

MSK:ksm;

01/04/2013

1 **AN ACT** *to renumber and amend* 48.23 (2); *to amend* 48.46 (1), (1m) and (2); and *to*
2 *create* 48.23 (2) (c) and (d), 809.10 (1) (b) 7. and 809.107 (2) (bm) 6. of the statutes;
3 **relating to:** waiver of counsel for a parent in a proceeding for involuntary
4 termination of parental rights, or a contested adoption; and requiring a parent's
5 signature on a petition for postdispositional relief or a notice of appeal in such a
6 proceeding.

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, in a proceeding involving an involuntary termination of parental rights (TPR), or a contested adoption, a parent who appears before the court assigned to exercise jurisdiction under the Children's Code (juvenile court) must be represented by counsel. A parent 18 years of age or over may waive counsel if the juvenile court is satisfied that the waiver is knowingly and voluntarily made. However, a parent under age 18 may not waive counsel.

Current law also provides that if an attorney represented a parent during a TPR proceeding, and has not been discharged, the representation continues during a TPR appeal.

The Wisconsin Supreme Court has strictly construed the statute requiring representation during an involuntary TPR proceeding in holding that an attorney may not be discharged from representing a parent who fails to cooperate with the court and the attorney. [*State v. Shirley E.*, 2006 WI 129; *State v. Darrell K.*, 2010AP1910 (Wis. Ct. App., Oct. 19, 2010, unpublished).]

Bill Draft

The draft specifies that a parent of any age who was ordered to appear in person at hearings for an involuntary TPR or contested adoption

proceeding, but has failed to appear, is considered to have waived the right to counsel. A failure to appear must be egregious and without clear and justifiable excuse, which may be presumed from a parent's failure to appear at consecutive hearings. A minor parent may not otherwise waive counsel.

The draft also requires a parent's signature, in addition to counsel's signature, on a notice of intent to appeal or notice of appeal from a TPR judgment, petition for rehearing from a CHIPS adjudication or TPR judgment, or motion for postdisposition relief from a CHIPS adjudication or TPR judgment.

1 **SECTION 1.** 48.23 (2) of the statutes is renumbered 48.23 (2) (a) and amended to read:

2 48.23 (2) **RIGHT OF PARENTS PARENT TO COUNSEL.** (a) Whenever a child is the subject of
3 a proceeding involving a contested adoption or ~~the~~ an involuntary termination of parental
4 rights, any parent under 18 years of age who appears before the court shall be represented by
5 counsel; ~~but~~ and no such parent may waive counsel, except as provided in par. (c) 2. Except
6 as provided in sub. (2g), a minor parent petitioning for the voluntary termination of parental
7 rights shall be represented by a guardian ad litem. If

8 **(b)** In a proceeding ~~involves~~ involving a contested adoption or ~~the~~ an involuntary
9 termination of parental rights, any parent 18 years old or older who appears before the court
10 shall be represented by counsel; ~~but the parent may waive counsel provided the court is~~
11 ~~satisfied such waiver is knowingly and voluntarily made, except as provided in par. (c).~~

NOTE: SECTION 1 separates the current language governing the right to counsel between a minor parent and a parent 18 years of age or over, and makes the right to counsel subject to the provisions created under the draft that allow counsel to be waived by an egregious and unjustifiable failure to appear.

12 **SECTION 2.** 48.23 (2) (c) and (d) of the statutes are created to read:

13 48.23 (2) (c) A waiver or discharge of counsel may be made as follows:

14 1. Notwithstanding pars. (b) and (d), a parent 18 years of age or over may waive counsel
15 if the court is satisfied that the waiver is knowingly and voluntarily made.

1 2. Notwithstanding pars. (a) and (b), a parent is presumed to have waived his or her right
2 to counsel and to appear by counsel if the court has ordered the parent to appear in person at
3 any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered,
4 and the court finds that the parent's conduct in failing to appear was egregious and without
5 clear and justifiable excuse. Failure by a parent to appear in person at consecutive hearings
6 as ordered by the court is presumed to be egregious and without clear and justifiable excuse.

7 (d) In a proceeding for reconsideration of a default judgment entered under s. 806.02
8 terminating parental rights, a parent who was presumed to have waived counsel under par. (c)
9 2. shall be represented by counsel, except as provided in par. (c) 1.

NOTE: SECTION 2 provides that a parent of any age who was ordered to appear in person at hearings for an involuntary TPR or contested adoption proceeding, but has failed to appear, is considered to have waived the right to counsel, if the juvenile court finds that the parent's conduct in failing to appear was egregious and without clear and justifiable excuse. The draft provides that consecutive failures to appear are presumed to be egregious and without clear and justifiable excuse. The draft also provides that a right to counsel is reinstated for a motion to reconsider a default TPR judgment, if counsel was presumed waived during the default TPR.

COMMENT: Under the draft, a minor parent may waive counsel by failing to appear, as may an adult parent, if the juvenile court finds that the minor parent's conduct in failing to appear was egregious and without clear and justifiable excuse. Is this the committee's intent?

Also, should the juvenile court be required to include a warning with an initial order to appear to inform the parent that consecutive failures to appear will be presumed to be a knowing and voluntary waiver of the right to counsel?

10 **SECTION 3.** 48.46 (1), (1m) and (2) of the statutes are amended to read:

11 48.46 (1) Except as provided in subs. (1m), (2) and (3), the child whose status is
12 adjudicated by the court, the parent, guardian or legal custodian of that child, the unborn child
13 whose status is adjudicated by the court or the expectant mother of that unborn child may at

1 any time within one year after the entering of the court's order petition the court for a rehearing
2 on the ground that new evidence has been discovered affecting the advisability of the court's
3 original adjudication. Upon a showing that such evidence does exist, the court shall order a
4 new hearing. Notwithstanding s. 802.05 (1), a petition by a parent under this subsection shall
5 be signed by the parent, and by the parent's attorney of record, if any.

6 (1m) Except as provided in sub. (2), the parent, guardian or legal custodian of the child
7 or the child whose status is adjudicated by the court in an order entered under s. 48.43 or an
8 order adjudicating paternity under subch. VIII may, within the time permitted under this
9 subsection, petition the court for a rehearing on the ground that new evidence has been
10 discovered affecting the advisability of the court's adjudication. Upon a showing that such
11 evidence does exist, the court shall order a new hearing. A petition under this subsection shall
12 be filed within one year after the date on which the order under s. 48.43 or order adjudicating
13 paternity under subch. VIII is entered, unless within that one-year period a court in this state
14 or in another jurisdiction enters an order granting adoption of the child, in which case a petition
15 under this subsection shall be filed before the date on which the order granting adoption is
16 entered or within 30 days after the date on which the order under s. 48.43 or order adjudicating
17 paternity under subch. VIII is entered, whichever is later. Notwithstanding s. 802.05 (1), a
18 petition by a parent under this subsection shall be signed by the parent, and by the parent's
19 attorney of record, if any.

20 (2) A parent who has consented to the termination of his or her parental rights under
21 s. 48.41 or who did not contest the petition initiating the proceeding in which his or her parental
22 rights were terminated may move the court for relief from the judgment on any of the grounds
23 specified in s. 806.07 (1) (a), (b), (c), (d) or (f). Notwithstanding s. 802.05 (1), a motion by
24 a parent under this subsection shall be signed by the parent, and by the parent's attorney of

1 record, if any. Any such motion shall be filed within 30 days after the entry of the judgment
2 or order terminating parental rights, unless the parent files a timely notice of intent to pursue
3 relief from the judgment under s. 808.04 (7m), in which case the motion shall be filed within
4 the time permitted by s. 809.107 (5). A motion under this subsection does not affect the finality
5 or suspend the operation of the judgment or order terminating parental rights. A parent who
6 has consented to the termination of his or her parental rights to an Indian child under s. 48.41
7 (2) (e) may also move for relief from the judgment under s. 48.028 (5) (c) or (6). Motions
8 under this subsection or s. 48.028 (5) (c) or (6) and appeals to the court of appeals shall be the
9 exclusive remedies for such a parent to obtain a new hearing in a termination of parental rights
10 proceeding.

NOTE: This SECTION requires a parent to sign a petition for rehearing or motion for postdisposition relief from a CHIPS adjudication, paternity adjudication, or TPR order, whether or not the parent is represented, and retains the requirement under current law that counsel sign the petition or motion if the parent is represented.

11 **SECTION 4.** 809.10 (1) (b) 7. of the statutes is created to read:

12 809.10 (1) (b) 7. Notwithstanding s. 802.05 (1), if the appellant is a parent appealing
13 an order or judgment under s. 48.43, the parent's signature, and the parent's attorney of
14 record's signature, if the parent is represented.

NOTE: This SECTION requires a parent to sign a notice of appeal from a TPR order, whether or not the parent is represented, and retains the requirement under current law that counsel sign the notice if the parent is represented.

15 **SECTION 5.** 809.107 (2) (bm) 6. of the statutes is created to read:

16 809.107 (2) (bm) 6. Notwithstanding s. 802.05 (1), if the appellant is the parent, the
17 parent's signature, and the parent's attorney of record's signature, if the parent is represented.

NOTE: This SECTION requires a parent to sign a notice of intent to appeal a TPR order, whether or not the parent is represented, and retains the

requirement under current law that counsel sign the notice if the parent is represented.

SECTION 6. Initial applicability.

(1) **WAIVER BY PARENT OF RIGHT TO COUNSEL BY FAILURE TO APPEAR.** The treatment of section 48.23 (2) (c) 2. of the statutes first applies to a parent who is ordered on the effective date of this subsection to appear in person at a hearing in a contested adoption or an involuntary termination of parental rights proceeding.

(2) POSTDISPOSITIONAL RELIEF PETITION OR NOTICE OF APPEAL; PARENT'S SIGNATURE REQUIRED. The treatment of sections 48.46 (1), (1m), and (2), 809.10 (1) (b) 7., and 809.107 (2) (bm) 6. of the statutes first apply to a parent who files a petition for rehearing, motion for postdisposition relief, notice of intent to appeal, or notice of appeal on the effective date of this subsection.

NOTE: This SECTION specifies that the provisions of the draft first apply to a waiver by a parent of the right to counsel from a failure to appear after a parent has been ordered to appear, and apply to a parent’s signature on a postdisposition motion, petition, notice of intent to appeal, or notice of appeal upon the filing of such document.

(END)