CHILDREN'S COURT IMPROVEMENT PROGRAM
WISCONSIN

Nuances of the Plea Hearing

Comm'r Anton Jamieson
Dane County Circuit Court
Madison

Hon. Christopher Foley
Milwaukee County Circuit Court
Milwaukee

Fundamentals of the Plea Hearing

- This is not the fundamentals of the Plea Hearing
- You can learn those by watching the CCIP E-Learning: www.wicciptraining.com
- Presentation addresses more significant issues that you are likely to encounter in Plea Hearings—right to/appointment of counsel; incompetent parents; role of GAL ….

Plea Hearing

- The child, parents, guardian, legal custodian and Indian custodian must be advised of their rights
  - Ex: substitute the judge, a jury trial, retain an attorney, etc.
  - Notice of Rights and Obligations – JD-1716 and IW-1716
- Pleas are taken from:
  - "Nonpetitioning parties": parents, guardian, legal custodian, and Indian custodian
  - Child ("if 12 years or older or otherwise competent to enter plea")
- If admissions or no-contest pleas are entered, the child will be adjudicated CHIPS and the case will be scheduled for a Dispositional Hearing within 30 days
- If a party enters a denial, a Fact-Finding Hearing is scheduled within 30 days

Appointment of Counsel for Parent in CHIPS Proceedings

- Generally, except in instances of WICWA children and in Pilot Program counties (§ 48.233), the SPD does not provide appointed counsel for indigent parents in CHIPS cases and the statute previously purported to prohibit courts from appointing counsel at public expense [§ 48.23 (3) and (2g)—as to WICWA children]
  - **However, see 2017 Act 253 (next slide)**
- Statutory prohibition is unconstitutional as violation of separation of powers and due process clause—*State v. Joni B.,* 202 Wis. 2d 1 (1996)

Appointment of Counsel for Parent in CHIPS Proceedings

- 2017 Wisconsin Act 253
  - Removed statutory prohibition in § 48.23(3) against appointing counsel for parents in CHIPS cases
  - Created authority (§ 48.233) and funding for SPD to appoint counsel for indigent parents in a five county pilot
    - Brown, Kenosha, Outagamie, Racine, and Winnebago
  - Extended through cases commenced before June 30, 2023

Appointment of Counsel

- Due Process may require appointment of counsel as a matter of fundamental fairness
  - Consider parent's age, education, mental capacity; complexity of case; likelihood of out of home placement; existence of or potential for related criminal proceedings—*Joni B.,* p. 19
  - Also consider parent's demonstrated level of interest and desire to participate

Appointment of Counsel

- Even in the absence of due process compulsion, court may appoint counsel in the furtherance of "the court's need for the orderly and fair presentation of the case."

  -*Joni B.,* p. 11

Appointment of Counsel

- While you do have to advise them of the right to be represented by counsel (§§ 48.30(2), 48.23(5), 48.243), court need not raise the issue for the parent
- "If the parent does not request appointment … and the court perceives no particularized need for counsel … the court need not address the issue" - *Joni B.,* p. 18

Appointment of Counsel

- However, just saying I don't have the power to appoint counsel is improper
  - "Inadequate and incomplete statement of the law"
  - When the issue is raised, court must exercise discretion and make individualized determination—*State v. Tammy L.D.,* 238 Wis.2d 516 (Ct.App. 2000)
- Self-representation and firing appointed counsel issues, see *Dane County v. Robert A.,* 302 Wis.2d 261 (Ct.App. 2007); *Dane County v. Susan P.S., 2006 WI*

Incompetent Parent

- § 48.235 (1) (g) directs appointment of a GAL in a TPR if § 48.295 evaluation shows parent is not competent
- GAL is to "provide info to court regarding the parent's competency … and provide assistance to the court and adversary counsel in protecting parent's rights"
- § 48.235 (1) permits appointment of GAL in any "appropriate matter"
  - No need for evaluation??

Incompetent Parent

- GAL advocates for best interests of ward; considering but not being bound by wishes of ward (must advise court if recommendation is substantially inconsistent with ward's wishes) [§ 48.235 (3)]
- Represents and acts in best interests even if doing so is contrary to ward's wishes [S.C.R. 20:4.5]

Incompetent Parent

- Adversary counsel must maintain normal relationship "as far as reasonably possible" with client with diminished mental capacity
- If reasonably believes "client cannot adequately act in their own interests … [may] seek appointment of GAL" [S.C.R. 20:1.14 (2)]
- May a GAL "substitute judgment" for an incompetent parent in Ch. 48 proceeding?

Incompetent Parent

- Compare *In the Interest of T.L.*, 151 Wis. 2d 725 and *Kainz v. Ingles*, 07 WI App 118
- Pure opinion (as there is no clear answer): If you follow the *Kainz* procedure to establish incompetence and parent does not overtly object to GAL's stipulation in CHIPS case, you probably avoid the strictures of *T.L.*
- Just would not take the chance in TPR

Paternity

- Critical in both short term and long term that paternity issue be resolved ASAP
- Paternal constellation represents potential placement with fit and willing relatives when OHC is necessary
- § 48.299(6)(e) allows court to determine paternity of father through genetic testing without all formalities of paternity adjudication; making father a party and relatives-"relatives"

Paternity

- Resolving paternity early also resolves long term issues in regard to permanency of the child
- "I did not know. I did not have the opportunity to parent."
  - ► See *State v. Bobby G.,* 2007 WI 77

Right to Jury and Substitution of Judge

- § 48.30(2) mandates that you advise the parent they have a right to a jury and right to substitution of judge.
  - ► Both rights are arguably forfeited if not exercised by the conclusion of the Plea Hearing.
- "Shall" in this instance does not necessarily mean "shall"—*State v. Kywanda F.,* 200 Wis. 2d 26 (1996)

Right to Jury and Substitution of Judge

- However, failure to do so will invalidate waiver of right to substitution upon a showing of prejudice -*Id*.
  - ► *Bangert* hearing will be necessitated
- Once demanded, waiver of right to jury must be knowing and voluntary
- Clearly best practice to advise

Right to Jury and Substitution of Judge

- While § 48.29 provides that "not more than one [substitution] request may be filed in any one proceeding," each party, including the GAL, may file one, *but not more than one*, substitution request—*Preston T.B.,* 2002 WI App 220
  - ► § 48.29 does not contain an "aligned interest" limitation seen in § 801.58(3)

Time Limits

- Fact-Finding Hearing must be held within 30 days of the Plea Hearing if the petition is contested, absent a finding of good cause [§ 48.30 (7), § 48.315]
- However, failure to comply with the time limits no longer deprives court of competency to proceed absent timely objection from a party [§ 48.315 (3)]

Time Limits

- However, timely permanence for children is a primary objective of ASFA
- In addition, parents of children in OHC, are on a 15-month time clock, starting with the date of removal from the home by the agency [§ 48.417 (1) (a)]
- Prompt resolution of the legal issues is critical to prompt resolution of the safety issues

GAL for Child

- "Advocate for best interests of [child]" [§ 48.235 (3)]
- However, best interests standard applies only after showing of parental unfitness in fact-finding phase of CHIPS/TPR—*CEW*, 124 Wis. 2d 47
- While it is not necessarily error to advise GAL represents best interests of child, *Scott S.,* 230 Wis. 2d 460, standard instruction advises they represent "interests" of the child—JI Children 300

GAL Duties

- Unless granted leave by court, at a minimum must:
  - ► Meet with child
  - ► Assess appropriateness/safety of child's environment
  - ► Interview the child if old enough to communicate
- Statement of GAL (JD-1799)
- Additional GAL Oversight Resources: www.wicourts.gov/courts/offices/ccip.htm

Guardian ad Litem

- GAL must be appointed for child in TPR or CHIPS case in which OHC is ordered, requested or recommended [§ 48.235(1)(e)]
- There are circumstances in which child may have both GAL and adversary [§ 48.235 (3), § 48.23 (1m), (3m)]

Stipulations and No Contest Pleas

One of These Things is Not Like the Other

- After an extensive plea colloquy and waiver of trial rights with the respondent parent, the trial judge asks the parent if she has read and understands the contents of the petition and whether she may take those facts as true for purposes of finding a basis for the stipulation
- The parent responds she has and further has discussed it with her lawyer
- All parties stipulate that the facts in petition may be used for purposes of the finding

One of These Things…

- Is this a sufficient factual basis in:
  - ► A CHIPS grounds phase proceeding??
  - ► A TPR grounds phase proceeding???

One of these things…

One of These Things…

- That record is probably sufficient to support a grounds finding in a CHIPS proceeding
  - § 48.30 requires that before accepting an admission to a CHIPS petition, the court must:
    - Address the parties personally and determine that plea is voluntary; made with an understanding of the nature of the acts alleged in the petition and potential dispositions
    - Establish whether any threats or promises were made to elicit plea and warn unrepresented parent that counsel might discover defenses or mitigating circumstances
    - ***Make such inquiries as satisfactorily establishes a factual basis***

One of These Things…

- That record is clearly and unquestionably inadequate to establish a factual basis for TPR grounds
- While § 48.422 (7) substantially tracks § 48.30 as to the requirements in accepting a stipulation or no contest plea to grounds, including the language regarding "make such inquiries as satisfactorily establish … a factual basis…."

One of These Things…

- § 48.422 (3) requires that if the TPR petition is not contested, ***"the court shall hear testimony in support of the allegations in the petition"***
  - ► *Waukesha County v. Steven H.,* 233 Wis. 2d 344 (2000)
- This requirement applies to default judgments in TPR
  - ► *Evelyn C.R. v. Tykila S.,* 246 Wis. 2d 1 (2001)
  - ► Principle was reiterated in *Mable K.,* 346 Wis. 2d 396 (2013)

One of These Things…

- Justice Wilcox emphasized in *Evelyn C.R.* that the court was fulfilling both a statutory and constitutional requirement in taking testimony as a parent's rights cannot be terminated without proof of unfitness to the requisite level of certainty (reasonable certainty by clear, satisfactory and convincing evidence)

One of These Things…

- We will be revisiting some of the critical aspects of stipulations, partial directed verdicts and summary judgment in the Fact-Finding and TPR sessions
- However, it is imperative that whenever a parent stipulates, in full or in part, to a CHIPS or TPR petition, that the record reflect an appropriate colloquy and finding that the waiver of trial rights is knowing and voluntary

Concluding The Hearing

- Advise parties of Trial (or Dispositional Hearing) date on the record and order them to appear in person or risk default
- Do provisions of the TPC Order need to be modified:
  - Have the safety issues been sufficiently ameliorated to permit return to the home
  - Is the child in placement with a relative (if not, why not and what efforts have been made to identify fit and willing relatives—has the parent provided the names of relatives for consideration)
  - Are the siblings together???!!!

Concluding The Hearing

- What visitation is occurring? Are restrictions on visitation still necessary, i.e. supervision?
  - If supervision is necessary, are fit and willing relatives being used to supervise and allow more frequent contact
- Is this a "reasonable efforts not required" case?
  - § 48.355(2d), i.e., prior involuntary TPR, relinquishment, or serious abuse of a child conviction
  - Court may order that reasonable efforts to safely return are not appropriate and set case for permanency hearing in 30 days