



## 2019 ASSEMBLY BILL 559

October 23, 2019 - Introduced by Representatives DITTRICH, MURPHY, FELZKOWSKI, JAMES, KULP, KURTZ, MAGNAFICI, MILROY, RAMTHUN, TUSLER, TRANEL and THIESFELDT. Referred to Committee on Family Law.

\*\*\*AUTHORS SUBJECT TO CHANGE\*\*\*

1     **AN ACT** *to repeal* 48.422 (4); *to amend* 48.31 (2), 48.31 (4), 48.356 (1), 48.38 (5)  
2           (a), 48.38 (5m) (a), 48.415 (intro.), 48.415 (2) (a) 1., 48.415 (4) (a), 48.415 (6) (b),  
3           48.422 (1), 48.422 (5), 48.424 (3), 48.424 (4) (intro.), 938.356 (1), 938.38 (5) (a)  
4           and 938.38 (5m) (a); and *to create* 48.02 (5e), 48.13 (15), 48.415 (1) (a) 4., 48.415  
5           (1) (a) 5., 48.415 (3m) and 48.415 (11) of the statutes; **relating to:** grounds for  
6           finding a child in need of protection or services or for terminating parental  
7           rights, right to a jury trial in a termination of parental rights proceeding, and  
8           permanency plan reviews.

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### ***Analysis by the Legislative Reference Bureau***

This bill changes the grounds for finding that a child is in need of protection or services under the Children's Code and for involuntarily terminating parental rights (TPR), eliminates the right to a jury trial in a TPR proceeding, and changes the process for permanency plan reviews under the Children's Code and Juvenile Justice Code.

#### ***Grounds for CHIPS***

Under current law, the court assigned to exercise jurisdiction under the Children's Code (juvenile court) has exclusive original jurisdiction over a child who is alleged to be in need of protection or services (CHIPS) that can be ordered by the

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juvenile court and who meets certain grounds. This bill creates a new ground for CHIPS where a child is found to be a drug-affected child. Under the bill, a drug-affected child is defined as a child who suffered prenatal exposure to a controlled substance or a child whose basic needs and safety have been adversely affected by a parent's or guardian's chronic and severe use of alcohol or a controlled substance.

***Grounds for TPR***

Under current law, in a proceeding for involuntary TPR, the juvenile court must determine whether grounds exist for TPR. One of the grounds for TPR under current law is failure to assume parental responsibility for the child, which is established by proving that the parent or the person who may be the parent of the child has not had a substantial parental relationship with the child. "Substantial parental relationship" is defined in current law as the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child. In evaluating whether a person has had a substantial parental relationship with the child, current law allows the juvenile court to consider certain factors, including whether the person has expressed concern for or interest in the support, care, or well-being of the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy.

This bill changes the factor related to expressing concern for or interest in the support, care, or well-being of the child to whether the person has provided care or support for the child. The bill eliminates the factor of whether the person has expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy. The bill instead provides that proving that a person who is or may be the father of the child failed to provide care and support for the mother during her pregnancy, without reasonable cause, establishes abandonment of a child, which is a ground for TPR under current law. Also under the bill, proving that a parent has failed without reasonable cause to pay court-ordered payments of child support establishes abandonment of the child.

Other grounds for TPR under current law include 1) continuing need of protection or services (continuing CHIPS), if a child is placed outside of the home for 15 of the last 22 months under a court order; or 2) a continuing denial of periods of physical placement or visitation, if a court order denying physical placement or visitation has been in place for one year. Under current law, the timeline for both of these grounds begins when a court order is entered in a CHIPS or juvenile in need of protection or services (JIPS) proceeding. Under this bill, the timeline for these two grounds can also begin when the court enters an order for temporary custody, when a child or juvenile is placed outside the home under a consent decree, or when a court-approved permanency plan places a child outside the home.

The bill creates a new ground for involuntary TPR where the child is a drug-affected child, which is established by showing that the child has been found to be a drug-affected child in a CHIPS proceeding. Under the bill, parental rights may not be terminated if a parent proves, by a preponderance of the evidence, that he or she enrolled in a substance abuse treatment or recovery program within 90

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days of the birth of the child or the placement of the child outside of the home under a CHIPS order, and that he or she continues to maintain substantial compliance with the substance abuse treatment or recovery program.

This bill also creates a new ground for TPR based on parental incarceration, which must be established by proving 1) that the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside the child's home pursuant to one or more court orders containing notice of the grounds for TPR that may be applicable and the conditions necessary for the child to be returned to the home; 2) that the parent is presently incarcerated; and 3) that the parent is likely to be incarcerated for a substantial period of the child's minority. In determining whether the parent is likely to be incarcerated for a substantial period of the child's minority, the court may consider a parent's history of repeated incarceration.

***Right to a jury trial***

Under current law, in a TPR proceeding, the juvenile court must hold a fact-finding hearing to determine if there are any grounds for the TPR. Under current law, any party to a TPR proceeding whose rights may be affected by the TPR order may demand a jury trial for this fact-finding hearing. This bill eliminates the right to a jury trial for the fact-finding hearing.

***Permanency plan reviews***

Under current law, within six months after a child is removed from his or her home in a proceeding under the Children's Code or the Juvenile Justice Code and every 12 months after that, the permanency plan is reviewed by the juvenile court or by a panel that is appointed by the juvenile court or by a child welfare agency. Within six months of the initial review and every 12 months after that, the permanency plan is reviewed in a hearing before the juvenile court. Under this bill, the initial six-month review and the reviews done every 12 months after that six-month review are done in a hearing before the juvenile court.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

- 1           **SECTION 1.** 48.02 (5e) of the statutes is created to read:
- 2           48.02 (5e) "Drug-affected child" means any of the following:
- 3           (a) A child who suffered prenatal exposure to a controlled substance or alcohol,
- 4           used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms
- 5           in the child at birth, a positive result from a toxicology test of the mother or child at

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1 the time of the child's birth, or developmental delays or other symptoms during the  
2 child's first year of life that have been diagnosed as a fetal alcohol spectrum disorder  
3 or as caused by prenatal exposure to a controlled substance.

4 (b) A child whose basic needs and safety have been adversely affected by a  
5 parent's or guardian's chronic and severe use of alcohol or a controlled substance.

6 **SECTION 2.** 48.13 (15) of the statutes is created to read:

7 48.13 (15) The child is a drug-affected child.

8 **SECTION 3.** 48.31 (2) of the statutes is amended to read:

9 48.31 (2) The A hearing on a termination of parental rights petition shall be  
10 to the court. A hearing on a petition under s. 48.13 or 48.133 shall be to the court  
11 unless the child, the child's parent, guardian, or legal custodian, the unborn child's  
12 guardian ad litem, or the expectant mother of the unborn child exercises the right  
13 to a jury trial by demanding a jury trial at any time before or during the plea hearing.  
14 If a jury trial is demanded in a proceeding under s. 48.13 or 48.133, the jury shall  
15 consist of 6 persons. If a jury trial is demanded in a proceeding under s. 48.42, the  
16 jury shall consist of 12 persons unless the parties agree to a lesser number. Chapters  
17 756 and 805 shall govern the selection of jurors. If the hearing involves a child victim  
18 or witness, as defined in s. 950.02, the court may order that a deposition be taken by  
19 audiovisual means and allow the use of a recorded deposition under s. 967.04 (7) to  
20 (10) and, with the district attorney, shall comply with s. 971.105. At the conclusion  
21 of the a hearing on a termination of parental rights petition, the court shall make a  
22 determination of the facts. At the conclusion of a hearing on a petition under s. 48.13  
23 or 48.133, the court or jury shall make a determination of the facts, except that in a  
24 case alleging a child or an unborn child to be in need of protection or services under  
25 s. 48.13 or 48.133, the court shall make the determination under s. 48.13 (intro.) or

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1 48.133 relating to whether the child or unborn child is in need of protection or  
2 services that can be ordered by the court. If the court finds that the child or unborn  
3 child is not within the jurisdiction of the court or, in a case alleging a child or an  
4 unborn child to be in need of protection or services under s. 48.13 or 48.133, that the  
5 child or unborn child is not in need of protection or services that can be ordered by  
6 the court, or if the court or jury finds that the facts alleged in the petition have not  
7 been proved, the court shall dismiss the petition with prejudice.

8 **SECTION 4.** 48.31 (4) of the statutes is amended to read:

9 48.31 (4) The court shall make findings of fact and conclusions of law relating  
10 to the allegations of a petition filed under s. 48.42. The court or jury shall make  
11 findings of fact and the court shall make conclusions of law relating to the allegations  
12 of a petition filed under s. 48.13, or 48.133 ~~or 48.42~~, except that the court shall make  
13 findings of fact relating to whether the child or unborn child is in need of protection  
14 or services ~~which~~ that can be ordered by the court. In cases alleging a child to be in  
15 need of protection or services under s. 48.13 (11), the court may not find that the child  
16 is suffering emotional damage unless a licensed physician specializing in psychiatry  
17 or a licensed psychologist appointed by the court to examine the child has testified  
18 at the hearing that in his or her opinion the condition exists, and adequate  
19 opportunity for the cross-examination of the physician or psychologist has been  
20 afforded. The judge may use the written reports if the right to have testimony  
21 presented is voluntarily, knowingly, and intelligently waived by the guardian ad  
22 litem or legal counsel for the child and the parent or guardian. In cases alleging a  
23 child to be in need of protection or services under s. 48.13 (11m) or an unborn child  
24 to be in need of protection or services under s. 48.133, the court may not find that the  
25 child or the expectant mother of the unborn child is in need of treatment and

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1 education for needs and problems related to the use or abuse of alcohol beverages,  
2 controlled substances, or controlled substance analogs and its medical, personal,  
3 family, or social effects unless an assessment for alcohol and other drug abuse that  
4 conforms to the criteria specified under s. 48.547 (4) has been conducted by an  
5 approved treatment facility.

6 **SECTION 5.** 48.356 (1) of the statutes is amended to read:

7 48.356 (1) Whenever the court orders a child to be placed outside his or her  
8 home, orders an expectant mother of an unborn child to be placed outside of her  
9 home, or denies a parent visitation because the child or unborn child has been  
10 adjudged to be in need of protection or services under s. 48.21 (4), 48.32, 48.345,  
11 48.347, 48.357, 48.363, or 48.365 and whenever the court reviews a permanency plan  
12 under s. 48.38 (5m), the court shall orally inform the parent or parents who appear  
13 in court or the expectant mother who appears in court of any grounds for termination  
14 of parental rights under s. 48.415 which may be applicable and of the conditions  
15 necessary for the child or expectant mother to be returned to the home or for the  
16 parent to be granted visitation.

17 **SECTION 6.** 48.38 (5) (a) of the statutes is amended to read:

18 48.38 (5) (a) Except as provided in s. 48.63 (5) (d), the court or a panel appointed  
19 under par. (ag) shall review the permanency plan for each child for whom a  
20 permanency plan is required under sub. (2) in the manner provided in this subsection  
21 not later than 6 months after the date ~~on which the child was first removed from his~~  
22 ~~or her home~~ of a hearing held under sub. (5m) and every 6 months after a previous  
23 review under this subsection for as long as the child is placed outside the home,  
24 except that for the review ~~that is required to be conducted not later than 12 months~~  
25 ~~after the child was first removed from his or her home and the reviews that are~~

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1 required to be conducted every 12 months after ~~that review~~ the initial hearing under  
2 sub. (5m), the court shall hold a hearing under sub. (5m) to review the permanency  
3 plan, ~~which.~~ The hearing may be instead of or in addition to the review under this  
4 subsection. The 6-month and 12-month periods referred to in this paragraph  
5 include trial reunifications under s. 48.358.

6 **SECTION 7.** 48.38 (5m) (a) of the statutes is amended to read:

7 48.38 **(5m)** (a) The court shall hold a hearing to review the permanency plan  
8 and to make the determinations specified in sub. (5) (c) for each child for whom a  
9 permanency plan is required under sub. (2) no later than ~~12~~ 6 months after the date  
10 on which the child was first removed from the home and every 12 months after a  
11 previous hearing under this subsection for as long as the child is placed outside the  
12 home. The 6-month and 12-month periods referred to in this paragraph include  
13 trial reunifications under s. 48.358.

14 **SECTION 8.** 48.415 (intro.) of the statutes is amended to read:

15 **48.415 Grounds for involuntary termination of parental rights.** (intro.)  
16 At the fact-finding hearing the court ~~or jury~~ shall determine whether grounds exist  
17 for the termination of parental rights. If the child is an Indian child, the court ~~or jury~~  
18 shall also determine at the fact-finding hearing whether continued custody of the  
19 Indian child by the Indian child's parent or Indian custodian is likely to result in  
20 serious emotional or physical damage to the Indian child under s. 48.028 (4) (e) 1. and  
21 whether active efforts under s. 48.028 (4) (e) 2. have been made to prevent the  
22 breakup of the Indian child's family and whether those efforts have proved  
23 unsuccessful, unless partial summary judgment on the grounds for termination of  
24 parental rights is granted, in which case the court shall make those determinations

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1 at the dispositional hearing. Grounds for termination of parental rights shall be one  
2 of the following:

3 **SECTION 9.** 48.415 (1) (a) 4. of the statutes is created to read:

4 48.415 (1) (a) 4. That a person who is or may be the father of the child failed  
5 without reasonable cause to provide care and support for the mother during her  
6 pregnancy.

7 **SECTION 10.** 48.415 (1) (a) 5. of the statutes is created to read:

8 48.415 (1) (a) 5. That the parent has failed without reasonable cause to pay  
9 court-ordered payments of child support.

10 **SECTION 11.** 48.415 (2) (a) 1. of the statutes is amended to read:

11 48.415 (2) (a) 1. That the child has been adjudged to be a child or an unborn  
12 child in need of protection or services and placed, or continued in a placement,  
13 outside his or her home pursuant to one or more court orders under s. 48.21 (4), 48.32,  
14 48.345, 48.347, 48.357, 48.363, 48.365, 48.38, 938.21 (4), 938.32, 938.345, 938.357,  
15 938.363 or, 938.365, or 938.38 containing the notice required by s. 48.356 (2) or  
16 938.356 (2).

17 **SECTION 12.** 48.415 (3m) of the statutes is created to read:

18 48.415 (3m) PARENTAL INCARCERATION. Parental incarceration, which shall be  
19 established by proving all of the following:

20 (a) That the child has been adjudged to be in need of protection or services and  
21 placed, or continued in a placement, outside his or her home pursuant to one or more  
22 court orders under s. 48.345, 48.357, 48.363, or 48.365 containing the notice required  
23 under s. 48.356 (2).

24 (b) That the parent is incarcerated at the time of the fact-finding hearing.



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1 (c) That the parent is likely to continue to be incarcerated for a substantial  
2 period of the child's minority. In determining whether the parent is likely to continue  
3 to be incarcerated for a substantial period of the child's minority, the court may  
4 consider whether the parent has a history of repeated incarceration.

5 **SECTION 13.** 48.415 (4) (a) of the statutes is amended to read:

6 48.415 (4) (a) That the parent has been denied periods of physical placement  
7 by court order in an action affecting the family or has been denied visitation under  
8 an order under s. 48.21 (4), 48.32, 48.345, 48.355 (3), 48.363, 48.365, 48.38, 938.21  
9 (4), 938.32, 938.345, 938.363 or, 938.365, or 938.38 containing the notice required by  
10 s. 48.356 (2) or 938.356 (2).

11 **SECTION 14.** 48.415 (6) (b) of the statutes is amended to read:

12 48.415 (6) (b) In this subsection, "substantial parental relationship" means the  
13 acceptance and exercise of significant responsibility for the daily supervision,  
14 education, protection, and care of the child. In evaluating whether the person has  
15 had a substantial parental relationship with the child, the court may consider such  
16 factors, including, ~~but not limited to,~~ whether the person has ~~expressed concern for~~  
17 ~~or interest in the~~ provided care or support, care or well-being of ~~for the child, and~~  
18 whether the person has neglected or refused to provide care or support for the child  
19 ~~and whether, with respect to a person who is or may be the father of the child, the~~  
20 ~~person has expressed concern for or interest in the support, care or well-being of the~~  
21 ~~mother during her pregnancy.~~

22 **SECTION 15.** 48.415 (11) of the statutes is created to read:

23 48.415 (11) **DRUG-AFFECTED CHILD.** The child is a drug-affected child, which  
24 shall be established by proving that the child has been adjudged to be a child in need

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1 of protection or services under s. 48.13 (15), unless the parent proves all of the  
2 following by a preponderance of the evidence:

3 (a) That the parent enrolled in a substance abuse treatment or recovery  
4 program within 90 days of the birth of the child or placement of the child outside of  
5 the home pursuant to a dispositional order under s. 48.345.

6 (b) That the parent continues to maintain substantial compliance with a  
7 substance abuse treatment or recovery program.

8 **SECTION 16.** 48.422 (1) of the statutes is amended to read:

9 48.422 (1) Except as provided in s. 48.42 (2g) (ag), the hearing on the petition  
10 to terminate parental rights shall be held within 30 days after the petition is filed.  
11 At the hearing on the petition to terminate parental rights the court shall determine  
12 whether any party wishes to contest the petition and inform the parties of their  
13 rights under ~~sub. (4) and~~ s. 48.423.

14 **SECTION 17.** 48.422 (4) of the statutes is repealed.

15 **SECTION 18.** 48.422 (5) of the statutes is amended to read:

16 48.422 (5) Any nonpetitioning party, including the child, shall be granted a  
17 continuance of the hearing for the purpose of consulting with an attorney ~~on the~~  
18 ~~request for a jury trial or~~ concerning a request for the substitution of a judge.

19 **SECTION 19.** 48.424 (3) of the statutes is amended to read:

20 48.424 (3) ~~If the facts are determined by a jury, the jury may only~~ The court  
21 shall decide whether any grounds for the termination of parental rights have been  
22 proved ~~and,~~ whether the allegations specified in s. 48.42 (1) (e) have been proved in  
23 cases involving the involuntary termination of parental rights to an Indian child.  
24 ~~The court shall decide,~~ and what disposition is in the best interest of the child.

25 **SECTION 20.** 48.424 (4) (intro.) of the statutes is amended to read:

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1           48.424 (4) (intro.) If the court finds grounds for the termination of parental  
2 rights ~~are found by the court or jury~~, the court shall find the parent unfit. A finding  
3 of unfitness shall not preclude a dismissal of a petition under s. 48.427 (2). Except  
4 as provided in s. 48.23 (2) (b) 3., the court shall then proceed immediately to hear  
5 evidence and motions related to the dispositions enumerated in s. 48.427. Except as  
6 provided in s. 48.42 (2g) (ag), the court may delay making the disposition and set a  
7 date for a dispositional hearing no later than 45 days after the fact-finding hearing  
8 if any of the following apply:

9           **SECTION 21.** 938.356 (1) of the statutes is amended to read:

10           938.356 (1) ORAL WARNING. Whenever the court orders a juvenile to be placed  
11 outside his or her home or denies a parent visitation because the juvenile has been  
12 adjudged to be delinquent or to be in need of protection or services under s. 938.21  
13 (4), 938.32, 938.34, 938.345, 938.357, 938.363, or 938.365 and whenever the court  
14 reviews a permanency plan under s. 938.38 (5m), the court shall orally inform the  
15 parent or parents who appear in court of any grounds for termination of parental  
16 rights under s. 48.415 which may be applicable and of the conditions necessary for  
17 the juvenile to be returned to the home or for the parent to be granted visitation.

18           **SECTION 22.** 938.38 (5) (a) of the statutes is amended to read:

19           938.38 (5) (a) Except as provided in s. 48.63 (5) (d), the court or a panel  
20 appointed under par. (ag) shall review the permanency plan for each juvenile for  
21 whom a permanency plan is required under sub. (2) in the manner provided in this  
22 subsection not later than 6 months after the date ~~on which the juvenile was first~~  
23 ~~removed from his or her home~~ of a hearing held under sub. (5m) and every 6 months  
24 after a previous review under this subsection for as long as the juvenile is placed  
25 outside the home, except that for the review ~~that is required to be conducted not later~~

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1 ~~than 12 months after the juvenile was first removed from his or her home and the~~  
2 ~~reviews that are required to be conducted every 12 months after that review the~~  
3 ~~initial hearing under sub. (5m)~~, the court shall hold a hearing under sub. (5m) to  
4 review the permanency plan. The hearing may be instead of or in addition to the  
5 review under this subsection. The 6-month and 12-month periods referred to in this  
6 paragraph include trial reunifications under s. 938.358.

7 **SECTION 23.** 938.38 (5m) (a) of the statutes is amended to read:

8 938.38 **(5m)** (a) The court shall hold a hearing to review the permanency plan  
9 and to make the determinations specified in sub. (5) (c) for each juvenile for whom  
10 a permanency plan is required under sub. (2) no later than ~~12~~ 6 months after the date  
11 on which the juvenile was first removed from the home and every 12 months after  
12 a previous hearing under this subsection for as long as the juvenile is placed outside  
13 the home. The 6-month and 12-month periods referred to in this paragraph include  
14 trial reunifications under s. 938.358.

15 **SECTION 24. Nonstatutory provisions.**

16 (1) PARENTAL INCARCERATION. A court assigned to exercise jurisdiction under ch.  
17 48 may terminate parental rights to a child who was ordered to be placed outside the  
18 home before the effective date of this subsection on the grounds specified under s.  
19 48.415 (3m) notwithstanding that the parent was not notified of those grounds under  
20 s. 48.356 (2) when that placement was ordered so long as the parent is notified of  
21 those grounds under s. 48.356 (2) before the filing of the termination of parental  
22 rights petition.

23 **SECTION 25. Initial applicability.**

