Appointment of Counsel, Ethics, and Due Process for Parents in CHIPS Cases

The Honorable Samantha Wagner
Brown County Circuit Court

Attorney Alaina Fahley
State Public Defender's Office

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Housekeeping

- PowerPoint & Materials
  - https://wicciptraining.com/Resources
  - Under Training Materials - Webinars
- Webinar Format
  - Everyone's microphone and video is turned off
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The National Context

NCCRC National Coalition for a Civil Right to Counsel

According to the *National Coalition for a Civil Right to Counsel*:

- 40 states (plus Washington D.C.) have found that parents have a **right** to counsel when accused of abuse or neglect, without qualification
- FIVE states (including Wisconsin), grant courts the **discretion** to appoint counsel for indigent parents accused of abuse or neglect
- SIX states **qualify**, or limit, indigent parents ability to have counsel when accused of abuse or neglect – in various ways

The National Context

NCCRC
National Coalition for a Civil Right to Counsel

Discretionary:

1. Oregon
2. Missouri
3. Nevada
4. Wisconsin
5. Vermont

Qualified:

1. California
2. Georgia
3. Kentucky
4. North Dakota
5. Oklahoma
6. Texas

The Statewide Picture

- Title IV-E Funding
  - 39, out of 72, counties in Wisconsin receive federal Title IV-E funding to help pay for counsel for parents in CHIPS cases
- SPD Pilot Program, s. 48.233
  - From July 1, 2018 to June 30, 2025 five counties appointed counsel to parents in CHIPS cases, via the State Public Defender's Office - (Brown, Outagamie, Racine, Kenosha, and Winnebago counties)
  - Ended when the legislative joint finance committee eliminated state funding
- Indian Child Welfare Act Cases (ICWA)
  - SPD represents indigent parents in CHIPS cases when ICWA applies

Why is Parent Representation Important?

- The federal Children's Bureau (CB) strongly encourages all child welfare agencies and jurisdictions (including, state and county courts, administrative offices of the court, and Court Improvement Programs) to work together to ensure that **high quality legal representation** is provided to **all parties** in all stages of child welfare proceedings

- The National Council of Juvenile and Family Court Judges (NCJFCJ) considers "high-quality" child welfare practice as one in which all parties have counsel who are well trained, culturally responsive, and adequately compensated



Why is Parent Representation Important?

The shortage of quality representation is one factor that may lead parents and their children to experience unnecessary removals into foster care, and needless, lengthy, and often devastating delays in reunifying. (ABA Center on Children and the Law, 2009 https://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/michigan_parent_representation_report.pdf

Research shows that an interdisciplinary law office approach (social worker, parent advocate, and salaried attorney), leads to children spending 118 fewer days on average in foster care during the four years following the filing of the case. (Gerber, Lucas A. et al, *Effects of an interdisciplinary approach to parental representation in child welfare*, (2019) Children and Youth Services Review. https://www.sciencedirect.com/science/article/pii/S019074091930088X



U.S. Supreme Court
Lassiter

- In *Lassiter,* the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not automatically confer the right to counsel to indigent parents facing the termination of their parental rights. *Lassiter v. Department of Social Services*, 452 U.S. 18, 31-32 (1981).
- The Court did note that "A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well." *Id.* at 33-34.

History of Parent's Counsel in Wisconsin

Prior to 1995, the Public Defender's Office represented parents in CHIPS cases

In 1995, the state legislature prohibited courts from appointing counsel to parents in CHIPS cases. (1995 Wis. Act. 27, Sec. 2442v).

SECTION 2442v. 48.23 (3) of the statutes is amended to read:

48.23 **(3)** POWER OF THE COURT TO APPOINT COUNSEL. ~~At~~ Except in proceedings under s. 48.13, at any time, upon request or on its own motion, the court may appoint counsel for the child or any party, unless the child or the party has or wishes to retain counsel of his or her own choosing. The court may not appoint counsel for any party other than the child in a proceeding under s. 48.13.

In response, two suits were consolidated into the *Joni B.* case, brought by indigent parents of children subject to CHIPS proceedings and seven Milwaukee Children's Court judges

Joni B.

The fundamental fairness doctrine of the Due Process Clause requires an "**individualized determination** of the necessity for appointment under the circumstances presented by the particular case." *Joni B. v. State*, 202 Wis. 2d 1, 549 N.W.2d 411 (1996).



A Due Process Analysis with *Joni B.*

- If a parent requests appointment of counsel, the circuit court should balance the **due process factors:**
  - private interests
  - governmental interests
  - and the risk of erroneous decisions
- And consider other factors, including:
  - complexity of the case,
  - the parent's interest in the proceedings,
  - the parent's personal characteristics,
  - whether the alleged incidents could lead to criminal prosecution,
  - the probability of out-of-home placement, and
  - the potential duration of separation



Tammy L.D.

"…When the parent requests counsel or when the circumstances otherwise raise a reasonable concern that the parent will not be able to provide meaningful self-representation, the court must exercise discretion conferred by *Joni B.* whether to appoint counsel." *State v. Tammy L.D.,* 238 Wis. 2d 516 (Ct. App. 2000).



The Court's Obligation

- The Court shall, at the Temporary Physical Custody Hearing (TPC), give the petition to the parent (if present) before the hearing begins. (s. 48.21(3)(b))
- The Court shall, before the start of the TPC hearing, inform the parents of the allegations, nature and possible consequences, the right to counsel (under s. 48.23), and the right to present, confront, and cross-examine witnesses. (s. 48.21(3)(d))
- The Court shall, at the beginning of the Plea Hearing, advise parents of their rights - including their right to counsel, judicial substitution, and a jury trial. (s. 48.30(2)) See: Notice of Rights and Obligation (Forms JD-1716 and IW-1716)



The Question of Cost

"While acknowledging the legitimacy of the State's pecuniary interests in not appointing counsel, *Joni B.* nevertheless concluded that in some cases, such an interest would not outweigh the shared interest 'in a just and accurate result which will require the 'equal contest' of counseled adversary proceedings." *State v. Tammy L.D.*, 238 Wis. 2d 516, 527 (Ct. App. 2000) (Citing *Joni B.* at 16, 549 N.W.2d 411).

When the court appoints counsel other than a state public defender, the county bears counsel's costs. *State v. Dean*, 163 Wis. 2d 503, 515-16, 471 N.W.2d 310 (Ct. App. 1991).

Legal Recognition of Parents and Family

- "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
- "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977).
- "[A] fundamental right must be 'objectively, deeply rooted in this Nation's history and tradition." *Dobbs v. Jackson Women's Health*, 597 U.S. 215 (2022).

Parental Rights are a Fundamental Right under the U.S. Constitution

Parents generally have great latitude in raising their children and have a fundamental right to make decisions concerning the care, custody and control of their children. The state may intervene where the parent is unable or unwilling to protect the child's safety and well-being. While the parent generally may make decisions regarding the child's education and medical care, these decisions may be regulated to protect the public interest

- *Meyer v. Nebraska*, 262 U.S. 390 (1923)
- *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925)
- *Prince v. Massachusetts*, 321 U.S. 158 (1944)

Parental Rights are Fundamental Rights

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . It is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Substantive Due Process Protections

"In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57 (2000).



Procedural Due Process

- Due process requires an individualized determination of parental unfitness; unmarried father could not be presumed to be an unfit father and was entitled to a hearing prior to removal. State's treatment of unmarried fathers violated the Equal Protection Clause. *Stanley v. Illinois*, 405 U.S. 645 (1972).
- Failure to provide notice of the adoption to the putative father did not violate the Due Process Clause or Equal Protection Clause. Father had not taken steps to guarantee he would receive notice of the adoption (i.e., file with the putative father registry), failed to "grasp the opportunity to develop a relationship" with his child, and did not accept some measure of responsibility for the child's future. Where he did not establish a relationship with his child, the biological link alone did not merit protection. *Lehr v. Robertson*, 463 U.S. 248 (1983).



Equal Protection and the Indian Child Welfare Act (ICWA)

The U.S. Supreme Court held that ICWA is consistent with Congress' Article I authority, in that it does not infringe on states' authority to regulate family law and that ICWA does not violate the anti-commandeering tenets of the Tenth Amendment because it does not force state to adopt or enforce federal law. Because the parties lacked proper standing, the Court rejected the parties' remaining claims that ICWA violates the equal protection clause and the nondelegation doctrine. *Haaland v. Brackeen*, 599 U.S. 255 (2023).

The Constitutional Rights Parents Do NOT Have in a Civil Child Welfare Case

Unlike criminal cases:

- CPS may conduct warrantless home searches – there is no Fourth Amendment protection against unreasonable government searches and seizures or a search warrant requirement based on probable cause
- In child welfare cases, parents may remain silent, but their silence may be used against them – there is no Fifth Amendment protection against self-incrimination and the right to remain silent
- Child welfare trials are closed to the public – there is no Sixth Amendment right to a public trial

The Ethics of Representing Parents in CHIPS Cases

Rules

Supreme Court rules & related information



SCR 20:1.1 Competence – Know the Law

Due process rights:

- Ensure your client can participate in hearings (i.e. Temporary Physical Custody (TPC) s. 48.21(1) and Plea Hearing s. 48(30)(2))
- Can request a jury trial (s. 48.243 and s. 48.30(1))
- Can request to substitute the judge (s. 48.29)
- Has access to an interpreter (s. 885.38)
- Can request an appeal (s. 809.30)

SCR 20:1.1 Competence – Know the Law

Wis. Stat. 48.028 - If a child meets the definition of an "Indian Child" under ICWA/WICWA, then their parent is afforded the protections of the Indian Child Welfare Act:

- Notice to Parents and Tribes
- Serious Emotional or Physical Damage proved by Qualified Expert Witness
- Active Efforts to prevent the breakup of the family

The conditions of return must be narrowly tailored to the needs of an incarcerated parent to protect their Due Process rights. *Kenosha County Dep't of Human Services v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845

SCR 20:1.2 Scope and Allocation of Authority

Q: What if my client and I do not agree on the best outcome of the case?

A: A lawyer shall abide by a client's decisions regarding how to conclude the case, including the clients desire to settle the case or not.

Outside of scope: Parent's counsel does not represent the best interest of the child.

SCR 20:1.2 Scope and Allocation of Authority

Q: Scope of representation – what if my client asks me for advice on their criminal case?

A: A lawyer cannot advise a client beyond the scope of the representation agreement or appointment order from the court.

SCR 20:1.3 Diligence & Promptness

Diligently advocate for a parent's rights to do the following under Ch. 48:

- Have visits with their child Wis. Stat. s. 48.355(3)
- Consult about placement decisions, education decisions, medical decisions
- Suggest placement options
- Regardless of immigration status, all parents must be given the opportunity to work towards reunification. Lawyers for parents may not disclose their client's immigration status, if asked not to

SCR 20:1.3 Diligence & Promptness

Q: What if my client's reunification work is delaying permanency?

A: A lawyer shall act with reasonable diligence in representing a client. Your client's timeline for reunification (i.e. more time needed for addiction recovery or to secure housing) may require more time than the agency considers timely for permanency. Be dedicated to the interests of your client and zealously advocate on the client's behalf.

SCR 20:1.4 Communication

Q: How do I handle requests for examinations and evaluations about my client?

A: The lawyer shall promptly inform their client about requests for testing and evaluations after discussing the material risks and reasonable alternatives, in order to obtain their client's informed consent.

Q: How often do I need to be in touch with my clients?

A: The lawyer must keep the client reasonably informed about the case, promptly comply with reasonable requests for information.

SCR 20:1.6 Confidentiality

Q: What do I do when the social worker, GAL, or other parent asks me about my client?

A: The lawyer shall not reveal information related to the client's case without their client's informed consent. Exceptions allowed to prevent crime, fraud, substantial bodily harm, death or harm to another's financial property.



SCR 20:1.6 Confidentiality

Q: If the court asks where my client is or when I last spoke to my client, how do I answer?

A. The lawyer owes a duty of confidentiality to their client, no matter to whom they are speaking. The lawyer's answer to this question is protected by attorney client privilege. However, it may be necessary to share some information - the case is a civil matter and default is a possibility.



SCR 20:1.6 Confidentiality

Q: Can I talk to my client's criminal defense attorney about their related case?

A: Only if your client gives their consent to do so and only so much as is necessary to assist you in resolving your case.

SCR 20:1.14 Diminished Capacity

Q: Should I raise competency if I have concerns about my client?

A: If the lawyer reasonably believes their client's capacity is diminished, or is at risk of substantial harm and the client cannot adequately act in their own best interest, the lawyer MAY take action to protect their client and ask the court to appoint a GAL *if necessary*. This should be done very selectively and is different than an attorney raising competency in a criminal case.

Confidentiality requirements still apply, so the lawyer may only reveal information reasonably necessary to protect their client.

SCR 20:1.14 Diminished Capacity

Q: What if my client wants to have a friend or family member join our discussion and my client has diminished capacity?

A: When necessary to assist in the legal representation, the presence does not necessarily affect attorney-client privilege, but you should still look to your client to make case decisions.

SCR 20:1.16 Ending Representation

Q: What do I do if I can no longer represent my client?

A: A lawyer shall not represent a client if the lawyer is discharged, the client "insists upon taking action... with which the lawyer has a fundamental disagreement," or other good cause exists to withdrawal.

This must considered in light of an attorney's obligation to zealously advocate and pursue client-led representation. The court must consider whether your withdrawal will materially adversely effect your client and ultimately decides whether to grant or deny your withdrawal motion.

SCR 20:2.1 Advisor

Q: What should I say if my client asks me, "When am I getting my kids back?"

A: The lawyer shall render candid advice. A client is entitled to straightforward legal advice even if it involves unpleasant or upsetting information.

SCR 20:3.1(2) Meritorious Claims and Contentions

Q: How do I respond when my client asks me to do something that I believe will harm their case?

A: The lawyer shall not put forth a factual position unless there is a basis for doing so that is not frivolous. However, SCR 20:1.2 still gives the client the ability to make decisions about their own case.

SCR 20:3.2 Expediting Litigation

Q: Can I ask for a continuance if my client needs more time to understand the proceeding?

A: A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of their client. Taking time to review the petition, look at discovery, or conduct depositions may require postponements if done in good faith.

SCR 20:3.3 Candor

Q: How do I respond if my client wants me to present evidence that I know is false?

A: Explain to your client that you may not do so, but only if you truly know personally that this evidence is false. Discuss that if a lawyer or their client offers material evidence that the lawyer knows to be false, the lawyer shall take reasonable remedial measures. However, be mindful of your countervailing obligation to review all evidence carefully and challenge its veracity if your client asks you to.

SCR 20:3.4 Fairness

Q: What if I have not received discovery but the court wants me to proceed nonetheless?

A: Your client is entitled to discovery and opposing counsel is required to make a reasonably diligent effort to comply with proper discovery requests. See also s. 48.293.

SCR 20:4.2. Communication with Person Represented by Counsel

Q: The other parent in my case wants to ask me about the case. How do I respond?

A. If the other parent in your case has their own lawyer, you may not speak to them, unless their lawyer has given you their consent or the court has ordered it. This includes a prohibition on the GAL speaking to your client, unless you have given them your consent.

SCR 20:4.3. Communication with Unrepresented Person

Q: The other parent in my case wants to ask me about the case. How do I respond?

A. If the other parent in your case does not have a lawyer, you may speak to them. However, you must be clear that you do not represent them and cannot give them legal advice, even if the parents' interests are aligned.

Thank you!

Questions?

Contact information:

- Attorney Alaina Fahley, fahleya@opd.wi.gov
- Judge Samantha Wagner, Brown County Circuit Court
- Attorney Christina Tenuta, CCIP, Christina.Tenuta@WIcourts.gov