

1 **AN ACT** *to renumber and amend* 48.23 (2); *to amend* 48.46 (1), (1m) and (2); and *to*
2 *create* 48.23 (2) (c), 48.23 (2) (c) 3. and 809.107 (2) (bm) 6. of the statutes; **relating**
3 **to:** waiver or discharge of counsel for a parent in a proceeding for a child in need of
4 protection or services, the involuntary termination of parental rights, or a contested
5 adoption, and requiring a parent’s signature on a petition for postdispositional relief
6 or a notice of appeal in such a proceeding.

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 Permanency for Young Children in the Child Welfare System.

Background

Under current law, in a proceeding involving an involuntary termination of parental rights (TPR), or a contested adoption, a parent who appears before the court assigned to exercise jurisdiction under the Children’s Code (juvenile court) must be represented by counsel. A parent under age 18 may not waive counsel. However, a parent 18 years of age or over may waive counsel if the juvenile court is satisfied that the waiver is knowingly and voluntarily made.

Current law also provides that if an attorney represented a parent during a TPR proceeding, and has not been discharged, the representation continues during a TPR appeal.

The Wisconsin Supreme Court has strictly construed the statute requiring representation during an involuntary TPR proceeding in holding that an attorney may not be discharged from representing a parent who fails to cooperate with the court and the attorney. [*State v. Shirley E.*, 2006 WI 129; *State v. Darrell K.*, 2010AP1910 (Wis. Ct. App., Oct. 19, 2010, unpublished).]

Bill Draft

The draft provides the following standards when a parent has failed to work with counsel, or to otherwise participate, in a TPR proceeding or a child in need of protection or services (CHIPS) proceeding:

- Allows a court to discharge counsel if a parent has failed to participate in the proceedings, as found by the parent's failure to answer discovery requests, the parent's failure to obey court orders, or the court's entry of a default judgment terminating parental rights.
- Specifies that a parent of any age who was ordered to appear in person at hearings for an involuntary TPR or contested adoption proceeding, but has failed to appear, without good cause, is considered to have waived the right to counsel. The draft specifies that a lack of good cause may be presumed from a repeated failure to appear. A minor parent may not otherwise waive counsel.
- Requires a parent's signature, in addition to counsel's signature, on a notice of intent to appeal a TPR judgment, petition for rehearing from a CHIPS adjudication or TPR judgment, or motion for postdisposition relief from a CHIPS adjudication or TPR judgment.

COMMENT: This draft revises s. 48.23 (2), and creates par. (b) within that subsection, as does draft WLC: 0010/1, which creates a right to counsel for a parent in a CHIPS proceeding. If both drafts are recommended by the committee for introduction to the legislature, the placement of the changes would need to be reconciled.

1 **SECTION 1.** 48.23 (2) of the statutes is renumbered 48.23 (2) (a) and amended to read:
 2 48.23 (2) ~~RIGHT OF PARENTS~~ PARENT TO COUNSEL. (a) Whenever a child is the subject of
 3 a proceeding involving a contested adoption or ~~the~~ an involuntary termination of parental
 4 rights, any parent under 18 years of age who appears before the court shall be represented by
 5 counsel; ~~but~~ and no such parent may waive counsel, except as provided in par. (c) 2. or 3.
 6 Except as provided in sub. (2g), a minor parent petitioning for the voluntary termination of
 7 parental rights shall be represented by a guardian ad litem. If
 8 (b) In a proceeding ~~involves~~ involving a contested adoption or ~~the~~ an involuntary
 9 termination of parental rights, any parent 18 years old or older who appears before the court
 10 shall be represented by counsel; ~~but the parent may waive counsel provided the court is~~

1 ~~satisfied such waiver is knowingly and voluntarily made~~ counsel, except as provided in par.
2 (c).

NOTE: SECTION 1 separates the current language governing the right to counsel between a minor parent and a parent 18 years of age or over, and makes the right to counsel subject to the provisions created under the draft that allow counsel to be waived by a failure to appear, without good cause.

3 **SECTION 2.** 48.23 (2) (c) of the statutes is created to read:

4 48.23 (2) (c) A waiver or discharge of counsel may be made as follows:

5 1. Notwithstanding par. (b), parent 18 years of age or over may waive counsel if the
6 court is satisfied that the waiver is knowingly and voluntarily made.

7 2. Notwithstanding pars. (a) and (b), a parent is considered to have waived his or her
8 right to counsel and to appear by counsel if the court has ordered the parent to appear in person
9 at any or all subsequent hearings in the proceeding and the parent fails to appear in person as
10 ordered without good cause. Repeated failure by a parent to appear in person as ordered is
11 presumed to be without good cause.

NOTE: SECTION 2 provides that a parent of any age who was ordered to appear in person at hearings for an involuntary TPR or contested adoption proceeding, but has failed to appear, without good cause, is considered to have waived the right to counsel. The draft provides that a lack of good cause may be presumed from a repeated failure to appear.

COMMENT: The committee could consider whether or not a minor parent may waive counsel, by a failure to appear, without good cause, as allowed in the draft.

The committee could also consider whether to require a court to include a warning with an initial order to appear to inform the parent that a failure to appear, without good cause, will be considered a knowing and voluntary waiver of the right to counsel.

12 **SECTION 3.** 48.23 (2) (c) 3. of the statutes is created to read:

1 48.23 (2) (c) 3. Notwithstanding pars. (a) and (b), a court may discharge counsel for a
2 parent if the court finds that a parent has failed to answer a discovery request described in s.
3 804.12, that a parent has failed to obey an order under s. 805.03, or the court has entered a
4 default judgment under s. 806.02 terminating parental rights.

NOTE: SECTION 3 allows a court to discharge counsel if a parent has failed to participate in the proceedings, as found by the parent's failure to answer discovery requests, the parent's failure to obey court orders, or the court's entry of a default judgment terminating parental rights.

COMMENT: The committee could consider whether or not a court may discharge counsel for a minor parent, as allowed in the draft.

5 **SECTION 4.** 48.46 (1), (1m) and (2) of the statutes are amended to read:

6 48.46 (1) Except as provided in subs. (1m), (2) and (3), the child whose status is
7 adjudicated by the court, the parent, guardian or legal custodian of that child, the unborn child
8 whose status is adjudicated by the court or the expectant mother of that unborn child may at
9 any time within one year after the entering of the court's order petition the court for a rehearing
10 on the ground that new evidence has been discovered affecting the advisability of the court's
11 original adjudication. Upon a showing that such evidence does exist, the court shall order a
12 new hearing. Notwithstanding s. 802.05 (1), a petition by a parent under this subsection shall
13 be signed by the parent as well as by the parent's attorney of record.

14 **(1m)** Except as provided in sub. (2), the parent, guardian or legal custodian of the child
15 or the child whose status is adjudicated by the court in an order entered under s. 48.43 or an
16 order adjudicating paternity under subch. VIII may, within the time permitted under this
17 subsection, petition the court for a rehearing on the ground that new evidence has been
18 discovered affecting the advisability of the court's adjudication. Upon a showing that such
19 evidence does exist, the court shall order a new hearing. A petition under this subsection shall
20 be filed within one year after the date on which the order under s. 48.43 or order adjudicating

1 paternity under subch. VIII is entered, unless within that one-year period a court in this state
2 or in another jurisdiction enters an order granting adoption of the child, in which case a petition
3 under this subsection shall be filed before the date on which the order granting adoption is
4 entered or within 30 days after the date on which the order under s. 48.43 or order adjudicating
5 paternity under subch. VIII is entered, whichever is later. Notwithstanding s. 802.05 (1), a
6 petition by a parent under this subsection shall be signed by the parent as well as by the parent's
7 attorney of record.

8 (2) A parent who has consented to the termination of his or her parental rights under
9 s. 48.41 or who did not contest the petition initiating the proceeding in which his or her parental
10 rights were terminated may move the court for relief from the judgment on any of the grounds
11 specified in s. 806.07 (1) (a), (b), (c), (d) or (f). Notwithstanding s. 802.05 (1), a motion by
12 a parent under this subsection shall be signed by the parent as well as by the parent's attorney
13 of record. Any such motion shall be filed within 30 days after the entry of the judgment or
14 order terminating parental rights, unless the parent files a timely notice of intent to pursue
15 relief from the judgment under s. 808.04 (7m), in which case the motion shall be filed within
16 the time permitted by s. 809.107 (5). A motion under this subsection does not affect the finality
17 or suspend the operation of the judgment or order terminating parental rights. A parent who
18 has consented to the termination of his or her parental rights to an Indian child under s. 48.41
19 (2) (e) may also move for relief from the judgment under s. 48.028 (5) (c) or (6). Motions
20 under this subsection or s. 48.028 (5) (c) or (6) and appeals to the court of appeals shall be the
21 exclusive remedies for such a parent to obtain a new hearing in a termination of parental rights
22 proceeding.

NOTE: This SECTION creates the requirement that a parent sign a petition for rehearing or motion for postdisposition relief from a CHIPS adjudication, paternity adjudication, or TPR order, in addition to the

requirement under current law that counsel sign the petition or motion if the parent is represented.

1 **SECTION 5.** 809.107 (2) (bm) 6. of the statutes is created to read:

2 809.107 (2) (bm) 6. Notwithstanding s. 802.05 (1), if the appellant is the parent, the
3 parent's signature as well as the parent's attorney of record's signature.

NOTE: This SECTION creates the requirement that a parent sign a notice of intent to appeal a TPR order, in addition to the requirement under current law that counsel sign the notice if the parent is represented.

4 **SECTION 6. Initial applicability.**

5 (1) **WAIVER BY PARENT OF RIGHT TO COUNSEL BY FAILURE TO APPEAR.** The treatment of
6 section 48.23 (2) (c) 2. of the statutes first applies to a parent who is ordered on the effective
7 date of this subsection to appear in person at a hearing in a contested adoption or an involuntary
8 termination of parental rights proceeding.

9 (2) **DISCHARGE OF COUNSEL FOR PARENT'S FAILURE TO PARTICIPATE IN PROCEEDINGS.** The
10 treatment of section 48.23 (2) (c) 3. of the statutes first applies to proceedings commenced
11 under section 48.13, 48.133, or 48.42 of the statutes on the effective date of this subsection.

12 (3) **POSTDISPOSITIONAL RELIEF PETITION OR NOTICE OF APPEAL; PARENT'S SIGNATURE**
13 **REQUIRED.** The treatment of sections 48.46 (1), (1m), and (2) and 809.107 (2) (bm) 6. of the
14 statutes first applies to a parent who files a petition for rehearing, motion for postdisposition
15 relief, or notice of intent to appeal on the effective date of this subsection.

NOTE: This SECTION specifies that the provisions of the draft first apply to the following actions after the draft becomes law: (1) a waiver by a parent of the right to counsel from a failure to appear applies after a parent has been ordered to appear; (2) a discharge of counsel from a parent's failure to participate in proceedings applies after filing of a CHIPS or TPR petition; and (3) a parent's signature on a postdisposition motion, petition, or notice of intent to appeal applies upon the filing of such document.