

Waiver to Adult Court

Wis. Stat. 938.18

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Overview of the Waiver Process

- 1) Delinquency Petition is filed
- 2) Waiver Petition is filed
- 3) Court Inquiry
 - a. Timeliness
 - b. Notice
 - c. Reports and Evaluations Ordered
- 4) Hearing on Waiver
 - a. Prosecutive Merit
 - b. Contested Petition
 - c. Uncontested Petition
- 5) Decision on Waiver
- 6) Transfer to Adult Facility & Bail
- 7) Criminal Case Initiated

Cases where a waiver petition can be filed - Wis. Stat. § 938.18(1)

- ▶ 14 years old and alleged to have violated: Wis. Stat. §§.
 - ▶ 940.03: **felony murder**
 - ▶ 940.06: **second degree reckless homicide**
 - ▶ 940.225 (1): **first-degree sexual assault**
 - ▶ 940.225 (2): **second-degree sexual assault**
 - ▶ 940.305: **taking hostages**
 - ▶ 940.31: **kidnapping**
 - ▶ 943.10 (2): **armed burglary**
 - ▶ 943.32 (2): **armed robbery**
 - ▶ 943.87: **robbery of a financial institution** or
 - ▶ 961.41(1): **manufacturing, delivery, or distribution of a controlled substance**
- ▶ 14 years old and alleged to have committed any violation of criminal law for the benefit of a criminal gang (defined in Wis. Stat. § 939.22(9)) that would be a felony if committed by an adult.
- ▶ 15 years old and alleged to have violated any state law.

Who can file a Waiver Petition? Wis. Stat. § 938.18(2)

- ▶ The District Attorney: This is the most common person to request waiver into the adult court system
- ▶ The Juvenile: This will almost always be filed by the defense attorney
- ▶ The Court: If the court initiates the petition for waiver, the judge SHALL disqualify himself/herself from any future proceedings on the case

When must a Waiver Petition be filed? - Wis. Stat. § 938.18(2)

- ▶ General Rule: A waiver petition must be filed prior to the plea hearing. Once the plea hearing has been completed there is no longer the ability to file a petition for waiver
- ▶ Exception: If the juvenile denies the facts of the petition and becomes 17 years of age before an adjudication, the petition for waiver may be filed any time prior to the adjudication

Requirements of the waiver petition - Wis. Stat. § 938.18(2)

- ▶ Must have a brief statement of the facts supporting the request for waiver.
 - ▶ Often times the State will attach a copy of the delinquency petition which has been filed in the case
- ▶ Waiver petition must accompany a delinquency petition, it cannot be filed on its own.

Agency Report Wis. Stat. § 938.18(2m)

- ▶ The court may designate an Agency to submit a report analyzing the criteria specified in Wis. Stat. 938.18(5).
- ▶ If a report is ordered, it has to be filed with the court and distributed to the juvenile, parent/guardian, and counsel at least 3 days before the hearing.
- ▶ The court may rely on facts stated in the report in making its findings with respect to the criteria specified in Wis. Stat. 938.18(5).

Court Ordered Evaluations Wis. Stat. § 938.295

- ▶ Upon a finding by the court that reasonable cause exists to warrant a physical, psychological, mental, or developmental examination, the court may order such evaluation.
- ▶ Results from this evaluation will be filed with the court and accessible by all legal parties.
- ▶ The expenses of an examination/evaluation ordered by the court shall be paid by the county of the court ordering the examination/evaluation.
- ▶ If the juvenile or a parent objects to a particular evaluator, the court shall appoint a different one.

Rights of the Juvenile Wis. Stat. § 938.18(3)

- ▶ Juvenile shall be represented by Counsel.
- ▶ Written notice of the time, place, and purpose of the hearing shall be given to the juvenile and any parent/guardian at least 3 days before the hearing.
- ▶ The juvenile has the right to substitute judge pursuant to Wis. Stat. 938.29(2).
- ▶ Counsel for the juvenile shall have access to the social records and other reports under 938.293.
- ▶ The juvenile has the right to present testimony on his or her own behalf including expert testimony and has the right to cross-examine witnesses.
- ▶ The juvenile does not have the right to a jury.

Prosecutive Merit Wis. Stat. § 938.18(4)

- ▶ Before the waiver petition may proceed, the court must find that there is a probability that the juvenile committed the offense.
 - ▶ This condition is almost always satisfied by a previous finding of probable cause by the court on the accompanying delinquency petition.
- ▶ Prosecutive merit is not a “mini trial”, and can often be established by reliable information provided in a delinquency and waiver petition alone.
 - ▶ *In Interest of P.A.K.* 119 Wis.2d 871 (1984).
- ▶ A finding of prosecutive merit has been equated to a determination of probable cause at a preliminary examination.
 - ▶ *State v. X.S.*, 2022 WI 49.
- ▶ If there is no prosecutive merit, the court shall deny the petition for waiver.

Uncontested Petition for Waiver Wis. Stat. § 938.18(4)

- ▶ Court must inquire into the juvenile's capacity to knowingly, intelligently, and voluntarily decide to not contest the waiver petition.
- ▶ If the court is satisfied with the juvenile's capacity, no testimony needs to be taken and the court, after considering the waiver petition and other evidence in the record, shall base its decision to waive jurisdiction on the criteria set forth in Wis. Stat. 938.18(5).

Contested Petition for Waiver Wis. Stat. § 938.18(4)

- ▶ If the waiver petition is contested, the District Attorney shall present relevant testimony.
- ▶ The court can consider the testimony and any other relevant evidence (Court-Ordered Evaluations or Agency Report).
- ▶ Possible Witnesses:
 - ▶ Agency Worker
 - ▶ Psychologist/Psychiatrist
 - ▶ Character Witness for juvenile (teacher, coach, mentor, etc.)
- ▶ The court shall base its decision whether to waive jurisdiction on the criteria specified in Wis. Stat. 938.18(5).
- ▶ If a juvenile absconds and does not appear at the waiver hearing, the court may proceed in the juvenile's absence.

Criteria for Waiver Wis. Stat. § 938.18(5)

- ▶ The statute sets forth specific criteria that the court must consider when making its decision on whether to waive a juvenile.
- ▶ Case law requires that the court consider each of the 5 factors set forth in the statute.
- ▶ What weight the judge gives to each of the factors is within his/her discretion.
- ▶ There is case law that states that a judge can rely solely on the seriousness of the offense to support waiving a juvenile.

Factor #1 Wis. Stat. § 938.18(5)(a)

- ▶ The personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile's physical and mental maturity, and the juvenile's pattern of living, prior treatment history, and apparent potential for responding to future treatment.

Factor #2

Wis. Stat. § 938.18(5)(am)

- ▶ The prior record of the juvenile, including whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the juvenile's motives and attitudes, and the juvenile's prior offenses.

Factor #3

Wis. Stat. § 938.18(5)(b)

- ▶ The type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner.

Factor #4

Wis. Stat. § 938.18(5)(c)

- ▶ The adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048.

- ▶ *Serious juvenile offender program crimes are: 939.32 (1)(a) [attempted first-degree intentional homicide] (a), 940.03 [felony murder], 940.06 [second degree reckless homicide], 940.21 [mayhem], 940.225 (1) [first-degree sexual assault], 940.305 [taking hostages], 940.31 [kidnapping], 941.327 (2) (b) 4 [tampering with household products causing death], 943.02 [arson], 943.10 (2) [armed burglary], 943.23 (1g) [armed carjacking], 943.32 (2) [armed robbery], 948.02 (1) [first-degree sexual assault of a child], 948.025 (1) [repeated acts of sexual assault to a child], or 948.30 (2) [armed abduction of a child] or attempting a violation of s. 943.32 (2) [attempted armed robbery] or the juvenile is 10 years of age or over and has been adjudicated delinquent for attempting or committing a violation of s. 940.01 [first-degree intentional homicide] or for committing a violation of s. 940.02 [second-degree intentional homicide] or 940.05 [first-degree reckless homicide].*

Factor #5

Wis. Stat. § 938.18(5)(d)

- ▶ The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in the court of criminal jurisdiction.

Decision on Waiver Wis. Stat. § 938.18(6)

- ▶ The court shall state its finding with respect to each of the criteria on the record.
- ▶ If the court finds that there is clear and convincing evidence that it is contrary to the best interests of the juvenile or of the public to hear the case, the court shall enter an order waiving jurisdiction and referring the matter to the district attorney for appropriate proceedings in the court of criminal jurisdiction.
 - ▶ After the order, the court of criminal jurisdiction has exclusive jurisdiction
- ▶ If the court denies the waiver, the delinquency case will proceed with a plea hearing and the juvenile court will retain jurisdiction.

Secure Custody & Bail Wis. Stat. § 938.18(8)

- ▶ Once waiver is granted, the juvenile, if held in secure custody, shall be transferred to an adult facility.
 - ▶ Often times a juvenile subject to criminal court will still be held in a juvenile detention center to comply with PREA.
 - ▶ If held in an adult jail without sight/sound separation from adults, the court must make specific findings set forth on form CR-219, which must be reviewed every 30 days.
- ▶ A waived juvenile held in secure custody shall be eligible for Bail pursuant to Wis. Stat. chs. 968 and 969.

Criminal Case Initiated Wis. Stat. § 938.18(9)

- ▶ When waiver is granted, a new case (CF or CM case number) will be initiated in the criminal court when the District Attorney's Office files a criminal complaint.
- ▶ The criminal complaint does not need to be for the same charges alleged in the prior delinquency petition which resulted in the waiver.

Circuit Court Forms

- ▶ JD-1722: Petition for Waiver of Jurisdiction
- ▶ JD-1723: Order Waiving Juvenile Court Jurisdiction
- ▶ JD-1731: Petition for Examination or Assessment
- ▶ JD-1732: Order for Examination or Assessment
- ▶ CR-219: Findings on Confinement of Juvenile Defendant Waived into Adult Court

Secure Custody Placement at Disposition

Historically (Pre July 1, 2021)

Placement Options:

- 1) Juvenile Correctional Facility/DOC
 - A. Pursuant to Wis. Stat. 938.34(4m) →Regular DOC
 - B. Pursuant to Wis. Stat. 938.34(4h) →SJO Order

- 2) Juvenile Detention Center
 - A. Pursuant to Wis. Stat. 938.34(3)(f)

Post Act 185 (Post July 1, 2021)

Placement Options:

- 1) Juvenile Correctional Facility/DOC
(State Facility)
 - A. Pursuant to Wis. Stat. 938.34(4h) → SJO Order
- 2) Secure Residential Center for Children and Youth/SRCCCY (County Facility)
 - 1) Pursuant to Wis. Stat. 938.34(4m)
- 3) Juvenile Detention Center (County Facility)
 - A. Pursuant to Wis. Stat. 938.34(3)(f)

2017 Act 185 and 2019 Act 8

► Old Law

- **938.34(4m)** CORRECTIONAL PLACEMENT. Place the juvenile in a juvenile correctional facility or a secured residential care center for children and youth under the supervision of the county department or the department of corrections if all of the following apply . . .

2017 Act 185 and 2019 Act 8

- ▶ New Law (effective July 1, 2021)
 - ▶ **938.34(4m)** CORRECTIONAL PLACEMENT. Place the juvenile under the supervision of the county department in a secured residential care center for children and youth identified by the county department if all of the following apply . . .

What Changed?

The statute no longer permits for the placement of a youth into a juvenile correctional facility under the supervision of the department of corrections.

The only secure placement that is authorized is placement in a secured residential care center for children and youth (SRCCCY).

Why Does This Matter?

Currently, there are no SRCCCY facilities that exist in the State of Wisconsin.

There are plans for facilities to be built in Milwaukee County and Racine County, but no dates have been set for these facilities to open.

While this remains a legal placement option within the statute, practically speaking it is not an option at this point.

So What Are The Court's Options?

- 1) Serious Juvenile Offender Program
- 2) Juvenile Detention Facility
- 3) Change in Placement to Juvenile Correctional Facility/DOC

Serious Juvenile Offender Program

- ▶ Who is eligible?
 - ▶ The juvenile is 14 years of age or over and has been adjudicated delinquent for committing or conspiring to commit a violation of s. [939.32 \(1\) \(a\)](#), [940.03](#), [940.06](#), [940.21](#), [940.225 \(1\)](#), [940.305](#), [940.31](#), [941.327 \(2\) \(b\) 4.](#), [943.02](#), [943.10 \(2\)](#), [943.231 \(1\)](#), [943.32 \(2\)](#), [948.02 \(1\)](#), [948.025 \(1\)](#), or [948.30 \(2\)](#) or attempting a violation of s. [943.32 \(2\)](#) or
 - ▶ the juvenile is 10 years of age or over and has been adjudicated delinquent for attempting or committing a violation of s. [940.01](#) or for committing a violation of s. [940.02](#) or [940.05](#).
- ▶ Where are they placed?
 - ▶ Department of Corrections: presently these youth are placed at Lincoln Hills/Copper Lake
 - ▶ In the future these youth will be placed at new facilities scheduled to be built in Milwaukee County, Dane County, and possible Northeastern WI

Juvenile Detention Facility

- ▶ Requirements:
 - ▶ The use of this placement is subject to adoption of a resolution by the county board of supervisors authorizing the use of a Juvenile Detention Facility as a Disposition
- ▶ Limitations:
 - ▶ Placement may only be for a maximum total of 365 days
 - ▶ Juvenile shall be given credit for all time spent in secure detention in connection with the case

Change in Placement to DOC

- ▶ Wis. Stat. 938.357(3)(a)
 - ▶ (a) Subject to subs. [\(4\) \(b\)](#), [\(c\)](#), and [\(d\)](#) and [\(5\) \(e\)](#), if the proposed change in placement would involve placing a juvenile in a *juvenile correctional facility* or a secured residential care center for children and youth . . .

Change in Placement to DOC

- ▶ Wis. Stat. 938.357(3)(b)
 - ▶ The court may order placement in a Type 1 juvenile correctional facility operated by the department of corrections for a juvenile who was adjudicated delinquent under s. [938.34 \(4m\)](#) if the court finds, after a hearing under this section, that *any* of the following apply:

Change in Placement to DOC

- ▶ Wis. Stat. 938.357(3)(b) (Continued)
 - ▶ if the court finds, after a hearing under this section, that any of the following apply:
 - ▶ 1. The juvenile is placed at a SRCCCY and . . .
 - ▶ Not applicable at the present time, there are no SRCCCY placements so there are no juvenile placed at one
 - ▶ 2. The county department does not have space for the juvenile in its SRCCCY and no other SRCCCY is willing and able to meet the juvenile's treatment needs
 - ▶ This is the provision the court will be using to effectuate the Change in Placement (No SRCCCY = No Space/No Other SRCCCY)

Change in Placement to DOC

- ▶ Practical Considerations
 - ▶ This can only occur AFTER the court has entered a dispositional order placing the juvenile somewhere other than DOC
 - ▶ A Petition for Change in Placement must be filed, this can be done by the Juvenile, Agency, State, or Court
 - ▶ Once a Petition for Change in Placement has been filed, the court can hold the juvenile in secure detention on a Temporary Physical Custody (TPC) Order while a hearing is scheduled for the Petition for Change in Placement

Change in Placement to DOC

▶ Procedural Requirements:

- ▶ A hearing shall be held, unless waived
- ▶ The juvenile is entitled to counsel
- ▶ Any party may present relevant evidence and cross-examine witnesses
- ▶ DOC shall have the opportunity to object to the change in placement, must be given notice of the hearing and the change in placement request

Change in Placement to DOC

▶ Required Court Findings

- ▶ Wis. Stat. 938.357(3)(b)2
 - ▶ 2. The county department does not have space for the juvenile in its secured residential care center for children and youth and no other secured residential care center for children and youth is willing and able to meet the juvenile's treatment needs.
- ▶ Wis. Stat. 938.357(3)(a), referencing Wis. Stat. 938.34(4m)(a)&(b)
 - ▶ (a) The juvenile has been found to be delinquent for the commission of an act that would be punishable by a sentence of 6 months or more if committed by an adult.
 - ▶ (b) The juvenile has been found to be a danger to the public and to be in need of restrictive custodial treatment.

Questions or Concerns?

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