

DATE: January 10, 2013

TO: Adam Plotkin, Legislative Liaison

FROM: Marla J. Stephens, Appellate Division Director

SUBJECT: WELFR: Expedited Appellate Procedures for ch. 48 cases  
**Legislative Council Draft WLC: 0031/2, 01/08/2013**

I reviewed the Legislative Council Drafts WLC: 0031/1 and WLC: 0031/2, the memos dated October 24, 2012 and December 14, 2012 from the Director of State Courts, and the memo and attachments dated December 4, 2012 from the Court of Appeals.

The Legislative Council committee seeks to expedite the appeals in all ch. 48 cases. I am concerned that the manner in which it proposes to do so is confusing, inefficient and inappropriate. It is not necessary to subject all parties and all appeals to the Rule 809.107 procedures in order to expedite all appeals under ch. 48.

Overview of concerns:

Under current law, various parties may appeal from ch. 48 cases. They are not all required to utilize the same procedures, however. The current rules of appellate procedure recognize that different kinds of cases under ch. 48 warrant different appeal procedures, and that the parties to some cases under ch. 48 have different rights on appeal.

For example, Rule 809.107 created special expedited responsibilities and procedures that are designed to protect the *respondent's* rights to appointed counsel and to effective assistance of counsel in a termination of parental rights (TPR) case. The Judicial Council Note, 2006 makes clear that s. 809.107 applies to *parents* who are appealing the TPR disposition. Rule 809.107 requires the appellant to raise all issues, whether apparent in the record, or developed outside the record, in one unified direct appeal. That is why the appellant is required to file a post-disposition motion to present an issue that is outside the record (such as newly discovered evidence, involuntariness of admissions, or ineffective assistance of counsel) for appellate review. That is why s. 809.107 (3) and (4) refer to public defender appointment of counsel and public defender requests for transcripts and copies of the record. That is why an appointed attorney who finds no arguably meritorious issues files a no-merit report under s. 809.107 (5m). Current law, in s. 48.43 (6), provides that an appeal from a judgment terminating parental rights (which would necessarily be filed by a parent whose rights were terminated) is governed by Rules 808.03 (1) and 809.107.

Section 48.465 (1) was intended to alert parties and practitioners that Rule 809.30 appeal procedures govern other cases under ch. 48 in which there is a right to appointed counsel, such as an appeal by a child in a Child in Need of Protection or Services (CHIPS) case. Section 48.465 (3) specifically excludes TPR cases and cases of parental consent to

abortion from its scope because each has its own expedited appeal procedure. Section 48.465 (2) was intended to clarify that a state's appeal from a final order in a ch. 48 case must be filed within the time specified in s. 808.04 (4) and in the manner provided for civil appeals in ch. 808 and 809. [Subsection (3) was poorly drafted<sup>1</sup>, as it was meant to be an exception to sub. (1) only, not an exception to the entire section 48.465. In other words, state's appeals in TPR, parental consent and all other ch 48 cases were to proceed under the civil rules.]

I would repeal and recreate s. 48.465 to specify which appellate procedure governs each of the specified cases under ch. 48. Appeals by the person who is the subject of any judgment and who has a right to counsel in the case would follow Rule 809.107. Appeals by all other parties in those right to counsel cases (the state, a guardian, a parent who is not the subject of the termination order, etc.) would follow the rules for civil appeals: s. 808.03 (1) sets out the right to appeal, s. 808.04 sets the time limits for initiating appeals in various case types, and subchapter II of Chapter 809 (ss. 809.10 – 26) specifies the subsequent procedures and time limits. Appeals by all parties in non-right to counsel cases (adoptions, custody, child support, the actions specified in ss. 48.13-16, licensing, etc.) would also follow the rules for civil appeals. Then I would shorten any time limits under the civil appeal rules that are deemed necessary to expedite the appeals in some or all of those cases.

It would be appropriate to require parents in Children in Need of Protection or Services (CHIPS) or Unborn Children in Need of Protection or Services (UCHIPS) cases to utilize the Rule 809.107 expedited appeal procedures *if and only if* these parents will have the right to appointed counsel under the other proposals. It would also be helpful to the parties and practitioners to draft a provision in the CHIPS subchapter similar to s. 48.43 (6) in the TPR subchapter.

Specifically, with respect to WLC 0031/2, my recommendations are:

Section 1. Delete. See suggestion above.

Section 2. Delete. Retain current law.

Section 3. Retain proposed law as new sub. (a), and change the time limit for ch. 48 cases to 30 days in a new (b), if it needs to be expedited.

Section 4. Delete. Amend current law to apply to all appeals filed by a party other than the state in ch. 48 cases that are not appealable under Rules 809.105, 809.107 or 809.30 (the right to counsel procedures), change time limit to 30 days.

Section 5. Page 3, Line 11 - delete deletion. Lines 12-13 - retain current law and expand to include CHIPS cases if right to counsel is extended to them. Line 15 – delete current law “Notwithstanding s. 809.62 (2) (a)...enlarged unless.” Page 4, Lines 1-4 – delete.

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<sup>1</sup> I feel qualified to make this statement, because I participated in drafting this section, along with other members of the Appellate Procedure Committee of the Wisconsin Judicial Council.

Section 6. Page 4: Line 7 (title) – retain current law but add CHIPS cases if right to counsel is extended to them. Lines 9-11 – retain current law; add references to CHIPS cases if right to counsel extended to them. Lines 12-14 – retain current law. Line 16 – 19 – retain current law.

Page 5: Lines 1-8 – retain current law. Line 7 – add “any party not represented by counsel.”

Section 7. Page 7, line 4 – delete “48.839 or 48.90.”

Section 8. Page 8, Line 1 (title) - retain “criminal,” delete “48,”.

Section 9. Line 5 - retain “criminal.” It is not redundant. A section 971.17 proceeding is a “not guilty by reason of mental disease or defect” civil commitment that arises in a criminal case. If anything, the reference to a “s. 971.17 proceeding” is redundant, but it is intentionally so.

Section 12. Page 9, Line 6 - add content (with title) of current Rule 809.30 (2) (fm) to Rule 809.107, but delete references to ch. 938 proceedings.

Section 13. Page 9, Line 21 – Page 10, Line 2 (title) - retain current law, add reference to CHIPS cases if right to counsel extended to them.

Section 14. Lines 4- 9 - retain current law; add reference to CHIPS cases if right to counsel extended to them.

Section 15. Retain current law; add reference to CHIPS cases if right to counsel extended to them.

Section 16. Lines 14-16. Delete “of a judgment.....or an appeal under,” Line 17 – Delete “s.,” insert comma before “809.30.” Add after “809.32,”: “or an appeal from a judgment or final order that was entered as a result of a petition under s. 48.415.”