



State of Wisconsin
2017 - 2018 LEGISLATURE

LRBs0219/1
EAW:emw

**ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO ASSEMBLY BILL 784**

January 26, 2018 - Offered by Representative BALLWEG.

1 **AN ACT** *to renumber and amend* 48.23 (4); *to amend* 48.20 (8) (a), 48.21 (3) (d),
2 48.213 (2) (d) and 48.23 (3); and *to create* 48.233 of the statutes; **relating to:**
3 the appointment of counsel in a child in need of protection or services
4 proceeding, providing an exemption from emergency rule procedures, granting
5 rule-making authority, and making an appropriation.

Analysis by the Legislative Reference Bureau

This substitute amendment removes the prohibition on assigning counsel to a parent in a child in need of protection or services (CHIPS) proceeding, and creates a five-county pilot program run by the state public defender to provide counsel for such a parent.

Under current law, a parent is entitled to legal representation in a proceeding under the Children's Code involving a contested adoption or an involuntary termination of parental rights. In all other cases under the Children's Code, the court assigned to exercise jurisdiction under the Children's Code (juvenile court) may appoint counsel to any party to the proceeding except that the juvenile court is prohibited from appointing counsel in a CHIPS proceeding for any party other than a child, an Indian parent, or an Indian custodian. This prohibition was ruled unconstitutional by the Wisconsin Supreme Court in *Joni B. v. State*, 202 Wis. 2d 1

(1996), on the grounds that the prohibition constitutes a violation of the separation of powers doctrine of the Wisconsin Constitution. This substitute amendment eliminates the statutory prohibition placed on a juvenile court regarding appointment of counsel for adult parents other than Indian parents or Indian custodians in a CHIPS proceeding.

This substitute amendment also creates a pilot program for the provision of counsel to a parent in a CHIPS proceeding in Brown, Outagamie, Racine, Kenosha, and Winnebago counties. The substitute amendment grants the SPD rule-making authority to implement the pilot program and gives certain exceptions to allow the pilot program rules to be promulgated through emergency rule making. The pilot program sunsets on June 30, 2021. Also, the SPD and the Department of Children and Families must each submit a report by January 1, 2021, to the Joint Committee on Finance and each house of the legislature regarding the costs of and data from implementing the pilot program created under the substitute amendment.

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

1 **SECTION 1.** 48.20 (8) (a) of the statutes is amended to read:

2 48.20 (8) (a) If a child is held in custody, the intake worker shall notify the
3 child's parent, guardian, legal custodian, and Indian custodian of the reasons for
4 holding the child in custody and of the child's whereabouts unless there is reason to
5 believe that notice would present imminent danger to the child. The parent,
6 guardian, legal custodian, and Indian custodian shall also be notified of the time and
7 place of the detention hearing required under s. 48.21, the nature and possible
8 consequences of that hearing, the right to counsel under s. 48.23, the right to present
9 and cross-examine witnesses at the hearing, and, in the case of a parent or Indian
10 custodian of an Indian child who is the subject of an Indian child custody proceeding,
11 as defined in s. 48.028 (2) (d) 2., the right to counsel under s. 48.028 (4) (b). If the
12 parent, guardian, legal custodian, or Indian custodian is not immediately available,
13 the intake worker or another person designated by the court shall provide notice as
14 soon as possible. When the child is 12 years of age or older, the child shall receive

1 the same notice about the detention hearing as the parent, guardian, legal custodian,
2 or Indian custodian. The intake worker shall notify both the child and the child's
3 parent, guardian, legal custodian, or Indian custodian.

4 **SECTION 2.** 48.21 (3) (d) of the statutes is amended to read:

5 48.21 (3) (d) Prior to the commencement of the hearing, the court shall inform
6 the parent, guardian, legal custodian, or Indian custodian of the allegations that
7 have been made or may be made, the nature and possible consequences of this
8 hearing as compared to possible future hearings, the right to counsel under s. 48.23,
9 the right to present, confront, and cross-examine witnesses, and, in the case of a
10 parent or Indian custodian of an Indian child who is the subject of an Indian child
11 custody proceeding under s. 48.028 (2) (d) 2., the right to counsel under s. 48.028 (4)
12 (b).

13 **SECTION 3.** 48.213 (2) (d) of the statutes is amended to read:

14 48.213 (2) (d) Prior to the commencement of the hearing, the court shall inform
15 the adult expectant mother and the unborn child's guardian ad litem shall be
16 ~~informed by the court~~ of the allegations that have been made or may be made, the
17 nature and possible consequences of this hearing as compared to possible future
18 hearings, the right to counsel under s. 48.23, and the right to present, confront, and
19 cross-examine witnesses, ~~and the right to present witnesses.~~

20 **SECTION 4.** 48.23 (3) of the statutes is amended to read:

21 48.23 (3) POWER OF THE COURT TO APPOINT COUNSEL. ~~Except in proceedings under~~
22 ~~s. 48.13, at~~ At any time, upon request or on its own motion, the court may appoint
23 counsel for the child or any party, unless the child or the party has or wishes to retain
24 counsel of his or her own choosing. ~~Except as provided in sub. (2g), the court may not~~
25 ~~appoint counsel for any party other than the child in a proceeding under s. 48.13.~~

1 **SECTION 5.** 48.23 (4) of the statutes is renumbered 48.23 (4) (a) and amended
2 to read:

3 48.23 (4) (a) If a child or a parent under 18 years of age has a right to be
4 represented by counsel or is provided counsel at the discretion of the court under this
5 section and counsel is not knowingly and voluntarily waived, the court shall refer the
6 child or parent under 18 years of age to the state public defender and counsel shall
7 be appointed by the state public defender under s. 977.08 without a determination
8 of indigency. If the referral is of a child who has filed a petition under s. 48.375 (7),
9 the state public defender shall appoint counsel within 24 hours after that referral.
10 Any counsel appointed in a petition filed under s. 48.375 (7) shall continue to
11 represent the child in any appeal brought under s. 809.105 unless the child requests
12 substitution of counsel or extenuating circumstances make it impossible for counsel
13 to continue to represent the child.

14 **(b)** In any situation under sub. (2), (2g), or (2m) in which a parent 18 years of
15 age or over or an adult expectant mother is entitled to representation by counsel;
16 counsel is not knowingly and voluntarily waived; and it appears that the parent or
17 adult expectant mother is unable to afford counsel in full, or the parent or adult
18 expectant mother so indicates; the court shall refer the parent or adult expectant
19 mother to the authority for indigency determinations specified under s. 977.07 (1).

20 **(c)** In any other situation under this section in which a person has a right to be
21 represented by counsel or is provided counsel at the discretion of the court,
22 competent and independent counsel shall be provided and reimbursed in any
23 manner suitable to the court regardless of the person's ability to pay, except that the
24 court may not order a person who files a petition under s. 813.122 or 813.125 to
25 reimburse counsel for the child who is named as the respondent in that petition.

1 **SECTION 6.** 48.233 of the statutes is created to read:

2 **48.233 Five-county pilot program. (1)** No later than July 1, 2018, the state
3 public defender shall establish a pilot program in Brown, Outagamie, Racine,
4 Kenosha, and Winnebago counties to provide counsel to any nonpetitioning parent
5 after a petition has been filed under s. 48.255 in a proceeding under s. 48.13.

6 **(2)** This section does not apply to a proceeding commenced under s. 48.13 after
7 June 30, 2021.

8 **(3)** The state public defender may promulgate rules necessary to implement
9 the pilot program established under sub. (1). The state public defender may
10 promulgate the rules under this subsection as emergency rules under s. 227.24.
11 Notwithstanding s. 227.24 (1) (a) and (3), the state public defender is not required
12 to provide evidence that promulgating a rule under this subsection as an emergency
13 rule is necessary for the preservation of the public peace, health, safety, or welfare
14 and is not required to provide a finding of emergency for a rule promulgated under
15 this subsection. Notwithstanding s. 227.24 (1) (c) and (2), emergency rules
16 promulgated under this subsection remain in effect until June 30, 2021.

17 **(4)** By January 1, 2021, the department and the state public defender shall
18 each submit a report to the joint committee on finance, and to the chief clerk of each
19 house of the legislature for distribution to the appropriate standing committees
20 under s. 13.172 (3), regarding costs and data from implementing the pilot program
21 under sub. (1).

22 **SECTION 7. Fiscal changes.**

23 **(1) PROGRAM OPERATION.** In the schedule under section 20.005 (3) of the statutes
24 for the appropriation to the public defender board under section 20.550 (1) (a) of the

1 statutes, the dollar amount for fiscal year 2018-19 is increased by \$739,600 for
2 implementation of the pilot program under section 48.233 of the statutes.

3 (END)