2001 DRAFTING REQUEST

Bill

Received: **01/16/2001**

Received By: **malaigm**

Wanted: **As time permits**

Identical to LRB:

For: **Joanne Huelsman (608) 266-2635**

By/Representing: **Janeen**

This file may be shown to any legislator: **NO**

Drafter: **malaigm**

May Contact:

Addl. Drafters:

Subject: **Children - TPR and adoption**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Termination of parental rights procedures

Instructions:

See attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	malaigm 02/20/2001	jdyer 02/21/2001		_____ _____			S&L
/1			jfrantze 02/22/2001	_____ _____	lrb_docadmin 02/22/2001	lrb_docadmin 03/14/2001	

FE Sent For:

<END>

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/?	malaigm	1/21 jld	1/22	2/22			

FE Sent For:

<END>

Gordon Malaise

Bill Request Form

Legislative Reference Bureau
100 N. Hamilton Street
Legal Section 266-3561

Use of this form is optional. It is often better to talk directly with the LRB attorney who will draft the bill. Use this form only for bill draft requests. Attach more pages if necessary.

Date 1/16/2001

Legislator, agency, or other person requesting this draft Sen. Huelsman

Person submitting request (name and phone number) Jocean 62635

Persons to contact for questions about this draft (names and phone numbers) above

Describe the problem, including any helpful examples. How do you want to solve the problem?

address issues raised by Henry Plum in attached letter

Please attach a copy of any correspondence or other material that may help us. If you know of any statute sections that might be affected, list them or provide a marked-up copy.

You may attach a marked-up copy of any LRB draft or provide its number (e.g., 1999 LRB-2345/1 or 1997 AB-67).

Requests are confidential unless stated otherwise. May we tell others that we are working on this for you? (YES) NO

If yes: Anyone who asks? (YES) NO
Any legislator? (YES) NO

Only the following persons

Do you consider this request urgent? YES (NO) If yes, please indicate why

Should we give this request priority over any pending request of this legislator, agency, or person? YES (NO)

Revised 8/16/00

HENRY J. PLUM

Attorney at Law

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2600 North Mayfair Road
Wauwatosa, Wisconsin 53226
(414) 475-5655
Fax (414) 475-5521

MEMORANDUM

To: Senator Joanne B. Huelsman

From: Henry J. Plum

Date: April 16, 1999

Re: Termination of Parental Rights Procedures

It has been almost three years since we worked on the Children's Law Legislative Committee regarding the changes to Chapter 48. At that time, several changes were passed in the area of Termination of Parental Rights; this includes both procedural changes and the grounds for termination of parental rights.

During the past three years I have had the chance to observe how these changes are working. In addition, Wisconsin has subsequently incorporated the federal act entitled, *Safe Families Adoption Act*, into the Children's Code.

Although the thrust of that law is designed to speed up the process for proceeding to a termination once that has been deemed appropriate, there remain certain stumbling blocks that, if eliminated, could shorten the Termination process itself. Two issues and suggestions are listed below.

<u>Issue 1</u>

In July 1996, several new grounds for termination of parental rights were introduced, and several other grounds were modified. These grounds include:

48.415(4)	Denial of Periods of Physical Placement or Visitation;
48.415(8)	Intentional Homicide of a Parent;
48.415(9m)	Commission of a Serious Felony Against one of the Person's Children;
48.415(10)	Prior Involuntary Termination of Parental Rights to Another Child.

The issues in each of these grounds are factually driven in the sense that the proof required is usually not in dispute. For example, under 48.415(4), either a court order suspending visitation exists or does not exist. Under 48.415(8), either a judgement of conviction for homicide exists or does not exist.

Under Wisconsin Law, a parent is entitled to request a jury, and therefore these questions are given to the jury. It is a time-consuming and expensive process with the results already predetermined. Usually, these questions would be subject to a directed verdict granted by the court. However, one still has to go through the jury selection process because the law requires it.

The solution to speed up this process is to allow the court to rule on these issues and determine whether there is a factual dispute. If there is, then a jury should decide the issue. If there is no factual dispute on these issues, then a jury is not necessary.

The mechanism currently available to accomplish this would be a summary judgement. Under current case law, *In the Interest of Phillip W.*, 189 Wis. 2d 432 (Ct. App. 1994), the appellate court proscribed the use of summary judgment in a termination proceeding. This decision was entered prior to the changes in July 1996. However, the court never determined whether a partial summary judgement could be used in a termination proceeding.

It is interesting to note that the Wisconsin Jury Instructions acknowledges this problem by its statement in the comment section as follows:

> The Committee is aware of the holdings of the Wisconsin Court of Appeals in *In the Interest of Phillip W.* ... proscribing, the use of summary judgment in a termination proceeding. *Phillip W.* was decided before the legislature enacted this and several other grounds for termination wherein prior findings or judgments are conclusive in establishing grounds for termination. It is unclear how the appellate courts will apply this decision in this context... In view of the holding in *Phillip W.* [Therefore], if a parent contests a petition alleging [these] grounds, a trial court may be best advised to convene a fact-finding hearing, receive evidence establishing the prior findings / judgement and the identity of the other parent as a victim; and direct a verdict in favor of the petitioner. [Wisconsin Jury Instructions-Children 370]

My suggestion is as follows:

1. Use the Language of Wis. Stats. §802.08(2) addressing use of summary judgement, and insert it into the procedure section under §48.422. The language would state that if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue of material fact as to the grounds under §48.415, the moving party is entitled to summary judgement as a matter of law and no fact-finding hearing on the issue of grounds is required. The court may proceed straight to the dispositional hearing.

Rationale:

1. This would still allow the parent the right to a jury when there is a genuine factual dispute.
2. This would eliminate needless delays with the scheduling of jury trials.
3. This would speed up cases and avoid needless delays, etc.
4. This would allow the court to make a decision much quicker, once a petition to terminate has been filed.

Issue 2

The second is the problems raised with the failure of the county to provide the proper warnings under Wis. Stats. §48.356. Under the current case law, the courts have ruled that if there are several valid orders in succession, but through an error or omission one dispositional order does not contain the warnings, there is nothing which can be done to correct this omission. The result is that the child may have to continue to remain in foster care.

My suggestion would be that a provision under Wis. Stats. 48.356 be added to provide that if a dispositional order does not contain the warning as required, that the time period covered by the order would not be included in considering whether the grounds exist. This would not preclude the court from hearing evidence during the time period that a dispositional order containing the warnings was in effect.

308 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABANDONMENT: WHEN CHILD UNDER ONE YEAR: CHIPS ABANDONMENT OR CRIMINAL ABANDONMENT [WIS. STAT. § 48.415(1)(a)1r]

NO INSTRUCTION IS RECOMMENDED.

COMMENT

Wis. Stat. § 48.415(1)(a)1r reads:

> **48.415. Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> (1) Abandonment. (a) Abandonment, which, subject to par. (c) shall be established by proving that:
> 1r. That a court of competent jurisdiction has found under s. 48.13 (2) or under a law of any other state or a federal law that is comparable to s. 48.13 (2) that the child was abandoned when the child was under one year of age or has found that the parent abandoned the child when the child was under one year of age in violation of s. 948.20 or in violation of the law of any other state or federal law, if that violation would be a violation of s. 948.20 if committed in this state.

The Committee concludes that a jury instruction for this ground is not necessary nor appropriate. The statute provides that a CHIPS finding based on abandonment or the fact of conviction in an underlying criminal proceeding, as evidenced by the final judgment of conviction, in combination with the fact that the child was under one year of age at the time of abandonment is conclusive in establishing this ground for termination. See Lee v. State Board of Dental Examiners, 29 Wis.2d 330, 139 N.W.2d 61 (1966); In the Matter of the Estate of Safran, 102 Wis.2d 79, 306 N.W.2d 27 (1981). Whether the conviction resulted from a trial, guilty plea, or no contest plea, the judgment of conviction is admissible and determinative. Lee, supra at 334-35; Safran, supra at 97.

Directed Verdict on an Element. The Committee is aware of the holding of the Wisconsin Court of Appeals in In the Interest of Philip W., 189 Wis.2d 432, 525 N.W.2d 384 (Ct. App. 1994), proscribing the use of summary judgment in a termination proceeding. In 1999, the court of appeals addressed the use of directed verdicts in TPR cases and distinguished the holding in Philip W. In In re Kristeena, No. 99-0719 (Ct. App. recommended for publication 9/8/99), 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 rights to a jury

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trial was violated. The court of appeals disagreed. It rejected the father's argument that to permit a directed verdict in a TPR case amounts to using summary judgment procedures. 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). The court pointed out that in Philip W., summary judgment occurred before a fact-finding hearing was held. The court of appeals concluded that:

> 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 view of the holding in Philip W. and Kristeena, if a parent contests a petition alleging this ground, a trial court may be best advised to convene a factfinding hearing; receive documentary and other evidence establishing the CHIPS finding or the judgment of conviction as well as the parental relationship and the child's age and, ultimately, direct a verdict in favor of the petitioner. In the Interest of J.A.B., 153 Wis.2d 761, 451 N.W.2d 799 (1989).

Trial courts need also be aware that the Wisconsin Court of Appeals held that the term "conviction," as used in Wis. Stat. § 48.415(5)(a) (child abuse), means a "conviction after the appeal as of right has been exhausted. The appeal as of right is limited to the right to appeal to the court of appeals under sec. 808.03, Stats." Monroe County v. Jennifer V., supra at 690.

The Committee does not believe that the adjudication must occur before the child's first birthday. Instead, the controlling issue is the conduct of the parent in relation to the child. There were three scenarios considered by the Committee: 1) where the adjudication occurs before the child's first birthday, 2) where the criteria for abandonment are met before the child is 1 years old, but the petition is filed after the first birthday, and 3) where the conduct establishing the abandonment straddles the child's first birthday. The Committee concludes that this TPR ground applies in the first two scenarios, but not the third.

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State of Wisconsin
2001 – 2002 LEGISLATURE

LRB–2098/1
GMM...:...:...

Draft

jld

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AN ACT ...; **relating to:** permitting the juvenile court to grant summary judgment in a termination of parental rights proceeding and prohibiting the juvenile court from granting a termination of parental rights based on an order placing a child in need of protection or services outside the home or denying parental visitation with such a child that does not warn the parent of any applicable termination of parental rights grounds and of the conditions necessary for the child to be returned to the home or for the parent to be granted visitation.

Analysis by the Legislative Reference Bureau

Under current law, the rules of civil procedure govern practice and procedure in all civil actions and proceedings in the circuit courts of this state, including the court assigned to exercise jurisdiction under the children's code (juvenile court), except when different procedures are prescribed by statute or rule. The rules of civil procedure include a procedure under which a court may grant summary judgment and thereby avoid the necessity of a trial when there is no genuine issue as to any material fact and one of the parties is entitled to judgment as a matter of law. The Court of Appeals recently held, however, in *In Interest of Philip W.,* 189 Wis. 2d 432 (Ct. App. 1994), that the juvenile court may not grant summary judgment in a contested termination of parental rights (TPR) proceeding because the very fact that the parent has contested the proceeding automatically raises the issue of material fact of whether the parent is a fit parent. As such, a fact–finding hearing and, if requested, a jury trial is required in all contested TPR proceedings. This bill permits

the juvenile court, without a fact–finding hearing or a jury trial, to grant summary judgment, find the parent unfit, and proceed to a dispositional hearing if the juvenile court finds that there is no genuine issue of material fact as to the grounds for TPR and that the party moving for the summary judgment is entitled to judgment as a matter of law.

Under current law, when the juvenile court orders a child in need of protection or services to be placed outside the child's home or denies a parent visitation with the child in a dispositional order, a change in placement order, or an order revising or extending a dispositional order, the juvenile court must notify the parents, both orally and in writing, of any grounds for TPR that may be applicable and of the conditions necessary for the child to be returned to the home or for the parent to be granted visitation. Currently, the juvenile court may not grant a TPR on certain grounds, including the grounds of abandonment, continuing need of protection or services, and continuing denial of visitation, if the parent has not received that notice in writing. The Supreme Court recently held, in *Waukesha County v. Steven H.*, 233 Wis. 2d 344 (2000), that in a case in which the child has been the subject of more than one order placing the child outside the home or denying parental visitation, only the last order, and not every order, must contain that notice. The Court of Appeals, however, recently held, in *Waushara County v. Lisa K.*, 237 Wis. 2d 830 (Ct. App. 2000), that the parent in that case had received adequate notice when the last order did not contain that notice, but a previous order had. This bill prohibits the juvenile court from granting a TPR based on an order placing a child outside the home or denying parental visitation if the order does not provide that notice. The bill specifies, however, that that prohibition does not preclude the juvenile court from granting a TPR based on any previous or subsequent order with respect to the same child that provides that notice. this

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 48.356 (2) of the statutes is amended to read:

2 48.356 **(2)** In addition to the notice required under sub. (1), any written order
3 ~~which~~ that places a child or an expectant mother outside the home or denies
4 visitation under sub. (1) shall notify the parent or parents or expectant mother of the
5 information specified under sub. (1). If a written order that places a child or an
6 expectant mother outside the home or denies visitation under sub. (1) fails to provide
7 notice under this subsection of the information specified in sub. (1), the court may

not grant an involuntary termination of parental rights under s. 48.415 based on that order. This prohibition does not preclude the court from granting an involuntary termination of parental rights under s. 48.415 based on any previous or subsequent order with respect to the same child that provides that notice.

History: 1979 c. 330; 1983 a. 399; 1989 a. 86; 1991 a. 39; 1995 a. 275; 1997 a. 292.

SECTION 2. 48.422 (2m) of the statutes is created to read:

48.422 **(2m)** If the petition is contested, a party may move for summary judgment on any ground for involuntary termination of parental rights that is asserted by or against the party. The motion shall be served at least 20 days before the time fixed for the fact–finding hearing, and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the fact–finding hearing. Section 802.08 (3) to (7) shall govern the procedure when a party moves for summary judgment under this subsection. If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact as to the grounds for involuntary termination of parental rights and that the moving party is entitled to a judgment as a matter of law, the court shall grant the judgment sought, find the parent unfit, and either proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427 or set a date for a dispositional hearing as provided in s. 48.424 (4). A finding of unfitness shall not preclude a dismissal of a petition under s. 48.427 (2). Notwithstanding subs. (2) and (4) and s. 48.31 (2), if the court grants summary judgment under this subsection, the court is not required to hold the fact–finding hearing set under sub. (2) or any jury trial granted under sub. (4).

SECTION 3. 48.424 (1) of the statutes is amended to read:

48.424 **(1)** The purpose of the fact–finding hearing is to determine whether grounds exist for the termination of parental rights in those cases ~~where~~ in which the termination was contested at the hearing on the petition under s. 48.422 and in which there is a genuine issue of material fact as to whether grounds exist for termination of parental rights.

History: 1979 c. 330; 1987 a. 383.

SECTION 4. 938.356 (2) of the statutes is amended to read:

938.356 **(2)** In addition to the notice required under sub. (1), any written order ~~which~~ that places a juvenile outside the home or denies visitation under sub. (1) shall notify the parent or parents of the information specified under sub. (1). If a written order that places a juvenile outside the home or denies visitation under sub. (1) fails to provide notice under this subsection of the information specified in sub. (1), the court may not grant an involuntary termination of parental rights under s. 48.415 based on that order. This prohibition does not preclude the court from granting an involuntary termination of parental rights under s. 48.415 based on any previous or subsequent order with respect to the same juvenile that provides that notice.

History: 1995 a. 77, 275.

SECTION 5. Initial applicability.

(1) NOTICE TO PARENTS. The treatment of sections 48.356 (2) and 938.356 (2) of the statutes first applies to termination of parental rights orders granted on the effective date of this subsection.

(2) SUMMARY JUDGMENTS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS. The treatment of sections 48.422 (2m) and 48.424 (1) of the statutes first applies to motions for summary judgment under section 48.422 (2m) of the statutes, as created by this act, filed on the effective date of this subsection.

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2098/1dn
GMM...:...:....

Henry:

In reviewing this draft, please note the following:

1. That in *In Interest of Philip W.,* 189 Wis. 2d 432 (Ct. App. 1994), the Court of Appeals' holding that a summary judgment may not be granted in a TPR proceeding was based on constitutional, not statutory grounds, that is, the court stated that "(d)ue process entitled Elizabeth to a factfinding hearing before her parental rights were terminated." *Id.* at p. 437. Accordingly, this draft might face a challenge that it is unconstitutional in that it would permit a parent's parental rights to be terminated without a fact–finding hearing.

In response, I would cite *In Interest of KDJ,* 163 Wis. 2d 90 (1991), for the proposition that a fact–finding hearing is not constitutionally required so long as the parent receives his or her day in court at the dispositional hearing. In *KDJ* the Supreme Court upheld the constitutionality of s. 48.424 (4), stats., which mandates a finding of unfitness if the grounds for TPR are found, but which expressly provides that a finding of unfitness does not preclude a dismissal of the petition if the court finds at the dispositional hearing that a TPR is not warranted. The court held that it was that discretion to dismiss that ensures "full, substantive due process." *Id.* at p. 115. Similarly, under this draft, even if the court grants summary judgment as to the grounds and, as a result, the parent does not receive a fact–finding hearing, the parent would still have the opportunity to argue at the dispositional hearing that a TPR is unwarranted, and the court would still have the discretion to dismiss the petition at that stage. As such, the parent's due process rights would still be protected even without a fact–finding hearing.

2. You are probably aware that in the interim since your April 16, 1999, letter to Senator Huelsman a couple of cases have come down that have ameliorated the effects of *In re D.F.,* 147 Wis. 2d 486 (Ct. App. 1986). Specifically, in *Waukesha County v. Steven H.,* 233 Wis. 2d 344 (2000), the Supreme Court held that only the last order placing the child outside the home, rather than every order, must contain the warning required under s. 48.356 (2). Similarly, in *Waushara County v. Lisa K.,* 237 Wis. 2d 830 (Ct. App. 2000), the Court of Appeals held that the parent in that case had adequate notice under s. 48.356 (2) when the last order did not contain the warning, but a previous order did. As such, the problem posed by *DF* may have been solved by those cases and the portions of this draft amending ss. 48.356 (2) and 938.356 (2) may have been rendered moot.

If you have any questions concerning this draft, please do not hesitate to contact me directly at the phone number or e–mail address listed below.

Gordon M. Malaise
Senior Legislative Attorney
Phone: (608) 266–9738
E–mail: gordon.malaise@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2098/1dn
GMM:jld:jf

February 22, 2001

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Gordon M. Malaise
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State of Wisconsin

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STEPHEN R. MILLER
CHIEF

LEGAL SECTION: (608) 266-3561
LEGAL FAX: (608) 264-6948

February 22, 2001

MEMORANDUM

To: Senator Huelsman

From: Gordon M. Malaise, Senior Legislative Attorney

Re: LRB-2098 Termination of parental rights procedures

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

____ JACKET FOR ASSEMBLY ✓ JACKET FOR SENATE

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 266-9738 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.