

1 **AN ACT** *to repeal* 48.235 (6), 48.243 (1) (g), 48.317 (2) and 48.422 (4); *to*
2 *consolidate, renumber and amend* 48.317 (intro.) and (1); and *to amend* 48.028 (4)
3 (d) 1. and 2., (e) 1. and 2. and (g) 1., 48.30 (2), 48.31 (2), 48.31 (4), 48.31 (5),
4 48.415 (intro.), 48.422 (1), 48.422 (5), 48.424 (3) and 48.424 (4) (intro.) of the
5 statutes; **relating to:** elimination of the right to a jury trial in a proceeding under the
6 children’s code for a child in need of protection or services or for termination of
7 parental rights.

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.

Under current law, a party to a child in need of protection or services (CHIPS) or termination of parental rights (TPR) proceeding may request a trial by a jury to determine if there are grounds to grant a CHIPS adjudication or TPR order.

The draft eliminates the right to request a jury trial in a CHIPS or TPR proceeding.

8 **SECTION 1.** 48.028 (4) (d) 1. and 2., (e) 1. and 2. and (g) 1. of the statutes are amended
9 to read:

10 48.028 (4) (d) 1. The court ~~or jury~~ finds by clear and convincing evidence, including
11 the testimony of one or more qualified expert witnesses chosen in the order of preference listed
12 in par. (f), that continued custody of the Indian child by the parent or Indian custodian is likely
13 to result in serious emotional or physical damage to the child.

14 2. The court ~~or jury~~ finds by clear and convincing evidence that active efforts, as
15 described in par. (g) 1., have been made to provide remedial services and rehabilitation

1 programs designed to prevent the breakup of the Indian child's family and that those efforts
2 have proved unsuccessful. The court ~~or jury~~ shall make that finding notwithstanding that a
3 circumstance specified in s. 48.355 (2d) (b) 1. to 5. applies.

4 (e) 1. The court ~~or jury~~ finds beyond a reasonable doubt, including the testimony of one
5 or more qualified expert witnesses chosen in the order of preference listed in par. (f), that the
6 continued custody of the Indian child by the parent or Indian custodian is likely to result in
7 serious emotional or physical damage to the child.

8 2. The court ~~or jury~~ finds by clear and convincing evidence that active efforts, as
9 described in par. (g) 1., have been made to provide remedial services and rehabilitation
10 programs designed to prevent the breakup of the Indian child's family and that those efforts
11 have proved unsuccessful.

12 (g) 1. The court may not order an Indian child to be removed from the home of the Indian
13 child's parent or Indian custodian and placed in an out-of-home care placement unless the
14 evidence of active efforts under par. (d) 2. or (e) 2. shows that there has been an ongoing,
15 vigorous, and concerted level of case work and that the active efforts were made in a manner
16 that takes into account the prevailing social and cultural values, conditions, and way of life
17 of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe,
18 tribal and other Indian child welfare agencies, extended family members of the Indian child,
19 other individual Indian caregivers, and other culturally appropriate service providers. The
20 consideration by the court ~~or jury~~ of whether active efforts were made under par. (d) 2. or (e)
21 2. shall include whether all of the following activities were conducted:

NOTE: This SECTION deletes the references related to a jury making findings of fact in a CHIPS or TPR proceeding involving an Indian child, and refers only to a court making the findings of fact.

22 **SECTION 2.** 48.235 (6) of the statutes is repealed.

NOTE: This SECTION deletes the reference to explaining a guardian ad litem's role to a jury.

1 **SECTION 3.** 48.243 (1) (g) of the statutes is repealed.

NOTE: This SECTION repeals the requirement for an intake worker to inform a parent, expectant mother, or child age 12 or older of the right to a jury trial.

2 **SECTION 4.** 48.30 (2) of the statutes is amended to read:

3 48.30 (2) At the commencement of the hearing under this section the child and the
4 parent, guardian, legal custodian, or Indian custodian; the child expectant mother, her parent,
5 guardian, legal custodian, or Indian custodian, and the unborn child through the unborn child's
6 guardian ad litem; or the adult expectant mother and the unborn child through the unborn
7 child's guardian ad litem; shall be advised of their rights as specified in s. 48.243 and shall be
8 informed that a request for a jury trial or for a substitution of judge under s. 48.29 must be made
9 before the end of the plea hearing or is waived. Nonpetitioning parties, including the child,
10 shall be granted a continuance of the plea hearing if they wish to consult with an attorney on
11 the request for a jury trial or substitution of a judge.

NOTE: This SECTION eliminates the requirement for a court to advise a party of the right to request a jury trial at the plea hearing in which any party may contest the CHIPS action. It also eliminates the right for a nonpetitioning party to be granted a continuance on the basis of consulting with an attorney on a request for a jury trial.

12 **SECTION 5.** 48.31 (2) of the statutes is amended to read:

13 48.31 (2) The hearing shall be to the court ~~unless the child, the child's parent, guardian,~~
14 ~~or legal custodian, the unborn child by the unborn child's guardian ad litem, or the expectant~~
15 ~~mother of the unborn child exercises the right to a jury trial by demanding a jury trial at any~~
16 ~~time before or during the plea hearing. If a jury trial is demanded in a proceeding under s. 48.13~~
17 ~~or 48.133, the jury shall consist of 6 persons. If a jury trial is demanded in a proceeding under~~
18 ~~s. 48.42, the jury shall consist of 12 persons unless the parties agree to a lesser number.~~

1 ~~Chapters 756 and 805 shall govern the selection of jurors.~~ If the hearing involves a child victim
2 or witness, as defined in s. 950.02, the court may order that a deposition be taken by
3 audiovisual means and allow the use of a recorded deposition under s. 967.04 (7) to (10) and,
4 with the district attorney, shall comply with s. 971.105. At the conclusion of the hearing, the
5 court ~~or jury~~ shall make a determination of the facts, ~~except that~~ and in a case alleging a child
6 or an unborn child to be in need of protection or services under s. 48.13 or 48.133, the court
7 shall make the determination under s. 48.13 (intro.) or 48.133 relating to whether the child or
8 unborn child is in need of protection or services that can be ordered by the court. If the court
9 finds that the child or unborn child is not within the jurisdiction of the court or, in a case
10 alleging a child or an unborn child to be in need of protection or services under s. 48.13 or
11 48.133, that the child or unborn child is not in need of protection or services that can be ordered
12 by the court or if the court ~~or jury~~ finds that the facts alleged in the petition have not been
13 proved, the court shall dismiss the petition with prejudice.

NOTE: This SECTION deletes the provisions governing the request for a jury trial in a fact-finding hearing under a CHIPS or TPR proceeding.

14 **SECTION 6.** 48.31 (4) of the statutes is amended to read:

15 48.31 (4) The court ~~or jury~~ shall make findings of fact and ~~the court shall make~~
16 conclusions of law relating to the allegations of a petition filed under s. 48.13, 48.133 or 48.42,
17 ~~except that the court~~ and shall make findings of fact relating to whether the child or unborn
18 child is in need of protection or services which can be ordered by the court. In cases alleging
19 a child to be in need of protection or services under s. 48.13 (11), the court may not find that
20 the child is suffering emotional damage unless a licensed physician specializing in psychiatry
21 or a licensed psychologist appointed by the court to examine the child has testified at the
22 hearing that in his or her opinion the condition exists, and adequate opportunity for the

1 cross-examination of the physician or psychologist has been afforded. The judge may use the
2 written reports if the right to have testimony presented is voluntarily, knowingly and
3 intelligently waived by the guardian ad litem or legal counsel for the child and the parent or
4 guardian. In cases alleging a child to be in need of protection or services under s. 48.13 (11m)
5 or an unborn child to be in need of protection or services under s. 48.133, the court may not
6 find that the child or the expectant mother of the unborn child is in need of treatment and
7 education for needs and problems related to the use or abuse of alcohol beverages, controlled
8 substances or controlled substance analogs and its medical, personal, family or social effects
9 unless an assessment for alcohol and other drug abuse that conforms to the criteria specified
10 under s. 48.547 (4) has been conducted by an approved treatment facility.

NOTE: This SECTION deletes references related to a jury making findings of fact in a CHIPS or TPR proceeding, and refers only to a court making the findings of fact.

11 **SECTION 7.** 48.31 (5) of the statutes is amended to read:

12 48.31 (5) If the child is an Indian child, the court ~~or jury~~ shall also determine at the
13 fact-finding hearing whether continued custody of the Indian child by the Indian child's
14 parent or Indian custodian is likely to result in serious emotional or physical damage to the
15 Indian child under s. 48.028 (4) (d) 1. and whether active efforts under s. 48.028 (4) (d) 2. have
16 been made to prevent the breakup of the Indian child's family and whether those efforts have
17 proved unsuccessful, unless partial summary judgment on the allegations under s. 48.13 or
18 48.133 is granted, in which case the court shall make those determinations at the dispositional
19 hearing.

NOTE: This SECTION deletes the reference to a jury making particular findings of fact that are required for an Indian child, and refers only to a court making those findings of fact.

1 **SECTION 8.** 48.317 (intro.) and (1) of the statutes are consolidated, renumbered 48.317
2 and amended to read:

3 **48.317 Jeopardy.** (intro.) Jeopardy attaches:

4 ~~(1) In a trial to the court,~~ when a witness is sworn.

5 **SECTION 9.** 48.317 (2) of the statutes is repealed.

NOTE: SECTIONS 8 and 9 delete the provision governing when jeopardy
 attaches in a jury trial, and refer only to when jeopardy attaches in a trial
 to the court.

6 **SECTION 10.** 48.415 (intro.) of the statutes is amended to read:

7 **48.415 Grounds for involuntary termination of parental rights.** (intro.) At the
8 fact-finding hearing the court ~~or jury~~ shall determine whether grounds exist for the
9 termination of parental rights. If the child is an Indian child, the court ~~or jury~~ shall also
10 determine at the fact-finding hearing whether continued custody of the Indian child by the
11 Indian child's parent or Indian custodian is likely to result in serious emotional or physical
12 damage to the Indian child under s. 48.028 (4) (e) 1. and whether active efforts under s. 48.028
13 (4) (e) 2. have been made to prevent the breakup of the Indian child's family and whether those
14 efforts have proved unsuccessful, unless partial summary judgment on the grounds for
15 termination of parental rights is granted, in which case the court shall make those
16 determinations at the dispositional hearing. Grounds for termination of parental rights shall
17 be one of the following:

NOTE: This SECTION deletes references to a jury determining whether
 grounds exist for TPR, and refers only to a court making that finding of
 fact.

18 **SECTION 11.** 48.422 (1) of the statutes is amended to read:

19 48.422 (1) Except as provided in s. 48.42 (2g) (ag), the hearing on the petition to
20 terminate parental rights shall be held within 30 days after the petition is filed. At the hearing

1 on the petition to terminate parental rights the court shall determine whether any party wishes
2 to contest the petition and inform the parties of their rights under ~~sub. (4) and~~ s. 48.423.

NOTE: This SECTION deletes the requirement for a court to inform the parties of the right to request a jury trial at the initial plea hearing in which it is determined whether a party wishes to contest the TPR proceeding.

3 **SECTION 12.** 48.422 (4) of the statutes is repealed.

NOTE: This SECTION repeals the right of a party to request a jury trial in a TPR proceeding.

4 **SECTION 13.** 48.422 (5) of the statutes is amended to read:

5 48.422 (5) Any nonpetitioning party, including the child, shall be granted a continuance
6 of the hearing for the purpose of consulting with an attorney ~~on the request for a jury trial or~~
7 concerning a request for the substitution of a judge.

NOTE: This SECTION eliminates the ability for a party in a TPR action to obtain a continuance for the purpose of consulting with an attorney on a request for a jury trial.

8 **SECTION 14.** 48.424 (3) of the statutes is amended to read:

9 48.424 (3) ~~If the facts are determined by a jury, the jury may only~~ The court shall decide
10 whether any grounds for the termination of parental rights have been proved, ~~and~~ whether the
11 allegations specified in s. 48.42 (1) (e) have been proved in cases involving the involuntary
12 termination of parental rights to an Indian child. ~~The court shall decide, and~~ what disposition
13 is in the best interest of the child.

NOTE: This SECTION deletes language regarding a jury determining whether any TPR grounds have been proven, as currently allowed. It instead requires a court to make this determination in addition to then determining what disposition is in the best interest of the child.

14 **SECTION 15.** 48.424 (4) (intro.) of the statutes is amended to read:

15 48.424 (4) (intro.) If grounds for the termination of parental rights are found by the court
16 ~~or jury,~~ the court shall find the parent unfit. A finding of unfitness shall not preclude a

1 dismissal of a petition under s. 48.427 (2). The court shall then proceed immediately to hear
2 evidence and motions related to the dispositions enumerated in s. 48.427. Except as provided
3 in s. 48.42 (2g) (ag), the court may delay making the disposition and set a date for a
4 dispositional hearing no later than 45 days after the fact-finding hearing if any of the following
5 apply:

NOTE: This SECTION deletes the reference to a jury making a determination on the grounds for TPR, and refers only to a court making that determination.

6 **SECTION 16. Initial applicability.**

7 (1) ELIMINATION OF JURY TRIALS IN PROCEEDINGS UNDER THE CHILDREN'S CODE. This act
8 first applies to a child in need of protection or services, or termination of parental rights,
9 proceeding in which the petition is filed on the effective date of this subsection.

NOTE: This SECTION provides that this draft first applies to a CHIPS or TPR proceeding for which a petition is filed after the draft takes effect as law.

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(END)