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## WISCONSIN LEGISLATIVE COUNCIL

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### PERMANENCY FOR YOUNG CHILDREN IN THE CHILD WELFARE SYSTEM

Legislative Council Conference Room  
One East Main Street, Suite 401, Madison

January 24, 2013  
9:45 a.m. – 4:30 p.m.

[The following is a summary of the January 24, 2013 meeting of the Special Committee on Permanency for Young Children in the Child Welfare System. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at <http://www.legis.wisconsin.gov/lc>.]

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#### Call to Order and Roll Call

Chair Kerkman called the committee to order. The roll was called and a quorum was determined to be present.

COMMITTEE MEMBERS PRESENT: Rep. Samantha Kerkman, Chair; Sen. Mary Lazich, Vice Chair; Rep. Jill Billings; and Public Members Colleen Ellingson, Chris Foley, Mark Gumz, Amy Herbst, Molly Jasmer, Esie Leoso-Corbine, Robin Neeson, Rändi Othrow, Ron Rogers, Michelle Snead, and Mary Sowinski.

COMMITTEE MEMBERS Public Members Tamara Grigsby and Laura Maki.

EXCUSED:

COUNCIL STAFF PRESENT: Melissa Schmidt and Margit Kelley, Staff Attorneys.

APPEARANCES: The Honorable Shelley J. Gaylord, Dane County Circuit Court Branch 6; Nancy Rottier, Legislative Liaison and Bridget Bauman, Children's Court Improvement Project Policy Analyst, Office of the Director of State Courts; and Fredi-Ellen Bove, Division Administrator, Division of Safety and Permanence, Department of Children and Families (DCF).

<p><b>*ATTENTION:</b> This was the final meeting of the Special Committee on Permanency for Young Children in the Child Welfare System. Committee members are requested to send any corrections regarding these Minutes to the Legislative Council staff. After the incorporation of any corrections, these Minutes will be considered approved by the committee.</p>
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## **Approval of the Minutes of the Special Committee's November 15, 2012 Meeting**

*Ms. Othrow moved, seconded by Mr. Rogers, that the minutes of the committee's November 15, 2012 meeting be approved. The motion passed on a unanimous voice vote.*

## **Presentation by Director of State Courts**

Ms. Rottier introduced Judge Gaylord and Ms. Bauman, who then briefly described the courts' comments regarding the bill drafts before the committee. The written comments were provided to the committee on January 18, 2013. A link to the courts' comments is available on the committee's website at: <http://www.legis.wisconsin.gov/lc>.

In response to a question from Ms. Neeson, Judge Gaylord commented that, personally, she thinks that having an attorney for a parent in a proceeding for a child in need of protection or services (CHIPS) would have the biggest impact towards meeting the committee's goal of improving permanency outcomes for children in the child welfare system, because when a parent is not represented the action is much harder and takes longer. Ms. Bauman commented that an attorney can also help in cases where the goal is to reunify the family, and the attorney encourages the parent to meet the conditions for return of the child.

In response to a follow-up question from Senator Lazich, Judge Gaylord added that removing the element of looking ahead nine months in the continuing CHIPS ground for termination of parental rights (TPR) would also help to reduce the time for achieving permanency.

Judge Gaylord and Judge Foley commented that, unfortunately, not all fixes are legislative, and improvements in achieving permanency must largely come from training and shifting the culture of professionals in Wisconsin's child welfare system.

In response to one of the court's concerns regarding implementation of the bill drafts before the committee, Chair Kerkman commented that she would direct staff to delay the effective dates by six months.

## **Description of Materials Distributed**

### **Memorandum from DCF and letter from Wisconsin State Public Defender**

Ms. Schmidt and Ms. Kelley briefly described the memorandum from DCF, dated January 23, 2013, regarding the department positions on bill drafts, and the letter from Adam Plotkin, Legislative Liaison for the Wisconsin State Public Defender (SPD), dated January 16, 2013.

Links to DCF's memorandum and SPD's letter are available on the committee's website at: <http://www.legis.wisconsin.gov/lc>.

**WLC: 0021/2, relating to posttermination agreement**

Ms. Kelley described draft WLC: 0021/2, relating to posttermination contact agreements and sharing of a home study report. Ms. Neeson expressed concern with allowing the so-called “open adoption” agreement provisions in child welfare cases, and preferred that these provisions only be available in private adoption cases. Ms. Ellingson, Mr. Rogers, and Ms. Jasmer stated that posttermination contact agreements are already being utilized but not currently enforceable. They explained that the draft would bring clarity and more certainty to the process.

In response to a comment from Ms. Leoso-Corbine, Ms. Kelley noted that the draft requires the court to consider a tribe’s recommendations before it may approve a posttermination contact agreement in the case of an Indian child.

*Ms. Sowinski moved, seconded by Ms. Ellingson, to amend WLC: 0021/2, by incorporating the modifications recommended in the courts’ comments, and to approve the draft, as amended. The motion was approved by a vote of Ayes, 10 (Rep. Kerkman; Sen. Lazich; and Public Members Ellingson, Foley, Gumz, Jasmer, Othrow, Rogers, Snead, and Sowinski); Noes, 4 (Rep. Billings; and Public Members Herbst, Leoso-Corbine, and Neeson); and Absent, 2 (Public Members Grigsby and Maki).*

**WLC: 0027/2, relating to adoption home investigations and confidentiality of change in placement and adoptive parent information**

Ms. Schmidt described draft WLC: 0027/2, relating to adoption home investigations, and confidentiality of change in placement and adoptive parent information. Mr. Rogers commented that a second evaluation after the foster home placement, at the time of adoption, would cause a delay in reaching permanency.

In response to a question from Ms. Neeson, Chair Kerkman recognized Ms. Fredi-Ellen Bove, DCF, from the audience, who commented that the suggestion for this draft in DCF’s memorandum could have the practical effect of requiring counties to utilize an evaluation tool for foster home placement that meets DCF’s requirements for an adoptive placement. Ms. Bove commented that a family should not need a second evaluation, if already done for the foster home placement, but that there should then be assurance that the foster home evaluation was properly qualified. In response to a question from Judge Foley, Ms. Bove stated that she believes many counties already use an evaluation tool for foster home placement that meets DCF’s requirements.

In response to a question from Judge Foley, Ms. Bove agreed that DCF would have a procedure in place for an adoptive parent to opt out of disclosing the adoption records for purposes of facilitating placement for a sibling of the adopted child.

*Ms. Ellingson moved, seconded by Ms. Snead, to amend WLC: 0027/2, by: (1) incorporating the modifications recommended in the courts’ comments; (2) incorporating the modifications recommended in DCF’s memorandum; and (3) applying the confidentiality provisions to all requests as noted in the comment on page 8 of the draft; and to approve the draft, as amended. The motion was approved by a vote of Ayes, 14 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson,*

*Foley, Gumz, Herbst, Jasmer, Leoso-Corbine, Neeson, Othrow, Rogers, Snead, and Sowinski); Noes, 0; and Absent, 2 (Public Members Grigsby and Maki).*

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

Ms. Kelley described draft WLC: 0040/1, relating to recognizing tribal customary adoption and suspension of parental rights. Ms. Leoso-Corbine commented that she had talked with members of other tribes, and each were comfortable with removing the word “permanent” from the definition of a “suspension of parental rights.”

*Ms. Sowinski moved, seconded by Ms. Herbst, to amend WLC: 0040/1, by incorporating the modifications recommended in DCF’s memorandum and SPD’s letter, and to approve the draft, as amended. The motion was approved by a vote of Ayes, 14 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Gumz, Herbst, Jasmer, Leoso-Corbine, Neeson, Othrow, Rogers, Snead, and Sowinski); Noes, 0; and Absent, 2 (Public Members Grigsby and Maki).*

**WLC: 0041/1, relating to adoption petitions filed by counties**

Ms. Schmidt described draft WLC: 0041/1, relating to adoption petitions filed by counties.

*Judge Foley moved, seconded by Ms. Neeson, to approve WLC: 0041/1. The motion was approved by a vote of Ayes, 14 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Gumz, Herbst, Jasmer, Leoso-Corbine, Neeson, Othrow, Rogers, Snead, and Sowinski); Noes, 0; and Absent, 2 (Public Members Grigsby and Maki).*

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

Ms. Kelley described draft WLC: 0010/2, relating to a right to counsel for a parent in a CHIPS proceeding. Chair Kerkman commented that, in order to have a better chance of passing the Legislature, the committee could consider including a sunset provision, with a report back to the Legislature in approximately three years. She commented that this would provide some data on the costs and improvements in achieving permanency, allowing the Legislature to have better oversight on the implementation of the right to counsel for a parent in CHIPS proceedings.

Ms. Bove cautioned that performance trends on the length of time to achieve permanency may or may not be due to the right to counsel, as DCF has other improvement initiatives, and other factors could contribute to the data.

In response to a question from Representative Billings, Chair Kerkman stated that a sunset provision would mean that the Legislature would have to act to reauthorize the right to counsel for a parent in a CHIPS proceeding.

Chair Kerkman commented that she was confident that the right to counsel for a parent in a CHIPS proceeding would benefit children struggling to achieve permanency. Senator Lazich commented that allowing the right to counsel for a parent would help the committee’s goal of speeding

the path to permanency, and that while there may be new dollars spent up front, there would be a cost savings and benefit to children in the long run. Judge Foley and Ms. Sowinski commented that many counties currently provide counsel for a parent in a CHIPS proceeding at the county's expense; they stated that, as such, the cost to provide representation would not increase but shift from the counties to the state, and if provided in all cases, there would be a cost savings and a benefit to children. Mr. Rogers commented that his county would likely save 10% of their budget by the second year of implementing a parent's right to counsel, by improving the permanency outcomes, and that if just seven other counties realized the same savings, those eight counties alone would offset the cost estimated in the draft. He further commented that if the measure helps children find permanency more quickly, that is the goal of the committee.

Many committee members expressed reservations about including a sunset provision, commenting that the committee members and those presenting to the committee agreed that a parent's right to counsel would considerably improve the CHIPS process.

*Ms. Sowinski moved, seconded by Ms. Snead, to amend WLC: 0010/3, by: (1) requiring a report to both houses of the Legislature and the Joint Committee on Finance from DCF and SPD by January 1, 2017; (2) sunsetting the provisions on June 30, 2017; and (3) clarifying that once the right to counsel for a parent is triggered by a child's removal from the home the right continues throughout the CHIPS proceeding whether or not the child remains in an out-of-home placement; and to approve the draft, as amended. The motion was approved by a vote of Ayes, 13 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Gumz, Herbst, Jasmer, Neeson, Othrow, Rogers, Snead, and Sowinski); Noes, 0; and Absent, 3 (Public Members Grigsby, Leoso-Corbine, and Maki).*

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

Ms. Kelley described draft WLC: 0026/1, relating to eliminating the right to a jury trial in a CHIPS or TPR proceeding. Ms. Sowinski suggested that committee members might prefer to separate the questions for eliminating the right to a jury trial, voting separately for CHIPS proceedings and for TPR proceedings.

Ms. Othrow commented that it is bizarre under the current system that in a CHIPS proceeding a parent has a right to a jury trial, but has no right to counsel. She stated that in a TPR proceeding, however, there should be a right to a jury trial because TPR is akin to the death penalty for a family. In response to a question from Representative Billings, Ms. Bove commented that DCF does not have a concern with eliminating the right to a jury trial in a CHIPS proceeding, but that DCF would be concerned about eliminating that right in a TPR proceeding, because the rights of a parent and a family are cherished as a fundamental right.

Judge Foley commented that in his experience, and in the experience from Arizona, a jury is equally likely as a judge to find grounds for a TPR. He noted that the issues that must be resolved by a judge or jury in a TPR proceeding are usually not truly factual questions that would warrant a jury, but rather questions about whether an agency made reasonable efforts to reunify the family.

Mr. Rogers noted that most children who are removed from the home are reunified with the family and that the system works very hard with all families. He said that for the smaller number of children who

are not reunified, eliminating a jury trial in a TPR proceeding would speed up the process of reaching a permanent home. Chair Kerkman commented that the delay caused by a jury trial is not just the duration of the trial itself, but the delay in being able to schedule a jury trial on the court's docket.

Ms. Snead commented that the delay in achieving permanency because of a jury trial is also due to the increased number of grounds for appeal that can occur when a jury is involved. She also noted that a parent has many opportunities throughout the CHIPS process to show that they have met the conditions for the safe return of the child, before the matter gets to a TPR.

In response to a question, Chair Kerkman cited data in the courts' memorandum to the committee dated October 24, 2012, showing that in CHIPS cases a jury trial occurred 41 times in 2007, 50 times in 2008, 56 times in 2009, and 51 times in 2010. She also cited the data showing that in TPR cases a jury trial occurred 131 times in 2007, 101 times in 2008, 145 times in 2009, and 133 times in 2010.

*Ms. Sowinski moved, seconded by Ms. Othrow, to approve WLC: 0026/1 in its application to a CHIPS proceeding. The motion was approved by a vote of Ayes, 12 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Herbst, Jasmer, Neeson, Othrow, Rogers, Snead, and Sowinski); Noes, 1 (Public Member Gumz); and Absent, 3 (Public Members Grigsby, Leoso-Corbine, and Maki).*

*Ms. Sowinski moved, seconded by Ms. Othrow, to approve WLC: 0026/1 in its application to a TPR proceeding. The motion was approved by a vote of Ayes, 9 (Rep. Kerkman; Sen. Lazich; and Public Members Ellingson, Foley, Herbst, Jasmer, Rogers, Snead, and Sowinski); Noes, 4 (Rep. Billings; and Public Members Gumz, Neeson, and Othrow); and Absent, 3 (Public Members Grigsby, Leoso-Corbine, and Maki).*

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

Ms. Schmidt described draft WLC: 0009/3, relating to CHIPS jurisdiction over a newborn. Mr. Gumz expressed concern that the draft does not adequately recognize that a parent can improve their circumstances. He suggested that, at a minimum, a parent should be given a warning at TPR that the termination could be future grounds for a CHIPS or TPR for another child born within the next three years. Ms. Othrow commented that if there are safety concerns for a child, other CHIPS grounds could be available, such as the grounds of abuse or neglect.

Ms. Sowinski stated that she agreed with the courts' comment that counsel would be especially important for a parent under this CHIPS ground because this ground would be amenable to summary judgment procedures. In response to a question from Representative Billings, Ms. Sowinski noted that for this ground to operate, a person would have to call the agency with concerns for the child, the agency would screen the report before doing an investigation, the agency would have to find a safety issue with the family in order to take the child into custody, and the court would have to agree at the temporary physical custody hearing that custody should be continued for the child under other grounds. Ms. Sowinski stated that only after that process could the petitioner move to amend the CHIPS grounds to be based on a prior TPR within the three years prior to the child's birth, which would then be a summary judgment question based on documentation of the events required for the ground (prior TPR, birth of another child within three years, and the temporary physical custody order for that child).

Judge Foley commented that the draft's ground is not based on a prior TPR alone, because of the required element that the court must have found that continued custody was necessary for the child under other grounds at the temporary physical custody hearing.

*Ms. Sowinski moved, seconded by Judge Foley, to amend WLC: 0009/3, by allowing the ground only if the parent has a right to counsel in the CHIPS proceedings, and by requiring an oral and written warning at the first TPR that it could be a basis within the next three years for a new CHIPS or TPR proceeding, and to approve the draft, as amended. The motion was approved by a vote of Ayes, 10 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Jasmer, Neeson, Rogers, Snead, and Sowinski); Noes, 3 (Public Members Gumz, Herbst, and Othrow); and Absent, 3 (Public Members Grigsby, Leoso-Corbine, and Maki).*

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

Ms. Sowinski and Ms. Othrow asked that draft WLC: 0011/3, relating to physical, psychological, mental, or developmental examination and AODA assessment of a parent, be withdrawn. Chair Kerkman withdrew the draft from consideration by the committee.

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

Ms. Kelley described draft WLC: 0012/3, relating to the TPR ground of continuing CHIPS. Ms. Sowinski stated that the concerns from DCF and SPD would not occur, because logistically it would be unlikely, at least in her county, to bring a TPR petition six months after a child has been removed from the home. Ms. Sowinski suggested, however, that, in the interest of allaying any concern of a TPR petition being brought too soon, the ground could include a requirement that if the child has not yet been placed outside the home for 15 of the last 22 months the petitioner must show that there is a substantial likelihood that the parent will not meet the conditions for the safe return of the child as of the date when the child reaches the 15<sup>th</sup> of the last 22 months outside the home.

Ms. Neeson commented that many children would benefit from this draft.

*Ms. Sowinski moved, seconded by Ms. Neeson, to amend WLC: 0012/3, by incorporating Ms. Sowinski's suggested language, and to approve the draft, as amended. The motion was approved by a vote of Ayes, 11 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Herbst, Jasmer, Neeson, Rogers, Snead, and Sowinski); Noes, 2 (Public Members Gumz and Othrow); and Absent, 3 (Public Members Grigsby, Leoso-Corbine, and Maki).*

**WLC: 0013/3, relating to when no reasonable efforts are required**

Ms. Kelley described draft WLC: 0013/3, relating to when no reasonable efforts are required, and briefly described the courts' comments that suggest revising the language generally from a court making an "order prohibiting reasonable efforts" to a court's "determination that an agency is not required to make reasonable efforts," and removing the draft's authority to suspend reasonable efforts to reunify a family. In

response to a question from Ms. Herbst, Judge Foley stated that currently a court “may” determine that reasonable efforts for reunification are not necessary in egregious circumstances, and the draft shifts the standard to provide that a court “shall” determine that reasonable efforts are not necessary in those circumstances, unless the court explicitly finds that such efforts would be in the child’s best interests.

*Judge Foley moved, seconded by Senator Lazich, to amend WLC: 0013/3, by using Attachment A to the courts’ comments, and to approve the draft, as amended. The motion was approved by a vote of Ayes, 13 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Gumz, Herbst, Jasmer, Neeson, Othrow, Rogers, Snead, and Sowinski); Noes, 0; and Absent, 3 (Public Members Grigsby, Leoso-Corbine, and Maki).*

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

Ms. Kelley described draft WLC: 0022/2, relating to standards for parental participation.

Judge Foley stated that he agrees with the suggestions in the courts’ comments. He stated that he would further suggest that a parent who had waived counsel (whether presumed or actively waived) should also be able to waive counsel again (whether presumed or actively waived) in the provision reinstating the right to counsel for a motion to vacate or reconsider a default judgment.

Ms. Bove stated that DCF suggests excluding minor parents from waiving counsel by a failure to appear. Ms. Bauman stated that a guardian ad litem is required for a minor parent only in a voluntary TPR, and not in an involuntary TPR.

*Judge Foley moved, seconded by Senator Lazich, to amend WLC: 0022/2, by: (1) incorporating the modifications recommended in the courts’ comments; (2) incorporating Judge Foley’s suggested language allowing a future waiver of counsel; and (3) allowing a presumed waiver of counsel from a failure to appear only in the case of an adult parent; and to approve the draft, as amended. The motion was approved by a vote of Ayes, 12 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Herbst, Jasmer, Neeson, Othrow, Rogers, Snead, and Sowinski); Noes, 1 (Public Member Gumz); and Absent, 3 (Public Members Grigsby, Leoso-Corbine, and Maki).*

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

Ms. Kelley described draft WLC: 0028/1, relating to TPR participation by an alleged father. Ms. Kelley added that under current law, in at least some cases an alleged father must be given notice, with the notice of the TPR action, that he may file a declaration of paternity within 21 days, and he must be given notice of the consequences of a failure to file a declaration of paternity. She further stated that current law includes a declaration that the act of sexual intercourse puts a person on notice of potential parenthood and that the law provides that it is a parent’s duty to protect the parent’s own rights and interests.

Judge Foley stated that he accepted the suggestion in the courts’ comments to revise the familial relationship standard, and stated that of the options given in the courts’ second suggestion he prefers the option that allows an alleged father to participate in TPR proceedings if he establishes that he was deprived of the opportunity to assume parental responsibility for the child.



Ms. Herbst commented that there could be fathers who legitimately do not know about the child, and who would not be allowed to participate in the TPR even if he could be a good father and would be good for the child's life.

Ms. Neeson commented that a father's ability to participate in a TPR proceeding, and potentially assume the parenting of the child, is a different question than wanting to simply know who the biological parents are, particularly when a child has already been parented in the proposed adoptive home and has bonded and connected with that family.

*Judge Foley moved, seconded by Ms. Sowinski, to amend WLC: 0028/1, by incorporating the modifications recommended in the courts' comments numbers 1. and 2.a., and to approve the draft, as amended. The motion was approved by a vote of Ayes, 12 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Gumz, Jasmer, Neeson, Othrow, Rogers, Snead, and Sowinski); Noes, 1 (Public Member Herbst); and Absent, 3 (Public Members Grigsby, Leoso-Corbine, and Maki).*

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

Chair Kerkman withdrew draft WLC: 0030/2 from consideration by the committee.

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

Chair Kerkman withdrew draft WLC: 0031/2 from consideration by the committee.

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

Ms. Kelley described draft WLC: 0055/1, relating to revising certain TPR grounds. In response to a question from Mr. Gumz, Ms. Sowinski stated that the standard for the burden of proof in the revised TPR grounds would continue to be clear and convincing evidence, as it is under current law.

*Ms. Sowinski moved, seconded by Judge Foley, to approve WLC: 0055/1. The motion was approved by a vote of Ayes, 10 (Reps. Kerkman and Billings; Sen. Lazich; and Public Members Ellingson, Foley, Jasmer, Neeson, Rogers, Snead, and Sowinski); Noes, 3 (Public Members Gumz, Herbst, and Othrow); and Absent, 3 (Public Members Grigsby, Leoso-Corbine, and Maki).*

[Staff Note: In the final combined draft that includes the provisions of WLC: 0055/1, the three exceptions relating to sexual assault by a minor will be corrected to include all nonviolent sexual assaults of a minor, and to conform identical language for these exceptions.]

**WLC: 0063/1, relating to requirements to locate relatives of a child placed outside of his or her home and disclosure of social services records**

Ms. Schmidt described draft WLC: 0063/1, relating to locating relatives. After a brief discussion, Chair Kerkman withdrew this draft from consideration by the committee.

### **Discussion of Committee Assignment**

Chair Kerkman directed staff to make all approved amendments to the drafts, and to combine the approved drafts, as amended, by subject area. She asked members to quickly return the mail ballot recommending the final combined drafts for introduction to the Legislature, in anticipation of the Joint Legislative Council's next meeting date.

### **Other Business**

There was no other business before the committee.

### **Adjournment**

The meeting was adjourned at 4:30 p.m.

MSK:ksm