

2011 DRAFTING REQUEST

Bill

Received: 04/06/2011

Received By: chanaman

Wanted: As time permits

Companion to LRB:

For: Sheila Harsdorf (608) 266-7745

By/Representing: Matt Wuebke

May Contact:

Drafter: chanaman

Subject: Criminal Law - crimes agnst kids  
Criminal Law - domestic abuse  
Criminal Law - victims

Addl. Drafters:

Extra Copies:

Submit via email: YES

Requester's email: Sen.Harsdorf@legis.wisconsin.gov

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Domestic abuse in the presence of a child

Instructions:

See attached-- 2009 SB 248 as starting point

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	chanaman 04/06/2011	kfollett 04/13/2011		_____			S&L
/1			mduchek 04/13/2011	_____	ggodwin 04/13/2011	sbasford 05/04/2011	

FE Sent For:

<END>

at  
intro  
6-10-11

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FE Sent For:

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## Hanaman, Cathlene

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**From:** Wuebke, Matt  
**Sent:** Wednesday, January 26, 2011 2:28 PM  
**To:** Hanaman, Cathlene  
**Subject:** 2009 SB 248 redraft

**Attachments:** WCADV memo on aggravated factor.pdf

Hi Cathlene,

We would like to obtain a new draft of last session's SB 248, with a couple significant modifications. Specifically, we would like to move away from the penalty enhancer approach and rather make domestic abuse in the presence of a child an aggravated factor to be considered at sentencing. I've attached a memo from the Wisconsin Coalition Against Domestic Violence that describes the approach we are looking to take in this session's bill.

We would like to maintain the language defining what constitutes abuse in the presence of a child, specifically that it is observable by or audible to a child.

Please let me know if you have any questions.

Thanks,  
Matt Wuebke  
Office of Sen. Sheila Harsdorf



WCADV memo  
n aggravated facto

To: Senator Shelia Harsdorf  
From: Tony Gibart, Policy Coordinator, Wisconsin Coalition Against Domestic Violence  
Det. Chuck Golden, River Falls Police Department  
Kim Wojcik, Executive Director, Turningpoint for Victims of Domestic Violence and Sexual Assault  
Re: Legislation regarding children witnessing domestic violence

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### **Background**

Thank you for your continuing concern for victims of domestic violence and their children. Last session you introduced Senate Bill 248, which would have created a penalty enhancer when an act of domestic violence is committed in the presence of a child. This bill responded to a lack of recognition in the criminal statutes of the distinct and separate harm that occurs when a child witnesses domestic violence.

After introduction, the Wisconsin Coalition Against Domestic Violence (WCADV) expressed some concern about unintended consequences of the proposal, while fully supporting the underlying intent and principle. WCADV was concerned that a penalty enhancer based on the child witnessing domestic violence would lead to further involvement of children in the criminal justice system, which could be re-traumatizing for children. Specifically, the penalty enhancer would require the prosecutor to prove beyond a reasonable doubt that the child witnessed the domestic violence. Because of defense strategies and the rules of evidence in criminal trials, this could lead to children being called to testify in court as to what they saw and heard.

### **Aggravated Factor v. Penalty Enhancer**

We came together to determine if we could find a way to achieve the basic goal of Senate Bill 248, while minimizing the possibility of unintended negative consequences. As a result, we believe creating an aggravated factor to be considered at sentencing, as opposed to a penalty enhancer, will recognize the distinct harm to children, but not greatly expand children's involvement in the criminal justice system. The key difference between a penalty enhancer and an aggravated factor is that the aggravated factor's requisite facts are not elements of a crime and need not be proven beyond a reasonable doubt.<sup>1</sup> Therefore, if the fact a child witnessed the act of domestic violence is known to the sentencing judge, either through information contained in the criminal complaint or through arguments at sentencing, the judge will consider this fact at sentencing. In the great majority of cases, there will not be a need for the child to testify.

We believe an aggravated factor has other advantages relative to a penalty enhancer. For instance, consideration of the aggravated factor cannot be 'dismissed' as part of a plea bargain; whereas, dismissal of penalty enhancers are common parts of plea bargain agreements. Additionally, an aggravated factor is, generally speaking, not subject to prosecutorial discretion, meaning it will be considered in all domestic violence cases in which the factual basis indicates a child was present and does not depend on the prosecutors charging decision.

The only possible disadvantage we perceive to an aggravated factor versus a penalty enhancer is that an aggravated factor does not raise the maximum sentence; it only directs the judge to consider imposing a greater sentence within the range allowable. We consider this possible disadvantage to be negligible because offenders almost never receive the maximum sentence under current law. For these reasons,

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<sup>1</sup> Wis. Stat. § 973.017(9)

we respectfully request that you consider introducing a bill to create an aggravated factor, rather than a penalty enhancer, when a child witnesses domestic violence.

Such a bill could include the following elements:

- A definition of child witnessing identical to that which you created in Senate Bill 248 (i.e. an act of domestic abuse, as defined in 968.075 (1) (a), that is observable by or audible to a child or is in the presence of a child and the actor knows or has reason to know that the act is observable by or audible to a child or is in the presence of a child)
- An amendment to s. 973.017, which currently includes a number of factors courts consider before imposing a bifurcated sentence.
- A statement that the aggravated factor should be consider in all applicable criminal sentences, both misdemeanors and felonies.
- A directive to include in any presentence investigation information about the presence of a child during the commission of domestic abuse

If you choose to further explore this option, we also believe it would be helpful for the drafter to consider whether the bills needs to include any statement about what basis the sentencing judge must have to believe the domestic abuse was committed in the presence of a child before considering the aggravated factor. We believe the aggravated factor will apply whenever there is a factual basis in the record that a child was present, but we would like to ensure additional guidance to sentencing courts is not needed for the aggravated factor to be uniformly considered.

Thank you for taking our views into consideration. We believe the approach we have described will achieve the goals of Senate Bill 248, while minimizing the potential negative on impact on children during the criminal justice process.



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kjf

Thus.  
per  
requester  
please

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

1

<sup>repeal</sup>  
**AN ACT ...; relating to:** aggravating factors for a court to consider when  
sentencing persons.

2

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***Analysis by the Legislative Reference Bureau***

Current law requires courts to consider specific factors when sentencing people convicted of certain crimes. For instance, if a person is convicted of first or second degree sexual assault of a child and the person was the child's parent, guardian, or temporary caregiver or another person legally responsible for the child's welfare, the sentencing court must consider as an aggravating factor that the convicted person was responsible for the welfare of the child. Under this bill, if a person is convicted of a crime involving an act of domestic abuse and the crime was committed in the presence of a child, the sentencing court must consider as an aggravating factor that the convicted person committed the crime in the presence of a child.

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

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

3

SECTION 1. 948.015 (9) of the statutes is created to read:



**Parisi, Lori**

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**From:** Sen.Harsdorf  
**Sent:** Tuesday, May 03, 2011 10:41 AM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB 11-1854/1 Topic: Domestic abuse in the presence of a child

Please Jacket LRB 11-1854/1 for the SENATE.