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11/01/2012

1 **AN ACT** *to renumber and amend* 48.23 (2); *to amend* 48.20 (8) (a), 48.21 (3) (d),
2 48.213 (2) (d) and 48.23 (3); and *to create* 48.23 (2) (b) of the statutes; **relating to:**
3 the right of a parent to have counsel in a proceeding for a child alleged to be in need
4 of protection or services, the ability of the court to appoint a state public defender,
5 and making an appropriation.

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

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill draft was prepared for the Joint Legislative Council's Special Committee on Review of Permanency for Young Children in the Child Welfare System.

Background

Under current statutes, in a proceeding under the Children's Code, the court assigned to exercise jurisdiction under the Children's Code (juvenile court) may appoint counsel for the child and any other party, with one exception. The juvenile court may not appoint counsel for any party other than the child, an Indian parent, or an Indian custodian in a proceeding in which it is alleged that a child is in need of protection or services (CHIPS) proceeding. This statutory prohibition, however, was ruled unconstitutional by the Wisconsin supreme court in *Joni B. v. State*, 202 Wis. 2d 1 (1996), on the grounds that the prohibition constitutes a violation of the separation of powers doctrine of the Wisconsin Constitution.

Also under current law, if a child has the right to be represented by counsel, or is provided counsel at the discretion of the juvenile court, and counsel is not knowingly or voluntarily waived, the court must refer the child to the state public defender (SPD) and the SPD must appoint counsel without a determination of indigency. Likewise, if a parent over the age of 18, an adult expectant mother, an Indian parent, or an Indian custodian has the right to be represented by counsel in a proceeding under ch. 48, the juvenile court must refer the parent or adult expectant mother to the SPD for an indigency determination. Because a parent over the age of 18 does not have a statutory right to be represented by counsel during a CHIPS proceeding, the court may not refer such a

parent to the SPD for possible representation. The juvenile court may, however, appoint counsel at its discretion, in which case the parent's legal representation is provided at the county's expense.

The Bill Draft

This draft eliminates the statutory prohibition placed on a juvenile court regarding appointment of counsel for certain parents so that a court may appoint counsel for any party, including a parent 18 years of age or over, in certain CHIPS proceedings. Because the draft allows a parent 18 years of age or over the right to counsel in certain CHIPS proceedings, the parent will also have the ability to be represented by an SPD, as the court is required to refer any parent 18 years of age or over to the SPD for indigency determinations if the parent has the right to counsel.

1 **SECTION 1.** 48.20 (8) (a) of the statutes is amended to read:

2 48.20 (8) (a) If a child is held in custody, the intake worker shall notify the child's parent,
3 guardian, legal custodian, and Indian custodian of the reasons for holding the child in custody
4 and of the child's whereabouts unless there is reason to believe that notice would present
5 imminent danger to the child. The parent, guardian, legal custodian, and Indian custodian
6 shall also be notified of the time and place of the detention hearing required under s. 48.21,
7 the nature and possible consequences of that hearing, the right to counsel under s. 48.23
8 regardless of ability to pay, the right to present and cross-examine witnesses at the hearing,
9 and, in the case of a parent or Indian custodian of an Indian child who is the subject of an Indian
10 child custody proceeding, as defined in s. 48.028 (2) (d) 2., the right to counsel under s. 48.028
11 (4) (b). If the parent, guardian, legal custodian, or Indian custodian is not immediately
12 available, the intake worker or another person designated by the court shall provide notice as
13 soon as possible. When the child is 12 years of age or older, the child shall receive the same
14 notice about the detention hearing as the parent, guardian, legal custodian, or Indian custodian.
15 The intake worker shall notify both the child and the child's parent, guardian, legal custodian,
16 or Indian custodian.

NOTE: This SECTION requires an intake worker to notify a parent of his or her right to counsel regardless of ability to pay at the same time the intake worker is notifying the parent of the detention hearing if the parent's child is held in custody.

1 **SECTION 2.** 48.21 (3) (d) of the statutes is amended to read:

2 48.21 **(3)** (d) Prior to the commencement of the hearing, the court shall inform the
3 parent, guardian, legal custodian, or Indian custodian of the allegations that have been made
4 or may be made, the nature and possible consequences of this hearing as compared to possible
5 future hearings, the right to counsel under s. 48.23 regardless of ability to pay, the right to
6 present, confront, and cross-examine witnesses, and, in the case of a parent or Indian
7 custodian of an Indian child who is the subject of an Indian child custody proceeding under
8 s. 48.028 (2) (d) 2., the right to counsel under s. 48.028 (4) (b).

NOTE: This SECTION provides that the court must to inform a parent, guardian, legal custodian, or Indian custodian of his or her right to counsel in a CHIPS action during the initial hearing for a child in custody as a result of a CHIPS petition.

9 **SECTION 3.** 48.213 (2) (d) of the statutes is amended to read:

10 48.213 **(2)** (d) Prior to the commencement of the hearing, the adult expectant mother
11 and the unborn child, through the unborn child's guardian ad litem, shall be informed by the
12 court of the allegations that have been made or may be made, the nature and possible
13 consequences of this hearing as compared to possible future hearings, the right to counsel
14 under s. 48.23 regardless of ability to pay, the right to confront and cross-examine witnesses
15 and the right to present witnesses.

16 **SECTION 4.** 48.23 (2) of the statutes is renumbered 48.23 (2) (a) and amended to read:

17 48.23 **(2)** (a) Whenever a child is alleged to be in need of protection or services under
18 s. 48.13, or is the subject of a proceeding involving a contested adoption or the involuntary
19 termination of parental rights, any parent under 18 years of age who appears before the court

1 shall be represented by counsel; but no such parent may waive counsel. Except as provided
2 in sub. (2g), a minor parent petitioning for the voluntary termination of parental rights shall
3 be represented by a guardian ad litem. If a proceeding involves a contested adoption or the
4 involuntary termination of parental rights, any parent 18 years old or older who appears before
5 the court shall be represented by counsel; but the parent may waive counsel provided the court
6 is satisfied such waiver is knowingly and voluntarily made.

7 **SECTION 5.** 48.23 (2) (b) of the statutes is created to read:

8 48.23 (2) (b) If a petition under s. 48.13 is contested, no child may be placed outside
9 his or her home unless the nonpetitioning parent is represented by counsel at the fact-finding
10 hearing and subsequent proceedings. If the petition is not contested, the child may not be
11 placed outside his or her home unless the nonpetitioning parent is represented by counsel at
12 the hearing at which the placement is made. A parent who is required under this paragraph
13 to be represented by counsel may, however, waive counsel if the court is satisfied such waiver
14 is knowingly and voluntarily made, and the court may place the child outside the home even
15 though the parent was not represented by counsel.

NOTE: SECTION 5 creates the right to counsel in any CHIPS proceeding for a parent who is under 18 years of age, in addition to the current right to counsel in any proceeding for a contested adoption or an involuntary termination of parental rights (TPR). It retains the right to counsel for a parent 18 years of age or over in any proceeding of a contested adoption or an involuntary TPR.

SECTION 6 creates a parent's right to counsel at the CHIPS fact-finding hearing and subsequent proceedings if the CHIPS petition is contested, in order for a child to be placed outside his or her home. If the CHIPS petition is uncontested, this SECTION requires that a parent be represented by counsel at the hearing in which placement is made in order for the child to be placed outside of his or her home. In both contested and uncontested CHIPS cases the parent may waive the right to counsel.

Current law requires that, if a parent has the right to counsel, a juvenile court must refer any parent 18 years of age or over to the SPD for

indigency determinations. Because SECTIONS 5 and 6 create a right for a parent 18 years of age or over to have counsel in certain CHIPS proceedings, a juvenile court must refer the parent to the SPD for an indigency determination. If the SPD determines that the parent is indigent, then the parent will be represented by an SPD in the specified CHIPS proceedings.

COMMENT: The changes in SECTIONS 3 and 4 create a right to counsel using the same parameters that were included in ch. 48 prior to the 1995 Biennial Budget Act. Should a parent 18 years of age or over have the right to counsel in any CHIPS proceeding; throughout the duration of the CHIPS order; or should the parent have the same right to counsel as was afforded under Wisconsin statutes prior to the 1995 act?

1 **SECTION 6.** 48.23 (3) of the statutes is amended to read:

2 48.23 (3) POWER OF THE COURT TO APPOINT COUNSEL. ~~Except in proceedings under s.~~
3 48.13, at At any time, upon request or on its own motion, the court may appoint counsel for
4 the child or any party, unless the child or the party has or wishes to retain counsel of his or her
5 own choosing. ~~Except as provided in sub. (2g), the court may not appoint counsel for any party~~
6 ~~other than the child in a proceeding under s. 48.13.~~

NOTE: This SECTION specifies that a juvenile court has the authority to appoint counsel to any party involved in a ch. 48 proceeding, not just a child, and makes the statutes consistent with current case law.

7 **SECTION 7. Nonstatutory provisions; public defender board.**

8 (1) POSITION AUTHORIZATIONS. (a) The authorized FTE positions for the state public
9 defender board are increased by 2 FTE positions funded from the appropriation under section
10 20.550 (1) (b) of the statutes, for the purposes for which the appropriation is made. The state
11 public defender shall identify the positions.

NOTE: This SECTION increases the number of SPD appellate attorneys by 2 full-time equivalent (FTE) positions for representing a parent appealing a disposition from a contested CHIPS petition.

12 (b) The authorized FTE positions for the state public defender board are increased by
13 10 FTE positions funded from the appropriation under section 20.550 (1) (c) of the statutes

1 for the purposes for which the appropriation is made. The state public defender shall identify
2 the positions.

NOTE: This SECTION increases the number of SPD trial attorneys by 10 FTE positions for representing a parent in certain CHIPS proceedings.

3 **SECTION 8. Fiscal changes; public defender board.**

4 (1) APPELLATE REPRESENTATION FUND. In the schedule under section 20.005 (3) of the
5 statutes for the appropriation to the public defender board under section 20.550 (1) (b) of the
6 statutes, as affected by the acts of 2013, the dollar amount is increased by \$209,440 for the
7 first fiscal year of the fiscal biennium in which this subsection takes effect to the purpose for
8 which the appropriation is made.

NOTE: This SECTION increases the SPD's appropriation for appellate representation by \$209,440 to fund representation for a parent appealing a disposition from a contested CHIPS petition.

9 (2) TRIAL REPRESENTATION FUND. In the schedule under section 20.005 (3) of the statutes
10 for the appropriation to the public defender board under section 20.550 (1) (c) of the statutes,
11 as affected by the acts of 2013, the dollar amount is increased by \$851,382 for the first fiscal
12 year of the fiscal biennium in which this subsection takes effect to the purpose for which the
13 appropriation is made.

NOTE: This SECTION increases the SPD's appropriation for trial representation by \$851,382 to fund representation for a parent in certain CHIPS proceedings.

14 (3) PRIVATE BAR AND INVESTIGATOR REIMBURSEMENT FUND. In the schedule under section
15 20.005 (3) of the statutes for the appropriation to the public defender board under section
16 20.550 (1) (d) of the statutes, as affected by the acts of 2013, the dollar amount is increased
17 by \$1,904,000 for the first fiscal year of the fiscal biennium in which this subsection takes
18 effect to the purpose for which the appropriation is made.

NOTE: This SECTION increases the SPD's appropriation for representation by members of the private bar by \$1,904,000 to fund the reimbursement of representing a parent in certain CHIPS proceedings.

1 (4) PRIVATE BAR AND INVESTIGATOR FUND. In the schedule under section 20.005 (3) of
2 the statutes for the appropriation to the public defender board under section 20.550 (1) (e) of
3 the statutes, as affected by the acts of 2013, the dollar amount is increased by \$125,000 for the
4 first fiscal year of the fiscal biennium in which this subsection takes effect to the purpose for
5 which the appropriation is made.

NOTE: This SECTION increases the SPD's appropriation for payments made to members of the private bar by \$125,000 to fund representation for a parent in certain CHIPS proceedings.

6 (5) TRANSCRIPTS, DISCOVERY, AND INTERPRETERS FUND. In the schedule under section
7 20.005 (3) of the statutes for the appropriation to the public defender board under section
8 20.550 (1) (f) of the statutes, as affected by the acts of 2013, the dollar amount is increased
9 by \$125,000 for the first fiscal year of the fiscal biennium in which this subsection takes effect
10 to the purpose for which the appropriation is made.

NOTE: This SECTION increases the SPD's appropriation by \$125,000 for payments made to obtain transcripts, discovery materials, and provide interpreters for clients in certain CHIPS proceedings.

11 **SECTION 9. Initial applicability.**

12 (1) REPRESENTATION IN PROCEEDINGS INVOLVING CHILDREN IN NEED OF PROTECTION OR
13 SERVICES. The treatment of sections 48.20 (8), 48.21 (3) (d), 48.23 (3), and 48.23 (4) of the
14 statutes, the renumbering and amendment of section 48.23 (2) of the statutes, and the creation
15 of section 48.23 (2) (b) of the statutes first applies to proceedings commenced under section
16 48.13 of the statutes on the effective date of this subsection.

NOTE: This SECTION specifies that a parent's right to counsel and the right to be represented by a state public defender in certain CHIPS

proceedings first apply to such CHIPS proceedings that are commenced on the effective date of the draft.

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(END)