

Juvenile Clerks Meet Up

September 13, 2022

Materials

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Please note that the information contained in this presentation is not meant to be construed as legal advice.

Any guidance provided should not override a judge's decision and authority.

Please do not provide any confidential case information in the chat.

Thank you!



Juvenile Clerks Meet Up *Competency in Chs. 48 & 938*

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September 13, 2022

Overview of Competency and NGI

- Generally, this will be seen in the following contexts:
 - ▶ Competency to participate in the proceedings
 - ✓ Parent: Ch. 48
 - ✓ Juvenile: Ch. 938
 - ▶ Not responsible by reason of mental disease or defect (NGI)
 - ✓ Ch. 938 applicability only
 - ▶ § 938.13(14) JIPS
 - ✓ Filed as a result of incompetency/NGI finding for juvenile
 - ▶ Juvenile Ch. 51 mental health
 - ✓ Concurrent with CHIPS/JIPS/Delinquency

Poll: Competency of Parent

- Have you experienced competency being raised regarding a parent in a **CHIPS** case?
 - A. Yes
 - B. No

Poll: Competency of Parent

- Have you experienced competency being raised regarding a parent in a **TPR** case?
 - A. Yes
 - B. No

- Other case types?

Ch. 48 – Competency of Parent

- The same standards exist for a parent representing themselves in a TPR proceeding as does in a criminal case
 - ▶ Knowingly and intelligent waiver of counsel
 - ▶ Ability to proceed without counsel
 - ✓ *Dane County DHS v. Susan P.S.*, 293 Wis. 2d 279, 715 N.W.2d 692.
 - ▶ Cannot force representation, unless incompetent
 - ✓ *In Re Sophia S.*, 715 NW 2d 692.
- No statutory procedure for competency in CHIPS cases
 - ▶ Judicial discretion to appoint GAL for parent

Ch. 48 – Competency of Parent

- GAL shall be appointed for a parent:
 - ▶ TPR case,
 - ▶ Parent is contesting, AND
 - ▶ Found incompetent by examination [§ 48.235(1)(g)]
- GAL has duty to report on parent’s competency and assist them in the proceeding BUT is not a party at trial [§ 48.235(5m)]
- Appointment of GAL for parent is discretionary for all other proceedings; “any appropriate matter” [§ 48.235(1)]
 - ▶ **Examination not required under statute**

Ch. 48 – Examination

- Schedule a date for a competency hearing (*CH*) on date as specified by the court and generate notice
- File *Petition for Examination or Assessment (JD-1731)* and/or the *Order for Examination or Assessment (JD-1732)* and enter them into CCAP using the *PEX (Petition for examination)* and *OEX (Order for examination or assessment)* court record events
 - ▶ *OFCE* (Order for Competency Examination)
- Schedule a review (*REV*) date that corresponds to the anticipated completion date stated in the order
 - ▶ If the report is not received by the due date, notify the physician or facility AND the judge
 - ▶ Follow up every 10 days until report is received
- File original exam/assessment report and enter it into CCAP using the *EPR* (Examining psychologist's report)
- If a hearing is held, take minutes of the proceeding using CCAP In Court Appearance Processing, and review the minutes for any required actions and file any other documents received

Ch. 48 – GAL for Parent

- Same as whenever a GAL is appointed for a child:
 - ▶ Assign a GAL according to local procedure
 - ▶ Complete the *Order Appointing Guardian ad Litem or Attorney (JD-1798A)*
 - ▶ Give the order to the judge for the judge’s signature
 - ▶ Once signed, enter the order into CCAP using the *OAG (Order appointing GAL)* court record event

Ch. 48 – Examination of Child

- Court may order any “physical, *psychological, mental, or developmental* examination” if reasonable cause exists to do so
 - ▶ See: § 48.295(1)
 - ▶ Also for use in AODA assessment
- When, if ever, have you seen this?
 - ▶ Older children—to determine need for GAL, in addition to adversary counsel?
 - ▶ Determine need for “special treatment or care” [§ 48.13(4m) & (9)]
 - ▶ Medical neglect [§ 48.13(10) & 10m)]
 - ▶ Emotional damage [§ 48.13(11)]
 - ▶ To determine dispositional needs

Payment for Examination

- “The expenses of an examination, if approved by the court, shall be paid by the county of the court ordering the examination” [§ 48.295(1) and § 938.295(2)(c)]
 - ▶ For Milwaukee: “the department” (DCF)
- No clear guidance or definition for “the county”; therefore, practice will vary by county as to which budget evaluations are paid from
- May recover reasonable contribution from parents
- Cost of evaluation is not a factor that may be considered by the court in ordering an examination
 - ▶ *In the Interest of Zachary A.*, Wis. Court of Appeals, 3rd Dist. (2010).

Poll: Payment

- In your county, what is the most common way in which payment is made for an evaluation?
 - A. County Agency Budget
 - B. Court Budget
 - C. Private Payment (Insurance)
 - D. Other
 - E. Unknown

Ch. 938 – Competency and NGI for Juvenile

- Procedures are substantially similar for both competency to participate and NGI [§ 938.295(2)]
 - ▶ If probable cause to believe the juvenile committed the alleged offense and is not competent to proceed, the court will order examination by a psychiatrist or licensed psychologist [§ 938.295(2)]
 - ▶ NGI plea under § 938.30(4)(c):
 - ✓ Report shall also contain an opinion regarding whether the juvenile suffered from mental disease or defect at the time of the commission of the act alleged in the petition and, if so, whether this caused the juvenile to lack substantial capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law [§ 938.295(2)(b)2.]
- In-patient exam only if substantial risk of harm OR consent by juvenile, parent, guardian, GAL, or juvenile’s counsel

Ch. 938 – Examination

- Schedule a date for a competency hearing (*CH*) on date as specified by the court and generate notice (see timeframes for conducting hearing on following slide)
- File *Petition for Examination or Assessment (JD-1731)* and/or the *Order for Examination or Assessment (JD-1732)* and enter them into CCAP using the *PEX (Petition for examination)* and *OEX (Order for examination or assessment)* court record events
 - ▶ *OFCE (Order for Competency Examination)*
- Schedule a review (*REV*) date that corresponds to the anticipated completion date stated in the order
 - ▶ If the report is not received by the due date, notify the physician or facility AND the judge
 - ▶ Follow up every 10 days until report is received
- File original exam/assessment report and enter it into CCAP using the *EPR (Examining psychologist's report)*
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Ch. 938 – Hearing on Examination

- Timelines for hearing to determine competency/NGI:
 - ▶ If NGI plea AND juvenile enters admission –OR– competency to proceed at issue, subject to good cause, a date must be set no more than:
 - ✓ **10 days** from the plea hearing for a juvenile in secure custody, OR
 - ✓ **30 days** from the pleas hearing for a juvenile not in secure custody
 - ▶ If NGI plea AND juvenile contests:
 - ✓ Hold Fact Finding Hearing and, if allegations proven, hold hearing on examination immediately

Poll: Examination Timeframes

- In your county, competency hearings are held within the statutory timeframes (10/30 days):
 - A. Almost Always
 - B. Often
 - C. Sometimes
 - D. Rarely
- What are the reasons for delays, if any?
 - ▶ Availability of evaluators? Reports not timely? Court calendar?

Ch. 938 – NGI Outcomes

- If the court finds the allegations to be proven, but the juvenile was not responsible due to mental disease or defect, the court will **dismiss the petition with prejudice** and direct (not up to the DA):
 - ▶ Filing of a petition under § 51.20(1), if probable cause exists for involuntary commitment, OR
 - ▶ Filing of a JIPS petition under § 938.13(14)
 - ✓ Not a “conversion” to JIPS; separate case under Ch. 938
 - ▶ File *Order Concerning Competency or Mental Responsibility Determination (JD-1733)*
 - ✓ Enter *OCCMR* (Order concerning competency/mental resp. determin.) –OR– *OCCNR* (Order concerning competency/NGI/referral to Ch. 51) event code, depending on whether referring to JIPS or Ch. 51, respectively

Ch. 938 – Competency to Proceed Procedures

- If the court finds the juvenile not competent to proceed, the court will **suspend the proceedings** and direct (not up to the DA):
 - ▶ Filing of a petition under § 51.20(1), if probable cause exists for involuntary commitment, OR
 - ▶ Filing of a JIPS petition under § 938.13(14); AND
 - ▶ Make a determination, based upon the report, as to whether the juvenile may become competent

Ch. 938 – Competency to Proceed Procedures

- Enter *DNC* (DE not competent to stand trial, case suspended) event code whenever the juvenile is found incompetent, regardless of whether likely to become competent:
 - ▶ Puts the case in "suspended" maintenance; stops the clock and will not be included in Statistical Reports
 - ▶ Case law suggests that the delinquency proceeding remains suspended **indefinitely**, unless the juvenile regains competency
 - ✓ *In the Interest of A.L.*, 2017 WI App 72.
- If juvenile becomes competent, take the case out of "suspended" status by entering the event code of *DCSL* (DE competent to stand trial, suspension lifted)

Ch. 938 – Competency to Proceed Procedures

- If the juvenile is likely to regain competency within 12 months OR the length of maximum adult sentence for the most serious offense, whichever is *less*:
 - ▶ Order reexamination and report every 3 months AND 30 days prior to expiration of order in Ch. 51 commitment or JIPS
 - ✓ Reexamination and reports are to be filed in the delinquency case, not Ch. 51/JIPS
 - Use *COMPR* (Competency Report) when entering in CCAP
 - ✓ Reexamination is the responsibility of the agency per *Order Concerning Competency or Mental Responsibility Determination (JD-1733)*

Ch. 938 – Competency Restoration

- Assessment includes determination of likelihood that juvenile, if provided treatment, may be restored to competence within statutory timeframes [§ 938.295(2)(b)3.]
- Statutes are silent on procedure and responsibility for providing this treatment after finding of incompetency
- What are the practices in your county for restoration? Who is responsible? Which budget?
 - ▶ No clear statutory guidance in § 938.30

Ch. 938 – Competency Restored

- If the juvenile regains competency during the statutory timeframe:
 - ▶ Hold a hearing on competency within 10 days of receiving any report indicating the juvenile has regained competency
 - ▶ May restart the case, after hearing, if satisfied the juvenile is now competent
 - ▶ May order administration of psychotropic drugs, if necessary to maintain competency
- Process may need to be repeated, should the juvenile again become incompetent

Ch. 938 - Victim

- If the victim of a delinquent act has been adjudicated as incompetent in WI, then the definition of “victim” includes any guardian who has been appointed to that individual
 - ▶ Notice rights
 - ▶ Marsy’s Law implications

Questions?

If anything was not answered today or if you have competency questions in the future, please contact:

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