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# Motion Practice:

— Moving to Dismiss the Petition —

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# Language TPR Attorneys Love

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state ... When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” Santosky v. Kramer, 455 U.S. 745, 752-754 (1982).

Severing the parent-child relationship in a TPR is “tantamount to imposition of a civil death penalty.” Matter of Parental Rights to K.D.L and S.P.K., 58 P.3d 181 (2002).

Congress: “Removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty.” H.R. Rep. No. 95-1386, pg.22 (1975)

# When Do I File a Motion to Dismiss



Wis. Stat. 48.297 - Motions before trial

- (1)** Any motion which is capable of determination without trial of the general issue may be made before trial.
- (2)** Defenses and objections based on defects in the institution of proceedings, lack of probable cause on the face of the petition, insufficiency of the petition or invalidity in whole or in part of the statute on which the petition is founded **shall be raised not later than 10 days after the plea hearing or be deemed waived**. Other motions capable of determination without trial may be brought any time before trial.

# Basis for Motion to Dismiss: Procedural Def

Wis. Stat. 48.42 sets forth all procedural requirements, including:

- Contents of Petition
- Who must be Summoned & Content of Summons
- Notice Requirements
- Service of Summons and Petition

# Let's look more closely



Service - 48.42(4)

When? Seven days before the hearing

Not necessary if party will submit to jurisdiction of the court

Constructive notice/Notice by Publication:

- Only if party cannot be served ***with reasonable diligence***

Content of Notice:

- Parent's rights may be terminated if fail to appear
- Right to counsel
- Appellate rights

# Service: Special Issues

Prison service statute, 302.025

- Requires service by warden or superintendent or someone appointed by the warden or superintendent



# Is Venue Appropriate?

Venue - 48.185



- Shall be in the county where the birth parent or child resides at the time the petition is filed.
- Must know where the child is living! - Private cases
- For CHIPS-related TPRs: Venue is where the dispositional order was issued, unless the child's county of residence has changed or parent has resided in different county for 6 months. Then, a **motion for good cause** can be heard to transfer the case to the county where parent or child resides

# Does the Court have Jurisdiction



- Petition required to include information under the Uniform Child Custody Jurisdiction and Enforcement Act, Wis. Stat. 822.29
  - Addresses of all places child has lived for past 5 years
  - Whether any other proceedings concerning custody and physical placement of child, including where, case number, etc.
  - Failure to include information may lead to stay in proceeding
- UCCJEA.net is an excellent resource for jurisdictional issues

# Sufficiency of the Petition

Wis. Stat. 48.42(1)(c)2.

- Petition shall include:
  - “A statement of the grounds for involuntary termination of parental rights under s. 48.415 and a statement of the facts and circumstances which the petitioner alleges establishes these grounds.”

2. The petitioner is interested as \_\_\_\_\_
3. The child is a  marital  non-marital child.
4. The father is  adjudicated.  presumed.  alleged.  biological (nonadjudicated).  unknown.  
 Names and addresses of additional possible fathers, if known, are attached.
5. The petitioner seeks termination of parental rights of  
 Parent #1 who  will  may  will not consent to the termination of his/her parental rights under §48.41, Wis. Stats.

If involuntary, grounds for termination of parental rights exist under §48.415(1, 4, and 6 \_\_\_\_\_), Wis. Stats.  
A statement of the facts and circumstances which support these grounds is as follows:  **See attached**  
Petitioners have had placement of the minor child since she was two weeks old. They obtained Guardianship in  
November 2015. Mother was incarcerated at the time of the Guardianship. She was sentenced to prison for heroin  
trafficking. The mother was released in October 2017 and has only seen the child four times since her release. The  
last time the mother saw the child was in June 2018.  
The mother has not provided any financial, emotional, or physical support for the child at any time.

- Parent #2 who  will  may  will not consent to the termination of his/her parental rights under §48.41, Wis. Stats.

If involuntary, grounds for termination of parental rights exist under §48.415(1, 4, and 6 \_\_\_\_\_), Wis. Stats.

# Motion to Dismiss for Lack of Probable Cause

Courtney E., 184 Wis. 2d. 592, 516 N.W. 2d 422 (1994).

The Petition must allege reliable and credible information which forms the basis of the allegations necessary to invoke the jurisdiction of the court and provides reasonable notice of the conduct or circumstances to be considered by the courts.

You must be able to know what you are defending against!



Problem areas: Abandonment periods

# Motions to Dismiss Constitutional

10 day time limit!

If attacking constitutionality on the face of the statute, remember to give notice to the Attorney General's office. See Wis. Stat. 806.04(11).



# Examples of Constitutional Challenges

Incest involuntary TPR constitutional as applied to parent who was victim of incest. (Monroe County Department of Human Services v. Kellie B., 2004 WI 48, 271 Wis. 2d 51).

Due Process challenges when your parent wasn't represented in CHIPS or family court. Kenosha County v. Jodie W. 2006 WI 93, 293 Wis. 2d 530, 716 N.W. 845 —think beyond just prison cases. Remember the basis for Jodie W. is that the conditions were impossible. Are your conditions impossible? Parent with disability and no accommodations for disability?

# More Examples of Constitutional Challenge

- Prior Involuntary – Consider a Due Process Challenge if the prior involuntary occurred because the parent was not competent to voluntarily consent. Sec. 48.41(3).
- (4) grounds. Family Court order versus Juvenile Court order. Kimberly S.S. and Ponn P. Higher courts are practically begging someone to argue unconstitutional as applied.

# Motions to Dismiss other issues

- ICWA?? Is child eligible for enrollment with an American Indian tribe?? Can lead to dismissal of TPR.
- Is the CHIPS dispositional order still in effect? Was there originally an expiration date? Was it extended prior to the expiration date?
- New CHIPS Continuing Need ground - were warnings on new ground given?



**Other ideas?  
Questions?**