

CHIPS PLEA HEARING OUTLINE

Statutory Summary

❖ **Jurisdiction**

- ❖ The court has exclusive jurisdiction over non-Indian children if the child/unborn child is need of protection or services based on one of the grounds in §48.13 or §48.133.
- ❖ The Indian tribe shall have exclusive jurisdiction over a child who resides or is domiciled on the reservation.
 - If the child is not residing/domiciled on the reservation, the Circuit Court may transfer the case to tribal court upon the petition of the parent, Indian Custodian, or tribe. §48.028

❖ **Notice - §48.27**

- ❖ The court shall notify the child, parents, guardian, legal custodian, foster parent, other physical custodian, and child's guardian ad litem/adversary counsel.
- ❖ The first notice to any interested party, foster parent, or other physical custodian shall be in writing and may have a copy of the petition attached to it.
 - Notice of subsequent hearings may be given by telephone at least 72 hours before the time of the hearing.

❖ **Plea Hearing Time Frame - §48.30**

- ❖ A plea hearing to determine whether any party wishes to contest the (U)CHIPS petition shall take place within:
 - 30 days after the filing of a petition for a child or expectant mother who is in non-secure custody or
 - within 10 days after the filing of the petition for a child held in secure custody.§48.30.
- ❖ Failure by the court or a party to act within any time period specified in this chapter does not deprive the court of personal or subject matter jurisdiction or of competency. §48.315(3)

❖ **Parties Rights - §48.243**

- ❖ The court must inform the parent, guardian, and/or legal custodian of:
 - The right to counsel under §48.23.
 - The right to counsel under §48.028(4)(b) for the parent or Indian custodian of an Indian child involved in an out-of-home placement proceeding.
 - The allegations that have been made or may be made.

- The nature and possible consequences of the hearing.
- The right to confront and cross-examine witnesses.
- The right to present witnesses.
- The right to remain silent.
- The right to have the allegations of the petition proved by clear and convincing evidence.
- The right to a jury trial.
 - Must be made before the end of the plea hearing or this right is waived.
- The right to substitution of the judge. §48.29
 - Must be made before the end of the plea hearing or this right is waived.

❖ **Right to Counsel - §§48.23 & 48.235**

- ❖ The court may appoint counsel for any party, unless the party wishes to retain counsel of his or her own choosing. §48.23(3)
 - An Indian child's parent or Indian custodian shall have the right to be represented by counsel as provided in §48.23(2g).
- ❖ If CHIPS allegation under §48.13, the child may be represented by counsel at the discretion of the court.
 - If the petition is contested, the court may not place the child outside the home unless the child is represented by counsel at the fact-finding hearing and subsequent proceedings. If the petition is not contested, the child cannot be placed outside the home unless the child is represented by counsel at the hearing where placement is made. For a child under 12 years of age, the judge may appoint a guardian ad litem (GAL) instead of counsel.
 - The court shall appoint counsel for any child alleged to be in need of protection or services under §48.13(3), (3m), (10), and (11), except that if the child is less than 12 years of age the court may appoint a GAL instead of counsel. §48.23(3m)
 - A child 15 years of age or older may waive counsel. §48.23(1m)(b)1.
- ❖ The court may appoint a guardian ad litem (GAL) for the child or any party, but must appoint a GAL for the child if placed out of the home or there is a recommendation/request to place the child out of the home.
 - **See Counsel/GAL chart.**
- ❖ UCHIPS Expectant Mothers - §48.23(2m)
 - If the expectant mother is a child, the expectant mother shall be represented by counsel and may not waive counsel.

- In a contested UCHIPS proceeding, no expectant mother may be placed outside of her home without being represented by counsel at the fact-finding hearing and thereafter. An adult expectant mother can waive counsel.
- If the petition is not contested, she may not be placed outside the home without being represented by counsel when the placement is made. An adult expectant mother can waive counsel.

❖ **Continuances**

- ❖ See §48.315(1) for reasons time periods shall be excluded in computing time periods.
- ❖ The court shall grant a continuance only upon a showing of good cause during court or a telephone conference on the record, and only for so long as is necessary, taking into account the request or consent of the DA or the parties and the interest of the public in the prompt disposition of cases. §48.315(2)
- ❖ If the court or a party does not act within a time period specified in this chapter, the court, while assuring the safety of the child, may:
 - Grant a continuance under §48.315(2);
 - Dismiss the proceeding without prejudice;
 - Release the child from secure or non-secure custody or from the terms of a custody order;
 - Or grant any other appropriate relief.
- ❖ Failure to object to a period of delay or a continuance waives any challenge to the court's competency to act during that period. §48.315(3)
- ❖ Court may grant no continuance, delay, exclusion or extension if it will result in:
 - An initial finding that reasonable efforts have been made to prevent the removal of the child from the home, while assuring that the child's health and safety are the paramount concerns, or an initial finding that those efforts were not required to be made because a circumstance specified in §48.355(2d)(b) 1. to 5. applies, more than 60 days after the date the child was removed from the home.
 - An initial finding under §48.38(5m) that the agency has made reasonable efforts to achieve the permanency goal of the child's permanency plan, or making any subsequent findings as to those reasonable efforts, more than 12 months after the date of a previous finding on the reasonable efforts.
 - A finding under §48.366(3)(am)3. that a person's placement in out-of-home care under a transition-to-independent-living agreement is in the best interests of the person more than 180 days after the date on which the agreement is entered into. §48.315(2m)

❖ **Court Ordered Examinations - §48.295**

- ❖ Physical, psychological, mental or developmental examinations:

- Upon the filing of a petition and a finding by the court that physical, psychological, mental, developmental, or AODA examinations are warranted, the court may order any child within its jurisdiction to be examined as an outpatient.
 - Court may order similar testing for parent/guardian/legal custodian/expectant mother if the ability to care for the child is at issue.
- ❖ DNA genetic testing - see §48.299(6).

❖ **Pleas**

- ❖ Non-petitioning parties and child over age 12 should state whether they wish to contest the petition. §48.30(3)
- ❖ Before accepting an admission or no contest plea to the allegations in the petition, the court shall:
 - Address the parties present personally, including the child or expectant mother, and determine that the plea/admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.
 - Establish whether any promises or threats were made to elicit the plea or admission, and inform the parties that a lawyer may be able to determine defenses or mitigating circumstances not apparent to the parties.
 - Make such inquiries as satisfactorily establishes that there is a factual basis for the plea or admission of the parent and child, of the parent and child expectant mother or of the adult expectant mother. §48.30(8)

❖ **Fact-Finding Time Frame**

- ❖ If the (U)CHIPS petition is contested, the fact-finding hearing shall be scheduled no more than 20 days after the plea hearing for a child who is held in secure custody and no more than 30 days after the plea hearing for a child or an expectant mother who is held in non-secure custody. §48.30(7)

❖ **Dispositional Hearing Time Frame**

- ❖ If the (U)CHIPS petition is not contested, the dispositional hearing shall be scheduled no more than 10 days after the plea hearing for a child held in secure custody or no more than 30 days after the plea hearing for a child or an expectant mother held in non-secure custody. §48.30(6)(a)
- ❖ If all parties consent, the dispositional hearing may be held immediately. §48.30(6)(a)
- ❖ Failure by the court or a party to act within any time period specified in this chapter does not deprive the court of personal or subject matter jurisdiction or of competency. §48.315(3)

Potential Issues

- ❖ Jurisdiction
- ❖ ASFA findings
- ❖ WICWA
- ❖ Time Periods
- ❖ Paternity

Case Law

- ❖ Statute barring court from appointing counsel for parents or any party other than child in proceedings for children alleged to be in need of protection or services (CHIPS) violated due process clause, which required individualized determination of need for appointment under circumstances presented by particular case; fundamental fairness required that circuit judge be given discretion to make determination of what due process would require on case-by-case basis. *Joni B. v. State*, 202 Wis.2d 1, 549 N.W.2d 411 (1996).
 - **Note:** § 48.23 was amended by 2017 Wisconsin Act 253 to allow the court to appoint counsel for CHIPS parents.
- ❖ Under *Joni B.*, juvenile courts have discretionary authority to appoint counsel for parents in CHIPS cases. When a parent requests counsel or when circumstances raise a reasonable concern that the parent will not be able to provide meaningful self-representation, the court must exercise that discretion. *State v. Tammy L.D.*, 2000 WI App 200, 238 Wis.2d 516, 617 N.W.2d 894.
- ❖ Under §48.30, the time limits under sub. (1) are mandatory; failure to comply results in the court's loss of competency and is properly remedied by dismissal without prejudice. *However, subsequent amendment of 48.315 provides that violation of time limits does not deprive court of personal or subject matter jurisdiction or competency to proceed. In re Jason B.*, 176 Wis. 2d 400, 500 N.W.2d 384 (Ct. App. 1993).
- ❖ A court's failure to inform a juvenile of the right to judicial substitution does not affect its competence and warrants reversal only if the juvenile suffers actual prejudice. *State v. Kywanda F.*, 200 Wis. 2d 26, 546 N.W.2d 440 (1996).
- ❖ Under §48.31, a trial court's sua sponte adjournment of a fact-finding hearing beyond the 30-day limit due to a congested calendar constituted good cause under sub. (2) when the adjournment order was entered within the 30-day period. *In re J.R.*, 152 Wis. 2d 598, 449 N.W.2d 52 (Ct. App. 1989).
- ❖ A court loses competence to exercise jurisdiction to extend an order when the hearing is not held within the 30-day period under §48.365(6); the 30-day period may not be expanded by a continuance under §48.315 and the court's loss of competence cannot be waived. **Please note:** §48.365(6) has since been amended to so that "Failure to object if a hearing is not held within the time period under this

subsection waives any challenge to the court's competency to act on the request." *In Interest of B.J.N.*, 162 Wis. 2d 635, 469 N.W.2d 845 (1991).

- ❖ The period under sub. (1)(c) includes the time required to assign the new judge, send any required notices, notify the parties, and arrange for time on the court's calendar; applicable time limits for plea hearings apply after the assignment of the new judge. *In Interest of Joshua M.W.*, 179 Wis. 2d 335, 507 N.W.2d 141 (Ct. App. 1993).
- ❖ Under sub. (2), "on the record" does not require reporting by a court reporter. A clerk's minutes satisfy the requirement. The benefits of a pretrial are universally recognized by bench and bar such that a court need not specify the factors supporting "good cause" for a continuance of the time limits under sub. (2). Under sub. (1)(a), the time limits are tolled for an examination of a parent under §48.295. *Waukesha County v. Darlene R.*, 201 Wis. 2d 633, 549 N.W.2d 489 (Ct. App. 1996).
- ❖ The general time requirements of sub. (2) control all extensions of time under Ch. 48. There are no provisions for waiver of time limits, and the only provisions for delays, continuances, and extensions are under this section. *State v. April O.*, 2000 WI App 70, 233 Wis. 2d 663, 607 N.W.2d 92.
- ❖ The word "continuance" in sub. (2) is sufficiently broad to encompass situations in which the fact-finding hearing is originally scheduled beyond the statutory 45-day time period. A circuit court's schedule or lawyers' or litigants' difficulties in scheduling court dates may amount to good cause for extension, delay, or continuance under sub. (2). *State v. Robert K.*, 2005 WI 152, 286 Wis. 2d 143, 706 N.W.2d 257.
- ❖ Reassignment of a case to a different judge because of docket congestion does not constitute disqualification of a judge under sub. (1)(c). *Brown County v. Shannon R.*, 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269.