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**WISCONSIN LEGISLATIVE COUNCIL**

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**Special Committee Staff Brief 04-1**

**ADOPTION AND TERMINATION OF  
PARENTAL RIGHTS LAW**



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***STAFF BRIEF 04-1***

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***ADOPTION AND TERMINATION OF PARENTAL RIGHTS LAWS***

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***INTRODUCTION***

The Special Committee on Adoption and Termination of Parental Rights Law is directed by the Joint Legislative Council to study: (1) current law relating to adoption and termination of parental rights (TPR) to determine whether modifications could be made to encourage adoption in Wisconsin and to make the adoption and TPR processes more efficient and more cost effective; (2) creating a state tax credit for adoption expenses; and (3) TPR and adoption in the context of the child welfare system to ensure compliance with federal law and that permanency is achieved for children as quickly as possible.

The U.S. Department of Health and Human Services has been conducting federal Child and Family Service Reviews in every state. Wisconsin's review was conducted in August 2003. Wisconsin, the 43rd state to be reviewed, was found to be in "substantial nonconformance" with federal criteria for the child welfare system's child outcomes and system processes. All of the other 42 states that had been reviewed were also to be found in substantial nonconformance with the federal criteria. Some areas of concern for Wisconsin are: children in the child welfare system having permanency and stability in their living situations. One of the factors affecting this is delay in terminating parental rights and finalizing adoptions.

Outside of the child welfare system, persons seeking to adopt a child may encounter delays and high expenses. Wisconsin currently offers a tax deduction for adoption expenses. However, a tax credit could provide greater financial assistance for persons seeking to adopt. Legislation to establish such a credit was considered, but not passed, in the 2003-04 Legislative Session. These issues were among those which led to the establishment of the Special Committee on Adoption and Termination of Parental Rights Law.

This Staff Brief provides the Special Committee with background information on TPR and adoption processes in Wisconsin.

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## **PART I**

### **TERMINATION OF PARENTAL RIGHTS**

Except in cases involving stepparent adoptions, certain foreign adoptions, or children whose birth parents are deceased, the parental rights of both of a child's birth parents must be terminated before the child may be adopted. Thus, TPR is often viewed as a first step in the adoption process.

TPR means that, pursuant to a court order, all rights, powers, privileges, immunities, duties, and obligations existing between a parent and child are permanently severed. [s. 48.40 (2), Stats.] TPR may be voluntary or involuntary.

In general, there are three phases in an action for involuntary TPR. First, after a TPR petition is filed a plea hearing is held. [s. 48.422, Stats.] Second, a fact-finding hearing, which may be to a judge or jury, is held to determine whether one or more of the grounds for involuntary TPR has been proved. [s. 48.424, Stats.] Third, if it has been determined that one or more of the grounds for involuntary TPR has been proved, a dispositional hearing is held at which the judge determines whether TPR would be in the best interests of the child and then enters a dispositional order. [ss. 48.426 and 48.427, Stats.]

In an action for voluntary TPR, once consent has been secured, the court holds a dispositional hearing to determine whether to terminate parental rights. [s. 48.41, Stats.]

### **CONSENT FOR VOLUNTARY TPR**

Current law provides that the court may accept a voluntary consent to terminate parental rights only as follows:

- The parent may appear personally at a TPR hearing and give his or her consent to TPR. The court may accept the consent only after the judge has explained the effect of TPR and questioned the parent, or has permitted an attorney who represents any of the parties to question the parent, and is satisfied that the consent is informed and voluntary.
- If the court finds that it would be difficult or impossible for the parent to appear in person at the hearing, the court may accept the parent's written consent given before an embassy or consul official, a military judge or a judge of any court of record in another county or state, or a foreign jurisdiction. This written consent must be accompanied by the signed findings of the embassy or consul official or judge who accepted the parent's consent, and these findings must indicate that the embassy or consul official or judge or an attorney who represents any of the parties questioned the parent and found that the consent was informed and voluntary.
- A person who may be, but who has not been adjudicated as, the father of a nonmarital child may voluntarily consent to TPR by signing a written, notarized statement which states that he has been informed of and understands the effect of a TPR order and that he voluntarily disclaims any rights that he may have to the child, including the right to

notice of TPR proceedings. [Such a person may also use the method of consent described above.]

- If the TPR proceeding is held prior to an adoption proceeding in which the petitioner is the child's stepparent or in which the child's birth parent is a resident of a foreign jurisdiction, the child's birth parent may consent to TPR by using the method of consent as described above, or by filing with the court an affidavit witnessed by two persons stating that he or she has been informed of and understands the effect of a TPR order and that he or she voluntarily disclaims all rights to the child, including the right to notice of TPR proceedings.

Unless questions are raised as to the capacity of the parent to give informed and voluntary consent, after accepting the parent's consent to voluntary TPR, the court must proceed to a dispositional hearing to determine whether to terminate parental rights. The dispositional hearing is discussed in below. [s. 48.41, Stats.]

### **GROUNDS FOR INVOLUNTARY TPR**

Grounds for involuntary TPR, as provided by law, must be one of the following:

***Abandonment.*** Abandonment is established by proving any of the following:

- The child has been left without care or support and the petitioner has investigated the situation and has been unable to find either parent for 60 days.
- The child has been left by the parent without care or support in a place or manner that exposes the child to substantial risk of great bodily harm<sup>1</sup> or death.
- A court has found in a children in need of protection or services (CHIPS) proceeding<sup>2</sup> that the child was abandoned or has found that the parent committed criminal abandonment of the child when the child was under one year of age.
- A court has placed the child, or continued placement, outside the parent's home and the parent has not visited or communicated with the child for at least three months.
- The parent left the child with another person, knows or could discover the whereabouts of the child and has not visited or communicated with the child for at least six months.

Current law specifies that ***incidental contact*** between a parent and child does not preclude the court from finding that the parent has failed to visit or communicate with the child.

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<sup>1</sup> "Great bodily harm" is defined under current statutes to mean bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury. [s. 939.22 (14), Stats.]

<sup>2</sup> In a CHIPS proceeding, the juvenile court has jurisdiction over a child who is alleged to be CHIPS for specified reasons such as having been abused, neglected or abandoned. If the court determines that a child is CHIPS, the court may order services for the child and his or her family and may place the child outside of the child's home.



Also, the time periods under those provisions do not include any periods during which the parent is prohibited by a court order from visiting or communicating with the child.

Also under current law, abandonment is *not* established if the parent proves both of the following by a preponderance of the evidence:

- Good cause for having failed to visit with the child throughout the time period specified.
- Good cause for having failed to communicate with the child throughout the time period specified.

If the parent proves good cause for having failed to communicate with the child, the parent must show that he or she either: (1) communicated about the child with the person who had physical custody of the child or with the agency responsible for the care of the child; or (2) had good cause for not communicating about the child.

***Relinquishment.*** Relinquishment is shown by proving that the parent voluntarily relinquished custody of the child when the child was 72 hours old or younger.

***Continuing Need of Protection or Services.*** Continuing need of protection or services is established by proving any of the following:

- The child has been adjudged CHIPS and placed, or continued in placement, outside of the home; the agency responsible for the care of the child has made a reasonable effort<sup>3</sup> to provide services to the family; the child has been placed outside the home for a cumulative total of at least six months; the parent has not met the established conditions for safely returning the child to the home; and there is a substantial likelihood that these conditions will not be met within 12 months.
- On at least three occasions the child has been adjudicated CHIPS due to abuse or neglect or being at substantial risk of abuse or neglect and, in connection with each of those adjudications, has been placed outside the home due to conditions caused by the parent.

***Continuing Parental Disability.*** Continuing parental disability is established by proving all of the following:

- The parent is presently, and for at least two of the previous five years has been, an inpatient at a hospital, licensed treatment facility, or state treatment facility due to mental illness or developmental disability.
- The parent's condition is likely to continue indefinitely.

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<sup>3</sup> In this provision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.

- The child is not receiving adequate care by a relative with legal custody, a parent, or a guardian.

***Continuing Denial of Periods of Physical Placement or Visitation.*** Continuing denial of periods of physical placement or visitation is established by proving all of the following:

- The parent has been denied physical placement by a court order in an action affecting the family (e.g., a divorce) or denied visitation under the Children’s Code or the Juvenile Justice Code.
- It has been at least one year since the parent was denied physical placement or visitation and the court has not modified its order.

***Child Abuse.*** Child abuse is established by proving a pattern of physically or sexually abusive behavior by the parent which is a substantial threat to the child’s health and either of the following:

- The parent has killed or injured a child and has been, consequently, convicted of a felony.
- The child has previously been removed from the parent’s home pursuant to a CHIPS order due to abuse or a substantial risk of abuse of the child.

***Failure to Assume Parental Responsibility.*** Failure to assume parental responsibility is established by proving that the parent never had a substantial parental relationship with the child. “Substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child.

In evaluating whether the person has had a substantial relationship with the child, the court may consider whether the person has ever expressed concern for or interest in the child’s support, care or well-being; whether the person has neglected or refused to provide care or support; and whether with respect to the father, the parent has ever expressed concern for or interest in the mother’s support, care or well-being during her pregnancy.

***Incestuous Parenthood.*** Incestuous parenthood is established by proving that the parent is also related, either by blood or adoption, to the child’s other parent in a degree of kinship closer than second cousin.

***Homicide or Solicitation to Commit Homicide of Parent.*** Homicide or solicitation to commit homicide of a parent is established by proving that one of the child’s parents has been a victim of first- or second-degree intentional homicide, first-degree reckless homicide or a comparable crime under federal or another state’s law, or has been the intended victim of a solicitation to commit first-degree intentional homicide or a comparable crime under federal or another state’s law, and that the person whose parental rights are sought to be terminated has been convicted of that offense.

***Parenthood as a Result of Sexual Assault.*** Parenthood as a result of sexual assault is established by proving that the child was conceived as a result of sexual assault. Conception as a result of sexual assault may be proved by evidence of conviction or other evidence indicating

that the person who may be the father of the child committed, during a possible time of conception, a sexual assault against the mother of the child.

If the child was conceived as a result of first- or second-degree sexual assault of a child, the child's mother may address the court regarding her desire for the termination of the father's parental rights.

***Commission of a Serious Felony Against One of the Person's Children.*** Commission of a serious felony<sup>4</sup> against one of the person's children is established by proving that a child was the victim of a serious felony committed by the parent as evidenced by a conviction.

***Prior Involuntary TPR to Another Child.*** Prior involuntary TPR is established by proving both of the following:

- The child has been adjudged to be CHIPS based upon having been abandoned, abused, or neglected.
- Within the three years prior to the CHIPS adjudication, a court has ordered involuntary TPR with respect to another child.

[s. 48.415, Stats.]

### **TPR PETITION**

A TPR proceeding is initiated by a petition filed by the child's parent, an agency (i.e., the Department of Health and Family Services (DHFS), a county department, a licensed child welfare agency), or the district attorney, corporation counsel, or person designated by the county board of supervisors.

An agency or the district attorney, corporation counsel, or person designated by the county supervisors **must** file a TPR petition, or join in an existing petition, if any of the following circumstances apply:

- The child has been placed outside of his or her home for 15 of the last 22 months, not including any period during which the child was a runaway from an out-of-home placement or the first six months of any period during which the child was returned home for a trial visit.

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<sup>4</sup> In this provision, "serious felony" means any of the following:

- a. The commission of, the aiding or abetting of, or the solicitation, conspiracy or attempt to commit, a violation of first- or second-degree intentional homicide, first-degree reckless homicide, felony murder or a violation of the law of any other state or federal law, if that violation would be a violation of one of those offenses if committed in this state.
- b. The commission of a violation of substantial or aggravated battery to an unborn child, first- or second-degree sexual assault, sexual assault of a child, repeated sexual assault of a child, intentional or reckless child abuse causing great bodily harm, sexual exploitation of a child, incest with a child or soliciting a child for prostitution or a violation of the law of any other state or federal law, if that violation would be a violation of one of those offenses if committed in this state.
- c. The commission of a violation of child neglect or a violation of the law of any other state or federal law, if that violation would be child neglect if committed in this state, that resulted in the death of the victim.

- The child was abandoned when under one year of age.
- The parent committed, aided or abetted the commission of, or solicited, conspired, or attempted to commit first- or second-degree intentional homicide, first-degree reckless homicide, or felony murder against his or her child.
- The parent committed a violation of substantial or aggravated battery, first- or second-degree sexual assault, first- or second-degree sexual assault of a child, repeated acts of sexual assault of the same child, or child abuse resulting in great bodily harm to the child or another of the parent's children.

An agency or the district attorney, corporation counsel, or other appropriate official is not required to file or join a TPR petition, however, if any of the following circumstances apply:

- The child is being cared for by a fit and willing relative.
- The child's permanency plan<sup>5</sup> indicates and provides documentation that TPR is not in the child's best interest.
- The agency providing services to the child and family has not provided the family, consistent with the time period in the child's permanency plan, with the services necessary for the safe return of the child to his or her home.
- Grounds for involuntary TPR do not exist.

[s. 48.417, Stats.]

### **RIGHT TO COUNSEL**

Under current law, in an involuntary TPR proceeding, any minor parent who appears before the court must be represented by counsel and may not waive counsel. A minor parent who petitions for voluntary TPR must be represented by a guardian ad litem (GAL).

An adult parent involved in an involuntary TPR proceeding must also be represented by counsel. An adult parent may waive counsel, however, if the court is satisfied that the waiver is made knowingly and voluntarily. [s. 48.23 (2), Stats.]

The court must refer a parent who has a right to be represented by counsel to the State Public Defender who must appoint counsel without a determination of indigency. Such parents are still entitled, however, to retain counsel of their own choosing at their own expense. [s. 48.23 (4) and (5), Stats.]

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<sup>5</sup> If a child is found to be CHIPS and placed outside of his or her home, the agency that placed the child or that is assigned primary responsibility by the court for providing services for the child must prepare a written permanency plan. This is a plan designed to ensure that a child is reunified with his or her family whenever appropriate, or that the child quickly attains a placement or home providing long-term stability. [See s. 48.38, Stats.]

### **GAL REPRESENTATION**

The court may appoint a GAL in any appropriate matter under the Children's Code. In addition, in certain TPR proceedings, the court must appoint a GAL.

First, the court must appoint a GAL for a minor parent petitioning for voluntary TPR. The GAL must interview the minor parent, investigate the reason for the TPR, assess the voluntariness of the consent and inform the minor parent of his or her rights and of the alternatives to, and the effect of, TPR.

Second, the court must appoint a GAL for any child who is the subject of a TPR proceeding if the child is the subject of a contested adoption proceeding or a proceeding to appoint a relative as a guardian. [s. 48.235 (1) (a), (b) and (c) and (5), Stats.]

### **HEARING ON THE PETITION**

The hearing on the TPR petition must be held within 30 days after the petition is filed. At this hearing, the court must determine whether any party wishes to contest the petition and must inform the parties of their right to a jury trial and the rights of a putative party to paternity.

If the petition is contested, the court must set a date for a fact-finding hearing that is within 45 days after the hearing on the petition, unless all of the parties agree to commence with the hearing immediately.

In a case in which a child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry and paternity has not been established, the court must hear testimony concerning the paternity of the child. Based on this testimony, the court must determine whether all interested parties who are known have been notified. [s. 48.422, Stats.]

If a man who alleges that he is the father appears at the hearing on the TPR petition and wishes to contest the TPR, the court must schedule a hearing on the issue of paternity or, if all parties agree, immediately commence hearing testimony regarding paternity. The court must inform the man claiming to be the father of right to his counsel. The man must prove paternity by clear and convincing evidence. [s. 48.423, Stats.]

### **FACT-FINDING HEARING**

The purpose of the fact-finding hearing is to determine whether grounds exist for TPR in those cases in which the termination is contested.

The hearing may exclude the child and is closed to the public.

If the hearing is to a jury, the jury may only decide whether any ground for TPR have been proven. The court must decide what disposition is in the best interests of the child.

If grounds for TPR are found by the court or jury, the court must find the parent unfit; however, such a finding does not preclude dismissal of the petition. The court must then proceed immediately to hear evidence and motions relating to the disposition. The court may consider disposition or schedule the dispositional hearing within 45 days if either of the following conditions exist:

- All parties to the proceeding agree.
- The court has not yet received a report on the child's history from an agency and now directs the agency to prepare this report.

If the court delays making a disposition, it may transfer temporary custody of the child to an agency for placement of the child until the dispositional hearing. [s. 48.424, Stats.]

### **DISPOSITIONAL HEARING**

Once voluntary consent to TPR is given or there is a finding that one or more of the grounds for involuntary TPR exists, the court must hold a dispositional hearing to determine whether parental rights should be terminated. At that dispositional hearing, the court must consider specified factors and the ***best interests of the child*** must be the ***prevailing factor*** considered by the court. [s. 48.426 (2), Stats.] The factors which the court must take into account in considering the best interests of the child include, but are not limited to, the following:

- The likelihood of the child's adoption after TPR.
- The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- The wishes of the child.
- The duration of the separation of the parent from the child.
- Whether the child will be able to enter into a more stable and permanent family relationship as a result of the TPR, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements. [s. 48.426 (3), Stats.]

### **DISPOSITIONAL ORDER**

Following the dispositional hearing, the court must either enter a TPR order or, if it finds the evidence does not warrant TPR, the court may dismiss the TPR petition. [s. 48.427 (2) and (3), Stats.] If the court orders termination of the rights of both parents or of the only living parent, the court may also transfer guardianship of the child as discussed below. Whether or not the TPR dispositional order transfers guardianship depends on whether or not a relative has already been appointed as the child's guardian under s. 48.977, Stats.

### ***1. Cases in Which a Relative Guardian Has Not Been Appointed***

If the rights of both parents or of the only living parent are terminated and ***if a relative guardian has not been appointed under s. 48.977, Stats.***, the court must do one of the following:

- Transfer guardianship and custody of the child pending adoptive placement to one of the following:
  - A county department authorized to accept guardianship.
  - A licensed adoption agency.
  - DHFS.
  - A relative with whom the child resides, if the relative has filed a petition to adopt the child or if the relative is receiving kinship care payments.
  - An individual who has been appointed guardian of the child by a court of a foreign jurisdiction.
- Transfer guardianship to one of the agencies listed above, and custody of the child to a relative or to an individual in whose home the child has resided for at least 12 consecutive months immediately prior to TPR. [s. 48.427 (3m) (a) and (b), Stats.]

### ***2. Cases in Which a Relative Guardian Has Been Appointed***

If the rights of both parents or of the only living parent are terminated and ***if a relative guardian has been appointed under s. 48.977, Stats.***, the court may, but is not required to, transfer guardianship as discussed above. [s. 48.427 (3p), Stats.]

### ***3. Sustaining Care***

In addition to any decision to transfer guardianship, if the rights of one or both parents are terminated, the court may enter an order placing a child in sustaining care if the court finds that the child is unlikely to be adopted or that adoption is not in the best interests of the child. [s. 48.427 (4), Stats.]

### **APPEAL**

Only a parent who has consented to a TPR or who did not contest a petition for involuntary TPR and whose rights were terminated may file a motion with the court for relief from the judgment. The motion must generally be filed within 30 days after the entry of the TPR judgment. Such a motion must be based on one of the following grounds:

- Mistake, inadvertence, surprise, or excusable neglect.
- Newly discovered evidence which entitles the parent to a new trial.
- Fraud, misrepresentation, or other misconduct of an adverse party.

- The judgment is void.
- A prior judgment on which the judgment is based has been reversed or otherwise vacated.

The motion does not affect the finality or suspend the TPR order or judgment. These motions and appeals to the court of appeals are the exclusive remedies for a parent to obtain a new hearing in a TPR proceeding. [s. 48.46, Stats.]



**PART II**  
**OVERVIEW OF CHILDREN'S CODE PROVISIONS**  
**RELATING TO ADOPTION**

**WHO MAY BE ADOPTED**

Section 48.81, Stats., provides for the adoption of a “minor,” who is any person who has not attained the age of 18 years. [s. 990.01 (20), Stats.] The terms “minor” and “child” are synonymous under the Children’s Code with respect to adoption. [The term “child” will be used in this Staff Brief.]

Any child who meets any of the following criteria may be adopted:

- Both of the child’s parents are deceased.
- The parental rights of both of the child’s parents with respect to the child have been terminated under ch. 48, Stats., or in another state or a foreign jurisdiction.
- The parental rights of one of the child’s parents with respect to the child have been terminated under ch. 48 or in another state or a foreign jurisdiction and the child’s other parent is deceased.
- The person filing the petition for adoption is the spouse of the child’s parent with whom the child and the child’s parent reside and either of the following applies:
  - The child’s other parent is deceased.
  - The parental rights of the child’s other parent with respect to the child have been terminated under ch. 48 or in another state or a foreign jurisdiction.
- Section 48.839 (3) (b), relating to the adoption of a foreign child, applies.
- The child is being readopted under s. 48.97.

Unless one of the statutory exceptions applies, the parental rights of **both** parents must be terminated before a child is eligible for adoption.

The two statutory exceptions are:

- Section 48.839 (3) (b), Stats., which provides that, in certain cases involving the adoption of a child from a foreign country, TPR is not required, but proof must be available to show that the child has been freed for adoption.
- Section 48.831, Stats., which provides that TPR is not required with respect to a child who has no living parent and for whom an appointment of a guardian has been made for an adoptability finding.

The Wisconsin Supreme Court also held that a third exception applies although not explicitly stated in s. 48.81 (1), Stats.; namely, that in cases of stepparent adoption, only the noncustodial birth parent's rights must be terminated. [*In the Interest of Angel Lace M.*, 184 Wis. 2d 492, 516 N.W.2d 678 at 683, n. 8.] (This holding is consistent with s. 48.835 (3) (b), Stats., which provides that, in cases of stepparent adoption when the child resides with the stepparent and the child's birth parent, a TPR petition must be filed only with respect to the noncustodial birth parent.)

## **WHO MAY ADOPT CHILDREN**

### ***1. Persons Eligible to Adopt Children***

Under s. 48.82 (1), Stats., all of the following persons are eligible to adopt a child if they are residents of Wisconsin:

- A husband and wife jointly.
- Either a husband or wife alone if the husband's or wife's spouse is a parent of the child (that is, cases of adoption by the child's stepparent).
- An unmarried adult. However, the Wisconsin Supreme Court has held that a parent's nonmarital partner could not adopt a child unless the parent's parental rights were terminated. This holding is based on the fact that while the nonmarital partner is eligible to adopt the child, the child is not eligible for adoption under the criteria in Section A., above. [*Angel Lace M.*, 516 N.W.2d at 682-83.]

### ***2. Additional Provisions Pertinent to Considering Who May Adopt a Child***

Although s. 48.82 (1), Stats., provides that all of the persons listed in item 1., above, are eligible to adopt a child, other state and federal laws provide that certain categories of persons must be considered when making an adoptive placement. Yet other state and federal laws prohibit discrimination against certain categories of persons. These provisions are as follows:

#### **◆ *Religion***

When practicable and if requested by the birth parent, the adoptive parents must be of the same religious faith as the birth parents of the child to be adopted. [s. 48.82 (3), Stats.] In addition, no person may be denied the benefits of the Children's Code provisions relating to the adoption of children and guardianship because of a "religious belief in the use of spiritual means through prayer for healing." [s. 48.82 (4), Stats.]

#### **◆ *Physical Handicaps***

No otherwise qualified person may be denied the benefits of s. 48.82, Stats. (relating to who may adopt a child), because the person is "deaf, blind or has other physical handicaps." [s. 48.82 (5), Stats.]

◆ ***Race, Color, Ancestry, or National Origin***

***Wisconsin Provisions.*** No otherwise qualified person may be denied the benefits of the adoption provisions of the Children’s Code because of his or her “race, color, ancestry or national origin.” [s. 48.82 (6), Stats.]

***Federal Provisions.*** The federal Multiethnic Placement Act provides that a state’s foster care and adoption assistance plan under Title IV-E of the Federal Social Security Act (IV-E plan) must provide, that neither the state nor any other entity in the state that receives federal funds and that is involved in adoption or foster care placements may: (a) deny to any individual the opportunity to become an adoptive or a foster parent on the basis of the race, color, or national origin of the person or of the child; or (b) delay or deny the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent or of the child. [42 U.S.C. s. 671 (a) (18).] The penalty for not complying with this provision is the partial loss to the state or federal IV-E funds. Moreover, if a person or the government does not comply with either provision, the noncompliance is considered to be a violation of Title VI of the Civil Rights Act of 1964.

The Multiethnic Placement Act continues to require that states “provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed.” [42 U.S.C. s. 622 (b) (9).]

◆ ***Consideration of Placement With a Relative***

***Wisconsin Provisions.*** Before placing a child for adoption, the agency making the adoptive placement must consider the availability of a placement for adoption with a relative of the child who is identified in the child’s permanency plan<sup>6</sup> or who is otherwise known by the agency making the adoptive placement. [s. 48.833, Stats.]

***Federal Provisions.*** The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 provides that every state’s IV-E plan must provide that the state must “consider giving preference to an adult relative over a nonrelated caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.” [42 U.S.C. s. 671 (a) (18).]

◆ ***Special Provisions Regarding American Indian Children***

The federal Indian Child Welfare Act (ICWA) supersedes Wisconsin law with respect to child custody proceedings, including adoptive placements, affecting American Indian children. [s. 48.028, Stats.] Under ICWA, in any adoptive placement of an American Indian child under state law, a preference must be given, in the absence of good cause to the contrary, to a

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<sup>6</sup> A “permanency plan” is the plan designed to ensure that a child is reunified with his or her family whenever appropriate or that the child quickly attains a placement or home providing long-term stability. With limited exceptions, a permanency plan is required for each child placed outside his or her home in substitute care. 1995 Wisconsin Act 275 also provided that, in making dispositions for CHIPS, if there is no less drastic alternative than transferring custody from the parent, the judge must consider transferring custody to a relative, wherever possible.

placement with: (a) a member of the child's extended family; (b) other members of the child's tribe; or (c) other American Indian families. [25 U.S.C. s. 1915 (a).]

The federal Multiethnic Placement Act explicitly provides that its provisions relating to cultural, ethnic, or racial background do not affect the application of ICWA.

## **TYPES OF ADOPTION**

### ***1. Basic Types of Adoption***

There are three types of adoption based on how a child is placed for adoption, that is, how a child is put in a proposed adoptive home prior to the actual adoption of the child: (a) agency adoptions when the child is placed by an agency under s. 48.833, Stats.; (b) relative adoptions when the child is placed by the parent with a relative under s. 48.835, Stats.; and (c) independent adoptions by a nonrelative when the child is placed by the court upon petition of a custodial parent and proposed adoptive parent or parents under s. 48.837, Stats. This section briefly describes each type of adoption. The procedure for each type of adoption is described in the next section.

Child welfare agencies are licensed by DHFS. A child welfare agency may accept guardianship of and make adoptive placements for children under their guardianship only if specifically licensed to do so by DHFS. This Staff Brief refers to child welfare agencies which have obtained a license to do so as "licensed adoption agencies." Agencies that may make adoptive placements are DHFS, a county department of human services or county department of social services (county department), or a child welfare agency licensed by DHFS to accept guardianship of children and make adoptive placements (licensed adoption agency).

#### **◆ *Agency Adoptions***

In agency adoptions, DHFS, a county department, or a licensed adoption agency serves as an intermediary between the birth parents and the adoptive parents. The agency places the child for adoption and provides the necessary services and assistance to complete the adoption. Section 48.833, Stats., provides that DHFS, a county department or a licensed adoption agency may place a child for adoption without a court order if DHFS, the county department, or the licensed adoption agency is the guardian of the child or makes the adoptive placement at the request of another agency which is the guardian of the child. The authority of DHFS, county departments, and licensed adoption agencies with respect to adoption services and their typical areas of practice are as follows:

#### **• *DHFS***

DHFS is authorized to accept guardianship of children when appointed by the court and to place children under its guardianship for adoption. [s. 48.48 (3) and (8), Stats.] DHFS is also authorized to accept appointment by an American Indian tribal court in Wisconsin as the guardian of a child for the purpose of making an adoptive placement for the child under certain circumstances. [s. 48.48 (3m), Stats.] In addition, a court may transfer guardianship of a foreign child who has been brought into Wisconsin for the purpose of adoption to DHFS if the child's guardian does not file required petitions or if a petition for adoption is withdrawn or denied. [s. 48.839 (4) (a), Stats.]

Except in unusual circumstances, DHFS recommends that it only be appointed as the guardian of children outside of Milwaukee County who have special needs.

- ***County Departments***

***Counties Other Than Milwaukee County.*** County departments in counties other than Milwaukee County are authorized to accept guardianship and make adoptive placements in foster parent conversion cases, that is, cases in which the county department has placed the child in a foster home or treatment foster home under a court order or under a voluntary agreement under s. 48.63, Stats., and the adoption will be by the foster parent or treatment foster parent. [s. 48.57 (1) (hm), Stats.]

***Milwaukee County.*** In Milwaukee County, the child welfare system has been operated by DHFS since 1998. The Bureau of Milwaukee Child Welfare in DHFS is authorized to accept guardianship of children when appointed by the court and to place children under its guardianship for adoption. [s. 48.57 (1) (e), Stats.] Currently, the Bureau of Milwaukee Child Welfare accepts guardianship of and places for adoption children in Milwaukee County who have special needs and children in foster care or treatment foster care when the proposed adoptive parent is the child's foster parent or treatment foster parent.

- ***Licensed Adoption Agencies***

A licensed adoption agency may accept guardianship of a child when appointed by the court and may place children under its guardianship for adoption.

- ◆ ***Relative Adoptions, Including Stepparent Adoptions***

A parent who has custody of a child may place the child in the home of a relative of the child without a court order for purposes of adoption. [s. 48.835, Stats.] For this purpose, "custody" means physical custody of a child by the child's parent not in violation of a custody order issued by a court. "Custody" does not include physical custody of a child during a period of physical placement with a parent who does not have legal custody. [s. 48.835 (1), Stats.] "Relative" means a parent, grandparent, stepparent, brother, sister, first cousin, nephew, niece, uncle, or aunt. The relationship may be by consanguinity or direct affinity. The most common form of relative adoption is stepparent adoption. [s. 48.02 (15), Stats.]

- ◆ ***Independent Adoptions***

In an independent adoption, the birth parent or parents and the proposed adoptive parent or parents mutually select each other without the assistance of a licensed adoption agency. A parent having custody of a child and the proposed adoptive parent or parents may then petition the court for placement of the child in the home of the proposed adoptive parent or parents (who are not relatives of the child), if the home is licensed as a foster home or treatment foster home. [s. 48.837, Stats.] If the court approves, the child may be placed in the home of the proposed adoptive parent or parents.

## ***2. Foreign and Interstate Adoptions***

Special provisions apply to the adoption of children from another state or from a foreign country, regardless of whether the adoption is arranged independently or by an agency. Thus, such adoptions are sometimes considered to be types of adoption. The adoption of foreign children, which is governed by s. 48.839, Stats., is discussed in the next section. The adoption of children from another state, which is governed by either s. 48.98 or 48.988, Stats., is also discussed in the next section.

### **ADOPTION PROCEDURE**

#### ***1. Jurisdiction and Venue***

The court assigned to exercise jurisdiction under chs. 48 and 938, Stats. (commonly referred to as the juvenile court), has ***exclusive jurisdiction*** over the adoption of children. [s. 48.14 (3), Stats.] The juvenile court of the county where the proposed adoptive parent or the child resides when the petition for adoption or for adoptive placement is filed has jurisdiction over the child until the petition is granted, denied, or withdrawn. [s. 48.83 (1), Stats.] If the adoption is denied, jurisdiction over the child immediately reverts to the court that appointed the guardian, unless the appointing court is a court of another state or foreign jurisdiction. In this case, the juvenile court of the county where the child is has jurisdiction. [s. 48.83 (2), Stats.]

Venue lies in the county where the proposed adoptive parent or child resides at the time the petition is filed. The juvenile court may transfer the case to the juvenile court in the county in which the proposed adoptive parents reside. [s. 48.83 (1), Stats.]

#### ***2. Procedure for Agency Adoption***

##### **◆ *Placement for Adoption***

DHFS, a county department, or a licensed adoption agency may place a child for adoption without a court order if the department or agency is the guardian of the child, or makes the placement at the request of another agency which is the guardian of the child. [s. 48.833, Stats.] Before the placement can be made, the prospective adoptive parents must be licensed as a foster home or treatment foster home.

Before placing a child for adoption, the department or agency making the placement must consider the availability of a placement for adoption with a relative of the child who is identified in the child's permanency plan, or who is otherwise known by the department or agency.

When a child is placed for adoption, the department or agency making the placement must enter into a written agreement with the prospective adoptive parent, which must state the date on which the child is placed in the home of the prospective adoptive parents for adoption. [s. 48.833, Stats.]

The services provided by a licensed adoption agency in a typical agency adoption are:

- ***Inquiry application.*** Persons interested in obtaining information about becoming adoptive parents file an application with the licensed adoption agency.

- ***Orientation meeting.*** The purpose of this meeting is to allow the agency providing adoption services to obtain basic information about the potential adoptive parents. The potential adoptive parents also learn about the adoption process and the responsibilities and issues involved in adopting a child.
- ***Formal application by the potential adoptive parents.*** If the persons decide they wish to become adoptive parents, they file a formal application with the agency.
- ***Home study by the agency.*** The home study consists of interviews with the potential adoptive parents and at least one visit to their home by an agency representative to evaluate whether it is appropriate for the placement of the child. The home study may also include inquiries into the financial, social and medical backgrounds of the potential adoptive parents.
- ***Approval of the potential adoptive parents for possible placement.*** The agency grants approval if it determines that the potential adoptive parents are qualified to be adoptive parents.
- ***Finding a child for placement.*** This step involves matching a child with the potential adoptive parents. Among the factors considered in matching a child are the preferences of the birth parent and the potential adoptive parents and whether the potential adoptive parents can satisfy the needs of the child. According to DHFS, it can take several years following approval for a placement before a child is actually placed if the potential adoptive parents wish to adopt a healthy infant or a child without “special needs.”
- ***Familiarizing the potential adoptive parents with the child.*** Once a suitable child for the potential adoptive parents is found, meetings are held between the agency and the potential adoptive parents to explain the child’s background. One of these meetings may include face-to-face contact between the potential adoptive parents and the child.
- ***Licensure of the home of the potential adoptive parents as a foster home or treatment foster home.***
- ***Signing the placement agreement between the agency and the potential adoptive parents.***
- ***Placement of the child in the home of potential adoptive parents.***

Section HSS 54.04, Wis. Adm. Code, sets forth some requirements which apply to these services. However, licensed adoption agencies have considerable discretion to develop their own standards and procedures.

When a child with special needs is in the guardianship of DHFS, the criteria and procedures for making an adoptive placement of the child are set forth in ch. HSS 51, Wis. Adm. Code. Also included in ch. HSS 51, Wis. Adm. Code, are the procedures for providing information to persons interested in adopting a child with special needs and for conducting a screening and home study of applicants.

◆ ***Petition for Adoption***

After the child has been in the home of the proposed adoptive parents for at least six months, the proposed adoptive parents may file a petition for adoption. [s. 48.90 (2), Stats.] As discussed below, the six-month placement requirement does not apply to adoption by relatives of the child by blood, adoption by the child's stepparent or foreign adoptions. [s. 48.90 (1), Stats.] In addition, the six-month placement requirement does not apply if the petition for adoption is accompanied by written approval of the guardian. According to DHFS, this exception is used only in unusual circumstances (for example, if a proposed adoptive parent is required to move to another state because of a job transfer before the end of the six-month period).

◆ ***Adoption Hearing***

Upon the filing of a petition for adoption, the court is required to schedule a hearing within 90 days and to order an ***investigation*** to determine whether the child is a proper subject for adoption and whether the petitioner's home is suitable for the child. [s. 48.88 (1m) and (2) (a), Stats.] In the case of an agency adoption, the court is required to order the agency with guardianship of the child to conduct the investigation unless the agency has already filed its report of investigation with its recommendation of the guardian. [s. 48.88 (2) (a) 1., Stats.]

The agency conducting the investigation must file its ***report*** with the court at least 10 days before the hearing on the petition for adoption unless the time is reduced for good cause shown by the petitioner. [s. 48.88 (2) (b), Stats.] If the report of the investigation is unfavorable or if it discloses a situation which, in the opinion of the court, raises a serious question as to the suitability of the proposed adoption, the court may appoint a GAL for the child whose adoption is proposed. The GAL may have witnesses subpoenaed and present proof at the hearing on the petition for adoption. [s. 48.88 (3), Stats.]

In addition to the investigation, the ***recommendation of the guardian*** must be filed at least 10 days before the hearing. [s. 48.85 (1), Stats.] No adoption of a child may be ordered without the written recommendation, favorable or unfavorable, of the child's guardian, if there is one. [s. 48.841, Stats.] The statute provides that if the guardian refuses or neglects to file its recommendation within the time specified, the court may proceed as though the guardian had filed a favorable recommendation.

After the required report and recommendation have been filed, the ***hearing*** on the petition for adoption is held. The hearing may be in the judge's chambers (rather than in the courtroom) unless an interested person objects. The petitioner and the child to be adopted, if 14 years of age or older, must attend unless the court orders otherwise. [s. 48.91 (1), Stats.] At the adoption hearing, the court must first establish whether the rights of any persons who have filed declarations of parental interest under s. 48.025, Stats., have been determined or whether paternity has been adjudicated in Wisconsin or in another state. (Under s. 48.025, Stats., any person claiming to be the father of a nonmarital child who is not adopted or whose parents do not



subsequently intermarry may file with DHFS a declaration of his interest in matters affecting the child. The declaration may be filed at any time except after termination of the father’s parental rights.) If the court finds that “no such determination” has been made, the court must proceed, prior to any action on the petition for adoption, to attempt to determine paternity of the child and the rights of any person who has filed a declaration under s. 48.025, Stats. [s. 48.91 (2), Stats.]

◆ ***Order Granting Adoption***

After the hearing and after studying the required report and recommendation, the court must make an ***order*** granting the adoption if it is satisfied that the necessary “consents or recommendations” have been filed and that the adoption is in the best interests of the child. The order may change the name of the minor to that requested by the petitioners. [s. 48.91 (3), Stats.]

After entry of the order granting the adoption, the clerk of court is required to promptly mail a copy of the order to DHFS, Bureau of Vital Statistics, and furnish any additional data needed for a new birth certificate. The Bureau of Vital Statistics then issues a new birth certificate unless the adoptive parents request that the birth certificate of the adoptee not be changed. [s. 48.94, Stats.]

***3. Procedure for Independent Adoption by Nonrelatives***

◆ ***Petitions for Adoptive Placement and Voluntary TPR***

Under s. 48.837, Stats., a birth parent with custody of a child and the proposed adoptive parents of the child may ***petition*** the court for placement of the child for adoption in the home of the proposed adoptive parents. As with an agency adoption, the home of the proposed adoptive parents must first be licensed as a foster home or treatment foster home. [s. 48.837 (1), Stats.]

The petition for adoptive placement must be accompanied by a petition for the voluntary consent to the termination of any existing rights of the petitioning parent or parents. [s. 48.837 (3), Stats.] The petition for adoptive placement may be filed prior to the birth of the child, but the hearing on that petition may not be held until after the child is born. [s. 48.837 (4) (a), Stats.]

The petition for adoptive placement must include all of the following:

- The identity and age of the child or the expected birth date of the child.
- The identity and age of the birth parents and the proposed adoptive parents.
- The identity of any person or agency which solicited, negotiated, or arranged the placement of the child with the proposed adoptive parents. [s. 48.837 (2), Stats.]

◆ ***Hearing***

When the petition for adoptive placement and the petition for voluntary TPR are filed, the court is required to hold a ***hearing*** within 30 days, but not before the birth of the child. The court is required to appoint counsel or GALs when required under s. 48.23, Stats. [s. 48.837 (4) (a) and (b), Stats.]

The court must also order DHFS or a county department to investigate the proposed adoptive placement, to interview each petitioner, to provide counseling if requested and to **report its recommendation** to the court at least five days before the hearing on the petition. If a licensed child welfare agency has investigated the proposed adoptive placement and interviewed the birth parent or parents and the proposed adoptive parents, the court may accept a report and recommendation from the licensed child welfare agency in place of the court-ordered report by DHFS or the county department. [s. 48.837 (4) (c), Stats.]

Under certain circumstances, the court may order that the child be placed in a licensed foster home or treatment foster home, other than the home of the proposed adoptive parents or a relative of the proposed adoptive parents, pending the hearing on the petition for adoptive placement. [s. 48.837 (4) (d), Stats.]

Before hearing on the petitions for adoptive placement and voluntary TPR, the court must determine whether the child's paternity has been adjudicated. If any person has filed a declaration of paternal interest under s. 48.025, Stats., the court must determine the rights of that person. If the child's paternity has not been adjudicated and if no person has filed a declaration of paternal interest, the court must attempt to ascertain the paternity of the child. The court may not proceed with the hearing on the petitions for adoptive placement and voluntary TPR unless the parental rights of the nonpetitioning parent, whether known or unknown, have been terminated. [s. 48.837 (4) (e), Stats.]

The hearings on the petition for adoptive placement and voluntary TPR are scheduled together, with the court first holding a hearing on the petition for adoptive placement. [s. 48.837 (6) (a), Stats.]. The child, if he or she is 12 years of age or older, and each petitioner are required to attend the hearing on adoptive placement. The child, if over age 12, and each parent having custody of the child, are required to attend the hearing on voluntary TPR. If the parent who has custody consents and the court approves, the proposed adoptive parents may also be present. The court may waive the requirement that the child attend either hearing. [s. 48.837 (5), Stats.]

A report containing a list of all transfers of anything of value made or agreed to be made in connection with the pregnancy, the birth of the child, the placement of the child with the proposed adoptive parents, or the adoption of the child by the proposed adoptive parents must be provided to the court at the time of the hearing on the petition for adoptive placement.

The report must be itemized and shall show the goods or services for which payment was made or agreed to be made. The report shall include the dates of each payment, the names and addresses of each person or organization receiving any payment from the proposed adoptive parents or a person acting on behalf of the proposed adoptive parents in connection with the pregnancy, the birth of the child, the placement of the child with the proposed adoptive parents, or the adoption of the child by the proposed adoptive parents. [s. 48.913 (6) and (7), Stats.]

The proposed adoptive parents of a child, or a person acting on behalf of the proposed adoptive parents, may pay the actual cost of any of the following:

- Preadoptive counseling for a birth parent of the child or an alleged or presumed father of the child.

- Post-adoptive counseling for a birth parent of the child or an alleged or presumed father of the child.
- Maternity clothes for the child's birth mother, not to exceed a reasonable amount.
- Local transportation expenses of a birth parent of the child that are related to the pregnancy or adoption.
- Services provided by a licensed child welfare agency in connection with the adoption.
- Medical and hospital care received by the child's birth mother in connection with the pregnancy or birth of the child. Medical and hospital care does not include lost wages or living expenses.
- Medical and hospital care received by the child.
- Legal and other services received by a birth parent of the child, an alleged or presumed father of the child, or the child in connection with the adoption.
- Living expenses of the child's birth mother, in an amount not to exceed \$1,000, if payment of the expenses by the proposed adoptive parents or a person acting on their behalf is necessary to protect the health and welfare of the birth mother or the fetus.
- Any investigation ordered under s. 48.837 (4) (c), according to a fee schedule established by the department based on ability to pay.
- If the adoption is completed, the cost of any care provided for the child under s. 48.837 (4) (d).
- Birthing classes.
- A gift to the child's birth mother from the proposed adoptive parents, of no greater than \$50 in value.

[s. 48.913 (1), Stats.]

At the beginning of the hearing on the petition for adoptive placement, the court must review reports submitted under s. 48.913 (6), Stats., to determine whether any conditions specified in the agreement are coercive to the birth parent. If the court finds that any of those conditions are coercive, the court must either dismiss the petitions for adoptive placement and voluntary TPR or amend the written agreement to delete any coercive conditions, if the parties agree to the amendment. [s. 48.837 (6) (b), Stats.]

After the hearing on the petition for adoptive placement, the court is required to make findings on the allegations of the petition and the report of the investigation of the proposed adoptive placement and make a conclusion as to whether placement of the child in the proposed adoptive home is in the best interests of the child. [s. 48.837 (6) (c), Stats.] If the court approves the proposed placement, the court proceeds to the hearing on the petition to terminate the

parental rights of the petitioning birth parent. If those rights are terminated, the court must **order** the child placed with the proposed adoptive parent or parents and appoint a guardian for the child, which may be either the DHFS, a county department or a licensed adoption agency. [s. 48.837 (6) (d), Stats.] Typically, the guardian appointed is the licensed adoption agency that conducted the home study and submitted its report and that has located a licensed foster home for the child to be placed in from the time of the child's discharge from the hospital until the adoptive placement.

◆ ***Petition for Adoption and Order Granting Adoption***

The procedure followed for the finalization of an independent adoption are the same as that followed for an agency adoption.

***4. Procedure for Adoption by Relatives, Including Stepparents***

◆ ***Placement for Adoption***

A parent having physical custody of a child not in violation of a custody order issued by a court may place the child for adoption in the home of a relative without a court order. [s. 48.835, Stats.] The relative is not required to obtain a foster care or treatment foster care license. [s. 48.62 (2), Stats.] Under the Children's Code, the term "relative" means a parent, grandparent, stepparent, brother, sister, first cousin, nephew, niece, uncle, or aunt. This relationship may be by consanguinity or direct affinity. [s. 48.02 (15), Stats.]

◆ ***Petition for Adoption***

A petition for adoption may be filed at any time if one of the petitioners is either: (a) a relative of the child by blood, excluding parents whose parental rights have been terminated and persons whose relationship to the child is derived through such parents; or (b) the child's stepparent. That is, for these adoptions, the usual six-month waiting period following adoptive placement does not apply. [s. 48.90 (1) (a) and (b), Stats.] If the child's parent has not filed a TPR petition, the relative with whom the child is placed must file a petition for termination of both parents' rights at the same time the petition for adoption is filed. If the person filing the adoption petition is a stepparent with whom the child and the child's parent reside, the stepparent must file only a petition to terminate the parental rights of the parent who does not have custody of the child. [s. 48.835 (3) (a) and (b), Stats.]

When a petition for adoption is filed by a relative other than a stepparent and no agency has guardianship of the child, the court must order an **investigation** to determine whether the child is a proper subject for adoption and whether the petitioner's home is suitable for the child. The investigation may be conducted by DHFS, a county department or a licensed adoption agency. [s. 48.88 (2) (a) 2., Stats.]

If a stepparent has filed a petition for adoption and no agency has guardianship of the child, the court must order a county department, the DHFS or a child welfare agency to conduct a **screening**, consisting of no more than one interview with the petitioner and a check of the petitioner's background through public records. The report of the screening must be filed with the court within 30 days. After reviewing the report, the court may act on the petition for

adoption or may order an investigation to determine whether the child is a proper subject for adoption and whether the petitioner's home is suitable for the child. [s. 48.88 (2) (c), Stats.]

◆ ***Order Granting Adoption***

The remaining procedures for finalization of adoption by a relative are the same as those for an agency adoption.

***5. Procedure for Adoption of Foreign Children***

Persons in Wisconsin who wish to adopt a child from a foreign country may pursue either of two alternatives. The first alternative is for the adoptive parents to go to another country and adopt a child in that country according to their laws. This type of foreign adoption often requires the adoptive parents to reside in the country for a certain length of time before the adoption is approved. Wisconsin residents who adopt a child in a foreign country are required to obtain prior approval of the placement from DHFS. [s. 48.97, Stats.] DHFS requires an adoptive home study to be completed by a licensed adoption agency as a precondition to granting approval of a foreign adoption under s. 48.97, Stats.

The second alternative is to arrange independently, or through a licensed adoption agency, for the placement of a foreign child with the proposed adoptive parents in Wisconsin. Section 48.839, Stats., generally governs the adoption of foreign children in Wisconsin. In addition, requirements of federal immigration laws pertaining to adoption must be met. Foreign adoptions also often come under the provisions of the Interstate Compact on the Placement of Children (ICPC) [s. 48.988, Stats.], because many agencies which place foreign children in Wisconsin for adoption are based in and licensed in other states. The ICPC is described below.

Any resident of Wisconsin appointed by a court of a foreign country as guardian of a child who is a citizen of that country must meet all of the following requirements before the child may be brought into Wisconsin for the purpose of adoption:

- File a \$1,000 noncancelable bond with DHFS. The condition of the bond must be that the child will not become dependent on public funds for his or her primary support before he or she is adopted. DHFS may waive the bond requirement.
- File with DHFS a certified copy of the judgment or order of a court of a foreign country or any other instrument, which has the effect of freeing the child for adoption under the laws of the foreign country and English translations of those documents.
- Furnish DHFS with a copy of an agency home study recommending the guardian as an adoptive parent.
- Identify a licensed child welfare agency to provide services to the child and to the proposed adoptive parents until the child's adoption is final. [s. 48.839, Stats.]

If all of these conditions are met and DHFS determines that the child is free for adoption, DHFS is required to certify to the U.S. Immigration and Naturalization Service (INS) that the state's preadoptive requirements have been met prior to the child's arrival in the United States. [s. 48.839 (2) (c), Stats.] The INS then determines whether the child may enter the country.

Within 60 days after the child's arrival in the state from a foreign country, the proposed adoptive parents are required to file a petition to adopt the child, a petition to terminate parental rights to the child, or both, if necessary. The usual six-month waiting period between adoptive placement and the filing of the petition for adoption does not apply to adoption of foreign children. [s. 48.90 (1) (d), Stats.] If only the TPR petition is filed, the proposed adoptive parents must file a petition for adoption within 60 days of filing the TPR petition. The termination of parental rights to a child who is from a foreign country is not necessarily required prior to the child's adoption in Wisconsin by his or her guardian. The TPR petition is required if the court hearing the petition for adoption determines that the child was not properly freed for adoption under the laws of the foreign jurisdiction. [s. 48.839 (3), Stats.]

The remaining procedures for the finalization of a foreign adoption are the same as for an adoption in Wisconsin, including a court-ordered agency investigation and a report on the adoption, a hearing on the petition for adoption and an order granting the adoption if the court determines that the necessary consents or recommendations have been filed and that the adoption is in the best interests of the child.

If the petition for adoption is withdrawn or denied by the court, or if the adoption or TPR petitions are not filed as required, the court is required to: (a) transfer guardianship of the child to DHFS, a county department, or a licensed adoption agency; (b) order the guardian to initiate TPR proceedings within 10 days; (c) transfer legal custody of the child to the DHFS, a county department, or a licensed adoption agency; and (d) order the bond to be forfeited. In addition, the court may order that physical custody of the child remain with a suitable individual with whom the child has been living. [s. 48.839 (4), Stats.]

## ***6. Procedure for Interstate Adoption of Children***

Interstate adoptions are those in which a child in Wisconsin is being adopted by persons in another state or a child from another state is being adopted by persons in Wisconsin. Most interstate adoptions are governed by s. 48.988, Stats., the ICPC. The ICPC has been enacted by all 50 states, the District of Columbia, and the Virgin Islands. The ICPC establishes orderly procedures, including financial and planning responsibilities, for interstate placement of children for foster care and adoption.

The ICPC applies to any placement by a sending agency located in one state to a prospective adoptive home in another state. A "sending agency" is any state, subdivision, or court of a state, or any person, agency, or other entity which sends, brings or causes to be sent or brought any child to another party state. Any sending agency must comply with all conditions for placement in the ICPC and all applicable laws of the receiving state governing placement of children in that state. [s. 48.988 (3), Stats.] The ICPC does not apply to placements made into medical or mental health facilities or boarding schools or placements of a child made by a parent or adult relative when placement is with another close relative and there is no court jurisdiction. [s. 48.988 (2) (b) and (8), Stats.] All interstate adoptions that are not covered by the ICPC are governed by s. 48.98, Stats., which is discussed below.

The ICPC provides that a sending agency may not send or bring any child into a receiving state for possible adoption unless the sending agency has complied with every requirement of the ICPC and with the applicable laws of the receiving state governing the placement of children. In addition, the child may not be sent or brought into the receiving state

until the appropriate public authorities of the receiving state have notified the sending agency that the proposed placement does not appear to be contrary to the interests of the child. [s. 48.988 (3) (d), Stats.]

The ICPC further provides that the sending agency retains jurisdiction over the child in all matters relating to the custody, supervision, care, treatment, and disposition of the child which it would have had if the child had remained in the sending agency's state until the child is adopted. The sending agency also has financial responsibility for support and maintenance of the child during the period of the placement. [s. 48.988 (5) (a), Stats.]

Sending or receiving a child in violation of the terms of the ICPC constitutes a violation of the laws respecting the placement of children of both the sending and receiving state. Such a violation may be punished or be subjected to penalty in either jurisdiction in accordance with its laws. In addition, any such violation is sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which allows it to place or care for children. [s. 48.988 (4), Stats.]

Interstate adoptions which are not covered by the ICPC are governed by s. 48.98, Stats. In pertinent part, that statute provides that no person may bring a child into Wisconsin or send a child out of Wisconsin for the purpose of adoption without a certificate from DHFS stating that the proposed adoptive home is suitable for the child. In addition, any person, other than a county department or a licensed child welfare agency, who brings a child into Wisconsin for the purpose of placing the child in a foster home or a treatment foster home must file a \$1,000 bond in favor of the state with DHFS. The bond requirement may be waived by DHFS. The bond is to ensure that the child will not become dependent on public funds for his or her primary support before the child reaches the age of 18 or is adopted. If this requirement is violated, the person who filed the bond and the surety company which issued the bond must be billed for the cost of care and maintenance of the child until the child is adopted or the child reaches age 18. In addition, any person bringing a child into the state or sending a child out of the state must report to DHFS at least once each year and at any other time required by DHFS concerning the location and well-being of the child until the child reaches age 18 or is adopted. [s. 48.98 (3), Stats.]

### APPEAL RIGHTS

Orders granting or denying an adoption are appealable like other circuit court final orders. An appeal by a **party other than the state** from a judgment or order **granting** adoption must be initiated by filing the notice required by s. 809.30 (2) (b), Stats., within 40 days of the date of entry of the judgment or order appealed from. [s. 808.04 (7), Stats.] This deadline cannot be changed by the court. An appeal by a **party other than the state** from a judgment or order **denying** adoption must be initiated by filing the notice required by s. 809.30 (2), Stats., within 20 days of the entry of the judgment. [s. 809.30 (2), Stats.] The **state** has 45 days after the entry of a judgment or order granting or denying adoption to initiate an appeal. [s. 808.04 (4), Stats.]

**UNAUTHORIZED PLACEMENT OF CHILDREN FOR ADOPTION**

Section 948.24, Stats., prohibits any person from taking any of the following actions:

- Placing or agreeing to place his or her child for adoption for anything other than the items listed in s. 48.913 (1), Stats. (see pp. 22 and 23, above).
- Soliciting, negotiating, or arranging the placement of a child for adoption for anything of value, except under s. 48.833, Stats., relating to placement of children for adoption by DHFS, county departments and licensed adoption agencies.
- Giving anything exceeding the actual cost of the hospital and medical expenses of the mother and the child incurred in connection with the child's birth and of the legal and other services rendered in connection with the adoption, the items in s. 48.913 (1), Stats., and payment of expenses in accordance with s. 48.913 (2), Stats., in order to receive a child for adoption.

The prohibitions described above do not apply to adoptive placements under s. 48.839, Stats., relating to foreign adoptions. Anyone who takes any of the prohibited actions is guilty of a Class H felony, punishable by a fine not to exceed \$10,000 or imprisonment not to exceed six years, or both. [s. 939.50 (3) (h), Stats.]

In addition to the penalties described above, a petition for adoption may be dismissed if the proposed adoptive parents have made any payments to the birth mother conditional on the adoption.

As for certain other costs, it should be noted that s. 48.837 (7), Stats., provides that the proposed adoptive parents must pay the cost of any home study ordered by the court during the hearing for adoptive placement, according to a fee schedule established by DHFS based on ability to pay and, if the adoption is completed, the adoptive parents must pay the cost of any foster care provided before the adoptive placement.



### **PART III**

#### **FINANCIAL INCENTIVES FOR ADOPTIVE PARENTS**

Adoptive parents in Wisconsin are generally eligible for a state income tax deduction and a federal income tax credit for expenses incurred in connection with an adoption. Adoptive parents of a special needs child are additionally eligible for adoption assistance after the child is adopted.

##### **STATE INCOME TAX DEDUCTION**

Statute allows a maximum of \$5,000 in adoption expenses may be deducted from an adoptive parent's modified adjusted gross income (AGI). Adoption expenses include adoption fees, court costs, or legal fees relating to the adoption of a child for whom a final order of adoption has been entered in a Wisconsin court during the taxable year. The deduction is available for amounts expended during the period that consists of the year to which the claim relates and the prior two taxable years. The deduction is available only to full-year residents. [s. 71.05 (6) (b) 22., Stats.]

##### **FEDERAL INCOME TAX CREDIT**

Federal law provides that taxpayers may claim a nonrefundable credit of up to \$10,000 for qualified adoption expenses for each eligible child. The credit is phased out for taxpayers with a modified AGI over \$150,000 and no credit is allowed to taxpayers with a modified AGI of \$190,000 or more. These amounts are adjusted for inflation. For 2004, the amount of the credit is projected to be approximately \$10,390. Unused credits may be carried forward for up to five years. A taxpayer who adopts a special needs child may claim the maximum adoption credit regardless of actual expenses paid or incurred in the year the adoption became final.

Qualified adoption expenses include reasonable and necessary adoption fees, court costs, attorney fees, and other expenses that are directly related to the legal adoption of an eligible child. Expenses for the adoption of a spouse's child are not eligible for the credit. An eligible child is an individual who has not attained the age of 18 at the time of the adoption or who is physically or mentally incapable of caring for him or herself. [SEC. 23, Internal Revenue Code.]

##### **ADOPTION ASSISTANCE FOR CHILDREN WITH SPECIAL NEEDS**

Adoption assistance is payments by DHFS to adoptive or proposed adoptive parents of a child, which are designed to assist in the cost of care of that child. Adoption assistance is available for children with special needs when DHFS has determined that such assistance is necessary to assure the child's adoption. [s. 48.975 (1) and (2), Stats.]

In fiscal year 2003-04, \$62,166,600 was expended on adoption assistance maintenance and adoption expense payments (\$31,532,400 general purpose revenue (GPR), \$30,634,200 federal funding.) In January 2004, 5,810 children were eligible for adoption assistance payments.

## ***Eligibility for Assistance***

### **◆ *Eligibility Criteria for the Child***

A child must be under 18 years of age at the time of the adoption and available for adoption to be eligible for adoption assistance. A child is available for adoption if the child is in the guardianship of DHFS, a county department, or an adoption agency and DHFS, the county department, or the adoption agency decides that the child cannot or should not return to the home of his or her parents. In addition, the child must have at least one of the following special needs at the time of the adoptive placement:

- The child is 10 years old or older, if age is the only factor in determining eligibility.
- The child is the member of a sibling group of three or more children who must be placed together.
- The child exhibits special need characteristics judged to be moderate or intensive or is at high risk of developing a moderate or intensive level of special needs.<sup>7</sup>
- The child belongs to a minority race and children of that minority race cannot be readily placed due to a lack of appropriate placement resources.

A child brought to Wisconsin for adoption from another state or from another nation under an orphan, relative, or medical immigrant visa may not be provided with adoption assistance. [s. HFS 50.03 (1), Wis. Adm. Code.]

### **◆ *Placement Efforts***

Current law requires that reasonable efforts be made to assure a timely placement of the child with the best available family without adoption assistance. The adoption agency must make efforts to consider a number of families in order to locate the most suitable family for the child, with consideration given to the availability of an adoptive placement with a relative. If two or more appropriate families are not available within the agency, the agency must make an effort to locate additional families.

Once the agency determines that placement with a specific family is most suitable for the child, the agency must make full disclosure to the family of the child's background, to the extent known, and of any existing or potential problem related to the child that is known by the agency. The agency must also inform the family of the availability of adoption assistance and ask the family whether they are willing to adopt without adoption assistance. If the family is not willing to adopt without adoption assistance, the requirement that a reasonable effort to place the child without adoption assistance is met and a child may not be removed from a current adoptive placement based upon a request for adoption assistance. [s. HFS 50.03 (2), Wis. Adm. Code.]

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<sup>7</sup> This assessment is based upon a schedule of difficulty-of-care levels established for foster children. The level may be based upon the child's emotional, behavioral, or physical and personal care needs. The schedule and specific descriptions of each level are set forth in s. HFS 56.11 (3), Wis. Adm. Code.

The requirement to make reasonable efforts to place a child without adoption assistance is waived if the child has developed significant emotional ties with the foster family that proposes to adopt the child or if a child is in an adoptive placement without adoption assistance and, prior to making the adoption final, problems arise and the family requests adoption assistance. [s. HFS 50.03 (3), Wis. Adm. Code.]

◆ ***Requesting Assistance***

Except in extenuating circumstances, adoption assistance must be requested and approved no later than the time of the adoptive placement of the child occurs. [s. HFS 50.04 (1), Wis. Adm. Code.] Extenuating circumstances include the adoptive parents not being informed of pertinent information about the child or the child's biological family that was known by the adoption agency at the time of the placement, an erroneous decision that the child was ineligible for adoption assistance, or the adoptive parents not being informed of the availability of adoption assistance. [See s. HFS 50.065 (2), Wis. Adm. Code.]

If adoption assistance is approved, an adoption assistance agreement must be completed and signed by the prospective adoptive parent or parents ("adoptive parents"), the adoption worker, and a representative of DHFS. If at any time prior to the adoption, the prospective adoptive parents believe there has been a substantial change in circumstances, the prospective adoptive parents may file an application for an amended agreement. Following an assessment, DHFS may offer to amend the agreement. [s. HFS 50.044, Wis. Adm. Code.]

Adoption assistance agreements may also be amended following the adoption. If an adoption agreement is for a child who is at high risk of developing a special need, the adoptive parents may request an amendment if at least 12 months have elapsed since the date of the adoption and the parents believe a substantial change in circumstances has occurred.

Adoptive parents of a child identified as having a special need at the time of the adoption may request an increase in their maintenance payment (described below) if they believe there has been a substantial change in circumstances since the agreement was signed. Such a request may be made at least 12 months after the adoption, 12 months after the last request for increased maintenance payments, 12 months following the amendment of an agreement for a child at risk of developing a special need, or within 120 days prior to the expiration of an amended agreement.

If DHFS determines that there has been a substantial change in circumstances and that there is no substantiated report of abuse or neglect by the adoptive parents, DHFS must offer to amend the adoption assistance for maintenance for up to one year. DHFS reviews amended agreements annually. [s. HFS 50.045, Wis. Adm. Code.]

***Types of Adoption Assistance***

DHFS may provide adoption assistance for maintenance, medical care, or nonrecurring adoption expenses or for any combination of those types of adoption assistance. [s. 48.975 (3), Stats.]

The amount of adoption assistance takes into consideration the circumstances of the adoptive family and the needs of the child being adopted. The circumstances DHFS must consider include the following:

- a. The burden on the family's financial resources is significant because of the need to provide for the adoptee.
- b. Although the family's financial resources are substantial, unusual circumstances have placed demands on the family income to the extent that providing for an adoptee would result in a significant financial burden.
- c. The family lacks health insurance or sufficient insurance to cover the expected medical needs of the adoptee.
- d. Resources needed by the adoptee are not available in the family's community and the expense of gaining access to the necessary resources would place a significant financial burden on the family.

[s. HFS 50.05 (4), Wis. Adm. Code.]

◆ **Maintenance**

This is a monthly payment to provide support for the child. Each adoptive child's situation is considered individually in computing the adoption assistance.

**Basic Maintenance Rate.** This rate is the same as the uniform foster care basic rate. [s. HFS 50.05 (1) (a) and (b), Wis. Adm. Code.] The uniform foster care basic rate for 2004 is:

<i>Age of child</i>	<i>Monthly rate</i>
0 to 4 years	\$302.00
5 to 11 years	\$329.00
12 to 14 years	\$375.00
15 to 18 years	\$391.00

**Supplemental Maintenance Payments.** In addition to the basic maintenance rate, the monthly payment may include a supplemental payment to cover the costs of caring for a child who needs more than the usual amount of care and supervision because of emotional, behavioral, or physical characteristics or personal care needs. The supplemental payments vary based on the child's care and supervision needs and are determined using the difficulty-of-care levels established for foster children, but may not exceed \$324. [DCS MEMO Series 95-26.]

**Exceptional Maintenance Payments.** In addition to the basic maintenance rate and the supplemental payment, the child may be eligible for an exceptional payment if the child's needs are so extreme that the basic and supplemental payments do not provide sufficient funding to ensure that the child can be cared for in the home and that placement in a more restricted setting

can be prevented or ended. The combined monthly payment for the basic, supplemental, and exceptional maintenance payments may not exceed \$2,000. [DCS MEMO Series 95-26.]

◆ ***Medical Care***

All children eligible for adoption assistance are also eligible for Medical Assistance. Medical Assistance pays for covered health care costs of the child that are not covered by the parent's health insurance policy. [s. HFS 56.05 (2), Wis. Adm. Code.]

◆ ***Nonrecurring Adoption Expenses***

If a child is adopted with an approved adoption assistance agreement, DHFS must reimburse the adoptive parents for nonrecurring adoption expenses of up to \$2,000. Nonrecurring adoption expenses include reasonable and necessary adoption fees, court costs, attorney fees, and other expenses that are directly related to the adoption. [s. 48.975 (3) (c), Stats., and s. HFS 50.05 (3), Wis. Adm. Code.]



## **PART IV**

### **STATE ADOPTION RESOURCES**

DHFS provides three grants to Adoption Resources of Wisconsin to administer the state adoption center, the state adoption information exchange, and six post-adoption resource centers.

Adoption Resources of Wisconsin receives \$346,000 annually in GPR and federal funding to operate the state adoption center and the adoption information exchange and receives \$70,000 annually in federal funding for each post-adoption resource center.

#### **STATE ADOPTION CENTER**

DHFS has established a state adoption center for the purposes of increasing public knowledge of adoption and promoting to adolescents and pregnant women the availability of adoption services. [s. 48.55, Stats.]

The state adoption center must do all of the following:

- Operate a toll-free telephone line to provide information and referral services.
- Refer expectant birth parents or their representatives who contact the center to a designated contact person in the county department or to a licensed adoption agency.
- Make available a list of public adoption agencies and licensed private adoption agencies in Wisconsin with brief descriptions of their services.
- Maintain current information on adoption services and related services.
- Publish a directory of post-adoptive services and support organizations available to assist birth parents who release their child for adoption.
- Seek out and provide training to persons who provide counseling to adolescents, including school counselors, county child welfare workers, family planning clinic employees, and other helping professionals to develop an understanding that adoption is an option for an adolescent or an adult experiencing a problem pregnancy or considering options to parenting, and to make people aware of the center's services. The training must include discussion of independent and agency adoption practices, the range of opportunities for contact between a birth parent and the adoptive parent and between the birth parent and the adopted person, adoption information search, and TPR proceedings.
- Offer to make presentations on the services of the center and on the adoption option at Wisconsin professional association and statewide and community organization meetings.
- Develop publicity to inform Wisconsin adolescents about adoption and to promote the positive benefits of adoption.

- Offer to make presentations to youth and young adult groups and assemblies to inform youth and young adults about adoption procedures and related services.
- Disseminate information widely, including through communications media, to make the public aware of the toll-free telephone number and services of the center.
- Work with local counseling, social service, education, health care, and other service providers to promote adoption as an option for adolescents and adults with problem pregnancies or who are considering options to parenting and increase public knowledge of adoption procedures and appreciation for adoption.

[s. HFS 42.05, Wis. Adm. Code.]

### **STATE ADOPTION INFORMATION EXCHANGE**

DHFS has established a state adoption information exchange for the purpose of finding adoptive homes for children with special needs who do not have permanent homes. [s. 48.55, Stats.]

The adoption information exchange must do the following:

- Maintain an ongoing central photolist registry of all special needs children<sup>8</sup> and register prospective adoptive families who have either referred themselves to the exchange or have been referred to the exchange by an adoption agency.
- Attempt to match children listed in the adoption photolisting with prospective adoptive families registered with the exchange.
- Develop and maintain a photolisting that includes information about and a photograph of each photolisted child that must be made available to all adoption agencies in the state, adoptive parent groups, child advocacy groups, other interested groups, and child-placing agencies in other states. The photolisting must be updated at least quarterly.
- Make inquiries of adoption agencies at least semi-annually to determine the progress toward adoption of children photolisted with the exchange.
- Maintain a central telephone number that people can call to get information about the exchange and about adoption of special needs children and publish and disseminate the telephone number of the exchange.

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<sup>8</sup> For purposes of photolisting, special needs children include:

- Children who have special needs due to medical, psychological, developmental, or behavioral conditions.
- Children who have special needs due to special circumstances such as age, sibling group, sex, race, or national or cultural origin.
- Children who have not been placed for adoption within 30 days after being legally freed.
- Foreign-born children who have been referred to DHFS for adoptive placement in Wisconsin.
- Children who are placed in sustaining care or at legal risk may be considered to have special needs and may be photolisted under certain circumstances.



- Develop and distribute pamphlets, brochures, displays, and media outreach materials to provide information regarding the services available from the exchange and to promote the adoption of special needs children.
- Compile statistics on: (1) the number of children photolisted during the reporting period and the total number of children currently listed; (2) the number of children photolisted who were placed for adoption within the previous six months and the average number of days that a child was listed prior to adoptive placement; (3) the number of adoption inquiries received for each child photolisted during the reporting period; (4) a semi-annual financial report; and (5) any other information requested by DHFS for program management.

[s. HFS 50.08, Wis. Adm. Code.]

A child may be photolisted at any time before a TPR. In general, adoption agencies must photolist a child with the exchange within 30 days after the child is legally freed for adoption or from the date of an adoptive placement disruption. The information provided for the photolisting includes a photograph of the child, a brief narrative description of the child, a brief social history, and an assessment of the child's current abilities and projected function levels as an adult. [s. HFS 50.09, Wis. Adm. Code.]

### **POST-ADOPTION RESOURCE CENTERS**

According to Adoption Resources of Wisconsin, the post-adoption resource centers do all of the following:

- Provide education, support, and services to adoptive families.
- Improve community awareness of adoption and promote a positive image of adoption and an increased understanding of the unique issues facing adoptive families, especially among human service providers, schools, and health care providers to enable these professionals to better serve adoptive families.
- Increase the availability of services for adoptive families by providing referral services such as: respite care, crisis intervention, child care, legal services, family counseling, support groups related to adoption, and planning for the transition of an adopted child into adulthood.
- Establish collaborative efforts among public and private organizations and the general public to address the needs of adoptive families.