

# Preparing for and Litigating Disposition

with **Katie Holtz** and  
**Matthew Giesfeldt**,  
Assistant State Public Defenders

MUSIC & LYRICS BY COLE PORTER

# ANYTHING GOES

BOOK BY GUY BOLTON & P.G. WODEHOUSE



# “ Best Interest ” Phase

Wis Stat. § 48.426(2): Standard. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.

# Court's Options at Disposition

\*\* Only the court makes the decision, not the jury.

- The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights. (Wis. Stat. § 48.427(2))
- The court may enter an order terminating the parental rights of one or both parents. (Wis. Stat. § 48.427(3))

**Wis. Stat. § 48.427(1):** any party may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations to the court...

**Wis. Stat. § 48.299(4)(b):** rules of evidence are not binding; hearsay admissible with circumstantial guarantees of trustworthiness; privilege intact; may make evidentiary objections; evidence still subject to materiality, relevance, and probative value

So, what is relevant,  
material, probative?

# Disposition Factors

“ Best Interests” defined in **Wis. Stat. § 48.426(3)**: The court shall consider, but is not limited to the following:

- (a) Likelihood of adoption after termination
- (b) Age and health of child at time of disposition and removal
- (c) Whether child has substantial relationship with parent/family and if it would be harmful to the child to sever these relationships
- (d) Wishes of the child
- (e) Duration of separation of parent from child

# Disposition: the “ **best interests**” phase

## (a) Likelihood of adoption

- ◆ Department of Children and Families Report
- ◆ Proposed- adoptive- parents’ promises
- ◆ Status of adoption study/license
- ◆ Previous placements



## Disposition: the “best interests” phase

(b) Age and health of the child at time of disposition and removal

- ◆ Physical and mental health of the child
  - Abuse or neglect discussed in CHIPS trial
- ◆ Special needs?
- ◆ Bonded or attached?
- ◆ ??

## Disposition: the “ **best interests**” phase

(c) Whether the child has substantial relationships with parent and parent’s family and whether it would be harmful *to the child* to sever those relationships

- ◆ Therapist recommend total severance?
- ◆ Promises of continued contact by foster parent?
- ◆ Examples of nurturing interactions
- ◆ Family members in their traditional roles?  
Extraordinary roles?
- ◆ Siblings in different adoptive resources or not in

## Disposition: the “best interests” phase

(d) Wishes of the child

- ◆ Guardian *ad litem*
- ◆ Not just report, but witnesses to support
- ◆ Child’s actions, not just words
- ◆ Anything to refute guardian *ad litem*?
- ◆ ??

## Disposition: the “ **best interests**” phase

(e) duration of separation from parent

- ◆ Expert? (Don't rely on “ common sense” )
- ◆ Age of child during the separation
- ◆ Reframe “ separation” - did parent visit, communicate, etc. with child while not living with her?
- ◆ ??

## Disposition: the “ **best interests**” phase

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child’s current placement, the likelihood of future placements and the results of prior placements.

- ◆ Issue at time of removal rectified?
- ◆ Attack on proposed adoptive parent(s)
- ◆ Have other placements failed?

# Focus your argument

- Identify a theme for disposition, just like your trial
- You may not be able to prevail on every factor, focus your attention on the strongest areas
- Be creative. Frame the factors in your client's favor

# Other Basics of the Process

- Court Report (Wis. Stat. § 48.425)
  - May be used with testimony of social worker
  - Includes:
    - Permanency planning
    - Likelihood of adoption (in SW's opinion)
    - Statement of services needed
  - Timing of drafting and filing?

# Other Basics of the Process

- Timing of Disposition?
  - 45 days from fact finding (Wis. Stat. § 48.424(4)) or sooner...
  - Consider timing strategically
  - Know when your judge prefers to do the hearing so you can prepare your client



# Other Basics of the Process

- Burden of proof?
  - Preponderance of the evidence
  - Petitioner's burden
  - But argue that it should be higher...
- Foster parent has the right to be heard- - can be testimony (if called by a party), written statement or oral statement. (Wis. Stat. § 48.427(1m))

# Alternative Disposition Arguments

- Revert back to the CHIPS case
- Transfer of Guardianship to current placement
- Move kid to relative placement- - then Transfer of Guardianship or just kinship
  - Subsidized guardianship (County \$\$) v. adoption assistance payments (State \$\$)
- Move the kid home immediately

# Preparing Client for Disposition

- Remind client: winning just gets you a CHIPS case back
- It is impossible to prepare your client for the ultimate decision of his/her parental rights being terminated.
- Decide whether your client will testify (or make a statement/write a letter *if allowed*)
- Discuss what others will testify to and evidence the parent will hear
- Explain the differences between focus in grounds phase (on the parents/ actions) and disposition (best interest

# Preparing for Disposition

- Don't forget- - Disposition is just as important as the fact- finding
- Begin identifying witnesses for disposition early in process
- Think about disposition when conducting discovery.
- Ask social worker to look into family placements.
- Consider filing changes in placement/guardianship

## Preparing for Disposition cont...

- Consider how much information about client's continued progress (in treatment, at visits, in other services, etc.) should be presented
- Changes if you have stipulated to grounds (which, again, you shouldn't do except in RARE instances)
- "Failed" adoptions- - when the fairy tale ends.

# Witnesses

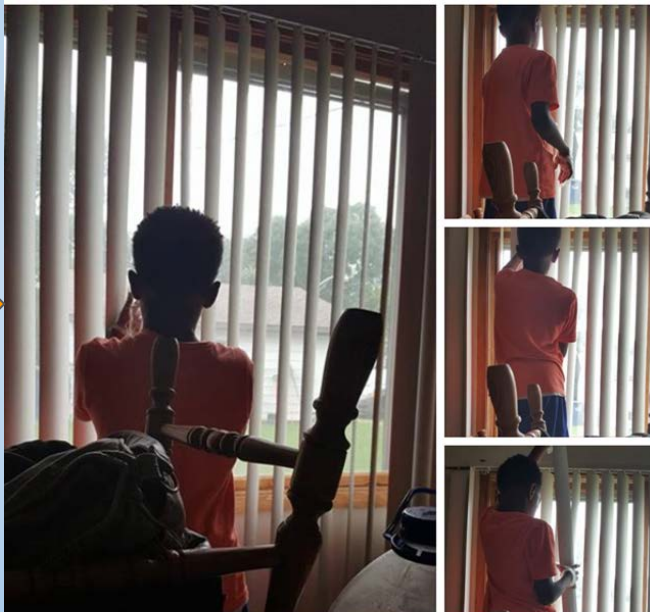
- Experts (psychological, bonding expert)
- Family members
- Visitation workers
- Kids' therapists
- The kids?

# Dealing with foster parents

- Request the entire file from the licensing agency
- Depositions of foster parents
- Ensure you're getting emails between case manager, FPs, and their worker through the discovery process
- Look them up on Facebook
- Dealing with promises of continued contact between kids and biological parents after adoption
- Consider how much to "attack" them

August 27, 2016 · 🌐

Woke him up at 6am to wipe down all the walls in the house, now he's doing the blinds because he can't keep his mouth close at school. Phone calls already on the 3rd day of school.



Found on  
a foster  
parents'  
publicly  
accessible  
Facebook  
page!



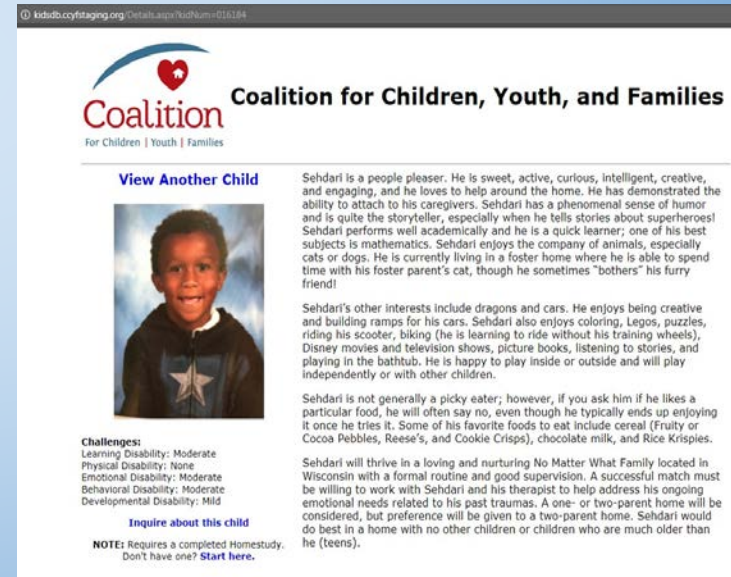
# Considerations for older kids



**Coalition** Coalition for Children, Youth, and Families  
For Children | Youth | Families


 <p><b>Aerriana</b> Gender: F Birthday: 05/01/2001 Ethnicity: African-American</p>	 <p><b>Anthony</b> Gender: M Birthday: 04/01/2001 Ethnicity: African-American</p>	 <p><b>Ashley</b> Gender: F Birthday: 03/01/2001 Ethnicity: Caucasian</p>	 <p><b>Ashley</b> Gender: F Birthday: 12/01/2001 Ethnicity: African-American</p>	 <p><b>Azy</b> Gender: M Birthday: 06/01/2004 Ethnicity: Asian</p>
 <p><b>Brandon &amp; Michael</b></p>	 <p><b>Caiden</b> Gender: M</p>	 <p><b>Video Available</b></p>	 <p><b>Video Available</b></p>	 <p><b>Video Available</b></p>

www.wiadopt.org/WI- kids



**Coalition** Coalition for Children, Youth, and Families  
For Children | Youth | Families

[View Another Child](#)



Sehdari is a people pleaser. He is sweet, active, curious, intelligent, creative, and engaging, and he loves to help around the home. He has demonstrated the ability to attach to his caregivers. Sehdari has a phenomenal sense of humor and is quite the storyteller, especially when he tells stories about superheroes! Sehdari performs well academically and he is a quick learner; one of his best subjects is mathematics. Sehdari enjoys the company of animals, especially cats or dogs. He is currently living in a foster home where he is able to spend time with his foster parent's cat, though he sometimes "bothers" his furry friend!

Sehdari's other interests include dragons and cars. He enjoys being creative and building ramps for his cars. Sehdari also enjoys coloring, Legos, puzzles, riding his scooter, biking (he is learning to ride without his training wheels), Disney movies and television shows, picture books, listening to stories, and playing in the bathtub. He is happy to play inside or outside and will play independently or with other children.

Sehdari is not generally a picky eater; however, if you ask him if he likes a particular food, he will often say no, even though he typically ends up enjoying it once he tries it. Some of his favorite foods to eat include cereal (Fruity or Cocoa Pebbles, Reese's, and Cookie Crisps), chocolate milk, and Rice Krispies.

Sehdari will thrive in a loving and nurturing No Matter What Family located in Wisconsin with a formal routine and good supervision. A successful match must be willing to work with Sehdari and his therapist to help address his ongoing emotional needs related to his past traumas. A one- or two-parent home will be considered, but preference will be given to a two-parent home. Sehdari would do best in a home with no other children or children who are much older than he (teens).

**Challenges:**  
Learning Disability: Moderate  
Physical Disability: None  
Emotional Disability: Moderate  
Behavioral Disability: Moderate  
Developmental Disability: Mild

**Inquire about this child**

**NOTES:** Requires a completed Homestudy. Don't have one? [Start here.](#)

# Notable “ Best Interests” Case Law

- *In re Termination of Parental Rights to Michael I.O., Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 551 N.W.2d 855 (Ct. App. 1994)
  - Termination at disposition left to discretion of the trial court

# Notable “ Best Interests” Case Law

- *In re Termination of Parental Rights to Prestin T.B., Sheboygan Co. Dept. of Human Serv. v. Julie A.B.*, 2002 WI 95, 225 Wis. 2d. 170, 648 N.W.2d 402
  - Court may consider factors favorable to parent, including prospective, positive predictions for improvement
  - Date of hearing = time for best interests analysis to be considered

## Notable “ Best Interests” Case Law

- *In the Interest of Brandon S.S.*, 179 Wis. 2d 114, 507 N.W.2d 94 (1993)
  - Error to exclude testimony of family members with substantial relationship who opposed termination

# Notable “ Best Interests” Case Law

- *State v. Margaret H., In re the Termination of Parental Rights to Daryl T.- H.*, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475
  - Court must consider the potentially harmful effect of severing familial relationship
  - Can consider proposed- adoptive parent’s promise to continue contact, but not “ legally enforceable.” \*
    - \*\* it may not be legally enforceable in juvenile court, but could it be in family court? See Wis. Stat. § 767.43

## Don't forget...

- Discuss whether client wants to appeal prior to the hearing . Complete appropriate forms (including trial court questionnaire for appellate attorneys).
- Have client fill out the DCF adoptive search records as fall back (Wis. Stat. §§ 48.427(6)(a) & 48.434)
- Ask for visitation to continue during appeal
- Ensure your client has emotional support

# Small Groups

Analysis of the Factors for  
Tanya's case

- What witnesses would you call for that factor
- What would be things you'd emphasize from adverse witnesses
- How would you deal with the facts that weigh against you
- What other evidence would you present

Be prepared to make the portion of the argument that you'd make to the judge!



# Disposition Factors

“ Best Interests ” defined in **Wis. Stat. § 48.426(3)**: The court shall consider, but is not limited to the following:

- (a) Likelihood of adoption after termination
- (b) Age and health of child at time of disposition and removal
- (c) Whether child has substantial relationship with parent/family and if it would be harmful to the child to sever these relationships
- (d) Wishes of the child
- (e) Duration of separation of parent from child
- (f) More stable and permanent family relationship



JUTTON FOSTER  
AND  
JOEL GREY



ALL RIGHTS RESERVED. © 1998 BY UNIVERSAL PICTURES

WRITTEN BY  
JOHN PORTER

STORY BY  
WINTHROP - BOYD

LIBRARY - BOYD  
AND BOYD

LIBRARY - BOYD  
AND BOYD

PRODUCED BY  
MARSHALL