway(s): due process requires that parent must be warned of the grounds for which his/her/their parental rights may be terminated
- *Sheboygan County D.H.S.S. v. Julie A.B.*, 2002 WI 95, 255 Wis. 2d 170, 648 N.W.2d 402
 - Big takeaway(s): court may dismiss a TPR at disposition, even if grounds for unfitness found at fact-finding, if dismissal would be in the child's best interests
- *State v. Lavelle W.*, 2005 WI App 266, 288 Wis. 2d 504, 708 N.W.2d 689; and *Waukesha Co. Dept. of Health & Human Services v. Teodoro E.*, 2008 WI App 16, 307 Wis. 2d 372, 745 N.W.2d 701
 - Big takeaway(s): parent must be afforded meaningful participation in a TPR proceeding (*see also* Wis. STAT. § 885.60)
- *State v. Thomas J. W.*, 213 Wis. 2d 264, 570 N.W.2d 586 (Ct. App. 1997)
 - Big takeaway(s): *Miranda* and the 5th Amendment right against self-incrimination do not apply in civil cases such as TPRs
- *In the Interest of: C.E. W.*, 124 Wis. 2d 47, 368 N.W.2d 47 (1985)
 - Big takeaway(s): best interest of the child is not relevant at the fact-finding for grounds; GAL aligned with petitioner shares preemptory challenges with petitioner
- *Evelyn C.R. v. Tykila S.*, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768
 - Big takeaway(s): even though default judgment is available in TPRs, a court must take evidence to determine that there is a factual basis to find a parent unfit
- *State v. Margaret H.*, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475
 - Big takeaway(s): at disposition, the court may consider a proposed adoptive parent's promise to facilitate contact post-TPR
- *In the Interest of: J.L. W.*, 102 Wis. 2d 118, 206 N.W.2d 46 (1981)
 - Big takeaway(s): a parent has a constitutionally-protected right to the care, custody, and management of a child

Develop Defenses & Theory of the Case

Consistent with ethical duties, defense counsel should develop a theory of the case and other potential legal and/or factual defenses for the client's case. Further, counsel should consider how best to implement these defenses and theories at every stage of the proceeding, considering whether a client should testify or otherwise present information to the court, whether to argue for inferences in your client's favor based on the petitioner's burden and/or make more active efforts to present evidence, and the best sources for potential evidence.

Motions

1. Timeliness:

- Any motion challenging the sufficiency of the petition shall be filed within ten (10) days of the hearing on the petition. WIS. STAT. § 48.297(2).
- Any other motion shall be made “before trial.” WIS. STAT. § 48.297(1).
- Summary judgment motions must be filed within eight (8) months of filing of the petition and so that opposing counsel has 20 days to respond before a hearing on the motion. WIS. STAT. §§ 802.08(1), (2).

2. Types of Motions:

- Facial insufficiency/lack of PC. *See In the Interest of Courtney E.*, 184 Wis. 2d 592, 601, 516 N.W.2d 422 (1994).
- Summary judgment. WIS. STAT. §§ 802.08(1), (2).
- Constitutional challenges.
- Suppression of evidence. WIS. STAT. § 48.297(3).
- Discovery. WIS. STAT. § 48.293, ch. 804.
- Sever one parent’s case from the other. WIS. STAT. §§ 803.06(1), 805.05(2).
- Etc.

3. General considerations:

- Preserve issues for appeal.
- Research thoroughly.
- Investigate factual bases for motions.

Witnesses (Work with CSS & Investigators) & Exhibits

When preparing the sources of evidence for your case (witnesses and exhibits), consider the following:

1. Counsel should identify and interview (with or through an investigator) all potential witnesses. If witnesses are represented by an attorney, counsel must obtain permission from that attorney before interviewing the witness. In some jurisdictions, corporation counsel considers the department workers their clients,¹ so be aware of the practice in your jurisdiction.
2. Identify, secure, prepare, and qualify expert witnesses, as appropriate. Depose opposing parties' experts, if possible.
3. Identify and organize all exhibits that may be necessary for trial.
4. The court may enter a scheduling order requiring exchange of witness and exhibit lists by a certain date, so be ready to follow such an order if entered.

¹ Though it is important to be aware of the practices in your jurisdiction, that does not mean that such practices are legal or correct. Corporation counsel is specifically authorized to represent the "interests of the public," not a particular entity or person. See WIS. STAT. § 48.09.

Motions in Limine

Like any criminal case, counsel should consider each case individually and prepare motions in limine to address issues to arise in each individual case regarding the scope of evidence, expert witnesses, voir dire, openings, closing, courtroom practices, etc. There are, though, some motions in limine that may be applicable to most TPR cases, generally. Specifically, counsel may wish to move for the following:

1. A hearing prior to the commencement of the trial, pursuant to WIS. STAT. § 907.02(1), and *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993) to review the admissibility of any expert testimony, including, but not limited to, any proposed expert opinion offered by any department/agency social worker.
2. An order against irrelevant other acts evidence pursuant to WIS. STAT. § 904.03, 906.09.
3. An order directing that all proceedings in this matter, including, but not limited to, opening statements, side bar conferences, and closing arguments be recorded.
4. An order that no reference be made before the jury to the respondent's indigence or to the attorney as "public defender" or "appointed counsel" or any other reference that would imply that the defendant is in any way in a different situation from a person who hires his or her attorney.
5. To determine before trial the existence of any criminal convictions of record against any witness and to consider the admissibility of those convictions prior to trial.
6. An order requiring aligned parties to share preemptory challenges.
7. An order for sequestration of witnesses pursuant to WIS. STAT. § 906.15, and further directing that all witnesses be admonished not to discuss their testimony with one another. Such order shall include the sequestration of the foster parents.
8. An order prohibiting the Petitioner or guardian *ad litem* from referring to, using at the time of trial, or moving into evidence any document not disclosed pursuant to any discovery demand.
9. An order prohibiting the Petitioner or guardian *ad litem* from calling any witness not previously disclosed on a witness list.
10. An order permitting the parent to appear before the jury in street clothes and without shackles (if incarcerated).
11. An order prohibiting the Petitioner and the Guardian ad Litem from eliciting from any properly qualified expert witness any inadmissible facts or data upon which the expert based an opinion, unless and until the court determines such disclosure appropriate WIS. STAT. § 907.03.

12. An order requiring the parties to exchange with the other parties any exhibits that any party may seek to introduce at trial, and to require such exchange at a specific date determined by the Court in advance of trial.
13. An order permitting the individual questioning of jurors during *voir dire* due to the sensitive nature of the proceedings.
14. An order requiring side-bars to occur during trial before the Court asks any witness any question so that the parties may be forewarned of the substance of the question to be asked and may raise any objections in the side-bar so as not to appear to the jury as if the attorney is arguing with the Court.
15. An order permitting the respondent to supplement these Motions in limine should new issues present themselves prior to trial.

Negotiations

Negotiations are unique in TPR cases, for these cases do not typically involve compromised outcomes; i.e., either the parent's rights are terminated or they are not, and there is no middle ground. However, consider the impact of an involuntary termination on any future children who may fall under CHIPS jurisdiction (*see* WIS. STAT. § 48.415(10)).

Further, and in a more complicated fashion, counsel may want to consider a possible third-party visitation agreement that, if adopted by a court, could grant a TPR'ed parent third-party visitation rights to the child post-adoption. This is not an open adoption, but rather this would be a separate family court action under WIS. STAT. § 767.43. To pursue this, it is important to gain assurances that the adoptive parents would, in any future family-court action, concede that the TPR'ed parent would have standing as a parent-like figure under WIS. STAT. § 767.43; this way, even if the agreement falls through, the TPR'ed parent could initiate his/her/their own family court action for visitation *even after* TPR. This is a complicated process, and it is recommended that counsel seek the assistance of the SPD family defense practice coordinator to pursue this line of negotiation. However, here is a summary of the applicable law, told from the perspective of a parent seeking to obtain third-party visitation:

Under Wisconsin law, there are three separate mechanisms by which a third-party non-parent may obtain court-ordered visitation² with a child. First, a court may grant visitation a “grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child[.]” WIS. STAT. § 767.43(1). Second, under the “special grandparent visitation provision,” a court may grant visitation to a grandparent if it finds that paternity has been established, the child has not been adopted, the grandparent has been prevented from maintaining a relationship with the child by the parent with legal custody, the grandparent is not likely to act in a manner contrary to the custodial parent's decisions, and the visitations would be in the best interest of the child. WIS. STAT. § 767.43(3). And finally, if neither statutory provision specifically applies to a case, a court may still grant visitation to a non-parent, utilizing its equitable powers, if the third-party has a “parent-like relationship” with the child and there was some “triggering event” justifying court intervention. *Wohlers v. Broughton*, 2011 WI App 122, ¶18.

While the parent is not a grandparent, she would be, once her parental rights are terminated, a third-party under either the first or third options, as described above. *See, e.g.*, WIS. STAT. § 48.40(2) (“Termination of parental rights’ means that, pursuant to a court order, all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed.”); *see also, e.g.*, WIS. STAT. § 48.426(3)(c) (discussing the permanent severance of relationships that comes with termination). Therefore, the parent will meet the initial threshold for visitation as someone to whom visitation may be ordered. *See* WIS. STAT. § 767.43(1); *see also Wohlers v. Broughton*, 2011 WI App 122, at ¶18.

² While the Family Code defines “physical placement” as “the condition under which a party has the right to have a child physically placed with that party[.]” it does not specifically define “visitation.” WIS. STAT. § 767.001. However, case law provides that “visitation” and “physical placement” are, at least in the circumstances described herein, one in the same. “Visitation” is treated as simply time with the child and something that is normally within the discretion of the parent to grant to someone. *See Lubinski v. Lubinski*, 2008 WI App 151, ¶13. Further, “visitation” and “physical placement” are “both situations where children go out of the custodial home, away from the parent with whom the children reside.” *In re Opichka*, 2010 WI App 23, ¶12.

However, this is not the only inquiry to determine the parent's standing, for not just any third-party has standing to seek visitation of a child. Instead, only third parties with "parent-like" relationships with a child may be granted visitation. WIS. STAT. § 767.43(1). The parent has such a status by way of the parent's role in the child's life to this point.

Beyond the parent's standing, a court could grant the parent visitation only if it determines that such visitation would be in the child's best interests. *See* WIS. STAT. § 767.43(1). Again, as described in greater detail below, the parties have agreed that the maintenance of some role by the parent in the child's life is in his best interests. Therefore, with the parent's standing and the parties' agreement that visitation with the parent is in child's best interests, a family court may order the visitation that the parties jointly seek.

Procedurally, the parties must obtain this visitation in family court. *See* WIS. STAT. § 767.43. While the statutes specifically provide that the special grandparent visitation provision must be utilized "in an underlying action affecting the family[.]" there is no such narrow requirement for the other third-party visitation mechanisms. *See* WIS. STAT. §§ 767.43(1), (3c); *see also* *Wohlers v. Broughton*, 2011 WI App 122, ¶18. Conversely, nothing precludes a third-party visitation petition from being filed in an underlying action affecting the family, either. *See* WIS. STAT. § 767.43(1); *see also* *Wohlers v. Broughton*, 2011 WI App 122, ¶18. As such, a third-party may seek visitation by filing a petition in an existing family action or as a new, independent family court petition.

If the circumstances are ripe for negotiations, consider the following:

1. Counsel must keep the client fully informed of all offers made by opposing counsel.
2. Counsel should discuss the advantages, disadvantages, and consequences of any such offer. *See also* WI SCR 20:1.2.
3. Counsel should not let negotiations impact the progress of trial preparation.

Litigate

At and before trial, consider the following:

1. Attend and prepare for all hearings.
2. Discuss the differences between a jury trial and court trial.
3. Counsel should be familiar with the rules of evidence and law relating to all stages of the CHIPS process, as well as legal and evidentiary issues that can be anticipated based on the pleadings, investigation, and discovery. Counsel should be prepared to make all appropriate objections.
4. Thoroughly prepare the client to testify at the trial. Because these are civil proceedings, the prosecution can call your client as a witness during the case in chief. Preparations should include the likelihood of impeachment and the possibility that the client might incriminate herself when testifying. The client may invoke her Fifth Amendment privilege against self-incrimination when responding to questions about potential criminal activity, however the fact-finder may make an adverse inference if the privilege is invoked.
5. Prepare for hearings and/or trial and make all appropriate motions and evidentiary objections. When appropriate, counsel should:
 - i. Develop a plan for direct examination potential witnesses.
 - ii. Determine the implications that the order of witnesses may have on the case.
 - iii. Consider the possible use of character witnesses and any negative consequences that may flow from such testimony.
 - iv. Consider the use of demonstrative evidence and other exhibits.
 - v. In the case of expert witnesses, ensure that proper notification and *Daubert* qualifications are met. If opposing parties are calling an expert witness, consider requesting a *Daubert* hearing challenging that witness' qualifications. Wis. Stat. § 907.02. If a department/agency worker will testify, ensure that the testimony is challenged to establish whether the worker is an expert, if she is going to be offering expert-like testimony.

- vi. Be familiar with Wisconsin statutory and case law on objections, motions to strike, offers of proof and preserving the record for appeal.
 - vii. Be familiar with Wisconsin statutory and case law on the admissibility of documentary evidence, the foundation necessary to secure introduction of evidence and any hearsay exceptions that might permit introduction of evidence without authentication.
6. Present and cross-examine witnesses, prepare and present exhibits.
7. Actively participate in jury selection and drafting jury instructions.
8. Counsel should have materials available at the time of the litigation that will be helpful to presenting the case. This may include:
- i. Copies of all relevant documents filed in the case, including the petition;
 - ii. A copy of applicable statutes and cases related to anticipated or common issues;
 - iii. Department/agency reports and attachments;
 - iv. Expert reports;
 - v. Copies of subpoenas;
 - vi. A list of all exhibits to be offered and the witnesses through whom they will be introduced;
 - vii. Reports, certificates, and notes from assessments, programs, and counseling;
 - viii. Documentation concerning client's employment and housing;
 - ix. Documentation of any special achievements of the child while in the custody of the parent;
 - x. Documentation regarding result of drug screens;
 - xi. An outline of opening and closing statements;

xii. Plans or outlines for direct and cross-examination of witnesses.

9. Counsel should consider whether there are tactical reasons to stipulate to damaging facts. This may include when facts are readily provable and uncontroverted, instances when the facts will have less impact on the fact-finder if they are summarized rather than the subject of lengthy testimony, and when there is the possibility that the fact-finder will view the client as accepting responsibility for the stipulated facts or circumstances.
10. At the close of the petitioner's case and at the conclusion of all evidence, counsel should make appropriate motions to dismiss.

Disposition

At the *dispositional* stage, a parent can present evidence argument as to whether termination would be in the best interests of the child. As such, counsel should be prepared to treat disposition like a second trial, this time on the issue of whether TPR would be in the best interests of the child. At disposition, consider the following:

1. The court will consider the following factors when determining whether termination would be in the child's best interests, under WIS. STAT. § 48.426(3):
 - a. The likelihood of the child's adoption after termination.
 - b. The age and health of the child, both at the time of disposition and, if applicable, at the time the child was removed from the home.
 - c. Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
 - d. The wishes of the child.
 - e. The duration of the separation of the parent from the child.
 - f. Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.
2. The court may consider any promises that any adoptive resources have made to the parent regarding future contact between the child and the parent after TPR. *See IN re Termination of Parental Rights to: Darryl T-H*, 2000 WI 42.
3. Counsel should present an alternative disposition plan, including the alternatives outlined in WIS. STAT. § 48.427.
4. The rules of evidence do not apply at disposition hearings. *See* WIS. STAT. § 48.299.

Appeal

To protect a client's right to appeal an unfavorable finding and order in a TPR case, counsel must do the following:

1. Defense counsel may petition the court for a re-hearing based on the acquisition of new evidence. WIS. STAT. § 48.46.
2. Counsel should file a notice of intent to pursue post-dispositional relief within 30 days of the date of the adverse dispositional order, consistent with WIS. STAT. § 809.107.
3. Counsel should prepare an appellate memo and send that memo to the SPD Appellate Intake at either the Madison or Milwaukee appellate office, along with a copy of the NOI.

Conclusion

Parents need zealous, knowledgeable, and passionate advocates to protect their parental rights. Indeed, TPRs are often viewed as cases that involve the “civil death penalty,”³ for no other civil matter involves a consequence so permanent and severe as termination of the bond between child and parent. As such, counsel should be prepared to litigate creatively, completely, and preparedly to give respondent parents the best chance to maintain the makeup of their families and, often times, to maintain that which defines them most as humans – parenthood.

³ See, e.g., *In re Amya C.*, 2021 WI App 106 (unpublished).