



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-4645/1
EAW:ahe

2017 ASSEMBLY BILL 784

December 27, 2017 - Introduced by Representatives BALLWEG, SUBECK, SNYDER, DOYLE, KATZMA, BILLINGS, NOVAK, MEYERS, PRONSCHINSKE, CROWLEY, RODRIGUEZ, KITCHENS, ANDERSON, BARCA, BERCEAU, BORN, E. BROOKS, CONSIDINE, FIELDS, FELZKOWSKI, GENRICH, KERKMAN, KOLSTE, KRUG, KULP, MURSAU, OHNSTAD, PETERSEN, PETRYK, RIPP, ROHRKASTE, SARGENT, SCHRAA, SINICKI, SPIROS, SPREITZER, STEINEKE, SWEARINGEN, C. TAYLOR, TAUCHEN, THIESFELDT, TRANEL, VANDERMEER, VRUWINK and EDMING, cosponsored by Senators FEYEN, JOHNSON, BEWLEY, LARSON, OLSEN, RINGHAND, L. TAYLOR, VINEHOUT, WANGGAARD and WIRCH. Referred to Committee on Judiciary.

AUTHORS SUBJECT TO CHANGE

1 **AN ACT to renumber and amend** 48.23 (4); **to amend** 48.20 (8) (a), 48.21 (3) (d),
2 48.213 (2) (d) and 48.23 (3); and **to create** 48.23 (2) (d) of the statutes; **relating**
3 **to:** a parent's right to counsel in a child in need of protection or services
4 proceeding, providing an exemption from emergency rule procedures, granting
5 rule-making authority, and making an appropriation.

Analysis by the Legislative Reference Bureau

This bill removes the prohibition on assigning counsel to a parent in a child in need of protection or services (CHIPS) proceeding, and creates a five-county pilot program that creates a right to counsel for such a parent.

Under current law, a parent is entitled to legal representation in a proceeding under the Children's Code involving a contested adoption or an involuntary termination of parental rights. In all other cases under the Children's Code, the juvenile court may appoint counsel to any party to the proceeding except that the juvenile court is prohibited from appointing counsel in a CHIPS proceeding for any party other than a child, an Indian parent, or an Indian custodian. This prohibition was ruled unconstitutional by the Wisconsin Supreme Court in *Joni B. v. State*, 202 Wis. 2d 1 (1996), on the grounds that the prohibition constitutes a violation of the separation of powers doctrine of the Wisconsin Constitution.

This bill eliminates the statutory prohibition placed on a juvenile court regarding appointment of counsel for parents other than Indian parents or Indian custodians and creates a five-county pilot program that grants a nonpetitioning

ASSEMBLY BILL 784

parent in a CHIPS proceeding in which the child has been taken into custody a right to counsel, including referral to the state public defender if appropriate.

Under the bill, the pilot program creating a right to counsel for a parent in a CHIPS proceeding in a participating county sunsets on June 30, 2021. Also, the SPD and the Department of Children and Families must each submit a report by January 1, 2021, to the Joint Committee on Finance and each house of the legislature regarding the costs of and data from implementing the pilot program created under the bill.

For further information see the *state* 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.** 48.20 (8) (a) of the statutes is amended to read:

2 48.20 (8) (a) If a child is held in custody, the intake worker shall notify the
3 child's parent, guardian, legal custodian, and Indian custodian of the reasons for
4 holding the child in custody and of the child's whereabouts unless there is reason to
5 believe that notice would present imminent danger to the child. The parent,
6 guardian, legal custodian, and Indian custodian shall also be notified of the time and
7 place of the detention hearing required under s. 48.21, the nature and possible
8 consequences of that hearing, the right to counsel under s. 48.23, the right to present
9 and cross-examine witnesses at the hearing, and, in the case of a parent or Indian
10 custodian of an Indian child who is the subject of an Indian child custody proceeding,
11 as defined in s. 48.028 (2) (d) 2., the right to counsel under s. 48.028 (4) (b). If the
12 parent, guardian, legal custodian, or Indian custodian is not immediately available,
13 the intake worker or another person designated by the court shall provide notice as
14 soon as possible. When the child is 12 years of age or older, the child shall receive
15 the same notice about the detention hearing as the parent, guardian, legal custodian,
16 or Indian custodian. The intake worker shall notify both the child and the child's
17 parent, guardian, legal custodian, or Indian custodian.

ASSEMBLY BILL 784

1 **SECTION 2.** 48.21 (3) (d) of the statutes is amended to read:

2 48.21 (3) (d) Prior to the commencement of the hearing, the court shall inform
3 the parent, guardian, legal custodian, or Indian custodian of the allegations that
4 have been made or may be made, the nature and possible consequences of this
5 hearing as compared to possible future hearings, the right to counsel under s. 48.23,
6 the right to present, confront, and cross-examine witnesses, and, in the case of a
7 parent or Indian custodian of an Indian child who is the subject of an Indian child
8 custody proceeding under s. 48.028 (2) (d) 2., the right to counsel under s. 48.028 (4)
9 (b).

10 **SECTION 3.** 48.213 (2) (d) of the statutes is amended to read:

11 48.213 (2) (d) Prior to the commencement of the hearing, the court shall inform
12 the adult expectant mother and the unborn child's guardian ad litem ~~shall be~~
13 ~~informed by the court~~ of the allegations that have been made or may be made, the
14 nature and possible consequences of this hearing as compared to possible future
15 hearings, the right to counsel under s. 48.23, and the right to present, confront, and
16 cross-examine witnesses, ~~and the right to present witnesses.~~

17 **SECTION 4.** 48.23 (2) (d) of the statutes is created to read:

18 48.23 (2) (d) 1. If a proceeding in a county participating in the pilot program
19 under subd. 2. involves a child alleged to be in need of protection or services under
20 s. 48.13 any nonpetitioning parent who appears before the court shall be represented
21 by counsel throughout the proceeding. The right to be represented by counsel under
22 this paragraph begins anytime after the filing of a petition under s. 48.255. Once
23 begun, the right to be represented by counsel continues throughout all stages of the
24 proceedings. A parent may waive counsel if the court is satisfied that the waiver is
25 knowingly and voluntarily made.

ASSEMBLY BILL 784**SECTION 4**

1 2. No later than July 1, 2018, the state public defender shall establish a pilot
2 program in Brown, Outagamie, Racine, Kenosha, and Winnebago counties to provide
3 counsel to parents under subd. 1.

4 3. This paragraph does not apply to a proceeding commenced under s. 48.13 or
5 48.21 after June 30, 2021.

6 4. The state public defender may promulgate rules necessary to implement the
7 pilot program established under subd. 2. The state public defender may promulgate
8 the rules under this subdivision as emergency rules under s. 227.24.
9 Notwithstanding s. 227.24 (1) (a), and (3), the state public defender is not required
10 to provide evidence that promulgating a rule under this subdivision as an emergency
11 rule is necessary for the preservation of the public peace, health, safety, or welfare,
12 and is not required to provide a finding of emergency for a rule promulgated under
13 this subdivision. Notwithstanding s. 227.24 (1) (c) and (2), emergency rules
14 promulgated under this subdivision remain in effect until June 30, 2021.

15 5. By January 1, 2021, the department and the state public defender shall each
16 submit a report to the joint committee on finance, and to the chief clerk of each house
17 of the legislature for distribution to the appropriate standing committees under s.
18 13.172 (3), regarding costs and data from implementing the pilot program under
19 subd. 2.

20 **SECTION 5.** 48.23 (3) of the statutes is amended to read:

21 48.23 (3) POWER OF THE COURT TO APPOINT COUNSEL. ~~Except in proceedings under~~
22 ~~s. 48.13, at~~ At any time, upon request or on its own motion, the court may appoint
23 counsel for the child or any party, unless the child or the party has or wishes to retain
24 counsel of his or her own choosing. ~~Except as provided in sub. (2g), the court may not~~
25 ~~appoint counsel for any party other than the child in a proceeding under s. 48.13.~~

ASSEMBLY BILL 784**SECTION 6**

1 **SECTION 6.** 48.23 (4) of the statutes is renumbered 48.23 (4) (a) and amended
2 to read:

3 48.23 (4) (a) If In any situation under sub. (2) (a), if a child or a parent under
4 18 years of age has a right to be represented by counsel or is provided counsel at the
5 discretion of the court under this section and counsel is not knowingly and
6 voluntarily waived, the court shall refer the child or parent under 18 years of age to
7 the state public defender and counsel shall be appointed by the state public defender
8 under s. 977.08 without a determination of indigency. If the referral is of a child who
9 has filed a petition under s. 48.375 (7), the state public defender shall appoint counsel
10 within 24 hours after that referral. Any counsel appointed in a petition filed under
11 s. 48.375 (7) shall continue to represent the child in any appeal brought under s.
12 809.105 unless the child requests substitution of counsel or extenuating
13 circumstances make it impossible for counsel to continue to represent the child.

14 (b) In any situation under sub. (2) (a) or (d), (2g), or (2m) in which a parent 18
15 years of age or over or an adult expectant mother is entitled to representation by
16 counsel; counsel is not knowingly and voluntarily waived; and it appears that the
17 parent or adult expectant mother is unable to afford counsel in full, or the parent or
18 adult expectant mother so indicates; the court shall refer the parent or adult
19 expectant mother to the authority for indigency determinations specified under s.
20 977.07 (1).

21 (c) In any other situation under this section in which a person has a right to be
22 represented by counsel or is provided counsel at the discretion of the court,
23 competent and independent counsel shall be provided and reimbursed in any
24 manner suitable to the court regardless of the person's ability to pay, except that the

ASSEMBLY BILL 784**SECTION 6**

1 court may not order a person who files a petition under s. 813.122 or 813.125 to
2 reimburse counsel for the child who is named as the respondent in that petition.

3 **SECTION 7. Fiscal changes.**

4 (1) PROGRAM OPERATION. In the schedule under section 20.005 (3) of the statutes
5 for the appropriation to the public defender board under section 20.550 (1) (a) of the
6 statutes, the dollar amount for fiscal year 2018-19 is increased by \$739,600 for
7 implementation of the pilot program under section 48.23 (2) (d) 2. of the statutes.

8 **SECTION 8. Initial applicability.**

9 (1) REPRESENTATION IN PROCEEDINGS INVOLVING CHILDREN IN NEED OF PROTECTION
10 OR SERVICES. The treatment of sections 48.20 (8) (a), 48.21 (3) (d), 48.213 (2) (d), and
11 48.23 (3) of the statutes, the renumbering and amendment of section 48.23 (4) of the
12 statutes, and the creation of section 48.23 (2) (d) of the statutes first apply to
13 proceedings commenced under section 48.13 or 48.21 of the statutes on the effective
14 date of this subsection.

15 (END)