

## Changes in Placement: Wis. Stat. §938.357

- For procedure at all such hearings, see Wis. Stat. §938.299(4)(b)

### CASE LAW:

- Changes In Placement:
  - *In the Interest of Terry T.*, 251 Wis.2d 462, 643 N.W.2d 175, 2002 WI App 81 (change in placement to Serious Juvenile Offender Program disallowed for juvenile who was 12 at time of disposition).
  - *In the Interest of Christena M.D.*, 2008 WL 426241 (unpublished) (citing the importance of the statutory procedures for changes in placement and overruling trial court's *sua sponte* change in placement).

### CHANGES IN PLACEMENT:

- **Changes “via notice” (Wis. Stat. §938.357(1)(a)):**
  - Requested by: (Wis. Stat. §938.357(1)(am)1.):
    - The person or agency primarily responsible for implementing the dispositional order,
    - The district attorney, OR
    - The corporation counsel.
  - Done by “causing written notice of the proposed change in placement” to be sent to:
    - The juvenile,
    - The juvenile’s counsel or guardian ad litem,
    - The parent, guardian and legal custodian, AND
    - Any foster parent or other physical custodian.
  - The notice must contain:
    - The name and address of the new placement,
    - The reasons for the change in placement,
    - A statement describing why the new placement is preferable to the present placement, AND
    - A statement of how the new placement satisfies objectives of the treatment plan/permanency plan.
  - After sending the notice to the above persons/parties, the person seeking the change must file the notice with the court “on the same day the notice is sent”

- All receiving notice have 10 days from the date of receipt to file an objection (Wis. Stat. §938.357(1)(am)2).
- If any party timely objects, the court must hold a hearing before any change of placement can occur [unless the change in placement was authorized in the dispositional order, in which case the change can happen upon filing the notice (and the only way to get a hearing is to object and allege new information that “affects the advisability of the dispositional order) (Wis. Stat. §938.357(1)(am)2m)].
- There must be 3 days notice for the hearing.
- If a hearing is held, and if the change in placement would remove the juvenile from a foster home or the home of another physical custodian, that person, while not a party, is also allowed to make a statement, either verbally or in writing at the hearing, or in writing prior to the hearing (Wis. Stat. §938.357(2r)).
- If no objection is filed, the court shall enter an order changing placement as proposed, though must still wait the ten days unless there are written waivers of objection signed.
- If the order changes placement from one out-of-home placement to another out-of-home placement, the order must (Wis. Stat. §938.357(1)(am)3.):
  - Indicate that the juvenile is being ordered “into the placement and care responsibility of the court department,” and that the court department is assigned the primary responsibility for providing services to the juvenile (Wis. Stat. §938.357(2v)(a)1m).
    - Contain a statement that either:
      - The court approves the recommendation of the person or agency primarily responsible for implementing the dispositional order, OR
      - The court does not approve the recommendation, after giving “bona fide consideration” to the recommendation of that person or agency and all parties (Wis. Stat. §938.357(2v)(a)2).
  - Include a finding (if the juvenile has siblings who have been placed outside the home as well) as to whether the county department or the agency primarily responsible for implementing the dispositional order has made reasonable efforts to place the juvenile in a placement that enables the sibling group to remain together (unless the court determines that a joint placement would threaten the safety of the juvenile and/or siblings, in which case the order must include a directive to the county department or agency to make reasonable efforts to provide “frequent

visitation or other ongoing interaction,” unless that, too, is deemed a threat to safety) (Wis. Stat. §938.357(2v)(a)2m).

**Practice Pointers:**

- When you receive the notice, immediately contact your client because the 10 day clock is ticking.
  - If your client does not wish to object:
    - Has a written waiver of objection, signed by your client, been attached? If so, and client still feels the same, then write the Court to confirm your client’s lack of objection.
    - Have written waivers of objection for other parties been attached? If not, and if your client is eager to move, can you assist in any way in getting those signed?
    - If no written waiver of objections have been filed, write the Court to note your client’s lack of objection AND, if your client is eager to move, offer to assist in getting other waivers effectuated.
  - If your client wishes to object,
    - Can you object based solely upon the request itself (i.e., doesn’t contain the information required)?
    - If not, simply file your objection letter with the court; while you should not have to so indicate, you should also request a hearing
  - Prep for the hearing:
    - Why is the new placement NOT preferable to the current one?
      - Changing schools?
      - New treatment providers?
      - Job?
      - What other connections might be lost?
    - How will it satisfy the objectives of the treatment plan? What is the treatment plan?
      - If the goal is reunification, will moving your client further away be helpful?
      - Is it easier/harder for parent to visit?

- If the request was filed by the district attorney/corporation counsel, what does the supervising agent think?
  - Is the current placement an ally? If so, remind them of the right to make a statement.
- The hearing itself:
  - The rules of evidence are not applicable (*see Wis. Stat. §938.299(4)(b)*).
  - Section provides no information about an applicable burden of proof.
  - What's the standard for determining if something is "preferable?"
  - When in doubt, remind the Court that:
    - Per Wis. Stat. §938.355(1), "The disposition should employ those means necessary to promote the objectives under s. 938.01." AND,
    - Per Wis. Stat. §938.01(2)(f), the court is to utilize "the most *effective* dispositional option." SO,
    - Will this proposed change in placement be effective?
- ***Requests for "out of home" placement (Wis. Stat. §938.357(1)(c)):***
  - Requested by (Wis. Stat. §938.357(1)(c)1.)
    - The person or agency primarily responsible for implementing the dispositional order,
    - The district attorney, OR
    - The corporation counsel.
  - Must be filed with the court.
  - Request must contain:
    - The name and address of the new placement,
    - The reasons for the change in placement,
    - A statement describing why the new placement is preferable to the present placement,
    - A statement of how the new placement satisfies objectives of the treatment plan/permanency plan, AND
    - Specific information showing that:

- Continued placement of the juvenile in her/her home would be contrary to the welfare of the juvenile, AND
  - The agency primarily responsible for implementing the dispositional order has made reasonable efforts to prevent removal.
- There must be a hearing on the request.
- The court must provide the notice and the request at least 3 days prior to the hearing, sending the same to:
  - The juvenile.
  - The juvenile’s counsel or guardian ad litem.
  - The parent, guardian and legal custodian of the juvenile.
  - The person or agency primarily responsible for implementing the dispositional order.
  - The district attorney or corporation counsel.
  - Any foster parent or physical custodian.
- If the court does grant the request, changing placement to out of home:
  - The court must request the parent to provide the names and other identifying information of 3 relatives or other individuals 18 years of age or over whose homes the parent wants explored as a placement option (Wis. Stat. §938.357(1)(c)2m).
  - The court must order the county department or the agency primarily responsible for implementing the dispositional order to conduct a “diligent search” to provide information to the named relatives and all other adult relatives within 30 days of the removal from home (Wis. Stat. §938.357(2v)(d)).
  - The order must contain the “contrary to welfare” and “reasonable efforts” findings (Wis. Stat. §§938.357(1)(c)3. and 938.357(2v)(a)1.) which are made “on a case-by-case basis based on circumstances specific to the juvenile” and which “document or reference the specific information on which those findings are made” (Wis. Stat. §938.357 (2v)(b)).
  - The order must indicate that the juvenile is being ordered “into the placement and care responsibility of the court department,” and that the court department is assigned the primary responsibility for providing services to the juvenile (Wis. Stat. §§938.357(1)(c)3. and 938.357(2v)(a)1m).

- If the placement was that recommended by the person or agency primarily responsible for implementing the dispositional order, the order must contain a statement that the court approves the recommendation of that person or agency (Wis. Stat. §§938.357(1)(c)3. and 938.357(2v)(a)2).
- Conversely, if the placement was not the out-of-home placement recommended by the person or agency primarily responsible for implementing the dispositional order, the order must contain a statement that the court has given “bona fide consideration” to the recommendation of that person or agency and all parties (Wis. Stat. §§938.357(1)(c)3. and 938.357(2v)(a)2).
- If the juvenile has siblings who have been placed outside the home as well, the order must include a finding as to whether the county department or the agency primarily responsible for implementing the dispositional order has made reasonable efforts to place the juvenile in a placement that enables the sibling group to remain together (unless the court determines that a joint placement would threaten the safety of the juvenile and/or siblings, in which case the order must include a directive to the county department or agency to make reasonable efforts to provide “frequent visitation or other ongoing interaction,” unless that, too, is deemed a threat to safety) (Wis. Stat. §§938.357(1)(c)3. and 938.357(2v)(a)2m).

***Practice Pointers:***

- Upon receipt of the request, immediately contact your client to determine their wishes.
- If they want to object because they want to stay home:
  - Can you make a facial objection to the sufficiency of the request?
  - If not, begin prepping.
- If they want to object because, while they don’t want to stay home, they don’t want to go to the placement being proposed:
  - Will the supervising agent make a referral to other placements? If not, get the Court to order other referrals.
  - Does your Court allow the existing request to serve as notice such that all options are now able to be argued? If not, file your own request to change placement under sub. (2m) [Even if the Court does, still file the request to avoid the other side claiming lack of notice]
- Prepping for hearing:
  - Focus on the findings:

- Why is the new placement preferable to home? Important things may be lost:
  - Siblings?
  - Changing schools?
  - New treatment providers?
  - Job?
  - Other connections?
- How will the new placement satisfy the objectives of the treatment plan?
  - If the issue is dynamics in the house, won't it be better to work on those while the juvenile is home?
  - Will parent/guardian be able to meaningfully participate in treatment from a distance?
- Is it truly contrary to the juvenile's welfare to remain home?
  - System recognizes the importance of family.
  - Any removal from home will be traumatic.
- Has the supervising person/agency truly made reasonable efforts to prevent this removal?
  - What have they tried?
  - Wouldn't it have been reasonable to also try "x?"
- If the request was filed by the district attorney/corporation counsel, what does the supervising agent think?
- What is the parent's position? Very likely that no one in the system knows the juvenile as well as Mom/Dad.
- Has there been any improvement since the request was filed?
- Will this Judge want to hear from the juvenile?
  - Should your client write something in advance?
  - Should your client have something prepared to read in court?
  - Can your client speak "from the heart?"
- The hearing itself:
  - The rules of evidence are not applicable (see Wis. Stat. §938.299(4)(b))

- Section provides no information about an applicable burden of proof.
- What's the standard for determining if something is "preferable?"
- When in doubt, remind the court that:
  - Per Wis. Stat. §938.355(1), "The disposition should employ those means necessary to promote the objectives under s. 938.01." AND,
  - Per Wis. Stat. §938.01(2)(f), the court is to utilize "the most *effective* dispositional option." SO,
  - Will this proposed change in placement be effective? Will the juvenile be able to focus and not be preoccupied with home? Will all of the losses be too much?
- If the court does remove your client from home:
  - Be sure that the court is asking the parent for the three names of relatives/adults.
  - Be sure that the court is ordering the agency to make a diligent search to provide the mandated information.
  - Will there be a change in the length of the order? There does not have to be. Remind the court that the language in (6)(a) says "may."
- ***Emergency" changes in placement (Wis. Stat. §938.357(2)):***
  - If "emergency" conditions necessitate an emergency change in placement, the person or agency primarily responsible for implementing the dispositional order may remove the juvenile to a new placement, even if not authorized in the dispositional order.
  - Within 48 hours, notice of the emergency move must be sent to (Wis. Stat. §938.357(2)(a)):
    - The juvenile,
    - The juvenile's counsel or guardian ad litem,
    - The parent, guardian and legal custodian, AND
    - Any foster parent or other physical custodian.
  - Upon receiving notice, any party may demand a hearing by filing an objection within 10 days.
  - If the "emergency" results in a removal from home and placement out-of-home (Wis. Stat. §938.357(2)(b)):



- The person or agency that removed the juvenile from home must “immediately notify the court by the most practical means.”
  - The court must schedule a hearing, to be held within 48 hours after the emergency change in placement (excluding Saturdays, Sundays and holidays).
  - The person or agency responsible for the removal shall provide notice to:
    - The juvenile;
    - The juvenile’s counsel or guardian ad litem;
    - The parent, guardian and legal custodian of the juvenile;
    - The person or agency primarily responsible for implementing the dispositional order;
    - The district attorney or corporation counsel, AND
    - Any foster parent or other physical custodian.
  - By the time of the hearing, a formal request to change placement under (1)(c)1. must be filed
- If, after the hearing, the court does order the out-of-home placement,
- The order must contain the “contrary to welfare” and “reasonable efforts” findings (Wis. Stat. §§938.357(2)(b)4. and 938.357(2v)(a)1.) which are made “on a case-by-case basis based on circumstances specific to the juvenile” and which “document or reference the specific information on which those findings are made” (Wis. Stat. §938.357(2v)(b)).
  - The court must order the county department or the agency primarily responsible for implementing the dispositional order to conduct a “diligent search” to provide information to the named relatives and all other adult relatives within 30 days of the removal from home (Wis. Stat. §938.357(2v)(d)).
  - The order must indicate that the juvenile is being ordered “into the placement and care responsibility of the court department,” and that the court department is assigned the primary responsibility for providing services to the juvenile (Wis. Stat. §§938.357(2)(b)4. and 938.357(2v)(a)1m).
  - If the placement was that recommended by the person or agency primarily responsible for implementing the dispositional order, the order

must contain a statement that the court approves the recommendation of that person or agency (Wis. Stat. §§938.357(2)(b)4. and 938.357(2v)(a)2).

- Conversely, if the placement was not the out-of-home placement recommended by the person or agency primarily responsible for implementing the dispositional order, the order must contain a statement that the court has given “bona fide consideration” to the recommendation of that person or agency and all parties (Wis. Stat. §§938.357(2)(b)4. and 938.357(2v)(a)2).
- If the juvenile has siblings who have been placed outside the home as well, the order must include a finding as to whether the county department or the agency primarily responsible for implementing the dispositional order has made reasonable efforts to place the juvenile in a placement that enables the sibling group to remain together (unless the court determines that a joint placement would threaten the safety of the juvenile and/or siblings, in which case the order must include a directive to the county department or agency to make reasonable efforts to provide “frequent visitation or other ongoing interaction,” unless that, too, is deemed a threat to safety) (Wis. Stat. §§938.357(2)(b)4. and 938.357(2v)(a)2m).
- In these “emergency situations,” the out-of-home placement can be (Wis. Stat. §938.357(2)(c)):
  - To a licensed public or private shelter care facility, for up to 20 days, OR
  - Any placement authorized under Wis. Stat. §938.34(3) [the non-correctional placement subsection of dispositions].

***Practice Pointers:***

- Upon receipt of the notice, immediately contact your client to determine their wishes.
- If they do not support this move, and it was an out-of-home to out-of-home, then file an objection right away:
  - Was this truly an emergency?? Most placements have contracts that require “giving notice” a certain number of days before a juvenile must be moved.
- If they do not support this move, and it was from in-home to out-of-home:
  - Did the entity that removed your client immediately notify the court?
  - Has there been a hearing set within 48 hours of the court being notified?

- Has the entity that removed your client now filed a change in placement request?
- Can you make a facial challenge in the sufficiency of that request?
- Prepping for the hearing, *see similar sections above*.
- The hearing itself, *see similar sections above*.
- If it does result in a removal from home, be sure that the order is complete, *see similar sections above*.
- **All other requests to change placement (Wis. Stat. §938.357(2m))**
- Requests made by:
  - The juvenile.
  - The juvenile’s counsel or guardian ad litem.
  - The parent, guardian or legal custodian of the juvenile.
  - The court, on its own motion.
- Request must contain: (Wis. Stat. §938.357(2m)(a))
  - The name and address of the new placement being requested;
  - What new information is available that “affects the advisability” of the current placement.
- If it’s a request to change placement from in-home to out-of-home, the request must further contain:
  - Specific information showing that continued placement of the juvenile in his/her home would be contrary to their welfare;
  - Specific information showing that the agency responsible for implementing the dispositional order has made reasonable efforts to prevent the removal.
- The court must hold a hearing on the request, unless: (Wis. Stat. §938.357(2m)(b)1).
  - The request is not to move the juvenile from in-home to out-of-home,
  - All parties sign written waivers of objection, AND
  - The court approves.
- Notice, with the request attached, must be provided three days before the scheduled hearing to (Wis. Stat. §938.357(2m)(b)2):

- The juvenile;
  - The juvenile’s counsel or guardian ad litem;
  - The parent, guardian and legal custodian of the juvenile;
  - The person or agency primarily responsible for implementing the dispositional order;
  - The district attorney or corporation counsel;
  - Any foster parent or other physical custodian.
- If a hearing is held, and if the change in placement would remove the juvenile from a foster home or the home of another physical custodian, that person, while not a party, is also allowed to make a statement, either verbally or in writing at the hearing, or in writing prior to the hearing (Wis. Stat. §938.357(2r)).
  - If the court changes the placement to an “out-of-home” placement:
    - The court must request the parent to provide the names and other identifying information of 3 relatives or other individuals 18 years of age or over whose homes the parent wants explored as a placement option, unless that has previously been done (Wis. Stat. §938.357(2m)(bm), AND
    - The court must order the county department or the agency primarily responsible for implementing the dispositional order to conduct a “diligent search” to provide information to the named relatives and all other adult relatives within 30 days of the removal from home (Wis. Stat. §938.357 (2v)(d)).
    - The order must contain the “contrary to welfare” and “reasonable efforts” findings (Wis. Stat. §§938.357(2m)(c)1. and 938.357(2v)(a)1.) and which are made “on a case-by-case basis based on circumstances specific to the juvenile” which “document or reference the specific information on which those findings are made” (Wis. Stat. §938.357 (2v)(b)).
    - The order must indicate that the juvenile is being ordered “into the placement and care responsibility of the court department,” and that the court department is assigned the primary responsibility for providing services to the juvenile (Wis. Stat. §§938.357(2m)(c)1.) and 938.357(2v)(a)1m).
    - If the placement was that recommended by the person or agency primarily responsible for implementing the dispositional order, the order must contain a statement that the court approves the recommendation of that person or agency (Wis. Stat. §§938.357(2m)(c)1. and 938.357(2v)(a)2).
    - Conversely, if the placement was not the out-of-home placement recommended by the person or agency primarily responsible for implementing the dispositional order, the order must contain a statement that the court has given “bona fide

consideration” to the recommendation of that person or agency and all parties (Wis. Stat. §§938.357(2m)(c)1. and 938.357(2v)(a)2).

- If the juvenile has siblings who have been placed outside the home as well, the order must include a finding as to whether the county department or the agency primarily responsible for implementing the dispositional order has made reasonable efforts to place the juvenile in a placement that enables the sibling group to remain together (unless the court determines that a joint placement would threaten the safety of the juvenile and/or siblings, in which case the order must include a directive to the county department or agency to make reasonable efforts to provide “frequent visitation or other ongoing interaction,” unless that, too, is deemed a threat to safety) (Wis. Stat. §§938.357(2m)(c)1. and 938.357(2v)(a)2m).

***Practice Pointers:***

- If you are filing this request on behalf of your client, be sure it can survive a facial challenge to the sufficiency of the request.
- If this is being proposed by the Court, was something specific filed by the Judge? Did the judge order someone else to file it and, if so, will that party support/prosecute the request? If not, who will?
- If you did not file the request, check with your client as soon as you can about their wishes, though unlike the other scenarios, there is not the same urgency in the form of strict timelines.
- For prepping for the hearing, the hearing itself, and ensuring the order contains all the required findings, see similar sections above.
- ***Duration of orders, for all changes in placement:***
- Any order that changes placement from an in-home placement to a placement in a foster home, group home, residential care center, relative who is not a parent or in a supervised independent living arrangement, the court MAY also extend the date of the original order to (Wis. Stat. §938.357(6)(a)):
  - The date on which the juvenile attains 18 years of age.
  - The date that is one year after the date on which the change-in-placement order is granted.
  - The date on which the juvenile is granted a high school or high school equivalency diploma or the date on which the juvenile attains 19 years of age, whichever occurs first, if the juvenile is a full-time student at a secondary school or its vocational or technical equivalent and is reasonably expected to complete the program before attaining 19 years of age.

- The date on which the juvenile is granted a high school or high school equivalency diploma or the date on which the juvenile attains 21 years of age, which occurs first, if the juvenile is a full-time student at a secondary school or its vocational or technical equivalent and if an individualized education program under s. 116.787 is in effect for the juvenile.
- Any order which returns the juvenile to the home must be shortened to a date that is no later than one year after the date that the order is entered (Wis. Stat. §938.357(6)(b)).
- ***Other sections of note:***
- If the juvenile is under extended supervision (up to age 21 under Wis. Stat. §938.355(4)(am)4.), see specific language/requirements under Wis. Stat. §938.357(2m)(bv).
- If the request is to move the juvenile to a secured correctional facility, see the process/procedure laid out in Wis. Stat. §938.357(3).
- If the supervision of the juvenile has been transferred to the Department of Corrections, see Wis. Stat. §938.357(4) for their ability to move juveniles without a hearing.
- For the requirements regarding aftercare for DOC and the revocation of the same, see Wis. Stat. §§938.357(4), (4m) and (5).