# Wisconsin State Public Defender

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January 16, 2012

Members, Special Committee on Permanency for Young Children in the Child Welfare System
Wisconsin Legislative Council
1 E. Main St.
Madison, WI 53703

Dear Chair Kerkman and Members,

Thank you for allowing the Office of the State Public Defender (SPD) to provide feedback on the legislative bill drafts being considered by the Special Committee on Permanency for Young Children in the Child Welfare System. The SPD was asked to provide a memorandum prior to the January 24 meeting of the committee regarding these drafts. Below are the comments and suggestions on relevant legislation made by SPD attorneys who specialize in cases involving juveniles and children in the child welfare system.

**WLC: 0009/3, relating to CHIPS jurisdiction over a newborn**

The SPD has serious concerns with 0009/3. There is no provision in the draft to allow for a demonstration that improvements in the parent's life, situation, and parenting skills have been made in the relevant time period. Once the parental rights to one child have been terminated under this subsection, any future sibling is automatically subject to a termination of parental rights proceeding in which the parents will be denied the fundamental protections afforded parents in termination of parental rights cases.

At the least, the SPD suggests adding language requiring a judicial warning at disposition of a TPR case that having a child within the next three years will result in a CHIPS petition and possible future termination of parental rights.

**WLC: 0010/3, relating to right to counsel for parents in CHIPS proceedings**

One change made to 0010/3 is a limitation that the SPD would provide representation for the parent only if the child is in-custody. While this is a policy question for the committee to decide, the SPD believes that this provision places a limitation on representation that is neither in CHIPS parents nor the justice system's best interests. Since data is not available as to how many in-home placement CHIPS become in-custody, there is no way to calculate any cost savings. Based on the current draft, there are also questions as to whether the SPD would be authorized to provide representation if a CHIPS placement starts as in-custody but is later changed to in-home under the provisions of the bill.

**WLC: 0011/3, relating to physical, psychological, mental, or developmental examination and AODA assessment of a parent**

The SPD believes it was the committee's intent that the use of these examinations and assessments only occur at the dispositional phase. The provisions contained in 0011/3 only excludes their use at the fact-finding stage.

The SPD suggests language that would say that examinations and assessments may only be used once grounds have been proved under §48.13.

**WLC: 0012/3, relating to TPR ground of continuing CHIPS**

The SPD has concerns that the most recent draft of 0012 goes beyond the intent of the committee in that it provides virtually no ability for parents to prove that they can improve and become good parents to their children.

Current law allows a 9-month period for parents to conclude their conditions of safe return. The initial draft of this bill provided for a look back at the last 15 of 22 months, which would have been consistent with federal ASFA requirements though still a change to current law, to the detriment of SPD clients. 0012/3 provides neither a statutory timeframe beyond 6 months nor a general allowance for "reasonable progress." In many cases it takes longer than six months for a parent to access the services necessary to comply with the terms of the CHIPS order. Other problems for these parents often include mental health, economic, and educational issues.

As drafted, the bill would seem to remove judicial discretion and result in a de facto summary judgment. By creating a provision that does not allow a reasonable time frame in which to comply with the conditions or a generic provision to allow the court to consider "reasonable progress" many more children will need to be placed with concurrent foster families and/or potential adoptive homes. It is unlikely that Wisconsin has the capacity to provide for this increased need.

If the best interests of the child can, in many cases, be preserved by keeping the family unit intact, this legislation would decrease the opportunity for success of a parent once grounds have been found in a CHIPS proceeding. If parents don't feel they have adequate time to accomplish this, they will likely seek to extend the timeframe between fact-finding and disposition, creating an unnecessarily adverse process for CHIPS cases.

The SPD believes that changing this law so drastically could, in many cases, infringe on the substantive due process rights of parents, similar to the Wisconsin Supreme Court's ruling in In re the Termination of Parental Rights to Max G.W. (*State v. Jodie W.*) 2006 WI 93. Courts cannot find parental unfitness based on a condition of return that was impossible for a parent to meet. Id. at ¶ 56. By speeding up the route to TPR for Continuing CHIPS cases, this legislation is going to be subject to many due process challenges because services just won't be available for parents with sufficient time for them to complete them--thus making the condition of return impossible to complete.

One suggestion would be to not start the 6-month clock until necessary services (AODA, education, parenting skills, etc.) have commenced. This change would at least allow the parents to be held harmless for delays created by the unavailability of services.

**WLC: 0022/2, relating to standards for parental participation**

The SPD appreciates the changes that were agreed upon by Senator Lazich and Judge Foley. We remain concerned with the use of the word "waived" in Section 2. This term implies a voluntary and affirmative action taken by the respondent. If included in the final version that becomes law, the entirety of the changes made by this bill will result in a near certain appeal and review based on what we believe is the improper use of the term "waived."

Additionally, Section 3 of the draft seems to have been included as a method of limiting what has been described as "frivolous" appeals filed by respondents' counsel without guidance from their client. While the SPD believes this is an inaccurate assertion, this legislation will likely do the opposite of limiting notice of intent to appeal filings in TPR cases. To provide full and ethical representation, attorneys will be obligated to bring the notice of intent to the TPR dispositional hearing and have it ready for the client to sign if termination is granted. This stands to potentially increase the number of appeals as the decision regarding appeal would be done at a time that is highly emotional and would not allow for a "cooling off" period and full consultation with one's counsel in a private (and less tense) setting than the courtroom presents.

**WLC: 0026/1, relating to eliminating right to jury trial in CHIPS and TPR**

The SPD believes that what is at stake in a termination of parental rights case justifies the highest and one of the most treasured rights in the justice system - right to a trial by jury. Often called a "civil death penalty," a TPR proceeding uses the power of the state to ask that a parent's right to custody of their children be legally ended. This type of proceeding should carry the same ability for a respondent to request a jury trial as a defendant in a criminal misdemeanor case.

Data provided to the committee indicates that in 71 of 72 Wisconsin counties, the average length of time to reach resolution is 8 days longer by jury trial than bench trial. The fact that this gap is closer to 35 days in only one county, Milwaukee, indicates that this issue is intended to address a problem of administration or resources specific to Milwaukee County, not a statewide concern that would call for such a major shift in the law. Eliminating the right to a jury trial in a TPR inappropriately focuses exclusively on Milwaukee's statistics, which are not typical of the experiences in the other 71 counties of the state.

The basic goal of permanency planning or children and families is and ought to be reunification. Removing a right as basic as trial by jury only serves to reduce opportunities to realize this goal.

**WLC: 0028/1, relating to TPR participation by alleged father**

The interest of a parent in his or her child has long been accorded constitutional protection. This draft creates an unreasonable requirement that a father establish his interest prior to the hearing on the petition, and removes a final opportunity to guarantee the rights of the father in a TPR proceeding.

**WLC: 0030/2, relating to CHIPS jurisdiction over a child born with alcohol or controlled substances**

In section 1 of the draft, the SPD recommends including the language on page 2, lines 3 to 7 that is bracketed.

**WLC: 0031/2, relating to expedited appellate procedures for ch. 48 cases**

The SPD is concerned that the manner in which this draft proposes to provide for expedited appeals in Ch. 48 cases is inefficient and technically inaccurate. A separate memo was provided to committee staff with suggestions to clarify the language but preserve the intent of the draft.

**WLC: 0040/1, relating to recognizing tribal customary adoption and suspension of parental rights**

To ensure that the SPD is authorized to provide representation in the suspension proceedings provided for in the draft, a slight change to §48.23(2g) would provide clarity. After "termination" insert "or suspension."

**WLC: 0055/1, relating to revising certain TPR grounds**

The provisions of 0055 that allow for "other evidence" in addition to a judgment of conviction dramatically reduce the standard of proof to terminate parental rights. Left undefined, "or other evidence" could be information that has not been proven under any standard of proof.

Sections 1 and 6 are useful additions to the draft. There are two suggested changes that will clarify and enhance these provisions. First, in section 1 on page 3, line 9 - strike everything after "assault" and insert under s. 948.02(1)(b) or (e), or (2), or 948.09 if that person was under 18 years of age at the time of the sexual assault, was not more than 4 years older or 4 years younger than the victim, and the assault did not involve the use or threat of force or violence." Second, in section 6 on page 6, after "(2)," insert "or s. 948.09."

Submitted by:
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