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Governor Scott Walker
Secretary Eloise Anderson

Secretary's Office

MEMORANDUM

Date: January 23, 2013

To: Special Committee on Permanency for Young Children in the Child Welfare System

From: Eloise Anderson

Re: Department Positions on Bill Drafts

Attached for the Special Committee's consideration is the position of the Department of Children and Families on the bill drafts that will be considered at the January 24th meeting of the Committee. My staff and I would be pleased to answer questions on any of the attached information.

Thank you for your consideration of this material.

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DEPARTMENT OF CHILDREN AND FAMILIES

Re: Special Committee on Permanency for Young Children in the Child Welfare System
January 23, 2013

WLC 0009/3: CHIPS jurisdiction over a newborn: DCF opposes this bill for the following reasons.

- The bill draft allows a petition for child in need of protection or services (CHIPS) or termination of parental rights (TPR) on the grounds that a child is under 3 years old, the child's parent had his/her parental rights terminated for a different child within the past 3 years, and the child has been removed from the home under a temporary physical custody order. The Department opposes this bill because a parent in this circumstance may be able to safely and capably care for his/her child, especially if the parent has formal or informal supports in place. The right to parent one's child is a fundamental and treasured right; that right should not be taken away or altered without the full, thorough processes and standards provided under current law to determine whether the parent can safely care for the child.

WLC 0010/3: Right to counsel for parents in CHIPS proceedings: DCF is neutral.

- The bill allows counsel to be appointed for all parents, including minor parents, and provides 12 new positions and $3.2 million for the state public defender to carry out the new provision.

WLC 0011/3: Physical, psychological, mental, or developmental examinations and AODA assessment of parent: DCF opposes for the following reasons:

- Under current law and practice, a physical, psychological, mental, or developmental examination or AODA assessment of a parent is typically undertaken, if the court determines it is warranted, at the CHIPS hearing. The bill draft allows any of these exams or assessments to be ordered at the temporary physical custody hearing. Under current law, exams/assessments may be done at any time that the CHIPS petition is filed, which is generally at tht time of the TPC or occasionally a few days later, and so currently an exam/assessment can be ordered at the time of the TPC or within a few days of the TPC hearing. Under current law, when the exam/assessment is ordered, the court must hear any objections of the parent before ordering the exam/assessment, which

allows the exam/assessment to be used at the CHIPS fact-finding hearing. Under the proposal, the exam/assessment results can not be used at the CHIPS hearing unless the parent consents. The Department opposes the bill draft on the grounds that it is unnecessary; creates the potential for duplication of exams/assessments because the child welfare agency may be forced to undertake an exam/assessment twice, at both the TPC and CHIPS, because a parent may not consent to having the results of an exam/assessment ordered at the TPC hearing used at the CHIPS hearing; and to the extent more exams/assessments are ordered at the TPC imposes a new expense on the child welfare system which can not be absorbed with existing resources in the child welfare system.

WLC 0012/3: TPR ground of continuing CHIPS: DCF supports the bill provided the following modification is made.

- The Department agrees that a court cannot with certainty make a judgment as to a parent's future behavior in the coming 9 months. However, simply removing this standard enables a TPR petition to be filed as early as 6 months without taking into account the parent's treatment plan and compliance. In many cases, a parent's treatment/service plan may require more than six months to complete, particularly if it involves AODA or mental health treatment where the duration of treatment is often more than six months and there may be a waiting list to enter the treatment. To balance these concerns, the Department recommends modifying the bill draft to:
    - **amend s. 48.415(s)(a)3 to insert "if the child has been outside the home for less than 15 months" before the clause: "there is a substantial likelihood that the parent will not meet these conditions within the 9 month period following the fact-finding hearing under s.48.424."**

WLC 0013/3: When no reasonable efforts are required: DCF is opposed, for the following reasons:

- Current law already provides courts flexibility to order that no reasonable efforts are required and to start and stop reasonable efforts, if and when a family's circumstances change. Statutory changes, such as those proposed, are not needed to attain that flexibility.

- The bill draft will impede a child welfare agency from initiating reasonable efforts without seeking and obtaining court approval on a case where reasonable efforts were not required initially, but where circumstances change such that reasonable efforts become appropriate. Changed circumstances could include, for example, the identification and engagement of the non-custodial father, making reunification with the father a possible permanency option. The proposed requirement for court approval of a change in reasonable efforts could delay permanency for the child in such cases.

WLC 0021/2: Posttermination agreement: DCF opposes for the following reasons:

- While the bill draft requires that the court determine that the posttermination agreement has been entered into voluntarily, the Department views that there is nonetheless a strong risk that a post-termination agreement between a birth parent(s) and adoptive parent(s) could be used inappropriately to coerce a birth parent to accept a voluntary TPR and adoption by the adoptive parent. Specifically, a birth parent who does not support proceeding with a TPR may be told by the prospective adoptive parent that the birth parent will not be allowed visits and/or contact with the child after adoption, unless the birth parent agrees to a voluntary TPR which expedites and makes certain the availability of the child for adoption.

- A post-termination agreement places requirements on adoptive parents that may be unreasonable and/or costly over time. For example, the adoptive parents may need to move for employment reasons, which could make it impossible to adhere to the birth parent visitation schedule established in the post-termination agreement. If the birth parents do not voluntarily agree to modify the post-termination agreement, the adoptive parents are required to undergo mediation, and if that fails, a court process to modify the agreement, which imposes time demands, stress, and cost on the adoptive parent.

- Due to the additional conditions placed on adoptive parents described above, the bill may deter recruitment of adoptive parents by child welfare agencies.

- Currently, it is possible for an adoptive and birth parent to pursue an "open adoption" approach and reach agreement regarding the involvement of the birth parent after adoption, without involving court processes that may be too rigid or burdensome over time.

WLC 0022/2: Standards for parental participation: DCF opposes the bill draft unless the bill is modified as described below.

- The bill draft presumes that a parent has waived the right to counsel if the parent does not attend two consecutive proceedings for an involuntary TPR or contested adoption. While it is reasonable to apply this standard to a parent who is an adult, the Department views that it is not reasonable to apply this standard to a minor parent, who is less than 18 years old. Youth under 18 years old do not have fully developed and mature judgment and are likely to lack an understanding of the court process(es) and their implications. For these reasons, youth may not attend a TPR or adoption process, despite the critical and lasting impacts of the court decisions on the youth. The Department views that the current protection afforded youth that the right to counsel can not be waived is appropriate and should be maintained. The Department requests that Section 2 of the bill draft be modified so that minor parents are exempted from s. 48.23 (2) (c)2.

WLC 0026/1: Eliminating Right to Jury Trials for CHIPS and TPR: DCF opposes the bill draft unless the bill is modified as described below.

- *CHIPS-related provisions:* The Department supports the provisions in the bill draft that eliminate jury trials for the CHIPS process as a means to expedite services and support and permanency for children at risk of or who have experienced child abuse or neglect.

- *TPR-related provisions:* The Department opposes the provisions in the bill draft that eliminate the right to a jury trial for the termination of parental rights (TPR). The right to parent one's child is a fundamental and treasured right; it should be eliminated only after all protections have been accorded the birth parent. The Department supports eliminating the TPR-related provisions as described in the appendix.

WLC 0027/2: Disclosure of Names and Addresses and Home Investigations: DCF supports the bill with the following modification.

- Because Wisconsin has a county-administered child welfare system, the process and standards for home investigations of foster and adoptive homes are not uniform throughout the state. The bill draft provides that certification as a foster home is sufficient for qualifying

to be an adoptive home. The Department supports the following modification to ensure that all county-administered foster care certifications are of sufficiently high quality to eliminate the need for a subsequent adoptive home investigation.

- **Add the following (5) to the sections on page 3 titled "Home Investigation of an Adoptive Parent" and Page 9 following # 4: (5) The foster care /adoption home investigation was completed utilizing a Department approved protocol and the adoptive home meets the requirements of DCF 51.**

WLC 0028/1: TPR participation by alleged father: DCF opposes the bill draft for the following reason:

- The bill creates a significant barrier to the engagement of fathers when theirchildren are in the child welfare system. Specifically, the bill eliminates the right of an alleged father to participate in TPR proceedings unless he has had a familial relationship with the child or has timely filed with the paternal interest registry (within 2 weeks of the child's birth). A father may not have taken either of these actions for a number of legitimate reasons; for example, the mother may have prevented him from being involved with the children and he may not have been aware of the paternal interest registry. The father may nonetheless be capable and interested in caring for his children and may be an appropriate permanent placement option, if the mother is no longer able to care for the children.

WLC 0030/2: CHIPS jurisdiction over a child born with alcohol or controlled substances: DCF opposes for the following reasons:

- The bill allows an involuntary TPR to be initiated if a child was born with a detectable amount of alcohol or drugs and 2 or more other children of the mother were born with alcohol or drugs and were subject to a CHIPS petition based on being born with a detectable amount of alcohol or drugs. A parent in this circumstance may be able to safely and capably care for his/her child, particularly if the parent has formal or informal supports in place. The right to parent one's child is a fundamental and treasured right; that right should not be eliminated without according all the protections under current law to the parent to demonstrate that the child's safety can be preserved within the parent's home.

WLC 0031/2: Expedited appellate procedures for ch. 48 cases: DCF is neutral

- The bill expedites the appellate procedures for CHIPS, adoption, and other cases under the Children's Code.

WLC 0040/1: Recognizing tribal customary adoption and suspension of parental rights: DCF supports the bill draft with the following modifications which are also supported by the DCF/Tribal Policy and Law Workgroup:

- The Department supports the intent of the bill draft to recognize and respect tribal values and practices by according full faith and credit to adoptions and suspensions of parental rights approved by a tribal court. For completeness and accuracy, the following modifications should be made:

    - **In section 4n, delete "permanent" before suspensions to reflect the fact that some suspensions are temporary and establish parallel provisions in Chapter 938 to address juveniles.**

WLC 0041/1: Adoption petitions filed in the TPR county: DCF is neutral

- The bill allows an adoption petition to be filed in the same court jurisdiction where the TPR was filed.

WLC 0055/1: Revising certain TPR grounds: DCF opposes for the following reasons:

- The bill allows a TPR to proceed if the Children's Court examines evidence and concludes that a parent has committed an egregious crime, even if the criminal trial for the parent has not concluded. The provision can result in permanent injustices and harm to children and parent, in that parents who are proven innocent of an egregious crime through their criminal trial, may lose their children for unfounded reasons.

WLC 0063/1: Locating relatives: DCF supports the bill with the following modification.

- The Department strongly supports and has implemented the practice of locating and engaging relatives, including domestic partners, when a child needs to be removed from his/her home, to serve as a placement option or support for the child. The diligent relative search should occur at the point of taking physical custody of the child or entering an out-of-home order rather than any time placement is changed under an existing order. For this reason, the Department proposes the following modification to eliminate potentially burdensome and unnecessary workload requirement:

    - **Eliminate the creation of Wis. Stat. 48.357(2z) because it would require a diligent relative search to occur every time a placement is changed for a child who is in out-of-home care and not placed with a relative.**

Appendix: DCF Proposed Changes in WLC 0026/1

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., 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 children's code for termination of 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 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 the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

2. The court ~~or jury~~ finds by clear and convincing evidence that active efforts, as 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~~ or jury finds beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

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

(g) 1. The court may not order an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in an out–of–home care placement unless the evidence of active efforts under par. (d) 2. or (e) 2. shows that there has been an ongoing, 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 of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers. The consideration by the court of whether active efforts were made under par. (d) 2. or the consideration by the court or jury of whether active efforts were made under (e) 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 for a CHIPS or UCHIPS proceeding involving an Indian child, and refers only to a court making the findings of fact.

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.

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

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 or UCHIPS 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.

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

48.31 **(2)** The hearing shall be to the court unless the child, the child's parent, guardian, or legal custodian exercises the right to a jury tria by demanding a jury trial at any time before the or during the plea hearing for a termination of parental rights. ~~unless the child, the child's parent, guardian, or legal custodian, the unborn child by the unborn child's guardian ad litem, or the expectant mother of the unborn child exercises the right to a jury trial by demanding a jury trial at any time before or during the plea hearing. If a jury trial is demanded in a proceeding under s. 48.13 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.~~ If a jury trial is demanded in a proceeding under 48.42, the jury shall consist of 12 persons unless the parties agree to a lesser number. Chapters 756 and 805 shall govern the selection of jurors. If the hearing involves a child victim or witness, as defined in s. 950.02, the court may order that a deposition be taken by audiovisual means and allow the use of a recorded deposition under s. 967.04 (7) to (10) and,

with the district attorney, shall comply with s. 971.105. At the conclusion of the hearing the court in a case alleging a child or unborn child to be in need of protection or services under 48.13 or 48.133 or a court or jury in the case of a termination of parental rights under 48.42 ~~or jury~~ shall make a determination of the facts~~, except that~~ and in a case alleging a child or an unborn child to be in need of protection or services under s. 48.13 or 48.133, the court shall make the determination under s. 48.13 (intro.) or 48.133 relating to whether the child or unborn child is in need of protection or services that can be ordered by the court. If the court finds that the child or unborn child is not within the jurisdiction of the court or, in a case alleging a child or an unborn child to be in need of protection or services under s. 48.13 or 48.133, that the child or unborn child is not in need of protection or services that can be ordered by the court or if the court or jury ~~or jury~~ finds that the facts alleged in the petition for a termination of parental rights have not been 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 UCHIPS proceeding.

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

48.31 **(4)** The court ~~or jury~~ shall make findings of fact and ~~the court shall make~~ conclusions of law relating to the allegations of a petition filed under s. 48.13, 48.133 and the court or jury shall make findings of fact and the court shall make conclusions of law relating allegation of a petition filed under s. or 48.42, ~~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 a child to be in need of protection or services under s. 48.13 (11), the court may not find that the child is suffering emotional damage unless a licensed physician specializing in psychiatry or a licensed psychologist appointed by the court to examine the child has testified at the hearing that in his or her opinion the condition exists, and adequate opportunity for the cross–examination of the physician or psychologist has been afforded. The judge may use the written reports if the right to have testimony presented is voluntarily, knowingly and 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) 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 education for needs and problems related to the use or abuse of alcohol beverages, controlled substances or controlled substance analogs and its medical, personal, family or social effects unless an assessment for alcohol and other drug abuse that conforms to the criteria specified 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 UCHIPS 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 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 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 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 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.

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

48.317 Jeopardy. (intro.) Jeopardy attaches: (1) In a trial to the court, ~~:~~ 4 ~~(1) In a trial to the court,~~ when a witness is sworn.

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

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 termination of parental rights. If the child is an Indian child, the court or jury shall also determine at the fact–finding hearing whether continued custody of the Indian child by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical 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 efforts have proved unsuccessful, unless partial summary judgment on the grounds for termination of parental rights is granted, in which case the court shall make those determinations at the dispositional hearing. Grounds for termination of parental rights shall be one of the following:

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

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

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

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 of the hearing for the purpose of consulting with an attorney on the request for a jury trial ~~on the request for a jury trial or~~ concerning a request for the substitution of a judge.

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

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

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

48.424 **(4)** (intro.) If grounds for the termination of parental rights are found by the court or jury ~~or jury~~, the court shall find the parent unfit. A finding of unfitness shall not preclude a dismissal of a petition under s. 48.427 (2). The court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427. Except as provided in s. 48.42 (2g) (ag), the court may delay making the disposition and set a date for a dispositional hearing no later than 45 days after the fact–finding hearing if any of the following apply:

SECTION 16. Initial applicability.

(1) ELIMINATION OF JURY TRIALS IN PROCEEDINGS ALLEGING A CHILD OR UNBORN CHILD IS IN NEED OF PROTECTION OR SERVICES. This act first applies to a child or unborn child in need of protection or services 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 UCHIPS proceeding for which a petition is filed after the draft takes effect as law.

(END)