



CHILDREN'S COURT IMPROVEMENT PROGRAM
W I S C O N S I N

CHIPS Fact-Finding Hearing

Hon. Wendy J.N. Klicko
Sauk County Circuit Court

Questions About County Practice

Have you ever conducted a Fact-Finding Hearing in a CHIPS case (either court or jury)?

- A. Yes
- B. No
- C. N/A (do not conduct)

If yes, were they court trials, jury trials, or both?

- A. Court
- B. Jury
- C. Both

Learning Objectives

- Know the purpose, timing, and procedures of fact-finding hearings
- Understand the role and responsibility of the judge at fact-finding hearings

**WOULD YOU LIKE A BENCH TRIAL,
A JURY TRIAL**



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Civil Proceeding

- Ch. 48 proceedings are civil proceedings and unless a different procedure is provided, the rules of civil procedure apply
- The rules of evidence apply at fact-finding hearing [§ 48.299 (4)]
- Middle burden—reasonable certainty by clear and convincing evidence—applies [§ 48.31 (1)]

Civil Proceeding

- Jeopardy attaches when the first witness is sworn or Jury is sworn [§ 48.317]
- Summary Judgment is available
 - ▶ *In Re F.Q.* 162 Wis.2d 607 (1991)
- Directed verdict (including partial directed verdict) is proper

Parent Issues

- Default judgment for failure to appear at initial appearance (assuming appropriate service) is proper [§ 806.02 (1)]
 - ▶ *Kimberly B.*, No. 2008 AP 1715 (Wi. App. Unpublished)
- Default judgment for failure to appear at trial may be proper as a sanction, but if counsel for parent is present the parent is “appearing” [§ 806.02 (5)]
 - ▶ *Evelyn C.R.*, 2001 WI 110.

Parent Issues

- Default Judgment proper as a sanction:
 - ▶ If parent fails to appear, was previously ordered to appear, and knew the date of the hearing
 - ▶ If parent violates a court order (i.e., discovery)
 - ▶ Grounds still need to be proven by evidence
 - ▶ Still can participate in future hearings including dispositional hearing

Parent Issues

- If parent cannot appear in person due to incarceration, hospitalization or other legitimate reason, alternative means of appearance (audio visual, telephonic) must permit “meaningful participation” (assess the witnesses, confer with their lawyer, hear everything that is going on)
 - ▶ *Teodoro*, 307 Wis. 2d 372 (Ct. App. 2007)

Parent Issues

- If parent stipulates to an element of CHIPS ground, stipulation should be supported by colloquy and finding that waiver of jury determination as to that element is knowing and voluntary
 - ▶ *Andrea L.O.*, 309 Wis. 2d 161 (2008)

Fact-Finding Procedure

- Fact-finding hearing is held 30 days after plea hearing or 20 days if child or expectant mother is in custody [§ 48.30 (7)]
- Typically closed and confidential proceedings pursuant to § 48.299 (1) (Some exceptions)
- The date of finding is either the date of removal or date of the filing of the petition
 - ▶ *Gregory L.S.*, 2002 WI App 101

CHIPS Findings

- Two-step procedure:
 - ▶ Whether the grounds [§ 48.13] are proven
 - ✓ Judge/Jury determination
 - ✓ Can be based on one parent's conduct
 - *Gregory L.S.*, 2002 WI App 101
 - ▶ Whether the child is in need of protection or services that can be ordered by the Court
 - ✓ Judge determination

WICWA Findings

- Judge/Jury must find by clear and convincing evidence that continued custody by the parent/custodian is likely to result in serious emotional or physical damage to the child and that active efforts have been made to prevent the breakup of the child's family and those efforts have proved unsuccessful

WICWA Findings

- Requires the testimony of a Qualified Expert Witness [§ 48.028(2)(g)]
- REMEMBER: There is an order of preference regarding qualified expert witnesses [§ 48.028(4)(f)]

Special Cases

- Emotional Damage [§ 48.13(11)]
 - ▶ Court must appoint a licensed Psychiatrist or Psychologist to examine the child and opine the emotional damage exists
 - ▶ Written report may be used if parties waive the right to have testimony presented [§ 48.31(4)]

Special Cases

- AODA Impairment [§ 48.13(11m)] / UCHIPS [§48.133]
 - ▶ Child or Expectant Mother must undergo an assessment for alcohol and other drug abuse conducted by an approved treatment facility [§ 48.31(4)]

Special Cases

- Abuse [§ 48.13(3)]
 - ▶ Reasonable Parental Discipline?
 - ▶ JI-Children's 215, Note III
 - ✓ No consensus
 - ✓ "While [the] statutory privilege is not specifically applicable to a CHIPS petition, it does seem incongruous to allow for Children's Code jurisdiction based on conduct deemed 'reasonable' by the Criminal Code"

Child's Testimony

- Audiovisual recording [§ 908.08]
 - ▶ The Child must be available for cross examination
- Audiovisual deposition [§ 967.04(7)]
 - ▶ Judge must preside at the deposition
- Exceptions to hearsay rule:
 - ▶ *State v. Sorensen*, 143 Wis. 2d 226 (residual exception)
 - ▶ *Ohio v. Clark*, 135 S.Ct. 2173 (2015) (may not violation confrontation clause)

Civil Proceeding – Jury Trial

- If a jury is demanded before the close of the plea hearing, § 48.31(2), the trial will be to a 6 person jury (CHIPS)
- Once a jury is timely demanded, demand must be withdrawn in person and in a knowing and voluntary fashion—*Andrea L.O.*, 309 Wis. 2d 161 (2008) (applies to stipulation to an element of a ground as well)
 - ▶ Aligned parties—frequently petitioner and GAL—share strikes in jury selection [§ 805.08(3)]

Civil Proceeding – Jury Trial

- 5/6 verdict rule applies—*In Interest of CEW*, 124 Wis.2d 47
- However, separate verdicts should be submitted as to each child and each ground alleged and jury instructed they need to make an independent determination as to each verdict

Civil Proceeding – Jury Trial

- As previously emphasized, jury’s sole function is to determine if grounds have or have not been proved and may not consider best interests in making determination [§ 48.31]
 - ▶ It is improper for GAL or any other lawyer to make reference to or argue “best interests” in opening statements, questioning witnesses or closing argument—*CEW*, p. 70
 - ▶ *Scott S.*, (Ct.App. 1999), [§ 48.235(6)], and the standard instruction direct that the jury be told GAL represents “interests” of the child

Civil Proceeding – Jury Trial

- Do not forget duty to conduct a jury instruction conference and to provide copy of written jury instructions to jury
[§ 805.13(3) and (4)]
- Use Wisconsin JI-Children (See materials for suggested order of instructions)

Fact-Finding Hearing

- If allegations are proven, and the Court determines that protection or services is appropriate a dispositional hearing must be held within:
 - ▶ 30 days or 20 days if child or expectant mother is in custody [§ 48.31(7)]
- Remember to order a dispositional report from the agency

Questions or Comments?