The Best Kind of Correct

Leveraging procedure to ensure due process in mental health cases

Overview

- Basic Procedural Nuances
- Discovery tools
- Location/attendance for the hearing
- Hearsay

Let’s Begin at the Beginning

Emergency Detentions

Personnel

- 51: LEO or other person authorized to take children/JV into custody
- 55: LEO, fire fighter, guardian, authorized county representative

Statement

- The individual taking the person into custody/placing them must fill out an ED statement and provide it to the director of wherever they take them
- This person needs to have personal knowledge of the basis for detention/be the person who the information was reported to

Pleadings

- 51: Must be filed by corp counsel, otherwise must be dismissed
- Must provide notice of hearing, petition, detention order, written explanation of rights and standard sought to be committed under (legal standard and factual basis)
- 55: Must allege standards in 55.08 and basis **with particularity**
  - Based on personal knowledge
- May only be filed in county of residence or, if extraordinary circumstances, where the person is located

Venue

- Set by the residence of the individual, not their physical location
- ED hearings can be held in county where individual is located
- Important to contact the local SPD office where case being transferred to

Substitution of Judge

- 801.58 - may ask for substitution
- Must be in writing
- Must be filed preceding the PC hearing
- If new trial judge is assigned mid-case - 10 days after assignment

Time Limits

Holding PC Hearing

- Within 72 hours of detention (excludes weekends/legal holidays)
- Not detained or inmate in 51:
  - 51: "Within reasonable time" of filing of petition
  - 55: No PC hearing, only final

Final Countdown

Reports

- 51: YOU need to have access 48 hours before hearing
- 55: All parties must be provided a copy 96 hours before hearing

Holding Final Hearing

- 51: 14 days from **date of detention**
- 55: 60 days from filing of petition (any party can request 45-day extension)
  - Can be expedited if allegation someone making health care decisions not in individual's best interests or if individual objects/protests placement

Jury Trials

Must be demanded at least 48 hours prior to scheduled final hearing

- 51: Depends on when demanded
  - Within 5 days of detention: 14 days from detention date
  - 6 or more days from detention: 14 days from date of demand
- 55: Unclear
  - Could be in a situation where 45 day extension has been used and request is made right before deadline (try to avoid this)

Remedy

Always Request Dismissal

- Losing competency for not holding timely hearings is clear in the case law
- Failure to timely file reports may require showing of prejudice
  - Due, in part, to statutory provisions about disregarding procedural defects that "do not affect substantial rights of the party"
  - Argue prejudice (inability to adequately prepare/investigate)
  - Argue that 51.20(10)(c) does not trump constitutional protections

The Point of Contention

Fond du Lac County v. S.N.W. unpublished slip op. No. 2019AP2073, ¶¶12-13 (WI App. June 17, 2020).

- Court held prejudice must be shown - not how statute is worded

Lessard v. Schmidt, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972).

- Due process requires: “names of examining physicians and all other persons who may testify in favor of his continued detention, and the substance of their proposed testimony” “sufficiently in advance of the scheduled hearing.”

Setting the Stage

Discovery

- 51.20(9)(c) – “all parties shall produce at a reasonable time and place designated by the court all physical evidence which each party intends to introduce in evidence.”
- “any party shall be permitted to inspect, copy, or transcribe such physical evidence”
- “The court may, **if the motion is made by the subject individual**, delay the hearing for such period as may be necessary for completion of discovery.”

Examination/Records

- 2 doctors (specific rules re: type) – 51.20(9)(a)(1)
- One of the physicians can be chosen by us– 51.20(9)(a)(2)
- Access to records with either:
  - 51.30(4)(b)11 – automatic access for us for purpose of defending involuntary commitment/recommitment
  - 51.30(4)(b)4 - Court order – only if the first fails

Protective Order

804.01 (2)(am) - Court can limit discovery by motion of party if:

- Discovery is cumulative/duplicative/can be obtained elsewhere easier, or
- Burden/expense outweighs the likely benefit or is not proportionate to the case/stake of the action

Location, Location, Location

Open/Closed

- 51.20(5)(a) and 55.10(3) require an open hearing
- The hearing can be closed at our request - only following present:
  - Person of interest
  - Providers of services
  - Attorneys
  - Witnesses
- Guardianships are closed - PP overrides this

Where are we?

- 51.20(5)(b) - hearing can take place at the institution
  - Court's discretion - may request depending
- 51.20(5)(c) - hearing can be handled by video conference
  - Counties where courthouse is 100+ miles away from facility presumed by video
    - Unless both parties object

Is Mr./Mrs. Present?

- 55.10(2) - Petitioner shall ensure attendance of proposed ward
  - Unless GAL waives attendance after personal interview
  - Must be in writing by the GAL
- If the client can't attend because of transport/residency at nursing home, then may request that the hearing be held in a place where they can attend
- 54.42(6) - Right to hearing in a accessible location or manner
  - Could be video/telephone

GAL Waived Attendance? Override

- Even if the GAL waives your clients attendance they have a right to be present
- Leg work is on us to ensure their appearance
- Call and work with APS/Facility/Family
- Perhaps telephonic/video conference appearance?

Hearsay: A Crash Course

Reminder

Pamela Moorsehead and Tom Aquino presenting on hearsay tomorrow from 10:50am-12:00pm in Milwaukee Room (2nd Floor)

Those Meddling Kids

Matter of S.Y., 156 Wis. 2d 317, 327–28.

- Caillier's position as an expert witness does not allow him to introduce inadmissible hearsay evidence. While experts may rely on inadmissible evidence in forming opinions, sec. 907.03, Stats., the underlying evidence is still inadmissible. Because there was no stated rationale for the trial court's decision and because the county fails to identify any statutory or case law supporting its position on appeal, we hold that admitting the testimony was an abuse of discretion.

Walworth County v. Therese B., 2003 WI App 223, ¶¶9-10.

- Section 907.03 does not allow the proponent of an expert to use the expert solely as a conduit for the hearsay opinions of others. While in a civil proceeding there is no independent right to confront and cross-examine expert witnesses under the state and federal constitutions, procedures used to appoint a guardian and protectively place an individual must conform to the essentials of due process.

Case Managers

Brown County v. Z.W.L., unpublished slip op. No. 2022AP2201, ¶19 (WI App. Sept. 12, 2023).

- No exception to hearsay rules for case manager testimony

Hearsay

Waupaca County v. G.T.H., unpublished slip op. No. 2022AP2146, (WI App. Aug. 24, 2023).

- Recommitments do not have different standard for admitting hearsay
- Bales and crisis worker testified exclusively to hearsay for dangerousness (notes and reports of others)
- Court has an interesting discussion of divorcing Bales' opinion as speculation, if not for the hearsay, *id.* at ¶¶29-30
    - "[A]s with Bales' testimony, the County fails to acknowledge that proof of G.T.H.'s alleged past actions actually showing decomposition is a necessary component to proving [a pattern of decompensation]." *Id.* at ¶30

A Helpful Resource

Another case, *Winnebago County v. D.E.S.*, unpublished slip op. No. 2023AP460 (WI App. Sept. 20, 2023) does a good job compiling some cases on the issue of hearsay.

Tom’s Plea

- Expert can rely on hearsay ≠ admissible to prove dangerousness
- Use MIL ahead of hearings to at least flag the hearsay issue
  - *Waupaca County v. G.T.H.*, unpublished slip op. No. 2022AP2146, ¶5 (WI App. Aug. 24, 2023) has a good example
- Object, Object, Object

Prepare for the Workaround

Statements for Purposes of Medical Diagnosis or Treatment - 908.03(4)

- Look to who the statement was made (*State v. Huntington*, 216 Wis. 2d 671, ¶42) and why (*State v. Nelson*, 138 Wis. 2d 418, 431-32)
- If not the patient, consider the relationship (*Huntington*, 216 Wis. 2d at ¶36, 38)
- Statement to court appointed doctor not necessarily for treatment (*Nelson*, 138 Wis. 2d at 435)

“Business” Records

Records of Regularly Conducted Activity - 908.03(6)

- Made near in time by someone with knowledge; regularly conducted activity; regular practice of the activity; proper certification; opponent doesn’t show lack of trustworthiness
- Medical records broad, cover many different types of statements
  - Without evidence of sources in report, reliability can’t be tested (*Scheerer v. Hardee’s Food Sys., Inc*, 92 F.3d 702, 706)
- Incident reports lack necessary reliability
  - Each individual involved in a statement must be part of the regularly conducted activity (*Wilder v. Classified Risk Ins. Co*, 47 Wis. 2d 286, 293)

Medical Records

Health Care Provider Records - 908.03(6m)

- Mostly exists to do away with a foundational witness; however that requires service of a complete and certified duplicate 40 days before trial or hearing (sub. (b)).
- Court still has control over what can come in
  - This is important to note throughout: the County is the proponent of the evidence, ask the court to require that they specify which parts of the record they are seeking to introduce and explain which exceptions apply to each individual hearsay statement, and then give you an opportunity to respond

Self-Incrimination

Admission by Party Opponent

- Technically not an exception (because it isn't hearsay)
- Must be made to individual who is testifying (otherwise there are multiple levels of hearsay), *see Z.W.L.* at ¶¶13-14.

Please reach out with questions

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