



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-5285/1
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2019 SENATE BILL 729

January 29, 2020 - Introduced by Senators STROEBEL and OLSEN, cosponsored by Representatives DITTRICH, MURPHY, FELZKOWSKI, JAMES, KULP, KURTZ, MAGNAFICI, MILROY, RAMTHUN, TUSLER, TRANEL, THIESFELDT, TITTL, EDMING and SNYDER. Referred to Committee on Insurance, Financial Services, Government Oversight and Courts.

1 **AN ACT** *to repeal* 48.422 (4); *to amend* 48.31 (2), 48.31 (4), 48.356 (2), 48.38 (5)
2 (a), 48.38 (5m) (a), 48.415 (intro.), 48.415 (4) (a), 48.422 (1), 48.422 (5), 48.424
3 (3), 48.424 (4) (intro.), 938.356 (2), 938.38 (5) (a) and 938.38 (5m) (a); and **to**
4 **create** 48.02 (5e), 48.13 (15), 48.356 (1m), 48.415 (3m), 48.415 (11) and 938.356
5 (1m) of the statutes; **relating to:** grounds for finding a child in need of
6 protection or services or for terminating parental rights, right to a jury trial in
7 a termination of parental rights proceeding, and permanency plan reviews.

Analysis by the Legislative Reference Bureau

This bill changes the grounds for finding that a child is in need of protection or services under the Children's Code and for involuntarily terminating parental rights (TPR), eliminates the right to a jury trial in a TPR proceeding, and changes the process for permanency plan reviews under the Children's Code and the Juvenile Justice Code.

Grounds for CHIPS

Under current law, the juvenile court is assigned to exercise jurisdiction under the Children's Code and has exclusive original jurisdiction over a child who is alleged to be in need of protection or services (CHIPS) if certain grounds relating to the child or his or her circumstances are met. The bill creates a new ground for CHIPS when a child is found to be a drug-affected child. Under the bill, a drug-affected child is

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a child who suffered prenatal exposure to a controlled substance or alcohol or a child whose basic needs and safety have been adversely affected by a parent's or guardian's chronic and severe use of alcohol or a controlled substance.

Grounds for TPR

Under current law, in a proceeding for involuntary TPR, the juvenile court must determine whether grounds for TPR exist. Current law grounds for TPR include 1) continuing need of protection or services if a child is placed outside the home for 15 of the last 22 months under a court order; or 2) a continuing denial of periods of physical placement or visitation if a court order denying physical placement or visitation has been in place for one year. Under current law, the timeline for both of these grounds begins when a court order is entered in a CHIPS or juvenile in need of protection or services (JIPS) proceeding. Under the bill, the timeline for these grounds can also begin when the court enters an order for temporary custody, when a child or juvenile is placed outside the home under a consent decree, or when a court-approved permanency plan places a child outside the home.

The bill creates a new ground for involuntary TPR when the child is a drug-affected child, which is established by showing all of the following:

1. That the child has been found to be a drug-affected child in a CHIPS proceeding.

2. That the parent has not made reasonable efforts to enroll in a substance use disorder treatment or recovery program within 90 days of the placement of the child outside the home under a CHIPS order, or, if the parent enrolled in a substance use disorder treatment or recovery program, that the parent has not maintained substantial compliance with the program.

3. That the parent is not participating in a drug court program.

4. That there is a substantial likelihood that the parent will not meet the conditions for the safe return of the child to the home by the date established at the child's most recent permanency review panel or hearing.

The bill also creates a new ground for TPR based on parental incarceration, which must be established by proving 1) that the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside the child's home pursuant to one or more court orders containing notice of the grounds for TPR and the conditions necessary for the child to be returned to the home; 2) that the parent is incarcerated at the time of the fact-finding hearing; and 3) that the parent is likely to continue to be incarcerated for a substantial period of the child's minority. In determining whether the parent is likely to be incarcerated for a substantial period of the child's minority, the court may consider a parent's history of repeated incarceration.

Right to a jury trial

Under current law, in a TPR proceeding, the juvenile court must hold a fact-finding hearing to determine if there are grounds for TPR. Under current law, any party to a TPR proceeding whose rights may be affected by the TPR order may demand a jury trial for this fact-finding hearing. The bill eliminates the right to a jury trial for the fact-finding hearing.

SENATE BILL 729***Permanency plan reviews***

Under current law, within six months after a child is removed from his or her home in a proceeding under the Children's Code or the Juvenile Justice Code and every 12 months after, the permanency plan is reviewed by the juvenile court or by a panel that is appointed by the juvenile court or by a child welfare agency. Within six months of the initial review and every 12 months after, the permanency plan is reviewed in a hearing before the juvenile court. Under the bill, the initial six-month review and the reviews done every 12 months after are done in a hearing before the juvenile court.

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.** 48.02 (5e) of the statutes is created to read:

2 48.02 (**5e**) "Drug-affected child" means any of the following:

3 (a) A child who suffered prenatal exposure to a controlled substance or alcohol,
4 used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms
5 in the child at birth, a positive result from a toxicology test of the mother or child at
6 the time of the child's birth, or developmental delays or other symptoms during the
7 child's first year of life that have been diagnosed as a fetal alcohol spectrum disorder
8 or as caused by prenatal exposure to a controlled substance.

9 (b) A child whose basic needs, as described in s. 48.01 (1) (ag), and safety have
10 been adversely affected by a parent's or guardian's chronic and severe use of alcohol
11 or a controlled substance.

12 **SECTION 2.** 48.13 (15) of the statutes is created to read:

13 48.13 (**15**) (a) The child is a drug-affected child, as defined in s. 48.02 (5e) (a),
14 and the petition is filed within 18 months of the child's birth.

15 (b) The child is a drug-affected child, as defined in s. 48.02 (5e) (b).

SENATE BILL 729**SECTION 3**

1 **SECTION 3.** 48.31 (2) of the statutes is amended to read:

2 48.31 (2) ~~The A hearing on a termination of parental rights petition shall be~~
3 ~~to the court. A hearing on a petition under s. 48.13 or 48.133 shall be to the court~~
4 unless the child, the child's parent, guardian, or legal custodian, the unborn child's
5 guardian ad litem, or the expectant mother of the unborn child exercises the right
6 to a jury trial by demanding a jury trial at any time before or during the plea hearing.
7 If a jury trial is demanded in a proceeding under s. 48.13 or 48.133, the jury shall
8 consist of 6 persons. ~~If a jury trial is demanded in a proceeding under s. 48.42, the~~
9 ~~jury shall consist of 12 persons unless the parties agree to a lesser number.~~ Chapters
10 756 and 805 shall govern the selection of jurors. If the hearing involves a child victim
11 or witness, as defined in s. 950.02, the court may order that a deposition be taken by
12 audiovisual means and allow the use of a recorded deposition under s. 967.04 (7) to
13 (10) and, with the district attorney, shall comply with s. 971.105. At the conclusion
14 ~~of the a hearing on a termination of parental rights petition, the court shall make a~~
15 ~~determination of the facts. At the conclusion of a hearing on a petition under s. 48.13~~
16 ~~or 48.133, the court or jury shall make a determination of the facts, except that in a~~
17 case alleging a child or an unborn child to be in need of protection or services under
18 s. 48.13 or 48.133, the court shall make the determination under s. 48.13 (intro.) or
19 48.133 relating to whether the child or unborn child is in need of protection or
20 services that can be ordered by the court. If the court finds that the child or unborn
21 child is not within the jurisdiction of the court or, in a case alleging a child or an
22 unborn child to be in need of protection or services under s. 48.13 or 48.133, that the
23 child or unborn child is not in need of protection or services that can be ordered by
24 the court, or if the court or jury finds that the facts alleged in the petition have not
25 been proved, the court shall dismiss the petition with prejudice.

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1 **SECTION 4.** 48.31 (4) of the statutes is amended to read:

2 48.31 (4) The court shall make findings of fact and conclusions of law relating
3 to the allegations of a petition filed under s. 48.42. The court or jury shall make
4 findings of fact and the court shall make conclusions of law relating to the allegations
5 of a petition filed under s. 48.13, or 48.133 or 48.42, except that the court shall make
6 findings of fact relating to whether the child or unborn child is in need of protection
7 or services ~~which~~ that can be ordered by the court. In cases alleging a child to be in
8 need of protection or services under s. 48.13 (11), the court may not find that the child
9 is suffering emotional damage unless a licensed physician specializing in psychiatry
10 or a licensed psychologist appointed by the court to examine the child has testified
11 at the hearing that in his or her opinion the condition exists, and adequate
12 opportunity for the cross-examination of the physician or psychologist has been
13 afforded. The judge may use the written reports if the right to have testimony
14 presented is voluntarily, knowingly, and intelligently waived by the guardian ad
15 litem or legal counsel for the child and the parent or guardian. In cases alleging a
16 child to be in need of protection or services under s. 48.13 (11m) or an unborn child
17 to be in need of protection or services under s. 48.133, the court may not find that the
18 child or the expectant mother of the unborn child is in need of treatment and
19 education for needs and problems related to the use or abuse of alcohol beverages,
20 controlled substances, or controlled substance analogs and its medical, personal,
21 family, or social effects unless an assessment for alcohol and other drug abuse that
22 conforms to the criteria specified under s. 48.547 (4) has been conducted by an
23 approved treatment facility.

24 **SECTION 5.** 48.356 (1m) of the statutes is created to read:

SENATE BILL 729**SECTION 5**

1 48.356 **(1m)** Whenever the court orders a child or expectant mother of an
2 unborn child to be placed outside his or her home or denies a parent visitation in an
3 order under s. 48.21 (4) or 48.32, the court shall orally inform the parent or parents
4 who appear in court or the expectant mother who appears in court of any grounds for
5 termination of parental rights under s. 48.415 that may be applicable and, if any
6 conditions are established for the parent or parents to be granted visitation with the
7 child, the court shall orally inform the parent or parents of those conditions.

8 **SECTION 6.** 48.356 (2) of the statutes is amended to read:

9 48.356 **(2)** In addition to the notice required under sub. (1) or (1m), any written
10 order which places a child or an expectant mother outside the home or denies
11 visitation under sub. (1) or (1m) shall notify the parent or parents or expectant
12 mother of the information specified under sub. (1) or (1m).

13 **SECTION 7.** 48.38 (5) (a) of the statutes is amended to read:

14 48.38 **(5)** (a) Except as provided in s. 48.63 (5) (d), the court or a panel appointed
15 under par. (ag) shall review the permanency plan for each child for whom a
16 permanency plan is required under sub. (2) in the manner provided in this subsection
17 not later than 6 months after the date ~~on which the child was first removed from his~~
18 ~~or her home~~ of a hearing held under sub. (5m) and every 6 months after a previous
19 review under this subsection for as long as the child is placed outside the home,
20 except that for the review ~~that is required to be conducted not later than 12 months~~
21 ~~after the child was first removed from his or her home and the reviews that are~~
22 required to be conducted every 12 months after ~~that review~~ the initial hearing under
23 sub. (5m), the court shall hold a hearing under sub. (5m) to review the permanency
24 plan, ~~which.~~ The hearing may be instead of or in addition to the review under this

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1 subsection. The 6-month and 12-month periods referred to in this paragraph
2 include trial reunifications under s. 48.358.

3 **SECTION 8.** 48.38 (5m) (a) of the statutes is amended to read:

4 48.38 **(5m)** (a) The court shall hold a hearing to review the permanency plan
5 and to make the determinations specified in sub. (5) (c) for each child for whom a
6 permanency plan is required under sub. (2) no later than ~~12~~ 6 months after the date
7 on which the child was first removed from the home and every 12 months after a
8 previous hearing under this subsection for as long as the child is placed outside the
9 home. The 6-month and 12-month periods referred to in this paragraph include
10 trial reunifications under s. 48.358.

11 **SECTION 9.** 48.415 (intro.) of the statutes is amended to read:

12 **48.415 Grounds for involuntary termination of parental rights.** (intro.)
13 At the fact-finding hearing the court ~~or jury~~ shall determine whether grounds exist
14 for the termination of parental rights. If the child is an Indian child, the court ~~or jury~~
15 shall also determine at the fact-finding hearing whether continued custody of the
16 Indian child by the Indian child's parent or Indian custodian is likely to result in
17 serious emotional or physical damage to the Indian child under s. 48.028 (4) (e) 1. and
18 whether active efforts under s. 48.028 (4) (e) 2. have been made to prevent the
19 breakup of the Indian child's family and whether those efforts have proved
20 unsuccessful, unless partial summary judgment on the grounds for termination of
21 parental rights is granted, in which case the court shall make those determinations
22 at the dispositional hearing. Grounds for termination of parental rights shall be one
23 of the following:

24 **SECTION 10.** 48.415 (3m) of the statutes is created to read:

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1 48.415 (3m) PARENTAL INCARCERATION. Parental incarceration, which shall be
2 established by proving all of the following:

3 (a) That the child has been adjudged to be in need of protection or services and,
4 while the parent is incarcerated, has been placed, or continued in a placement,
5 outside his or her home pursuant to one or more court orders under s. 48.345, 48.357,
6 48.363, or 48.365 containing the notice required under s. 48.356 (2).

7 (b) That the parent is incarcerated at the time of the fact-finding hearing under
8 s. 48.424.

9 (c) That the parent is likely to continue to be incarcerated for a substantial
10 period of the child's minority. In determining whether the parent is likely to continue
11 to be incarcerated for a substantial period of the child's minority, the court may
12 consider whether the parent has a history of repeated incarceration.

13 **SECTION 11.** 48.415 (4) (a) of the statutes is amended to read:

14 48.415 (4) (a) That the parent has been denied periods of physical placement
15 by court order in an action affecting the family or has been denied visitation under
16 an order under s. 48.21 (4), 48.32, 48.345, 48.355 (3), 48.363, 48.365, 48.38, 938.21
17 (4), 938.32, 938.345, 938.355 (3), 938.363 or, 938.365, or 938.38 containing the notice
18 required by s. 48.356 (2) or 938.356 (2).

19 **SECTION 12.** 48.415 (11) of the statutes is created to read:

20 48.415 (11) DRUG-AFFECTED CHILD. The child is a drug-affected child, which
21 shall be established by proving all of the following:

22 (a) That the child has been adjudged to be a child in need of protection or
23 services under s. 48.13 (15) (b) and placed outside the home pursuant to one or more
24 court orders under s. 48.345, 48.347, 48.357, 48.363, or 48.365.

25 (b) That one of the following applies:

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1 1. The parent has not made reasonable efforts to enroll in a substance use
2 disorder treatment or recovery program within 90 days of the placement of the child
3 outside the home pursuant to one or more court orders under s. 48.345, 48.347,
4 48.357, 48.363, or 48.365.

5 2. The parent enrolled in a substance use disorder treatment or recovery
6 program after placement of the child outside the home pursuant to one or more court
7 orders under s. 48.345, 48.347, 48.357, 48.363, or 48.365 but has not maintained
8 substantial compliance with the program.

9 (c) That the parent is not participating in a drug court program as described
10 in s. 165.955 (1).

11 (d) That there is a substantial likelihood that the parent will not meet the
12 conditions for the safe return of the child to the home by the date established by the
13 court or a review panel under s. 48.38 (5) (c) 5. or by the court under s. 48.38 (5m) (e)
14 at the child's most recent permanency review or permanency hearing prior to the
15 filing of the petition for termination of parental rights.

16 **SECTION 13.** 48.422 (1) of the statutes is amended to read:

17 48.422 (1) Except as provided in s. 48.42 (2g) (ag), the hearing on the petition
18 to terminate parental rights shall be held within 30 days after the petition is filed.
19 At the hearing on the petition to terminate parental rights the court shall determine
20 whether any party wishes to contest the petition and inform the parties of their
21 rights under ~~sub. (4)~~ and s. 48.423.

22 **SECTION 14.** 48.422 (4) of the statutes is repealed.

23 **SECTION 15.** 48.422 (5) of the statutes is amended to read:

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1 48.422 (5) Any nonpetitioning party, including the child, shall be granted a
2 continuance of the hearing for the purpose of consulting with an attorney ~~on the~~
3 ~~request for a jury trial or~~ concerning a request for the substitution of a judge.

4 **SECTION 16.** 48.424 (3) of the statutes is amended to read:

5 48.424 (3) ~~If the facts are determined by a jury, the jury may only~~ The court
6 shall decide whether any grounds for the termination of parental rights have been
7 proved ~~and,~~ whether the allegations specified in s. 48.42 (1) (e) have been proved in
8 cases involving the involuntary termination of parental rights to an Indian child.
9 ~~The court shall decide,~~ and what disposition is in the best interest of the child.

10 **SECTION 17.** 48.424 (4) (intro.) of the statutes is amended to read:

11 48.424 (4) (intro.) If the court finds grounds for the termination of parental
12 rights ~~are found by the court or jury,~~ the court shall find the parent unfit. A finding
13 of unfitness shall not preclude a dismissal of a petition under s. 48.427 (2). Except
14 as provided in s. 48.23 (2) (b) 3., the court shall then proceed immediately to hear
15 evidence and motions related to the dispositions enumerated in s. 48.427. Except as
16 provided in s. 48.42 (2g) (ag), the court may delay making the disposition and set a
17 date for a dispositional hearing no later than 45 days after the fact-finding hearing
18 if any of the following apply:

19 **SECTION 18.** 938.356 (1m) of the statutes is created to read:

20 938.356 (1m) Whenever the court orders a juvenile to be placed outside his or
21 her home or denies a parent visitation in an order under s. 938.21 (4) or 938.32, the
22 court shall orally inform the parent or parents who appear in court of any grounds
23 for termination of parental rights under s. 48.415 that may be applicable.

24 **SECTION 19.** 938.356 (2) of the statutes is amended to read:

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1 938.356 **(2)** WRITTEN WARNING. In addition to the notice required under sub. (1)
2 or (1m), any written order which places a juvenile outside the home or denies
3 visitation under sub. (1) or (1m) shall notify the parent or parents of the information
4 specified under sub. (1) or (1m).

5 **SECTION 20.** 938.38 (5) (a) of the statutes is amended to read:

6 938.38 **(5)** (a) Except as provided in s. 48.63 (5) (d), the court or a panel
7 appointed under par. (ag) shall review the permanency plan for each juvenile for
8 whom a permanency plan is required under sub. (2) in the manner provided in this
9 subsection not later than 6 months after the date ~~on which the juvenile was first~~
10 ~~removed from his or her home~~ of a hearing held under sub. (5m) and every 6 months
11 after a previous review under this subsection for as long as the juvenile is placed
12 outside the home, except that for the review ~~that is required to be conducted not later~~
13 ~~than 12 months after the juvenile was first removed from his or her home and the~~
14 reviews that are required to be conducted every 12 months after ~~that review~~ the
15 initial hearing under sub. (5m), the court shall hold a hearing under sub. (5m) to
16 review the permanency plan. The hearing may be instead of or in addition to the
17 review under this subsection. The 6-month and 12-month periods referred to in this
18 paragraph include trial reunifications under s. 938.358.

19 **SECTION 21.** 938.38 (5m) (a) of the statutes is amended to read:

20 938.38 **(5m)** (a) The court shall hold a hearing to review the permanency plan
21 and to make the determinations specified in sub. (5) (c) for each juvenile for whom
22 a permanency plan is required under sub. (2) no later than ~~12~~ 6 months after the date
23 on which the juvenile was first removed from the home and every 12 months after
24 a previous hearing under this subsection for as long as the juvenile is placed outside

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1 the home. The 6-month and 12-month periods referred to in this paragraph include
2 trial reunifications under s. 938.358.

3 **SECTION 22. Nonstatutory provisions.**

4 (1) PARENTAL INCARCERATION. A court assigned to exercise jurisdiction under ch.
5 48 may terminate parental rights to a child who was ordered to be placed outside the
6 home before the effective date of this subsection on the grounds specified under s.
7 48.415 (3m) notwithstanding that the parent was not notified of those grounds under
8 s. 48.356 (2) or 938.356 (2) when that placement was ordered so long as the parent
9 is notified of those grounds under s. 48.356 (2) or 938.356 (2) before the filing of the
10 termination of parental rights petition.

11 **SECTION 23. Initial applicability.**

12 (1) RIGHT TO A JURY TRIAL. The treatment of ss. 48.31 (2) and (4), 48.415 (intro.),
13 48.422 (1), (4), and (5), and 48.424 (3) and (4) (intro.) first applies to a termination
14 of parental rights proceeding for which the petition is filed on the effective date of this
15 subsection.

16 (2) CHILD IN NEED OF PROTECTION OR SERVICES GROUND. The treatment of s. 48.13
17 (15) first applies to a petition filed under s. 48.13 on the effective date of this
18 subsection.

19 (3) WARNINGS FOR GROUNDS OF AN INVOLUNTARY TERMINATION OF PARENTAL RIGHTS.
20 The treatment of s. 48.415 (11) first applies to a court order required to contain the
21 notice under s. 48.356 (2) or 938.356 (2) granted on the effective date of this
22 subsection.

23 (4) PERMANENCY PLAN REVIEWS. The treatment of ss. 48.38 (5) (a) and (5m) (a)
24 and 938.38 (5) (a) and (5m) (a) first applies to a permanency plan that is filed with
25 the court under s. 48.38 (3) or 938.38 (3) on the effective date of this subsection.

