

# State of Wisconsin



2005 Assembly Bill 261

Date of enactment: **August 17, 2005**

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## 2005 WISCONSIN ACT 42

AN ACT *to amend* 48.293 (3), 48.31 (2), 302.113 (9) (e), 302.114 (9) (d), 304.06 (3), 304.06 (3d), 908.08 (title), 908.08 (1), 908.08 (2) (a), 908.08 (2) (b), 908.08 (3) (intro.), 908.08 (3) (a) (intro.), 908.08 (3) (b), 908.08 (4) (intro.), 908.08 (4) (i), 908.08 (5) (a), 908.08 (5) (b), 908.08 (6), 908.08 (7), 938.293 (3), 938.31 (2), 950.055 (2) (b), 967.04 (7) (a) (intro.), 967.04 (7) (b) 10., 967.04 (8) (a), 967.04 (8) (b) (intro.), 967.04 (9), 967.04 (10), 970.03 (14) (b), 971.23 (1) (e), 973.10 (2g) and 973.10 (2m) of the statutes; **relating to**: use of and access to audiovisual recordings of a child's statement in certain court and administrative proceedings.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1.** 48.293 (3) of the statutes is amended to read:

48.293 (3) Upon request prior to the fact-finding hearing, counsel for the interests of the public shall disclose to the child, through his or her counsel or guardian ad litem, or to the unborn child, through the unborn child's guardian ad litem, the existence of any ~~videotaped~~ audiovisual recording of an oral statement of a child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the requesting person to view the ~~videotaped~~ oral statement. If, ~~subsequent to~~ after compliance with this subsection, the state obtains possession, custody or control of such a ~~videotaped~~ statement, counsel for the interests of the public shall promptly notify the requesting person of that fact and make reasonable arrangements for the requesting person to view the ~~videotaped~~ oral statement.

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

48.31 (2) The hearing shall be to the court unless the child, the child's parent, guardian, or legal custodian, the unborn child by the unborn child's guardian ad litem, or the expectant mother of the unborn child exercises the right to a jury trial by demanding a jury trial at any time before or during the plea hearing. If a jury trial is demanded in a proceeding under s. 48.13 or 48.133, the jury shall consist of 6 persons. If a jury trial is demanded in a proceeding under s. 48.42, the jury shall consist of 12 persons unless the parties agree to a lesser number. Chapters 756 and 805 shall govern the selection of jurors. If the hearing involves a child victim or witness, as defined in s. 950.02, the court may order ~~the taking~~ that a deposition be taken by audiovisual means and allow the use of a ~~videotaped~~ recorded deposition under s. 967.04 (7) to (10) and, with the district attorney, shall comply with s. 971.105. At the conclusion of the hearing, the court or jury shall make a determination of the facts, except that in a case alleging a child or an unborn child to be in need of protection or services under s. 48.13 or 48.133, the court shall make the determination under s. 48.13 (intro.) or 48.133 relating to whether the child or unborn child is in need of protection or services that can be ordered by

\* Section 991.11, WISCONSIN STATUTES 2003-04 : Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

the court. If the court finds that the child or unborn child is not within the jurisdiction of the court or, in a case alleging a child or an unborn child to be in need of protection or services under s. 48.13 or 48.133, that the child or unborn child is not in need of protection or services that 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 shall dismiss the petition with prejudice.

**SECTION 3.** 302.113 (9) (e) of the statutes is amended to read:

302.113 (9) (e) If a hearing is to be held under par. (am) before the division of hearings and appeals in the department of administration, the hearing examiner may order ~~the taking that a deposition be taken by audiovisual means~~ and allow the use of a ~~videotaped recorded~~ deposition under s. 967.04 (7) to (10).

**SECTION 4.** 302.114 (9) (d) of the statutes is amended to read:

302.114 (9) (d) If a hearing is to be held under par. (am) before the division of hearings and appeals in the department of administration, the hearing examiner may order ~~the taking that a deposition be taken by audiovisual means~~ and allow the use of a ~~videotaped recorded~~ deposition under s. 967.04 (7) to (10).

**SECTION 5.** 304.06 (3) of the statutes is amended to read:

304.06 (3) Every paroled prisoner remains in the legal custody of the department unless otherwise provided by the department. If the department alleges that any condition or rule of parole has been violated by the prisoner, the department may take physical custody of the prisoner for the investigation of the alleged violation. If the department is satisfied that any condition or rule of parole has been violated it shall afford the prisoner such administrative hearings as are required by law. Unless waived by the parolee, the final administrative hearing shall be held before a hearing examiner from the division of hearings and appeals in the department of administration who is licensed to practice law in this state. The hearing examiner shall enter an order revoking or not revoking parole. Upon request by either party, the administrator of the division of hearings and appeals shall review the order. The hearing examiner may order ~~the taking that a deposition be taken by audiovisual means~~ and allow the use of a ~~videotaped recorded~~ deposition under s. 967.04 (7) to (10). If the parolee waives the final administrative hearing, the secretary of corrections shall enter an order revoking or not revoking parole. If the examiner, the administrator upon review, or the secretary in the case of a waiver finds that the prisoner has violated the rules or conditions of parole, the examiner, the administrator upon review, or the secretary in the case of a waiver, may order the prisoner returned to prison to continue serving his or her sentence, or to continue on parole. If the prisoner claims or appears to be indigent,

the department shall refer the prisoner to the authority for indigency determinations specified under s. 977.07 (1).

**SECTION 6.** 304.06 (3d) of the statutes is amended to read:

304.06 (3d) Upon demand prior to a revocation hearing under sub. (3), the district attorney shall disclose to a defendant the existence of any ~~videotaped~~ audiovisual recording of an oral statement of a child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the defendant and defense counsel to view the ~~videotaped~~ statement. If, ~~subsequent to~~ after compliance with this subsection, the state obtains possession, custody or control of such a ~~videotaped~~ statement, the district attorney shall promptly notify the defendant of that fact and make reasonable arrangements for the defendant and defense counsel to view the ~~videotaped~~ statement.

**SECTION 7.** 908.08 (title) of the statutes is amended to read:

**908.08** (title) ~~Videotaped~~ Audiovisual recordings of statements of children.

**SECTION 8.** 908.08 (1) of the statutes is amended to read:

908.08 (1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or 938.31 or revocation hearing under s. 302.113 (9) (am), 302.114 (9) (am), 304.06 (3), or 973.10 (2), the court or hearing examiner may admit into evidence the ~~videotaped~~ audiovisual recording of an oral statement of a child who is available to testify, as provided in this section.

**SECTION 9.** 908.08 (2) (a) of the statutes is amended to read:

908.08 (2) (a) Not less than 10 days ~~prior to~~ before the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the ~~videotape~~ camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the ~~videotape~~ prior to statement before the hearing under par. (b).

**SECTION 10.** 908.08 (2) (b) of the statutes is amended to read:

908.08 (2) (b) ~~Prior to~~ Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or ~~prior to~~ before the hearing, the court shall view the ~~videotape~~ statement. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44 (12).

**SECTION 11.** 908.08 (3) (intro.) of the statutes is amended to read:

908.08 (3) (intro.) The court or hearing examiner shall admit the ~~videotape statement recording~~ upon finding all of the following:

**SECTION 12.** 908.08 (3) (a) (intro.) of the statutes is amended to read:

908.08 (3) (a) (intro.) That the trial or hearing in which the ~~videotape statement recording~~ is offered will commence:

**SECTION 13.** 908.08 (3) (b) of the statutes is amended to read:

908.08 (3) (b) That the ~~videotape recording~~ is accurate and free from excision, alteration and visual or audio distortion.

**SECTION 14.** 908.08 (4) (intro.) of the statutes is amended to read:

908.08 (4) (intro.) In determining whether the interests of justice warrant the admission of ~~a videotape~~ an audiovisual recording of a statement of a child who is at least 12 years of age but younger than 16 years of age, among the factors which the court or hearing examiner may consider are any of the following:

**SECTION 15.** 908.08 (4) (i) of the statutes is amended to read:

908.08 (4) (i) Whether admission of the ~~videotape statement recording~~ would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

**SECTION 16.** 908.08 (5) (a) of the statutes is amended to read:

908.08 (5) (a) If the court or hearing examiner admits a ~~videotape recorded~~ statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the ~~videotape~~ statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the ~~videotape~~ statement to the trier of fact for cross-examination.

**SECTION 17.** 908.08 (5) (b) of the statutes is amended to read:

908.08 (5) (b) If a ~~videotape recorded~~ statement under this section is shown at a preliminary examination under s. 970.03 and the party who offers the statement does not call the child to testify, the court may not order under par. (a) that the child be produced for cross-examination at the preliminary examination.

**SECTION 18.** 908.08 (6) of the statutes is amended to read:

908.08 (6) ~~Videotaped~~ Recorded oral statements of children under this section in the possession, custody or control of the state are discoverable under ss. 48.293 (3), 304.06 (3d), 971.23 (1) (e) and 973.10 (2g).

**SECTION 19.** 908.08 (7) of the statutes is amended to read:

908.08 (7) At a trial or hearing under sub. (1), a court or a hearing examiner may also admit into evidence ~~a videotape~~ an audiovisual recording of an oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.

**SECTION 20.** 938.293 (3) of the statutes is amended to read:

938.293 (3) Upon request prior to the fact-finding hearing, the district attorney shall disclose to the juvenile, and to the juvenile's counsel or guardian ad litem, the existence of any ~~videotaped~~ audiovisual recording of an oral statement of a juvenile child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the requesting person to view the ~~videotaped oral statement~~. If, ~~subsequent to~~ after compliance with this subsection, the state obtains possession, custody or control of such a ~~videotaped~~ statement, the district attorney shall promptly notify the requesting person of that fact and make reasonable arrangements for the requesting person to view the ~~videotaped oral statement~~.

**SECTION 21.** 938.31 (2) of the statutes is amended to read:

938.31 (2) The hearing shall be to the court. If the hearing involves a child victim, as defined in s. 938.02 (20m) (a) 1., or a child witness, as defined in s. 950.02 (5), the court may order ~~the taking that a deposition be taken~~ by audiovisual means and allow the use of a ~~videotaped recorded~~ deposition under s. 967.04 (7) to (10) and, with the district attorney, shall comply with s. 971.105. At the conclusion of the hearing, the court shall make a determination of the facts. If the court finds that the juvenile is not within the jurisdiction of the court or the court finds that the facts alleged in the petition or citation have not been proved, the court shall dismiss the petition or citation with prejudice.

**SECTION 22.** 950.055 (2) (b) of the statutes is amended to read:

950.055 (2) (b) Advice to the judge, when appropriate and as a friend of the court, regarding the child's ability to understand proceedings and questions. The services may include providing assistance in determinations concerning the taking of ~~videotaped depositions~~ by audiovisual means under s. 908.08 or 967.04 (7) and (8) and the duty to expedite proceedings under s. 971.105.

**SECTION 23.** 967.04 (7) (a) (intro.) of the statutes is amended to read:

967.04 (7) (a) (intro.) In any criminal prosecution or any proceeding under ch. 48 or 938, any party may move the court to order ~~the taking of that a videotaped deposition of a child who has been or is likely to be called as a witness~~ be taken by audiovisual means. Upon notice and hearing, the court may issue an order for such a deposi-

tion if the trial or hearing in which the child may be called will commence:

**SECTION 24.** 967.04 (7) (b) 10. of the statutes is amended to read:

967.04 (7) (b) 10. Whether the use of a videotaped recorded deposition would reduce the mental or emotional strain of testifying and whether the deposition could be used to reduce the number of times the child will be required to testify.

**SECTION 25.** 967.04 (8) (a) of the statutes is amended to read:

967.04 (8) (a) If the court orders a deposition under sub. (7), the judge shall preside at the taking of the deposition and enforce compliance with the applicable provisions of ss. 885.44 to 885.47. Notwithstanding s. 885.44 (5), counsel may make objections and the judge shall make rulings thereon as at trial. The clerk of court shall keep the certified original videotape recording of a deposition taken under sub. (7) in a secure place. No person may inspect or copy the deposition except by order of the court upon a showing that inspection or copying is required for editing under s. 885.44 (12) or for the investigation, prosecution or defense of the action in which it was authorized or the provision of services to the child.

**SECTION 26.** 967.04 (8) (b) (intro.) of the statutes is amended to read:

967.04 (8) (b) (intro.) If the court orders that a videotape deposition be taken by audiovisual means under sub. (7), the court shall do all of the following:

**SECTION 27.** 967.04 (9) of the statutes is amended to read:

967.04 (9) In any criminal prosecution or juvenile fact-finding hearing under s. 48.31 or 938.31, the court may admit into evidence a videotaped recorded deposition taken under subs. (7) and (8) without an additional hearing under s. 908.08. In any proceeding under s. 302.113 (9) (am), 302.114 (9) (am), 304.06 (3), or 973.10 (2), the hearing examiner may order that a deposition be taken by audiovisual means and preside at the taking of ~~a~~ the videotaped deposition using the procedure provided in subs. (7) and (8) and may admit the videotaped recorded deposition into evidence without an additional hearing under s. 908.08.

**SECTION 28.** 967.04 (10) of the statutes is amended to read:

967.04 (10) If a court or hearing examiner admits a videotaped recorded deposition into evidence under sub. (9), the child may not be called as a witness at the proceeding in which it was admitted unless the court or hearing examiner so orders upon a showing that additional

testimony by the child is required in the interest of fairness for reasons neither known nor with reasonable diligence discoverable at the time of the deposition by the party seeking to call the child. The testimony of a child who is required to testify under this subsection may be taken in accordance with s. 972.11 (2m), if applicable.

**SECTION 29.** 970.03 (14) (b) of the statutes is amended to read:

970.03 (14) (b) At any preliminary examination, the court shall admit videotape an audiovisual recording of a statement under s. 908.08 upon making the findings required under s. 908.08 (3). The child who makes the statement need not be called as a witness and, under the circumstances specified in s. 908.08 (5) (b), may not be compelled to undergo cross-examination.

**SECTION 30.** 971.23 (1) (e) of the statutes is amended to read:

971.23 (1) (e) Any relevant written or recorded statements of a witness named on a list under par. (d), including any videotaped audiovisual recording of an oral statement of a child under s. 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

**SECTION 31.** 973.10 (2g) of the statutes is amended to read:

973.10 (2g) Upon demand prior to a revocation hearing under sub. (2), the district attorney shall disclose to a defendant the existence of any videotaped audiovisual recording of an oral statement of a child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the defendant and defense counsel to view the videotaped statement. If, ~~subsequent to~~ after compliance with this subsection, the state obtains possession, custody or control of such a videotaped statement, the district attorney shall promptly notify the defendant of that fact and make reasonable arrangements for the defendant and defense counsel to view the videotaped statement.

**SECTION 32.** 973.10 (2m) of the statutes is amended to read:

973.10 (2m) In any administrative hearing under sub. (2), the hearing examiner may order the taking that a deposition be taken by audiovisual means and allow the use of a videotaped recorded deposition under s. 967.04 (7) to (10).