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February 8, 2018

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 784 and Senate Bill 657: Office of the State Public Defender Representation of Parents in a Child in Need of Protection or Services Proceeding

Assembly Bill 784 and Senate Bill 657 (AB 784/SB 657) are companion bills relating to a parent's right to counsel in a child in need of protection or services (CHIPS) proceeding. Assembly Bill 784 was introduced on December 27, 2017, and referred to the Committee on Judiciary. Senate Bill 657 was introduced on December 27, 2017, and referred to the Committee on Judiciary and Public Safety. On January 26, 2018, Assembly Substitute Amendment 1 (ASA 1) was offered to AB 784 and on January 29, 2018, Senate Substitute Amendment 1 (SSA 1) was offered to SB 657. Public hearings were held on the bills on January 30, 2018. The bills remove the prohibition on assigning counsel to a parent in a CHIPS proceeding, grant rule-making authority, make an appropriation to the State Public Defender (SPD), and create a five-county pilot program associated with a right to counsel for such a parent.

On January 31, 2018, the Assembly Committee on the Judiciary recommended adoption of ASA 1 to AB 784 with a 9-0 vote and passage of ASA 1 to AB 784 with a 8-1 vote. On February 2, 2018, SB 657 was withdrawn from the Committee on Judiciary and Public Safety and referred to the Joint Committee on Finance. On that same date, AB 784 was also referred to the Joint Committee on Finance.

BACKGROUND

The Children's Code (Chapter 48 of the statutes) governs the CHIPS process and the Juvenile Justice Code (Chapter 938 of the statutes) governs the juveniles in need of protection or services (JIPS) and juvenile delinquency processes. In addition, tribal courts place children in out-of-home care pursuant to the procedures included in each tribe's children's code.

A child can be removed from his or her home under the Children's Code for a variety of reasons, including the child's safety. After a child is taken into custody, the matter comes before a

juvenile court intake worker to determine whether legal grounds exist to continue to hold the child in custody. A child can be held in custody if there is probable cause to believe that: (a) the child will self-inflict injury or will be subject to injury by others; or (b) the parent, guardian, or legal custodian is neglecting, refusing, unable, or unavailable to provide adequate supervision and care and that services to ensure the child's safety and well-being are not available or would be inadequate. Probable cause may also be found for the child at issue if another child in the home meets either criteria. Further, custody may be continued if there is probable cause to believe that the child will run away or be taken away so as to be unavailable for court proceedings. The intake worker must make every effort to release the child to the parent, guardian, or custodian where appropriate.

Local law enforcement and child protection agencies may also intervene to protect an unborn child of an expectant mother. Physical custody may be continued if there is probable cause to believe that: (a) there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered by the expectant mother's habitual lack of self-control in the use of alcohol or drugs; and (b) the expectant mother refuses or has not made a good faith effort to participate in any substance abuse treatment services offered to her.

If the child or expectant mother is not released from custody, a court hearing must be held within 48 hours from the time when the decision to hold the child in custody was made. The judge must determine whether the child should remain in the custody of the county or state, based on a finding of probable cause of any of the criteria identified above.

The county or state must file a CHIPS petition at the custody hearing. If a court does not hold a hearing within 48 hours or a CHIPS petition is not filed at the hearing, the court may order that the child be held for up to an additional 72 hours if certain conditions exist. The CHIPS petition must state that the court has exclusive original jurisdiction over a child alleged to be in need of protection or services, and one of a number of conditions apply.

Within 30 days after filing the CHIPS petition, the court conducts a plea hearing to determine whether any party wishes to contest the allegations made in the petition. If no one wishes to contest the CHIPS petition, the court sets a date for a dispositional hearing within 30 days, or immediately proceeds with that hearing if all parties consent. If any party wishes to contest the CHIPS petition, a date is set for a fact-finding hearing within 30 days, where the court will determine if the allegations in the CHIPS petition are proved by clear and convincing evidence. The parties may request a jury trial for the fact finding hearing at any time before or during the plea hearing.

If, after the conclusion of the hearing, the fact finder determines that the allegations are not proved, the case is dismissed and the child returns home. If the fact finder determines that there is clear and convincing evidence, the court will hold a dispositional hearing within 30 days or immediately if all parties consent.

For each child placed in out-of-home care, the agency assigned responsibility for placing or providing services to the child must prepare a written permanency plan. A permanency plan is

created with the goal of reunification, or termination of parental rights (TPR) and eventual adoption. Termination of parental rights means that all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed, pursuant to a court order. Parental rights may be terminated either voluntarily or involuntarily. Courts terminate parental rights for the purpose of allowing adoption of a child. A CHIPS proceeding typically precedes the TPR process.

Under current law, a parent is entitled to legal representation in a proceeding under the Children's Code involving a contested adoption or TPR. In the 1995-97 budget (1995 Act 27), the Legislature eliminated statutory authority and placed a prohibition on a parent's right to counsel in CHIPS cases. In all other cases under the Children's Code, the juvenile court may appoint counsel to any party to the proceeding, but the court was prohibited from appointing counsel in a CHIPS proceeding for any party other than a child, an Indian parent, or an Indian custodian.

Subsequent to 1995 Act 27, in 1996, the Supreme Court of Wisconsin ruled in *Joni B. v. State* that "the complete elimination of the court's power to appoint counsel…is an unreasonable burden and a substantial interference with the judicial branch's authority…and is therefore violative of the separation of powers doctrine embodied in our state's constitution."

Even though the prohibition was ruled unconstitutional, the SPD is not statutorily authorized to represent parents in CHIPS cases. Consequently, if a court determines that public representation is required, such counsel is paid for by counties. While the SPD is authorized to provide representation for any child who is the subject of a JIPS order, CHIPS order, or is accused of having committed a delinquent act they are only allowed to provide representation to parents in TPR cases.

SUMMARY OF BILL

On January 26, 2018, Assembly Substitute Amendment 1 (ASA 1) was offered to AB 784 and on January 29, 2018, Senate Substitute Amendment 1 (SSA 1) was offered to SB 657. The substitute amendments are identical. The substitute amendments: (a) remove the initial applicability section which would have applied to the pilot program. Instead this information is in the section creating the pilot program; and (b) clarify that while the prohibition on parents obtaining counsel is removed, the amendments do not create a new right to an attorney provided at state or county expense in the five county pilot program area. A summary of the substitute amendments is provided below.

The substitute amendments eliminate the statutory prohibition placed on a juvenile court regarding appointment of counsel for parents other than Indian parents or Indian custodians. In addition, the intake worker for the CHIPS proceeding must notify the relevant persons of their civil right to counsel if the child is held in custody. In addition, the court must notify the relevant persons of their civil right to counsel before a CHIPS hearing, or a hearing for an adult expectant mother in custody.

Under the substitute amendments, a pilot program in Brown, Kenosha, Outagamie, Racine,

and Winnebago Counties would provide an attorney at state expense to indigent parents through the SPD in CHIPS proceedings in which the child has been taken into custody starting no later than July 1, 2018. The pilot program is funded at $739,600 GPR in 2018-19 and sunsets on June 30, 2021. If a parent is under the age of 18, an indigency determination is not required. If a parent is over the age of 18 an indigency determination is necessary. As under current law, if a parent has limited means, an attorney may be appointed at county expense with the parent responsible for reimbursing the county. In addition, 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 bill.

FISCAL ESTIMATE

A fiscal estimate was submitted by DCF. In addition, information related to the bill was provided by the SPD during the public hearing.

Department of Children and Families. Under the bill as introduced, DCF's fiscal estimate indicates that county costs may increase if a parent in a CHIPs case has a right to an attorney within the previously discussed pilot program counties. In this scenario, the SPD would provide representation to parents determined to be indigent. However, there could be some parents who do not qualify for SPD representation and are unable to hire an attorney. The counties in the pilot program may then have had to appoint council to the parents at county expense with the expectation that the parent repay the county under a payment plan. Under the substitute amendments, however, it is made clear that there is no new right to an attorney at state or county expense through the five county pilot, only the opportunity and funding for the SPD to provide representation to indigent parents. Thus, potential court appointed representation would remain the same for all counties. The Department indicated it would absorb the costs of the report.

State Public Defender's Office. The bill creates a five county (Brown, Kenosha, Outagamie, Winnebago, and Racine), three-year pilot program with data collection and reporting requirements to determine the programs efficacy. The cost of the pilot program is $739,600 GPR in 2018-19. The SPD’s office indicates that it does not need additional staff to provide representation. The estimate is based on approximately 800 additional cases. Further, the estimate takes into account the number of appointments going to the private bar and cases shifted from SPD staff to the private bar to allow for additional CHIPS appointments to SPD staff.

The SPD indicates that the result of this bill would be a reduction in the number of TPR cases, including those in which the SPD provides representation. In addition, the SPD expects savings to local corporation counsel, district attorneys, and courts from not having to handle as many TPRs. Further, the SPD expects, as a result of a faster path to permanence, a reduction in the number of days a child is placed in foster care may occur. Finally, the SPD anticipates a reduction of expenses at the county level due to a reduction in county appointed counsel for parents in CHIPS cases.

Prepared by: Sarah Wynn