DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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February 4, 2002

Representative Kestell:

When the DHFS legal and program staff review this draft, they should note all of the following:

1. ***Physical custody hearings and orders.*** In ss. 48.21 (3) (am) and 938.21 (2) (am) and (3) (am) the drafting instructions would eliminate the requirement that a parent or juvenile who has waived his or her right to participate in the physical custody hearing be granted a rehearing on request. The draft does not eliminate that requirement because eliminating that requirement would contradict ss. 48.21 (1) (a) and 938.21 (1) (a), which require a parent who is not present at the hearing to be granted a rehearing on request, and ss. 48.21 (3) (e) and 938.21 (2) (e) and (3) (e), which permit a parent or juvenile who is not represented by counsel at the hearing to request a rehearing and which provide that any custody order is subject to rehearing on good cause shown.

Also, in ss. 48.21 (5) (b) 1. and 938.21 (5) (b) 1. the draft requires the court to include in a custody order not only a finding that reasonable efforts to prevent the removal of the child from the home were made but also a finding that continued placement of the child in the home would be contrary to the welfare of the child and a finding that reasonable efforts were made to return the child to the home. The draft requires the contrary–to–welfare finding because 45 CFR 1356.21 (c) requires that finding to be made in the first court ruling that sanctions, even temporarily, the removal of a child from the home. The draft requires the reasonable efforts to return the child to the home finding because s. 48.20 (2) (ag) and (7) (b) and 938.20 (2) (ag) and (7) (b) require the person who took the child into custody and the intake worker to make every effort to release the child to his or her parents.

In addition, in ss. 48.21 (5) (b) 1. and 938.21 (5) (b) 1. the draft does not require that the contrary–to–welfare and reasonable–efforts findings be made within 60 days after the child is removed from the home because current ss. 48.21 (1) (a) and 938.21 (1) (a) already require the custody hearing to be held within 48 hours after the child is taken into custody, not including Saturdays, Sundays, and legal holidays, with one 72–hour extension permitted. Instead, that 60–day time limit is covered in ss. 48.315 (2m) and 938.315 (2m), as created by the draft, relating to time limits.

2. ***Documentation of judicial findings.*** The drafting instructions would require the CHIPS, JIPS, delinquency, or civil law or ordinance violation petition under s.

48.255 or 938.255 to allege the factual basis for the contrary–to–welfare and reasonable–efforts findings. The draft does not require the petition to make those allegations because not every petition results in an out–of–home placement. Also, even if the disposition does ultimately result in an out–of–home placement, it would be premature to make those allegations at the petition stage before the case has been fully investigated and a permanency plan determined. Accordingly, the draft instead requires the agency to include that factual basis in the court report under ss. 48.33 and 938.33 and to present evidence as to that factual basis at the dispositional hearing under ss. 48.335 and 938.335.

Also, the federal regulations prohibit "nunc pro tunc" orders, which literally means "now for then" orders. Rather than draft a Latin term that nobody understands, the draft translates that term to mean "an amended order that retroactively corrects an earlier order" that does not comply with the federal requirements.

3. ***Time limits.*** In s. 48.315 (2m), which prohibits extensions, continuances, and periods of delay that would result in the court making the contrary–to–welfare and reasonable–efforts findings more than 60 days after the child is removed from the home or in the court finalizing the permanency plan more than 12 months after the child is removed from the home, the draft includes a provision that is similar to s. 938.315 (3) under current law clarifying that a failure to meet those time limits does not deprive the court of jurisdiction or of competency to exercise that jurisdiction and providing the court with flexibility in fashioning remedies for a failure to meet those time limits, such as dismissing the proceeding with or without prejudice, ordering the release of the child, or granting such other relief as the court considers appropriate.

The draft includes that provision because, under current law, failure to meet a time limit results in the court losing competency to proceed, which in turn results in the child being returned to the home, without regard to whether the home is safe. This draconian remedy does not serve to protect children; instead it only serves to punish the child for the error of the district attorney. With the inflexible time limits mandated by the federal regulations, some fail–safe mechanism is necessary to protect children in those rare, but inevitable, cases in which a time limit is missed through no fault of the child. Indeed, you might wish to consider drafting a provision in s. 48.315 that is similar to s. 938.315 (3) to protect children in all cases of missed time limits and not just those cases covered in this draft.

4. ***Termination of orders.*** The drafting instructions would amend ss. 48.355 (4), 48.357 (6), 48.365 (5), 938.355 (4) (a) and (b), 938.357 (6), and 938.365 (5) to provide that a dispositional order, which currently must be extended every year, continues until the child reaches 18 years of age unless terminated sooner. The concern expressed is that with a permanency plan review scheduled every six months, a permanency plan hearing scheduled every 12 months, and an extension hearing scheduled every 12 months and with all of those time periods starting from different starting points, the court would be required to hold at least two or three hearings annually for a child, which would increase the chances of missed time limits.

This draft accomplishes those instructions, but distinguishes in–home placements from out–of–home placements because, as noted earlier, not every dispositional order

results in an out–of–home placement. Accordingly, the draft provides that for out–of–home placements the order continues until the child is 18 years old unless the court specifies a shorter period of time or terminates the order sooner. For an in–home placement, an order would continue to terminate after one year, unless extended, as under current law.

Similarly, the draft addresses the issue of duplication of six–month permanency plan reviews and 12–month permanency plan hearings in ss. 48.38 (5) (a) and 938.38 (5) (a) by requiring that the permanency plan review be conducted six months after the child is removed from the home and every 12 months after that review and that the permanency plan hearing be conducted 12 months after the child is removed from the home and every 12 months after that hearing. As such, the six–month reviews and the annual hearings will not overlap, but rather will alternate.

5. ***Reasonable–efforts findings.*** The drafting instructions would delete from s. 48.355 (2) (b) 6. and 938.355 (2) (b) 6. the reference to making reasonable efforts to return the child to the home and would replace that reference with a reference to achieving the goal of the permanency plan on the theory that the general category of achieving the goal of the permanency plan includes the specific goal of returning the child to the home and, therefore, the reference to returning the child to the home is unnecessary.

The draft adds the reference to achieving the goal of the permanency plan, but provides an exception for when the goal of the permanency plan is to return the child to the home and one of the aggravated circumstances specified in s. 48.355 (2d) (b) 1. to 5. or 938.355 (2d) (b) 1. to 4. applies. The draft provides that exception because those aggravated circumstances only excuse the agency from making reasonable efforts to return the child to the home; they do not excuse the agency from making reasonable efforts to achieve other permanency plan goals such as adoption.

Also, with respect to the permanency plan hearing that is required to be held not more than 30 days after a finding that reasonable efforts to return the child to the home are not required, the draft specifies that the child's foster parent must receive notice and an opportunity to be heard at the hearing as required under 45 CFR 1356.21 (o). See ss. 48.21 (5) (d), 48.32 (1) (c), 48.355 (2d) (c), 48.357 (2v) (c), 938.21 (5) (d), 938.32 (1) (d), 938.355 (2d) (c), and 48.357 (2v) (c), as created by the draft.

6. ***Minor variations.*** The draft also makes a couple of other minor variations from the drafting instructions. Specifically:

a. *Trial home visits.* The drafting instructions provide that trial home visits of less than six moths are not counted in determining whether the child has been out of the home for 15 of the most recent 22 months. 45 CFR 1356. 21 (e), however, permits a trial home visit to last for more than six months if authorized by the court. Accordingly, the draft excludes trial home visits of more than six months that are authorized by the court as well as trial home visits of less than six months in counting those 15 months. See ss. 48.365 (2g) (b) 3., 48.38 (5) (c) 6. (intro.), 48.417 (1) (a), 938.365 (2g) (b) 3., and 938.38 (5) (c) 6. (intro.), as affected by the draft.

b. *Child placed in the home of a relative.* The drafting instructions specify in s. 48.38 (2) (intro.) and 938.38 (2) (intro.) that the agency that placed or arranged the placement

of a child in the home of a relative *either under court order or a voluntary placement agreement* must prepare a permanency plan for the child. The draft does not include the court order or voluntary placement agreement language in ss. 48.38 (2) (intro.) and 938.38 (2) (intro.) because those requirements are already covered in ss. 48.38 (2) (c) and (d) and 938.38 (2) (c) and (d). As such, the qualifying language is unnecessary.

Also, on the effective date of the draft there will already be children placed in the homes of relatives for whom permanency plans must be prepared. Accordingly, the draft includes a nonstatutory transitional provision, SECTION 9123 (1), that provides a timeline for preparing permanency plans for those children. That timeline was based on similar language found in the 2001–02 budget bill, 2001 SB–55, SECTION 9123 (1).

7. ***Technical cleanups.*** Finally, in addition to the language changes requested by DHFS, the draft makes the following technical cleanups to chs. 48 and 938:

a. *Foster parent statements.* The draft amends ss. 48.27 (3) (a) 1m., 48.38 (5) (b), 48.42 (2g), 48.427 (1m), 938.27 (3) (a) 1m., and 938.38 (5) (b) to require a statement made by a foster parent at a CHIPS or TPR hearing or at a permanency plan review to be made under oath or affirmation. A similar requirement already exists for such statements made at a change–of–placement, revision, or extension hearing under s. 48.357 (2r), 48.363 (1m), 48.365 (2m) (ag), 938.357 (2r), 938.363 (1m), or 938.365 (2m) (ag).

b. *Aggravated circumstances — judgment of conviction.* Currently, ss. 48.355 (2d) (b) (intro.) and 938.355 (2d) (b) (intro.) refer to certain findings in the subdivisions that follow them *as evidenced by a final judgment of conviction*. Not all of the subdivisions that follow them, however, reference criminal convictions. For example, ss. 48.355 (2d) (b) 4. and 938.355 (2d) (b) 4. reference a TPR. The draft amends ss. 48.355 (2d) (b) (intro.), 1., 2., 3., 4., and 5. and 938.355 (2d) (b) (intro.), 1., 2., 3., and 4. to specify in each of those subdivisions whether the finding must be evidenced by a judgment of conviction or some other final judgment.

c. *Payment for child's care.* Sections 48.38 (2) (f) and 938.38 (2) (f) require a permanency plan to be prepared if the child's care is paid for under s. 49.19, which is the former AFDC program. The draft amends that qualification to require a permanency plan to be prepared if the child's care *would be* paid for under s. 49.19, *but for* the fact that the program no longer exists.

d. *Permanency plan review.* Finally, the draft creates 48.38 (5) (c) 6. cg. and d. so that that subdivision parallels s. 48.38 (4) (fg), as created by the draft.

If as you review this draft you have any questions about the draft or about any of the issues raised in this drafter's note, please do not hesitate to contact me directly at the phone number or e–mail address listed below.

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