JANEL BRANDTJEN

STATE REPRESENTATIVE • 22ND ASSEMBLY DISTRICT

Thank you Chairman Snyder and the members of the Assembly Committee on Children and Families for hearing AB 263. This bill is a bipartisan bill that addresses a list of concerns regarding adoption in Wisconsin. Wisconsin is known throughout the adoption community as a difficult state to adoption children in; AB 263 will go a long way to correct that perception. We can all agree that promoting an environment where children can grow up with loving and caring parents, who have the will and the means to raise healthy children, is a worthy endeavor.

AB 263 does the following to streamline the adoption process in Wisconsin:

1. Combines the fact-finding hearing and dispositional hearing in a TPR proceeding, which will significantly reduce the time it takes to adopt a child in Wisconsin.

2. Provides a method by which a mother, father, or alleged or presumed father, may disclaim his or her parental rights with respect to a child in writing, as an alternative to appearing in court to consent to the termination of his or her parental rights.

3. Changes the factor related to expressing concern for, or interest in, the support, care, and well-being of the child, as to whether the person has provided care or support for the child.

4. Provides that an alleged father of a nonmarital child, whose paternity has not been established, is entitled to actual notice of a TPR proceeding and the resulting rights of standing in that proceeding, only if that person has filed a declaration of paternal interest.

5. Allows payments to be made to a licensed out-of-state private child-placing agency for services provided in connection with an adoption.

We believe these simple changes to Wisconsin's adoption laws will make a positive difference in the lives of many Wisconsin children. Every child deserves a happy and loving home.

Thank you,

Janel Brandtjen

State Representative Janel Brandtjen

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Testimony before the Assembly Committee on Children and Families
State Senator André Jacque
November 13, 2019

Chairman Snyder and Members of the Assembly Committee on Children and Families,

Thank you for the opportunity to testify before you today in support of Assembly Bill 263, The Adoption Reform Act that Rep. Brandtjen and I have introduced to make some vital reforms to the adoption process in Wisconsin.

Adoption in the United States is a complex patchwork of law and practice that imposes considerable strain on those navigating it. According to the most recent state-by-state statistical review of adoption, published by the Children's Bureau of the U.S. Department of Health & Human Services in 2011, Wisconsin ranks behind 37 states and the District of Columbia in the rate of adoptions completed in our state, even lagging behind several less populated states in the number of total adoptions. The difficult and uncertain court process faced by prospective birthparents and adoptive parents in Wisconsin is often cited as a factor, leading families seeking to adopt to look out of state. Several multi-state adoption agencies have indicated that they do not finalize adoptions in Wisconsin due to the length and complexity of the court process; one prominent interstate adoption agency assists in placements in 46 states, but notably, Wisconsin is not among them.

This proposal makes a number of vital reforms to Wisconsin's adoption system in consultation with and at the request of birth parents, adoptive parents, adoption attorneys and adoption agencies:

1. Adding the option for birthparents to invoke the termination of their parental rights (TPR) without the requirement to endure a lengthy court process. Such an alternative is commonly used in the majority of states throughout the U.S. and is considered a best practice.

This change will create a system that is easier to navigate for birthparents by removing the fear and uncertainty surrounding mandatory court proceedings which can make them feel like they are being penalized for their decision, particularly if such proceedings would potentially require them to relive traumatic events. This option would also remove a large portion of uncertainty for adoptive parents about the permanency of the placement of a child with them, which would encourage more adoptions to take place in Wisconsin.

By allowing parents to voluntarily disclaim their parental rights after 72 hours from the birth of the child, Assembly Bill 263 will bring more consistency to Wisconsin's adoption process instead of variability from county to county and judge to judge, while reducing unnecessary court time and costs for the completion of the adoption. This legislation allows for the TPR paperwork to be completed by birthparents with trusted counselors they have established a relationship with, and requires the affidavit of disclaimer of parental rights to be signed by two witnesses and notarized.

2. Adding abandonment grounds for involuntary TPR, including failure to provide care and support for a child, failure to pay child support, and failure to provide reasonable care and support for the mother of the child without reasonable cause.

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3. Combining the fact-finding and dispositional hearings in a TPR proceeding by requiring the juvenile court to hear all evidence relevant to TPR grounds and disposition before making a determination as to whether the parent is unfit.
4. Expanding parental options by allowing payments to be made to a licensed out-of-state private child placing agency for services provided in connection with an adoption.
5. Requiring greater accountability and responsibility by providing that an alleged father of a nonmarital child whose paternity has not been established is entitled to actual notice of a TPR proceeding, and the resulting rights of standing in that proceeding, only if that person has filed a declaration of paternal interest.

Our proposal does not impact the other requirements of the domestic adoption process in Wisconsin, including selecting an agency and completing a home study, which encompasses background checks, home inspections and interviews about family, background, finances and reasons for wanting to adopt. Wisconsin law requires that women considering adoption be provided counseling and certain living expenses up to $5,000.

A significant portion of this legislation passed the State Assembly by voice vote in a previous session, and we were pleased to work with Wisconsin's Native American Tribes to allay concerns before doing so. Those changes have been maintained in this legislation, along with additional components which make this reform even more effective and comprehensive. Unfortunately, the prior legislation did not have a Senate author, but I am pleased that several Senators are in strong support this session. I am pleased to also note that this legislation is supported by the Wisconsin Chapter of the National Association of Social Workers.

Thank you for your consideration of Assembly Bill 263.

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Governor Tony Evers
Secretary Emilie Amundson

Secretary's Office

TO: Chair Snyder and Members of the Assembly Committee on Children and Families

FROM: Nadya Pérez-Reyes, Legislative Advisor
Danielle Karnopp, Chief, Adoptions and Interstate Services Section
Rachel Nili, Attorney, Office of Legal Counsel

DATE: November 13, 2019

SUBJECT: 2019 Assembly Bill 263

Thank you for the opportunity to provide testimony on Assembly Bill 263.

The Department of Children and Families is committed to the goal that **all** Wisconsin children and youth are safe and loved members of thriving families and communities. To support this goal, the Wisconsin child welfare system is guided by the following key principles as the Department has highlighted in prior testimony before the Speaker's Task Force on Adoption and Committee on Family Law. These principles are also embodied in the new federal child welfare law, the Family First Prevention Services Act, which Wisconsin must implement by October 2021:

- **Prevention:** Child welfare increasingly focuses on prevention efforts and keeping children in their homes when possible.
- **Reunification:** The primary goal is to reunify a child with his/her birth family whenever it is safe to do so.
- **Permanence**: The child welfare system aims to transition children in out-of-home care (OHC) safely and quickly back with their family, whenever possible, or to another permanent home.
- **Relatives:** As familiar, caring adult relatives play an important part in children's lives as caregivers or ongoing supports and should be used as out-of-home placements whenever possible.

It is through the lens of these principles that the Department reviewed the bill before the Committee today. The Department of Children and Families is testifying in opposition to AB263 and Assembly Substitute Amendment 1.

The Department recognizes and expresses appreciation for the dedication of legislators to issues affecting Wisconsin's children and families. AB263 addresses complex legal, programmatic, and emotional issues that carry significant ramifications for a wide range of individuals. As currently drafted, the bill presents legal, policy, and implementation challenges. Our comments seek to bring to the attention of the Committee the broader ramifications of the bill so that the Committee can consider the impact on all affected parties and stakeholders as it develops statutory changes in this policy area.

AB 263 eliminates the right to a TPR jury trial. The right to parent is one of the most treasured and fundamental rights. It is the Department's view that birth parents should have all possible legal protections before the decision to terminate parental rights is made.

AB 263 allows a parent to submit an affidavit of a disclaimer to their parental rights to a child without appearing in court to terminate their parental rights. The Department supports efforts to create an avenue to voluntarily terminate parental rights that avoids possible trauma of appearing in court, but opposes the bill, as written, for several reasons:

a) Allowing a mother to submit an affidavit of disclaimer as early as 72 hours after the birth of a child does not allow adequate time for a mother or father to receive appropriate counseling and/or legal representation after the birth of their child regarding services that may be available to the mother or father, the consequences of terminating her parental rights, and the effects of an adoption on their child;
b) Under the current language of the bill, an affidavit executed by a mother is irrevocable if executed 72 hours or more after the birth of the child (which is the only time when the mother can submit an affidavit) unless it was obtained by fraud or duress. There is no process specified on how a parent would prove fraud or duress.
c) Current language in the bill allows a parent to bring an action to invalidate an affidavit within 6 months of execution of the affidavit, if exceptions do not apply. Adoptions may be finalized within the 6-month period, which could leave the integrity of the adoption vulnerable.

d) The parent must have two witnesses for the affidavit of disclaimer, but the bill does not define or place parameters on who may be a witness. This would allow for witnesses that may not have the parent's best interest at heart, or may have other incentives or potential for personal gain. This would create the opportunity for coercion of the parent to sign a disclaimer without understanding the consequences;
e) The bill does not describe a process to ensure the parent's understanding of the disclaimer. There are concerns as to:
    a. Whether there is an identified father who must be notified;
    b. Whether the child is an Indian child;
    c. Whether the parent received adequate explanation of services and counseling available to him/her; and
    d. Whether the parent understands the consequences of the disclaimer and subsequent termination of their parental rights; and
f) This bill appears to be targeted for parents of newborns and does not address whether there is an expiration of time for a disclaimer as the child ages. This leaves questions as to its impact on a parent arranging an adoption of an older child. The bill's timeline is based on the birth of the child, which leaves question of whether it applies to adoptive parents of a child.

AB 263 revises abandonment grounds for TPR to include failure without reasonable cause to provide care and support for a mother during pregnancy or failure without reasonable cause to pay child support. Current law already allows a court to consider whether a parent has "neglected or refused to provide care or support for a child" or whether a person who is or may be the father of the child has expressed an interest or concern for the care and support of the mother during pregnancy as a basis to terminate parental rights for failure to assume parental responsibility.

The proposed changes in AB263 impact the rights of fathers by making the failure to provide care and support for a mother during pregnancy or failure to pay child support, without reasonable cause, a ground for termination of parental rights on its own. The Department anticipates the provision will have a disproportionate effect on parents living in poverty. In addition, there are key concepts that are not defined such as what constitutes "reasonable cause" for failure to pay child support or if a failure to pay a single child support payment is

grounds for TPR. The Department anticipates appeals related to the provisions in this ground, which will result in delays in permanency for children.

AB 263 lessens notification requirements to potential fathers in termination of parental rights proceedings significantly, which will limit the rights of fathers to their children, especially to fathers of children over one year of age. The bill specifies that except in certain circumstances, the failure to submit a declaration of paternal interest deems the father to have irrevocably consented to the termination of parental rights, even if he was unaware at the time that he was the father of the child. The right to parent one's child is a fundamental and treasured right; it should be taken away only after all protections have been accorded to the parent. This new provision to eliminate notices to alleged fathers does not afford protections to the parent.

With respect to Assembly Substitute Amendment 1, though a comprehensive review has not been completed with stakeholders, the Department is supportive of the efforts to maintain rights to a jury trial and to offer clarification regarding voluntary termination of parental rights via affidavit before a child's first birthday. DCF is not supportive of the addition of a provision that allows minors to voluntary terminate their parental rights through submission of an affidavit, in light of DCF's concerns with the provisions related to the affidavit provisions discussed earlier in this testimony. The other provisions of AB263 appear to remain consistent between the bill as drafted and the amendment, except for these changes, therefore the Department opposes the substitute amendment.

Conclusion

Thank you for the opportunity to testify on this bill. The proposed bill and substitute amendment AB263 have potentially adverse consequences for at least some key stakeholders. For these reasons, we view that it is appropriate for any legislation in this area to be developed in a careful manner with sufficient time to allow full and thoughtful consideration to the range of views and impacts and an understanding of the tradeoffs of possible statutory and policy changes. The Department is pleased to engage with legislators and others in further discussion, including exploring possible modifications to the bill. We would be pleased to respond to any questions.

My wife Jill and I attempted to adopted a baby girl in November, 2017. The birth mother chose us to parent her child when she was seven months pregnant. She explained that neither she nor the father was in any position to parent and that she wanted what was best for this child. She had been harassed by the birth father, so much so that she petitioned the court for a restraining order, which was granted.

The birth father made no attempt to offer any support to the birth mother throughout the pregnancy. He was made aware of the adoption plan and on multiple occasions the social service facilitating the adoption attempted to contact him for his input. He refused all correspondence, even rejecting certified mail. Not once did he reach out to ask about the health of the birth mother, and most importantly, the health of the child. (We recognize that he was not allowed to contact the mother due to the restraining order, but he was able to contact her family members, or the social worker).

Our daughter was born on November 1st, 2017. We stayed with her in the hospital and then took her home two days later. The social worker attempted to contact the birth father immediately after birth. He did not reply to her voicemail. We spoke with the attorney working the case, and were told the birth mother would go to court to legally terminate her parental rights and the birth father would be served papers to appear for the same court hearing. If the birth father did not show up to the court hearing, the judge would most likely grant a default judgement against him, automatically terminating his parental rights. The lawyer and social workers told us that they had no reason to believe the birth father would appear in court as he did not make a single attempt to inquire about the child throughout the pregnancy.

Nearly two months after birth, the court date finally came. Wisconsin law states that this court date be approximately 30 days from birth, but there were delays in this as well. By comparison, other states require parental rights to be terminated within 48 hours from birth. This was a big day for us as terminating parental rights is the largest step towards legally completing an adoption. The birth mother appeared in court ready to terminate her rights. Sadly, the birth father decided to appear out of nowhere and came to the hearing

The birth father decided to contest the adoption. My wife and I then met with him to try and explain the benefits of an adoption and to tell him that we would like him to be involved with us in having a relationship with the child. He later refused. The birth mother was adamant that the father would be a danger to the child and therefore went forward with what is called an involuntary termination of parental rights trial. All legal fees associated with this trial are paid for by the adoptive parents, regardless of who the judgement is made in favor for. The birth father was also made aware that if the judgement was in his favor, the birth mother would simply take the child back and he would be required to take her to family court to initiate visits with the child, at which point his child support obligations would begin. There were multiple pre-trial hearings, and on each occasion the birth father appeared without an attorney. State law in Wisconsin states that these matters must be resolved within 45 days of birth, unless the court finds "good cause" for extending past this deadline. Judge Joe Voiland, the judge assigned to this case, apparently ruled that the birth fathers unwillingness to hire an attorney was "good cause". Therefore, this process was extended until the child was nearly six months old.

There are two parts to a termination of parental rights trial. Part one is called the "grounds phase". This determines whether or not the biological parent has done something so negligent or harmful to the child that the court may decide to move forward to part two. In this case, the

ground being argued was called "failure to assume parental responsibility". In Wisconsin, if you do not make an attempt to take responsibility for your child, as well as show concern for the health and well being of the mother carrying your child, your parental rights may be terminated. As our story would indicate, the birth father did neither. In fact, if you read the legal definition of "failure to assume parental responsibility," you would be convinced that it was written to exactly describe this particular case.

The second hearing only takes place if the court finds there are sufficient grounds to move forward. This second hearing examines what is "in the best interest of the child." There are six items that are considered in this best interest phase, and all six items clearly leaned in our favor, *and against the birth father.*

The trial came and sadly, somehow, the ruling was made in favor of the birth father in the grounds phase. We still have no idea how or why this was. The facts could not have been more clear. We never made it past the grounds phase and therefore we were not even allowed to present the case of what is in the best interest of the child. The birthfather's deposition alone, should have been enough to show he was not what was in the best interest of the child. This was not even allowed to be shown in court because we didn't "make it to part two".

After nearly six months with our daughter, we made plans to return her to her birth mother the next day. That night we read her one last story, and said her bed time prayer one last time. The following morning we packed her belongings to be sent with her. We gave her one last bath, changed her diaper one last time and fed her one more bottle. Then, the social worker came. we put her in a stranger's car seat, said goodbye and watched the car drive off. with our child inside.

This happened in May of 2018. Over the next few months, the birth mother stopped updating us on the child. As of that time, months after the trial, the birth father had still not made a single attempt to initiate visits with the child through the court. He was told in early January 2018 of the steps needed to take in order to visit the child. He refused to offer support and we believe that he does not care about this child. If that isn't "failure to assume parental responsibility", I have no idea what is.

This should not have happened. The judges' incorrect ruling forever removed the child from a comfortable home with two parents in a stable, loving marriage and forced a single mother to parent against her will. This process was set into motion by a spiteful birth father intent on making the birthmothers' life as difficult as possible. This is just one of the examples of a court case in Wisconsin that did not take the child's best interest into mind.

We have talked with multiple social workers who have advised us to try to adopt a child in a different state because the laws in Wisconsin make adoption incredibly difficult. We have paid in excess of $20,000 for our daughter who we will most likely never get to see again. We are currently going through Texas as we can't afford the heartache we have experienced in WI again. 11 out of the 29 families waiting on the adoption agency we are going through in TX are from WI. I think those numbers speak for themselves that adoptive parents who live in WI, are tired of the laws here that are stacked against them.

Prepared Testimony of Eve Dorman, Legal Director for Permanency Planning in Dane County

Public Hearing on Assembly Bill 263

Assembly Committee on Children and Families

November 13, 2019

Good afternoon members of the Assembly Committee on Children and Families. My name is Eve Dorman and I am the Legal Director for Permanency Planning in Dane County. I have been with the Corporation Counsel's Office for approximately 16 years. In my role, I along with four other attorneys, prosecute Children in Need of Protection (CHIPS) and Termination of Parental Rights (TPR) cases for Dane County.

Dane County Department of Human Services and the Permanency Planning Unit work very closely together to serve our community in a way that ensures child safety, supports legal permanency, and builds on family strengths. We have a strong track record with steadily declining caseloads and more discharges from care than new entries into care. Over the past several years, approximately 45% of our kids reunify, 25% achieve permanency through TPR/adoption (many with relatives) and another 20% achieve permanency through relative guardianship.

Dane County has a few concerns with Assembly Bill 263.

This bill would combine fact-finding and disposition hearings in TPR cases. That means a fact finder, whether judge or jury, won't make a decision about parental unfitness until they have heard all the information about parental behavior alleged to support grounds for TPR, plus information related to the child's best interest. Case law and the jury instructions make it clear that evidence regarding the child's best interest is not relevant or admissible to determine the grounds phase of a TPR action as the grounds are currently defined in Sec. 48.415 Wis. Stat. Simply combining the steps procedurally does not address the evidentiary concerns. If we have a fact finder - especially a jury - hear all the dispositional evidence BEFORE they decide whether grounds exist, then there is a high potential for jury verdicts based on improper evidence. There are real questions about whether evidence related to the dispositional factors set forth in Sec. 48.427 Wis. Stat. is relevant and/or overly prejudicial to parents at the fact-finding stage for grounds. In any case, there would be serious questions raised on appeal and the permutations of an appeal on this issue would vary based on the facts of each case. Thus, I anticipate that there would be ongoing appeals rather than getting to a place where the issue is clearly decided.

If I were a defense attorney, I would be very hesitant to exercise any right to trial by jury in light of these evidentiary concerns. This has the impact of chilling the right to a jury trial. Though a jury trial is not constitutionally required, if Wisconsin chooses to offer one, then it should be a real right and not one that is compromised by allowing potentially prejudicial evidence to be heard by the jury each and every time a jury trial is requested. If you choose to mandate combined TPR hearings, it would be better to formally eliminate the jury trial at the grounds phase. Judges as fact-finders are commonly tasked with determining *as a question of law*, what evidence is relevant to the issues presented. Juries are finders of fact and are not permitted to decide questions of law.

I do not believe this change is necessary. Current law provides that once grounds are found, the court SHALL *proceed immediately* (emphasis added) to hear evidence regarding disposition unless certain reasons exist for delay. *See*, Sec. 48.424(4) Wis. Stat. This current law avoids the difficulties of ensuring that each part of the decision is based on proper evidence, while still ensuring that the process is not unnecessarily delayed.

Finally, expanding TPR grounds under abandonment to require actual care and support of the child or mother and require payment child support to avoid TPR is concerning because it will disproportionately affect poor and minority clients. If you choose to require actual care and support of mother during pregnancy, I believe you should consider providing clear exemptions in cases in which the parents are not together as a couple during the pregnancy as a result of domestic violence, cases in which the identity of the father may not be known until after the birth of the child, and cases in which the mother interferes with the ability of potential father to provide care or support. If you choose to include failure to pay child support as a form of abandonment, to avoid constitutional concerns, I believe you need to ensure that poverty is considered reasonable cause for any failure to pay, similar to the exemption for poverty in the definition of neglect at the CHIPS stage. Secs. 48.02(12g) and 48.13(10) Wis. Stat.

Thank you for the opportunity to testify today. I'd be happy to answer any questions you may have.

Ho-Chunk Nation Legislature

Testimony of Representative Hinu Smith

Wisconsin State Assembly Committee on Children and Families
AB 263
November 13, 2019

Thank you, Representatives Snyder and Ramthun for eliciting testimony from the public and tribes on this very important issue. We appreciate every opportunity to discuss potential state legislative matters that will have an effect on our tribes in a government-to-government manner.

One of the paramount purposes of the Indian Child Welfare Act (hereinafter ICWA) is to ensure "the placement of [ ] children in foster or adoptive homes or institutions which will reflect the unique values of the Indian culture."[1] The ICWA's mandate that an adoptive placement is preferred to be with members of the child's extended family, other members of the same tribe, or other Indian families is "[t]he most important substantive requirement imposed on the state."[2] Further, the ICWA permits Tribes that desire to have a different, more culturally appropriate order of preferences to adopt such preferences to take the place of the standard placement scheme found in the ICWA.[3]

It was the intent of Congress to ensure that "white, middle-class standards" not be utilized in determining whether preferred placements are suitable.[4] "Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values."[5]

> The importance of unique Indian social and cultural standards cannot be overemphasized – the historical lack of understanding of such standards by state courts and agencies, and the resulting effects on the populations of Indian tribes and the self identification of Indian children, is precisely why the ICWA was enacted, as "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[6]

Thus, in determining the suitability of a potential home, the relevant standards must be "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural

[1] H.R. Rep. No. 95-608, 95th Cong. 2nd Sess. 8 (1978); *see also* 25 U.S.C. § 1902.
[2] *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).
[3] 25 U.S.C. § 1915(c).
[4] H.R. Rep. No. 95-1386, 95th Cong. 2nd Sess. 24 (1978).
[5] H.R. Rep. No. 95-608, 95th Cong. 2nd Sess. 11 (1978).
[6] CALIFORNIA INDIAN LEGAL SERVICES, CALIFORNIA JUDGES BENCHGUIDE: THE INDIAN CHILD WELFARE ACT 46 (May 2010 ed.); *see also* 25 U.S.C. § 1901; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-37 (1989).

ties."[7] This language illustrates that Congress intended agencies and state courts to look beyond just the reservation boundaries, and focus on social and cultural ties as well.

The tribal nations have no intention to cause harm, but instead seek and advocate for ICWA compliance at every opportunity in an effort to protect their children. This is because with knowledge comes compliance; and with compliance comes healthier and more positive outcomes. The Indian child is saved from becoming part of the statistic that Indian adoptees have a higher rate of suicide, alcohol/drug dependence, and other behavioral health related issues than white adoptees (who also have a higher rate of these issues than non-adoptees). The tribe does not lose one of its future leaders. The extended family and clan have their child safe within their community. The parents are able to take the needed time to overcome whatever issues they have that either (a) led them to be involved in the child welfare system, or (b) led them to believe they would not be able to parent from the very beginning of that child's life. And ultimately the family and tribal ties are never severed.

Assembly Amendment to Senate Bill 232

1. Combines the fact-finding hearing and dispositional hearing in a TPR proceeding.

- The Nation does not have too many concerns with regards to combining the fact-finding hearing and dispositional hearing in a TPR proceeding. This appears to be a provision that would indeed help with lessening the time to permanence.

- If this bill were to combine those two hearings in the CHIPs stage, then the Nation would have serious concerns as it would limit time to develop conditions for return of the child with the parents and lead to cookie-cutter conditions that will be of no benefit to families.

- There are two areas that we would like to highlight as it pertains to the combining of these hearings at the TRP proceeding:

    - Placement Preferences:
        - Ideally, in a perfect world, a placement should have already been identified at this stage of the proceedings. However, in those rare instances where exhaustion of placement preferences is ongoing, this combining of the hearings would limit time to address additional exhaustion efforts. So, that is one note of concern.

        - Again, the Tribe's goal is always to have ICWA followed from day one, and that an ICWA compliant placement would have been identified prior to the filing of a TPR petition.

    - Fact-Finder:

[7] 25 U.S.C. § 1915(d).

- The Nation believes clarifying language is needed to specifically identify that it is the fact-finder who would be the one to make the ICWA findings regarding active efforts by clear & convincing evidence and substantial harm by beyond a reasonable doubt.

- The way the language is written now, it could be interpreted as either judge or jury- potentially leading to differing opinions.

    - This made sense under the bifurcated system. If parents admitted to the allegations and moved straight to disposition, the judge would make those findings. However, if the parents denied the allegations and requested a jury trial, the jury would make those findings.

- It would just help to add clarifying language that it is the fact-finder who would make those ICWA findings.

2. Provides a method by which a mother, father, or alleged or presumed father may disclaim his or her parental rights with respect to a child under the age of one who is not an Indian child in writing as an alternative to appearing in court to consent to the termination of his or her parental rights.

- We appreciate that it is made clear that Indian children would be exempted from this provision. We are in agreement with this.

- There is just some additional language we believe would be assistive:

    - The Nation requests that language be mandated in the affidavit regarding overturning for fraud and duress if it is an Indian child.

    - It would make sense to add the language proposed in section 48.21 subsection 2, sub bm, sub 2, sub d into Section 48.21 subsection 2, sub bm, sub 4.

    - While the language does say an Affidavit should not be used for an Indian child, we believe this extra reference to WICWA (48.028) is still ideal.

3. Makes changes to some of the grounds for involuntary TPR.

- As a patrilineal society, the Ho-Chunk Nation has grave concerns about any provisions that would not provide the same level of protections to biological fathers as mothers. They should be treated equally under the law, and have every opportunity to protect their fundamental rights to parent.

- The Nation has further concerns with several of these provisions, as issues of poverty could be at play, and as such, Indian families would be disproportionately impacted in a negative manner.

- We have concerns about the level of discretion and interpretation involved in determining what would be considered "reasonable cause."
    - This could lead to inconsistent treatment of parents from county to county, judge to judge. And thus, could lead to unnecessary litigation that will lengthen the case.
- Reasonable cause needs to be defined so that poverty is not utilized as a ground for TPR, and in the case of a mother lying to avoid the application of ICWA, that a dad should not be penalized for believing the mother's statements that the child is not his. These lies ultimately result in the tribes not being noticed, and thus the loss of our Indian children.
- With regards to providing support and care for the mother while pregnant, this looks very different within the Ho-Chunk Nation for religious reasons. For example, you are not supposed to purchase anything before the baby arrives or have a baby shower in advance of the birth. Thus, this provision could unfairly target Ho-Chunk fathers, who are merely following their religious beliefs.

4. **Provides that an alleged father of a nonmarital child whose paternity has not been established is entitled to actual notice of a TPR proceeding, and the resulting rights of standing in that proceeding, only if that person has filed a declaration of paternal interest.**

- The fact that potential fathers could be denied service of the TPR petition is alarming.
- This denial could lead to tribes not being noticed.
    - For example, if the potential father is Ho-Chunk, and the mother was not aware of this, she could very well claim that she has no reason to believe her child is an Indian child. However, if the father was noticed he could reach out to the Tribe and appear at the hearing to let the court know that the child is an Indian child, thereby allowing the Tribe to receive proper notice.
- This change to the law would prevent fathers from having equal protection under the law as mothers would have. Thus, we anticipate further litigation adding to the length of time before the child reaches permanence.

5. Allows payments to be made to a licensed out-of-state private child placing agency for services provided in connection with an adoption.

- The Nation would like to see that sanctions would still be imposed in some similar manner, as they would be in Wisconsin. See for example the sanctions imposed on child-placing agencies in Wisconsin under WI DCF § 54.05(6).

- Because this deals with out-of-state licensure, there needs to be some other protections built in. Obviously, Wisconsin would not be able to pull the license of say a Michigan child placing agency. However, Wisconsin could say that they will no longer allow that particular agency to operate in Wisconsin.

Conclusion

There is nothing more important to a tribe than its children. They are our future, and they will ultimately be the links to our past. It is likewise in their best interests to know and have the opportunity to learn about their Indian heritage and be connected with their tribal communities. We- Wisconsin and tribes- must work together to address the adoption system before we lose any more of our tribal children and before our tribal children lose us. Whatever legislative changes come from this committee must comply with the federal protections afforded to Indian children and tribes. Working cooperatively to ensure these protections is of great importance. Great things happen when we work together- just look at WICWA. Thank you for your time.

APPENDIX A
(Selection of laws and regulations)

U.S. CODE

25 U.S.C. § 1913 - Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 U.S.C. § 1914- Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

U.S. FEDERAL REGULATIONS

25 CFR § 23.124 - What actions must a State court undertake in voluntary proceedings?

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c)State courts must ensure that the placement for the Indian child complies with §§ 23.129-23.132.

25 CFR § 23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.
(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:
(1) The terms and consequences of the consent in detail; and
(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:
(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or
(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or
(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.
(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.
(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.
(e) A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

WISCONSIN CHAPTER 48
CHILDREN'S CODE

Wis. Stat. § 48.028
(5) VOLUNTARY PROCEEDINGS; CONSENT; WITHDRAWAL.
(a) *Out-of-home care placement.* A voluntary consent by a parent or Indian custodian to an out-of-home care placement of an Indian child under s. 48.63 (1) (a) or (b) or (5) (b) or a delegation of powers by a parent regarding the care and custody of an Indian child under s. 48.979 is not valid unless the consent or delegation is executed in writing, recorded before a judge, and accompanied by a written certification by the judge that the terms and consequences of the consent or delegation were fully explained in detail to and were fully understood by the parent or Indian custodian. The judge shall also certify that the parent or Indian custodian fully understood the explanation in English or that the explanation was interpreted into a language that the parent or Indian custodian understood. Any consent or delegation of powers given under this paragraph prior to or within 10 days after the birth of the Indian child is not valid. A parent or Indian custodian who has executed a consent or delegation of powers under this paragraph may withdraw the consent or delegation for any reason at any time, and the Indian child shall be returned to the parent or Indian custodian. A parent or Indian custodian who has executed a consent or delegation of powers under this paragraph may also move to invalidate the out-of-home care placement or delegation of powers under sub. (6).
(b) *Termination of parental rights.* A voluntary consent by a parent to a termination of parental rights under s. 48.41 (2) (e) is not valid unless the consent is executed in writing, recorded before a judge, and accompanied by a written certification by the judge that the terms and consequences of the consent were fully explained in detail to and were fully understood by the parent. The judge shall also certify that the parent fully understood the explanation in English or that the explanation was interpreted into a language that the parent understood. Any consent given under this paragraph prior to or within 10 days after the birth of the Indian child is not valid. A parent who has executed a consent under this paragraph may withdraw the consent for any reason at any time prior to the entry of a final order terminating parental rights, and the Indian child shall be returned to his or her parent unless an order or agreement specified in s. 48.368 (1) or 938.368 (1) provides for a different placement. After the entry of a final order terminating parental rights, a parent who has executed a consent under this paragraph may withdraw that consent as provided in par. (c), move to invalidate the termination of parental rights under sub. (6), or move for relief from the judgment under s. 48.46 (2).
(c) *Withdrawal of consent after order granting adoption.* After the entry of a final order granting adoption of an Indian child, a parent who has consented to termination of parental rights under s. 48.41 (2) (e) may withdraw that consent and move the court for relief from the judgment on the grounds that the consent was obtained through fraud or duress. Any such motion shall be filed within 2 years after the entry of an order granting adoption of the Indian child. A motion under this subsection does not affect the finality or suspend the operation of the judgment or order

terminating parental rights or granting adoption. If the court finds that the consent was obtained through fraud or duress, the court shall vacate the judgment or order terminating parental rights and, if applicable, the order granting adoption and return the Indian child to the custody of the parent, unless an order or agreement specified in s. 48.368 (1) or 938.368 (1) that was in effect prior to the termination of parental rights provides for a different placement.

(6) INVALIDATION OF ACTION. Any Indian child who is the subject of an out-of-home care placement, of a delegation of powers under s. 48.979, or of a termination of parental rights proceeding, any parent or Indian custodian from whose custody that Indian child was removed, or the Indian child's tribe may move the court to invalidate that out-of-home care placement, delegation of powers, or termination of parental rights on the grounds that the out-of-home care placement or delegation of powers was made or the termination of parental rights was ordered in violation of 25 USC 1911, 1912, or 1913. If the court finds that those grounds exist, the court shall invalidate the out-of-home care placement, delegation of powers, or termination of parental rights.

(7) PLACEMENTS AND DELEGATIONS OF POWERS; PREFERENCES.

(a) *Adoptive placement or delegation of powers; preferences.* Subject to pars. (c) and (d), in placing an Indian child for adoption or in delegating powers, as described in sub. (2) (d) 5., regarding an Indian child, preference shall be given, in the absence of good cause, as described in par. (e), to the contrary, to a placement with or delegation to one of the following, in the order of preference listed:

1. An extended family member of the Indian child.

2. Another member of the Indian child's tribe.

3. Another Indian family.

DCF 50
FACILITATING PUBLIC ADOPTIONS AND ADOPTION ASSISTANCE

WI DCF § 50.08 Placement for the purpose of a public adoption.

(1) Best interest of the child.

(a) The public adoption agency that is responsible for placing a child for adoption or, if the child is at legal risk, the placing agency, shall determine if placement with specific prospective adoptive parents whose home study has been approved is in the best interest of the child.

(b) A public adoption agency shall consider the availability of a placement for adoption with a relative of the child who is identified in the child's permanency plan or is otherwise known to the public adoption agency, as required under s. 48.834 (1), Stats.

(c) If a child has one or more siblings who have been adopted or have been placed for adoption, the public adoption agency shall make reasonable efforts to place the child with an adoptive parent or proposed adoptive parent of such a sibling who is identified in the child's permanency plan or otherwise known to the public adoption agency, unless the public adoption agency determines that a joint placement would be contrary to the safety or well-being of the child or the sibling, as required under s. 48.834 (2), Stats.

(d) If the child is an Indian child, the public adoption agency **shall** comply with the order of placement preference under s. 48.028 (7), Stats., unless there is good cause as described in s. 48.028 (7) (e), Stats., for departing from that order.

(2) Removal from foster home. Before the adoption is final, an agency appointed as guardian of the child under s. 48.427 (3m) (a) 1. to 4., (am), or (b), Stats., may remove the child from the child's placement under s. 48.437, Stats.

(3) Placement not guaranteed. Prospective adoptive parents whose home study has been approved are not guaranteed placement or continued placement of a child.

WISCONSIN DCF 54
CHILD-PLACING AGENCIES

WI DCF § 54.05 Indian children.

(1) Determination that a child is or may be an Indian child. If an agency has obtained information at intake or through other means that the child or at least one of the child's biological parents is or may be of American Indian descent, the child's case manager shall:

(a) Carry out and document in the child's case record diligent efforts, including but not limited to contacting the potential tribe or tribes' membership or enrollment offices and child welfare offices, and the U.S. department of

interior's bureau of Indian affairs where contacts with individual tribes do not document the child's Indian descent, to verify that the child is an Indian child and to identify the child's Indian tribe;
(b) Inform the court of a determination that the child is an Indian child and of the factual basis for that determination and document and date in the child's case record that determination; and
(c) Comply with 25 USC 1912 (a).
(2) Compliance with Indian child welfare act. If the agency determines under sub. (1) that a child is an Indian child, the agency shall comply with all provisions of the Indian Child Welfare Act, 25 USC 1901 to 1963, and s. 48.028, Stats.
(3) Services for Indian child and family.
(a) Before providing services to an Indian child and the Indian child's family, the agency shall inform the child's tribe, if known, and ask for the tribe's participation in efforts to provide services to the Indian child and the Indian child's family. The child's case manager shall document and date in the child's case record agency efforts to inform the tribe and seek its participation.
(b) The Indian child's case manager shall undertake active efforts to prevent breakup of the child's family by providing remedial services and rehabilitative programs to the Indian child and the child's family in accordance with 25 USC 1912 (d). The child's case manager shall document and date those efforts in the child's case record.
(4) Termination of parental rights. An agency seeking the termination of parental rights to an Indian child shall notify the parents and tribe in accordance with 25 USC 1912 (a) of their rights of intervention and shall provide the court of jurisdiction with information on agency efforts described under sub. (3). The information shall include the reasons why those efforts proved unsuccessful. The agency shall record in the Indian child's case record the date the information was given to the court.
(5) Placement of an Indian child.
(a) Adoptive placement.
1. For the adoptive placement of an Indian child, 25 USC 1915 (a) requires that preference be given, in the absence of good cause to the contrary, to placement with, in order of priority, a member of the Indian child's extended family, another member of the Indian child's tribe or another Indian family. The Indian child's case manager shall investigate the availability of a placement in the order of priority indicated.
2. After completing the adoption of the Indian child, the child's case manager shall request in writing that the court that ordered the adoption notify the secretary of the U.S. department of the interior of the following enrollment information:
a. The name and tribal affiliation of the Indian child;
b. The name and address of the adoptive parents; and
c. The name and address of any agency having files or information on the child's adoptive placement.
3. The Indian child's case manager shall file a copy of the written request under subd. 2. in the child's case record.
(b) Foster care or preadoptive placement.
1. For foster care or preadoptive placement of an Indian child, 25 USC 1915 (b) requires that the child be placed in the least restrictive setting which most approximates a family and in which any special needs of the child may be met, within reasonable proximity to the child's home. Preference is to be given, in the absence of good cause to the contrary, to placement, in order of priority:
a. With a member of the Indian child's extended family;
b. In a foster home licensed, approved or specified by the Indian child's tribe;
c. In an Indian foster home licensed by the department, a county social services or human services department or a child-placing agency; or
d. In an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.
2. For foster care or preadoptive placement of an Indian child, except for an emergency placement under 25 USC 1922, the child's case manager shall investigate to determine the availability of a placement under subd. 1. in the order of priority indicated. The Indian child's case manager shall document in the child's case record the investigative efforts and results, as well as any emergency placement and the reason for it.
3. An agency seeking to place an Indian child in foster care shall notify the parents and tribe in accordance with 25 USC 1912 (a) of their right of intervention and shall provide the court of jurisdiction with information on agency efforts described under sub. (3). The information shall include the reasons why those efforts proved unsuccessful. The agency shall record in the Indian child's case record the date the information was given to the court.
(c) Preference of tribe, child or parent. In the case of a placement under par. (a) or (b), if the Indian child's tribe establishes a different order of preference by resolution, the agency shall follow that order so long as the placement is the least restrictive setting appropriate to the particular needs of the child as provided in par. (b). Where

appropriate, the preference of the Indian child or the child's parent shall be considered provided that where a consenting parent evidences a desire for anonymity, the agency shall give weight to that desire in applying the preference.

(d) Informing the court. Prior to the court ordering termination of parental rights, foster care placement, adoptive placement or adoption of an Indian child, the agency shall inform the court in writing of agency investigative efforts and results to determine the availability of a placement in order of priority under par. (a) or (b) including when there is an emergency placement or when a different order of preference is expressed under par. (c).

(e) Record of placement. When an agency places an Indian child under par. (a) or (b), the agency shall forward a record of the placement to the department. The record shall provide evidence of efforts to comply with the order of preference under par. (a) 1. or (b) 1., as appropriate. The department, pursuant to 25 USC 1915 (e), shall maintain the record and shall make it available at any time upon request of the secretary of the U.S. department of the interior or of the Indian child's tribe.

Note: Send records of placement to the Bureau of Permanence and Out-of-Home Care, Division of Safety and Permanence, P.O. Box 8916, Madison, WI 53708-8916.

(6) Sanctions for not complying with the Indian child welfare act. A child-placing agency which fails to follow the provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 to 1963, concerning child custody proceedings involving an Indian child shall be subject to the following department sanctions:

(a) If the child-placing agency knowingly and intentionally disregards a requirement of the ICWA, the department shall by letter of notification order the child-placing agency to stop accepting for service all Indian children referred for service to the agency. The agency shall ensure that no child accepted for service is an Indian child;

(b) If the child-placing agency knowingly and intentionally disregards the department's letter of notification under par. (a), the department shall revoke or not renew, as appropriate, the child-placing agency's license;

(c) If the child-placing agency is informed or discovers that it has unknowingly or negligently violated a requirement of the ICWA, the child-placing agency shall do the following:

1. Notify the court and the department upon being informed of or discovery of the violation of the ICWA;

2. Notify the parent Indian custodian, tribe and child upon being informed of or discovery of the violation of the ICWA; and

3. Cooperate with all parties in promptly correcting any inappropriate placements; and

(d) If the child-placing agency under par. (c) does not comply with par. (c) 1. to 3., the child-placing agency shall be subject to the sanctions under pars. (a) and (b).

APPENDIX B
(List of Resources on ICWA/WICWA)

1) "Missing Threads: The Story of the Wisconsin Indian Child Welfare Act"
https://www.youtube.com/watch?v=ZCLUbS4FxWo (film on youtube)
http://missingthreadswicwa.blogspot.com/2015/11/why-we-produced-this-documentary_20.html

2) This Land (podcast) – Episode 8 "The Next Battleground"
https://crooked.com/podcast/this-land-episode-8-the-next-battleground/

3) Indian Child Welfare Act Proceedings- 2016 Regulations
https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf

4) BIA ICWA Rule Training Module
https://www.indianaffairs.gov/cs/groups/webteam/documents/document/idc2-041802.pdf

5) BIA Indian Child Welfare Act; Designated Tribal Agents for Service of Notice
https://www.federalregister.gov/documents/2018/06/04/2018-11924/indian-child-welfare-act-designated-tribal-agents-for-service-of-notice

6) Guidelines for Implementing the Indian Child Welfare Act- 2016 Guidelines
https://www.indianaffairs.gov/cs/groups/public/documents/text/idc2-056831.pdf

7) BIA's Quick Reference Sheet for State Court Personnel
https://www.indianaffairs.gov/cs/groups/xois/documents/document/idc2-041404.pdf

8) BIA's Webpage on the Indian Child Welfare Act
https://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm

9) Wisconsin's Children's Court Improvement Program's WICWA E-Learning Activity
http://www.wicciptraining.com/Content/wicwa_latest/player.html

10) Judicial Checklist - Wisconsin Indian Child Welfare Act
https://www.wicourts.gov/courts/programs/docs/ccipwicwa.pdf

11) WICWA Active Efforts Guide
https://dcf.wisconsin.gov/files/publications/pdf/464.pdf

12) WICWA Circuit Court Forms
https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=21

13) Wisconsin's Department of Children and Families' WICWA Page
https://dcf.wisconsin.gov/wicwa

14) National Indian Child Welfare Association
http://www.nicwa.org/

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Kelli Thompson
State Public Defender

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Assembly Committee on Children and Families
Wednesday, November 13, 2019
Assembly Bills 263

Chair Snyder and members,

Thank you for the opportunity to testify today on behalf of the State Public Defender (SPD). My name is Diane Rondini. I am the agency's Legal Counsel and have more than 30 years of experience practicing juvenile and family law in Wisconsin. Several of the proposals within Assembly Bill (AB) 263, as changed by Assembly Substitute Amendment 1, raise concerns for the practice of law and clients of the State Public Defender's office.

We do want to note and thank the author of the bill for the change in the amendment removing the provision eliminating the right to a trial by jury in a termination of parental rights (TPR) case. As we've noted in previous testimony to several legislative committees, there is empirical evidence that shows a jury trial does not delay TPR cases and is a vital element in a TPR, a type of case that the United States Supreme Court has likened to the "civil death penalty."

For some background on the agency, SPD is authorized to provide representation for children who are the subject of a Juvenile in Need of Protection and Services (JIPS), Children in Need of Protection and Services (CHIPS), or who are accused of having committed a delinquent act.

For parents in the family system, we provide representation statewide in TPR proceedings and for parents only in Indian Child Welfare Act (ICWA) cases.

The SPD is just over a year into a pilot program of representing parents in any CHIPS case in 5 counties - Brown, Outagamie, Winnebago, Racine and Kenosha. So far we have made about 1200 appointments for parents in the pilot program under 2017 Act 253. The goal of providing representation for parents at the CHIPS stage is to increase the chances of success, reduce the number of termination proceedings, and increase the speed and permanency of placement.

In bills such as AB 263 and others that have been introduced recently, it appears that there is an assumption that decreasing the time from petition filing to permanency is what meets the statutory benchmark of "best interests of the child." It is often our experience that speed leads to instability in placement which means the overall process will take longer to reach a final permanency.

There are four main topics of the bill that we want to address.

Termination of Parental Rights Hearings

The bill as amended combines the fact-finding and dispositional hearing for a TPR proceeding. Our concern is that combining these two proceedings confuses the separate findings made during the grounds

phase of the case and the disposition in the best interests of the child. Most importantly combining these two proceedings makes it more difficult to find alternatives to termination.
Not providing representation for parents in CHIPS cases also makes implementation of a policy like this significantly more difficult and problematic. Outside of the five pilot counties, because SPD attorneys aren't involved with the parent at the CHIPS stage, there are often significant delays and tremendous amounts of discovery material to gather and review. What the attorney is looking for out of that material is significantly different for the grounds phase versus disposition. Combining the two phases and getting all the material for the first time when the TPR petition is filed will lead to increased delays as attorneys will need more time to prepare for a hearing where the end result is a combination of outcomes. Combining the material would also confuse the trier of fact as they hear what might be important in one phase of the TPR trial, but may not be important or even relevant in the other phase.

Disclaimer of Parental Rights

Given the stakes involved in terminating parental rights, ensuring due process is important when considering a concept like disclaimer of parental rights. We do not allow a person to plead guilty to a misdemeanor without appearing before a judge and, given the stakes in a TPR proceeding, should not require anything less for this process. There can be conflicts of interest between the attorney representing the other parent or the adoption agency that may not be readily apparent to the individual, or, in the worst case hypothetical, coercion into signing the document that a personal appearance in court would address. At the least it would be advisable to allow for the appointment of counsel and a court appearance to ensure voluntariness.

Grounds for Termination of Parental Rights

The changes to the definition of substantial parental relationship under the failure to assume parental responsibility grounds and the changes to the abandonment grounds raise a number of potential issues.

First, the reality is that sometimes fathers don't know that they are a parent until later in the process and through no fault of their own. The Bobby G. case, 2007 WI 77, is a good example of a father who continued to seek out the mother after an initial encounter to no avail. In addition, when more than one father is named, men may rely on what might end up being inaccurate information on their status as the father. A pregnant woman may rebuff help or services based upon who she believes to be the father.

Other case law relates to the ability of a mother to refuse the help of the father. Mary EB v. Cecil M., 2014AP160. That case law and the language in AB 263 will have to be synchronized, likely through litigation.

Second, the statute as drafted includes the phrase "reasonable cause" related to payment of child support. As this is a term of art, it is likely that litigation will be required to figure out how reasonable cause interrelates to the portion of the statute that says that CHIPS petitions should only be filed for reasons other than poverty. An individual experiencing poverty or with a mental illness, cognitive difficulties, or with a history of trauma can be a good parent.

Finally, several years ago the legislature made changes to the failure to assume parental responsibility to account for how long the parent failed to assume responsibility. The words of that statute and the intent of the legislature seemed clear at the time but a subsequent court decision, Tammy W-G v. Jacob T. 2011 WI 30, changed the time factor to allow for any amount of time to meet the standard of failure to assume which greatly expanded the bill author's original intent. The outcome of that legislation and

subsequent court decision could be instructive in considering the unintended consequences of this legislation.

Rights of an Alleged Father

This is another example of the Bobby G. scenario where a father is either unaware of or tries to be supportive both pre- and post-natal. As has come up in previous Task Force hearings on this issue, very few people are aware of the parental registry or have a compelling interest to report their sexual activity to the government. Not allowing a potential father to participate in a termination proceeding will increase the chances of future litigation on their right to notification, and eliminate the ability to consider not only the father but the father's extended family for placement and support of the child.

We appreciate the intent to ensure that the best interests of the child are served. Balancing the constitutional rights of a birth parent with the desire to achieve permanency is a difficult balance. Ultimately, achieving permanency, whether through reunification or adoption, is everyone's goal. That goal is best served by ensuring that due process is guaranteed and that what at first appears permanent is in fact permanent.

Thank you again for the opportunity to testify. If we can be helpful as you consider this bill further, please reach out to our office as a resource.

KIDS FORWARD

Every Kid. Every Family. Every Community.

Date: November 13, 2019

To: Assembly Committee on Children and Families

From: Ken Taylor, Executive Director, Kids Forward

Subject: AB 263

Thank you for the opportunity to testify today. My name is Ken Taylor, and I am the Executive Director of Kids Forward. Kids Forward works to inspire action and promote access to opportunity for every kid, every family, and every community in Wisconsin. We are proudly pro-kid, and have been ever since we were founded in 1881.

After 4 years as a Naval officer, I started my career in child welfare in 1994 in Illinois, working in the Governor's Office of Republican Jim Edgar. I have worked within the state child welfare agencies in Illinois and here in Wisconsin. As a consultant, I worked to improve outcomes for kids in child welfare systems across the country, including in NY, PA, NV, TN and CA. There are many differences among the child welfare systems across the nation, but one thing is consistent, families matter. And if a family member, particularly a parent, wants to step forward to take care of a child, we should support that action, not make it more difficult.

The Family First Prevention Services Act was signed into law at the federal level in 2018. This is the largest reform to child welfare in the past few decades. Its goal is to support families to prevent children from entering into the child welfare system. So it seems strange to me, with the advent of Family First and our efforts in Wisconsin to implement it, and so much talk about personal responsibility, that we would be discussing a bill that makes it more difficult for parents, particularly fathers, to step forward for their children.

I have three main concerns.

First is the grounds for Termination of Parental Rights (TPR). A new standard in AB 263 is that non-payment of child support establishes abandonment, which is grounds for Termination of Parental Rights (TPR). While this might sound logical to some, it ignores the realities of many of parents, particularly low-income parents, who are involved in the child support system. The reality is that there are many factors that contribute to the non-payment of child support. In Wisconsin, according to the federal Office of Child Support Enforcement, there are arrears in child support of over $2.5 billion. Because a substantial portion of arrears payments go to the government instead of the family, some dads who want to support their children may decide to pay the family directly instead of paying off their arrears. This decision to bypass the system to get more money in the hands of their family would, under this new standard, look like abandonment, when it is the exact opposite. This action by dads to better support their children could result, under ASB 263, in termination of their rights.

Second, the bill restricts the rights of fathers to be notified about TPR proceedings to those who have filed piece of paperwork called a "declaration of paternal interest." This bill provides that a person who fails to file this piece of paperwork has "irrevocably consented to the termination of any parental rights." This declaration needs to be filed at the latest within 14 days of the child's birth. So under AB 263, unless you sign a government form indicating your parental interest within 2 weeks of the birth of a child, the government gets to take away your rights to be a father. Again, this bill makes it harder for fathers to step forward, and will have disproportionate impact on low-income people who are less likely to have access to legal council.

My third concern is around the affidavit process this bill allows for a father to disclaim his parental rights for a child. My concern that an affidavit process does not allow for a judge to make sure that the signer fully understands the implications of this decision, which is irrevocable after 4 days after the birth of the child. In addition, no action to invalidate the disclaimer may be commenced more than six months after the affidavit was executed. So it is possible under AB 263 that someone who signs this disclaimer without fully understanding its implications can lose their parental rights before the child is actually born, and has no recourse to change that decision.

In closing, Wisconsin should be working to support parents who want to step forward for their kids, not making it harder. AB 263 makes it harder for parents to step forward for their kids, which is why I ask you to oppose it.

Thank you.

Oneida Nation
Oneida Business Committee
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ONEIDA

November 12, 2019

Testimony on Assembly Substitute Amendment 1,
To Assembly Bill 263

The Oneida Nation is very concerned with the proposal to include language that if a father does not file a declaration of paternal interest, that he irrevocably consents to termination of his parental rights and the rights to any notice of proceedings. In the proposal there is no consideration given as to whether he was even told that a woman he had sexual intercourse with was pregnant or that the child could be his. There is no consideration given if the mother defrauds the potential father. It should be based on whether the person knew of should have known that he was the alleged father. A man should not be considered to have terminated his parental rights if he did not even know he may be the father of the child. This leaves the door open to so many instances of mother's not naming fathers to avoid notice to them.

In addition, it is not a well-known fact that a man can even file a notice of paternal interest. So why would we fault a man who didn't even know filing such a document could protect his parental rights.

Most of all this is potentially harmful to so many children whose father's may want to be involved, take custody or have their family take guardianship or adopt. If they find out too late that they may be the father, their rights are taken away without even so much as a notice.

Lastly, but most importantly, for Indian Tribes this could be detrimental. Many of our children are based on the blood line of their fathers and could be lost because the father is not noticed simply because he didn't file a declaration of paternal interest. However, we believe this is completely against what ICWA stands for and would be a direct violation of both ICWA and WICWA. Any time a child who is enrolled or eligible for enrollment is placed outside of the home, including termination of parental rights and adoption, the appropriate Tribe must be notified and allowed to intervene. Parents are to be noticed via ICWA and WICWA and have the right to counsel. An irrevocable consent to termination of parental rights based on a failure to file a piece of paper would violate those rights afforded under ICWA and WICWA. If this is still considered, it should include a statement that this also does not apply to Indian children.

The Oneida Nation continues to object to failure to pay child support as a ground for termination of parental rights. Below is the testimony I provided regarding AB 559 which also proposed to have failure to pay child support as grounds for failure to pay child support.

Failure to pay child support is not always based on a parent shirking their responsibilities as a parent. And clearly this would affect more fathers than anything. Sometimes these fathers are involved in their children's lives and are behind in their support payments. There is unexpected illness or injury or loss of a job that cause them to get behind in their child support payments. That doesn't mean they aren't a good parent or an involved parent. There is no amount placed on this ground, so it could literally be used for someone who is only $100 in arrears on their child support. This gives a lot of deference to the DA or Corp Counsel and with this being very vague, it opens the door for great inconsistency across the State for how this ground is utilized. This should not be a stand-alone for a termination of parental rights.

Lastly, the Oneida Nation objects to the portion of the bill that allows payments to be made to an out-of-state private child placing agency that is licensed in the state in which it operates. This is very concerning for Tribal Nations. We have many experiences with other states and their adoption agencies who do not follow ICWA. These agencies will not be regulated and controlled to ensure compliance. This opens the door for too many of our children to be lost to adoption without proper notification. There are many appropriate agencies within the State of Wisconsin, there is no need to open this door and allow for something as serious as the adoption of a child to go unregulated. It puts Native children at risk.

Contact on Behalf of Oneida Nation
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Memorandum

STATE OF WISCONSIN
DIRECTOR OF STATE COURTS

DATE: November 13, 2019

TO: Rep. Patrick Snyder, Chair
Assembly Committee on Children and Families

FROM: Bridget Bauman, Director
Children's Court Improvement Program

SUBJECT: Assembly Bill 263 regarding Termination of Parental Rights

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Please accept the following written comments regarding Assembly Bill 263. The Wisconsin court system administration takes no position on the policy aspects of AB 263 (or the substitute amendment that has been introduced) but rather seeks to highlight unintended consequences that may be identified and technical drafting issues that may require attention. All comments refer to the provisions of Assembly Substitute Amendment 1.

- Sections 2 and 20: These sections provide that a person who is eligible to but has failed to file a declaration of paternal interest is deemed to have irrevocably consented to termination of parental rights/adoption. There are three exceptions listed: person subject to a paternity action or motion that has been filed and not yet resolved, person acknowledged as the child's father under a voluntary acknowledgment of paternity, or person who meets the conditions set forth in s. 48.423(2).
    - The Committee may want to consider adding the circumstances under s. 48.299(6)(e)4. as an additional exception. Under that subsection, the court has determined that the person is the child's biological parent for purposes of a child in need of protection or services (CHIPS) proceeding after genetic testing.

- Section 4: In order to be consistent with the wording of the other abandonment grounds in s. 48.415(1), as well as the definition of substantial parental relationship in the failure to assume parental responsibility ground in s. 48.415(6), the Committee may want to change the term "care and support" to "care or support."

- Section 8: Under the bill, only alleged fathers who have filed a declaration of paternal interest are entitled to actual notice of a termination of parental rights (TPR) proceeding.

- In an effort to be consistent with the exceptions provided in Sections 2 and 20, should a person subject to a paternity action or motion that has been filed and not yet resolved and a person acknowledged as the child's father under a voluntary acknowledgment of paternity be included in the list of individuals who are entitled to be summoned?
- The Committee may want to consider adding a person who has been determined to be the child's biological parent for purposes of a child in need of protection or services (CHIPS) proceeding after genetic testing pursuant to s. 48.299(6)(e)4. It is not clear whether these individuals would be entitled to notice under the existing "parent" category as s. 48.299(6)(e)5. states that the determination in the CHIPS case is not considered an adjudication of paternity.

- Section 17, Lines 14-15: The substitute amendment changes the introduction of s. 48.424(4) to read, "The court or jury shall hear all evidence relevant to the issues under sub. (1) and to the issue of disposition under s. 48.427…" [emphasis added].
  - As currently drafted, the issue of both grounds and disposition would be decided by a jury. Under current law, only the fact-finding hearing is heard by a jury. This language appears to be inadvertent as it would conflict with other language in the bill.

Thank you for allowing us to submit this testimony. If you have questions, please do not hesitate to contact our Legislative Liaison, Nancy Rottier. Thank you.

CHILDREN & THE LAW SECTION

To:	Sen. Andre Jacque and Rep. Janel Brandtjen
From:	Children and the Law Section Board, State Bar of WI
Date:	November 13, 2019
Re:	AB 263/SB 232 – Adoption Reform

The Children and the Law Section Board supports in part sections of SB 232 and AB 263, as amended, regarding Wisconsin's TPR and adoption systems. Specifically, the board supports the section related to allowing payments out-of-state private adoption agencies and individuals. The board does not have a position on any other portion of the proposed legislation.

Currently, Wisconsin law prohibits any payments in an adoption to an adoption agency that is not licensed by the Wisconsin Department of Children and Families. In other words, payments made to an out-of-state adoption agency are prohibited. *See* Wis. Stat. §§ 48.913(1)(e) (the adoption expenses statute), 48.60(1) (licensed "child welfare agency" defined), and 48.02(4) (definition of "department"), in that order. When prohibited payments are made, the adoption is jeopardized and could be denied.

As written, the proposed bills would allow payments for "services provided in connection with the adoption by a private child placing agency, as defined in s. 48.99(2)(p), operating lawfully under the laws of another state."

The board appreciates the efforts of the bill sponsors to address initial drafting concerns raised by the board as related to this section, and believes allowing payments to out-of-state private adoption agencies and individuals would be a welcome change to current statute.

If you have questions or concerns, please do not hesitate to contact our lobbyist, Lynne Davis, ldavis@wisbar.org or 608-852-3603.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

STATE BAR OF WISCONSIN

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To: Wisconsin Assembly Committee on Children & Families
From: Attorneys Theresa L. Roetter, Stephen W. Hayes, Lynn J. Bodi, Elizabeth A. Neary, Emily Dudak Leiter, Gary A. Debele, & Krislyn M. Holaday
Date: November 12, 2019
Re: AB 263/SB 232

We write to you today in support of AB 263/SB 232.

We are licensed Wisconsin attorneys with state-wide law practices. We regularly appear in our 72 counties to assist birth mothers in making an adoption plan for their children and to support prospective adoptive families hoping to provide a home for a child who needs a stable, mature, loving environment. We are also Fellows of the Academy of Adoption and Assisted Reproduction Attorneys and many of us have served the Academy in leadership roles. The Academy is an invitation-only organization dedicated to advancing the ethical practice of adoption and surrogacy in the United States and internationally.

We appreciate the work of the Adoption Task Force, the Bills which resulted from that work, and the work of other legislators over the past few years which has resulted in the current draft of these Bills.

In the last thirty years, there have been very few revisions to the Wisconsin adoption laws. AB 263 / SB 232 provides necessary changes to the framework supporting the legal placement of children in adoptive homes.

The barriers to adoption in Wisconsin are many. Delay after delay occurs in our court system due to the current clunky process which includes a jury trial option, provides broad excuses for abandoning a child or failing to ever assume parental responsibility, requires in-court consents, limits Wisconsin residents from benefitting from matching services from reputable agencies licensed in other states, and results in many women parenting a child when they believe that placing their child for adoption is truly what is best.

The changes included in AB 263/SB 232 will improve the adoption process for children, birth parents, and prospective adoptive families by addressing the problems outlined above. The changes will encourage Wisconsin residents to look here – in their own home state – for an adoption match rather than looking to another state or country.

It was discouraging to hear the opposition to these Bills at the Task Force meetings. It was clear to those of us who attended, that the reasons for opposing the bills were not focused on the best interest of children. It is important to remember that Wisconsin Statutes Chapter 48, the Children's Code, has best interests as an overarching guide – what our courts have referred to as the "Polestar" of our laws regarding Wisconsin children and families. Wis. Stat. 48.01: "...the best interests of the child . . . shall always be of paramount consideration." We recommend AB 263/SB 232 in the best interest of Wisconsin children.

We ask you to vote "yes" and unanimously pass AB 263/SB 232 out of Committee. Thank you.

My husband and I are residents of Chippewa County and are reaching out to you to ask for your support of Assembly Bill 263. We truly believe adoption reform in Wisconsin needs to take place as soon as possible and is in the best interest of all parties of the adoption triad, including the adoptive parents, the birth families, and most importantly the child. My husband and are adoptive parents of two little boys whom we are truly grateful for, but they came into our lives at a great emotional cost that we feel could have been avoided if this bill would have been law at the time of our adoptions. Below is our adoption story that we hope will help shed some light on why it is so important for this bill to pass.

Our adoption story consists of three open adoption matches that all took place in the state of Wisconsin in the last decade through a local agency. Our first match took place in Milwaukee, where the birth mother wanted us to take her baby home directly from the hospital. We were extremely hesitant in doing so as we knew there was a chance the birth mother could change her mind if we took him home. We talked to our social worker and she urged us to say we would take him home and we were assured the birth mother wasn't going to change her mind. We had him in our home for 3 weeks waiting for the termination of the parental rights hearing to take place when we received the phone call from our social worker stating the birth mother changed her mind. We were stunned. We had him in our home for several more days before the birth mother could come get him because she didn't have transportation. It was absolutely devastating having to care for him yet, knowing he was no longer going to be our son. We still live with the pain and loss every day, as well as our extended families. This was by far the worst pain we had ever felt. What was supposed to be a joyful time was anything but.

Only two months went by and we were still grieving when we got another phone call about another match, this time from the Madison area. This birth mother, also, insisted on us taking the baby home directly from the hospital. This match ended with an adoption finalization thankfully, but we had to wait five weeks and had two hearings before the parental rights were officially terminated. The entire five weeks we were caring for the baby in our home it was always in the back of our minds that the birth mother could change her mind. Our hearts were guarded and we were nervous wrecks knowing it could all end at any moment.

Adoption match number three was almost the worst one of all and took place in 2014 in the Superior area. The baby was born in August 2014 and we were at the hospital when he was born due to the birth mother's request. We had him in our arms for only three hours this time when the birth mother changed her mind and decided to parent. Needless to say, we were absolutely devastated once again. A month went by and we were at work when we got a phone call from the social worker stating birth mother changed her mind and wanted us to adopt him after all and that she'd be at our house with the baby in eight hours. Five hours went by and we received another phone call from the social worker saying the birth mother changed her mind yet again and wanted to keep him. Another month went by and we received a call stating birth mother wants us to proceed with the adoption again, but this time he had already been removed from the birth mother's care and had been living in a bridge care foster home for ten days without our knowledge. We were shocked and so confused as to what to do as we knew we wanted to parent this child with every fiber of our beings, but yet at how much of an emotional cost to us and to our five year old child who wanted a sibling so bad?

We took two days to think about it and didn't want to risk this child being placed in a different foster home so we decided to proceed with his adoption. Again we had been assured the birth mother and father, were sure of their decision. At this time the baby was already over two months old. We visited him in the bridge care home for two weeks trying to protect our hearts just in case the birth mother changed her mind again, but could see this wasn't in the baby's best interest to not be bonding with us. We then took another leap of faith and decided to have him come home with us on November 1st, 2014. The termination of the parental rights of both the birth mother and father was scheduled to take place November 24th, 2014. An end was finally in sight. Unfortunately, the rights were not terminated due to the birth father was not served his papers in time. We were incredibly upset as the birth father was in prison. How could the lawyers not get the papers to him in time? Another hearing was then scheduled for just before Christmas. This court hearing never took place because the birth father was now wavering on his decision to terminate. Yet another hearing was scheduled for the end of January 2015. This time the birth mother was a no show to court as she was upset and just wanted the process to be over. Another hearing was scheduled where finally both rights of the birthparents were officially terminated. This whole time we were caring for the child not knowing if he was officially going to be our son or not. It was absolutely awful to say the least.

Thankfully, he now officially is our son, but we truly feel all this time of uncertainty and doubt is not in the best interest of any of the members of the adoption triad. The emotional toll it takes on the birth parents always knowing in the back of their minds they can still change their minds is unimaginable to us. This is no doubt one of the hardest decisions they will every make in their lives and having the option there for great lengths of time is detrimental to their emotional well-being as well.

Most importantly, we do not feel it is in the best interest of the children. When a baby is placed with the adoptive parents directly from the hospital and the rights are not terminated it is impossible for the adoptive parents to feel the absolute joy one would feel knowing a birth parent is not going to change their minds. There is always going to be a wall up and we do not feel this is what is best for a child. A child should be loved without any doubt or fear right from the start just like a non-adoptive family.

Also, we saw the devastating effects it has on a baby when we brought our third little boy home. By this point we were his third home within his two and a half month life and when he awoke from his naps the look of panic and fear in his eyes was heart breaking as he did not recognize his surroundings. He would cry for longer lengths of time as most babies and there was nothing we could do except hold him, love him and console him the best we could. We can only imagine if he was older how much worse this would have been on him. Our little boy did recover and has now fully attached to us, but it breaks our hearts that he even had to endure such a situation at such a young age. Bonding is so critical right from the start of a child's life and we truly feel with this bill it would enable this to happen from the beginning in a much better and healthier way for all involved in the adoption triad.

Thank you for taking the time to listen to our testimony. We hope you now see why your support of this bill is so important.

Sincerely, Bradley and Maria Shilts