WISCONSIN LEGISLATIVE COUNCIL

PERMANENCY FOR YOUNG CHILDREN IN THE CHILD WELFARE SYSTEM

Legislative Council Conference Room
One East Main Street, Suite 401, Madison

November 15, 2012
9:30 a.m. – 4:30 p.m.

[The following is a summary of the November 15, 2012 meeting of the Special Committee on Permanency for Young Children in the Child Welfare System. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at **http://www.legis.state.wi.us/lc**.]

Call to Order and Roll Call

Chair Kerkman called the committee to order. The roll was called and a quorum was determined to be present.

COMMITTEE MEMBERS PRESENT:	Rep. Samantha Kerkman, Chair; Rep. Jill Billings; and Public Members Colleen Ellingson, Chris Foley, Amy Herbst, Molly Jasmer, Esie Leoso-Corbine, Robin Neeson, Rändi Othrow, Ron Rogers, Michelle Snead, and Mary Sowinski.
COMMITTEE MEMBERS EXCUSED:	Sen. Mary Lazich, Vice Chair; Rep. Tamara Grigsby; and Public Members Mark Gumz and Laura Maki.
COUNCIL STAFF PRESENT:	Melissa Schmidt and Margit Kelley, Staff Attorneys.
APPEARANCES:	Devon Lee and Adam Plotkin, State Public Defender's office; and Bridget Bauman, Director of State Courts office.

Approval of the Minutes of the Special Committee's October 9, 2012 Meeting

Judge Foley noted that he was not included in the list of excused members, which was correct, but asked that his name be added to the list of committee members who were present, for the October 9, 2012 meeting.

Ms. Ellingson moved, seconded by Ms. Othrow, that the minutes of the committee's October 9, 2012 meeting be approved, as corrected. The motion passed on a unanimous voice vote.

Description of Materials Distributed

WLC: 0021/1, relating to posttermination agreement

Margit Kelley described draft WLC: 0021/1, relating to posttermination contact agreements and sharing of a home study report. Ms. Ellingson explained that currently there is not a clear mechanism for a proposed adoptive family to ask that a home study report be shared if the family begins working with a new agency, and stated that she supports that element and the posttermination contact agreement provisions of the draft.

Judge Foley suggested that there be no condition on who may propose a posttermination contact agreement, and suggested that before a court approves a posttermination contact agreement the court should make an explicit finding that the birth relative would not subvert the parenting of the adoptive family. Ms. Sowinski noted that Judge Foley's second suggestion would better ensure that a birth relative will not subvert an adoptive family's parenting than the condition on who could propose a posttermination contact agreement.

A number of members expressed their approval for creating a structure that allows a birth relative to enter into a posttermination contact agreement with the proposed adoptive parents of a child, with the provisions that require approval by the court of the voluntary agreement, and allow modification only in the best interests of the child. Ms. Jasmer noted that such agreements could help resolve termination of parental rights (TPR) proceedings more quickly.

Based on consensus of the committee, Chair Kerkman directed staff to revise the draft with Judge Foley's two suggestions.

WLC: 0027/1, relating to adoption home investigations and confidentiality of change in placement and adoptive parent information

Melissa Schmidt described draft WLC: 0027/1, relating to adoption home investigations, and confidentiality of change in placement and adoptive parent information.

Ms. Ellingson commented that it may not be appropriate to simply eliminate the requirement for a home study of a proposed adoptive parent when the person had obtained a foster home license, because some counties do not use the same evaluation tool for both foster care licensing and a pre-adoption home investigation. Mr. Rogers also noted that there are different levels of foster care licensure, but commented that eliminating the home study in some circumstances could help to achieve permanency more quickly. Based on consensus of the committee, Chair Kerkman directed staff to revise this portion of the draft to specify that a home investigation of a proposed adoptive parent is not required if: (1) the person holds a level 2 foster care license; (2) the child has been placed continuously in the proposed adoptive home for 12 months prior to the filing of an adoption petition; (3) the level 2 foster care license is in active status; and (4) the person has never had a foster care license revoked.

The committee discussed two issues related to the portion of the draft that creates a procedure to withhold the name and address of an anticipated permanent placement or proposed adoptive placement. Based on discussion, Chair Kerkman directed: (1) that the draft retain its applicability to a placement that is anticipated to be a permanent placement or proposed adoptive placement, rather than applying to any type of change in placement; and (2) that the draft be revised to specify that the name and address may be withheld in the notice and after a hearing ordering the information to be withheld, based on the best interests of the child, rather than based on an imminent danger to the child or to the physical custodian.

Ms. Ellingson asked if the third portion of the draft is needed, which allows disclosure of records and papers pertaining to a prior adoption proceeding to be disclosed for purposes of determining the availability of placement for a sibling of the previously adopted child. Judge Foley and Ms. Sowinski commented that the draft appears to eliminate any questions about whether disclosure is allowed, and adds a necessary piece to the sibling visitation provisions given under current law. Based on consensus of the committee, Chair Kerkman directed that that this portion of the draft be retained.

WLC: 0041/P1, relating to adoption petitions filed by counties

Ms. Schmidt described draft WLC: 0041/P1, relating to adoption petitions filed by counties. Ms. Jasmer stated that this draft is on point with the committee's goal of reducing a child's time to achieving permanency, but suggested that the portion of the draft that specifies who may have authority to file an adoption petition needs more research on its implications, and that this portion should be tabled.

Based on consensus of the committee, Chair Kerkman directed staff to revise the draft to: (1) remove the portion specifying who may file an adoption petition; and (2) specify in the portion relating to venue and jurisdiction that a court having jurisdiction over an adoption petition has jurisdiction related only to the adoption.

WLC: 0040/1, relating to recognizing tribal customary adoption and suspension of parental rights

Ms. Kelley described draft WLC: 0040/1, relating to recognizing tribal customary adoption and suspension of parental rights. She noted that Minnesota and California have passed laws relating to recognition of tribal customary adoptions and suspension of parental rights. Ms. Leoso-Corbine explained it is not in tribal culture to terminate parental rights, and described the success that the White Earth Band of Ojibwe has had in suspending, rather than terminating, parental rights along with a ceremony and tribal adjudication of a customary adoption.

In response to a question, Ms. Kelley noted that the draft's definition of a "suspension of parental rights" includes the word "permanent" as it was included in the White Earth Band of Ojibwe's Judicial Code definition, and noted that the draft's definition is parallel to the statutory definition for a TPR, in order to effectuate full changes in legal rights. Judge Foley noted that these phrases are likely used in order for a suspension of parental rights to be legally recognized under federal law as a substantial equivalent to "termination." Ms. Leoso-Corbine noted that this could include eligibility for adoption assistance.

Based on consensus of the committee, Chair Kerkman directed that no revisions be made to this draft.

Memo No. 4, Proposals to Revise Certain Grounds for Involuntary TPR

Ms. Kelley described Memo No. 4, which included four suggestions from committee members to revise certain grounds for an involuntary TPR.

In response to a concern from Ms. Neeson about the continuing parental disability ground applying to people with mental health issues and developmental delays, Ms. Sowinski and Ms. Snead noted that the ground requires long-term inpatient history, not outpatient history, and the ground would only be applicable in the most extreme cases. They noted that such cases are not very common, but that the revised time period for a history of inpatient treatment would be helpful in those cases. Judge Foley noted that the ground includes other elements that are not revised in the suggestion, such as finding that the parent's condition is likely to continue indefinitely, and that the parent has not arranged for the child to be cared for by another relative. Based on consensus of the committee, Chair Kerkman directed staff to prepare a bill draft from this proposal.

Regarding the ground of parenthood as a result of sexual assault, Chair Kerkman recognized Ms. Devon Lee, of the State Public Defender's office, from the audience. Ms. Lee commented that the use of "other evidence" lacked a definition or standard of what that evidence would be, and suggested that the committee consider including a so-called "Romeo and Juliet" exception for juvenile offenders, similar to the exception in the sexual offender registry. Ms. Sowinski responded that "other evidence" would include any acceptable evidence other than a judgment of conviction and would be admitted under current constitutional standards. Ms. Sowinski also suggested that a draft could include an exception from using the ground if the perpetrator was under age 18, unless the crime was forcible rape. Based on consensus of the committee, Chair Kerkman directed staff to prepare a bill draft from this proposal, with Ms. Sowinski's suggestion.

Regarding the grounds of a pattern of child abuse, homicide of a parent, and felony against a child, after a brief discussion and consensus by the committee, Chair Kerkman directed staff to prepare a bill draft from this proposal.

Ms. Sowinski indicated that if the TPR ground of a child's continuing need of protection or services (CHIPS) is revised under draft WLC: 0012/2, that a ground based on the long-term incarceration of a parent may not be needed. Chair Kerkman directed that this suggestion not be drafted.

Memo No. 5, Proposal to Revise a Ground for Involuntary TPR and Letter From Adam Plotkin, Legislative Liaison, State Public Defender's Office

Ms. Kelley described the proposal from the State Public Defender's office to revise the involuntary TPR ground of a failure to assume parental responsibility. After a brief discussion by committee members and Ms. Lee, and consensus by the committee, Chair Kerkman directed that this suggestion not be drafted.

Memo No. 6, Revising the Time When a Petition for TPR Must be Filed

Ms. Kelley described the proposal from Senator Lazich to require that a TPR petition be filed after a child has been placed outside the home for six months if a child is under eight years old, and for certain children eight years old or over. After questions and some concerns from committee members, Chair Kerkman directed that this suggestion not be drafted.

WLC: 0012/2, relating to TPR ground of continuing CHIPS

Ms. Kelley explained the revisions from the first draft in WLC: 0012/2, relating to the TPR ground of continuing CHIPS. Ms. Othrow expressed concern with the draft's revision of the requirement in the TPR ground of continuing CHIPS for a finding that there is a substantial likelihood that the parent will not meet the conditions for the safe return of the child within a certain time period. Judge Foley questioned how the revision would work and how it would be explained to a jury, and Ms. Jasmer noted that a case would not be in trial exactly at the time period given in the suggestion.

Ms. Sowinski suggested that the requirement to look ahead for a certain time period for the parent's likelihood of meeting the conditions for the safe return of the child could be removed. In response to a question from Ms. Lee, Ms. Sowinski stated that removing that element would not make the ground amenable to summary judgment, because the other elements must still be proved. In response to a question from Representative Billings, Judge Foley noted that this ground includes other elements that are not revised in the draft, including a requirement to find that that the agency has made reasonable efforts to provide all ordered services to the family.

Chair Kerkman directed staff to revise the draft with Ms. Sowinski's suggestion.

WLC: 0028/1, relating to TPR participation by alleged father

Ms. Kelley described draft WLC: 0028/1, relating to TPR participation by an alleged father. Judge Foley described the U.S. Supreme Court's decision in *Lehr v. Robertson* [463 U.S. 248 (1983)], which held that reliance on a putative father registry, or actions to parent the child, does not violate the due process or equal protection clauses of the U.S. Constitution. In response to a question from Ms. Neeson, Ms. Sowinski stated that the revision in the draft would measurably speed up the process to achieve permanency, and cited the example of *State v. Bobby G.* [(*In re Marquette S.*), see 2007 WI 77, 2009 WI App 41, and 2009 WI 99], which she said took four years of litigation.

Ms. Jasmer and Ms. Othrow noted that this draft applies to an alleged father only during a TPR proceeding, and does not limit an alleged father's standing in a CHIPS proceeding. Ms. Neeson and Ms. Leoso-Corbine commented that it is problematic when an alleged father or the tribe of an alleged father is not notified that a child has been removed from the home until late in the process, sometimes not until a TPR petition has been filed. Ms. Lee commented that there is a distinction between considering whether an alleged father has due process rights and considering the policy choice of giving standing to an alleged father.

Based on consensus of the committee, Chair Kerkman directed that no revisions be made to this draft.

Memo No. 7, Minnesota's Family Group Decision Making Program and Alternative Dispute Resolution

Ms. Schmidt described Minnesota's history and current statutes relating to family group decision making and alternative dispute resolution. Ms. Schmidt commented that Wisconsin courts currently can use these methods, as La Crosse County does, and that any new legislation would simply convey support for using these methods.

Ms. Herbst commented that such practices should not be limited to family group decision making, as other methods of alternative dispute resolution can work better in different circumstances. Ms. Leoso-Corbine commented that alternative dispute resolution methods helped children reach permanency more quickly, in her experience with Hennepin County, Minnesota. She noted that family group decision making had the best results among the models, and that Hennepin County maintained the use of that method with county funding after federal funding had diminished, because of the method's success and the basic skills their staff had already attained in using this method of dispute resolution.

Ms. Jasmer commented that these methods are already used in Waukesha County, and have been very successful in encouraging a family support system, rather than isolating the parents from the family. Representative Billings commented that it sounds as if legislation is not needed to allow counties in Wisconsin to utilize these methods, unless legislation is needed to obtain state or federal funding.

Chair Kerkman asked the Department of Children and Families to provide information to the committee on how to obtain funding to encourage the use of alternative dispute resolution methods.

Memo No. 8, Relative Searches in Wisconsin and Minnesota

Ms. Schmidt described Minnesota law relating to relative searches. Ms. Herbst commented that Minnesota's standards for relative searches are a model because the search is done both immediately and for children lingering in out-of-home care, and because the search is made further than the first and second degree of relationship. She suggested that Wisconsin's standards for relative searches could be improved with: (1) more clarity on what information may be shared with relatives about the child's circumstances; (2) a broader definition of a relative and a person in a relative-like relationship; and (3) more clarity in providing that although a relative search must be made within 30 days of the child's removal from the home, as required under current law, the search should continue after that initial timeframe.

Based on consensus of the committee, Chair Kerkman directed staff to work with Ms. Herbst to develop a draft to improve relative search standards in Wisconsin.

WLC: 0038/1, relating to placement with relatives

Ms. Schmidt described draft WLC: 0038/1, relating to placement with relatives. After questions and some concerns from committee members, Chair Kerkman directed that this draft be tabled.

WLC: 0008/2, relating to sibling visitation

Ms. Schmidt explained the revisions from the first draft in WLC: 0008/2, relating to sibling visitation. After questions and some concerns from committee members, Chair Kerkman directed that this draft be tabled.

WLC: 0014/1, relating to demand for speedy trial in criminal case

Ms. Kelley described draft WLC: 0014/1, relating to a demand for a speedy trial in a criminal case. Ms. Sowinski, Ms. Jasmer, and Ms. Othrow suggested that the petitioner in a CHIPS or TPR proceeding should be authorized, rather than required, to take action in a related criminal matter, and that if the petitioner chooses to take any action, it should be to notify the court in the criminal matter of the pending CHIPS or TPR proceeding, rather than to demand a speedy trial in the criminal matter.

Based on consensus of the committee, Chair Kerkman directed that the draft be revised with these changes.

<u>WLC: 0031/1, relating to expedited appellate procedures for ch. 48 cases</u>

Ms. Schmidt described draft WLC: 0031/1, relating to expedited appellate procedures for ch. 48, Stats., cases. Ms. Sowinski commented that, given the provisions of the draft that require an expedited appeal, the current statutory provision requiring "preference" for an appeal from an adoption adjudication would be unnecessary. She further commented that the current statutory provision prohibiting a party from filing a motion for reconsideration of a court of appeals decision in a parental consent to abortion or TPR proceeding should apply to any type of case in the Children's Code, which would be consistent with the draft treating any type of case in the Children's Code in the same manner for expedited appellate timelines.

Based on consensus of the committee, Chair Kerkman directed that the draft be revised with these changes.

<u>WLC: 0033/1, relating to TPR challenge based on ineffective assistance of counsel</u>

Ms. Kelley described the draft. After a brief discussion, Ms. Sowinski asked that this draft be withdrawn, and Chair Kerkman directed that the draft be tabled.

<u>WLC: 0022/1, relating to standards for parental participation</u>

Ms. Kelley described draft WLC: 0022/1, relating to standards for parental participation. In response to a question from Representative Billings, Judge Foley stated that a parent's failure to appear "without good cause" is more than a parent's failure to appear one time, and that a court would be summarily reversed if it were to find that there was no good cause for an absence due to the breakdown of a parent's car on the way to a hearing. Judge Foley suggested that "without good cause" could be revised to the caselaw standard used when a party's conduct in failing to comply with a court order is "egregious and without clear and justifiable excuse," in order to more accurately describe the nature of the conduct that must be found. Ms. Neeson commented that in her experience as a foster parent a court would readily hold a rehearing if a parent said they had tried, but were not able to come to a hearing.

Judge Foley described the difficulty under the current caselaw interpretation of the statutory requirement for a parent in a TPR or contested adoption matter to be represented by counsel, which holds that counsel cannot be discharged. He noted that in other types of proceedings it is recognized that counsel may be discharged if a parent does not work with counsel or appear in court. Ms. Jasmer noted that in some circumstances a parent may have decided not to contest a matter, but may prefer not to notify the court that the action will not be contested.

Chair Kerkman recognized Adam Plotkin, Legislative Liaison for the State Public Defender's office, from the audience. Mr. Plotkin commented that attorneys have an ethical obligation to present a full and zealous defense, but that attorneys are frustrated, too, when a client does not work with counsel or appear in court. He asked if the law allows a remedy after counsel has been discharged, such as re-appointing counsel when appropriate. Mr. Plotkin agreed that using the phrase "egregious and without clear and justifiable excuse" would better explain the standard than "without good cause." Mr. Plotkin then suggested that he could work with Judge Foley and Senator Lazich, who had suggested the portion of the draft relating to waiver of counsel if a parent has failed to appear without good cause. Judge Foley agreed that this portion could be removed from the draft for further discussions with Senator Lazich and the State Public Defender's office.

Chair Kerkman directed that staff remove the portion of the draft relating to waiver of counsel if a parent has failed to appear without good cause, and retain the remaining portions of the draft.

<u>WLC: 0013/2, relating to when no reasonable efforts are required</u>

Ms. Kelley explained the revisions from the first draft in WLC: 0013/2, relating to when no reasonable efforts are required, and commented that both she and the Department of Children and Families had reviewed the federal law and regulations relating to reasonable efforts requirements, and had determined that the draft did not affect any federal funding. Chair Kerkman recognized Bridget Bauman, Policy Analyst with the Children's Court Improvement Project for the Director of State Courts Office, from the audience. Ms. Bauman noted that she and others in her office are still reviewing any federal funding implications in the draft's amendments to current law, and reviewing for general alignment with federal law.

Judge Foley noted that he had originally been interested in revising current law to presume that reasonable efforts are prohibited in certain egregious circumstances, unless reasonable efforts to return the child to the home would be in the child's best interests, but it appeared that federal law might not allow that discretion in some egregious circumstances.

Chair Kerkman directed that the draft be considered at the committee's next meeting.

<u>WLC: 0010/2, relating to right to counsel for parents in CHIPS proceedings</u>

Ms. Schmidt described draft WLC: 0010/2, relating to a right to counsel for a parent in a CHIPS proceeding. Chair Kerkman commented that it could be appropriate to combine this draft with draft WLC: 0026/1, as a package together, when voting on whether or not to recommend the drafts for introduction to the Legislature.

Members discussed certain aspects of the draft, such as: (1) whether the right to be represented by a state public defender should be afforded to a minor parent; (2) whether a right to counsel should attach during the dispositional phase of a CHIPS proceeding, or earlier, during the immediate phase for the temporary physical custody hearing; (3) whether appointment of a state public defender should be automatic or should require an indigency determination; and (4) whether the right to be represented by a state public defender could apply only in CHIPS cases when a child has been removed from the home or should also apply in CHIPS cases when a child is not removed from the home.

Judge Foley and Ms. Sowinski commented that the initial temporary physical custody hearing is critical, and that a parent should have a right to counsel from that moment forward in a CHIPS proceeding, if it is possible to assign a state public defender that quickly.

In response to a reservation from Mr. Plotkin that limiting representation to CHIPS proceedings only after a child has been removed from the home could be creating separate classes of parents, Ms. Sowinski stated that it is not until a child is removed from the home that a parent's liberty interest is infringed sufficiently to require the state to pay for counsel. Ms. Neeson commented that when a child is at home, the matter is not viewed as moving towards TPR. Ms. Jasmer and Ms. Sowinski stated that if counsel is available to a parent only when a child has been removed from the home, the standard should be clear that "removal" does not include a child's move to reside with the other parent.

Chair Kerkman directed that the draft be considered at the committee's next meeting, along with draft WLC: 0026/1.

WLC: 0026/1, relating to eliminating right to jury trial in CHIPS and TPR

Ms. Kelley described draft WLC: 0026/1, relating to eliminating the right to a jury trial in a CHIPS or TPR proceeding. Chair Kerkman directed that the draft be considered at the committee's next meeting, along with draft WLC: 0010/2.

WLC: 0030/1, relating to CHIPS jurisdiction over a child born with alcohol or controlled substances

Ms. Schmidt described draft WLC: 0030/1, relating to CHIPS jurisdiction over a child born with alcohol or controlled substances. Ms. Neeson and Mr. Rogers commented that fetal alcohol syndrome can be difficult to diagnose, and does not fit well with the draft's focus on the presence of alcohol or other drugs in newborn testing results.

In response to concerns from members about basing the standard on a "trace" amount of alcohol or other drugs, Ms. Othrow suggested that the measure be based on a "detectable" amount of alcohol or other drugs in the same manner as under the state's operating under the influence statute. [s. 346.63, Stats.] Ms. Leoso-Corbine commented that the presence of prescription drugs is a problem for newborns. Ms. Jasmer suggested that the draft could be silent on who is performing the evaluation, as it would only be done at a hospital before the newborn is discharged.

In response to a question from Ms. Schmidt, Ms. Sowinski suggested that it could be appropriate to create a TPR ground based on three or more findings of CHIPS jurisdiction over a child born with alcohol or other drugs, and that one finding alone should not be sufficient grounds for a TPR action.

Ms. Sowinski and Ms. Othrow commented that if a guardian ad litem is not already required for a child in a CHIPS action, and only authorized, appointment of a guardian ad litem should be required in this CHIPS ground.

Based on consensus of the committee, Chair Kerkman directed staff to revise this draft in accordance with the committee's comments.

WLC: 0009/2, relating to CHIPS jurisdiction over a newborn

Ms. Schmidt explained the revisions from the first draft in WLC: 0009/2, relating to CHIPS jurisdiction over a newborn. In response to Ms. Sowinski's concern that the basis could become circular, Judge Foley commented that the requirement to find that a child is in continued need of custody at a temporary physical custody hearing is intended to allay any concern that a child could be removed from the home simply on the basis of a prior TPR, when otherwise unwarranted, and that the CHIPS ground is designed be filed in conjunction with other CHIPS grounds, such as neglect of the child or neglect of another child in the home.

Based on consensus of the committee, Chair Kerkman directed that no revisions be made to this draft.

WLC: 0011/2, relating to physical, psychological, mental, or developmental examination and AODA assessment of a parent

Ms. Schmidt explained the revisions from the first draft in WLC: 0011/2, relating to physical, psychological, mental, or developmental examination and AODA assessment of a parent. Ms. Jasmer

commented that some counties have access to very good, reliable, psychological evaluations from social workers, while other counties do not.

Ms. Othrow suggested that the report of an examination or assessment should be allowed as evidence for purposes of crafting a CHIPS disposition order, but not allowed as evidence during a CHIPS fact-finding hearing. Judge Foley added to Ms. Othrow's suggestion, proposing that a report should not be allowed as evidence during a CHIPS fact-finding hearing if introduction into evidence is objected to by the parent, as there could be circumstances when a parent would wish to have the report admitted. Ms. Jasmer suggested that the portion of the draft referring to a TPR proceeding could be removed.

Based on consensus of the committee, Chair Kerkman directed staff to revise the draft with these changes.

Other Business

There was no other business before the committee.

Plans for Future Meetings

Chair Kerkman announced that the meeting previously scheduled for December 18, 2012, will most likely be rescheduled to mid-January, 2013. She also asked that committee members be prepared to vote at the next meeting to recommend drafts. Chair Kerkman noted that approved drafts could then be combined by subject areas in recommending them to the Joint Legislative Council.

Adjournment

The meeting was adjourned at 4:30 p.m.

MSK:ksm