

1 **AN ACT** *to renumber and amend* 806.07 (2); *to amend* 48.43 (6) (a); and *to create*
2 806.07 (2) (b) of the statutes; **relating to:** a challenge to a termination of parental
3 rights order claiming ineffective assistance of counsel.

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, a parent may appeal a judgment for termination of parental rights (TPR) as a matter of right, but appeal rights are lost if notice of intent to appeal is not filed within 30 days of the final judgment.

A parent may also petition a circuit court for a rehearing, after a judgment of TPR is entered, only on the ground that new evidence has been discovered affecting the advisability of the court's adjudication. A petition for rehearing must be filed within one year of the judgment, or sooner if a court is granting an adoption. If a parent consented to the TPR, or did not contest the TPR petition, the parent may move the circuit court for relief from judgment within 30 days of the TPR judgment.

One basis for challenge to a TPR judgment is a claim of ineffective assistance of counsel. Wisconsin courts recognize that a parent has a right to effective assistance of counsel when being represented in a TPR proceeding. [*In the Interest of M.D.(S.)*, 168 Wis. 2d 995 (Wis. 1992).] In determining whether counsel was ineffective, a court must apply the same analysis that is used to determine whether trial counsel was ineffective in criminal cases, using a 2-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

If a notice of intent to appeal is filed within 30 days of the TPR judgment, the statutes specify that if the challenge is made on the ground of ineffective assistance of counsel, the appellant must file a motion raising that issue and requesting fact-finding by the circuit court within 15 days after the filing of the record on appeal.

However, a claim for ineffective assistance of counsel may also be brought directly to the circuit court as a motion for relief from judgment. In general civil cases, the statute provides that a motion for relief from judgment must be made to the circuit court within a reasonable time. Whether such a motion was brought within a reasonable time requires a balancing of 2 competing factors: the need for finality of judgments, and the ability of a court to do substantial justice when the circumstances so warrant. [*State ex. rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618 (1994).]

Bill Draft

The draft specifies that if a claim for ineffective assistance of counsel in a TPR proceeding is brought directly to the circuit court as a motion for relief from judgment, the motion must be filed within one year of the final judgment, or, if an adoption is to be granted, the motion must be filed before the adoption is granted and within one year of the judgment, or within 30 days of the judgment, whichever is later.

This means that such a motion may be filed up to one year after the TPR order is entered unless the child is adopted within the year after the TPR order is entered. In that case, such a motion cannot be filed after the adoption order is entered, unless the adoption order is entered less than 30 days after the date on which the TPR order is entered, in which case the motion may be filed within 30 days after the date on which the TPR order is entered.

1 **SECTION 1.** 48.43 (6) (a) of the statutes is amended to read:

2 48.43 (6) (a) Judgments under this subchapter terminating parental rights are final and
3 are appealable under s. 808.03 (1) according to the procedure specified in s. 809.107 and are
4 subject to a petition for rehearing or a motion for relief only as provided in s. 48.46 (1m) and
5 (2) or 806.07 (2) (b) and, in the case of an Indian child, s. 48.028 (5) (c) and (6). The attorney
6 representing a person during a proceeding under this subchapter shall continue representation
7 of that person by filing a notice of intent to appeal under s. 809.107 (2), unless the attorney
8 has been previously discharged during the proceeding by the person or by the trial court.

NOTE: This SECTION specifies that a motion for relief from judgment, based on a claim of ineffective assistance of counsel in a TPR proceeding is included in the limited bases allowed for a challenge to a TPR judgment.

1 **SECTION 2.** 806.07 (2) of the statutes is renumbered 806.07 (2) (a) and (c) and amended
2 to read:

3 806.07 (2) (a) The Except as provided in par. (b), the motion shall be made within a
4 reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment
5 was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made
6 within the time provided in s. 805.16.

7 (c) A motion under this section does not affect the finality of a judgment or suspend its
8 operation. This section does not limit the power of a court to entertain an independent action
9 to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on
10 the court.

11 **SECTION 3.** 806.07 (2) (b) of the statutes is created to read:

12 806.07 (2) (b) Notwithstanding par. (a) and s. 48.43 (6) (a), a motion under this section
13 that claims ineffective assistance of counsel in a proceeding under s. 48.42 for termination of
14 parental rights shall be filed within one year after the date on which the order under s. 48.43
15 is entered, unless within that one-year period a court in this state or in another jurisdiction
16 enters an order granting adoption of the child, in which case a motion under this section shall
17 be filed before the date on which the order granting adoption is entered or within 30 days after
18 the date on which the order under s. 48.43 is entered, whichever is later.

NOTE: This SECTION provides that if a claim of ineffective assistance of counsel in a TPR proceeding is brought directly to the circuit court as a motion for relief from judgment, the motion must be filed within one year of the final judgment, or, if an adoption is to be granted, the motion must be filed before the adoption is granted and within one year of the judgment, or within 30 days of the judgment, whichever is later. Thus, such a motion may be filed up to one year after the TPR order is entered unless the child is adopted within the year after the TPR order is entered. In that case, such a motion cannot be filed after the adoption order is entered, unless the adoption order is entered less than 30 days after the

date on which the TPR order is entered, in which case the motion may be filed within 30 days after the date on which the TPR order is entered.

The time limitation in this SECTION is the same as that afforded to a petition for a rehearing on the ground that new evidence has been discovered that affects the advisability of a court's judgment for TPR or paternity, under s. 48.46 (1m).

COMMENT: The committee could consider whether the time limitation to challenge a TPR judgment based on a claim of ineffective assistance of counsel should also apply to an adjudication of a child or unborn child in need of protection or services.

SECTION 4. Initial applicability.

(1) This act first applies to an order terminating parental rights under section 48.43 of the statutes entered on the effective date of this subsection.

NOTE: This SECTION provides that the specified time limitation to file a motion for relief from a TPR order, based on a claim of ineffective assistance of counsel, applies to an order entered on or after the effective date of the draft becoming law.

(END)