

PLEA HEARING OUTLINE - CHIPS

A. STATUTORY SUMMARY

I. Establish Jurisdiction

a. Is the child an *Indian child*?

- i. The Indian tribe shall have exclusive jurisdiction over a child who resides or is domiciled on the reservation. If the child is a ward of the tribal court, the tribe retains jurisdiction regardless of domicile or residence.
- ii. If the child is not residing/domiciled on the reservation, the court may transfer the proceeding to the jurisdiction of the tribe upon the petition of the parent, Indian custodian, or tribe.

1. Unless certain conditions apply; see §48.028(3)(c)1.-3.

b. If the child is *not an Indian child*, the court has exclusive original jurisdiction if the child is need of protection or services and:

- i. Is without a parent or guardian
- ii. Has been abandoned
- iii. Custody has been relinquished by the parent
- iv. Has been the victim of abuse
- v. Is at substantial risk for becoming a victim of abuse, based on reliable and credible information that another child in the home has been the victim of such abuse.
- vi. Whose parents or guardians have signed the petition for jurisdiction and are unable or need assistance to provide care or treatment for the child
- vii. Whose guardian is unable or needs assistance to provide treatment or care for the child, but is unable to sign the petition for jurisdiction
- viii. Has been placed for adoption in violation of the law
- ix. Is receiving inadequate care while a parent is incarcerated, institutionalized, hospitalized, or missing
- x. Is at least age 12 and signs the petition for jurisdiction, and needs care or treatment which the parent or guardian is unwilling, neglecting, unable, or needs assistance to provide
- xi. Whose parent/guardian/legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, so as to seriously endanger the physical health of the child
- xii. Whose parent/guardian/legal custodian is at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide care, so as to endanger seriously the physical health of the child, based on reliable and credible information of similar abuse to another child in the home
- xiii. Is suffering emotional damage for which the parent/guardian/legal custodian has neglected, refused or been unable for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate the symptoms

- xiv. Is suffering from an alcohol or other drug abuse impairment, and the parent/guardian/legal custodian is neglecting, refusing, or unable to provide treatment.
- xv. Has not been immunized as required by §252.04 and not exempted under §252.04(3)
- xvi. The child's parent is residing in a qualifying residential family-based treatment facility or will be residing at such a facility at the time of a child's placement with the parent in the facility, signs the petition requesting jurisdiction under this subsection, and, with the department's consent, requests that the child reside with him or her at the qualifying residential family-based treatment facility. See §48.13.

II. Right to Counsel

- a. A CHIPS may be represented by counsel at the court's discretion, except that a child over 15 may voluntarily and knowingly waive counsel.
- b. If the petition is contested, the court may not place the child outside the home if the child is not represented by counsel at the fact-finding hearing and thereafter. If the petition is not contested, the court cannot place the child outside the home unless the child is represented at the placement hearing. If the child is under 12, the court may appoint a GAL.
- c. A minor in the court's jurisdiction under §48.14(5) must be represented by counsel, and the court may not accept a waiver.
- d. A minor in the court's jurisdiction under §48.16 who is required to appear in court shall be represented by counsel.
- e. In a contested adoption or TPR proceeding, a parent under 18 must be represented by and cannot waive counsel. Parents over 18 shall be represented by counsel, but may knowingly and voluntarily waive.
- f. In a proceeding involving the removal of an Indian child from the home or TPR of an Indian child, the parent or Indian custodian shall have a right to counsel as in e. and j.
- g. Expectant mothers
 - i. For UCHIPS, the child expectant mother shall be represented by counsel and may not waive.
 - ii. 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. 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, however, may waive counsel if the court is satisfied that the waiver is knowingly and voluntarily made and the court may place her outside of her home even though she was not represented by counsel.
 - iii. If the expectant mother is under 12, the court may appoint a GAL instead of counsel.

- h. At any time, upon request or on its own motion, the court may appoint counsel under §48.23(3) for the child or any party, unless the child or party wishes to retain counsel of his or her own choosing. *See Joni B., 202 Wis. 2d.* An Indian child's parent or Indian custodian shall have the right to be represented by counsel as provided in §48.23(2g).
- i. The court shall appoint counsel for CHIPS under §48.13(3), (3m), (10), (10m) and (11), except that if the child is less than 12 years of age the court may appoint a GAL instead of counsel. The GAL or counsel for the child may not represent any other party or any agency involved and may not act as a CASA for the child in the proceeding.
- j. If a child has a right to be represented by counsel and does not waive it, the court shall refer the child to the public defender, and counsel shall be appointed without a determination of indigency.
 - i. If the referral is of a child who has filed a petition under §48.375(7), the state public defender shall appoint counsel within 24 hours after that referral. Counsel appointed under §48.375(7) shall continue to represent the child in any appeal brought under §809.105 unless the child requests a substitution or extenuating circumstances make it impossible to continue to represent the child.
 - ii. Under sub. (2), (2g), or (2m), when a parent 18 years of age or over or an adult expectant mother is entitled to representation by counsel; counsel is not knowingly and voluntarily waived; and it appears or is indicated that the parent or adult expectant mother is unable to afford counsel in full, the court make a referral to the authority for indigency determinations.
 - iii. In any other situation under this section in which a person is provided or has a right to be represented by counsel at the discretion of the court, competent and independent counsel shall be provided and reimbursed in any manner suitable to the court regardless of the persons ability to pay, except that the court may not order a person who files a petition under §§813.122 or 813.125 to reimburse counsel for the child who is named as the respondent in that petition.
- k. Regardless of any provision of this section, any party is entitled to retain counsel of his or her own choosing at his or her own expense in any proceeding under this chapter. See §48.23

III. Plea Hearing

- A. Review Petition for Legal Sufficiency - See § 48.255
- B. Check for Proper Notice to All Interested Parties - See §§ 48.27, 48.273
 - a. The child, any parent, guardian, and legal custodian of the child, any foster parent, or other physical custodian described in s. 48.62(2) of the child, the unborn child by the GAL, if applicable, a person who has filed a declaration of paternal interest or the alleged father, unless the conception was the result of a sexual assault, Indian custodian or tribe, and the CASA; if applicable.
 - b. Notify of all hearings involving the child except hearings on motions for which notice must be provided only to the child and his or her counsel.
 - c. If the person fails to appear or acknowledge service, a continuance may be granted and service must occur personally or by certified mail if personal service is impracticable. The court may refuse to grant a continuance, but must serve notice as in b.

C. Advise Parties of their Rights

- a. What allegations could be in the petition
- b. The nature & consequences of the proceedings
- c. The right to remain silent and the fact that silence may be relevant
- d. The right to confront and cross-examine those who may be appearing against them
- e. The right to counsel under §48.23
- f. The right to present and subpoena witnesses
- g. The right to a jury trial
- h. The right to have the allegations of the petition proved by clear and convincing evidence - See §48.243
- i. The right to judge substitution
 - i. Must be made before the end of a plea hearing or it is waived - See §48.29

D. Time Periods

- a. If the parties wish to have a hearing to contest (U)CHIPS, it must take place within 30 days of the filing of the petition if the child or expectant mother is not being held in secure custody and 10 days if the child is being held within secure custody. See §48.30 (1).
- b. If the petition is not contested, the court should arrange a dispositional hearing not more than 10 days after the plea hearing for a child in secure custody and not more than 30 days after the plea hearing for a child or expectant mother not in secure custody. Subject to 48.299(9), if all parties consent, the dispositional hearing may be held immediately. See §48.30(6) (a).
- c. If the petition is contested, the fact-finding hearing should be scheduled not more than 20 days after the plea hearing if the child is in secure custody and not more than 30 days after the plea hearing if the child or expectant mother is not in secure custody. See §48.30(7).
- d. If the child has been involuntarily removed from the parent's custody under §48.19 (1) (c), (cm), (d) 5 or 8, or an adult expectant mother was involuntarily taken into custody under §48.193(1) (c) or (d) 2, the court shall schedule both a plea and fact-finding hearing, which may be combined, within 30 days after the request of the parent/guardian/expectant mother.
 - i. A continuance may only be granted in this situation upon the consent of the requesting parent, guardian or expectant mother. See §48.305.

E. Procedure

- a. Non-petitioning parties and child over age 12 should state whether they wish to contest the petition. See §48.30(3).
- b. If the court believes the dispositional hearing may result in the child being placed outside of the home, the court shall order the parent to furnish to the court, designated agency, or the department, a statement of income, assets, debts, and living expenses at least 5 days before the dispositional hearing. See §48.30(6) (b) - (c).

- c. Before accepting an admission or plea of no contest to the allegations in the petition, the court shall:
 - i. 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.
 - ii. 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.
 - iii. 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. See §48.30 (8).
- d. The parties may participate in hearings under §48.30 by telephone or live audiovisual means. See §48.30 (10).

F. Delays, Continuances and Extensions

- a. The court shall exclude the following time periods when computing time periods under this chapter: See §48.315(1).
 - i. Any period of delay resulting from other legal actions concerning the (unborn) child or the expectant mother, including an examination under §48.295 or a hearing related to the mental condition of the child, parent/guardian/legal custodian or expectant mother, prehearing motions, waiver motions and hearings on other matters.
 - ii. Any period of delay granted at the request or with the consent of the child by counsel or the unborn child by GAL.
 - iii. Any period of delay caused by the disqualification of a judge.
 - iv. Any period of delay resulting from a continuance granted at the request of the representative of the public under §48.09 if the continuance is granted because of the unavailability of evidence material to the case when due diligence was exercised to obtain it and there are reasonable grounds to believe it will be available at a later date, or to allow additional time to prepare the case, justified by exceptional circumstances.
 - v. Any period of delay resulting from the imposition of a consent decree.
 - vi. Any period of delay resulting from the absence or unavailability of the child or expectant mother.
 - vii. Any period of delay resulting from the inability of the court to provide the child with notice of an extension hearing under §48.365 due to the child having run away or being otherwise unavailable to receive that notice.
 - viii. A reasonable period of delay when the child's hearing is joined with another child's whose time for a hearing has not expired under this section, if there is good cause for not hearing the cases separately.
 - ix. Any period of delay resulting from the need to appoint a qualified interpreter.

- x. A reasonable period of delay, not to exceed 20 days, in a proceeding involving the out-of-home care placement of or TPR to a child whom the court knows or has reason to know is an Indian child, resulting from a continuance granted at the request of the child's parent, Indian custodian, or tribe to enable the requester to prepare for the proceeding.
- b. 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. See §48.315(2).
- c. The court may grant no continuance, delay, exclusion or extension if it will result in:
 - i. 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.
 - ii. 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.
 - iii. A finding under s. 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. See §48.315(2m).
- d. 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. See §48.315(3).
- e. Failure to object to a period of delay or a continuance waives any challenge to the court's competency to act during that period. See §48.315(3).
- f. 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:
 - i. Grant a continuance under F.b. above;
 - ii. Dismiss the proceeding without prejudice;
 - iii. Release the child from secure or non-secure custody or from the terms of a custody order;
 - iv. Or grant any other appropriate relief.
 - v. See §48.315

G. Court Ordered Testing

- a. 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.

- b. Examination can be in an approved treatment facility for alcohol and drug abuse, by a physician, psychiatrist, or licensed psychologist, by another expert appointed by the court holding at least a master's degree in social work or a similar area of child development.
- c. Court may order similar testing for parent/guardian/legal custodian/expectant mother if the ability to care for the child is at issue.
- d. Hear objections before making the order
- e. Payment is by the department or county - See §48.295 (1)
- f. AODA assessment payments
 - i. Judge may order parent/adult expectant mother to pay if he or she neglects, refuses, or is unable to pay through health insurance. See §48.361 (a) 1, 1m.
 - ii. Court may order 3rd party payer or health insurance to pay in accordance with parent/adult expectant mother's plan. See §48.361 (a) 1, 1m.
 - iii. If the county has an AODA program and the court finds it is not attainable under i. and ii., court may order the county DHS or §§51.42, 51.437 departments to pay. See §48.361 (2) (b) 1, 1m.
 - iv. Approved facility will report results of the assessment within 14 days of the court order, except if the child is not an expectant mother and not in custody, the court may extend the time period to 20 days. Report must include whether the facility recommends treatment. See §48.295 (1g).
- g. The examiner shall file a report of the examination by the date specified in the order. The court shall transmit copies to the DA or corporation counsel, to counsel or GAL, and to the CASA. The report describes the nature of the examination and identify the persons interviewed, the records reviewed and any tests administered, and states in reasonable detail the facts and reasoning upon which the examiners' opinions are based.
- h. If one of the parties objects to a particular physician, psychiatrist, licensed psychologist or other expert as required under this section, the court shall appoint a different one.
- i. Motions or objections under this section may be heard under §807.13
- j. See §48.295 (2)-(4)

B. CASE LAW

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 s. 48.365 (6); the 30-day period may not be expanded by a continuance under s. 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 s. 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.

C. POTENTIAL ISSUES

1. Jurisdiction
2. ASFA findings
3. WICWA
4. Time Periods