

1997-98 SESSION

COMMITTEE HEARING RECORDS

Assembly Committee on Children & Families (AC-CF)

Sample:

Record of Comm. Proceedings ... RCP

- 05hrAC-EdR_RCP_pt01a
- 05hrAC-EdR_RCP_pt01b
- 05hrAC-EdR_RCP_pt02

➤ Appointments ... Appt

➤ **

➤ Clearinghouse Rules ... CRule

➤ **

➤ Committee Hearings ... CH

➤ **

➤ Committee Reports ... CR

➤ **

➤ Executive Sessions ... ES

➤ **

➤ Hearing Records ... HR

➤ **

➤ Miscellaneous ... Misc

➤ **97hr_AC-CF_Misc_pt02**

➤ Record of Comm. Proceedings ... RCP

➤ **



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 (Revised October 23, 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 17, 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. 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" if 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 (under age 18) 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 Prevention Board (also commonly 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 juvenile court may extend the dispositional order for an unborn child after the child is born.

9. Expands the ground for involuntary termination of parental rights (TPR) relating to a child who has been placed outside of the home under a CHIPS order for six months or longer to include any period during which the child was placed outside of the home as an unborn child.

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

The remainder of this memorandum consists of a detailed description of the contents of the Substitute Amendment.

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 statement of legislative purpose in 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 also amends the statement of legislative purpose 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 statement of legislative purpose 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 in the statement of legislative purpose 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 because the unborn child's 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 juvenile court also has exclusive original jurisdiction over the expectant mother of such an unborn child, except that any voluntary or involuntary admissions, placements or commitments, other than for alcoholism or drug dependency, of an adult expectant mother is governed by ch. 51, Stats. (the Mental Health Act).

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 newly 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. Consistent with 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 her into custody may release her to a responsible adult after counseling or warning her as may be appropriate. If the child expectant mother is 15 years old or older, the person who took her into custody may release her without immediate adult supervision after counseling or warning her 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) (see item 9., below) 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

Similar to 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.

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: (a) if 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 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 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. 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. "Abuse," as related to an unborn child, 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) dietitians; (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 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

analogues 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 analogues 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 analogues 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 analogues 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:lah;wu;ksm

October 27, 1997

Representative Michael Huebsch
Assembly Committee on Children and Families
P. O. Box 8953
Madison, WI 53708

Dear Rep. Huebsch:

On the behalf of the City of Milwaukee Health Department, I wish to express our position opposing AB 463 and Substitute Amendment 1 because of the serious potential this bill has for reducing the length and quality of prenatal care in this state, thereby negatively affecting the health of mothers and children. I regret that I am not able to offer this testimony in person on October 30th.

As you know, this bill would expand the children's code to cover unborn children who are at the state of development such that they are likely to survive outside of the womb, and the Health Department has specific concerns relative to public health. These concerns are shared by public health experts nationwide.

Clearly alcohol and other drug abuse by expectant mothers is a hazard to the health of the fetus. However, there are effective programs which can be employed to address this problem. Women in need of such services should be aggressively directed to enroll in them by their physicians.

Our specific concerns with the bill include the following:

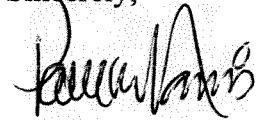
1. This act has the potential to cause mothers to conceal substance use from their health care providers, thus interfering with voluntary identification and treatment processes which the health care provider could assist the mother in obtaining.
2. This act may encourage mothers to delay or even avoid prenatal care entirely, thus introducing new and significant risks to the health of the mother and the child.
3. Restricting this act to alcohol and illicit drugs is arbitrary in the sense that tobacco and other substances are also harmful to the fetus. It opens a pandora's box in terms of potential enforcement challenges.

4. It is difficult to define adequately what "habitual use" and "substantial risk" mean in order to satisfy all parties, including health care providers who would be legally at-risk for not reporting. These terms are insufficiently defined within the act, and writing clear definitions may well be impossible.

5. Most of all, we are concerned that a criminal justice approach to maternal and child health issues is not the first and best alternative. Indeed it is destructive. Readily available alcohol and drug treatment for expectant mothers would be preferable to threatening mothers with incarceration and loss of parental rights.

Thank you for considering our position on this bill. Please do not hesitate to contact me or Dr. Seth Foldy, Medical Director, if you have any questions regarding this opinion.

Sincerely,



Paul W. Nannis
Commissioner of Health

/cm

cc: Alderman Wayne Frank, Chair, Judiciary and Legislation Committee
Seth Foldy, MD, Medical Director, Milwaukee Health Department



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State Affiliate of the National
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Washington, DC 20004-2293

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Phil Kurtz

Wisconsin Right to Life, Inc.
10625 West North Avenue, Suite LL
Milwaukee, WI 53226-2331

PH: 414/778-5780
FAX: 414/778-5785

E-MAIL: wrtl@inc.net
HMPGE: <http://www.wrtl.org>

TESTIMONY OF

SUSAN ARMACOST

LEGISLATIVE DIRECTOR

WISCONSIN RIGHT TO LIFE, INC.

on

ASSEMBLY BILL 463

before the

ASSEMBLY COMMITTEE ON CHILDREN & FAMILIES

OCTOBER 30, 1997

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Please remember the Wisconsin Right to Life Education Fund 501(c)(3) charity and its lifesaving programs in your estate plan. By doing so, you may be able to achieve significant income, gift or estate tax benefits. Please call our development department today for confidential help in successfully implementing the gift plan most suitable for you.

I am Susan Armacost, Legislative Director for Wisconsin Right to Life. I am testifying for information only regarding AB 463 but also with the purpose of urging this committee to expand the scope of the bill to permit intervention on behalf of unborn children throughout the entire nine months of pregnancy.

This legislation was introduced in response to the case of a an 8 month unborn male child of a cocaine-addicted Waukesha County woman. The child was placed in protective custody by Waukesha County so that he would be spared further trauma from cocaine in the final weeks prior to his birth. Unfortunately, the State Supreme Court disagreed with Waukesha County and ruled that a pregnant cocaine user cannot be confined to protect her unborn child.

Wisconsin Right to Life believes the general approach of this legislation is positive. It would use the children's code, rather than the criminal code to intervene on behalf of unborn children when their mothers are abusing drugs or alcohol. Detention would be a last resort when other interventions have failed and would, unlike criminal incarceration, end when the child was born. In addition, the various interventions to protect unborn children would also benefit their mothers.

Wisconsin Right to Life has always been reluctant to support to measures that would apply purely criminal penalties to pregnant women who abuse drugs or alcohol because we believe it would be an incentive for women under these circumstances to have abortions because of the fear of a lengthy prison sentence. Also, we believe criminal penalties would do little or nothing to rehabilitate the woman. We believe the children's code process outlined in AB 463 would make these problems far less likely to occur and has a real chance to alleviate a tragic

problem in our society.

While we appreciate the process outlined in the bill, we are deeply concerned about the outcome if AB 463 is not broadened to permit intervention on behalf of unborn children throughout pregnancy. There is evidence in research literature that babies can suffer irreversible and devastating damage in the critical first months of pregnancy as a result of their mothers' abuse of drugs or alcohol. This was found to be true even when drug and alcohol abuse ceased early in pregnancy. Behavior impairment, genito-urinary defects and other congenital malformations, especially those associated with neuron tube and brain formation are all irreversible conditions that can result from substance abuse in the early months of pregnancy.

By limiting intervention to the last months of pregnancy, help will come much too late for many babies. If the bill is modified to permit intervention throughout pregnancy, we believe it will be an effective piece of legislation that would go a long way to help eradicate the long-term consequences of drug and alcohol abuse on helpless children. Limiting intervention to the last months of pregnancy makes no sense if we are truly serious about addressing this very serious issue. On behalf of Wisconsin Right to Life, I urge this committee to support Representative Mary Lazich's amendment to permit intervention throughout pregnancy.



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TESTIMONY OF

MARY A. KLAVER

LEGISLATIVE LEGAL COUNSEL

WISCONSIN RIGHT TO LIFE, INC.

ON

ASSEMBLY BILL 463

October 30, 1997

before the

Assembly Committee on

Children and Families

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Chairman Huebsch and members of the committee, my name is Mary Klaver. I am the Legislative Legal Counsel for Wisconsin Right to Life, Inc. I appear today for information purposes regarding Assembly Bill 463, the "cocaine mom" bill, and in support of an amendment that would extend the protective services provided under this legislation to an unborn child throughout the mother's pregnancy.

Some concern has been expressed as to whether this amendment would be constitutional. There are some very strong arguments in favor of the constitutionality of this legislation and its application throughout pregnancy. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), when the U.S. Supreme Court reaffirmed the essential holding of *Roe v. Wade*, 410 U.S. 113 (1973), it reaffirmed that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." In its rejection of the rigid trimester approach of *Roe*, the court stated that "[b]efore viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." Clearly, the U.S. Supreme Court is openly inviting states to assert more interest in the life of an unborn child throughout pregnancy.

It should be remembered that the privacy right recognized by *Roe v. Wade* is not absolute. In *Roe*, the court recognized the state's "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." The court stated, "[t]he privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The

Court has refused to recognize an unlimited right of this kind in the past.” The court then concluded “that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”

For many years, medical professionals have sought and obtained court orders for necessary medical interventions on behalf of unborn children. The most common are court orders for a cesarean section or a blood transfusion which is being refused by the mother on religious grounds. Many of these cases involve a viable unborn child, as a factual matter, especially those involving a cesarean section where the child must be viable in order to survive. In 1985, a New York court ordered a blood transfusion over the mother’s religious objections in order to save the mother and her 18-week old unborn child. *See In Re Application of Jamaica Hospital*, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985). The court recognized that “the state has a highly significant interest in protecting the life of a mid-term fetus, which outweighs the patient’s right to refuse a blood transfusion on religious grounds.” There appear to be no cases that have refused to intervene on behalf of an unborn child because it is not yet viable.

The state of Wisconsin has substantial legitimate interests in the well-being of unborn children and can assert these interests by intervening in the exceptional cases covered by AB 463. This legislation is narrowly drawn to cover extreme cases of unborn child abuse and carefully balances the liberty interests of the mother and the right of a child to be born with a sound mind and body. The decision in *Roe* addressed the respective interests of the state and the mother and focused on the woman’s right to privacy in the narrow context of a criminal abortion statute that had to be narrowly construed. That is not the case here. The children’s code is a civil law which is to be liberally construed for the benefit of the children it seeks to protect. There was an unfortunate era in our history when adults could abuse *born* children with total legal immunity.

Fortunately, there is now legal protection from abuse for all born children. This legislation will change that and provide legal protection for *unborn* children as well. There is no legal reason to only protect viable unborn children from severe alcohol and drug abuse. This legal protection can and should apply throughout pregnancy.



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