



CHIPS FACT-FINDING HEARINGS

Judge Bennett Brantmeier
Jefferson County Circuit Court

Learning Objectives

- Know the purpose, timing, and procedures of fact-finding hearings
- Discover tips and strategies to assist you in a fact-finding hearing



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



**OR A TRIAL BY
FACEBOOK?**



Quick Quiz - True or False

- 1. Parents get a jury trial, unless waived on the record.
- 2. Parents are only entitled to a 6 person jury.
- 3. Parents have to pay the jury fee.
- 4. Virtual “Zoom” hearings can be used for all non–contested CHIPS proceedings.

Quick Quiz - True or False

- 1. Parents get a jury trial, unless waived on the record.
 - **FALSE** - parent **must request** jury trial §48.31(3)

Quick Quiz - True or False

- 2. Parents are only entitled to a 6 person jury.
 - **TRUE.** § 48.299(4)(b) (TPR cases get 12)

Quick Quiz - True or False

- 3. Parents have to pay the jury fee.
 - **TRUE.** Jury fee required in TPR cases. *Steven V. v. Kelley, 2004 WI 47, 271 Wis.2d 1, 26*, and by extension to CHIPS cases.
 - Payment of jury fee required to have a jury in a civil case. § 814.61(4).

Quick Quiz - True or False

- 4. Virtual “Zoom” hearings can be used for all non–contested Chips proceedings.
 - **TRUE** : get consent/waiver from parents.
 - Civil proceeding not a confrontational issue, but subject to common law review.

CIVIL PROCEEDING

- Ch. 48 proceedings are civil proceedings and unless a different procedure is provided, the rules of civil procedure apply. *In Interest of S.S.K.*, 143 Wis. 2d 603 (Ct. App. 1988)
- The rules of evidence apply at fact-finding hearing. §48.299 (4)
- Middle burden of proof : clear and convincing evidence applies. §48.31 (1)

CIVIL PROCEEDING

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

PARENT ISSUES

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 Unpublished)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

PARENT ISSUES

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

PARENT ISSUES

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

PARENT ISSUES

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

FACT-FINDING PROCEDURE

- Fact-finding hearing is held 30 days after plea hearing. §48.30(7)
- Typically closed and confidential proceedings. §48.299(1) (Some exceptions)
- The date of finding is either the date of removal or date of the filing of the petition
 - *Gregory L.S.*, 2002 WI App 101

CHIPS Findings

- Two-step procedure:
 - Whether the §48.13 grounds are proven
 - Judge/Jury determination
 - Can be based on one parent's conduct
 - *Gregory L.S.*, 2002 WI App 101
 - Whether the child is in need of protection or services that can be ordered by the Court
 - Judge determination §48.31(3)

WICWA FINDINGS

- Judge/Jury must find by clear and convincing evidence that continued custody by the parent/custodian is likely to result in serious emotional or physical damage to the child and that active efforts have been made to prevent the breakup of the child's family and those efforts have proved unsuccessful. §§48.028(4) & 48.31(5)

WICWA FINDINGS

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

SPECIAL CASES

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

SPECIAL CASES

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

SPECIAL CASES

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

CHILD'S TESTIMONY

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

CIVIL PROCEEDING—JURY TRIAL

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

CIVIL PROCEEDING—JURY TRIAL

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

CIVIL PROCEEDING—JURY TRIAL

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

CIVIL PROCEEDING—JURY TRIAL

- If allegations are proven, and the Court determines that protection or services is appropriate a dispositional hearing must be held within 30 days. §48.31(7)

Tips, Tricks and Traps

- Use civil discovery statutes
- Use partial summary judgment
- Call parents or social worker adversely
 - If parent takes the 5th can be used against him/her. JI-Civil 425
- Use diagrams, photos and charts
- Parents sit nearest the jury
- Consent Decree (§ 48.32)



**QUESTIONS ABOUT
COUNTY PRACTICE**



**QUESTIONS OR
COMMENTS?**