TERMINATION OF PARENTAL RIGHTS OUTLINE

Abbreviations:
(U)CHIPS – (Unborn) Child in need of protection or services
AODA – Alcohol and Other Drugs Abuse
CASA – Court-Appointed Special Advocate
GAL – Guardian ad litem
ASFA – Adoption and Safe Families Act
TPR – Termination of Parental Rights

I. STATUTORY SUMMARY

A. A termination of parental rights may be voluntary under §48.41 or involuntary based on one or more of the grounds set forth in §48.415.
See §48.41 and §48.415.

B. Whether the request is based on a voluntary termination or involuntary termination, the action is commenced by the filing of a petition.
See §48.42.

C. The petition may be filed by the child's parent, an agency or a person who has knowledge of the facts or is informed of them and believes them to be true, the counsel or guardian ad litem for a parent, relative, guardian or child, or a relative with whom the child is placed.
See §48.25 and §48.835.

D. The petition may have to be filed by or joined in by an agency or district attorney, corporation counsel or other appropriate official designated under §48.09, if the circumstances set forth in §48.417(1) apply.
See §48.417 and §48.09.

E. The petition must state:

1. The name, birth date or anticipated birth date, and address, of the child.
2. The name and addresses of the child's parent or parents, guardian and legal custodian.
3. One of the following:
    a. That consent to termination will be given.
    b. The grounds for involuntary termination and a statement of the facts and circumstances which the petitioner alleges establishes the grounds.
4. A statement of whether the child may be subject to ICWA/WICWA and the names of the child's Indian custodian and tribe, if known.

5. If the petition is seeking the involuntary TPR to an Indian child, a statement of reliable and credible information showing that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage and reliable and credible information showing that active efforts have been made, unsuccessfully, to prevent the breakup of the Indian child's family.

See §48.42(1).

F. An affidavit under §48.42(1g) may be filed with the petition. If so, there is a requirement to give notice of the right to file a declaration of paternal interest.
See §48.42(1g).

G. If grounds for involuntary termination are stated in the petition, the petitioner may request and the court may grant a temporary order and injunction prohibiting the person whose parental rights are sought to be terminated from having any contact or visitation with the child.
See §48.42(1m).

H. A summons must also be filed which:

1. Contains the name and birth date of the child, and the nature, location, date and time of the initial hearing.
2. Advises the party of his or her right to legal counsel, regardless of the ability to pay.
3. Advises the parties of the possible result of the hearing and the consequences of failure to appear or respond.
4. Advises the parties that if the court terminates parental rights, a notice of intent to pursue relief from the judgment must be signed and filed within 30 days after the judgment is entered. Except as provided in 48.42(2g)(ag), the initial hearing must be held within 30 days after the petition is filed.

See §48.42(2g)(ag), (3) and §48.422(1).

I. In general, unless conception resulted from a sexual assault, the petitioner shall have the summons and petition served on the parent or parents of the child (unless notice has been waived), a person who has filed an unrevoked declaration of paternal interest, a person or persons who are alleged to be the father or may be the father of the child, a person who has lived in a familial relationship with the child and may be the father, the guardian, guardian ad litem and legal custodian of the child, the Indian custodian, to the child if 12 or older and any person to whom notice must be given under the Uniform Child Custody Jurisdiction and Enforcement Act (Chapter 822). Personal service is required at least 7 days before the hearing. If the case involves TPR to an Indian child, the petitioner shall serve the Indian child's parent, Indian custodian, and tribe. Notice must be written and may be delivered personally or by mail. No hearing may be held until 10 days after receipt of notice, or 15 days if notice is provided to the Secretary of the Interior due to an unknown tribe. On request of the Indian parent/guardian/custodian, the court shall grant an additional 20 days.
See §48.42(2), §48.42(4), §48.028(4).

J. Notice must also be given by mail to any foster parent, treatment foster parent, of other physical custodian, who are also entitled to notice of ALL hearings on the petition. A foster parent or physical custodian may make a written or oral statement during the hearing or submit a statement prior to the hearing.
See §48.42(2g).

K. Appoint a guardian ad litem. A guardian ad litem is required in all TPR cases.
See §48.235(1)(c).

L. The general public shall be excluded from initial 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.
See §48.299.

M. At the initial hearing on the petition the court shall inform the parties of their rights to:
1. Right to a jury trial (which must be requested before the end of the initial hearing on the petition).
2. Rights of a person who appears claiming to be the father of the child.

See §48.422 and §48.423.

N. If the petition is filed by an agency, the court shall order the agency to file a report under §48.425, except if the child is an Indian child, the court may order the tribal welfare department of the child's tribe to file the report. If the petition is filed by a person or if the report under §48.425 is waived, the court shall order any parent whose rights may be terminated to file with the court medical information of the child.
See §48.422(8), §48.422(9) and §48.425(1)(am).

O. If the child's paternity has not been established, the court shall determine if all interested parties who are known have been notified.
See §48.422(6).

P. At the initial hearing on the petition the court shall determine whether any party wishes to contest the petition.
See §48.422(1).

Q. If the petition IS CONTESTED, a fact-finding hearing shall be set within 45 days, unless the child is an Indian child (*see §48.42(2g)(ag)*), or unless all parties agree to commence the hearing in the merits immediately. Any party shall be granted a jury trial if requested by the end of the initial hearing. Further, any non-petitioning party shall be granted a continuance to consult with an attorney on the request for a jury trial or substitution of judge.
See §48.422(2), §48.422(4) and §48.422(5).

R. The purpose of the fact-finding hearing is to determine whether grounds exist for the TPR. The child may be excluded from the hearing and the public shall be excluded from the hearing. If heard by a jury, the jury only decides whether any grounds for termination of parental rights have been proven and whether the allegations specified in 48.42(1)(e) have been proven in a TPR to an Indian child.
See §48.424(1), §48.424(2) and §48.424(3).

S. If grounds for TPR are found by the court or jury, the court shall find the parent unfit and proceed immediately to hearing evidence and motions related to disposition. However, except as provided in §48.42(2g)(ag), the court may delay making a disposition and set a disposition hearing within 45 days if:
1. All parties agree; or
2. The court has not yet received the agency or tribal child welfare department report required under §48.425.

If the dispositional hearing is delayed, the court may transfer temporary custody of the child to an agency until the dispositional hearing.
See §48.424(4) and §48.424(5).

T. Any party may present evidence at the dispositional hearing and may make alternative dispositional recommendations to the court. Further, the foster parent, treatment foster parent or other physical custodian shall have an opportunity to be heard by submitting a written statement prior to disposition or by making a written or oral statement at the dispositional hearing. The court shall enter a disposition within 10 days.
See §48.427(1) and §48.427(1m).

U. When determining a disposition, the prevailing factor to be considered by the court shall be the best interests of the child and the following factors:
1. The likelihood of the child's adoption after termination.
2. Age and health of the child at time of removal from home, if applicable and at the time of disposition.
3. Whether the child has substantial relationships with the parent or other family members and, if so, if it would be harmful to sever those relationships.
4. The wishes of the child.
5. The duration of the separation of the parent from the child.
6. Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination.

See §48.426.

V. If the petition IS NOT CONTESTED, the court shall hear testimony in support of the allegations in the petition and the court shall:
1. Address the parties and determine if the admission is voluntary, with understanding of the acts alleged in the petition and potential dispositions.
2. Establish whether any promises or threats were made to elicit an admission and alert unrepresented parties that a lawyer may discover defenses or mitigating circumstance that may not be apparent to the party.
3. If there is a proposed adoptive parent who is not a relative, order a report regarding payments under §48.913.

4. Establish whether any parent or alleged or presumed father has been coerced, which, if established, requires dismissal of the petition.
5. Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

See §48.422(3), §48.422(7) and §48.913. *Must "hear testimony in support of the allegations in the petition" pursuant to §48.422 (3).*

W. After considering the best interests of the child and the other necessary factors, the court shall dismiss the petition or terminate the rights of one or both parents. If the rights of both parents or the only living parent are terminated the court may shall enter an order:
1. Transferring guardianship and custody pending adoptive placement.
2. Transferring guardianship and custody for placement for adoption.
3. Transferring guardianship to an agency and custody to an individual in whose home the child has resided for at least 12 consecutive months or to a relative.
4. Appoint a guardian under §48.977 and transfer guardianship and custody to the guardian.

See §48.427(3m) and §48.977.

X. If a person whose parental rights are terminated is present in court when the court grants the order terminating rights, the court shall provide written notification of to the person of the time periods for appeal. The person shall sign the written notification. If the parent wishes to appeal the TPR, the parent must sign and file the Notice of Intent to Pursue Postdisposition Relief within 30 days after entry of the order terminating parental rights.
See §48.43(6m) and 2017 Assembly Bill 778.

Y. If TPR to an Indian child is involuntarily terminated, the court shall provide notice to the Indian tribe as in §48.028(4)(a). No hearing shall be held for 10 days after receipt of notice by the tribe or 15 days of receipt by the Secretary of the Interior. The court may grant a 20 day continuance at the request of either.
See §48.43(5)(bm).

Z. A judgment shall be entered in an order, which shall contain the information required in §48.43, including the reasons for dismissal if the petition is dismissed, a finding that the termination is in the child's best interests if the parental rights are terminated, and, if parental rights are terminated, inform each parent of the provisions of §48.432, regarding access to medical information, §48.433 regarding access to identifying information about parents and §48.434 regarding release of information by an agency when authorization is granted.
See §48.427(6)(a) and §48.43.

II. CHANGES IN PLACEMENT

The 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. Within 10 days of the filing of the notice, the judge shall either approve the change in placement or schedule a hearing on the matter.

See §48.437(1) and (2).

III. CASE LAW SUMMARY

PARENTAL UNFITNESS

Termination of mother's parental rights without a finding that she was an unfit parent denied her constitutionally protected rights to care, custody and maintenance of child, where mother had legal custody of child until a court ordered otherwise, she had physical custody of the child during most of the child's first four months of life, and child's existing "family unit" included his natural mother. *In Interest of J.L.W. (1981) 306 N.W.2d 46, 102 Wis.2d 118.*

Where trial court found that father was unfit based on his potentially long prison sentence, history of violence, and inability to care for his son in the foreseeable future and psychological trauma he had caused his son by murder of the child's mother, and found that best interests of child would be served by termination of father's parental rights, in light of child's rights to emotional security, stable family relationship, sound environment, as well as good physical care, adequate food, shelter and clothing, trial court's failure to specifically label the state's compelling interest was not an abuse of discretion or constitutional error. *Matter of A. M. K. (App. 1981) 312 N.W.2d 840, 105 Wis.2d 91.*

"Best interests of the child" standard is applicable only to dispositional stage of bifurcated termination of parental rights proceeding; fact finder, at initial fact-finding stage, does not utilize "best interests" standard in determining whether grounds for terminating parental rights exist. *In Interest of C.E.W. (1985) 368 N.W.2d 47, 124 Wis.2d 47.* [AUTHOR SUMMARY: NEVER BEST INTERESTS BEFORE UNFITNESS]

This section which provides that the trial court shall find a parent unfit if trier of fact finds the relevant grounds for unfitness is not unconstitutional for failing to require trial court to make an independent finding of unfitness; a parent whose rights were terminated under the statute received more than adequate protection by prescribed process of termination of parental rights, and this section was not arbitrary, capricious or unreasonable. *In Interest of K.D.J. (App. 1989) 450 N.W.2d 499, 153 Wis.2d 249,* review granted *454 N.W.2d 805,* affirmed *470 N.W.2d 914, 163 Wis.2d 90.*

This section which provides for termination of parental rights requires a trial court to find the parent unfit once the fact finder has determined that the grounds for termination of parental rights exist. *In Interest of K.D.J. (App. 1989) 450 N.W.2d 499, 153 Wis.2d 249,* review granted *454 N.W.2d 805,* affirmed *470 N.W.2d 914, 163 Wis.2d 90.*

Trial court was required to find that parent was unfit, where jury had found grounds for termination of parental rights. Parental rights may only be terminated if parent is unfit. *In Interest of K.D.J. (App. 1989) 450 N.W.2d 499, 153 Wis.2d 249,* review granted *454 N.W.2d 805,* affirmed *470 N.W.2d 914, 163 Wis.2d 90.*

Statute requiring finding of parental unfitness as statutory ground for termination of parental rights did not violate due process as applied; another statute vested in trial court discretion to dismiss petition for termination if it found termination was not warranted and that statute assured substantive due process. *In Interest of K.D.J. (1991) 470 N.W.2d 914, 163 Wis.2d 90.*

Mother had adequate notice of what was expected of her for the return of her children to her and was properly warned that her parental rights were in jeopardy, though final order, which extended the dispositional order, finding mother's children to be in need of protection or services (CHIPS), did not contain a description of conditions mother had to meet to regain custody of her children, where mother received on four occasions the requirements that she was to meet, on three occasions she received the conditions necessary for the return of her children to her, and on four occasions she received a notice or warning of the grounds for termination of her parental rights. *In re Katherine N. (App. 2000) 615 N.W.2d 204, 237 Wis.2d 830.*

Court failed to include TPR warnings in last order prior to the filing of TPR petition, although the parent had received multiple written and oral warnings previously. Held that as long as the parent does receive any compliant order with TPR warnings attached, noncompliance in other orders does not preclude a TPR claim for continuing need of protection or services. *In re Matthew D., 880 NW 2d 107.*

During fact-finding portion of contested termination of parental rights proceeding, in which it is determined whether grounds exist for termination of parental right, burden is on government, and parent enjoys full complement of procedural rights. *In re Termination of Parental Rights to Prestin T.B. (2002) 648 N.W.2d 402, 255 Wis.2d 170*.

In termination of parental rights (TPR) cases, the "best interests" standard does not dominate every step of every proceeding; best interests of the child do not "prevail" until the parent has been declared unfit after fact-finding by the court or jury at the grounds phase of the TPR proceeding. Steven V. v. Kelley H. (*In re Termination of Parental Rights to Alexander V). (2004) 678 N.W.2d 856, 271 Wis.2d 1*.

Application of termination of parental rights statute providing for termination on ground of incestuous parenthood to terminate parental rights of mother whose three children were born of incestuous relationship with her own her father, which relationship began when she was a minor and in connection with which her father was criminally convicted for incest, violated mother's right to substantive due process. *In re Zachary B. (2004) 678 N.W.2d 831, 271 Wis.2d 51.*

On its face, statute permitting termination of parental rights on grounds of continuing denial of periods of physical placement or visitation, based on step-by-step process that involves an evaluation of a parent's fitness, is narrowly tailored, for substantive due process purposes, to serve the State's compelling interest of protecting children from unfit parents, including the temporal component in this interest that promotes children's welfare through stability and permanency in their lives. *In re Termination of Parental Rights to Diana P. (2005) 694 N.W.2d 344, 279 Wis.2d 169*.

If grounds are found for an involuntary termination of parental rights, the court must find the parent unfit. *In re Brianca M.W. (2007) 728 N.W.2d 652, 299 Wis.2d 637.*

CONSENT//VOLUNTARINESS

To determine on record whether consent to termination of parental rights is voluntary and informed, circuit court must ascertain following basic information: extent of parent's education and parent's level of general comprehension; parent's understanding of nature of proceedings and consequences of termination, including finality of parent's decision and circuit court's order; parent's understanding of role of guardian ad litem, if parent is minor, and parent's understanding of right to retain counsel at parent's expense; extent and nature of parent's communication with guardian ad litem, social worker or any other advisor; whether any promises or threats have been made to parent in connection with termination of parental rights; and whether parent is aware of significant alternatives to termination and what those are. *In Interest of D.L.S. (1983) 332 N.W.2d 293, 112 Wis.2d 180.*

Parent's full knowledge of his or her alternatives to terminating parental rights is particularly important ingredient to determination of whether consent to terminate parental rights is informed and involuntary; when parent is himself or herself a juvenile, living in his or her parent's home, and understandably subject to pressure to give up child, parent must be advised of these alternatives to insure informed and voluntary consent. Parental advice, argument or persuasion do not constitute coercion if individual who has to make decision acts freely when he or she gives consent to termination of parental rights, even though consent might not have been executed except for advice, argument or persuasion. *In Interest of D.L.S. (1983) 332 N.W.2d 293, 112 Wis.2d 180*.

In determining whether parent has voluntarily consented to termination of his or her parental rights, trial court must analyze parent's education and comprehension, whether there were any threats or inducements, and extent to which consequences of termination are understood, the trial court must be satisfied that parent has full knowledge of his or her alternatives to termination. *In Interest of A.B. (App. 1989) 444 N.W.2d 415, 151 Wis.2d 312*.

In absence of evidence in record indicating that father was aware of alternatives to termination of parental rights--alternatives that might have alleviated concerns father expressed about his daughter's welfare--trial court's determination that father's consent to termination of parental rights was voluntary could not stand. *In Interest of A.B. (App. 1989) 444 N.W.2d 415, 151 Wis.2d 312.*

ROLE OF JURY//JURY VERDICT

In initial fact-finding stage of termination of parental rights proceeding, six jury verdicts, comprising consideration of two statutory grounds for termination with respect to each of three children, were separate and distinct, and there was no logical reason to impose requirement of unanimity across verdicts; instruction relating to five-sixths verdict rule, which suggested that same jurors must make same decision on all verdicts, was thus erroneous. *In Interest of C.E.W. (1985) 368 N.W.2d 47, 124 Wis.2d 47*.

Best interests of the child" standard is applicable only to the dispositional phase of bifurcated termination of parental rights proceeding; fact finder, at initial fact-finding stage, does not utilize "best interests' standard in determining whether grounds for terminating parental rights exist. *In the Interest of C.E.W*, 124 Wis. 2d 47 (1985). [AUTHOR SUMMARY: NEVER BEST INTERESTS BEFORE UNFITNESS]

RESPONSIBILITIES OF GAL

Recommendation of guardian ad litem, who has performed his duties carefully and responsibly, as to whether parental rights should be terminated should not be lightly overridden by court. *Matter of Kegel (1978) 271 N.W.2d 114, 85 Wis.2d 574*.

Guardian ad litem, who had aligned himself with county in initial fact-finding stage of bifurcated termination of parental rights proceeding, should have been permitted right to share in county's peremptory challenges. *In Interest of C.E.W. (1985) 368 N.W.2d 47, 124 Wis.2d 47*.

Guardian ad litem can represent interest of child in initial fact-finding stage of bifurcated termination of parental rights proceeding by helping develop facts as they relate to whether grounds for termination exist. *In Interest of C.E.W. (1985) 368 N.W.2d 47, 124 Wis.2d 47.*

Guardian ad litem, who had aligned himself with county in initial fact-finding stage of bifurcated termination of parental rights proceeding, had right to argue facts to jury at end of fact-finding stage; guardian could not, however, invoke "best interests of the child" standard, which was not applicable in initial phase of termination proceeding. *In Interest of C.E.W. (1985) 368 N.W.2d 47, 124 Wis.2d 47.*

In proceeding to terminate parental rights, guardian ad litem had duty to inform court of children's wishes and to make recommendations to court even if those recommendations were against wishes of children. *In Interest of Guenther D.M. (App. 1995) 542 N.W.2d 162, 198 Wis.2d 10,* review denied *546 N.W.2d 470*.

PARTIES / STANDING IN TPR

Provisions of Wisconsin Uniform Child Custody Jurisdiction Act (UCCJA) are not applicable to purely intrastate termination of parental rights proceedings, notwithstanding statute requiring that summons and petition for termination of parental rights be served upon any person to whom notice is required to be given under UCCJA; statute requires only that, in every child custody and termination of parental rights case, circuit court first consider whether case involves persons outside state and so falls within scope of UCCJA, and one way of gaining information necessary to make this decision is for court to request that information required under UCCJA to be included in first pleading. *In Interest of Brandon S.S. (1993) 507 N.W.2d 94, 179 Wis.2d 114,* reconsideration denied *513 N.W.2d 409*.

Intervenor statute did not apply to termination of parental rights action to allow maternal birth grandparents, who had custody and visitation action pending in another court, to intervene, even though statute pertaining to termination of parental rights does not prescribe different procedure for intervention; bringing in additional parties pursuant to intervenor statute is not consistent with purpose and policies underlying proceedings set forth in termination of parental rights statute, which limits persons who must be notified of proceedings. *In Interest of Brandon S.S. (1993) 507 N.W.2d 94, 179 Wis.2d 114,* reconsideration denied *513 N.W.2d 409*.

DISPOSITION

Even if jury finds grounds for termination of parental rights in fact-finding stage, circuit court, at dispositional stage of termination proceedings, need not terminate parental rights. *In Interest of C.E.W. (1985) 368 N.W.2d 47, 124 Wis.2d 47*.

In determining whether to terminate parental rights, trial court evaluates not just fact that "grounds" for termination have been found but also evaluates quantity, quality, and persuasiveness of the evidence. Even though jury finds the "facts" that would constitute "grounds" for termination of parental rights, trial court may still dismiss petition if court finds either that evidence does not sustain any of jury's individual findings or that even though findings may be supported by evidence, evidence of unfitness is not so egregious as to warrant termination of parental rights. *In Interest of K.D.J. (1991) 470 N.W.2d 914, 163 Wis.2d 90.*

In order to determine what course of action is in child's best interests in termination of parental rights proceeding, circuit court must understand nature of child's substantial relationships with family members, and, unless court is willing to listen to people who have formed such relationships with child, it cannot make reasoned determination of child's best interests. *In Interest of Brandon S.S. (1993) 507 N.W.2d 94, 179 Wis.2d 114,* reconsideration denied *513 N.W.2d 409*.

Trial court's decision to terminate parental rights and to place child for adoption with nonrelatives constituted erroneous exercise of its discretion, where maternal birth grandparents, in whose care child had spent much of his life, were not given opportunity to be heard; among factors to be considered by trial court were child's substantial relationships with family members and harm to child if those relationships were severed, trial court was aware of grandparents' custody and visitation action pending in another county and of opposition to termination and adoption proceedings of guardian ad litem in grandparents' action, and it should have been clear to court that grandparents were available to provide important, relevant evidence. *In Interest of Brandon S.S. (1993) 507 N.W.2d 94, 179 Wis.2d 114,* reconsideration denied *513 N.W.2d 409*.

Termination of father's parental rights in exchange for lump sum payment for child support was not in child's best interests, where child was only six years old, termination eliminated over $54,000 of needed future support, and there was no compelling evidence that father had negative impact on child. *In re Termination of Parental Rights of Michael I.O. (App. 1996) 551 N.W.2d 855, 203 Wis.2d 148*

Once basis for termination of parental rights has been found by jury and confirmed with finding of unfitness by court, court must move to second-step, the dispositional hearing, in which prevailing factor--the polestar--is best interests of child; overruling *State v. Kelly S., 247 Wis.2d 144, 634 N.W.2d 120. In re Termination of Parental Rights to Prestin T.B. (2002) 648 N.W.2d 402, 255 Wis.2d 170*.

At dispositional hearing in proceeding for termination of parental rights, court may consider factors favorable to parent, including prognosis for parent's markedly changed behavior. Trial court should explain basis for its disposition, on the record, by alluding specifically to statutory factors concerning best interests of child and any other factors that it relies upon in reaching its decision. *In re Termination of Parental Rights to Prestin T.B. (2002) 648 N.W.2d 402, 255 Wis.2d 170.*

At dispositional hearing in termination of parental rights proceeding, court must explore child's best interests and then determine whether maintaining parent's rights serves child's best interests. *In re Termination of Parental Rights to Prestin T.B. (2002) 648 N.W.2d 402, 255 Wis.2d 170.*

In making determination of whether it is in the best interest of the child that the parent's rights be permanently extinguished, the court should welcome any evidence relevant to the issue of disposition, including any factors favorable to the parent, and must, at a minimum, consider the six statutory "best interests" factors. *Steven V. v. Kelley H. (In re Termination of Parental Rights to Alexander V). (2004) 678 N.W.2d 856, 271 Wis.2d 1.*

TIME LIMITS

Trial court, having failed within 30 days to hold initial hearing on mother's petition to terminate father's parental rights, which petition was filed concurrently with stepfather's petition to adopt, was without jurisdiction to terminate father's *parental rights. In re J.L.F. (App. 1992) 484 N.W.2d 359, 168 Wis.2d 634,* review denied *490 N.W.2d 22*.

Circuit court's failure to either hold initial hearing in proceeding to terminate mother's parental rights within 30-day statutory time limit, or to grant continuance in open court before 30-day period expired, resulted in court losing competency to proceed. *In re Termination of Parental Rights to Everett W.O. (App. 2000) 607 N.W.2d 927, 233 Wis.2d 663.*

Circuit court's failure to extend statutory 45-day time limit for dispositional hearing by finding, before time limit expired and in open court, that good cause for extension existed resulted in court losing competency to proceed. *In re Termination of Parental Rights to Everett W.O. (App. 2000) 607 N.W.2d 927, 233 Wis.2d 663*.

Father's motion for severance of his fact-finding hearing on petition to terminate father's parental rights from hearing on petition to terminate mother's parental rights did not toll 45-day period to hold fact-finding hearing on petition involving mother; delay in holding hearing was not caused by filing of motion since motion was not filed until after hearing had been rescheduled. *In re Termination of Parental Rights to Joshua S. (2005) 698 N.W.2d 631, 282 Wis.2d 150,* reconsideration denied *705 N.W.2d 664, 286 Wis.2d 104,* certiorari denied *126 S.Ct. 1579, 547 U.S. 1019, 164 L.Ed.2d 300*.

Circuit court, in scheduling fact-finding hearing outside of statutory 45-day period following plea hearing in proceeding to terminate parental rights, need not refer in open court to statute governing continuances in proceedings under Children's Code and need not utter any magic words or deliver any special utterances to invoke that statute. *In re Termination of Parental Rights to Moriah K. (2005) 706 N.W.2d 257, 286 Wis.2d 143.*

Good cause requirement under statute governing continuances in proceedings under Children's Code was satisfied concerning scheduling of fact-finding hearing for date that was outside of statutory 45-day time period following plea hearing in proceeding to terminate parental rights, although trial took place six months after plea hearing; court, litigants, and lawyers did their best to accommodate scheduling needs of various participants, court operated on six-week trial cycle, father was not prejudiced since delay afforded father time to meet conditions for safe return of children, there was no dilatory party, scheduling hearing when all participants could be present was in children's best interests, and delay was no longer than necessary. *In re Termination of Parental Rights to Moriah K. (2005) 706 N.W.2d 257, 286 Wis.2d 143*.

Each circuit court that relies on statute governing continuances in proceedings under Children's Code in action to terminate parental rights should cite statute on the record, state basis for concluding good cause exists to continue, delay, or extend a fact-finding hearing beyond statutory 45-day period between plea hearing and the fact-finding hearing, and explain that fact-finding hearing was not delayed longer than was necessary. *In re Termination of Parental Rights to Moriah K. (2005) 706 N.W.2d 257, 286 Wis.2d 143.*

As long as the required rulings are made within the 10-day time limit set forth in statute, requiring court to enter a disposition within 10 days of the dispositional hearing, even if they are oral, the court does not lose competency in termination of parental rights proceeding. *In re Termination of Parental Rights to Artavia B. (App. 2007) 731 N.W.2d 360, 301 Wis.2d 731,* review denied *742 N.W.2d 527, 305 Wis.2d 130*.

AUTHOR'S NOTE:

48.315 (3) NOW *PROVIDES* THAT THE FAILURE TO ACT WITHIN THE TIME PERIODS SET FORTH IN CH. 48 DOES NOT DEPRIVE A COURT OF COMPETENCY TO EXERCISE JURISDICTION. IT FURTHER PROVIDES THAT THE FAILURE TO OBJECT TO A CONTINUANCE BEYOND THE APPLICABLE TIME LIMIT WAIVES ANY CHALLENGE TO THE COURT'S COMPETENCY TO ACT.

ALLEGED FATHERS//STANDING//NOTICE

In order to comply with constitutional dictates, notice for termination of unwed father's parental rights should be the same as that required to be given to married persons or unwed mothers; petitions by either unwed parent require personal or constructive notice to terminate rights of either or both, and consent of both, or consent of one with proper termination of parental rights of the other, is necessary for adoption by consent without formal termination of parental rights. *State ex rel. Lewis v. Lutheran Social Services of Wisconsin and Upper Michigan (1973) 207 N.W.2d 826, 59 Wis.2d 1*.

Statute depriving putative father of standing to contest termination of parental rights to child conceived as result of sexual assault did not violate equal protection as applied to father who was convicted of second-degree sexual assault based on sexual intercourse with mother when she was under age 16, where father had not established parental relationship with child. *Matter of SueAnn A.M. (1993) 500 N.W.2d 649, 176 Wis.2d 673*.

Statute depriving putative father standing to contest termination of his parental rights to child conceived as result of sexual assault did not violate due process clauses of State and Federal Constitutions as applied to father who was convicted of second-degree sexual assault based on sexual intercourse with mother when she was under age 16; father's interest in personal contact with child was not protected under due process clause when father had failed to assume custodial, personal or financial relationship with child. *Matter of SueAnn A.M. (1993) 500 N.W.2d 649, 176 Wis.2d 673*.

Statute providing that notice of proceeding to terminate parental rights is not required to be given to putative father of child conceived as result of sexual assault denies putative father standing to contest *termination of his parental rights. Matter of SueAnn A.M. (1993) 500 N.W.2d 649, 176 Wis.2d 673*.

Biological father's attempts to assume parental responsibility for child after he learned he was child's father, which did not occur until after TPR petition was filed, were relevant to determination of whether he failed to assume parental responsibility. *State v. Bobby G.* (In Re Marquette S.) (2007) 734 N.W.2d 81, 301 Wis. 2d 531.

ADMISSION / NO CONTEST / STIPULATION TO GROUNDS

On entire record of proceedings on petition for termination of father's parental rights, colloquy between circuit court and father was sufficient to allow father to waive his right to contest grounds for termination of parental rights; father stated under oath that he understood the claims in the petition and was not contesting them, that he understood that if he contested facts the county would be required to prove them by clear and convincing evidence, that he had discussed matters with his counsel and believed that he understood what he was doing, and that he did not wish to contest by trial claim that grounds existed to terminate his parental rights. *In re Termination of Parental Rights of Brittany Ann H. (2000) 607 N.W.2d 607, 233 Wis.2d 344*.

Before accepting admission of alleged facts in petition for termination of parental rights, circuit court shall: address the parties present and determine that the admission is made voluntarily and understandingly; establish whether any promises or threats were made to elicit an admission; establish whether a proposed adoptive parent of the child has been identified; and make such inquiries as satisfactorily establish a factual basis for the admission. *In re Termination of Parental Rights of Brittany Ann H. (2000) 607 N.W.2d 607, 233 Wis.2d 344*.

Parent challenging circuit court's acceptance of admission of alleged facts in proceeding on petition for termination of parental rights must make prima facie showing that circuit court violated its mandatory duties, and must allege that in fact he or she did not know or understand information that should have been provided at hearing; if parent makes this prima facie showing, burden shifts to county to demonstrate by clear and convincing evidence that parent knowingly, voluntarily and intelligently waived right to contest allegations in petition. *In re Termination of Parental Rights of Brittany Ann H. (2000) 607 N.W.2d 607, 233 Wis.2d 344*.

There was insufficient evidence to support conclusion that mother entered her no contest plea in termination of parental rights proceeding knowingly, voluntarily, and intelligently, as plea form and modifications contained inconsistencies, trial court's colloquy was incomplete with regard to these inconsistencies, and trial court refused to allow testimony regarding mother's reasons for entering plea of no contest. Kenosha County DHS v. Jodie W. (*In re Termination of Parental Rights to Max G.W). (2006) 716 N.W.2d 845, 293 Wis.2d 530*.

Before accepting biological father's admissions on State's motion for partial summary judgment regarding father's lack of attempt to assume parental responsibility with respect to child whose existence father was unaware of until after petition to terminate parental rights was filed, trial court was required to determine that admissions were voluntarily made and with understanding of nature of actions alleged in petition and potential disposition, and to ensure that there was factual basis for admissions. *State v. Bobby G.* (*In re Marquette S). (2007) 734 N.W.2d 81, 301 Wis.2d 531.*

Prior to accepting a plea of no contest to a petition for termination of parental rights, the circuit court is required to engage the parent in a personal colloquy in accordance with provision of statute governing the hearing on the petition. *Oneida County DSS v. Therese S.* (*In re Yasmine B). (App. 2008) 762 N.W.2d 122, 314 Wis.2d 493.*

In order for no contest pleas at grounds stage to be entered knowingly and intelligently, with regard to petition for termination of parental rights, parents must understand that acceptance of their pleas will result in findings of parental unfitness and have knowledge of the constitutional rights given up by the plea. The circuit court was also required to inform mother that best interests of child was prevailing factor considered by court in determining disposition. *Oneida County DSS v. Therese S.* (*In re Yasmine B). (App. 2008) 762 N.W.2d 122, 314 Wis.2d 493.*

When parent alleges plea of no contest to petition for termination of parental rights was not knowingly and intelligently made, *Bangert* analysis applies, and, under that analysis, parent must make a prima facie showing that circuit court violated its mandatory duties and must allege parent did not know or understand information that should have been provided at hearing; if a prima facie showing is made, burden then shifts to county to demonstrate by clear and convincing evidence that parent knowingly and intelligently waived right to contest allegations in petition. *Oneida County DSS v. Therese S.* (*In re Yasmine B). (App. 2008) 762 N.W.2d 122, 314 Wis.2d 493.*

DEFAULT JUDGMENT / SUMMARY JUDGMENT / DIRECTED VERDICT

Entry of default judgment against child's mother, in child protection proceeding, on issue of abandonment, without first taking evidence sufficient to support such finding, was erroneous exercise of circuit court's discretion; entry of default as sanction for mother's failure to appear pursuant to court orders, without first taking evidence, violated constitutional and statutory requirements for termination of parental rights. *Evelyn C.R. v. Tykila S.* (*In re Termination of Parental Rights to Jayton S). (2001) 629 N.W.2d 768, 246 Wis.2d 1.*

Pursuant to the Fourteenth Amendment to the United States Constitution and applicable state statutes, prior to determining that grounds existed to terminate mother's parental rights, circuit court was required to find by clear and convincing evidence at fact-finding hearing that subject child had been left by mother with relative or other person, that mother knew or could have discovered child's whereabouts, and that mother had failed to visit or communicate with child for period of six months or longer. *Evelyn C.R. v. Tykila S.* (*In re Termination of Parental Rights to Jayton S.) (2001) 629 N.W.2d 768, 246 Wis.2d 1*.

While a trial court may sanction a parent for disobeying an order to appear in person for all hearings in an involuntary TPR proceeding by granting "default judgment," counsel for the parent must continue to represent the parent through the conclusion of the proceedings, including in the dispositional phase. Wisconsin Statute sec. 48.23 provides that a parent who appears in a TPR "shall appear by counsel" absent a knowing and voluntary waiver. *State v. Shirley E.* (*In re Torrance P., Jr). (2006) 724 N.W.2d 623, 298 Wis.2d 1. Also see Dane County v. Mable K., 2013 WI 28. [Recent amendment to 48.23 provides that failure to appear may constitute waiver of counsel by conduct and permit discharge of counsel.]*

Order granting partial summary judgment on the issue of parental unfitness in termination of parental rights (TPR) case where there are no facts in dispute and the applicable legal standards have been satisfied does not violate the parent's statutory right to a jury trial or the parent's constitutional right to procedural due process; overruling *Walworth County Dep't of Human Servs. v. Elizabeth W.*, *189 Wis.2d 432, 525 N.W.2d 384. Steven V. v. Kelley H. (In re Termination of Parental Rights to Alexander V). (2004) 678 N.W.2d 856, 271 Wis.2d 1.*

Directed verdict as to one element of a ground for termination of parental rights is permissible (if a reasonable, impartial and properly instructed jury could reach but one conclusion as to that element) and does not violate the parent's right to a jury trial. Door County DHFS v. Scott S. 230 Wis. 2d 460, 602 N.W.2d 167 (Ct.App. 1999). Element on which verdict is directed must be "undisputed and undisputable." *Manitowoc County H.S.D. v. Allen J.*, 314 Wis.2d 100 (2008). 2008 WI App.137.

RELEVANT EVIDENCE

For purposes of determining whether termination of parental rights is appropriate, a history of parental conduct may be relevant to predicting a parent's chances of complying with conditions in the future, despite failing to do so to date. Evidence of events that occurred prior to issuance of "Child in Need of Protection or Services" (CHIPS) dispositional orders regarding two of mother's children, including mother's long history of failing to take advantage of state-offered mechanisms to obtain housing and employment training, was admissible, in termination of parental rights proceeding, as evidence tended to show that mother was unlikely to meet stable housing and employment conditions required for return of children to her in the future. *In re Deantye P.-B. (App. 2002) 643 N.W.2d 194, 252 Wis.2d 179,* review denied *644 N.W.2d 688, 252 Wis.2d 152*.

Trial court's error in excluding psychologist's expert opinion testimony in termination of parental rights proceeding regarding whether mother was likely to be able to meet the conditions for return of her children within twelve-month period denied mother her due process right to present a defense, and thus constituted reversible error; proper foundation had been laid for psychologist's testimony, and psychologist's testimony was relevant to a material issue and was necessary to mother's case, as psychologist was the only expert mother had called to testify that she was able to meet the conditions for return of her children within twelve-month period, and jury had heard no direct testimony contravening county's witnesses' opinions that mother was not able to meet the conditions for return of her children within twelve-month period. *In re Termination of Parental Rights to Daniel R.S. (2005) 706 N.W.2d 269, 286 Wis.2d 278*.

Trial court's refusal to change jury's verdict answer that father did not fail to visit or communicate with child for a period of six months or longer, as required to support termination of father's parental rights on ground of abandonment, or to grant new trial, was not clearly wrong; it was undisputed that, while incarcerated, father attempted to communicate with child via letters to child's mother, and jury could reasonably have inferred that mother, who did not testify, talked and communicated with child about father's love and concern, and it was possible that jury did not believe that State proved the six-month period of abandonment. *In re Deannia D. (App. 2005) 709 N.W.2d 879, 288 Wis.2d 485.*

Error in trial court's refusal to consider at grounds stage of proceedings to terminate parental rights evidence of biological father's attempts to assume parental responsibility after he learned of child's existence and that he was child's father, which did not occur until after petition to terminate parental rights was filed, was not harmless; evidence was relevant to determination whether father failed to assume parental responsibilities, as statutory ground for terminating parental rights, father had not defaulted in grounds phase of proceedings, and father had demanded but was denied his statutory right jury trial to make fact-findings regarding father's post-petition efforts. *State v. Bobby G.* (*In re Marquette S). (2007) 734 N.W.2d 81, 301 Wis.2d 531.*

A father's efforts to assume parental responsibility for a biological child undertaken after he learns of the existence of the child but before the adjudication of the grounds for terminating parental rights must be considered by the circuit court in determining whether the statutory ground of failing to assume a parental relationship has been proven by clear and convincing evidence. *State v. Bobby G.* (*In re Marquette S). (2007) 734 N.W.2d 81, 301 Wis.2d 531.*

Failure to assume parental responsibility, as grounds for terminating parental rights, is established by proof that the parent has never had a substantial parental relationship with the child. *State v. Bobby G.* (*In re Marquette S). (2007) 734 N.W.2d 81, 301 Wis.2d 531.*

Biological father's attempts to assume responsibility for child after he learned he was child's father, which did not occur until after petition to terminate parental rights was filed, were relevant to determination whether he failed to assume responsibility for child, as grounds for terminating his parental rights. *State v. Bobby G.* (*In re Marquette S). (2007) 734 N.W.2d 81, 301 Wis.2d 531.*

Existence (or nonexistence) of substantial parental relationship pursuant to failure to assume parental responsibility statute, 48.415 (6), is determined under totality of the circumstances, including whether the parent has exposed child to hazardous living environment. *Tammy W-G v. Jacob T.,* *2011 WI 30.*

Dispositional Order which directed that the department provide "supervision, services and case management" was sufficient to allow proof made reasonable efforts "to provide the services ordered by the court" as required by 48.415 (2) (b). Tanya M.B., 325 Wis. 2d 524.

RIGHT TO COUNSEL

In that 48.23 provides that a parent who has appeared in an involuntary TPR proceeding shall appear by counsel absent a knowing and voluntary waiver of that right, attorney for parent defaulted as sanction for failure to appear in person as ordered by the court must be allowed to continue to represent the defaulted parent and participate in the remainder of both the grounds and dispositional phase of the proceedings. *State v. Shirley E.*, 2006 WI 129; *Dane County DHS v. Mable K*, 2013 WI 28. *[Section 48.23(2)(b)3. was subsequently amended to provide that failure to appear may constitute waiver of counsel by conduct and permit discharge of counsel.]*

ICWA/WICWA

State and tribal courts share concurrent jurisdiction in foster care and termination of parental rights involving an Indian child not domiciled or living within the reservation of the child's tribe.

Parent, Indian Custodian or Tribe may petition for transfer of jurisdiction to tribal court in such proceedings. In absence of objection from either parent, declination of jurisdiction by tribal court, or showing that good cause exists (after hearing on good cause) to deny transfer, jurisdiction is to transfer to the tribal court. Denial of parent's petition for transfer without good cause hearing was error. *In the Interest of Shawnda G.*, 247 Wis. 2d 158, 634 N.W.2d 140 (Ct. App. 2001).

Dual burdens of proof apply in TPR involving Indian child. State law ground(s) elements must be proved by clear and convincing evidence. ICWA elements that "continued custody of the child by the parent is likely to result in serious emotional or physical damage" and that "active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and those efforts were unsuccessful" must be proved beyond a reasonable doubt. *In the Interest of D.S.P.*, 166 Wis.2d 464, 480 N.W.2d 234 (1992) Editor's Note: See 48.028 (4): Continued custody …serious physical or emotional damage element still requires proof beyond a reasonable doubt in TPR (clear and convincing in CHIPS); however, active efforts to prevent breakup of Indian family now require the lesser clear and convincing evidence standard.

Social workers with extensive experience in Indian tribal customs, familial relations and child rearing practices were qualified expert witnesses competent to offer required expert testimony to support finding that continued custody by the Indian parent would result in serious emotional or physical damage to the child. *In Interest of D.S.P.*, 166 Wis. 2d 464, 480 N.W.2d 234 (1992).

Indian child under ICWA is "unmarried person under the age of 18 and is either a member of an Indian tribe or is eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe. Tribes determine "membership" which in some instances is automatic (if a descendant of a tribal member) or can require enrollment. *In re TPR to Arianna R.G.*, 2003 WI 11.

ICWA provisions---including notice requirements to tribe(s)---apply if court knows or has reason to know child may be an Indian child. At a minimum, court must inquire if child is tribal member or child of tribal member and eligible for enrollment. However, when parent(s) were not tribal members and no party claimed child was a tribal member, and only information presented to the court was that the child may have had a great, great, great grandmother who was a tribal member, the court had no reason to know that child was an Indian child and requirements of ICWA did not apply. *In Re TPR to Arianna R.G.*, 2003 WI 11.

While other ICWA/WICWA requirements still apply (e.g., notice, placement preferences, etc.), the serious emotional or physical damage finding and active efforts are not required if the parent never had physical or legal custody of the Indian child prior to any child custody proceedings. Relying on *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013), the Court of Appeals rejected the argument that WICWA would provide a higher level of protection under these circumstances. *Kewaunee County Dep't of Human Services v. R.I.*, 2018 WI App. 7.

The adoptive placement preferences of ICWA are inapplicable when no "preferred placement" party has sought to adopt child. *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).

III. POTENTIAL ISSUES

A. Pre-petition procedures, e.g., TPR warnings given?

B. WICWA.

C. Representation by counsel.

D. Paternity issues.

E. Time requirements.

F. **Advising the parties of their rights. In addition to the rights that the parties must be advised of under 48.422(4) and 48.423, it is recommended that they also be advised of:**

1. Right to counsel
2. Right to contest the petition
3. Right to request a substitution of judge
4. Right of any non-petitioning party to a continuance for the purpose of consulting with an attorney on the request for a jury trial or concerning the request for a substitution of a judge
5. Alternatives to termination

G. **Full and complete questioning in voluntary termination proceeding.**