SM-2 SPECIAL MATERIALS: USE OF SUMMARY JUDGMENTS, JURY WAIVERS, STIPULATIONS, AND DIRECTED VERDICTS IN TERMINATION AND CHIPS PROCEEDINGS

NO INSTRUCTION IS RECOMMENDED

1. **Summary Judgment in TPR Cases**

The Wisconsin Supreme Court has held that summary judgment is available in the first phase of a TPR case at which parental unfitness is determined. Steven V. v. Kelly H., 2004 WI 47, 271 Wis.2d 1, 678 N.W.2d 856. The court in Steven V. overruled Walworth County Dep't of Human Services v. Elizabeth W., 189 Wis.2d 432, 525 N.W.2d 384 (Ct. App. 1994) to the extent that the decision prohibited use of summary judgment in TPR proceedings. Elizabeth W. involved a petition to terminate on grounds of abandonment and continuing need of protection or services. In Steven V., the court said the holding in Elizabeth W. was "overbroad" and "statutorily and constitutionally unwarranted." The supreme court held in Steven V.:

> Neither due process nor the TPR statutes require an absolute prohibition on summary judgment in the grounds or unfitness phase of a TPR proceeding. That a parent has contested the termination of his or her parental rights does not automatically mean there are material facts in dispute regarding the grounds for unfitness. 2004 WI 47, ¶ 31.

The court also concluded that "although the private interest at stake is fundamental, . . .due process does not mandate a jury trial in the unfitness phase of a TPR case." According to the court, the jury trial right of the parent is statutory only, and is subject to the provisions of the civil procedure code, including summary judgment. The court reasoned that "due process requires a hearing . . .and clear and convincing proof of unfitness . . .and the summary procedure under Wis. Stat. § 802.08 accommodates both."

In Steven V., the mother argued that summary judgment was inappropriate because she was entitled to present evidence regarding her reasons for having failed to comply with

the conditions for re-establishing visitation in the order denying placement and visitation. The parent cited State v. Frederick H., 2001 WI App 141, 246 Wis.2d 215, 630 N.W.2d 734, in which the court of appeals held that such evidence is relevant at the grounds phase of a TPR proceeding, and, that a circuit court's refusal to allow such evidence at the grounds phase deprived the parents of the right "to meaningfully participate in the TPR proceedings." The supreme court in Steven V. overruled Frederick H., noting that it was inconsistent with Sheboygan County DHSS v. Julie A.B., 2002 WI 95, 255 Wis.2d 170, 648 N.W.2d 402, in which the court withdrew language on which Frederick H. was based.

A concurrence in Steven V. noted that "in certain cases, a parent will be able to raise his or her legitimate explanation about why his or her conduct does not constitute unfitness by means of a constitutional challenge. In those cases where the legislative scheme seems to bypass any meaningful determination of unfitness, the petitioner can assert that the statutory ground for unfitness is not sufficiently narrowly tailored to meet the constitutional standards (citing Monroe Dep't of Human Services v. Kelli B., 2004 WI 43, 271 Wis.2d 51, 678 N.W.2d 831)." See also commentary to JI-Children 350.

A number of grounds for termination of parental rights in Wis. Stat. § 48.415 are subject to motions for summary judgment. The supreme court in Steven V. 2004 WI 47, listed grounds capable of proof by "official documentary evidences" such as court orders or judgments of conviction (§ 48.415(1m), (4), (9), and (9m) and (10). The court referred to these as "paper grounds." A dissent suggested other grounds which may also be proved by "official documentary evidence," citing Wis. Stat. § 48.415(5) (child abuse) and § 48.415(7) (incestuous parenthood).

The court noted that in many termination cases, the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing, because the alleged grounds involve the adjudication of parental conduct vis-a-vis the child. (Specifically, the court cited § 48.415(2), (3), (5), (6) and (7). For these fact-intensive grounds, the court said summary judgment will "ordinarily" be inappropriate.

Summary Judgment. For two cases discussing Steven V. involving summary judgment when the issue to be resolved is abandonment, see Dane County Dep't of Human Services v. Wesley J. Appeal No. 2013AP1226 (not published; one judge) and Racine County Dep't of Human Services, Appeal No. 2012AP1974 (not published; one judge). The decision in Wesley J. notes that the burden of proof as to "good cause" for failing to visit or communicate rests with the parent, not the department.

Partial Summary Judgment. In Bobby G., 2007 WI 77, ¶ 39-40, 301 Wis.2d 531, 734 N.W.2d 81, the supreme court said that partial summary judgment at the grounds phase of a termination proceeding is permitted. The court acknowledged that not all TPR cases are "suited for partial summary judgment." It noted that the grounds for unfitness most likely to form the basis of a successful motion for partial summary judgment are those that are sustainable on proof of a court order or judgment of conviction (sometimes referred to as "paper grounds," see Steven V.) The court in Bobby G. also said that summary judgment will ordinarily be inappropriate in TPR's premised on these "fact-intensive grounds." Nevertheless, Wisconsin appellate courts have never said that a "fact-intensive ground" could never form the basis for partial summary judgment; instead the supreme court has said that "the propriety of summary judgment is determined case-by-case." Bobby G., 2007 WI 77, ¶ 39-40.

See also Wisconsin Judicial Benchbooks, Volume IV (Juvenile), Chapter 13.

2. **Summary Judgment in CHIPS Proceedings**

A circuit court may use summary judgment in CHIPS fact-finding hearings. N.Q. v. Milwaukee County Dep't of Social Services, 162 Wis.2d 607, 611-12, 470 N.W.2d 1 (1991).

3. **Jury Waivers; No-Contest Pleas**

Wisconsin appellate courts have addressed appeals from parents who have argued: (1) that a stipulation entered into by the parent with respect to one element of a TPR ground deprived the parent of the right to a jury trial and (2) that he or she did not knowingly and voluntarily waive that right.

The right to a jury trial in a Wisconsin TPR proceeding is statutory, not constitutional. Steven V. v. Kelly H., 2004 WI 47, 271 Wis.2d 1, 678 N.W.2d 856; Wis. Stat. § 48.422. See also Walworth County DHHS v. Andrea L.O., 2008 WI 46, 309 Wis.2d 161, 749 N.W.2d 168; Racine County Human Services Department v. Latanya D.K., 2013 WI App 28, 346 Wis.2d 75, 828 N.W.2d 251 . When a parent stipulates to an element of an unfitness ground, Wisconsin courts have said this waiver of the parent's right to a jury trial on the element must be made knowingly and voluntarily. Andrea L.O., supra; Manitowoc County HSD v. Allen J., 2008 WI App. 137, 314 Wis.2d 100, 757 N.W.2d 842; and Racine County Human Services Department v. Latanya D.K., 2013 WI App 28, 346 Wis.2d 75, 828 N.W.2d 251. See also Wis. Stat. § 48.422(7) and State v. Connie P., Appeal No. 2013AP2854 (one-judge decision, July 1, 2014). When a parent enters a no-contest plea that a ground exists to terminate his or her parental rights at the grounds phase, Wis. Stat. § 48.422(7) requires the trial court to:

(a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.

(b) Establish whether any promises or threats were made to elicit an admission . . .

(bm) Establish whether a proposed adoptive parent of the child has been identified . . .

(br) Establish whether any person has coerced a birth parent [into making an admission].

(c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

Additionally, the parent must have knowledge of the constitutional rights given up by the plea. Kenosha Cnty. DHS v. Jodie W., 2006 WI 93, ¶25, 293 Wis.2d 530, 716 N.W.2d 845.

For a decision involving a parent's jury waiver and her stipulation to two of the four elements needed to prove unfitness, see Walworth County DHHS v. Roberta J.W., 2013 WI App 102, 349 Wis.2d 691, 836 N.W.2d 860. In this decision, the parent claimed the trial court erred when it held that her jury waiver and stipulation, prior to her second fact-finding hearing, were still effective on remand for a third fact-finding hearing. The court of appeals agreed with the parent and reversed.

4. **Withdrawal of Jury Demand**. In a 2014 termination of parental rights case, the court denied a parent's request to withdraw her jury demand. Racine County v. Latasia D.M., Appeal No. 2014 AP1672 (one-judge decision, December 23, 2014). The county refused to consent to the withdrawal. The parent argued that the county had forfeited its right to a jury trial when it failed to submit its own demand at the initial hearing. The trial court disagreed, finding that once the parent demanded a jury trial, the county did not need to file a separate demand to preserve its right to a jury trial. The parent argued on appeal that the court erred in requiring the consent of a party that had not demanded a jury trial before she could withdraw her own request and that Wis. Stat. § 805.01(3) was not applicable to TPR proceedings. The court of appeals disagreed stating:

> TPR proceedings are civil in nature, Door Cnty. DHFS v. Scott S., 230 Wis.2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999), and thus the procedures and practice of such proceedings are governed by Wis. Stat. chs. 801 to 847 "except where different procedure is prescribed by statute or rule," Wis. Stat. § 801.01(2). "The TPR statute allows a parent to demand a jury trial but does not provide a means to withdraw such a demand." Manitowoc Cnty. HSD v. Allen J., 2008 WI App 137, ¶16, 314 Wis.2d 100, 757 N.W.2d 842. We therefore look to Wis. Stat. § 805.01(3), which provides the procedure for withdrawing a jury demand in civil proceedings and requires "the consent of the parties." The circuit court properly applied § 805.01(3) to deny Latasia's

request to withdraw her jury demand when the Department refused to consent to the withdrawal.

5. **Evidentiary Stipulations; Judicial Notice**

In some cases, it will be helpful to the jury and will reduce the need for trial testimony to have the judge explain to the jury what CHIPS procedures have occurred prior to the TPR proceeding.

An example of an explanation used in Milwaukee County for this purpose follows:

JUDICIAL NOTICE OF UNDERLYING CHIPS PROCEEDINGS

When allegations of child abuse or neglect are made, it is the responsibility of the Bureau of Milwaukee Child Welfare (BMCW) to investigate those allegations. If in the view of BMCW, there is probable cause to believe that the parent is neglecting, refusing, unable or is unavailable to provide adequate supervision and care and that services to ensure the child's safety and well being are unavailable or would be inadequate, the children are held in a foster home, relative home or other appropriate placement.

A hearing must be held before a judge within 48 hours at which the judge must determine if the children should remain in that placement. A Child in Need of Protection and Services (CHIPS) petition is filed and court proceedings—often referred to as CHIPS proceedings—are conducted.

If the children are found to be in need of protection and services by agreement of the parties or trial (or default), a court order is entered governing the custody and placement of the children. If the children are placed in the parent's home, the court sets conditions the parent must comply with and BMCW must monitor to reasonably assure the safety of the child in the home.

If the child is placed outside of the parental home (in foster or relative care), the court order sets conditions the parent must meet to have a child safely returned to his/her care ("conditions of safe return") and services BMCW must provide to assist the parent in meeting the conditions of safe return. BMCW is legally obligated to make reasonable efforts to provide those services to the parents. An order placing a child outside the parental home must also warn the parents of any grounds for termination of parental rights which may be applicable.

In this case, the child was taken into custody on:

The child was found to be in need of protection and services of the court on:

> The court order containing the termination of parental rights warnings established the following conditions for the parent to meet in order to have the child safely returned to the parent's care:
>
> The order directed BMCW to make reasonable efforts to provide the following services to assist the parent in meeting the conditions of safe return to the home:
>
> [The order governing the custody and placement of the child was extended on . . . .]

The explanation must be tailored to the facts of the case. Use of this type of explanation is optional. The Committee recommends that the court have the parties stipulate to its use.

See also Walworth County DHHS v. Roberta J.W., supra.

6. **Directed Verdict on an Element**

In 1999, the court of appeals addressed the use of directed verdicts in TPR proceedings. In Door County DHFS v. Scott S., 230 Wis.2d 460, 602 N.W.2d 167 (Ct. App. 1999), the trial court directed a verdict on the question whether the daughter had been adjudged to be in need of protection or services and placed outside the home pursuant to one or more court orders. After the jury found the remaining elements necessary to terminate parental rights, the court terminated the father's rights. The father appealed, arguing that by removing one of the requisite elements under the TPR statute from the jury's consideration, his due process right to a jury trial was violated. The court of appeals disagreed. The court of appeals distinguished several decisions cited by the father, including In re Philip W., 189 Wis.2d 432, 436, 525 N.W.2d 384 (Ct. App. 1994) and concluded:

> In this case, the verdict was directed as to only one undisputed element of the TPR statute, after a full jury trial in which (the father) had ample opportunity to secure discovery and introduce evidence to refute the department's contentions that (the daughter) had been in CHIPS custody. When no contrary evidence was provided, the circuit court was justified in directing a verdict as to the first element. (The father's) due process rights were not violated; he enjoyed the benefits of all of

the procedural devices and safeguards that attend a full trial.

In an unpublished opinion in 2014, State v. Queentesta H., Appeal No. 2014AP761, the court of appeals considered a parent's argument that the trial court should have let the jury determine whether the court orders, in a TPR based on continuing need, had the termination of parental rights required by law. The parent contended that the Wisconsin Supreme Court "has not sanctioned the granting of a directed verdict on an element in a termination of parental rights case." The court of appeals said a trial court may grant a directed verdict in a termination-of-parental-rights case '"where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion."' Door Cnty. DHFS v. Scott S., 230 Wis.2d 460, 465, 602 N.W.2d 167, 170 (Ct. App. 1999). Moreover, the court noted "[s]ummary judgment on the existence of grounds for termination is proper, in appropriate cases, where there is no genuine issue of material fact in dispute regarding the grounds and the moving party is entitled to judgment as a matter of law." Racine County Human Services Department v. Latanya D.K., 2013 WI App 28, ¶17, 346 Wis.2d 75, 91, 828 N.W.2d 251, 258-259. The court also addressed the parent's contention that the Wisconsin Supreme Court has not sanctioned the procedure. It said:

> [The mother] relies on Walworth County DHHS v. Andrea L.O., 2008 WI 46, 309 Wis.2d 161, 749 N.W.2d 168, which upheld a jury's verdict underlying the termination of Andrea L.O.'s parental rights. There, the lawyers stipulated in open court that she had received the requisite notices under Wis. Stat. §§ 48.356(2) and 48.415(1), but the trial court submitted the question to the jury anyway. Andrea L.O., 2008 WI 46, ¶¶2-3, 309 Wis.2d at 163-164, 749 N.W.2d at 170. Significantly, Andrea L.O. not only approved of Scott S., see Andrea L.O., 2008 WI 46, ¶37, 309 Wis.2d at 175-176, 749 N.W.2d at 176, but also opined that where an element is "expressly provable by

> the official documentary evidence" that element may be taken from the jury, *id.*, 2008 WI 46, ¶¶40-41, 309 Wis.2d at 176-177, 749 N.W.2d at 176. Thus, [the mother]'s representation that the supreme court "has not sanctioned the granting of a directed verdict on an element" in a termination-of-parental-rights case unless the parties have so stipulated, seeks a bridge too far.

The court of appeals concluded that Scott S. is still good law, and the trial court did not err in following Scott S.

If there is a dispute on a factual element, *e.g.* the child's age at the time of relinquishment, then a trial on that issue is necessary. If a parent contests a petition alleging such a ground, a trial court may be best advised to convene a fact-finding hearing and receive documentary and other evidence establishing the element. See In re J.A.B., 153 Wis.2d 761, 451 N.W.2d 799 (1989).