

MS:ksm;

01/04/2013

1 **AN ACT** *to renumber* 48.23 (2); *to renumber and amend* 48.23 (4); *to amend* 48.20
2 (8) (a), 48.21 (3) (d), 48.213 (2) (d) and 48.23 (3); and *to create* 48.23 (2) (bm) and
3 48.23 (4) (c) and (d) 1. to 3. of the statutes; **relating to:** the right of a parent to have
4 counsel in a proceeding for a child alleged to be in need of protection or services, the
5 ability of the court to appoint a state public defender, and making an appropriation.

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 statutes, in a proceeding under the Children's Code, the court assigned to exercise jurisdiction under the Children's Code (juvenile court) may appoint counsel for the child and any other party, with one exception. The juvenile court may not appoint counsel for any party other than the child, an Indian parent, or an Indian custodian in a proceeding in which it is alleged that a child is in need of protection or services (CHIPS). This statutory prohibition, however, was ruled unconstitutional by the Wisconsin supreme court in *Joni B. v. State*, 202 Wis. 2d 1 (1996), on the grounds that the prohibition constitutes a violation of the separation of powers doctrine of the Wisconsin Constitution.

Also under current law, if a child has the right to be represented by counsel, or is provided counsel at the discretion of the juvenile court, and counsel is not knowingly or voluntarily waived, the court must refer the child to the state public defender (SPD) and the SPD must appoint counsel without a determination of indigency. Likewise, if a parent over the age of 18, an adult expectant mother, an Indian parent, or an Indian custodian has the right to be represented by counsel in a proceeding under ch. 48, the juvenile court must refer the parent or adult expectant mother to the SPD for an indigency determination. Because a parent over the age of 18 does not have a statutory right to be represented by counsel during a CHIPS proceeding, the court may not refer such a

parent to the SPD for possible representation. The juvenile court may, however, appoint counsel at its discretion, in which case the parent's legal representation is provided at the county's expense.

The Bill Draft

This draft eliminates the statutory prohibition placed on a juvenile court regarding appointment of counsel for parents so that a court may appoint counsel for any party, including a parent 18 years of age or over, during a CHIPS proceeding.

The draft also allows a parent of any age the right to counsel during a CHIPS proceeding, giving the parent the ability to be represented by an SPD, if the child has been taken into custody. In order for an SPD to be appointed immediately for a temporary physical custody hearing, a court may order an indigency determination at the conclusion of a CHIPS proceeding, rather than upon the initial referral to SPD.

1 **SECTION 1.** 48.20 (8) (a) of the statutes is amended to read:

2 48.20 (8) (a) If a child is held in custody, the intake worker shall notify the child's parent,
3 guardian, legal custodian, and Indian custodian of the reasons for holding the child in custody
4 and of the child's whereabouts unless there is reason to believe that notice would present
5 imminent danger to the child. The parent, guardian, legal custodian, and Indian custodian
6 shall also be notified of the time and place of the detention hearing required under s. 48.21,
7 the nature and possible consequences of that hearing, the right to counsel under s. 48.23
8 regardless of ability to pay, the right to present and cross-examine witnesses at the hearing,
9 and, in the case of a parent or Indian custodian of an Indian child who is the subject of an Indian
10 child custody proceeding, as defined in s. 48.028 (2) (d) 2., the right to counsel under s. 48.028
11 (4) (b). If the parent, guardian, legal custodian, or Indian custodian is not immediately
12 available, the intake worker or another person designated by the court shall provide notice as
13 soon as possible. When the child is 12 years of age or older, the child shall receive the same
14 notice about the detention hearing as the parent, guardian, legal custodian, or Indian custodian.

1 The intake worker shall notify both the child and the child's parent, guardian, legal custodian,
2 or Indian custodian.

NOTE: This SECTION requires an intake worker to notify a parent of his or her right to counsel regardless of ability to pay at the same time the intake worker is notifying the parent of the detention hearing if the parent's child is held in custody.

3 **SECTION 2.** 48.21 (3) (d) of the statutes is amended to read:

4 48.21 (3) (d) Prior to the commencement of the hearing, the court shall inform the
5 parent, guardian, legal custodian, or Indian custodian of the allegations that have been made
6 or may be made, the nature and possible consequences of this hearing as compared to possible
7 future hearings, the right to counsel under s. 48.23 regardless of ability to pay, the right to
8 present, confront, and cross-examine witnesses, and, in the case of a parent or Indian
9 custodian of an Indian child who is the subject of an Indian child custody proceeding under
10 s. 48.028 (2) (d) 2., the right to counsel under s. 48.028 (4) (b).

NOTE: This SECTION provides that the court must inform a parent, guardian, legal custodian, or Indian custodian of his or her right to counsel in a CHIPS action during the initial hearing for a child in custody as a result of a CHIPS petition.

11 **SECTION 3.** 48.213 (2) (d) of the statutes is amended to read:

12 48.213 (2) (d) Prior to the commencement of the hearing, the adult expectant mother
13 and the unborn child, through the unborn child's guardian ad litem, shall be informed by the
14 court of the allegations that have been made or may be made, the nature and possible
15 consequences of this hearing as compared to possible future hearings, the right to counsel
16 under s. 48.23 regardless of ability to pay, the right to confront and cross-examine witnesses
17 and the right to present witnesses.

18 **SECTION 4.** 48.23 (2) of the statutes is renumbered 48.23 (2) (a).

19 **SECTION 5.** 48.23 (2) (bm) of the statutes is created to read:

1 48.23 (2) (bm) If a proceeding involves a child alleged to be in need of protection or
2 services under s. 48.13, and the child has been taken into custody, any nonpetitioning parent
3 who appears before the court shall be represented by counsel throughout the proceeding. The
4 right to be represented by counsel begins with a hearing held under s. 48.21, or anytime after
5 the filing of a petition under s. 48.255 when the child has been taken into custody. A parent
6 may waive counsel provided the court is satisfied such waiver is knowingly and voluntarily
7 made.

NOTE: SECTIONS 4 and 5 create a right for a parent, whether minor or adult, to be represented by counsel during a CHIPS proceeding, if the child has been taken into custody. The right begins with the temporary physical custody hearing, or upon the child being taken into custody anytime after the filing of a CHIPS petition.

8 **SECTION 6.** 48.23 (3) of the statutes is amended to read:

9 48.23 (3) POWER OF THE COURT TO APPOINT COUNSEL. ~~Except in proceedings under s.~~
10 48.13, at any time, upon request or on its own motion, the court may appoint counsel for
11 the child or any party, unless the child or the party has or wishes to retain counsel of his or her
12 own choosing. ~~Except as provided in sub. (2g), the court may not appoint counsel for any party~~
13 ~~other than the child in a proceeding under s. 48.13.~~

NOTE: This SECTION specifies that a juvenile court has the authority to appoint counsel to any party involved in a ch. 48 proceeding, not just a child, and makes the statutes consistent with current case law.

14 **SECTION 7.** 48.23 (4) of the statutes is renumbered 48.23 (4) (a), (b), and (e) and
15 amended to read:

16 48.23 (4) PROVIDING COUNSEL. (a) If In any situation under sub. (2) (a), if a child or a
17 parent under 18 years of age has a right to be represented by counsel or is provided counsel
18 at the discretion of the court under this section and counsel is not knowingly and voluntarily
19 waived, the court shall refer the child or parent under 18 years of age to the state public

1 defender and counsel shall be appointed by the state public defender under s. 977.08 without
2 a determination of indigency. If the referral is of a child who has filed a petition under s. 48.375
3 (7), the state public defender shall appoint counsel within 24 hours after that referral. Any
4 counsel appointed in a petition filed under s. 48.375 (7) shall continue to represent the child
5 in any appeal brought under s. 809.105 unless the child requests substitution of counsel or
6 extenuating circumstances make it impossible for counsel to continue to represent the child.

7 (b) In any situation under sub. (2) (a), (2g), or (2m) in which a parent 18 years of age
8 or over or an adult expectant mother is entitled to representation by counsel; counsel is not
9 knowingly and voluntarily waived; and it appears that the parent or adult expectant mother
10 is unable to afford counsel in full, or the parent or adult expectant mother so indicates; the court
11 shall refer the parent or adult expectant mother to the authority for indigency determinations
12 specified under s. 977.07 (1).

13 (e) In any other situation under this section in which a person has a right to be
14 represented by counsel or is provided counsel at the discretion of the court, competent and
15 independent counsel shall be provided and reimbursed in any manner suitable to the court
16 regardless of the person's ability to pay, except that the court may not order a person who files
17 a petition under s. 813.122 or 813.125 to reimburse counsel for the child who is named as the
18 respondent in that petition.

NOTE: This SECTION separates current law into paragraphs to distinguish
how counsel may be provided in different types of proceedings.

19 **SECTION 8.** 48.23 (4) (c) and (d) 1. to 3. of the statutes are created to read:

20 48.23 (4) (c) In any situation under sub. (2) (bm) in which a parent has a right to be
21 represented by counsel, the parent shall be referred as soon as is practicable to the state public

1 defender, who shall appoint counsel for the parent under s. 977.08 without a determination of
2 indigency.

3 (d) 1. At or after the conclusion of a proceeding under sub. (2) (bm) in which the state
4 public defender has provided legal counsel for a parent, the court may inquire as to the parent's
5 ability to reimburse the state for the costs of representation. If the court determines that the
6 parent is able to make reimbursement for all or part of the costs of representation, the court
7 may order the parent to reimburse the state an amount not to exceed the maximum amount
8 established by the public defender board under s. 977.075 (4). Upon the court's request, the
9 state public defender shall conduct a determination of indigency under s. 977.07 and report
10 the results of the determination to the court.

11 2. Reimbursement ordered under this paragraph shall be made to the clerk of courts of
12 the county where the proceedings took place. The clerk of courts shall transmit payments
13 under this section to the county treasurer, who shall deposit 25 percent of the payment amount
14 in the county treasury and transmit the remainder to the secretary of administration. Payments
15 transmitted to the secretary of administration shall be deposited in the general fund and
16 credited to the appropriation account under s. 20.550 (1) (L).

17 3. By January 31st of each year, the clerk of courts for each county shall report to the
18 state public defender the total amount of reimbursements ordered under subd. 1. in the
19 previous calendar year and the total amount of reimbursements paid to the clerk under subd.
20 2. in the previous year.

NOTE: This SECTION specifies that a nonpetitioning parent, whether minor or adult, who has a right to counsel in a CHIPS proceeding must be referred as soon as practicable to the SPD, which must appoint counsel for the person without a determination of indigency unless counsel was knowingly and voluntarily waived. This SECTION also specifies that at, or after, the conclusion of a CHIPS proceeding in which the SPD provided counsel, the court may inquire as to the parent's ability

to reimburse the state for the costs of representation in the CHIPS proceeding. If the court determines that the parent was able to reimburse the costs of representation, the court may order the parent to reimburse the state an amount not to exceed the maximum amount established by the SPD board, by rule, for the type of case.

1 **SECTION 9. Nonstatutory provisions; public defender board.**

2 (1) POSITION AUTHORIZATIONS. (a) The authorized FTE positions for the state public
3 defender board are increased by 2 FTE positions funded from the appropriation under section
4 20.550 (1) (b) of the statutes, for the purposes for which the appropriation is made. The state
5 public defender shall identify the positions.

NOTE: This SECTION increases the number of SPD appellate attorneys by 2 full-time equivalent (FTE) positions for representing a parent appealing a disposition from a contested CHIPS petition.

6 (b) The authorized FTE positions for the state public defender board are increased by
7 10 FTE positions funded from the appropriation under section 20.550 (1) (c) of the statutes
8 for the purposes for which the appropriation is made. The state public defender shall identify
9 the positions.

NOTE: This SECTION increases the number of SPD trial attorneys by 10 FTE positions for representing a parent in certain CHIPS proceedings.

10 **SECTION 10. Fiscal changes; public defender board.**

11 (1) APPELLATE REPRESENTATION FUND. In the schedule under section 20.005 (3) of the
12 statutes for the appropriation to the public defender board under section 20.550 (1) (b) of the
13 statutes, as affected by the acts of 2013, the dollar amount is increased by \$209,440 for the
14 first fiscal year of the fiscal biennium in which this subsection takes effect to the purpose for
15 which the appropriation is made.

NOTE: This SECTION increases the SPD's appropriation for appellate representation by \$209,440 to fund representation for a parent appealing a disposition from a contested CHIPS petition.

1 (2) TRIAL REPRESENTATION FUND. In the schedule under section 20.005 (3) of the statutes
2 for the appropriation to the public defender board under section 20.550 (1) (c) of the statutes,
3 as affected by the acts of 2013, the dollar amount is increased by \$851,382 for the first fiscal
4 year of the fiscal biennium in which this subsection takes effect to the purpose for which the
5 appropriation is made.

NOTE: This SECTION increases the SPD's appropriation for trial representation by \$851,382 to fund representation for a parent in certain CHIPS proceedings.

6 (3) PRIVATE BAR AND INVESTIGATOR REIMBURSEMENT FUND. In the schedule under section
7 20.005 (3) of the statutes for the appropriation to the public defender board under section
8 20.550 (1) (d) of the statutes, as affected by the acts of 2013, the dollar amount is increased
9 by \$1,904,000 for the first fiscal year of the fiscal biennium in which this subsection takes
10 effect to the purpose for which the appropriation is made.

NOTE: This SECTION increases the SPD's appropriation for representation by members of the private bar by \$1,904,000 to fund the reimbursement of representing a parent in certain CHIPS proceedings.

11 (4) PRIVATE BAR AND INVESTIGATOR FUND. In the schedule under section 20.005 (3) of
12 the statutes for the appropriation to the public defender board under section 20.550 (1) (e) of
13 the statutes, as affected by the acts of 2013, the dollar amount is increased by \$125,000 for the
14 first fiscal year of the fiscal biennium in which this subsection takes effect to the purpose for
15 which the appropriation is made.

NOTE: This SECTION increases the SPD's appropriation for payments made to members of the private bar by \$125,000 to fund representation for a parent in certain CHIPS proceedings.

16 (5) TRANSCRIPTS, DISCOVERY, AND INTERPRETERS FUND. In the schedule under section
17 20.005 (3) of the statutes for the appropriation to the public defender board under section
18 20.550 (1) (f) of the statutes, as affected by the acts of 2013, the dollar amount is increased

1 by \$125,000 for the first fiscal year of the fiscal biennium in which this subsection takes effect
2 to the purpose for which the appropriation is made.

NOTE: This SECTION increases the SPD's appropriation by \$125,000 for payments made to obtain transcripts, discovery materials, and provide interpreters for clients in certain CHIPS proceedings.

3 **SECTION 11. Initial applicability.**

4 (1) REPRESENTATION IN PROCEEDINGS INVOLVING CHILDREN IN NEED OF PROTECTION OR
5 SERVICES. The treatment of sections 48.20 (8), 48.21 (3) (d), 48.23 (3), and 48.23 (4) of the
6 statutes, the renumbering and amendment of section 48.23 (2) of the statutes, and the creation
7 of section 48.23 (2) (b) of the statutes first applies to proceedings commenced under section
8 48.13 of the statutes on the effective date of this subsection.

NOTE: This SECTION specifies that a parent's right to counsel and the right to be represented by an SPD in a CHIPS proceeding first apply to a CHIPS proceeding that is commenced on the effective date of the draft.

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(END)