

**SPECIAL MATERIALS: ANALYSIS OF EFFECTIVE DATES OF JUVENILE LEGISLATION AND JURY INSTRUCTIONS ON THE NEW ELEMENTS**

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**I. TPR Jurisdiction B ' 48.415**

The majority of the current grounds for termination of parental rights under ' 48.415 were either amended or created by 1995 Wisconsin Act 275, enacted in spring 1996.

**A. Relevant case law on statutory changes in TPR grounds and trial**

While considering Act 275, the legislature was aware of the published decision of the Wisconsin Court of Appeals in the case *In re Jason P.S.*, 195 Wis.2d 855, 537 N.W.2d 47 (Ct. App. 1995). The court of appeals indicated that there are constitutional issues insofar as determining which law the jury should be instructed on when one of the elements is a TPR warning and where that warning advised the parent of statutory grounds which have since been amended.

In that case, Jason's mother had been given a TPR warning under an earlier version of ' 48.415(2)(c) which described one of the elements for continuing need of protection or services as that the "parent has substantially neglected, willfully refused, or been unable to meet the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions in the future." Subsequent to that warning, and prior to the TPR action, the legislature enacted 1993 Wisconsin Act 395 which, effective May 5, 1994, amended the relevant part of ' 48.415(2)(c) to read that: "The parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under ' 48.425."

The trial court denied the motion filed by the parent to dismiss on grounds that the petition alleged grounds other than those on which the mother had received the TPR warning. The trial court was reversed by the court of appeals. In relevant part, the court of appeals indicated that:

When the State warned the parent that his or her rights to a child may be lost because of the parent's future conduct, if the State substantially changes the type of conduct that may lead to the loss of rights without notice to the parent, the State applies a fundamentally unfair procedure. *Jason P.S.*, *supra* at 863.

The court of appeals determined that the parent had been deprived of her parental rights without due process of law and the order was reversed.

*Jason P.S.* was followed by an unpublished court of appeals case *In re Termination of Parental Rights of Matthew A.H.*, Case No. 96-1224, decided June 21, 1996. The court of appeals acknowledged the law as established in *Jason P.S.* and attempted to go further in

answering the question as to whether or not a termination of parental rights could go forward where the parent is advised under a given statute and the statute is subsequently amended by the legislature. The court of appeals answered that question in the affirmative but seemed to indicate that the jury should be instructed under both the old and new grounds in the particular statute. The court gave directions as follows:

The petition should allege as conduct supporting termination that the parent has failed to demonstrate substantial progress toward meeting the conditions established for returning the child to the home . . . because the parent either substantially neglected, willfully refused or was unable to meet the conditions established for the return of the child to the home. . . . The jury should be instructed about the conduct required for termination under the former version of ' 48.415(2)(c), Stats. 1991-92. Then, the jury should be instructed that if it finds the conduct described in the former statute has been established, it may find the conduct supporting termination has been established under the new statute. Using this procedure, the jury will have found the parent satisfied both the conduct about which he or she was warned, and the conduct described in the new statute which was implicitly present in the former statute. *Id.* at 1996 WL 339817, \*4(Wis. App.).

With these things in mind, let's take a look at how the legislature dealt with the implementation of the various amendments and additions to ' 48.415, all of which are otherwise in effect as of July 1, 1996.

**B. Abandonment on court ordered placement B TPR ' 48.415(1)(a)2**

Subsection 48.415(1)(a)2 was revised to shorten the period for abandonment on a court ordered out-of-home placement from six months to three months. This is generally effective July 1, 1996. However ' ' 9110 and 9310 of Act 275 prohibit the filing of a termination of parental rights petition on this ground unless the parent has received the appropriate notice under ' 48.356(2) or ' 938.356(2) of this ground for termination, as affected by this act, and three months or longer have elapsed since the date of the notice. It

should be noted, however, that ' 9110 of Act 275 specifically indicates that it "does not preclude a person from filing a petition" under ' 48.415(1)(a)2, 1993 Stats., against a parent who received appropriate notice under the then-existing statute and if six months or longer have elapsed since the date of that notice.

**C. Continuing need of protection or services B TPR ' 48.415(2)(c)**

This ground was amended by shortening the time period from 12 months to 6 months. An appropriate TPR warning is an element under this subsection. This is generally effective July 1, 1996. However, ' ' 9110(2) and 9310(5)(b) of Act 275 indicate that with regard to this revised TPR ground, "no person may file a petition" under such section, as affected by this act, unless the parent has received appropriate notice (TPR warning) under ' 48.356(2) or ' 938.356(2) of the revised statute with the shortened time period. Notwithstanding this provision, ' 9110(2)(c) goes on to indicate "this subsection does not preclude a person from filing a petition under" ' 48.415(2)(c), 1993 Stats., against a parent who has received appropriate notice under ' 48.356(2) or ' 938.356(2) of the grounds for termination under the previous statute and if one year or longer has elapsed since the date of that notice. (This last provision only applies to children who had attained the age of 3 at the time of the initial order. For children under the age of 3, the old law already provided a time period of only 6 months.)

**D. Child left by parent B TPR ' 48.415(1)(a)3**

Wis. Stat. ' 48.415(1)(a)3 shortened the time period on a child who had been left by the parent from a period of one year to six months. This statute does not have as an element that there was any type of TPR warning. However, the legislature determined that this

particular part of the act would not apply until six months after the effective date of the act. In other words, it first applies to petitions filed on January 1, 1997, or thereafter.

**E. Revised TPR for continued denial of visitation B TPR ' 48.415(4)**

Wis. Stat. ' 48.415(4) provided a ground for termination of rights in cases where there has been a continual denial of periods of physical placement. Act 275 amended that to add continuing denial of periods of "*visitation*." One of the elements is that one year has elapsed from the date of the order denying visitation. Section 9310(5)(d) of Act 275 indicates that the revised language of ' 48.415(4) as well as the revisions in the language and treatment of ' ' 48.356 and 938.356 shall first apply to court orders denying a parent visitation under ' ' 48.345, 48.357, 48.363, or 48.365 entered on or after July 1, 1996. Therefore, TPR petitions based on a continued denial of *visitation* cannot be filed until at least July 1, 1997.

**F. Reckless homicide of other parent, ' 48.415(8), and commission of serious felony against another child B TPR ' 48.415(9m)**

Wis. Stat. ' 48.415(8) was amended to indicate that termination of rights may occur not only where a parent has committed a first or second degree intentional homicide of the other parent but may also be established by evidence that the parent committed *first degree reckless homicide* of the other parent in violation of ' 940.02. Wis. Stat. ' 48.415(9m) creates a new ground of termination of parental rights for *commission of a serious felony against one of the person's children*. Under ' 9310(5)(e) and (f) of Act 275, the new provisions for termination of rights for reason of first degree reckless homicide of a parent and commission of a serious felony against one of the person's children both apply as of July 1, 1996, but both statutes preclude consideration of a conviction obtained prior to that date. In other words, the conviction for first degree reckless homicide and/or the serious

felony against the child must be obtained on or after July 1, 1996, in order for the statute to be used as a TPR ground. *Note* that based on the wording of ' 9310 of Act 275, the incident giving rise to the conviction may occur prior to July 1, 1996.

**G. Prior involuntary TPR as to another child B TPR ' 48.415(10)**

Wis. Stat. ' 48.415(10) is a new ground for termination of parental rights. What must be established is that the child who is the subject of the current TPR petition has been found to be in need of protection under ' 48.13(2), (3), or (10), and that within three years previous to the CHIPS determination, that there was an involuntary TPR as to another child. Section 9310(5)(g) of Act 275 indicates that this new ground first applies to petitions filed on or after July 1, 1996. Section 9310(5)(g) of Act 275 goes on to indicate that this "does not preclude consideration of prior orders of a court terminating parental rights." However, it is required that the previous order be entered within three years prior to the date that the court adjudged the other child to be CHIPS under Wis. Stat. ' 48.13(2), (3), or (10). Please note that ' 9310 of Act 275 is silent as to whether the court is precluded from considering orders entered prior to the effective date of the act finding the second child to be in need of protection or services under ' 48.13(2), (3), or (10).

**H. Other TPR provisions effective on July 1, 1996**

The following subsections of ' 48.415 first apply to petitions filed on or after July 1, 1996:

- (1)(a)1m (child left without care that exposes child to substantial risk of great bodily harm or death)
- (1)(c) (language changing the standards to rebut presumption of abandonment. Does away with "did not disassociate" and establishes "good cause" standards)
- (5) (revised child abuse TPR statute)
- (6) (revised failure to assume parental responsibility TPR statute)

For these new or revised sections, it would not matter generally when the events occurred giving rise to the petition as long as it is filed on or after July 1, 1996. Please note, however, that if an element includes a warning as to TPR for abandonment, and if all of the warnings were using the old "did not disassociate" language of ' 48.415(1)(c), the jury should presumably be instructed using the old standard.

## **II. CHIPS Jurisdiction B ' 48.13**

In 1995 Wisconsin Act 275, the legislature amended the following grounds for CHIPS jurisdiction under ' 48.13:

- (3) (a victim of abuse)
- (3m) (at substantial risk of becoming a victim of abuse)
- (4) (parent unable to provide care or special treatment)
- (9) (child signs petition for special treatment or care)
- (11) (child suffering emotional damage)
- (11m) (child suffering from alcohol and other drug abuse in family)

Subsection 9310(6) of 1995 Wisconsin Act 275 indicates that as to these amended grounds for CHIPS, they first apply to a petition under ' 48.255 filed on the effective date of the act, which was July 1, 1996.

## **III. JIPS (juveniles in need of protection or services) Jurisdiction B ' 938.13**

In 1995 Wisconsin Act 77, the new juvenile justice code legislation, the legislature transferred the following CHIPS grounds out of ' 48.13 and moved them into the following subsections of ' 938.13:

- (6) (habitually truant from school)
- (6m) (a school dropout)
- (7) (habitually truant from home)
- (12) (juvenile under age 10 alleged to have committed a delinquent act)

(14) (juvenile not responsible by reason of mental disease or defect)

The Juvenile Justice Act and trailer bill contain no specific provisions as to the effective date for the grounds under Wis. Stat. ' 938.13. Therefore, the general effective date provision of ' 9300(1g) would apply. The act reads that "this act first applies to violations committed on the effective date of this subsection." The effective date of the subsection is July 1, 1996. Note, however, that no jury trials are available to juveniles alleged to be JIPS under ' 938.13.

In 1995 Wisconsin Act 275, the legislature amended JIPS jurisdiction under ' 938.13(4), which allows for jurisdiction where a parent is unable or needs assistance to control the juvenile. Section 9310(6) of 1995 Wisconsin Act 275 indicates that this amended ground first applies to a petition filed on the effective date of the act, which is July 1, 1996.