1997-98 SESSION

COMMITTEE HEARING RECORDS

Assembly Committee on Children & Families

(AC-CF)

- *Appointments* ... *Appt*
- **

- *Clearinghouse Rules* ... *CRule*
- **

- *Committee Hearings* ... *CH*
- **

- *Committee Reports* ... *CR*
- **

- *Executive Sessions* ... *ES*
- **

- *Hearing Records* ... *HR*
- **

Sample:

Record of Comm. Proceedings ... RCP
- 05hrAC-EdR_RCP_pt01a
- 05hrAC-EdR_RCP_pt01b
- 05hrAC-EdR_RCP_pt02

- *Miscellaneous* ... *Misc*
- **97hr_AC-CF_Misc_pt01**

- *Record of Comm. Proceedings* ... *RCP*
- **

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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DATE: October 28, 1997

TO: REPRESENTATIVES SCOTT JENSEN AND BONNIE LADWIG

FROM: David J. Stute, Director

SUBJECT: Constitutionality of Extending 1997 Assembly Bill 463 to Unborn Children From the Point of Conception

This memorandum, prepared at your request, discusses the constitutional implications under *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992), of a proposed amendment to 1997 Assembly Bill 463 that, as explained below, would extend the Bill's applicability to all stages of pregnancy. This memorandum concludes that the constitutionality of such an amendment is ***highly doubtful.***

A. 1997 ASSEMBLY BILL 463

1997 Assembly Bill 463, relating to unborn children who are at substantial risk of serious physical injury due to the habitual lack of self-control of their expectant mothers in the use of alcohol beverages, controlled substances or controlled substances analogs, exhibited to a severe degree, was introduced by Representative Ladwig and others; cosponsored by Senator Huelsman and others, on July 31, 1997. Assembly Substitute Amendment 1 to 1997 Assembly Bill 463 was introduced by Representatives Ladwig and Huebsch on October 17, 1997. The Bill, hereafter referred to as "the Substitute Amendment," will receive a public hearing before the Assembly Committee on Children and Families on October 30, 1997.

The Substitute Amendment modifies and applies the provisions of the Children's Code (Ch. 48, Stats.) to unborn children in need of protection or services and their expectant mothers. Briefly, the Substitute Amendment expands current law to provide that expectant mothers may be taken into custody and subjected to various dispositions under the Children's Code if a showing satisfactory to a judge is made that, due to the expectant mother's habitual act of self-control in the use of alcohol beverages, controlled substances or controlled substances analogs, exhibited to a severe degree, 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 unless the expectant mother is taken into custody. Further, a number of the possible dispositions involve

placing the expectant mother in various types of continuing physical custody, presumably in some cases up to the point of delivery of the child.

The Bill and the Substitute Amendment respond to the Wisconsin Supreme Court's conclusion in *Angela M. W. v. Kruzicki*, No. 95-2480-W (1997 Wis. LEXIS 39, at *30), that "the legislature is in a better position than the courts to gather, weigh and reconcile the competing policy proposals addressed" when taking up issues related to the physical confinement of a pregnant woman for the benefit of her unborn child.

The Substitute Amendment defines "unborn child" as an unborn human who is at that stage of fetal development when there is reasonable likelihood of sustained survival outside of the womb, with or without artificial support. It has been proposed to amend the Substitute Amendment by replacing this definition of unborn child with a definition that "unborn child" means a human being from the time of fertilization to the time of birth. You have asked about the constitutional implications of such an amendment, which would extend the sweep of the Substitute Amendment to pregnant women at every stage of their pregnancy.

B. DISCUSSION

The fundamental issue in *Roe v. Wade* and its progeny is the extent to which the state, in respect to its recognized important and legitimate interest in protecting the potentiality of human life, may interfere with the constitutional right of the mother to be free from intrusion. This right, discussed in terms of personal privacy, is derived from the due process-liberty interest guaranteed by the Fourteenth Amendment to the U.S. Constitution. In *Roe*, the U.S. Supreme Court balanced these two competing rights by deciding that the state's interest reaches a "compelling state interest" at some point. As the U.S. Supreme Court said in *Roe* ". . . it is reasonable and appropriate for a state to decide that at some point in time another interest, that the health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." [*Roe* at U.S. 159.] In *Roe*, with respect to the state's interest in the health of the mother, the Court found the compelling point to arise at approximately the end of the first trimester. Before that stage of pregnancy, the state is without power to intervene. With respect to the state's interest in potential human life, the Court found the "compelling" point to be at viability, because the fetus then presumably had the capability of meaningful life outside of the mother's womb.

In *Casey*, the Court modified *Roe* by concluding that not all state regulation must be deemed unwarranted. The Court adopted an "undue burden" standard as the appropriate means of reconciling the state's interest in potential life with the woman's constitutionally protected liberty interest. In *Casey*, the Court found that, in the abortion context, the state may enact rules and regulations designed to encourage pregnant women to know that there are "philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term," so long as they do not constitute an "undue burden." However, the Court explicitly did ***not*** disturb the central holding of *Roe*, that the state may not prohibit a woman from making a decision to terminate her pregnancy before viability.

Extending the reasoning of these two cases to the Substitute Amendment, as it is proposed to be amended, requires a balancing of the state's interest in unborn human life against the mother's absolute right, prior to viability, to make all ***decisions*** concerning that pregnancy. In the abortion context, the issue is whether the state may interfere, before viability, in the mother's decision to continue or not continue her pregnancy. In the situation addressed by the proposed amendment to the Substitute Amendment, the issue is whether, prior to viability, the state's interest in unborn human life is such as to effectively regulate specific conduct, under threat of loss of physical liberty by application of provisions of the Children's Code.

It appears ***unlikely*** that a court would hold that the state's interest in unborn human life is sufficient to justify the burden placed on the mother to conform her previability behavior and actions to that implicitly required by the Substitute Amendment, under pain of deprivation of personal liberty. If the liberty and privacy interests acknowledged and protected in *Roe v. Wade* and subsequent cases are to have any meaning, there must be a point at which the mother's interests, vis-à-vis the state's, are relatively absolute; that is, the mother's conduct, up to and including the termination of the pregnancy, is ***none*** of the state's business.

Within the abortion context, that point exists up until viability is attained. As the pregnancy continues, and the unborn child reaches the point of fetal development at which there is a reasonable likelihood of sustained survival outside of the womb (the test of the Substitute Amendment), the state's interest in an unborn life may become sufficient to constitutionally justify the imposition of the potential loss of physical liberty resulting from application of the requirements of the Children's Code to the actions and conduct of the expectant mother. However, it is difficult to perceive how, as proposed by the amendment, that interest of the state can extend back in the gestational process to the point of conception. The application of the provisions of the Substitute Amendment, and their implied regulation of the actions and conduct of an expectant mother, prior to viability, appears to impose an undue burden on the woman in contravention of *Casey*.

Please feel free to contact me at the Legislative Council Staff offices for further comment on this question.

DJS:lah:wu;lah

CRIMINALIZATION OF A DISEASE

Carlyn Graham
Masters in Law & Social Policy
Thesis
May 16, 1997

The Fourth Amendment to the Constitution says, The right of the people to be secure in their person's, houses, papers, and effects, against UNRRASONABLE SEARCHES AND SEIZURES, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

Substantive Due Process-(an essential part or constituent or relating to what is essential) is doctrine on clauses of the Fifth and Fourteenth Amendment to the Constitution requiring Legislation to be fair and reasonable in content as well as in application. The essence of due process is protection from arbitrary and unreasonable action.

In the early 1980's the Regan-Bush "war-on-drugs" took a new strategy toward pregnant addicted substance abusers (Paltrow 1990; Daniels 1993; Kandall 1996). This unprecedented strategy called for the prosecution of pregnant addicts under the State Criminal statutes involving child endangerment, assault with a deadly weapon, and the delivery of a controlled substance to a minor (Kandall 1996). Kandall continues to say, "These statutes were not intended to apply to these particular situations:" but by September 1994 over two hundred women, in twenty-four states, had been prosecuted for drug-related use during pregnancy. The "punitive" approach arose at a time when two highly controversial issues were in the forefront: focus on the "war on drugs" and "women's reproductive options". So, do they

deal with both issues? No they don't, they put them together and have a tighter control on a woman's reproductive organs, and by jailing her if she doesn't do what the State says she should. The State says drugs are illegal, you will be arrested, punished by the criminal courts and the family court will take your child upon birth, if you are a pregnant active addict.

This form of punishment had been discussed at length, looking at the potential outcome of this process: arrest versus treatment. Would it in-fact do what this law was set out to do, protect the fetus? Major health organizations were against this form of prosecution, fearing the ultimate outcome, where women would be staying away from drug treatment/pre-natal care. Many States proceeded to prosecute pregnant addictss, even with a Public Health warning,

The "Fourth Amendment to the Constitution guarantees, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures": Even when this right conflicts with another's right to life itself. The courts have been extremely reluctant to violate this basic liberal principle as stated in Daniels book. According to Daniels, "Thirty -six cases of forced medical treatment on pregnant non-drug using women have been reported in the courts from twenty-six States". Daniels stated, "Despite this case ruling, thirty-five of the forty-six States that currently have living-will laws, restrict Women's Right to die when they are both severely ill

and pregnant: and twenty states have disqualified without exception pregnant women the right to die, as soon as they become pregnant, even if they have a fully executed living will" (Daniels, 1996).

Legal research shows since 1985 there have been at least 167 documented cases of criminal prosecution of women who used illicit drugs or alcohol during pregnancy (Daniels, 1996). Many organizations have stated publicly they are against this, reason number one, it keeps women away from medical care at a time when they need it most for both themselves and their child. The American Medical Association, The American Public Health Association, The American Society of Addiction Medicine, The March of Dimes and the National Right-to-Life all saw what the courts, legislatures, lawyers and judges don't seem to be able to see. We were creating an epidemic of pregnant moms with no pre-natal care and giving birth to babies who may have issues with drug withdrawal upon birth. All of these medical conditions could have been addressed during pregnancy with appropriate pre-natal care.

Early in this century America began to regard addictions as contrary to its own best interest and drug use had no place in a country that valued action, rationality, and predictability. Kandall states, "Addicts-viewed as enslaved, unproductive, inefficient, escapist and self-centered-were a threat to American society" (Kandall, 1996). With this in mind, "The government took on doing something constructive about the "Drug problem" and felt reporting on women's drug

addiction furthered the National agenda", said Kandall. Ultimately, the vigorous campaign against addictive drugs was political rather than medical. The Foster Bill, introduced in April 1910 by Representative David Foster of Vermont, was specific to problems of women and children with addictions, the bill failed to pass, due to lobbying of the drug manufacturing and pharmacy lobbying groups (Kandall, 1996). According to Kandall, "this led to one of the major legislative anti-drug initiatives of the twentieth century". The Harrison Anti-Narcotic Act, which was passed by the House in 1913 and the Senate in 1914, was signed into law by President Woodrow Wilson in December 1914. The Harrison Act was specific to controlling the flow of Opium into the U.S. market. It created a lot of confusion with Law Enforcers, U.S. Surgeon General, the American Medical Association and the Bureau of Internal Revenue. It came down to the I.R.S. enforcement of the Act by looking at the initial intent of the Act. The initial intent was, "That using narcotics for any purpose other than medical treatment was harmful and should be punished, they continued to say, providing narcotics to addicts solely for addiction maintenance was also illegal" (Kandall, 1996).

President Richard Nixon, in 1971 signed in the Comprehensive Drug Abuse Prevention and Control Act. It included for the first time a schedule or categories of drugs ranked according to their lethal potential, according to Kandall. Around 1971 Odyssey House, opened a number of facilities in the

tri-state area for pregnant women and their children (Kandall, 1996). It was noted that female addicts did not do well in the TC's (Therapeutic Communities) because it was unlikely to achieve success through confrontational, male-oriented treatment models, and making retention rate very low for this population. This was due to the past histories of women who had been physically, sexually and emotionally abused along with other abuses. It was to be discovered that this was one of; The biggest causes/symptoms of why women used substances, majority of the women had histories of severe sexual abuse in addition to paying for their drugs by prostituting themselves. The confrontational approach was not going to work with women. They had been to Hell and back before their addiction took them over! No one had to tear them down, they already had done that to themselves, that is why they needed help not confrontation!

I am now looking at the criminal codes of the State of New Jersey under Chapter 35 which covers Controlled Dangerous Substances which comes under the "Comprehensive Drug Reform Act of 1986" (Gunn). One of the changes provided for the doubling of the term of imprisonment, term of parole eligibility, fine and penalty otherwise applicable to an adult who is convicted of distributing drugs to a minor or to a pregnant female under 2C:35-8. Under Section 1-1, it is the intention of the legislature...to facilitate where feasible the rehabilitation of drug dependent persons so as ultimately to reduce the demand for illegal controlled

dangerous substances and the incidence of drug-related crime. Under this law the word "Deliver" or "Delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled dangerous substances or controlled substance analog, whether or not there is an agency relationship. A Residential Treatment Facility means any facility approved by any County Probation Department for the inpatient treatment and rehabilitation of drug dependent persons. According to section 2C:43-1 Degrees of Crime; Crimes are classified into four degrees; first, second, third, and fourth and if an offense is declared a crime without specification of degree it is of the fourth degree. The degree or maximum sentence for a drug offense prior to June 22, 1987 comes under Title 24 and if none see 2C:43-1b. Under 2C:43-6 it states; the case of a crime in the first degree sentencing will be not less than 10 years and no more than 20 years.

Crime of the First Degree min. 10 years--maximum 20 years
Crime of the Second Degree " 5 " " 10 "
Crime of the Third Degree " 3 " " 5 "
Crime of the Fourth Degree " not to exceed 18 months

All of the above sentencing can have "extended term" added if the court feels it is necessary, according to the crime committed. Example, first degree extend 20 to life, second 10 to 20 years and third 5 to 10 years extension, fourth degree does not apply.

A controlled drug substance or/analog under schedule I, II, III or IV crime of third degree.

A controlled drug substance or/analog under Schedule V is a crime of the fourth degree.

Having possession of more than 50 grams of marijuana etc. is a crime of the fourth degree.

Having possession of 50 grams or less of marijuana etc. is a crime of disorderly conduct.

Under Subtitle 2 Part 1, Chapter 11 Criminal Homicide, a 1971 commentary state: the definition of "human being" set forth adopts the common-law definition which has been the law of New Jersey and which excludes the killing of a fetus from homicide. Change, if appropriate, was thought to be for the Legislature (Gunn). In Part 3, Chapter 24 section 2C:24-4b says a "child" shall mean any person under 16 years of age. Under this section it states; Endangering Welfare of Children A-any person having legal duty for the care of a child of who has assumed responsibility for the care of the child...or who causes the child harm that would make the child an abused or neglected as defined in R.S.9:6-1, R.S.9:6-3 and P.L. 1974 c.119. *1 (C.9:9-8.21) is guilty of a crime of the second degree. The word "child" under the law mean any child alleged to have been abused or neglected (West). Cited in the State of New Jersey, Department of Human Services, Division of Youth and Family Services Policy and Procedures Manual states under section 303 that neglect can be considered when there is a drug addiction in a newborn. It goes on to give the definition of a Perpetrator of Abuse/Neglect is, one who either actively or passively allows non-accidental physical injury or substantial risk of injury to occur... .

As Kendall looks at imprisonment of females, he looks at the stats for drug treatment in prison for women and in 1979 only

5 percent of all inmates received treatment regardless of sex while ten years later only 11 percent were receiving any form of drug treatment. I am unaware if any of these women were pregnant in addition to being addicted. In the same time period the press was looking at maternal drug use and, as in the turn of the century women would again be pointed to: Mothers using drugs were incapable of exercising supervision over their young children (Kandall, 1996). Throughout the 1980's and into the 1990's, there was a growing reflection that drug abuse among women was a complicated, multidimensional problem. Kandall stated, "the appropriation of adequate funding for these women, strongly affected by the surge in crack/cocaine use, disintegrating family structures, homelessness, and HIV - associated diseases, was hampered in large measure by societal indifference, hostility and criminal prosecution. This in turn began to recognize special needs of addicted women and Federal Funds Set Asides for treatment specific to women and pregnant women" (Kandall 1996).

The laws for pregnant women and their fetus(s) have a history of at least 100 years. The earliest fetal-rights case was in 1884 in Northampton, Mass., it was Dietrich v. Northampton. This case set the precedent for the rights of an unborn child for nearly fifty years. The woman had fallen due to a defect in the town highway causing her to miscarry her four month fetus. She sued the town for damages to her pregnancy and lost her case. Oliver Wendell Holmes argued, "the unborn

fetus had been lost before it became a person" (Daniels, 1996). Legal Action, he argued, was dependent upon having the child achieve "some degree of quasi independent life" (Daniels, 1996).

The earliest deviation from this belief came under the legal area of inheritance. An individual could inherit from an estate even if not born at the time of the death of its benefactor (Daniels, 1996). Establishing the existence of limited fetal rights did not happen until 1946, in the case of Bonbrest v. Kotz where a father was allowed to sue for fetal harm during delivery of his child. This was the beginning of the erosion of the Dietrich case.

In 1954 a defendant who was convicted of manslaughter charges for killing her newborn, appealed to the Supreme Court. The case is State of Wyoming v. Osmus judgement had been rendered by the District Court of Natrona County. In the case the phrase "direct cause" was defined. It stated "the active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source". Unless charges are proven beyond a reasonable doubt it is impossible to find a person guilty of a crime, specifically through direct cause.

What was also beginning to surface was the issue of a woman having the right to a legal abortion, without permission of spouse nor would the woman's life have to be in medical

danger. There were a number of cases that were leading up to; the Right to Privacy, a woman's free choice in reproductive rights, women's rights over her own body...but Roe v. Wade, 1977 would become the ice breaker for a woman's right to privacy under the 14th Amendment.

In 1960 it could be seen, further erosion was happening, in Brennan v. Smith where recovery was allowed for a fetus harmed in a car accident before the point of viability (Daniels, 1996). This case clearly stated the rights of a fetus before birth. It was stated; "the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from wrongful act of another" (Daniels, 1996). In this case the court's statement was, "the child has a legal right to begin life with a sound mind and body" (Daniels, 1996). This case would have major influence twenty (20) years down the road. It was additionally stated that the fetus had the right of a child to be protected from negligence or harm while in-utero (Daniels, 1996). This case was to set precedent to protect both the mother and the child from harm not the child being harmed by the mother while in-utero. These decisions would be turned against the mother in a few short decades. As long as fetal rights remained contingent upon live birth and as long as the spirit of the law remained focused on the injustice done to the mother as well as to the fetus, the establishment of fetal rights posed no threat to pregnant women's autonomy (Daniels, 1996).

I will now focus a little on the area of treatment for this population. Having worked in the area of perinatal addictions, I speak with some expertise not of the women but of what I have learned from them. The program I worked at was at Elizabeth General Medical Center, called Perinatal Addictions Treatment Program, it initially had been part of a NIDA Demonstration program called "Perinatal 20". The program was an intensive mandatory five day a week outpatient program for the women and their children. It was funded under the 1988 Anti-Drug Abuse Act. All the programs were to be five year demonstration programs with a complete follow up and with the prospects of having the programs be self-sufficient at the end of the grant. While there I worked with approximately 50 women and their children on an individual and group basis. Of the fifty women, forty-eight had been sexually assaulted by a family member before the age of twelve. Majority of the women I worked with stated they had gone to eleventh grade but most of them had the reading ability of sixth grade. Most lived in homes filled with violence in some form ie: domestic, sexual abuse, physical abuse, sleep deprivation, drug use within the home, and a multitude of domestic problems that society has spent centuries burying by not doing a frontal attack on a major public health problem/crisis. We need to view pregnant addicts in an holistic view as a symptom of an illness in a society which would rather jail than treat! I wonder why? The most cost-effective way is treat not jail! It began in 1990 and of the original women who competed the full twelve

months, a majority of them are still clean and sober and contributing members within their community, working and taking care of their children, who are no longer in the foster care system. The recent 1995 graduates of the program, which consisted of approximately 15 women, are all still clean, sober, have their children and are assets to their communities.

Women who are pregnant and addicted are a tough population to work with but not impossible! Usually they welcome intervention that will make their family's lives better. They know better than anyone else what they are doing to their unborn child. Their problem is called an addiction and it is a disease, according to the medical profession. It controls them not vice versa.

I will give a general profile of a woman who is an addict, pregnant, mother of other children and not always but a high percentage of the time on welfare. In my opinion (don't have stats in front of me) this will generally describe a majority of the women who are prosecuted in the United States under the child abuse laws, of delivering drugs to the fetus in-utero. These are the easiest women to target in the legal system, ignorance of the law is the reason why. They may have lost other children to the Child Welfare System for a variety of reasons. A recent case in N.J. showed the continued direction of the courts, illegal maneuver of a Judge appointing a Pro-Life lawyer for a fetus of a woman who had been incarcerated on drug chargers. This was done

specifically for the fetus with no concern for the woman. Had she been arrested on drug charges without being pregnant she would have caused no great stir, just one more female drug user in jail. Sonya Jackson's only request was to have an abortion, to which she was legally entitled, and had planned to have prior to her arrest. The question becomes, not whether an abortion is legal or illegal but that her rights were violated by the very court system that was supposed to protect her, in addition to the fetus. The Judge was in violation of the laws the same as the defendant was, but his status let him get away with it! The only reason her rights were violated had to do with pregnancy, again invasion of privacy but that the local court feels it is acceptable in this case. The value of the female is only according to her reproductive status, no more. However; if she is arrested for drug use and pregnant, the above or similar scenario is the result.

Individuals who would normally run in the other direction from a woman such as Sonya Jackson, suddenly wanted to assist her and the only reason was because the fetus' needed to be "salvaged/saved" not the woman. Women in certain levels of society are "throw-aways" except when they are "with-child". Upon successful completion of the pregnancy she once more becomes a throw-away! This is truly a sad statement in a country that is supposed to be one of the most advanced in the world.

We are merely undermining the public health of this country by not having readily available treatment slots for women who are pregnant and may or may not have other children. How we attack it will determine how an entire population of women will react. In the criminal justice system, we have minimal pre-natal care or non-existing drug treatment. This continuum allows the on-going medical abuse of fetus/newborns with women shackled to the bed while in labor and delivery. The public health system belief is to assist women in having healthy babies, having access to drug treatment in the jail/prison system, and eventually we will see a decrease in female population in the jail/prison system.

According to the decision by the U.S. Supreme Court in Roe v. Wade, 410 U.S.113 (1977) Right to Privacy was upheld, by the opinion set down by the Justices. Dr. James Hubert Hallford a Licensed Physician in Texas, stated in his complaint to the U.S.S.C. that the statutes in the State of Texas were vague and uncertain, in violation of the Fourteenth Amendment, without Due Process or Law, and that they violated his own and his patients right to privacy in the doctor-patient relationship.

In the case of Angela Carder which began in 1987, the family sued after the death of their daughter and grandchild, who had been court ordered to have C-section. Angela was terminally ill and although she had agreed to a C-section at 28 weeks initially, she refused because it was too early in the pregnancy, making the child high risk and she wanted to

wait as long as possible to deliver the baby, and give it a higher chance of survival. "Forced medical treatment became possible only when the idea arose that women could no longer be trusted to subordinate their own interests to the interest of the fetus." The Carder Case 1987 continued by saying; "While a man's refusal to submit to a medical procedure could be defended as rational, a woman's refusal to submit to a similarly invasive medical procedure for the sake of her fetus could not" (Daniels, 1996). The family sued for violations of their daughter's civil rights and in April of 1990, the U.S. Court of Appeals stated, "forcefully upholding the pregnant woman's rights and arguing that the lower court "erred in subordinating Angela Carder's right to bodily integrity in favor of the state's interest in potential life". It continued on to say, "The right to bodily integrity is so deeply entrenched in the American liberal tradition that when one first comes across cases of forced medical treatment of pregnant women it is difficult to imagine how such actions could be permitted under the law or justified in the public mind" (Daniels, 1996). Body Organs can't be removed for transplant without prior consent of the deceased nor can an individual be forced to give bone marrow to a cousin, if they choose not to (Daniels, 1993). So why do these rights stop at the door of the Uterus?

Despite the Fourth Amendment protection, "for women against invasions of their bodies it continues; and as stated by Kandall (1996)," over the last decade, given the broad

options of legalizing drugs, expanding the role of child protective agencies, and increasing the number of gender-specific treatment programs, society has instead responded by prosecuting women for substance abuse during pregnancy."He goes on to say, "Despite condemnation from the medical, public health and legal organizations by September of 1994 over two hundred women in twenty-four States had been prosecuted for drug-related behavior during pregnancy. At the same time less than 1 percent of Federal Anti-Drug funding was directed at treatment for addicted women, and even less was earmarked for drug treatment during pregnancy (Kandall, 1996).

The Right To Privacy was a new area for the Court to consider in reference to a woman's choice of abortion rights. In Section VII of the opinion of the court it states; "The 3rd reason of the State's interest, ...terms of duty-in protecting prenatal life." This argument for this justification, rests on the theory that a new human life is present from the moment of conception Roe v. Wade, 1977. Although the Constitution does not define "person " in so many words, it does define it in a number of areas such as the Fourteenth, Fifth, Twelfth and Twenty-Second Amendments. In nearly all of these instances, the use of the word is such that it has application only postnatally, none indicates it has any pre-natal application Roe v. Wade, 1977. The state of Texas argues that a fetus is entitled to Fourteenth Amendment protection as a person, as stated: "...Nor shall

any State deprive any person of life, liberty, or property, without due process of law". However, not in Texas nor in any other State are all abortions prohibited. So if a fetus is a person who is not to be deprived of life without due process of law, (see previous definition), and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's condition? Roe V. Wade. 1977. Justice Douglas concurred by saying: "The Ninth Amendment doesn't create Federally enforceable Rights but a catalogue of the Rights retained by the people includes...and many of these Rights come within the meaning of the term "liberty" as used in the Fourteenth Amendment". The First is autonomous control over the development and expression of one's intellect, interests, tastes, and personality. Second is freedom of choice in the basic decision's of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children. And third, freedom to care for one's health, and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf. The Court's belief is, where certain "fundamental rights" are involved has held regulation limiting these right may be justified only by a "compelling state interest" and that legislative enactments must be narrowly drawn to express only legitimate state interests at stake...(Stone et.al.,1996).

But somehow, the tide slowly began to turn on women who were pregnant and addicted, they were to become the new "in" item

with the courts, legal system, treatment centers and the general public. This began in the early 1980's as discussed earlier in this paper. Nothing is more disgusting than a pregnant drug using woman. If she wouldn't give it up for herself at least she should have the decency to stop using until she has her baby. The public's belief was, she didn't care not just for herself but for her unborn child. The belief that incarceration was the answer began to surface. If she wouldn't/couldn't do it on her own then the legal system had to step in and take over. Concern surfaced for the fetus not for the woman. Divorcing the fetus from the mother began to take on a life of its own in the early 1970's.

The State of Florida in 1991 charged Jennifer Clarice Johnson with a violation of section 893.13(1) (c) (1) of a Florida Statute (1989) permitting criminal prosecution of a woman ingesting a controlled substance just prior to birth but before the umbilical cord was severed. The case Johnson V. State, 1991, shows the legislative history and intent was not to use the word "delivery" in their context of criminally prosecuting mother for delivery of controlled substance to a minor by way of the umbilical cord. The primary question in this case came down to was section 893.13(1)(c)1. intended to be used by the legislature to apply to the birthing process. They were using the time lapse between the actual birth and the cutting of the umbilical cord to make the case of delivery of drugs to the

now, newborn, no longer a fetus. In 1987 there was a bill proposed to include physical dependency of a newborn infant upon certain controlled drugs Johnson v. State, 1992. Concern among the legislatures was, that it would induce prosecution of women who gave birth to drug dependent infants so it was amended to provide that no parent of a drug-dependent newborn shall be subject to criminal investigation solely on the basis of the infant's drug dependency Johnson v. State, 1992. In Michigan, People V. Bremer, 1991, charged the defendant with delivery of cocaine to her newborn after toxicology test on both her and the child were positive for drugs. The Circuit Court concluded that the Michigan Legislature never intended this form of prosecution under the delivery statute of drugs, to interpret this section to cover ingestion of cocaine by a pregnant woman would be a radical intrusion upon existing law Johnson v. State, 1992. Michigan also believed it was up to the legislatures not the courts to change the laws on transfer of drugs in-utero. In Johnson, the case of State v. Gray, 1990, from Ohio agreed with Michigan and Florida. Advocates, at this time, wanted to increase the legal rights of the fetus, in answer to Brennan v. Smith. They believed women were having injustices done to them due to employers, violence of muggers, abusive husbands, drunken drivers etc. The theory to protect both, in my opinion was excellent, but it backfired in later years. They could not have had any concept on the enormity and "life of its own" that it took on in a few short years, not for the protection of a woman and her fetus, but for the

fetus alone.

In the Harvard Law Journal, Jeffrey Parness wrote, "Crimes against the Unborn: Protecting and Respecting the Potentiality of Human Life". His belief was, since it was possible now for a fetus to live outside the womb earlier and earlier, then the "born alive" rule was outmoded (Daniels, 1996). He saw the answer: to create the "Peticide" laws, this would protect the women's right to compensation and the legal integrity of "pre-born" life (Daniels, 1996). This form of thinking and acting-upon began to create new laws and pressures within the legal system.

In 1984 in Commonwealth v. Cass, exactly 100 years after the original case of Dietrich, Massachusetts again set precedent with this case. It affirmed the personhood of a fetus before birth. A fetus who died, as a result of an accident and/or injury to the mother, was recognized by the court. As recently as the last few years cases have been ruled that the fetus was a person when involved in car accidents. (see attached)

While the "live birth" rule had now been discarded, in it's place were new "feticide laws" which could and would be turned against women by the National Abortion Rights Action League and the legal system. This opened the door to legally holding women responsible, for what up until now, had only been held responsible if a third party had caused the damage/death of a fetus. The fetus was now going to be given

an independent life within the legal system, in the year 1984.

In People v. Hardy, 1991 a woman was charged with delivery of less than 50 grams of mixture cocaine to her baby through the umbilical cord. The Circuit Court denied her suppression of use of urine tested following delivery but the Court of Appeals held this was not legislative intent in the law and reversed the decision. She had been charged with second degree child abuse dur to her ingestion of cocaine.
As stated in People v. Hardy the primary goal of a court when interpreting statutes is to ascertain and give effect to the intent of the Legislature. It continues with: a statute must be construed in light of the purpose to be accomplished by its enactment.

People V. Ham-Ying, 142 Mich. App. 831,835,371 N.W.2d 874 (1985). Judge Reilly in his concurring statement says a position for "legal entity" should be rejected as in Blacks Law Dictionary (5th Ed.) states a Legal Existence is: "an entity, other than a natural person, who has sufficient existence in legal contemplation that it can function legally, be sued or sue and make decisions through agents as in the case of corporations". It further states, under Roe v. Wade, 1977 although an unborn fetus is considered to be a "potential human being", entitled to protection, it is not afforded the full rights and obligations of a person, an individual or a legal entity. The prosecutor in this case

contends that the strong enforcement of our drug laws is the first step in protecting a newborn from its mother's selfish and destructive behavior, People v. Hardy, 1991. However, that argument ignores the underlying problem of addiction and the compulsive behavior it generates and how this behavior was started. The State of Ohio in, Ohio v. Gray, 1991. prosecuted a woman for giving birth to a child "addicted" to cocaine. The Court of Appeals reversed that decision and stated a parent may not be prosecuted for child endangerment for substance abuse occurring before the birth of the child. Important Holding, in this case is the reinforcement by the state, their right to not prosecute a drug abusing mother who gives birth to a child within hours of using controlled substances. The compelling interest of the State doesn't overrule the privacy rights of a woman, Roe v. Wade, 1977. Most of the Amicus Briefs submitted for this case were negative to the case for the woman, especially one that stated, "any person of ordinary intelligence has to know that in-utero exposure to cocaine poses an unacceptable risk to the unborn child".

This was also the time when the courts were beginning to look at Feticide Laws, brought to their attention by Jeffrey Paress. These two areas were on the same track but were to accomplish very different end results. Each one meant well but both would entirely fail, the very population they were trying to protect. Fetal-Rights or Feticide Laws seem to be the "hot" word for prosecuting pregnant addicts. Prosecution

has been done in both civil and criminal court, depending on state of residence and how the laws pertaining to drug use and sales are enforced.

The case law precedence has been in the direction of: not accepting the fetus as a person. The State of South Carolina has done its prosecution differently as shown in the recent case of Whitner v. State of South Carolina, 1996. They hold that under their statute in the South Carolina Children's Code, S.C. Code Ann. *20-7-50 (1985). We hold the word "child" as used in that statute includes viable fetuses. The question for this Court, therefore, is whether a viable fetus is a "person" for purposes of the Children's Code in Whitner v. State, 1996. When we look at pregnant addicts, it depends from what system we are looking at them.

Criminal justice system wants to lock her up with a sentence that meets the criteria from previously stated New Jersey Statues, and deliver the baby while shackled to a bed, making her feel and look like an animal. The child is then placed in foster care upon discharge from the hospital and minimal or no contact is made/allowed between mother and baby. The mother serves out her sentence and is released. What she has learned is, jail and prison may or may not have a treatment program for addicts, her child is gone and there is little help for her on the outside, once removed from the legal system. If she continues in her addiction, the next pregnancy and delivery will not take place in a hospital or clinic, she will deliver anywhere else but not within the

"system". She has learned her lesson. What the Criminal Justice System has failed to see is: Without treatment the cycle will continue! They want her punished for child abuse. They want to do whatever is necessary to protect the fetus, ignoring the woman. The justice system seems to feel that divorcing the fetus from the mother, prioritizes the fetus and now we can throw away the mother.

The treatment field wants to enter the woman into treatment but not until after she delivers her baby. It is too complicated to treat a woman who is pregnant, a high liability. After delivery majority of treatment programs, due to lack of funding, can only accommodate the woman but not her child(ren) in either residential or intensive outpatient programs. The treatment field has, in the past, been male based, which began with Alcoholics Anonymous in the 1930's. This trend has continued to some major extent into today. I mention this because it reinforces that a man who has an addiction is a "man who needs help" but a woman who has an addiction is a "low-level person". Both have same disease but viewed very differently in society and in the legal system. The criminal justice system can't guarantee her to be drug-free while incarcerated as drugs are as readily available in jail as out of jail. The article attached, shows the prison system has as much drugs as anywhere else.

Drug use among women is not new nor is drug use among pregnant women. The only difference now is, we are paying

more attention to it and the largest scope of women to be affected are those specific to the lower socio-economic class. All areas of the legal, medical and treatment systems have stated; that treatment seems to be the answer, but no one has bothered, from the legislature on down to make funding available for treatment of pregnant women who already have families and no money. These are the women who are least likely to fight back or have the support to fight a system that is generally run by white males in the middle and upper classes of this society. It must be remembered that, we live in a paternalistic society and it is doing today what it has done for the hundreds of years, run women's lives and have control their bodies.

All of the outreach of the Public Health Organizations in the United States will be wasted if we continue on the road of prosecuting and incarcerating pregnant, addicts. There are statistics to prove that treatment works. I stated clearly in the early part of this paper that long term intensive in/out patient programs can and do work but without appropriate funding they can't exist.

I find it very hard to believe that the cost of incarcerating women for 3-10 years, the final cost of the foster care system taking care of her child(ren), the possible future cost of the juvenile justice system which has a high causality when they reach adolescence can equal or be justified compared to the cost of a long-term eighteen month to two year treatment program for a woman and her children.

The benefits and ultimate goals will far outweigh prosecution of this population. This way, end results can be compared to the program I worked in and has been proven to be effective with both women and children.

It is truly shameful that our political arena decides how to deal with the "hot issue" of the day and the Criminal Justice System is the quickest and easiest way to do it that shows a quick return to the general public which wants a "quick fix" to a multi-generational abscess in society, which effects all socio-economic levels but seems to be focusing only on lower socio-economic which statistics prove out. We deal only with the symptom never the underlying cause, therefore the cycle continues, endlessly. The middle and upper socio-economic class have ways and means to keep out of the criminal justice system. They can plea bargain, go to a Rehab for thirty days, hire good defense lawyers. Urine Drug Screens are not the norm in private doctors offices or in private hospitals. So, why are we, as society, so quick to judge people when drinking and drugging takes place every day behind closed doors in all economic neighborhoods, legally and illegally? We need to look within ourselves before looking outward! A very difficult, if not impossible, task for many of us!

In summarizing what I have written, it is plain that the United States Supreme Court will have to be the Court to decide the ultimate decision on this life-threatening issue for both mother an child. Relying on established precedent in

the Supreme Court of Canada and the English Legal System, the panel found that a fetus is not a person and cannot be made a ward of the court or legally treated and an individual separate from its mother according to the Court of Appeals in Manitoba, Canada. Every case I have read and reported on has stated clearly that, the original intent of the law was not to prosecute pregnant addicts. Why then does the legal system continue to arrest women who have given birth or are pregnant and have an addiction problem? The only possible direction I can see the courts and ultimately case law going into: is mandating long-term substance abuse treatment for women and their child(ren). There are many working models that have had good success rates with this population, they can be accessed by the treatment field professionals and would be much more beneficial to all involved than jail and the foster care system. I don't foresee, the Supreme Court acknowledging the fetus as a "person". At this time doing this would clearly cause great concern on local, State and Federal level of cases pending, in addition to all previous cases decided already.

The Supreme Court will clearly have to look at Whitner v. State of South Carolina and decide if "viable fetus" which comes under the word "child" in the "Children's Code", making it a "person" is constitutionally correct? They need to look at the word "viable", which must be decided by the Medical Association. This is the only state to have this in their code. With more and more State of the Art medical

equipment etc., it becomes obvious that viable can be defined at an earlier and earlier stage of pregnancy. The next question is, who determines when a stage is viable in pregnancy? Will this be done by General Practitioners, Internists, Ob/Gyn, or who? Or possibly decided by neo-natalogists or pediatricians? The more in-depth you get, the more complicated it will become. If a woman's and fetuses' life is on the line, jail or not to jail, then we better make sure all "bases" are covered and she has the best legal defense for her benefit. Is each pregnancy viable at the exact same time or does health and circumstances vary and will this be considered? Will this be for each pregnancy or will it have to change in each case presented? It is obvious we have no set answers nor are we likely to have any in the near future. What is clear is, what the court does ultimately will open up a large can of worms we may not want to deal with. Are we then moving away from Stare Decisis of Roe v. Wade in the right to privacy vs. fetus viability?

As an aside, the new Welfare revamping will create major havoc if states are allowed to prosecute addicted pregnant women. If they are made aware of what will happen if pregnant and using, what the new laws are meant to do will not work. Women will go underground, drop off welfare roles and in the process create a whole new sub-set of problems. Treatment must be number one over school or job training for without treatment the other rules will not be followed. The answer is simply stated by Kandall in Substance and Shadow in 1996:

at issue in the early 1980's were the involuntary nature of drug addiction; Supreme Court precedents condemning the criminalization of addiction; the unique characteristics of addiction in women; the discriminatory impact of this policy on minority women of lower socio-economic status because of biased testing and reporting policies; the acknowledged futility of jailing pregnant addicts for either treatment or deterrence; and the failure to acknowledge and address the complex social matrix, including poverty, physical and sexual abuse, and incest, that was known to influence addictive behavior. History of the legal system, nationally and internationally, has shown a strong support of "fetus not a person". The legal system then would fare much better by following what the majority of professionals in the area of women and pregnancy have stated, treatment not jail is the answer. Considering what I am strongly suggesting, I am by no means naive, but feel that the cost of all the above would be better spent in treatment, jail, foster care etc. mandated through the courts, if necessary. Drug/alcohol addiction is a disease. Using drugs and alcohol is never condoned at any time and especially during pregnancy. But if you have a disease, which needs to be assessed by professionals, then you need treatment not incarceration or if incarcerated then treatment must be provided/mandated within the prison system. This treatment must be provided through a Certified, Licensed, Addictions Program. Present statistics on model programs will prove fiscally it is more responsive to treat than jail.

In New Jersey under the Division of Youth and Family Services nowhere is there reference to a "fetus" as a child as in the criminal law within the state, at this time. However within N.J. they have charged women with aggravated manslaughter and child endangerment . However, the Judge when dismissing the charges said, "The New Jersey legislature did not intend for criminal statues to apply to prenatal conduct."

Without this direction we will continue to separate the family and the legal system will assist in continuing the cycle of abuse. Quick fixes will not work in this area!

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in child abuse and neglect protective services approved by the DHFS. The DHFS must monitor compliance with this provision according to rules promulgated by the DHFS.

The Substitute Amendment expands the above provisions to also apply to unborn child abuse.

B. FUNDING

Under the Substitute Amendment, the purposes for which the DHFS must distribute Community Aids funds to eligible counties include the provision of: (1) services related to unborn child abuse, including unborn child abuse prevention, investigation and treatment; and (2) services to expectant mothers.

In addition, under the Substitute Amendment, funds received from the Federal Child Welfare Block Grant may be used by counties for unborn child abuse independent investigations.

C. CONFIDENTIALITY OF MENTAL HEALTH RECORDS

Current law provides that mental health treatment records are confidential, except under certain specified exceptions. The Substitute Amendment provides that these provisions of current law also apply to adult expectant mothers who are receiving AODA treatment under the Children's Code. The Substitute Amendment also permits these records to be disclosed to the unborn child's GAL.

D. DRUG TESTING INFANTS AND EXPECTANT MOTHERS

Under current law, any hospital employe who provides health care, social worker or juvenile court intake worker may refer an infant to a physician for testing of the infant's bodily fluids for controlled substances or controlled substance analogs if the hospital employe, social worker or intake worker suspects that the infant has controlled substances or controlled substance analogs in the infant's bodily fluids because of the mother's use of controlled substances or controlled substance analogs while she was pregnant with the infant. The physician may test the infant to ascertain whether or not the infant has controlled substances or controlled substance analogs in his or her bodily fluids, if the physician determines: (1) that there is a serious risk that there are controlled substances or controlled substance analogs in the infant's bodily fluids because of the mother's use of such substances while she was pregnant; and (2) that the health of the infant may be adversely affected by the controlled substances.

If the results of the test indicate that the infant does have controlled substances or controlled substance analogs in his or her bodily fluids, the physician must report the results to the county department of human or social services. When the county department receives the report, it must offer to provide appropriate services and treatment to the infant and the mother or to have those services provided.

The Substitute Amendment modifies current law so that the above provisions permit testing of an expectant mother if a physician determines that there is a serious risk that there are

controlled substances or controlled substance analogs in the mother's bodily fluids because of the use of such substances by the expectant mother while she is pregnant.

If you would like any further information on this subject, please feel free to contact me at the Legislative Council Staff offices.

AS:all:wu:ksm;wu

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701–2536
Telephone (608) 266–1304
Fax (608) 266–3830

DATE: October 16, 1997

TO: REPRESENTATIVE BONNIE LADWIG

FROM: Anne Sappenfield, Staff Attorney

SUBJECT: Description of Assembly Substitute Amendment 1 to 1997 Assembly Bill 463, Relating to Unborn Children Who Are at Substantial Risk of Serious Physical Injury Due to the Habitual Lack of Self-Control of Their Expectant Mothers in the Use of Alcohol Beverages, Controlled Substances or Controlled Substance Analogs, Exhibited to a Severe Degree

This memorandum, prepared at your request, describes Assembly Substitute Amendment 1 (hereinafter, "the Substitute Amendment") to 1997 Assembly Bill 463, relating to unborn children who are at substantial risk of serious physical injury due to the habitual lack of self-control of their expectant mothers in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree. Assembly Bill 463 was introduced on July 31, 1997 by you and others; cosponsored by Senator Joanne Huelsman and others. The Bill has been referred to the Assembly Committee on Children and Families, which has scheduled a public hearing on the Bill for ***October 30, 1997***. Assembly Bill 463 is a companion bill to 1997 Senate Bill 264 which has been referred to the Senate Committee on Judiciary, Campaign Finance Reform and Consumer Affairs. The Substitute Amendment was offered by you on October 14, 1997.

BACKGROUND

Under current law, the Children's Code [ch. 48, Stats.] grants the juvenile court jurisdiction over children who are alleged to be in need of protection or services (CHIPS). These children include children who are abused or neglected. [See s. 48.13, Stats.]

In a recent Wisconsin Supreme Court case, the Supreme Court held that the Children's Code does not grant the juvenile court jurisdiction over unborn children who are alleged to be in need of protection or services because the word "child" as defined in the Children's Code, although ambiguous, means only children who have been born. It should be noted that the Court stated in its opinion:

> We stress at the outset of our analysis that this case is not about the propriety or morality of the petitioner's conduct. It is also not about her constitutional right to reproductive choice guaranteed under *Roe v. Wade*. Rather, this case is one of statutory construction. The issue presented is whether a viable fetus is included in the definition of "child" provided in Wis. Stats. s. 48.02. [*Angela M.W. v. Kruzicki*, No. 95-2480-W, 1997 Wis. LEXIS 39, at *11 (1997) (citation omitted).]

Although the Court noted that it has held that a viable fetus is a "person" under certain statutes, the Court found that "person" or "child" does not include a viable fetus under s. 48.02 (2), Stats., because: (1) the legislative history is silent regarding whether the Legislature intended to include viable fetuses in the definition of "child"; and (2) the provisions of the Children's Code relating to taking a child into custody, providing parental notification and releasing a child from custody would "require absurd results" in the definition of "child" included unborn children. [*Id.* at *15 and *20.] Finally, the Court stated that because "the confinement of a pregnant woman for the benefit of her fetus is a decision bristling with important social policy issues," the Legislature is in a better position to study and address the issue. [*Id.* at *30.]

DESCRIPTION OF THE SUBSTITUTE AMENDMENT

The Substitute Amendment modifies Senate Bill 264 as follows:

1. Clarifies that the Bill applies to child expectant mothers as well as adult expectant mothers. Under the Substitute Amendment, a child expectant mother is generally subject to the same procedures in the Children's Code as a child in need of protection or services.

2. Creates a definition of "abuse" which is specific to unborn children.

3. Permits a juvenile court to assert ch. 51, Stats., jurisdiction over adult expectant mothers for alcohol or other drug abuse (AODA) issues only. Adult expectant mothers who have mental health or developmental disability issues are not subject to juvenile court jurisdiction but may be subject to proceedings under ch. 51, Stats.

4. Permits an adult expectant mother to be held in custody in a community-based residential facility (CBRF) or placed in a CBRF as a disposition.

5. Deletes proposed references to unborn children in provisions of current law relating to the responsibilities of the Child Abuse and Neglect and Prevention Board (also known as the Children's Trust Fund).

6. Requires a petition to state if an unborn child may be an Indian child when born and requires notice to the tribe with which the child may be affiliated when born. The Substitute Amendment also allows the juvenile court to permit the tribe to intervene in an unborn child in need of protection or services (UCHIPS) proceeding.

7. Permits the juvenile court to impose any disposition which may be imposed on a child who has been found to be in need of protection or services on an unborn child when born.

8. Clarifies that a dispositional order for an unborn child may be extended after the child is born.

9. Expands the ground for involuntary termination of parental rights (TPR) relating to placement of the child outside of the home for six months or longer to include any period during which the unborn child was placed outside of the home.

10. Includes expectant mothers who receive AODA treatment in provisions of current law relating to confidentiality of mental health records.

A. PROCEEDINGS RELATING TO UNBORN CHILDREN UNDER THE CHILDREN'S CODE

The Substitute Amendment amends provisions of the Children's Code to apply them to unborn children who are in need of protection or services and their mothers. The Substitute Amendment defines "unborn child" as an unborn human who is at that stage of fetal development when there is reasonable likelihood of sustained survival outside the womb, with or without artificial support.

1. Purpose of the Children's Code

The Substitute Amendment amends the legislative purpose provisions of the Children's Code to provide that, in construing the code, the best interests of the child ***or unborn child*** must always be of paramount consideration. The Substitute Amendment amends legislative purposes under current law to provide that the code shall be liberally construed to effectuate the legislative purposes of:

a. While recognizing that the paramount goal of the code is to protect children ***and unborn children***, to preserve the family, whenever appropriate, by strengthening family life by assisting parents ***and the expectant mothers of unborn children***, whenever appropriate, in fulfilling their responsibilities as parents ***or expectant parents***. The legislative purpose of the code is further amended to provide that the courts and agencies responsible for child welfare should assist parents ***and the expectant mothers of unborn children*** in changing any circumstances in the home which might harm the child ***or unborn child***, which may require the child to be placed outside the home ***or which may require the expectant mother to be taken into custody.***

b. To encourage innovative and effective prevention, intervention and treatment approaches, including collaborative community efforts and the use of community-based programs, as significant strategies in planning and implementing legislative, executive and local government policies and programs relating to children and their families and substitute families ***and to unborn children and their expectant mothers.***

c. To divert children ***and unborn children*** from formal proceedings under the code to the extent that this is consistent with protection of children, ***unborn children*** and public safety.

In addition, the Substitute Amendment creates the following legislative purposes of the Children's Code:

a. To recognize that unborn children have certain basic needs which must be provided for, including the need to develop physically to their potential and the need to be free from physical harm due to the habitual lack of self-control of their expectant mothers in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree. It is further recognized that, when an expectant mother of an unborn child suffers from a habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, in order to ensure that the needs of the unborn child, as described in this paragraph, are provided for, the court may determine that it is in the best interests of the unborn child for the expectant mother to be ordered to receive treatment, including inpatient treatment, for that habitual lack of self-control, consistent with any applicable law relating to the rights of the expectant mother.

b. To ensure that unborn children are protected against the harmful effects resulting from the habitual lack of self-control of their expectant mothers in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

2. Juvenile Court Jurisdiction Over Unborn Children in Need of Protection or Services

Under the Substitute Amendment, the juvenile court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services, which can be ordered by the court, whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that 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 unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control. Under the Substitute Amendment, the court also has exclusive original jurisdiction over the expectant mother of such an unborn child.

3. Taking an Expectant Mother Into Custody

The Substitute Amendment distinguishes between child expectant mothers and adult expectant mothers regarding taking expectant mothers into custody.

Under current law, a child may be taken into custody under any of the following:

a. A warrant.

b. A *capias* issued by a judge.

c. An order of the judge if made upon a showing satisfactory to the judge that the welfare of the child demands that the child be immediately removed from his or her present custody.

d. Circumstances in which a law enforcement officer believes on reasonable grounds that certain conditions, such as the child has run away or is suffering from illness or injury or is in immediate danger from his or her surroundings, exist.

Under current law, when a child is taken into physical custody, the person taking the child into custody must immediately attempt to notify the parent, guardian and legal custodian of the child by the most practical means.

The Substitute Amendment expands current law to provide that a child may also be taken into custody by an order of the judge if made upon a showing satisfactory to the judge that the child is an expectant mother and that due to the child expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, there is substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the child expectant mother is taken into custody.

In addition, a child expectant mother may be taken into custody under circumstances in which a law enforcement officer believes on reasonable grounds that the child is an expectant mother and there is substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered due to the child expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, unless the child expectant mother is taken into custody.

The Substitute Amendment provides that an ***adult expectant mother*** may be taken into custody under any of the following:

a. A warrant.

b. A *capias* issued by a judge.

c. An order of the judge if made upon a showing satisfactory to the judge that due to the adult expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, there is substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the adult expectant mother is taken into custody.

d. Circumstances in which a law enforcement officer believes on reasonable grounds that any of the following conditions exists:

(1) A *capias* or warrant for the apprehension of the adult expectant mother has been issued in this state or in another state.

(2) There is substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered due to the adult expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, unless the adult expectant mother is taken into custody.

(3) The adult expectant mother has violated the conditions of an order releasing her from custody with restrictions or the conditions of an order for temporary physical custody by an intake worker.

The Substitute Amendment provides that when an adult expectant mother of an unborn child is taken into physical custody, the person taking the mother into custody must immediately attempt to notify an adult relative or friend of the adult expectant mother by the most practical means.

The Substitute Amendment specifies that, as under current law, taking into custody is not an arrest except for the purpose of determining whether the taking into custody or the obtaining of any evidence is lawful.

4. Releasing an Expectant Mother From Custody

Generally, the current provisions relating to releasing a child who is alleged to be CHIPS from custody apply to child expectant mothers under the Substitute Amendment. As provided under current law, a person taking a child expectant mother into custody must make every effort to release the child immediately to the child's parent, guardian or legal custodian. If the child's parent, guardian or legal custodian is unavailable, unwilling or unable to provide supervision for the child, the person who took the child into custody may release the child to a responsible adult after counseling or warning the child as may be appropriate. If the child is 15 years old or older, the person who took the child into custody may release the child without immediate adult supervision after counseling or warning the child as may be appropriate. If the child expectant mother is a runaway, the person who took her into custody may release her to a runaway home.

Under the Substitute Amendment, a person taking an adult expectant mother into custody must make every effort to release her to an adult relative or friend after counseling or warning her as may be appropriate. If an adult relative or friend is unavailable, unwilling or unable to accept the release of the adult expectant mother, the person taking the adult expectant mother into custody may release the adult expectant mother under her own supervision after counseling or warning her as may be appropriate.

Current law includes provisions for the placement of children alleged to be in need of protection or services who need specialized services. These provisions also apply to expectant mothers under the Substitute Amendment. Specifically, if the expectant mother is believed to be mentally ill, drug dependent or developmentally disabled, and exhibits conduct which constitutes a substantial probability of physical harm to herself or to others, or a very substantial probability of physical impairment or injury to herself due to her impaired judgment, and the standards under s. 51.15, Stats., for emergency detention are met, the intake worker or other appropriate person must proceed under ch. 51, Stats. (the Mental Health Act). Also, if the expectant mother is believed to be an intoxicated person who has threatened, attempted or inflicted physical harm on herself or on another and is likely to inflict such physical harm unless committed, or is incapacitated by alcohol, the person taking the expectant mother into custody, the intake worker or other appropriate person must proceed under s. 51.45 (11), Stats., relating to treatment and services for intoxicated persons and others incapacitated by alcohol.

The Substitute Amendment creates an additional provision regarding circumstances in which either: (a) the unborn child or expectant mother is believed to be suffering from a serious physical condition which requires either prompt diagnosis or prompt medical treatment; or (b) there is substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered due to the expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree. In either of those situations, the person taking the expectant mother into physical custody, the intake worker or other appropriate person must deliver the expectant mother to a hospital or a physician's office.

Consistent with current law, if the expectant mother is held in custody, an intake worker must also review the need to keep the expectant mother in custody and must make every effort to release the expectant mother from custody. In addition, an intake worker must interview, unless impossible, the expectant mother. If this is impossible, the intake worker must interview a child expectant mother's parent or a responsible adult or an adult expectant mother's adult relative or friend.

If the intake worker decides to hold the expectant mother in custody, the intake worker must notify the child expectant mother's parent, guardian and legal custodian, the adult expectant mother and the unborn child by the unborn child's guardian ad litem (GAL) of the reasons for holding the expectant mother in custody and of the expectant mother's whereabouts unless there is reason to believe that notice would present imminent danger to the expectant mother.

5. Criteria for Holding an Expectant Mother in Custody

Under current law, a child may be held in custody if the intake worker determines that there is probable cause to believe that the child is within the jurisdiction of the court and one of the following conditions exists:

a. Probable cause exists to believe that if the child is not held, he or she will cause injury to himself or herself or be subject to injury by others.

b. Probable cause exists to believe that the parent, guardian or legal custodian of the child or other responsible adult 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.

c. Probable cause exists to believe that the child will run away or be taken away so as to be unavailable for proceedings of the court or its officers.

The above provisions would also apply to a child expectant mother who met any of the criteria described.

The Substitute Amendment creates an additional criteria which provides that a child or adult expectant mother may be held in physical custody if probable cause exists to believe that if the expectant mother is not held, 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 beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

6. Places Where an Expectant Mother May Be Held in Custody

As provided under current law for children alleged to be in need of protection or services, a ***child expectant mother*** who is held in physical custody may be held in any of the following places:

a. The home of a parent or guardian.

b. The home of a relative.

c. A licensed foster home or a licensed treatment foster home.

d. A licensed group home.

e. A nonsecure facility operated by a licensed child welfare agency.

f. A licensed private or public shelter care facility.

g. The home of a person not a relative, if the placement does not exceed 30 days, though the placement may be extended for an additional 30 days for cause by the court, and if the person has not had a foster home or treatment foster home license refused, revoked or suspended within the last two years.

h. A hospital or a physician's office if the child is an expectant mother and the unborn child or child expectant mother is believed to be suffering from a serious physical condition which requires either prompt diagnosis or prompt medical treatment or in which there is substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered due to the child expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

i. A hospital which is approved as a detention facility, an approved public treatment facility, a center for the developmentally disabled, a state treatment facility or an approved private treatment facility if the child expectant mother is held due to mental illness, drug dependence or developmental disability.

j. An approved public treatment facility if the child expectant mother is held due to being an intoxicated person.

k. A county children's home (Milwaukee County only).

As provided under current law, a child expectant mother may also be held in a secure detention facility if: (a) the child expectant mother consents in writing to being held in order to protect herself from an imminent physical threat from another and such secure custody is

ordered by the judge in a protective order; or (b) probable cause exists to believe that the child expectant mother, having been placed in nonsecure custody by an intake worker or by the judge or juvenile court commissioner at the detention hearing, has run away or committed a delinquent act and no other suitable alternative exists.

An ***adult expectant mother*** of an unborn child held in physical custody may be held in any of the following places:

a. The home of an adult relative or friend of the adult expectant mother.

b. A licensed CBRF.

c. A hospital or a physician's office if the unborn child or adult expectant mother is believed to be suffering from a serious physical condition which requires either prompt diagnosis or prompt medical treatment or in which there is substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered due to the adult expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

d. A hospital which is approved as a detention facility, an approved public treatment facility, a center for the developmentally disabled, a state treatment facility or an approved private treatment facility if the adult expectant mother is held due to mental illness, drug dependence or developmental disability.

e. An approved public treatment facility if the adult expectant mother is held due to being an intoxicated person.

An adult expectant mother may not be held in secure custody on the basis that her unborn child is in need of protection or services.

7. Hearing for Holding an Expectant Mother in Custody

Consistent with current law, if an expectant mother who has been taken into custody is not released, as described above, a hearing to determine whether the expectant mother will continue to be held in custody must be conducted by the judge or juvenile court commissioner within 48 hours of the time the decision to hold the expectant mother was made, excluding Saturdays, Sundays and legal holidays. By the time of the hearing, a UCHIPS petition must be filed.

If no hearing has been held within 48 hours, excluding Saturdays, Sundays and legal holidays, or if no petition has been filed at the time of the hearing, the expectant mother must be released except as provided below.

If no petition has been filed by the time of the hearing, an expectant mother may be held in custody with approval of the judge or juvenile court commissioner for an additional 72 hours from the time of the hearing, excluding Saturdays, Sundays and legal holidays, only if, as a result of facts brought forth at the hearing, the judge or juvenile court commissioner determines

that probable cause exists to believe that there is a substantial risk that if the expectant mother is not held, 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 beverages, controlled substances or controlled substance analogs, exhibited to a severe degree. An extension may also be granted for the holding of a child expectant mother if, as a result of facts brought forth at the hearing, the judge or juvenile court commissioner determines that probable cause exists to believe that the expectant mother is an imminent danger to herself or to others, or that probable cause exists to believe that the parent, guardian or legal custodian of the child expectant mother or other responsible adult is neglecting, refusing or unable to provide adequate supervision and care.

An extension may be granted only once for any petition. In the event of failure to file a petition within the extension period provided for, as described above, the judge or juvenile court commissioner must order the expectant mother's immediate release from custody.

In the case of a child expectant mother, her parent, guardian or legal custodian may waive the detention hearing. Agreement in writing of the child expectant mother is required if she is over 12. An adult expectant mother may waive her detention hearing. However, after any waiver, a hearing must be granted at the request of any interested party.

If the expectant mother is not represented by counsel at the hearing and is continued in custody as a result of the hearing, she may request through counsel subsequently appointed or retained or through a GAL that the order to hold her in custody be reheard. If the request is made, a rehearing must take place as soon as possible. Also, any order to hold the expectant mother in custody is subject to rehearing for good cause, whether or not counsel was present.

If the judge or juvenile court commissioner finds that a ***child expectant mother*** should be continued in custody, he or she must enter one of the following orders:

a. Place the child expectant mother with a parent, guardian, legal custodian or other responsible person. The judge or juvenile court commissioner may also impose reasonable restrictions on the child expectant mother's travel, association with other persons or places of abode during the period of placement, including a condition requiring the child expectant mother to return to other custody as requested or may subject the child expectant mother to the supervision of an agency agreeing to supervise the child expectant mother. Reasonable restrictions may also be placed upon the conduct of the parent, guardian, legal custodian or other responsible person which may be necessary to ensure the safety of the child expectant mother.

b. Order the child expectant mother to be held in physical custody.

If the judge or juvenile court commissioner finds that an ***adult expectant mother*** should be continued in custody, he or she must enter one of the following orders:

a. Release the adult expectant mother and impose reasonable restrictions of the adult expectant mother's travel, association with other persons or places of abode during the period of the order, including a condition requiring the adult expectant mother to return to custody as requested. The judge or juvenile court commissioner may also subject the adult expectant

mother to the supervision of an agency agreeing to supervise her. Reasonable restrictions may also be placed upon the conduct of the adult expectant mother which may be necessary to ensure the safety of the unborn child and of the child when born.

b. Order the adult expectant mother to be held in physical custody.

Any order placing a child expectant mother with a parent, guardian, legal custodian or other responsible person with conditions and any order imposing restrictions on an adult expectant mother may at any time be amended, with notice, so as to place the expectant mother in another form of custody for failure to conform to the conditions originally imposed.

8. Right of Expectant Mother to Counsel

The Substitute Amendment provides that when an unborn child is alleged to be in need of protection or services and the expectant mother is a child, the expectant mother must be represented by counsel and may not waive counsel. For an expectant mother under 12 years of age, the judge may appoint a GAL instead of counsel.

Also under the Substitute Amendment, if a UCHIPS petition is contested, no expectant mother may be placed outside of her home unless the expectant mother is represented by counsel at the fact-finding hearing and subsequent proceedings. If the petition is not contested, the expectant mother may not be placed outside of her home unless the expectant mother is represented by counsel at the hearing at which the placement is made. An adult expectant mother, however, may waive counsel if the court is satisfied that the waiver is knowingly and voluntarily made and the court may then place the adult expectant mother outside of her home even though she was not represented by counsel.

In a situation in which an adult expectant mother is entitled to representation by counsel and counsel is not knowingly and voluntarily waived, if it appears or if the adult expectant mother indicates that she cannot afford counsel in full, the court must refer her to the State Public Defender for indigency determinations.

9. Appointment of GAL for the Unborn Child

Under the Substitute Amendment, the court must appoint a GAL for any unborn child alleged to be in need of protection or services.

The GAL is an advocate for the best interests of the unborn child. As provided under current law, the GAL must function independently, in the same manner as an attorney for a party to the action, and must consider, but may not be bound by, the positions of others as to the best interests of the unborn child. Under the Substitute Amendment, the GAL for an unborn child who is the subject of a UCHIPS proceeding must do all of the following:

a. Unless granted leave by the court not to do so, personally, or through a trained designee, meet with the expectant mother of the unborn child and assess the appropriateness and safety of the environment of the unborn child.

b. Make clear and specific recommendations to the court concerning the best interest of the unborn child at every stage of the proceeding.

In any matter involving an unborn child found to be in need of protection or services, the GAL may, if reappointed or if the appointment is continued by the court after entry of the final order, do any of the following: (a) participate in permanency planning under ss. 48.38 and 48.43 (5), Stats., after the child is born; (b) petition for a change of placement under s. 48.357, Stats.; (c) petition for TPR or any other matter specified under s. 48.14, Stats. (e.g., appointment of a guardian following a TPR or adoption), after the child is born; (d) petition for commitment of the expectant mother of the unborn child under ch. 51, Stats.; (e) petition for revision of dispositional orders under s. 48.363, Stats.; (f) petition for extension of dispositional orders under s. 48.365, Stats.; (g) petition for a temporary child abuse or harassment restraining order and injunction under s. 813.122 or 813.125, Stats., after the child is born; (h) petition for relief from judgment terminating parental rights under s. 48.46, Stats., after the child is born; (i) petition for the appointment of a relative as a guardian under s. 48.977 (2), Stats., revision of such a guardianship order under s. 48.977 (6), Stats., or removal of such a guardian under s. 48.977 (7), Stats., after the child is born; (j) bring an action or motion for the determination of the child's paternity under s. 767.45, Stats., after the child is born; and (k) perform any other duties consistent with the Children's Code.

10. Intake

Consistent with current law, information indicating that an unborn child should be referred to the court as in need of protection or services is referred to an intake worker who must conduct an intake inquiry on behalf of the court to determine whether the available facts establish *prima facie* jurisdiction (i.e., sufficient evidence to give the court jurisdiction) and to determine the best interests of the unborn child and of the public with regard to any action to be taken.

Also as part of the intake inquiry, the intake worker may conduct multidisciplinary screens and intake conferences. In counties that have an alcohol or other drug abuse (AODA) program under s. 48.547, Stats., a multidisciplinary screen must be conducted for any expectant mother 12 years old or older who has not refused to participate. Such a screen must also be conducted for any child expectant mother who consents to it if requested by her parents.

It should be noted that current law provides that no child or other person may be compelled to appear at any conference, participate in any multidisciplinary screen, produce any papers or visit any place by an intake worker.

Consistent with current law, if the intake worker determines as a result of the intake inquiry that the unborn child should be referred to the court, the intake worker must request that the district attorney (DA) or corporation counsel file a petition.

11. Informal Disposition

Consistent with current law, the intake worker may enter into a written agreement with all parties which imposes an informal disposition if the intake worker has determined that neither

the interests of the unborn child nor of the public require filing a UCHIPS petition. Informal disposition is available only if: (a) the facts persuade the intake worker that the jurisdiction of the court, if sought, would exist; (b) upon consent of the child expectant mother, her parent, guardian and legal custodian and the unborn child, through the unborn child's GAL; or (c) upon consent of the adult expectant mother and the unborn child, through the unborn child's GAL.

Informal disposition may provide for any one or more of the following:

a. That the child expectant mother appear with a parent, guardian or legal custodian for counseling and advice or that the adult expectant mother appear for counseling and advice.

b. That the expectant mother abide by such obligations as will tend to ensure the protection or care of the unborn child and the rehabilitation of the expectant mother.

c. That the expectant mother submit to an AODA assessment that conforms to the criteria specified under s. 48.547 (4), Stats., and that is conducted by an approved treatment facility for an examination of the use of alcohol beverages, controlled substances or controlled substance analogs by the expectant mother and any medical, personal, family or social effects caused by its use, if a multidisciplinary screen shows that the expectant mother is at risk of having needs and problems related to the use of alcohol beverages, controlled substances or controlled substance analogs and its medical, personal, family or social effects.

d. That the expectant mother participate in an AODA outpatient treatment program or an education program relating to the abuse of alcohol beverages, controlled substances or controlled substance analogs, if an AODA assessment conducted under item c., above, recommends outpatient treatment or education.

If the informal disposition provides for AODA outpatient treatment, the child expectant mother and her parent, guardian or legal custodian, or the adult expectant mother, must execute an informed consent that indicates that they are, or that she is, voluntarily and knowingly entering into an informal disposition agreement for the provision of AODA outpatient treatment.

Current law provides that an informal disposition may not include any form of residential placement and may not exceed six months, unless extended. As provided under current law, an informal disposition may be extended for up to an additional six months. An extension may be granted only once for any informal disposition. The Substitute Amendment also provides that an extension relating to an unborn child who is alleged to be in need of protection or services may be granted after the child is born.

Consistent with current law, an informal disposition must be terminated or may be altered upon the request of the child expectant mother, her parent, guardian or legal custodian or the unborn child by the unborn child's GAL, or upon request of the adult expectant mother or the unborn child by the unborn child's GAL. If the obligations imposed under the informal disposition are met, no petition may be filed on the charges that brought about the informal disposition nor may the charges be the sole basis for a UCHIPS petition.

12. Petitions

Under current law, a petition initiating proceedings under the Children's Code must be signed by a person who has knowledge of the facts alleged or is informed of them and believes them to be true. The Substitute Amendment provides that the DA or corporation counsel may file a UCHIPS petition. In addition, the counsel or GAL for an expectant mother or the GAL for an unborn child may file a UCHIPS petition.

Under the Substitute Amendment, a UCHIPS petition is entitled "In the interest of (J. Doe), an unborn child, and (expectant mother's name), the unborn child's expectant mother" and must set forth with specificity:

a. The estimated gestational age of the unborn child and a statement that the unborn child is at that stage of fetal development when there is a reasonable likelihood of sustained survival outside the womb, with or without artificial support.

b. The name, birth date and address of the expectant mother.

c. The names and addresses of the parent, guardian, legal custodian or spouse, if any, of the expectant mother, if the expectant mother is a child; the name and address of the spouse, if any, of the expectant mother, if the expectant mother is an adult; or, if no such person can be identified, the name and address of the nearest relative of the expectant mother.

d. Whether the expectant mother is in custody and, if so, the place where the expectant mother is being held and the time when the expectant mother was taken into custody unless there is reasonable cause to believe that disclosure of that information would result in imminent danger to the unborn child, expectant mother or physical custodian.

e. Whether the unborn child, when born, may be subject to the Federal Indian Child Welfare Act, 25 U.S.C. ss. 1911 to 1963.

f. Reliable and credible information which forms the basis of the allegations necessary to invoke the jurisdiction of the court and to provide reasonable notice of the conduct or circumstances to be considered by the court, together with a statement that the unborn child is in need of protection or care and that the expectant mother is in need of supervision, services, care or rehabilitation.

If any of the facts required under items a. through e., above, are not known or cannot be ascertained by the petitioner, the petition must so state. If the information required under item f., above, is not stated, the petition must be dismissed or amended.

13. Discovery

Under the Substitute Amendment, all records relating to an unborn child and the unborn child's expectant mother, which are relevant to the subject matter of a Children's Code proceeding are open to inspection by a GAL or counsel for any party, upon demand and upon presentation of releases when necessary, at least 48 hours before the proceeding. However, the

court may instruct counsel not to disclose specified items in the materials to the expectant mother if the court reasonably believes that the disclosure would be harmful to the interests of the unborn child.

14. Procedures at Hearings

Under the Substitute Amendment, as provided for other hearings under the Children's Code, the general public is excluded from hearings for UCHIPS proceedings unless a public fact-finding hearing is demanded by an expectant mother through her counsel or by an unborn child through the unborn child's GAL. However, the court must refuse to grant the public hearing if the expectant mother or unborn child through the unborn child's GAL objects.

If a public hearing is not held, generally only the parties and their counsel or GAL, if any, a child expectant parent's foster parent, treatment foster parent or other physical custodian who is a relative, witnesses and other persons requested by a party and approved by the court may be present. Also, if a public hearing is not held, any person who divulges any information which would identify the expectant mother may be held in contempt of court.

15. Plea Hearing

The plea hearing, at which the court determines whether any party wishes to contest an allegation that an unborn child is in need of protection or services must take place within 30 days after the filing of the UCHIPS petition. At the hearing, the nonpetitioning parties and the child expectant mother, if she is 12 years old or older or is otherwise competent to do so, or the adult expectant mother must state whether they desire to contest the petition.

If the petition is not contested, the court must set a date for the dispositional hearing which is no more than 30 days after the plea hearing. If the petition is contested, the court must set a date for the fact-finding hearing which is no more than 30 days after the plea hearing.

16. Hearing Upon the Involuntary Removal of an Expectant Mother

Consistent with current law, if a child expectant mother is removed from the physical custody of her parent or guardian or without the consent of her parent or guardian or if an adult expectant mother is taken into custody without her consent, the court must schedule a plea hearing and a fact-finding hearing within 30 days after a request from the parent or guardian from whom custody was removed or from the adult expectant mother who was taken into custody. In such a case, the plea and fact-finding hearings may be combined.

17. Fact-Finding Hearing

The fact-finding hearing on a UCHIPS petition is to the court or to a six-person jury. At the conclusion of the hearing, the court or jury makes a determination of the facts, except the court must make the determination relating to whether the unborn child is in need of protection or services which can be ordered by the court. If the court finds that the unborn child is not within the jurisdiction of the court or that the unborn child is not in need of protection or

services which can be ordered by the court or if the court or jury finds that the facts alleged in the petition have not been proved, the court must dismiss the petition.

At the close of the fact-finding hearing, the court must set a date for the dispositional hearing which is no more than 30 days after the fact-finding hearing.

18. Consent Decrees

Consistent with current law, at any time after filing a UCHIPS petition and before entry of judgment, the judge or juvenile court commissioner may suspend the proceedings and place the expectant mother under supervision in her home or present placement. The court may establish terms and conditions applicable to the child expectant mother and her parent, guardian or legal custodian or to the adult expectant mother. This order is called a "consent decree" and must be agreed to by the child expectant mother, her parent, guardian or legal custodian, the unborn child by the unborn child's GAL and the person filing the UCHIPS petition; or by the adult expectant mother, the unborn child by the unborn child's GAL and the person filing the UCHIPS petition.

Consistent with current law, a consent decree may remain in effect up to six months unless the expectant mother is discharged sooner by the judge or juvenile court commissioner. However, upon the motion of the court or the application of the expectant mother, unborn child by the unborn child's GAL, intake worker or any agency supervising the expectant mother, the court may extend the decree for up to an additional six months in the absence of objection to extension by the parties to the initial consent decree. If the expectant mother or unborn child by the unborn child's GAL objects to the extension, the judge must schedule a hearing and make a determination on the issue of extension. In addition, an extension of a consent decree relating to an unborn child who is alleged to be in need of protection or services may be granted after the child is born.

If, prior to discharge by the court or expiration of the consent decree, the court finds that the expectant mother has failed to fulfill the express terms and conditions of the consent decree or that the expectant mother objects to the continuation of the consent decree, the hearing under which the expectant mother was placed under supervision may be continued to conclusion as if the consent decree had never been entered.

19. Court Reports

Before the disposition of an unborn child adjudged to be in need of protection or services, the court must designate an agency (i.e., the Department of Health and Family Services (DHFS), a county department of human or social services or a licensed child welfare agency) to submit a report which contains all of the following:

a. The social history of the expectant mother.

b. A recommended plan of rehabilitation or treatment and care for the expectant mother which is based on the investigation conducted by the agency and any report resulting from an examination or assessment under s. 48.295, Stats., which employs the least restrictive means

available to accomplish the objectives of the plan and, in cases of unborn child abuse, which also includes an assessment of the risks to the unborn child's physical safety and physical health and a description of a plan for controlling the risks.

c. A description of the specific services or continuum of services which the agency is recommending that the court order for the expectant mother, the persons or agencies that would be primarily responsible for providing those services and the identity of the person or agency that would provide case management or coordination of services, if any.

d. A statement of the objectives of the plan, including any behavior changes desired of the expectant mother and the academic, social and vocational skills needed by the expectant mother.

e. A plan for provision of education services to a child expectant mother.

f. If the agency is recommending that the court order the expectant mother to participate in mental health treatment, anger management, individual or family counseling or parent or prenatal development training and education, a statement as to the availability of those services and to the availability of funding for those services.

20. Disposition

As provided under current law, the court must conduct a hearing to determine the disposition of a case in which an unborn child is adjudged to be in need of protection or services.

a. Child Expectant Mothers

If the judge finds that the unborn child of a child expectant mother is in need of protection or services, the judge must enter an order deciding one or more of the following dispositions:

(1) Counsel the child expectant mother or her parent, guardian or legal custodian.

(2) Place the child expectant mother under supervision of an agency, the DHFS, or a suitable adult, including a friend of the child expectant mother, under conditions prescribed by the judge including reasonable rules for her conduct, designed for her physical, mental and moral well-being and behavior and for the physical well-being of the unborn child.

(3) Place the child expectant mother in her home under the supervision of an agency or the DHFS and order the agency or the DHFS to provide specified services to the child expectant mother and her family, which may include individual, family or group counseling; homemaker or parent aide services; respite care; housing assistance; day care; parent skills training; or prenatal development training or education.

(4) Designate one of the following as the placement for the child expectant mother:

(a) The home of a relative.

(b) A home which need not be licensed as a foster home if the placement is for less than 30 days.

(c) A licensed foster home, treatment foster home or group home.

(d) A licensed residential treatment center.

(5) Order the child expectant mother's parent to provide special treatment or care. Under the Substitute Amendment, "special treatment or care" includes professional services which need to be provided to the expectant mother to protect the physical health of the unborn child and of the child when born from the harmful effects resulting from the mother's habitual lack of self-control in the use of alcohol, controlled substances or controlled substance analogs, exhibited to a severe degree. The term includes medical, psychological or psychiatric treatment, AODA treatment or other services which the court finds to be necessary and appropriate.

(6) Order that the child expectant mother, on attaining 17 years of age, be allowed to live independently, either alone or with friends, under such supervision as the judge deems appropriate.

(7) Order the child expectant mother to attend an educational program.

(8) Order the child expectant mother to enter an outpatient AODA treatment program or participate in an AODA education program.

(9) If the judge finds that the child expectant mother is in need of inpatient treatment for her habitual lack of self-control in the use of alcohol, controlled substances or controlled substance analogs, exhibited to a severe degree, that inpatient treatment is appropriate for the child expectant mother's needs and that inpatient treatment is the least-restrictive treatment consistent with the child expectant mother's needs, order the child expectant mother to enter an inpatient AODA treatment program at an inpatient facility.

In addition, the Substitute Amendment provides that, if it appears that an unborn child in need of protection or services may be born during the period of the dispositional order, the judge may order that the child, when born, be provided with any services or care that may be ordered for a child in need of protection or services under the Children's Code.

b. Adult Expectant Mothers

The Substitute Amendment provides that if the judge finds that an unborn child of an adult expectant mother is in need of protection or services, the judge must enter an order deciding one or more of the following dispositions:

(1) Counsel the adult expectant mother.

(2) Place the adult expectant mother under supervision of the county department, the DHFS or a suitable adult, including an adult relative or friend of the adult expectant mother, under conditions prescribed by the judge which may include reasonable rules for the adult expectant mother's conduct, designed for the physical well-being of the unborn child. Such an

order may also include an order to participate in mental health treatment, anger management, individual or family counseling or prenatal development training or education and to make a reasonable contribution, based on ability to pay, for the cost of those services.

(3) Designate one of the following as the placement for the adult expectant mother:

(a) The home of an adult relative or friend.

(b) A CBRF.

(4) Order the adult expectant mother to obtain the special treatment or care.

(5) Order the adult expectant mother to enter an outpatient AODA treatment program or participate in an AODA education program.

(6) If the judge finds that the adult expectant mother is in need of inpatient treatment for her habitual lack of self-control in the use of alcohol, controlled substances or controlled substance analogs, exhibited to a severe degree, that inpatient treatment is appropriate for the adult expectant mother's needs and that inpatient treatment is the least-restrictive treatment consistent with the adult expectant mother's needs, order the adult expectant mother to enter an inpatient AODA treatment program at an inpatient facility.

(7) If it appears that the unborn child may be born during the period of the dispositional order, order that the child, when born, be provided with any services or care that may be ordered for a child in need of protection or services under the Children's Code.

21. Effect of Judgment and Disposition on Future Proceedings

Consistent with current law, the disposition of an unborn child and any record of evidence given in a hearing in court is not admissible as evidence against the expectant mother of the unborn child in any case or proceeding in any other court except as follows:

a. In sentencing proceedings after the expectant mother has been convicted of a felony or misdemeanor only for the purpose of a presentence study and report.

b. In a proceeding in any juvenile court.

c. In a family court which is considering the custody of children.

As provided under current law, the above provision does not preclude the court from disclosing information to qualified persons if the court considers the disclosure to be in the best interests of the unborn child or of the administration of justice.

22. Dispositional Orders

Consistent with current law, in any order imposing a disposition for an unborn child adjudged to be in need of protection or services, the judge must decide on a placement and

treatment finding based on evidence submitted to the judge. The disposition must employ those means necessary to maintain and protect the well-being of the unborn child which are the least restrictive of the rights of the child expectant mother and her parent or of the rights of the adult expectant mother, and which assure the care, treatment or rehabilitation of the child expectant mother, the unborn child and her family or of the adult expectant mother and the unborn child, consistent with the protection of the public. When appropriate, and in cases of unborn child abuse, when it is consistent with the unborn child's best interest in terms of physical safety and physical health, the family unit must be preserved and there must be a policy of placing the expectant mother outside of her home only when there is no less drastic alternative.

Under current law, dispositional orders generally remain in effect for one year. The Substitute Amendment provides that a UCHIPS order made before the unborn child is born may be effective for a time up to one year after its entry unless the judge specifies a shorter period of time.

A child expectant mother, her parent, guardian or legal custodian, an adult expectant mother, an unborn child by the unborn child's GAL, any person or agency bound by a dispositional order or the DA or corporation counsel may request or the court may propose a revision to the order that does not involve a change in placement or an extension of the order. The Substitute Amendment specifies that an order entered before the child who is the subject of the order was born may also be extended.

Consistent with current law, in addition to any dispositional order entered for the expectant mother or the unborn child, the court may enter an order applicable to a child expectant mother's parent, guardian or legal custodian, to a family member of an adult expectant mother or to another adult. Specifically, if in the hearing of a case of an unborn child alleged to be in need of protection or services it appears that any person 17 years old or older has been guilty of contributing to, encouraging or tending to cause by any act or omission, the condition of the unborn child and expectant mother resulting in the UCHIPS allegation, the judge may make orders with respect to the conduct of such person in his or her relationship to the unborn child and expectant mother. An act or failure to act may also be determined to contribute to the condition of the unborn child and expectant mother, even if the unborn child is not adjudicated to be in need of protection or services, if the natural and probable consequences of that act or failure to act would cause the unborn child to be found in need of protection or services.

23. Duty of Court to Warn of TPR

Under the Substitute Amendment, whenever the court orders an expectant mother to be placed outside of her home because the expectant mother's unborn child has been found to be in need of protection or services, the court must orally inform the expectant mother of any grounds for TPR which may be applicable and of the conditions necessary for the expectant mother to be returned to her home.

Under the Substitute Amendment, the applicable ground for involuntary TPR following a UCHIPS proceeding requires that all of the following criteria have been met:

a. The child has been adjudged to be an unborn child in need of protection or services and has been placed, or continued in a placement, outside of his or her home pursuant to a court order under the Children's Code.

b. The agency responsible for the care of the child and the family, or of the unborn child and the expectant mother, has made a diligent effort to provide the services ordered by the court. "Diligent effort" includes an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the expectant mother, the level of cooperation of the expectant mother and other relevant circumstances of the case.

c. That the child has been outside the home for a cumulative total period of six months or longer pursuant to a court order under the Children's Code, ***including time spent outside the home as an unborn child***, and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing.

24. Confidentiality of Records

a. Law Enforcement Records

The Substitute Amendment provides that law enforcement officers' records of expectant mothers of unborn children must be kept separate from records of adults or other adults. Law enforcement officers' records of the expectant mothers of unborn children are not open to inspection and their contents may not be disclosed except under certain exceptions, described below, and as permitted in discovery. As provided under current law, this provision does not apply to the representatives of newspapers or other reporters of news who wish to obtain information for the purpose of reporting news without revealing the identity of the expectant mother involved. In addition, there are the following exceptions to the general rule of confidentiality:

(1) If requested by an expectant mother of an unborn child who is the subject of a law enforcement officer's report, if 14 years old or older, or if requested by an unborn child through the unborn child's GAL, a law enforcement agency may, subject to official agency policy, provide to the expectant mother or unborn child by the unborn child's GAL a copy of that report.

(2) Upon the written permission of an expectant mother of an unborn child who is the subject of a law enforcement officer's report, if 14 years old or older, or of her parent, guardian or legal custodian, if under age 14, and of the unborn child by the unborn child's GAL, a law enforcement agency may, subject to official agency policy, make available to the person named in the permission any reports specifically identified by the expectant mother, or parent, guardian or legal custodian, and unborn child by the unborn child's GAL in the written permission.

b. Court Records

As provided under current law, juvenile court records must be entered in books or deposited in files kept for that purpose only. They may not be open to inspection or their contents disclosed except by order of the court and under specified exceptions. Under the Substitute Amendment, the following exceptions are created:

(1) Upon request of an expectant mother of an unborn child who is the subject of a record of the juvenile court, if 14 years old or older, or upon request of an unborn child by the unborn child's GAL, the court must open for inspection by the expectant mother or by the unborn child by the unborn child's GAL, the records of the court relating to that expectant mother, unless the court finds, after due notice and hearing, that inspection of those records by the expectant mother or by the unborn child by the unborn child's GAL would result in imminent danger to anyone.

(2) Upon the written permission of an expectant mother of an unborn child who is the subject of a juvenile court record, if 14 years old or older, or of her parent, guardian or legal custodian, if under 14 years of age, and of the unborn child by the unborn child's GAL, the court must open for inspection by the person named in the permission any records specifically identified by the expectant mother, parent, guardian or legal custodian, and unborn child by the unborn child's GAL in the written permission, unless the court finds, after due notice and hearing, that inspection of those records by the person named in the permission would result in imminent danger to anyone.

As provided under current law, any person who is denied access to a juvenile court record under either of the above exceptions, may petition the court to order the disclosure.

c. Agency Records

Under current law, subject to specified exceptions, no agency (i.e., the DHFS, a county department of social or human services or a licensed child welfare agency) may make available for inspection or disclose the contents of any record kept or information received about an individual in its care or legal custody. The Substitute Amendment creates the following exceptions to this general rule of confidentiality:

(1) Upon the request of an expectant mother of an unborn child who is the subject of the record, if 14 years old or older, or upon the request of an unborn child by the unborn child's GAL, the agency may make available for inspection or disclose the contents of the record to the expectant mother or the unborn child by the unborn child's GAL, unless the agency determines that inspection of those records by the expectant mother or unborn child by the unborn child's GAL would result in imminent danger to anyone.

(2) Upon the written permission of an expectant mother of an unborn child who is the subject of the record, if 14 years old or older, and of her parent, guardian or legal custodian, if under 14 years of age, and of the unborn child by the unborn child's GAL, the agency may make available for inspection or disclose the contents of a record to the person named in the permission if the expectant mother, parent, guardian or legal custodian, and unborn child by the unborn

child's GAL specifically identify the record in the written permission, unless the agency determines that inspection of those records by the person named in the permission would result in imminent danger to anyone.

25. Mandatory Reporting of Unborn Child Abuse

a. "Mandatory Reporters"

The Substitute Amendment requires persons required under current law to report suspected child abuse or neglect also to report suspected unborn child abuse. "Unborn child abuse" is defined as serious physical harm inflicted on the unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

Under the Substitute Amendment, the following persons are required to report unborn child abuse if they have reason to believe that an unborn child of an expectant mother they have seen in the course of professional duties has been abused or is at substantial risk of abuse: (1) physicians; (2) coroners; (3) medical examiners; (4) nurses; (5) dentists; (6) chiropractors; (7) optometrists; (8) acupuncturists; (9) other medical or mental health professionals; (10) social workers; (11) marriage and family therapists; (12) professional counselors; (13) public assistance workers, including financial and employment planners (i.e., caseworkers employed by a Wisconsin Works (W-2) agency who provide financial or employment counseling services to a W-2 participant); (14) school teachers, administrators or counselors; (15) family court mediators; (16) child care workers in day care centers or child caring institutions (CCIs); (17) AODA counselors; (18) members of the treatment staff employed by or working under contract with a county department of human services, community programs or developmental disabilities services; (19) physical therapists; (20) occupational therapists; (21) dieticians; (22) speech-language pathologists; (23) audiologists; (24) emergency medical technicians; or (25) police or law enforcement officers.

Any other person, including an attorney, having reason to suspect that an unborn child has been abused or reason to believe that an unborn child is at substantial risk of abuse ***may*** make a report.

Under current law, whoever intentionally violates the requirement to report abuse may be fined not more than $1,000 or imprisoned for not more than six months, or both.

b. Reports and Investigation of Unborn Child Abuse

Consistent with current law, a person who is required to report suspected unborn child abuse must immediately inform, by telephone or personally, the county department or sheriff or city, village or town police department of the facts and circumstances contributing to a suspicion of unborn child abuse or reason to believe that an unborn child is at substantial risk of abuse.

Any person reporting suspected unborn child abuse may request an ***immediate*** investigation by the sheriff or police department if the person has reason to suspect that an unborn child's

health or safety is in immediate danger. Upon receiving such a request, the sheriff or police department must immediately investigate to determine if there is reason to believe that the unborn child's health or safety is in immediate danger and take any necessary action to protect the unborn child.

The investigating officer must take the expectant mother into custody and deliver her to the intake worker if the expectant mother meets the criteria under the Children's Code for being taken into custody.

Within 24 hours after receiving a report of suspected unborn child abuse, the county department or licensed child welfare agency under contract with the county department must, in accordance with its powers to investigate under s. 48.57 (1) (a), Stats., initiate a diligent investigation to determine if the unborn child is in need of protection or services. The investigation must be conducted in accordance with standards established by the DHFS for conducting unborn child abuse investigations.

If the person making the investigation determines that it is consistent with the unborn child's best interest in terms of physical safety and physical health to take the expectant mother into custody for the immediate protection of the unborn child, he or she must take the expectant mother into custody and deliver her to the intake worker.

If the county department determines that an expectant mother is in need of services, the county department must offer to provide appropriate services or to make arrangements for the provision of services. If the expectant mother refuses to accept the services, the county department may request that a petition be filed alleging that the unborn child is in need of protection or services.

c. Training Relating to Unborn Child Abuse

Current law requires the DHFS and county departments, to the extent feasible, to conduct continuing education and training programs for staff of the DHFS, county departments and tribal social services departments; persons and officials required to report; the general public; and others, as appropriate. The programs must be designed to encourage reporting of child abuse and neglect, to encourage self-reporting and voluntary acceptance of services and to improve communication, cooperation and coordination in the identification, prevention and treatment of child abuse and neglect. The DHFS and county departments must also develop public information programs about child abuse and neglect.

Under current law, the DHFS must also, to the extent feasible, ensure that there are available in the state administrative procedures, personnel trained in child abuse and neglect, multidisciplinary programs and operational procedures and capabilities to deal effectively with child abuse and neglect cases.

Finally, under current law, each county department or licensed child welfare agency under contract with a county department staff member and supervisor whose responsibilities include investigation or treatment of child abuse and neglect must successfully complete training