

TERMINATION OF PARENTAL RIGHTS TRAINING

WISCONSIN DELLS, WISCONSIN
OCTOBER 16, 2014

A VIEW FROM THE BENCH

Hon. John DiMotto – Milwaukee County

Hon. Edward Vlack – St. Croix County

Special thanks to the Hon. Christopher Foley, Milwaukee County, as the power point he used during his presentation at the Child Welfare Law Orientation on September 19, 2014, was the foundation for this power point.

Special thanks, also, to the Hon. John DiMotto, Milwaukee County, as many of the points made in this power point were taken from his Termination of Parental Rights Checklist.

LEARNING OBJECTIVES

- Basic procedures in TPR cases
- Identify significant issues and stages in TPR cases

In *Evelyn C.R. v. Tykila S.*, 2001 WI 110, 246 Wis.2d 1, 629 N.W.2d 768, the Wisconsin Supreme Court stated, at page 15:

“Due to the severe nature of terminations of parental rights, termination proceedings require heightened legal safeguards against erroneous decisions.”

Later, in *State v. Bobby G.*, 2007 WI 77, 301 Wis.2d 531, 734 N.W.2d 81, the Wisconsin Supreme Court stated, at page 563:

“Termination proceedings require heightened legal safeguards against erroneous decisions.”

What does that mean?

Who makes “decisions?”

Who makes “erroneous decisions?”



Who is familiar with the case of
In re Termination of Parental
Rights to M.A.M., 116 Wis.2d
432, 342 N.W.2d 410 (1984)?

In M.A.M. the rights of the parents , who did not have counsel present at the first hearing on the petition, were subsequently terminated after trial to the court and disposition.

The termination was affirmed by the Court of Appeals.

In M.A.M. the Wisconsin Supreme Court stated, at page 441:

The statutory direction is unequivocal: A parent has the right to representation in court unless there is a waiver; and, in any case, the trial court has the duty to make a full explication of the statutory rights—the right to representation, the right to a continuance, the right to request a jury trial, and the right to request a substitution of judge.

In *M.A.M.* the Wisconsin Supreme Court held that the trial court had a duty, among others, to ensure that the parents, absent a waiver, were in fact represented by counsel.

The order of termination was vacated.

AND their ruling was applied to cases that were not final when decided, e.g. those in which TPR had been granted, child in adoptive placement, but pending TPR appeal.

*The impact of M.A.M. has been somewhat lessened by the case of *In Interest of Robert D.*, 181 Wis.2d 887, 512 N.W.2d 227 (Ct.App. 1994).

So, what does all this mean?

Judges will dot their “i’s,”
cross their “t’s”

And . . .

JUDGES DON'T WANT
THESE COMING BACK!



GENERAL TPR STATISTICS

INVOLUNTARY TPR FILINGS BY YEAR

- 2006 – 805
- 2007 – 633
- 2008 – 669
- 2009 – 648
- 2010 – 722
- 2011 – 872
- 2012 – 826
- 2013 -- 923

FILINGS BY COUNTY - 2013

| | |
|-------------|-----|
| • Bayfield | 0 |
| • Brown | 26 |
| • Dane | 62 |
| • Dodge | 12 |
| • Jefferson | 25 |
| • Manitowoc | 9 |
| • Marathon | 9 |
| • Milwaukee | 328 |
| • Oneida | 3 |
| • Outagamie | 36 |
| • Portage | 10 |
| • Rock | 13 |
| • St. Croix | 6 |
| • Walworth | 22 |
| • Winnebago | 15 |

OTHER TPR STATISTICS

- Number of TPR cases filed by county in 2013:
<http://www.wicourts.gov/publications/statistics/circuit/docs/juvcounty13.pdf>
- **Other statistical reports are available at:**
<http://www.wicourts.gov/publications/statistics/circuit/circuitstats.htm>

STATUTORY LAW

CHAPTER 48 CHILDREN'S CODE

- 48.40 Definitions
- 48.41 Voluntary consent to termination of parental rights
- 48.415 Grounds for involuntary termination
- 48.417 Petition for termination of parental rights
- 48.42 Procedure
- 48.422 Hearing on the Petition

STATUTORY LAW con't

CHAPTER 48 CHILDREN'S CODE

- 48.424 Fact finding hearing
- 48.425 Court report by agency
- 48.426 Standard and factors
- 48.427 Dispositions
- 48.428 Sustaining care
- 48.43 Court orders; content and effect;
review

STATUTORY LAW con't

CHAPTER 48 CHILDREN'S CODE

- 48.432 Access to medical information
- 48.433 Access to identifying information about parents
- 48.434 Release of identifying information by an agency when authorization is granted
- 48.435 Custody of children

STATUTORY LAW con't

CHAPTER 48 CHILDREN'S CODE

- 48.23 Right to Counsel
- 48.235 Guardian ad Litem
- 48.29 Substitution of Judge
- 48.293 Discovery
- 48.295 Physical, psychological, mental, or developmental examination
- 48.297 Motions before trial
- 48.299 Procedures at hearings
- 48.31 Fact Finding Hearing
- 48.315 Delays, continuances and extensions

FEDERAL AND STATE CHILD WELFARE LAW

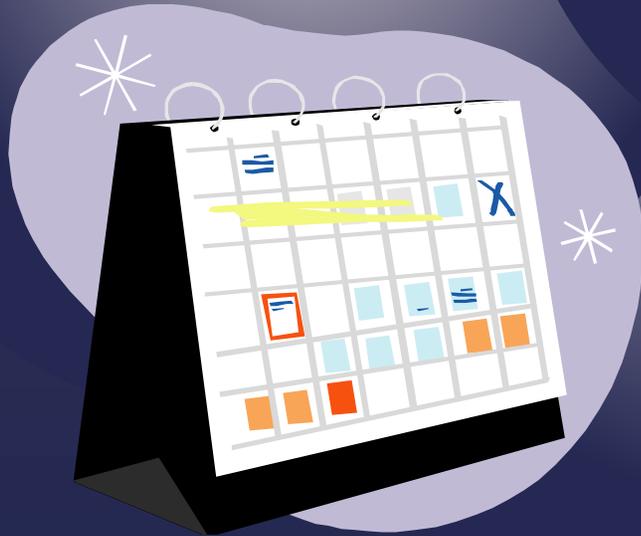
- ASFA: Adoption & Safe Families Act
- ICWA: Indian Child Welfare Act
Wisconsin WICWA 48.028
- ICPC: Interstate Compact on Placement of Children
- Chaffee Act of 1999
- Fostering Connections to Success and Increasing Adoptions Act of 2008

OTHER RESOURCES

- Case law
- Juvenile Benchbook JV 13
- Wisconsin Jury Instructions Children
- Checklists
- Outlines
- CCIP On-Line Training
<http://www.wicciptraining.com/>

BASIC PROCEDURES:

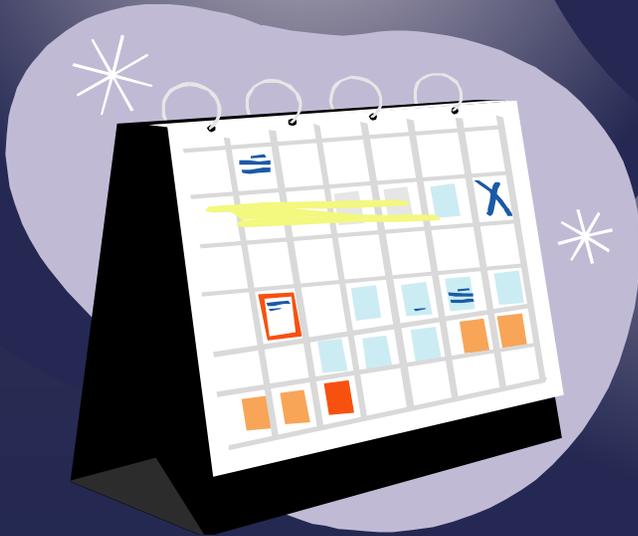
Hearing on Petition must be held within 30 days after petition filed.



Wis. Stat. § 48.422 (1)

BASIC PROCEDURES:

If contested, fact finding hearing must be held within 45 days of the hearing, (unless ICWA).



Wis. Stat. § 48.422 (2)

BASIC PROCEDURES:

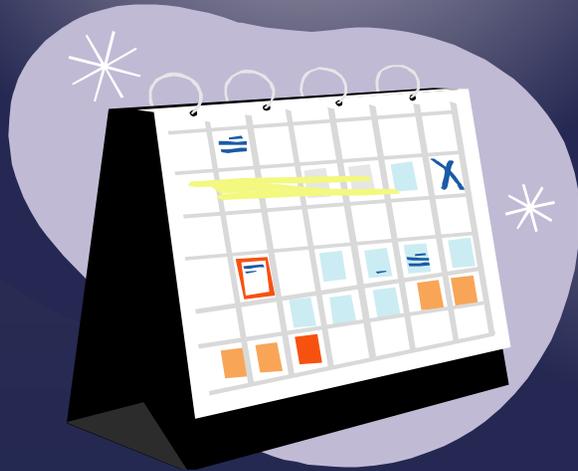
Once grounds are found, judge must make a finding of unfitness and proceed to disposition.



Wis. Stat. § 48.424 (4)

BASIC PROCEDURES:

Dispositional hearing can be delayed up to 45 days if all agree and no report to court yet under §48.425.



Wis. Stat. § 48.424 (4)

LEARNING POINTS

- Treat TPR cases like a homicide
- Be familiar with the law – statutory and case law
- Be thorough

IMPORTANT STAGES IN TPR CASES

- INITIAL HEARING
- DISCOVERY AND INVESTIGATION
- DEFAULT AND SUMMARY JUDGMENT
- PRE-FACT FINDING MOTIONS
- FACT FINDING HEARING
- DISPOSITIONAL HEARING
- OTHER MATTERS

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INITIAL HEARING

At an involuntary termination of rights proceeding, any adult parent shall be represented by counsel unless counsel is knowingly and voluntarily waived.

At an involuntary termination of rights proceeding, any minor parent shall be represented by counsel. A minor parent may not waive counsel.

Wis Stat. § 48.23(2)

At the initial hearing the court shall determine whether any party wishes to contest the petition and inform the parties:

1. Right to a jury trial
 - 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.

Wis Stat. §§ 48.422(1) & (4) and 48.423

It is *recommended* that judges go the extra mile(s) and determine:

1. Is the petition legally sufficient?
2. Have all necessary parties been notified?
3. Are all necessary parties present?

It is also *recommended* that judges read the petition, explain the grounds alleged, and:

- Explain the two phases: Grounds and Disposition. See Wis. Stat. §§ 48.424 (3) and (4)
- Order parent(s) to:
 - appear in person for all hearings;
 - maintain contact with their lawyer;
 - cooperate with discovery;
 - and warn of potential default sanction.

It is also *recommended* that judges advise the parties of these additional rights:

- Right to counsel
- Right to testify
- Present evidence
- Subpoena witnesses
- Cross examine witnesses
- Remaining silent can be used against you
- Right to substitute Judge
- Right to continuance to consult with attorney about jury trial and substitution
- Paternity testing

Why would you:

- Request substitution
- Not request substitution
- Request a jury trial
- Not request a jury trial

DON'T FORGET...

If any nonpetitioning party wishes to consult with an attorney regarding a request for a jury trial or a request for substitution, a continuance SHALL be granted.

Wis. Stat. § 48.422(5)

Potential Issues

- Contact with the child
- ICWA/WICWA
- Competency
- Severance
- Criminal charges against a party
- Party in DOC or Federal custody
- Order for access to CHIPS files and agency files

LEARNING POINTS

- Initial hearing is more than entering a denial and scheduling
- If need more time to discuss substitution and/or jury trial, ask to continue
- Advise client to follow all court orders

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DISCOVERY AND INVESTIGATION

Don't underestimate the importance of discovery and investigation.

- Most others have had a history with the family, but you have not. You have to catch up.
- You could obtain information that may be the basis for dismissal of the Petition.

DISCOVERY IN GENERAL

See Sec. 48.293 and Chapter 804

UNDERLYING CHIPS CASES

- Were the requirements for reunification reasonable
- Were the requirements for reunification clear
- Were all services provided
- Should other services have been provided

UNDERLYING CHIPS CASES,

Con't

- Were reasonable efforts actually made
- Did the services used meet the needs of the client
- Were proper findings made
- Were proper TPR warnings given
- Were proper TPR warnings attached to all orders

UNDERLYING CHIPS CASES,

Con't

- Did your client have an attorney at any stage of the CHIPS case
- Need any transcripts

PERMANENCY PLAN REVIEWS

- Was initial goal reunification
- If not, why not
- If so, was that the only goal
- If not, why not
- Were the reviews perfunctory or in depth

PERMANENCY PLAN REVIEWS, con't

- When was goal changed from reunification to concurrent
- Why
- If goal was changed from concurrent to TPR, why
- When
- Was your client present
- If not, what notice was given

PERMANENCY PLAN REVIEWS, con't

- Did your client have an attorney at any Permanency Plan hearing
- Need any transcripts

AGENCY RECORDS

- All agency records
- CHIPS records
- Mental health records
- AODA records
- Foster parent comments
- Visitation agency comments

OTHER INVESTIGATION

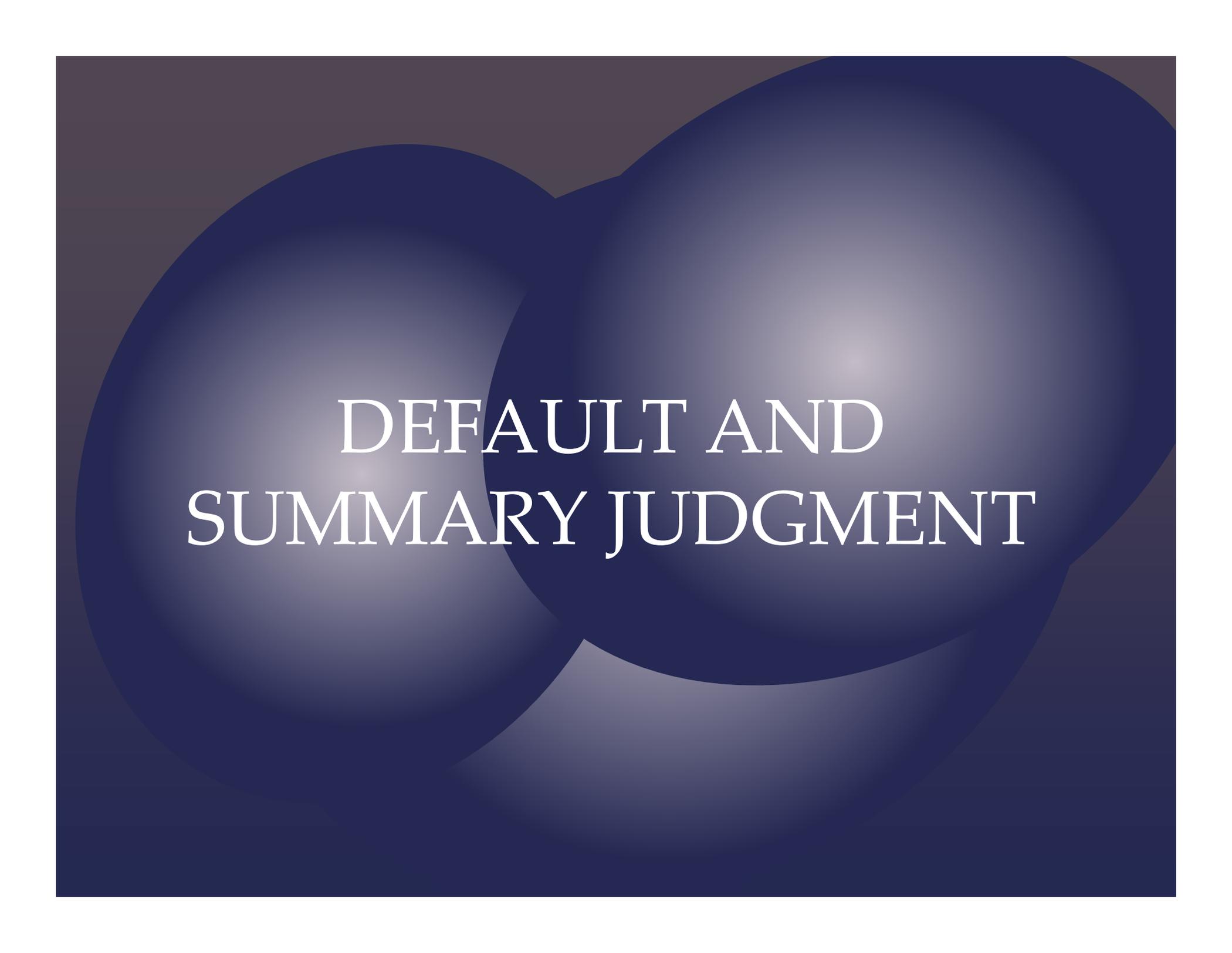
- Read the Petition
- Read the statutes that apply the grounds
- Read the jury instructions
- Now is the time to begin thinking about trial and disposition strategies

OTHER INVESTIGATION, con't

- Medical records
- Outside evaluations
- Expert reports
- Consider hiring your own expert
- Where does the GAL stand

LEARNING POINTS

- Talk to your client
- Get information/records from all possible sources
- Begin consideration of pre-hearing motions and trial strategies

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DEFAULT AND
SUMMARY JUDGMENT

Default Judgments: Failure to Obey a Summons

If a parent has been properly summoned and fails to appear, Court may enter default judgment, but only after taking testimony on grounds.

- See Wis. Stat. §§ 48.422 (3) and 806.02(1)
- *Kenosha County DHS v. Kimberly B.*, No. 2009 AP 1715 (WI App., Unpublished Slip Op.)
- *Evelyn C.R. v. Tykila S.*, 2001 WI 110 (as to the requirement to take testimony)

Default Judgments: Failure to Obey Court Order

Parent who has appeared in TPR proceeding and is ordered to appear in person for all subsequent hearings may be defaulted as a sanction **but only if the nonappearance** (or other violation of the court orders) is **egregious and without justifiable excuse or in bad faith.**

- *Evelyn C.R. v. Tykila S.*, 2001 WI 110
- *State v. Shirley E.*, 2006 WI 129, par. 13, fn. 3
- Wis. Stat. §§ 804.12 (2) and 805.03

Default Judgments: Failure to Appear at Trial

- If a parent has been properly notified of and ordered to appear in person at the Fact-Finding Hearing, Court may enter default judgment, but only after taking testimony on grounds.
 - Wis. Stat. § 806.02(5); *Evelyn C.R.*

Default: Parent Representation

- No default for failing to appear at trial or failing to obey a summons if parent's attorney appears at the hearing on behalf of the parent. Parent is "appearing" by counsel.
 - *Evelyn C.R.*, par. 17
 - *Shirley E.*, par. 13, fn.1.
- But still available for failing to obey court order to appear in person.
- Under prior case law, parent's attorney was required to be allowed to participate and could not withdraw as counsel.
 - *State v. Shirley E.*, 2006 WI 129
 - *Dane County DHS v. Mable K.*, 2013 WI 28

Default: Parent Representation

- Recent amendment of Wis. Stat. § 48.23 (2) provides that the nonappearance of adult parent in violation of a court order to appear in person, if egregious and without justifiable excuse:
 - Waives the right to counsel and to appear by counsel;
 - Allows discharge of lawyer;
 - Permits default and prove up without participation of lawyer for parent

Default: Parent Representation

- However, court must delay disposition for 48 hours when default occurs pursuant to this waiver of counsel provision
- If warranted, probably best to:
 - ⌘ grant motion for default as sanction for nonappearance;
 - ⌘ allow parents lawyer to participate in prove up;
 - ⌘ adjourn the matter for disposition
- If parent fails to appear, counsel *may* be discharged
- If parent reappears, counsel is still available and disposition may proceed

Default: Parent Representation

- Default is not the only available sanction for noncompliance with court order
- Court could choose to strike parent's jury demand (*Mable K.*) or other sanction under Wis. Stat. § 804.12

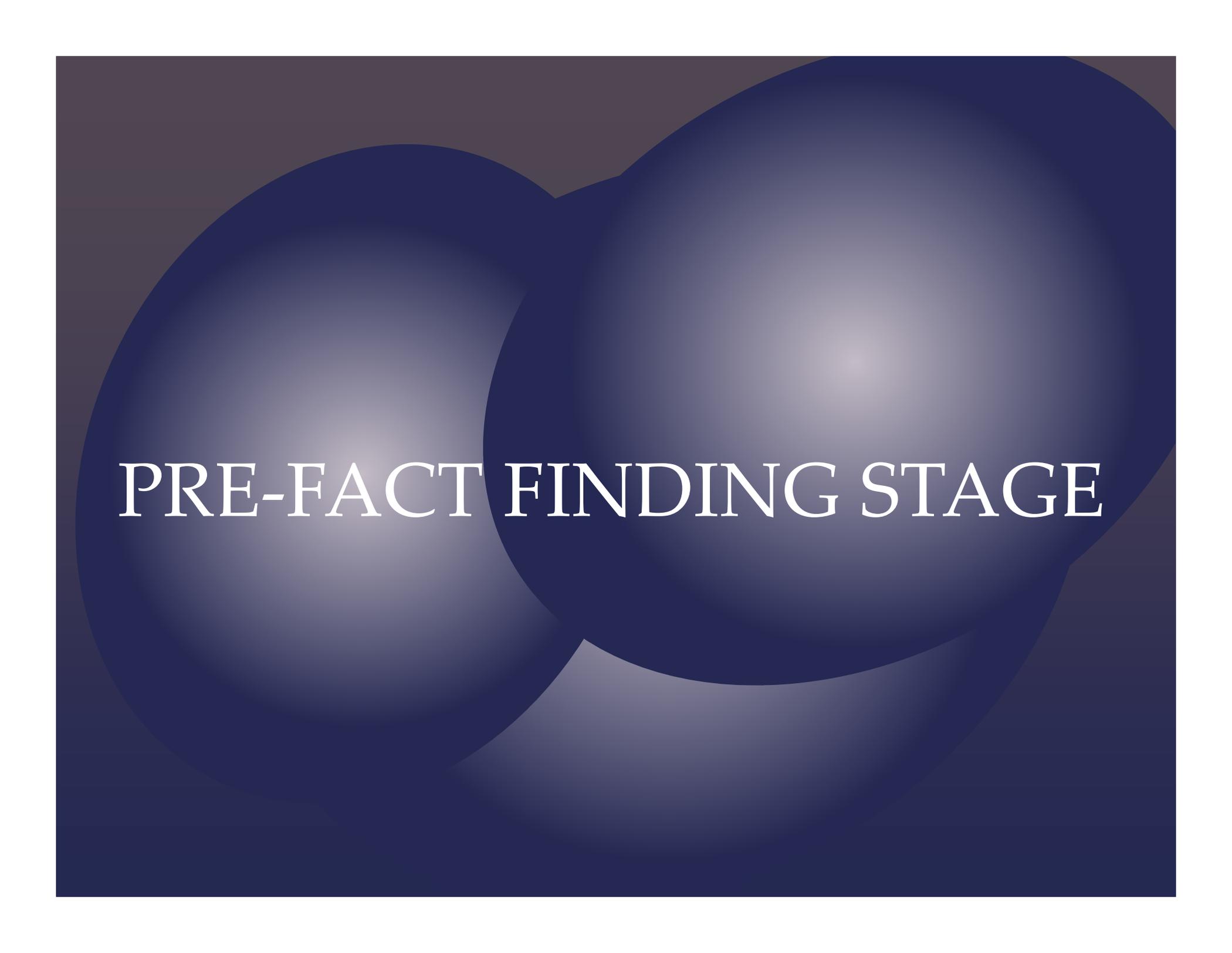
SUMMARY JUDGMENT

Summary Judgment is possible for grounds stage only. *Steven V. v. Kelley H.*, 2004 WI 47

See also Wisconsin Jury Instructions
Children – SM 2

LEARNING POINTS

- Default judgments can be sticky ethically
- Maintain and document client contacts
- Always respond to motions for summary judgment

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PRE-FACT FINDING STAGE

PRE-FACT FINDING STAGE

Things to consider:

- More trial/disposition strategy
- Frank discussions with client
- Pre-Fact Finding Motions
- Motions in Limine
- Potential jury panel members
- Begin preparation of voir dire questions
- Stipulations to grounds

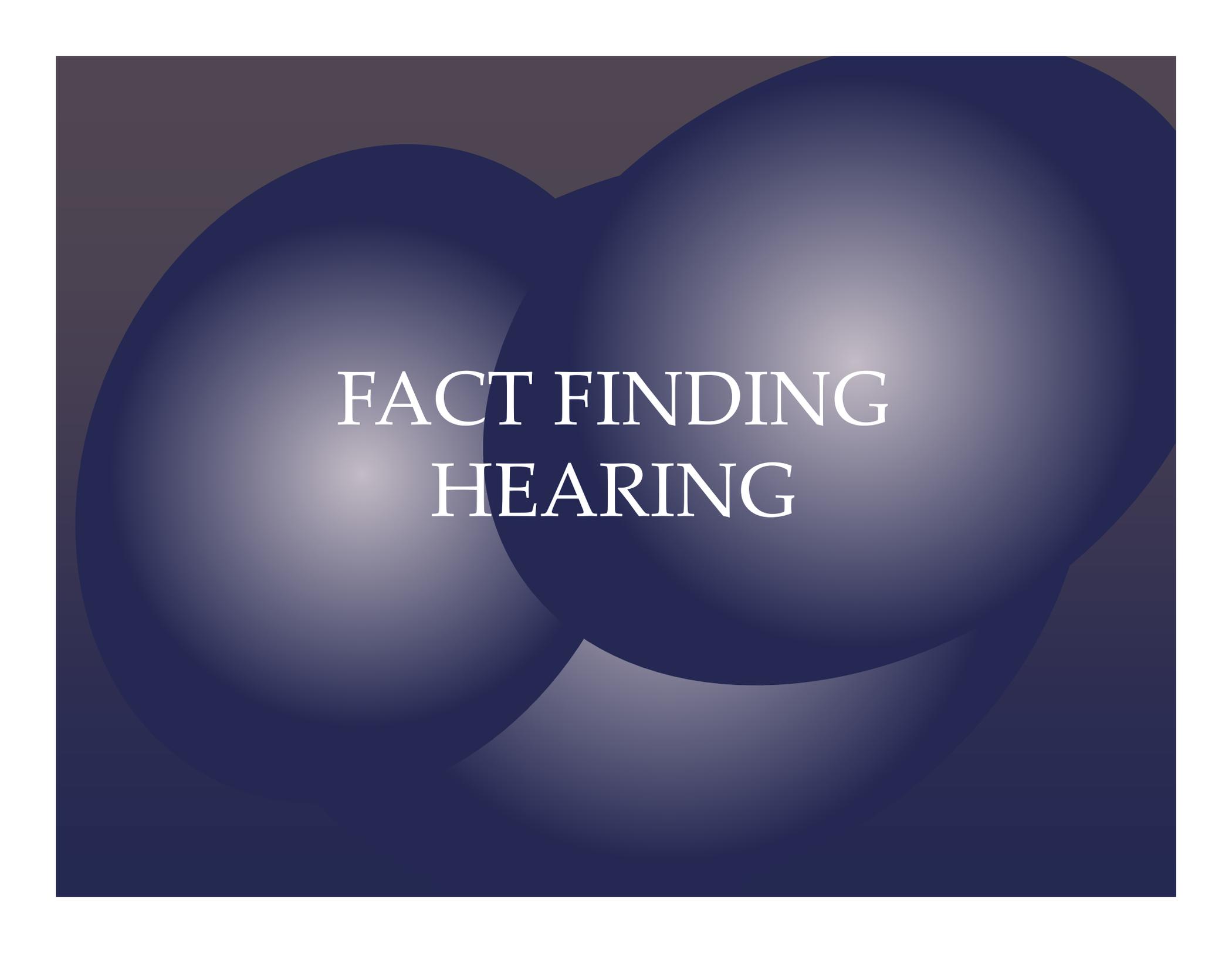
PRE-FACT FINDING STAGE

Motions to consider:

- Motion for Discovery and Inspection
- Motion for Continuance
- Motion to Dismiss
- Motion for counseling and/or visitation
- Motions in Limine
- Daubert
- See 48.295 and 48.297

LEARNING POINTS

- Possible motions – think outside the box
- Frank discussion with client about strategy
- Judges do not like surprises

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FACT FINDING HEARING

FACT FINDING HEARING

IN GENERAL:

- 48.299 Procedures at hearings
- 48.31 Fact-finding hearing
- 48.424 Fact-finding hearing

FACT FINDING HEARING

CONSIDERATIONS:

- Your motions in limine
- Response to State's motions in limine
- Role of the GAL – 48.235(6)
- Sequestration of witnesses
- Voir Dire
- Jury strikes for cause – judge rehabilitation
- Peremptory strikes – where does GAL align

FACT FINDING HEARING

CONSIDERATIONS, con't:

- Opening statements
- Cross examination
- Client testifying
- Jury instructions
- Closing arguments
- Burden of proof

FACT FINDING HEARING

Your Motions in Limine:

- What do you want kept out
- Why?

FACT FINDING HEARING

The State's Motions in Limine:

- What do you want kept in?
- Why?

FACT FINDING HEARING

Role of the Guardian ad Litem – 48.235(6)

The Guardian ad Litem represents the interests of the child

FACT FINDING HEARING

Sequestration of witnesses – Sec. 906.15

- Are you asking for exclusion?
- Are you asking for exclusion and separation?
- Are you asking for exclusion, separation and non-communication?

FACT FINDING HEARING

Voir Dire:

- Why do we do voir dire?
- What do we hope to accomplish?
- Fully engage the entire jury panel
- Individual voir dire
- In camera voir dire

FACT FINDING HEARING

Voir Dire Resources:

- Sec. 805.08
- Wisconsin Trial Practice – Ch. 3: Jury Selection
- Judicial Benchbook – CV 12

See also:

- Judicial Benchbook – CR 23
- Wisconsin Jury Instructions – Criminal – SM 20

FACT FINDING HEARING

Voir Dire Resources, con't:

WISCONSIN LAW JOURNAL

Bench Blog: Judges' perspective on voir dire

By: Judge Jean DiMotto

September 11, 2013

“Voir dire is subject to judicial control and discretion, so it pays to know your judge.”

FACT FINDING HEARING

Jury strikes:

- Strikes for cause
- Peremptory strikes – Sec. 805.08(3)
- Where does the GAL align

FACT FINDING HEARING

Opening statements:

- Highlight the positive conduct and behavior of your clients
- Acknowledge the negative

FACT FINDING HEARING

Cross Examination:

- Highlight client's positive behavior and conduct during cross examination, especially cross examination of the social worker

FACT FINDING HEARING

Testimony by your client:

- Will likely at least be called adversely
- How will your client present him or herself
- Any pending criminal charges

FACT FINDING HEARING

Jury instructions:

- Read them
- Consider need for non-canned jury instructions

FACT FINDING HEARING

Closing Arguments:

- Reflect behavior and conduct evidence of your client against language in the jury instructions to paint your client in the most favorable light possible
- Remember State may emphasize that jury only decides grounds and judge decides whether to terminate

FACT FINDING HEARING

Burden of proof:

Evidence that is clear, satisfactory and convincing, to a reasonable certainty

FACT FINDING HEARING

Partial directed verdict is permissible

- *Door County DHFS v. Scott S.*, 230 Wis. 2d 460 (Ct. App. 1999)
- Wis. Stat. § 805.14 (4)
- Compare *Walworth County DHHS v. Andrea L.O.*, 2008 WI 46 (colloquy with respondent-parent recommended when stipulation to element of ground for TPR)

FACT FINDING HEARING

Partial directed verdict is appropriate when the element is “undisputed and undisputable”

- *Manitowoc County v. Allen J.*, 2008 WI App 137

FACT FINDING HEARING

Failure to Assume Parental Responsibility

- Whether a parent has failed to assume parental responsibility, i.e. has a substantial parental relationship with their child is based upon a totality of the circumstances standard, including whether the parent has exposed the child to a hazardous living environment.
 - *Tammy W-G. v. Jacob T.*, 2011 WI 30

FACT FINDING HEARING

If grounds are found, the judge must make a finding of unfitness and proceed to disposition.

Wis. Stat. § 48.424 (4)

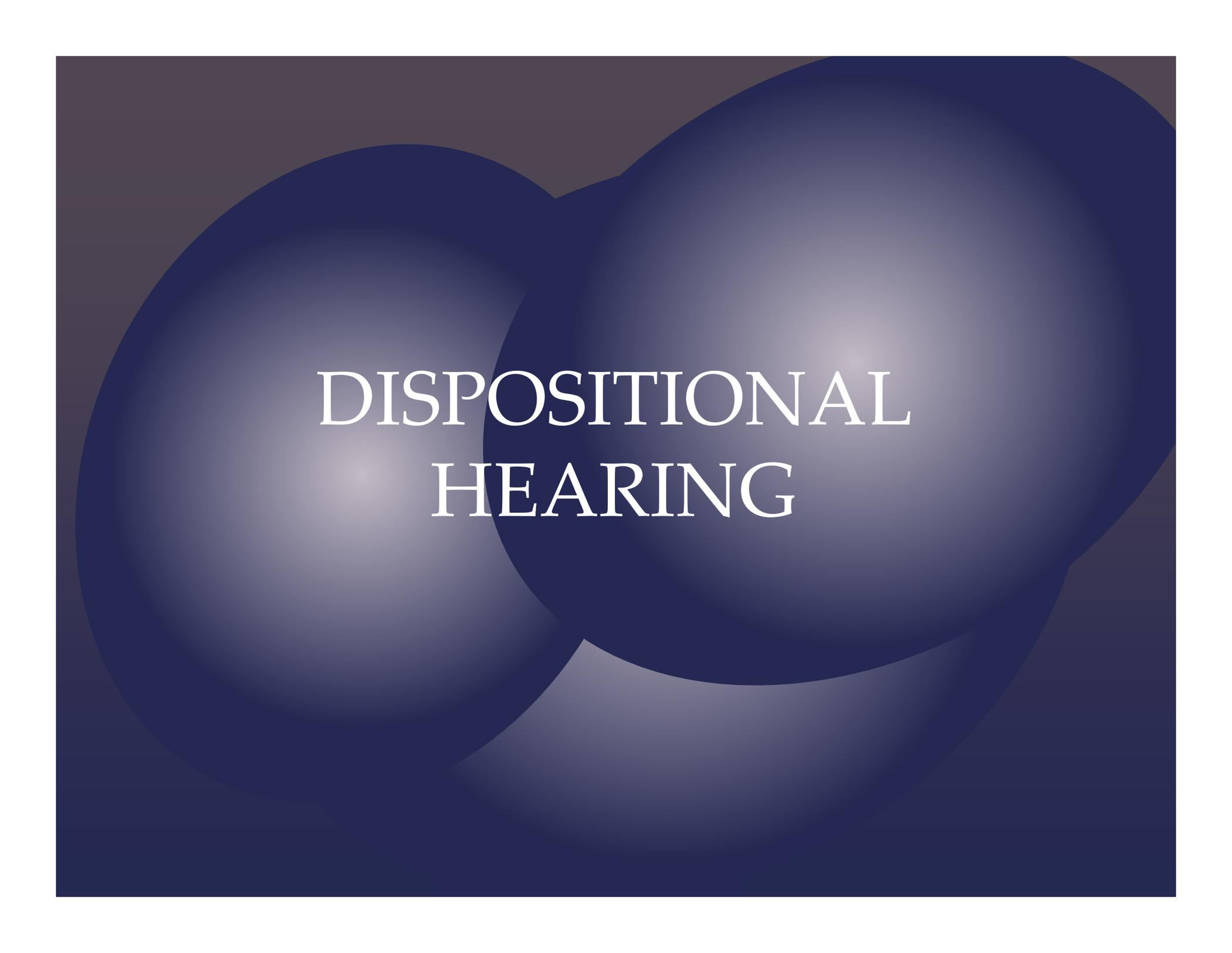
FACT FINDING HEARING:

Dispositional hearing can be delayed up to 45 days if all agree and no report to court yet under §48.425.

Wis. Stat. § 48.424 (4)

LEARNING POINTS

- Voir dire – talk with the jurors
- Acknowledge client not perfect but emphasize the positive
- Your client's demeanor and testimony may be the key

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DISPOSITIONAL HEARING

DISPOSITIONAL HEARING

In general:

See Wis. Stats. 48.299 and 48.427(1)

DISPOSITIONAL HEARING

Disposition Standard:

The prevailing standard to be considered by court for disposition is best interest of the child and a number of statutory factors.

Wis. Stat. § 48.426

DISPOSITIONAL HEARING

Disposition Factors:

1. 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. Wishes of the child
5. 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.

Wis. Stat. § 48.426

DISPOSITIONAL HEARING

When considering the TPR Factors:

- Court has broad discretion when weighing
- Exclusive focus on one factor is improper
 - *Darryl T.-H. v. Margaret H.*, 2000 WI 42
- Failure to hear necessary evidence is erroneous exercise of discretion (e.g., child's relationship with relatives)
 - *Brandon S.S.*, 179 Wis. 2d 114 (1993)

DISPOSITIONAL HEARING

Court must make findings and required rulings within 10 days. 48.427(1)

DISPOSITIONAL HEARING

After considering factors:

If the court Orders TPR it shall:

1. Transfer guardianship & custody pending adoptive placement
2. Transfer guardianship & custody for placement and adoption
3. Transfer 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 Wis. Stat. § 48.977 and transfer guardianship and custody to the guardian
5. Order sustaining care

DISPOSITIONAL HEARING

If court orders TPR:

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 to the person of the time periods for appeal. The person shall sign the written notification.

Wis. Stat. § 48.43(6m)

DISPOSITIONAL HEARING

If the Court determines that TPR does not serve best interests, the Court should:

- List reasons for dismissal (a written order is also necessary)
- Inquire into status of any CHIPS case or family court order
- NOTE: Wis. Stat. § 48.368 automatically extends existing CHIPS order during pendency of TPR. If safety issues persist, Court may stay the order of dismissal to permit filing of extension petition.

DISPOSITIONAL HEARING

Strategy:

- Remember it is the nature of the child's relationship to others not the parents' relationship to the child that is of the utmost importance

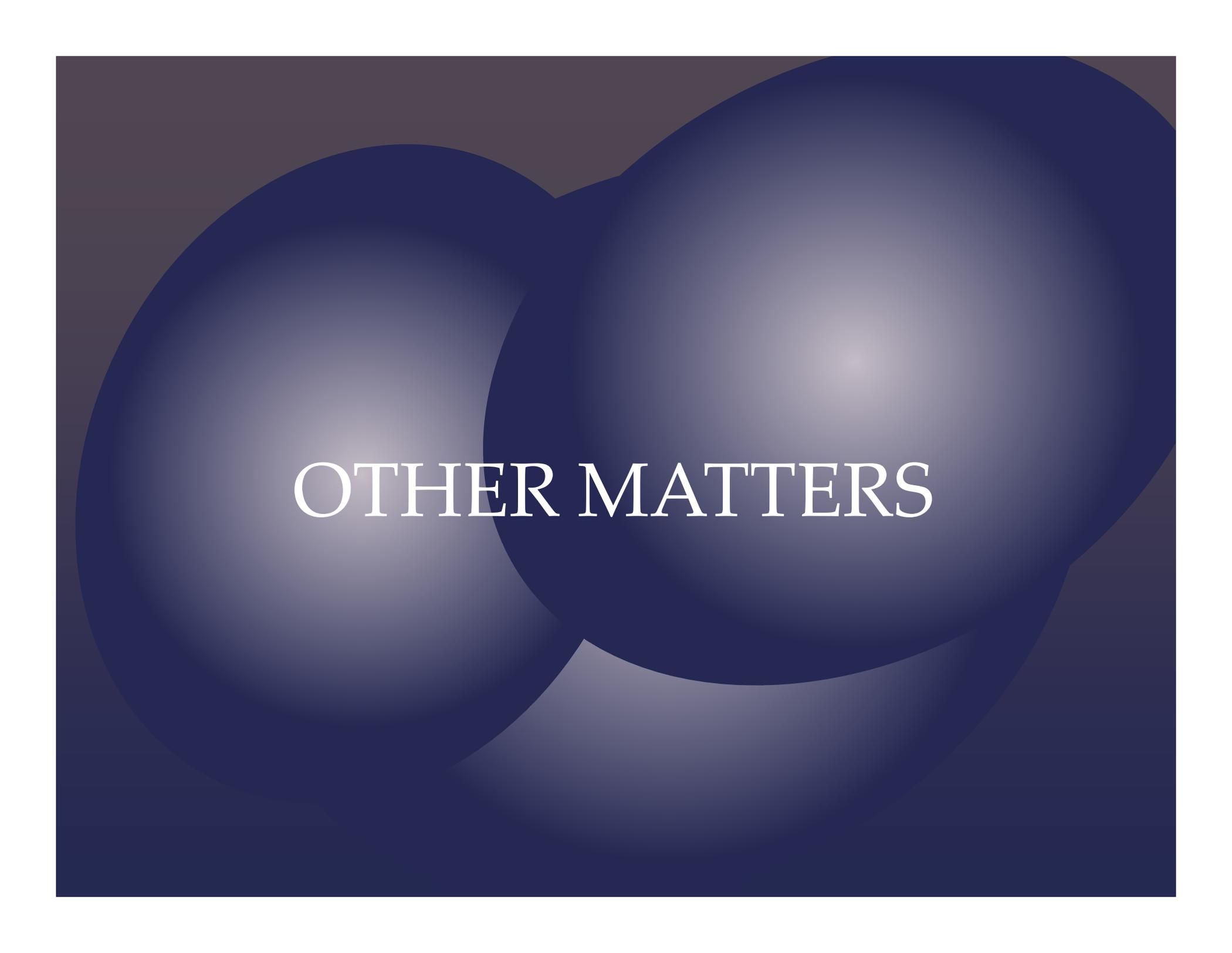
DISPOSITIONAL HEARING

Post Disposition:

- Appeal: 30 days from entry of judgment/order
Sec. 808.04(7m) and 809.107
- Relief from judgment: Sec. 48.46(1)

LEARNING POINTS

- Children have a natural attachment to their parent
- Do you want judge to meet with the child
- In the back of the judge's mind are the words safety and permanence

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OTHER MATTERS

OTHER MATTERS

If grounds are not contested:

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.

OTHER MATTERS

If grounds not contested (con't):

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 Wis. Stat. § 48.913.

OTHER MATTERS

If grounds are not contested (con't):

4. Establish whether any parent or alleged or presumed father has been coerced, which, if established, requires dismissal of the petition.
5. In order for no contest plea (or stipulation to ground) at grounds stage to be entered knowingly and intelligently, parents must understand that acceptance of their pleas will result in findings of parental unfitness.

OTHER MATTERS

If grounds are not contested (con't):

6. Make such inquiries as satisfactorily establish that there is a factual basis for the admission by taking testimony in support of the grounds alleged in the petition as required by the statute.

Wis. Stat. §§ 48.422(3), 48.422(7) and 48.913

Evelyn C.R., 2001 WI 110

OTHER MATTERS

If grounds are not contested (con't):

Circuit court, before accepting mother's no contest plea to grounds portion of petition for termination of parental rights, was required to inform mother that best interests of child was prevailing factor considered by court in determining disposition.

In re Yasmine B. (App. 2008) 314 Wis.2d 493

OTHER MATTERS

Voluntary Consent to TPR:

- If conducting a voluntary termination of parental rights, make sure there is full and complete questioning
- Treat it as the substantial equivalent of a guilty plea in a serious felony
 - *In the Interest of D.L.S.*, 112 Wis. 2d 180
- See the Voluntary Termination of Parental Rights Checklist provided in the materials

OTHER MATTERS

Written Consent

1. Consent in Another Jurisdiction

- Impossible or difficult for parent to appear in person
- Written consent given before judge in another jurisdiction

2. Notarized Statement

- Alleged father of non-marital child

3. Affidavit

- Step-parent adoption or parent foreign resident
- Affidavit witnessed by two persons

LEARNING POINTS

- Client makes final decision whether to stipulate to a fact or to grounds
- Make sure you document contacts and discussions with your client
- If client wants to voluntarily consent, be thorough

TERMINATION OF PARENTAL RIGHTS TRAINING

Hon. John DiMotto
Milwaukee County Circuit Court Judge

Hon. Edward Vlack
St. Croix County Circuit Court Judge

Wisconsin Dells, Wisconsin
October 16, 2014