

TEMPORARY PHYSICAL CUSTODY OUTLINE - CHIPS

I. STATUTORY SUMMARY

- A. If a child has been taken into custody and not released under §48.20, a hearing must be conducted by a judge or circuit court commissioner within 48 hours of the time the decision to hold the child was made, excluding Saturday, Sundays, and legal holidays.
See §48.21 (1).
- B. If no hearing has been held within the time limits, the child shall be released.
See §48.21 (1) (a).
- C. A petition shall be filed by the time of the hearing unless a 72 hour extension is granted under §48.21 (1) (b), or unless the child was taken into custody under a capias issued by a judge in this state, under a capias or warrant for the child's apprehension issued in another state, or the child has violated conditions of an order for temporary physical custody.
See §48.21 (1) (a).
- D. Prior notice of the hearing shall be given to the child's parent, guardian and legal custodian and Indian custodian, and to the child if he or she is 12 years of age or older.
See §48.21 (3) (b).
- E. There is no right of substitution for a temporary physical custody hearing. The general public shall be excluded from the hearing. The only persons entitled to be present are the parties and their counsel or guardian ad litem, the court appointed special advocate for the child, the child's foster parent or other physical custodian, witnesses and other persons requested by a party and approved by the court. A child, with the consent of the child's counsel or guardian ad litem, may be temporarily excluded from the court. Except as provided in §901.05, neither common law nor statutory rules of evidence are binding. Telephone or live audiovisual means may be used. The court should admit all testimony having reasonable probative value. Hearsay evidence may be admitted. The court shall give effect to the rules of privilege recognized by law.
See §§48.29 (1) and 48.299.
- F. The temporary physical custody hearing cannot be waived, but the parent, guardian, legal custodian, or Indian custodian may waive his or her right to participate in the hearing. However, after any waiver, a rehearing shall be granted at the request of the parent, guardian, or legal custodian, or any other interested party for good cause shown.
See §§48.21(1) (a) and 48.21 (3) (am).

- G. If present at the hearing, a copy of the TPC request and petition, if the petition has been filed by the time of the hearing, shall be given to the parent, guardian, legal custodian, or Indian custodian and to the child if the child is 12 years of age or older, before the hearing begins.
See §48.21 (3) (b).
- H. Prior to the commencement of the hearing, the parent, guardian, or legal custodian shall be informed by the court of:
1. The right to counsel under s. 48.23.
 2. The allegations that have been made or may be made.
 2. The nature and possible consequences of the hearing.
 3. The right to confront and cross-examine witnesses.
 4. The right to present witnesses.
 5. 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.
See §48.21 (3) (d)
- I. If a child is alleged to be in need of protection or services under §48.13, the child may be represented by counsel at the discretion of the court. A child 15 years of age or older may waive counsel.
See §48.23(1m) (b) 1.
- J. At any time, upon request or on its own motion, the court may appoint counsel for the child or any party, unless the child or party wishes to retain counsel of his or her own choosing. An Indian child's parent or Indian custodian shall have the right to be represented by counsel as provided in §48.23 (2g).
- K. 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 guardian ad litem instead of counsel.
See §48.23 (3m).
- L. At the conclusion of the hearing, the judge or circuit court commissioner should determine whether the child shall be continued in custody under one or more of the following criteria:
1. Probable cause exists to believe that if the child is not held he or she will cause injury to himself or herself or be subject to injury by others.
 2. Probable cause exists to believe that if the child is not held he or she will be subject to injury by others, based on a determination under par. 1. or a finding under s. 48.21 (4) that if another child in the home is not held that child will be subject to injury by others.
 3. Probable cause exists to believe that the parent, guardian or legal custodian of the child or other responsible adult is neglecting, refusing, unable or unavailable to provide adequate supervision and care and that services to ensure the child's safety and well-

being are not available or would be inadequate.

4. Probable cause exists to believe that the child meets the criteria specified in par. 2., based on a determination under par. 2. or a finding under s. 48.21 (4) that another child in the home meets those criteria.
5. Probable cause exists to believe that the child will run away or be taken away so as to be unavailable for proceedings of the court or its officers.
6. Probable cause exists to believe that the child is an expectant mother and if she is not held, there is a substantial risk to the physical health of the unborn child, and the child, when born, will be seriously affected or endangered due to the expectant's mother's habitual and severe abuse of alcohol or other drugs and refusal to get treatment.

See §§48.21 (4) and 48.205 (1).

- M. If no petition has been filed by the time of the hearing, a child may be held in custody with the approval of the judge or circuit court commissioner for an additional 72 hours from the time of the hearing, excluding Saturday, Sundays, and legal holidays, only if, as a result of the hearing, the judge or circuit court commissioner determines probable cause exists to believe any of the following:
1. That additional time is required to determine whether the filing of a petition is necessary.
 2. That the child is in imminent danger to himself, herself or others.
 3. That probable cause exists to believe that the parent, guardian, or legal custodian of the child or other responsible adult is neglecting, refusing, unable, or unavailable to provide adequate supervision and care.
 4. That, if the child is an expectant mother who was taken into custody under s. 48.19 (1) (cm) or (d) 8., probable cause exists to believe that there is a substantial risk that if the child expectant mother is not held, the physical health of the unborn child, and of the child when born, will be seriously affected or endangered by the child expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances, or controlled substance analogs, exhibited to a severe degree, and to believe that the child expectant mother is refusing or has refused to accept any alcohol or other drug abuse services offered to her or is not making or has not made a good faith effort to participate in any alcohol or other drug abuse services offered to her.

See §48.21 (1) (b).

- N. If the judge or circuit court commissioner finds that the child should be continued in custody, he or she shall either (1) place the child with a parent, guardian, legal custodian, relative, or other responsible person and may impose reasonable restrictions on the child's travel, association with other persons or places of abode during the period of placement, or subject the child to supervision of an agency agreeing to supervise the child. Reasonable restrictions may be placed upon the

conduct of the parent, guardian, legal custodian or other responsible person which may be necessary to ensure the safety of the child or (2) order the child held in a licensed foster home, licensed group home, nonsecure facility operated by a licensed child welfare agency, a licensed public or private shelter care facility, a hospital, or, if in Milwaukee County, the county children's home, or (3), the home of a non-relative, if the placement does not exceed 30 days (though placement can be extended for cause), and if the person has not had a license under §48.62 refused, revoked, or suspended within the last 2 years.
See §§48.21 (4) and 48.207.

- O. If the child is ordered to be held outside the home of the child, the order shall also include all of the following:
1. A finding that continued placement of the child in his or her home would be contrary to the welfare of the child.
 2. A finding as to whether the person who took the child into custody and the intake worker have made reasonable efforts to prevent the removal of the child from the home, while assuring that the child's health and safety are the paramount concerns.
 3. A finding as to whether the person who took the child into custody and the intake worker have made reasonable efforts to make it possible for the child to return safely home .
 4. If the judge or circuit court commissioner finds that any of the circumstances specified in §48.355 (2d) (b) 1. to 5. applies with respect to a parent, the judge or circuit court commissioner shall hold a hearing under § 48.38 (4m) within 30 days after the date of that finding to determine the permanency plan for the child.
See §48.21 (5).
- P. All orders to hold a child in custody shall be in writing and list the reasons and criteria for the basis for the decision. Further, if the child is ordered to be held in custody outside the child's home, the order shall also include the findings in Sec. O. above. The findings under Sec. O. shall be on a case-by-case basis and based upon circumstances specific to each child.
See §48.21 (5).
- Q. The order continues until a dispositional order or consent decree is entered, the petition is withdrawn or dismissed, or the TPC Order is modified or terminated by further order of the court.
See §48.21 (5m).
- R. A child, parent, guardian, legal custodian, or Indian custodian who was not represented by counsel at the hearing where custody is continued may request a rehearing, which shall take place as soon as possible.
See §48.21 (3) (e).

S. Changes in Placement

1. The caseworker, agency, district attorney, or corporation counsel may perform a change in placement following a 10-day notice to case participants. Emergency changes in placement may occur immediately, provided that notice is sent within 48 hours of the change in placement. A hearing would occur if an objection is filed by any party receiving notice, except CASA. Placement may change immediately if authorized via written waivers of objection or authorized by the original TPC Order, unless new information exists to affect the advisability of that order. See §48.217 (1) and (2).
2. The child, child's counsel or guardian ad litem, parent, guardian, legal custodian, or Indian custodian may request a change in placement where new information exists to affect the advisability of the TPC Order. The court may also propose new placement. A hearing is required unless written waivers and approval of court. Pending: See §48.217 (2m).

II. 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 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.

Determination of self-representation competency requires an assessment of whether a person is able to provide himself or herself with “meaningful” self-representation; in making this assessment, courts must distinguish technical legal knowledge--something that is not required--from the practical ability to make arguments, present evidence, and ask effective questions. *In re Sophia S.*, 2006 WI App 100, 293 Wis.2d 279, 715 N.W.2d 692, review denied, 2006 WI 126, 297 Wis. 2d 323, 724 N.W.2d 205.

County of venue is required to pay fees of guardian ad litem appointed to represent indigent minor, if no specifically applicable provision for payment of fees appears in statute pursuant to which guardian was appointed. *Katie T. v. Justin R.*, 204 Wis. 2d 401, 555 N.W.2d 651 (1996).

Although courts retain ultimate authority to determine amount of compensation for court-appointed attorneys, courts should follow statutory fee schedule when determining compensation for court-appointed guardians ad litem and special prosecutors, absent clear and compelling need; circuit court must articulate clear and compelling need when exercising its inherent authority to compensate court-appointed attorneys at greater than statutory rate to secure qualified and effective attorneys for case before it. *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995).

III. POTENTIAL ISSUES

- A. Security for hearing
- B. Need for an interpreter
- C. Notice of hearing
- D. Paternity
- E. WICWA – for notice and future hearings
- F. Incarcerated parent – Physical or audio/video appearance available
- G. Any language or cognitive challenges
- H. Need for counsel or guardian ad litem