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STATE REPRESENTATIVE • 38th ASSEMBLY DISTRICT

December 1, 2021

Rep. Barbara Dittrich Testimony

AB 626 – grounds for finding a child in need of protection or services or for terminating parental rights
AB 627 – terminating parental rights based on the parent's incarceration
AB 628 – elimination of a jury trial in a proceeding under the Children's Code
AB 629 – postadoption contact agreements
AB 630 – termination of parental rights by motion in CHIPS proceeding
AB 631 – various changes to the safe haven law
AB 632 – duty to participate in an appeal of an order terminating parental rights

Assembly Committee on Family Law

Thank you Committee Chair Magnafici and members of the Assembly Committee on Family Law for scheduling a hearing on these bills. I appreciate the opportunity to speak to you on a topic that rarely gets the coverage it should, but is incredibly important to the children of Wisconsin.

Some of the bills before the committee today are the product of the Speaker's Taskforce on Adoption, formed last session to examine ways to get children in out of home care more expeditiously into permanency and stability. Several of these ideas, while still originating from concepts discussed last session during taskforce hearings, are new to the legislature this session. I hope that the bills before the committee today will be passed and signed into law, making a real difference in the lives of our children and families all around our state.

Many may not be aware that the majority of adoptions in Wisconsin are public adoptions. This typically means that children arrive at a place of permanency through our child welfare system. It is messy. And there is trauma. What is very apparent is that we have shifted from total disregard for parents to favoring parents over the children who may not be safe in their care. These bills seek to put that perspective/policy decisions back into balance, seeking both the best welfare of the child while ensuring parents' rights are upheld.

One of the overarching concepts to keep in mind with most of this proposed legislation is that in order for the tools in these bills to be utilized, a child has to already have been ruled by the courts as a "child in need of protection/services" (CHIPS). These bills are not aimed at taking children away from parents arbitrarily or prematurely, but rather ensuring children more expeditiously achieve permanency and stability for their childhood. All of this legislation comports with the Federal Families First Act. It is of note that several of these bills already have amendments, either introduced or in drafting. My office welcomes any feedback or suggestions as we work to improve these bills for Wisconsin families and children.

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Assembly Bill 626 creates grounds for a CHIPS order, to be heard in court, based on prenatal exposure to a controlled substance or a parent's chronic and severe use of alcohol or a controlled substance. Additionally, it creates grounds for termination of parental rights (TPR) based on the child being drug-affected, as previously established by way of a CHIPS hearing. Under the bill, a parent's rights SHALL NOT be terminated if he or she enrolls in a substance abuse treatment or recovery program within 90 days of the child's birth or of the child's placement outside of the home. Additionally, these grounds cannot be brought at all if the child is older than 18 months.

Assembly Bill 627 seeks to ensure stability for children when their parent will be incarcerated for a continuous period of 4 years or more. Again, in order for this TPR ground to be brought before the court, a child has to already been ruled as a CHIPS status by the court. The court may also consider a parent's history of repeated incarceration, where applicable, in making their ruling.

Assembly Bill 628 eliminates the option for a jury trial in a CHIPS case. According to an article published in the *Wisconsin Lawyer*, the official publication of the State Bar of Wisconsin, the utilization of jury trials in CHIPS, JIPS, and TPR cases often are in conflict with the best interest of the child. In making this change, it would allow a judge who is already well-versed in Children's Code/CHIPS/TPR to hear and decide the case. The option for a jury trial would still remain for TPR cases.

Assembly Bill 629 provides an opportunity for adoptive and biological parents to enter into a voluntary agreement regarding post-adoption contacts. It is important to note, there is nothing in these contracts that would lead any of the parties to believe these contracts are permanent. In fact, the legislation states the opposite. These contracts are entirely voluntary to enter, and terms can be changed at any time by either the adoptive parent or the biological parent via the means laid out in the legislation. The bill also states that tribal rights are not effected and does not impair cultural contact agreements, per the Indian Child Welfare Act (ICWA).

Assembly Bill 630 allows a TPR motion to be filed in a CHIPS case. Currently, due to extended timelines in separate proceedings, a new judge, jury, and attorneys require education about the facts of the case and much of the same paperwork needs to be refiled, delaying permanency and driving up costs. Allowing these cases to run concurrently is a simple step to reducing redundancies and creating efficiencies, both for courts and children.

Assembly Bill 631 extends the amount of time a parent can relinquish their child without fear of repercussion or lengthy, potentially expensive court proceedings. Wisconsin's safe haven law has been on the books since 2001, yet sadly has one of the shortest windows of opportunity in the country. A parent is given only THREE DAYS to make what could be the most important decision of their life, the least amount of time provided by the states. This bills expands the time limit to relinquish a child the most common time frame in the country at 30 days. In expanding the time limit allowed to relinquish a child, Wisconsin would join 17 other states in the nation. The bill also acknowledges the sovereignty of Native Americans living the state of Wisconsin by allowing an

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Indian child to be relinquished to a tribal official. There is nothing in this bill that prevents the counties or Child Protective Services from intervening if the child is living in an unsafe environment prior to the 30 day time limit.

Assembly Bill 632 creates a duty for the biological parent that files an appeal to a TPR judgement to participate in those proceedings. Under current law, an appellant who has filed an appeal on an order terminating his/her parental rights is not required to participate in that appeal. Currently, the appellant MAY but is NOT REQUIRED to file a notice of abandonment. Due to this unmerited, unfair legal maneuvering, the child is kept in limbo for much longer than necessary, and their wellbeing is neglected resulting in more ambiguity and trauma. This bill remedies this flaw.

In closing, who of us here want these children languishing in uncertainty and instability longer than need be? Who of us wants to increase the trauma these children face? How many chances are birth parents supposed to be afforded before we put their suffering child first? These bills give us a chance to make Wisconsin a more "adoption friendly"... and dare I say child friendly state.

Thank you for the opportunity to testify on these bills. It is my hope the committee will move these bills through the legislative process, recognizing the necessity of them. Our children are our most precious gift. Their lives are not "throw away" and we must protect the upcoming generation if we expect our state to continue to move forward in the decades to come.

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HO-CHUNK NATION LEGISLATURE
Governing Body of the Ho-Chunk Nation

Written Comments
AB Bills 626, 627, 628, 629, 630, 631, 632
Wisconsin State Assembly
Committee on Family Law
December 1, 2021

Thank you, Chair Magnafici, Vice-Chair James, and the Committee on Family Law, for accepting these written comments from the Ho-Chunk Nation Legislature on a set of bills that will have an impact on tribes, tribal children, and tribal families.

> *"The fundamental constitutional right to family integrity extends to all family members, both parents and children." O'Donnell v. Brown, 335 F.Supp.2d 787, 820 (W.D. Mich. 2004), citing Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 2000). The "right of a child to be raised and nurtured by his parents" is "fundamental. . ." Brokaw v. Mercer County, 235 F.3d 1000, 1019 (7th Cir. 2000).*

One of the paramount purposes of the Indian Child Welfare Act (hereinafter ICWA) is to ensure "the placement of [] children in foster or adoptive homes or institutions which will reflect the unique values of the Indian culture."[1] The ICWA's mandate that an adoptive placement is preferred to be with members of the child's extended family, other members of the same tribe, or other Indian families is "[t]he most important substantive requirement imposed on the state."[2] It was the intent of Congress to ensure that "white, middle-class standards" not be utilized in determining whether preferred placements are suitable.[3] "Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values."[4]

> The importance of unique Indian social and cultural standards cannot be overemphasized – the historical lack of understanding of such standards by state courts and agencies, and the resulting effects on the populations of Indian tribes and the self identification of Indian children, is precisely why the ICWA was enacted, as "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[5]

Thus, in determining the suitability of a potential home, the relevant standards must be "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which

[1] H.R. Rep. No. 95-608, 95th Cong. 2nd Sess. 8 (1978); *see also* 25 U.S.C. § 1902.
[2] *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).
[3] H.R. Rep. No. 95-1386, 95th Cong. 2nd Sess. 24 (1978).
[4] H.R. Rep. No. 95-608, 95th Cong. 2nd Sess. 11 (1978).
[5] CALIFORNIA INDIAN LEGAL SERVICES, CALIFORNIA JUDGES BENCHGUIDE: THE INDIAN CHILD WELFARE ACT 46 (May 2010 ed.); *see also* 25 U.S.C. § 1901; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-37 (1989).

the parent or extended family members maintain social and cultural ties."[6] This language illustrates that Congress intended agencies and state courts to look beyond just the reservation boundaries, and focus on social and cultural ties as well.

Some might question, why would this still be important of a newborn child placed for adoption at birth or even a child placed at a young age? They would not "know" they are even Indian, so why does it matter? Answer- it is of critical importance. Not only to the tribes fighting to maintain existence in the 21st Century and beyond, but to the children subjected to the negative effects brought on by removal from their communities. In fact, children adopted out of their tribal communities are highly affected by this removal-invoking trauma long after the adoption is finalized.

Negative Effects of Removal from Tribal Communities and Families

In a study of Indian adoptees, startling information was discovered. Information that shows just how deep the trauma can be for these children as they reach adolescence and adulthood. Dr. Carol Locust, of the Native American Research and Training Center at the University of Arizona College of Medicine, performed in-depth research on the disorder known as "Split Feather Syndrome." What is that exactly?

> [Dr. Locust] identified unique factors of Indian children placed in non-Indian homes that created damaging effects in these children's lives. Locust found that: Native children placed in non-Native homes were at great risk for experiencing psychological trauma leading to long-term emotional and psychological problems as adults; that the same clusters of long-term psychological problems experienced by native adult adoptees were recognizable as a syndrome; and 'split feather' syndrome appears to be related to a reciprocal-possessive form of belongingness unique to survivors of cultures subjected to annihilation.[7]

These children grow up, looking in the mirror and within their hearts, knowing that there is something "different" about them- something special. However, without their tribal community there to support them as they go through life, they are simply going through the motions.[8] They lack the tribal connection and cultural leaders to guide them as they transition through these formative years and develop their individual and tribal identity.[9] They lack the guidance as to how they are supposed to act as a male or female of their particular tribe.

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[6] 25 U.S.C. § 1915(d).

[7] *ICWA from the Inside Out: 'Split Feather Syndrome,'* MINN. DEPT. OF HUMAN SERVS. (July 2005), *available at* http://www.dhs.state.mn.us/main/groups/children/documents/ pub/dhs16_180049.pdf.

[8]

> Recent child and adolescent development research has said that developing cultural identity and passing down of values between generations is an important milestone for adolescence (Albert and Trommsdorff, 2014). The benefit to youth is a sense of "groundedness," which means a sense of coherence in one's self-identity (Super and Harkness, 2002; LaFromboise et al., 1993). That strong sense of self helps to foster youth well-being and may be protective for adverse mental health outcomes (Sahota, 2019). Newer research in developmental psychology has highlighted the importance of the "niche" in which a person's psychology is developed. This niche includes the entire social environment within which a child is raised, including their family, school, and community, and caring adults in all these settings, which help to shape the child's psychological development and identity. Therefore, this entire niche needs to be considered in decisions about placement and child and adolescent well-being more broadly.

Nat'l Indian Child Welfare Ass'n, *Contemporary Attachment and Bonding Research: Implications for American Indian/Alaska Native Children and their Service Providers, available at* https://www.nicwa.org/wp-content/uploads/2020/10/Contemporary-Attachment-and-Bonding-Research-Final.pdf (Feb. 2020).

[9] "Individual identify and one's tribal identity are the driving forces to empowerment and realization, but cultural identity loss leads to grief, depression, anxiety and more serious mental health problems. It is well known that these problems lead to longer term health care issues and increases morbidity and mortality." Dale Walker, MD, *Association of American Indian*

They lack the support in how to combat the feelings of loss and disconnectedness. A piece of them is missing. And a piece of the tribe is missing too.

In 2017, a group of researchers proceeded with a quantitative study of the mental health differences found within American Indian adoptee populations versus Non-Indian adoptee populations. While no difference was found between non-Indian (Caucasian) adoptees and American Indian adoptees on self-assessed depression or diagnosed depression, meaning adoptees in general experience depression, there were significant differences with regards to other areas of mental health.[10] American Indian adoptees were found to be more vulnerable to mental health problems within the whole adoption system generally.[11] Specifically, American Indian adoptees were more likely to report alcohol addiction, alcohol recovery, drug addiction, drug recovery, self-assessed eating disorder, eating disorder diagnosis, self-injury, suicidal ideation, and suicide attempts.[12] The study highlights that historical trauma is inherited through one's ancestors, as such American Indian "adoptees experience trauma through their lived experiences of being separated from their families and culture, a phenomenon referred to as "blood memory.""[13]

AB 626 – Drug Impacted Child Grounds

- **Object to Overall Bill**

This bill have a disproportionate impact on Indian families, as American Indians have higher instances of drug/alcohol abuse due to historical trauma inflicted from past wrongs this country has done to American Indian communities. ICWA was meant to address the disproportionate removals of Indian children from their homes. Yet, this bill merely strengthens the cyclical nature of wrongs committed against tribal peoples. Because drug/alcohol abuse is often used to self-medicate historical trauma- a trauma inflicted in part from the boarding school and CPS removals- Indian families continue to be ravaged by the western theories of assimilation and white middle-class standards established within the child welfare system.

What protections will be in place to prevent implicit bias and profiling? Which type of testing will be used to address prenatal drug usage?

- Concerns regarding testing procedures.
    1) 2018 Article from American Ass'n for Clinical Chemistry:
        - 1) Universal Testing: this would help eliminate implicit bias and profiling, but would result in high numbers of reports to Social Services and potentially the increased number of low-risk cases resulting in unfair removals.
        - 2) Risk-Based Testing: this would increase the chance of testing based on implicit bias and profiling.
- A positive result from a toxicology test of the child at birth does not account for a pregnant woman who was using before she found out she was pregnant and ceased usage upon discovering her pregnancy. Many drugs will remain in the baby's meconium, and thus could lead to unfair outcome.
    1) 2018 Article from American Ass'n for Clinical Chemistry:

Physicians Disenrollment Background Paper, available at https:// www.aaip.org/media/news/m.blog/76/disenrollment-background-papers-and-resolution (last visited July 22, 2019).

[10] Ashley L. Landers, PhD et al., *American Indian and white Adoptees: Are there Mental Health Differences?* AMERICAN INDIAN AND ALASKA NATIVE MENTAL HEALTH RESEARCH (2017) at 69.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 70.

- Meconium begins to form around the 12th to 16th week of gestation, but more than half of the material is produced in the final 8 weeks of pregnancy. Many waste products, including drugs and metabolites, accumulate in meconium. This leads to meconium's very long window of detection, which is estimated to include exposures in most of the third trimester, and in some cases, the later part of the second trimester.

2) 2018 Study Front Pharmacol. 2018; 9: 961:
   - However, collection may be missed as meconium can sometimes be passed in utero and screening may show drugs administered during labor, potentially confounding results (Farst et al., 2011; Wood et al., 2014).
   - However, drug levels in the umbilical cord have been shown to be lower than in matched meconium (Montgomery et al., 2006; Colby, 2017). It is uncertain whether this represents accurate results to maternal ingestion, or whether meconium might represent a cumulative exposure measure. The flow of drugs across the placenta, distribution of drugs in the umbilical cord, and the detection window for screening in this tissue are not completely understood.
3) Some places are using umbilical cord testing. This is not culturally appropriate, as some Tribes bury the placement and cord as part of their cultural practices.

- Assurance of protection for Indigenous women who might use peyote during religious practices is needed.
  1) Add language after "nonmedical purpose" to include "nonreligious purpose".
- There is a severe lack of treatment centers available, let alone the qualified residential treatment programs required under federal Family First Prevention Services Act (FFPSA). More importantly, there are only two (2) facilities, maybe three (3), in the entire state that will allow a child to be placed with the mother during treatment. Removal of newborns from their parent(s) does not permit for normal human nature to lead the way- instead it can result in attachment and bonding issues.
- The filing of the child in need of protection or services petition within 18 months combined with only the definition of a drug impacted child does not appear to consider Wisconsin's Child Safety Intervention standards followed by Social Services or the Child Safety Decision-making Model adopted by the Courts. If there are no present or impending danger threats and the parent has developed protective parenting skills, then it should not result in removal based upon best practice. This leads us to believe that the ground as written could drive up *unnecessary* removals when the state is trying to prevent unnecessary removals.

AB 627 – Incarcerated Parent Grounds

- **Object to Overall Bill**

This will result in a disproportionate impact on Indian families. American Indians represent a disproportionate rate of those incarcerated in Wisconsin. In 2013, Wisconsin had the highest rate of American Indians incarcerated in the country. And those rates do not seem to be going down.[14]

Again, remember that historical trauma inflicted on Indigenous peoples results in self-medication and mental health concerns that could lead to behaviors that more often than not result in incarceration. There are additionally implicit biases in policing and prosecutorial discretion that lead to disproportionate impacts on Indigenous communities when it comes to criminal matters.

[14] https://www.greenbaypressgazette.com/story/news/native-american-issues/2021/03/17/native-americans-incarcerated-among-highest-rates-wisconsin/6841084002/.

The Indian Child Welfare Act (ICWA) requires that active efforts be provided to prevent the breakup of an Indian family. These are above and beyond reasonable efforts. Yet, over and over conditions recommended from county social workers for incarcerated parents are essentially nothing. The overarching theme is "once you get out, then we will work with you". Instead of making it easier to terminate parental rights, the system should be enhanced on the prevention side. When a parent is incarcerated, they are the easiest to locate and work with. This is an optimal time to work with them on parental safety.

COVID shines a light on the impossibility of moving towards termination of parental rights when reasonable or active efforts cannot be provided. Many jurisdictions were putting termination of parental rights cases on hold and are tolling time because of the lack of services provided during the pandemic. Yet counties have not provided reasonable, and certainly not active, efforts to incarcerated parents (remember "once you get out, then we will work with you"), yet moved swiftly to permanency for years. Which leads to a very important revelation- this is ultimately an unnecessary ground. TPR could still be accomplished through a continuing need for protection and services, and has for many years.

Important to remember in all of this, is not all parents who are incarcerated lack a parental relationship with their child. If that were the case, every single child would be in the "system", when in fact familial supports and delegations of authority have long been safe and acceptable forms of addressing incarceration. Yet, the State is now going to single out incarceration as a ground for termination of parental rights? When incarceration disproportionately impacts those with behavioral health issues (drugs, alcohol, mental health, disabilities) and/or are minorities?

AB 628 – Elimination of the Jury Trial at TPR

- **Object to Overall Bill**

A TPR is akin to a criminal case because it likewise involves a constitutionally protected fundamental right and liberty interest. In the child welfare world, it is often stated that TPR is the death sentence of civil actions. A constitutionally protected fundamental right should require the availability of a jury trial. The State Public Defender Office testified during the adoption taskforce and after, and presented data, that jury trials did not lengthen the process. In fact, they moved things along in a more swift manner.

AB 629 – Post-Adoption Contact Agreements

- **Appreciate/Support Tribally Focused Language; Could Support Bill if Drafters Worked on Bill Edits with Stakeholders**

The practice of open adoption can at times be a tool to limit the amount of trauma a child faces because it allows a child to maintain ties to their birth family. Research shows that even non-Indian adoptee children tend to have higher instances of mental health and substance use disorders. "Adoptees had higher odds for lifetime SUDs than nonadoptees in this study using NESARC data. Despite the advantages of adoptees' higher educational levels probably due to being raised by higher educated, higher income adopting parents, adoptees are still at higher risk to lifetime SUD."[15] As such, we support the practice of open adoption- of bio & adoptive parents having long-lasting relationships for the children's benefit, but we still have the following two concerns:

- Duress/coercion being used to make parents sign away rights ("If you sign away your rights, we will enter into a post-adoption parental contact agreement").

[15] Gihyun Yoon, et al., *Substance Use Disorders and Adoption: Findings from a National Sample*, PLoS ONE 7(11): e49655, *available at* https://doi.org/10.1371/journal.pone.0049655 (Nov. 15, 2012).

- This section would be created under Subchapter XIX for adoption of minors. So, this would occur after the parent's rights are already terminated. The Judge appears to thus be making clear and convincing evidence findings without the bio-parents being there- and solely off the written document. This is of concern when trying to rule out coercion.
- There should be a separate hearing on the post-adoption agreement, wherein a full colloquy can be performed with the bio-parent. Thus, it makes sense that this would occur earlier in the process- during the TPR stage. This of course is assuming an adoptive home has already been identified and those potential adoptive parents are involved at the TPR stage of proceedings.
    - There have been successful applications of post-adoption visitation agreements in the state of Wisconsin even without this Bill language though. This is through the use of a two-step process. Step-one being contractual, which could limit some of the coercion concerns. The parties enter into a written contract to agree to the jurisdiction of the family court for the purpose of ordering a Wis. Stat. § 767.43 visitation agreement under a "person who has maintained a relationship similar to a parent-child relationship with the child." The juvenile court judge agrees to address the family court visitation order. After the TPR, then the Court addresses the Wis. Stat. § 767.43 visitation order.
- Bio-parents and Bio-family are placed at a disadvantage by oftentimes not having funds to fight for enforcement, as mediation and court battles require funds.

Some of the Indian specific language needs to be tightened up. Under Section 1, we do not believe the Court can mandate the Tribal child welfare department do this under sovereignty principles. The burden on ICWA cases to do active efforts is on the county agency. They would be the ones mandated to present this type of information to the court. Under their Section 4 (48.905(2)(a)), it would be helpful if they added at the end of that sentence ", as there are separate revocation rules applicable under those statutes." It will help clarify for a reader why this is the case- particularly a pro se litigant.

AB 630 – TPR by Motion

- **Will support if ICWA/WICWA cases are done by Petition only.**

While we have concerns that this turns civil practice on its head, we would be willing to support if ICWA/WICWA cases were done by Petition only. The need for a clear start of TPR protections afforded by ICWA is achieved through a new initial pleading. TPR is a new cause of action with different grounds and different requirements and burdens of proof under ICWA/WICWA. There must be a clear delineation between a child in need of protection and services and a termination of parental rights- this really can only be achieved by abiding by common civil procedure rules.

Civil litigation clearly starts with an initial pleading. There is a distinct difference between an initial pleading and a motion. There is fear that this will create far too much confusion, and ultimately result in ICWA/WICWA not being followed.

Federal Rules of Civil Procedure:
Rule 7. Pleadings Allowed; Form of Motions and Other Papers
(a) Pleadings. Only these pleadings are allowed:
(1) a complaint;
(2) an answer to a complaint;
(3) an answer to a counterclaim designated as a counterclaim;
(4) an answer to a crossclaim;

(5) a third-party complaint;
(6) an answer to a third-party complaint; and
(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;
(B) state with particularity the grounds for seeking the order; and
(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

Wis. Stat. 802.01 Pleadings allowed; form of motions.

(1) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross claim, if the answer contains a cross claim; a 3rd-party complaint, if a person who was not an original party is summoned under s. 803.05, and a 3rd-party answer, if a 3rd-party complaint is served. No other pleading shall be allowed, except that the court may order a further pleading to a reply or to any answer.**(2)**Motions.**(a)***How made.* An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of wr**(b)***Supporting papers.* Copies of all records and papers upon which a motion is founded, except those which have been previously filed or served in the same action or proceeding, shall be served with the notice of motion and shall be plainly referred to therein. Papers already **(c)***Recitals in orders.* All orders, unless they otherwise provide, shall be deemed to be based on the records and papers used on the motion and the proceedings theretofore had and shall recite the nature of the motion, the appearances, the dates on which the motion was heard an**(d)***Formal requirements.* The rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers in an action, except that affidavits in support of a motion need not be separately captioned if served and filed with the motion. The n**(e)***When deemed made.* In computing any period of time prescribed or allowed by the statutes governing procedure in civil actions and special proceedings, a motion which requires notice under s. "https://docs.legis.wisconsin.gov/document/statutes/801.15(4)"801.15 (4) shall be deemed made when it is served with its notice of motion.

Wis. Stat. 801.02 Commencement of action.

(1) A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.

Wis. Stat. 801.19

(1)(j) "Initiating document" means a summons and complaint, petition, application, citation, criminal complaint, notice of appeal, or any other document filed to commence a court action or proceeding.

SBW - Wisconsin Civil Litigation Before Trial

B. Motions Distinguished from Pleadings [§ 5.10]

Motions are authorized by Wis. Stat. § 802.01(2) . Motions are not pleadings. This distinction may be significant, for example, in connection with a summary-

judgment motion under Wis. Stat. § 802.08(2) . Wis. Stat. § 802.08(2) allows a court to examine the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in determining whether to grant summary judgment, but it does not authorize the court to consider any information contained in a motion. Motions are discussed in chapter 8 , infra.

AB 631 – Safe Haven

- **Safe Haven is in direct conflict with the federal Indian Child Welfare Act. As such, federal law should preempt state safe haven laws. The tribal additions, except those proposed that infringe on tribal sovereignty, are needed to reach a compromise. However, anything less, and the Nation will not provide support.**

- Two obvious areas that Safe Haven conflicts with WICWA/ICWA.
  - Under WICWA/ICWA no Indian child may be relinquished within ten (10) days after birth and any such relinquishment of an Indian child after ten (10) days must be completed and certified before a judge.
    - For voluntary foster care placements, the parents need to put their voluntary consent in writing, which in turn needs to be recorded by a judge and accompanied by the judge's written certification that the terms and consequences were explained and understood. 25 U.S.C. § 1913(a); Wis. Stat. § 48.028(5)(a).
  - One of the main requirements of WICWA/ICWA is that placement preferences be followed when placing an Indian child out of the home or having an Indian child adopted.

- Ho-Chunk Nation Comments from 2015:
  - "Safe Haven is a back door approach to ICWA and WICWA avoidance. Without obtaining the necessary information to confirm a child's status as an Indian child results in the tribes not receiving notice. Notice is one of the core elements of the ICWA and WICWA. It is the trigger that must be pulled in order to promote the stability and security of Indian tribes and families. It is what gets the tribes in the door to take that child into custody and place with tribal families or for the tribes to at least intervene in the county court proceedings to advocate for their preferred tribal placement.

    Is the bill draft perfect to remedy the ICWA and WICWA noncompliance? No. Is it a compromise? Yes. It is not unreasonable for the questions to be asked that must be answered to determine Indian eligibility. If anonymity is the primary goal of Safe Haven, then obviously you cannot force someone to answer. However, it was my belief that the primary goal of Safe Haven was to have safe children. And a safe Indian child is a child placed within his/her community.

    There is certainly an argument that anonymity is what is needed to prevent infanticide. However, this is weak at best. And considerably weaker with the lack of any hard data to suggest that anonymity is indeed what is required to prevent infanticide. There is quite a bit of legal literature that instead speaks of how anonymity does not prevent infanticide- as people are still abandoning children- despite states having "Safe Haven

Laws." Instead, the literature illustrates the role anonymity has in being more of a detriment to the adoptees than assistive. And in fact, there is no place that this becomes a larger detriment than in the hospital setting.

> These anonymity provisions are particularly vexing because a vast majority of abandoned newborns are abandoned at the hospital after birth even without any safe haven laws (citation omitted). These infants do not seem to have been at risk of harm or death since they were left at sheltered places with attendants and medical care, and there is no indication that need for anonymity or fear of criminal prosecution prevents mothers who give birth in the hospital from leaving their newborns there. Yet the statutes, nearly all of which designate hospitals as safe havens [citation omitted], may now permit these hospital abandonments to be classified as safe haven relinquishments with the attendant anonymity and barriers to obtaining family and medical information that may be useful to the child and adoptive parents and, in the case of Native American children, the tribe. Thus, the statutes potentially have injected anonymity onto tens of thousands of babies born, and abandoned, at hospitals each year.

Annette R. Appell, *Safe Haven to Abandon Babies, Part III: The Effects*, ADOPTION QUARTERLY Vol. 6(2) 2002.

It is fully understood the difference between anonymity and confidentiality. When the tribes proffer that they have stringent confidentiality, it is not a misconceived understanding of anonymity. Instead, it is to show that the intent of the Safe Haven Laws can still be achieved. We can handle these actions in a manner that the parent(s) remain anonymous. We need the basic information to verify eligibility of membership. Yet, we can protect them through this process to ensure the child is safe and healthy, while recognizing the desire of the parent(s) to be unknown among our tight knit tribal communities.

Whether these actions are considered involuntary or voluntary makes no difference with regards to ICWA and WICWA noncompliance. If these are to be considered voluntary, those arrangements to sever one's parental ties to their Indian child must be recorded before a judge who can explain in detail the terms and consequences of the proposed action. 25 U.S.C. § 1913; Wis. Stat. § 48.028(5)(b). Furthermore, any consent given under a voluntary proceeding is not valid if given prior to or within 10 days after the birth of an Indian child. Id. Additionally, placement preferences of the tribes are to be followed with regards to placing the infant. Wis. Stat. § 48.028(7)(c)(finding that placement preferences of the tribes should be followed, absent good cause, for preadoptive placements). If they are to be instead treated as involuntary, as is suggested by the Wisconsin Children's Court Improvement Project, then the tribe shall receive notice and be permitted to intervene, among other federally and state provided rights. 25 U.S.C. §§ 1911-12; Wis. Stat. § 48.028(3)(e); (4)(a). So, no matter how one cuts it, the Safe Haven Law of Wisconsin is in direct conflict with federal law."

- If the State wishes to address unsafe relinquishment practices and/or infanticide, it must implement measures that prevent the issues leading to relinquishments as opposed to simply trying to respond after the fact and continuing to allow conditions that lead to relinquishments.
    - Rebecca F. Wilson, PhD; Joanne Klevens, MD, PhD; Dionne Williams, MPS; Likang Xu, MD, "Infant Homicides Within the Context of Safe Haven Laws – United States, 2008-2017," Vol. 69 CENTERS FOR DISEASE CONTROL AND PREVENTION MORBIDTY AND MORTALITY WEEKLY REPORT No. 39, p. 1385-1390 (Oct. 2, 2020).
        - p. 1389-90
            - Although infants make up a small percentage of homicide victims, these deaths are preventable. Programs and policies that strengthen economic supports for families, provide quality and affordable childcare, develop parenting skills (e.g., through home visiting programs), assure safe, stable, nurturing relationships and environments for all infants (10), and increase the public's awareness of Safe Haven Laws might contribute to preventing infant homicides.

- **Section 4, and all subsequent section increasing the time for relinquishment from 72 hours to 30 days, is not supported by data.**
    - Although there is a specific method of inputting safe haven cases into the eWiSACWIS system per Administrative Rules, it is not followed consistently across the State from county to county. As such, there is insufficient data to support a change from 72 hours to 30 days.
    - Rebecca F. Wilson, PhD; Joanne Klevens, MD, PhD; Dionne Williams, MPS; Likang Xu, MD, "Infant Homicides Within the Context of Safe Haven Laws – United States, 2008-2017," Vol. 69 CENTERS FOR DISEASE CONTROL AND PREVENTION MORBIDTY AND MORTALITY WEEKLY REPORT No. 39, p. 1385-1390 (Oct. 2, 2020).
        - p. 1385-86
            - No obvious association was found between infant homicide rates and Safe Haven age limits. States are encouraged to evaluate the effectiveness of their Safe Haven Laws and other prevention strategies to ensure they are achieving the intended benefits of preventing infant homicides. Programs and policies that strengthen economic supports, provide affordable childcare, and enhance and improve skills for young parents might contribute to the prevention of infant homicides.
        - p.1389
            - In addition, the association between infant homicide and Safe Haven age limits did not follow a linear pattern of risk, suggesting that rates cannot be explained by Safe Haven age limits, but might be related to other factors (e.g., maternal age or unintended pregnancy) (2).

- **Section 5 violates tribal sovereignty.**
    - Tribes shall maintain their sovereign right to exert jurisdiction over their tribal members and tribal domestic relations. There should be no requirement that a tribal agent must deliver the child to the county, if they wish to exert jurisdiction themselves.

- **Section 9 is needed.**

- **Section 10 is required to bring Safe Haven into compliance with federal law- the Indian Child Welfare Act.**

- **Section 13- Description of why tribal membership is important is needed.**

  - We previously thought something like this included would be beneficial.

Tribal Membership =
Rights & Privileges for this Child if Indian

Statement Required by Wis. Stat. § 48.195(3)(a)5

Indian children retain certain rights and privileges due to this political designation. First and foremost, they have the right to be socially and culturally connected to their Tribe and Clan. From this stems a variety of potential benefits that come from tribal membership, however, identifying information is needed for children to become members of their tribes. The potential benefits include, but are not limited to:

1. **Belonging/Cultural Connection:** The best interests of an Indian child in Wisconsin is realized when an "Indian child" can establish, develop, and maintain political, cultural, and social relationships with their Indian family, community, and tribal nation. Wis. Stat. § 48.01(2)(b)2.

2. **Right to Participate in Tribal Governance:** To hold office or vote, one generally has to be a member of their tribal nation.

3. **Federal Rights & Privileges:** There are numerous federal laws and programs that pertain specifically to tribal people. For example, treaty rights such as hunting and fishing would fall under here, but so too would the protections granted to Indian families under the Indian Child Welfare Act (ICWA).

4. **Access to Health Care Benefits:** The federal government owes a trust responsibility to tribal people- one responsibility is the provision of health care. Indian Health Services (IHS), provides funding and operational assistance to numerous Indian health clinics, hospitals, and tribal governments across the United States.

5. **Access to Educational Benefits:** The federal government offers numerous educational benefits from the head start days all through college. Many tribes offer additional college assistance to their members. Additionally, proof of membership is oftentimes needed for independent Native American scholarships.

6. **Right to Own/Inherit/Lease Indian Property:** Members of tribal nations have the ability to lease trust/reservation lands, which are tax exempt. They also have the right to inherit and own Indian property.

7. **Direct Tribal Assistance:** Many tribal nations offer periodic payments to their members (often called per-capita). They may also have other forms of tribal programming, for example emergency assistance monies, housing/rental assistance, job skills assistance, employment, and more.

- **Section 14 violates tribal sovereignty.**
  - Placing requirements on the tribal agent is outside the scope of State legislative authority as it relates to tribal jurisdiction over tribal domestic relations.

- **Section 19 is needed.**

- The Tribes should be consulted on the materials.

AB 632 – Duty to Participate in Appeal of TPR

- **Need more information on this, as this has not ever been identified as an issue.**

Conclusion

We say it every time we present comments, but it is because it holds that much truth and meaning to tribal peoples. As such, our final words are as they should always be:

There is nothing more important to a tribe than its children.
They are our future,
and they will ultimately be the links to our past.

Thank you for taking the time to listen to how these bills will impact our tribal community. We would be happy to meet with any legislator to answer questions or elaborate on any information provided herein.

Wisconsin Department of Children and Families

Governor Tony Evers
Secretary Emilie Amundson
dcf.wisconsin.gov

TO: Chair Magnafici, Vice-Chair James, and Honorable Members of the Assembly Committee on Family Law

FROM: Jeff Pertl, Deputy Secretary
Wendy Henderson, Administrator of the Division of Safety and Permanence
Amanda Merkwae, Legislative Advisor
Rachel Nili, Attorney, Office of Legal Counsel

DATE: December 1, 2021

SUBJECT: 2021 Assembly Bills 626, 627, 628, 629, 630, 631, and 632

The Department of Children and Families (DCF) appreciates the dedication of legislators to issues affecting Wisconsin children and families involved in the child welfare system. DCF will be testifying in opposition to Assembly Bills 626, 627, 628, and 630 and testifying for information on Assembly Bills 629, 631, and 632.

DCF is committed to the goal that **all** Wisconsin children and youth are safe and loved members of thriving families and communities. To support this goal, the Wisconsin child welfare system is guided by the following priorities, which are also embodied in the new federal child welfare law, the Family First Prevention Services Act, which Wisconsin was required to begin implementing in October 2021:

- **Prevention:** Child welfare increasingly focuses on preventing children from being removed from their homes by strengthening families to raise their children.
- **Relatives:** Relatives play an important part in children's lives as caregivers or ongoing supports and should be used as out-of-home placement resources whenever possible.
- **Reunification:** The primary goal is to reunify a child with their family whenever it is safe to do so.
- **Permanence**: The child welfare system strives to transition children placed in out-of-home care (OHC) safely and quickly back with their family, whenever possible, or to another permanent home.

It is through the lens of these priorities that DCF reviewed these bills—all related to Children in Need of Protection or Services (CHIPS) and Termination of Parental Rights (TPR) cases—that address complex legal and programmatic issues with profound consequences to a range of children, families, and other stakeholders.

Terminating Parental Rights Has Monumental Consequences for Children and Families

It is important to begin with a recognition of some of the monumental interests at stake with each of these bills. **Termination of parental rights implicates not only a parent's fundamental liberty interest to direct the care and custody of their child under the Fourteenth Amendment but also a child's constitutional right to familial association.** To terminate parental rights—to legally sever the relationship between a child and their parent—is a profoundly significant act.

Termination of parental rights and subsequent adoption also severs any legal relationship a child of any age has with their siblings, their aunts, their uncles, their cousins, their grandmother, their grandfather, and entire biological family. They are no longer family under the eyes of the law. For tribal children, this could also mean severing ties to extended family, traditions, customs, and tribal identity. After a parent has exhausted their TPR appeal rights, the judge's order at the final dispositional phase of the case terminating those legal relationships cannot be reversed.

Since the inception of organized child protective services (CPS) systems in the United States over 150 years ago, Black and Indigenous children have been removed from their homes and families by various iterations of child protective services at astronomically higher rates than white children, sometimes specifically sanctioned by the system as targeted removals. These disparities persist in Wisconsin's recent data regarding removal, the out-of-home care population, and children who are the subject of termination of parental rights proceedings.

Decades of research illuminating the effectiveness of community-based prevention efforts and the harms caused by removal and the legal severing of familial bonds culminated in Congress passing the Family First Prevention Services Act ("Family First"), signed into law by President Trump in February 2018. This bi-partisan effort incentivized states to fund evidence-based prevention efforts, curtail the use of congregate or group care for children, and reduce traumas related to removal and family separation. These changes to the Title IV-E funding structure aims to free up dollars from the deep end of the child welfare system for more upstream efforts to prevent child abuse and neglect in the first place, a policy priority of the Trump Administration's child welfare team that carries forward under the Biden Administration.

Through Wisconsin's child welfare strategic transformation and Family First implementation, underway since 2018, DCF continues to work towards a system that serves more children in-home and in family settings whenever safely possible; strengthens local communities and cross-agency collaboration for services; improves our group care settings; and supports our child welfare workforce.

An Alternative Solution: Codifying a Parent's Right to Counsel in CHIPS Cases for More Timely Permanency, Reduced TPR Litigation, and Protection of Due Process

Guaranteeing the right to counsel for parents in child in need of protection or services (CHIPS) cases in Wisconsin could get at the root causes of issues these bills may intend to address: for parents—ensuring they are afforded due process and can meaningfully participate in court proceedings from the beginning of a case, reducing TPR litigation at the trial and appellate levels. For children—lessening the time spent in out-of-home care before achieving permanency.

The bipartisan legislation signed into law by Governor Walker, 2017 Wisconsin Act 253 repealed a statutory prohibition on appointing counsel for a parent in a CHIPS proceeding and created a pilot program in five counties (Brown, Outagamie, Racine, Kenosha, and Winnebago) to provide counsel to parents in CHIPS proceedings. In a preliminary review of data illustrating the impact of the pilot since its inception in July 2018—even when accounting for the tremendous impact the pandemic has had on court operations—the pilot is a success. Three goals of the child welfare system as it relates to children in out-of-home care are to increase permanency, decrease children re-entering out-of-home-care after achieving permanency, and reduce the length of time that a child spends in out-of-home care. In comparing these metrics for counties included in the SPD pilot versus non-SPD pilot counties between July 1, 2018 and December 31, 2020, SPD pilot counties had a higher permanency rate for children, a lower rate of children re-entering out-of-home care, and a lower median length of time children spent in out-of-home care.

Anecdotally, SPD has noted several successes and challenges during the pilot program. Challenges have included delays in the appointments of counsel due to several factors, pushback in pilot counties from a new process, challenges navigating the advocacy on clients' behalf, and specific challenges related to the pandemic. Successes included changes to the allegations in the petition, increased understanding of the process by parents, consent decrees instead of formal disposition orders, increased reunification, and increased placement with relatives.

In an examination of parent representation models in other states, it is clear that access to counsel for parents in CHIPS proceedings has demonstrated similar favorable results: reduced time in out-of-home placements, reduced time to final disposition, and fewer contested petitions for termination of parental rights. Moreover, advocate counsel for parents allows for earlier intervention, which increases the chances of family reunification or, at times, prevents the separation of families entirely prior to removal and entering the judicial process.

Assembly Bill 626

DCF opposes AB626, which creates a new ground for CHIPS and TPR where the child is found to be a drug-affected child. Under the bill, the juvenile court may enter a CHIPS dispositional order for a child if it finds that the child either (1) had prenatal exposure to alcohol or a controlled substance and the CHIPS petition was filed within 18 months of the child's birth or (2) the child's 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. Additionally, the bill allows a juvenile court to order TPR for a child placed outside of the home pursuant to a CHIPS dispositional order by finding that the child's basic needs and safety have been adversely affected by a parent's chronic and severe use of alcohol or a controlled substance if the court also finds that there is a substantial likelihood that the parent will not meet the conditions of return and the parent is not seeking treatment or complying with a treatment program.

DCF has significant concerns with the overly broad language in the definition of "drug-affected" child. First, the definition could encompass a wide range of children, many of whom can be safely cared for in their home without government intervention, including the following:

- A child whose mother used drugs or alcohol during her pregnancy, even for a short period of time but does not use drugs after the child's birth and is able to safely care for the child.
- A child whose mother is undergoing treatment for drug or alcohol addiction and has another parent or relative who is able to safely care for the child.
- A child who has developmental delays or other symptoms and is misdiagnosed as having fetal alcohol spectrum disorder or prenatal exposure to a controlled substance. As the CDC, Mayo Clinic, and Cleveland Clinic note, making a fetal alcohol syndrome diagnosis can be difficult because there are no particular medical tests or procedures to make such a determination, and many other disorders can have similar symptoms.

Second, a child "whose basic needs and safety have been adversely affected" by a parent or guardian's substance use is already encompassed within the definition of the neglect and substantial risk of neglect grounds for CHIPS in s. 48.13, which are tied to the "serious endanger[ment of] the physical health of the child." Without further enumeration, the ambiguity of the phrase "adversely affected" in the bill may also raise constitutional concerns.

The static nature of the definition of "drug-affected child" in the bill creates additional concerns and conflicts with DCF's safety model, which evaluates the safety of the child and the parent or caregiver's protective capacities. Under the legislation, a child's status as a "drug-affected child" may be cemented even before the child is born, and for the purpose of CHIPS jurisdiction there is nothing the parent or parents can do once a child has been deemed to be a "drug-affected child" to prevent jurisdiction from attaching under s. 48.13. At the TPR stage, the static nature of the definition of "drug-affected child" presents similar concerns. Ultimately, this ground does not require the child welfare agency to prove any current concerns with a parent's ability to safely parent the child, but rather provides the opportunity for these agencies to make decisions based on a determination from a previous proceeding when a parent may not be represented by counsel. As a result, this bill may also have the unintended effect of discouraging pregnant people from seeking prenatal care or substance abuse treatment for fear of losing custody of their child.

Consistent with federal funding requirements, Wisconsin statutes require a physician to report to the child welfare agency newborn babies who test positive for controlled substances. The child welfare agency must complete an assessment on all such referrals to determine if the baby is safe, and if not, put in place a safety plan, and if necessary, remove the baby from the home. Wisconsin child welfare agencies use a robust framework for assessing child safety in a comprehensive manner for all types of possible child maltreatment reports, including cases involving drug positive infants. It is important to note that prenatal substance use is not the only factor taken into account in determining a child's safety.

The proposed ground for TPR also includes if a parent has not made reasonable efforts to enroll in a substance use disorder treatment or recovery program within 90 days of the child's placement outside the home, or if the parent has not maintained substantial compliance with the treatment or recovery program they are enrolled in, and if the parent is not participating in drug treatment court. The ambiguity of the terms "reasonable efforts" and "substantial compliance" could be interpreted in a multitude of ways across Wisconsin's 72 counties and 11 Tribal nations and do not account for the realistic barriers that prevent individuals from accessing substance abuse treatment, including but not limited to: waitlists, limited options based on geographic location, inconsistent transportation, and inability to leave work to attend treatment.

In sum, the legal ambiguities in the bill as currently drafted may cause disproportionate outcomes for families and lead to appellate litigation. In line with components included in Family First related to treatment of substance use disorder, state legislative solutions could instead expand timely access to substance use disorder treatment and recovery programs for parents and increase funding for children to be placed with their parent while receiving treatment, when possible. Research and evidenced based practice inform us that the disease of addiction requires comprehensive support and family-centered treatment versus punitive measures.

Assembly Bill 627

DCF opposes AB627, which creates a new ground for TPR based on parental incarceration. This bill would allow local child welfare agencies to pursue a TPR for children and youth whose parent(s) have been and/or will be incarcerated for a significant portion of the child or youth's life.

First, parental incarceration is already a factor that may be considered in a TPR, and adding a ground making parental incarceration on its own a sufficient basis to terminate parental rights could raise constitutional concerns. For example, current statute s. 48.415(6), Failure to Assume Parental Responsibility, allows local child welfare agencies to pursue TPR if the parent(s) have not had a "substantial parental relationship" with the child. Substantial parental relationship is defined as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child."

Second, the elements of the bill's new TPR ground may be unconstitutionally vague, leading to significant litigation. TPR could be proven by showing that the parent is incarcerated at the time of the fact-finding hearing and "is likely to continue to be incarcerated for a substantial period of the child's minority." In making this determination, the fact-finder "may consider whether the parent has a history of repeated incarceration." This language essentially asks the fact-finder to speculate as to whether the parent is going to re-offend and be incarcerated again in the future once they are released without outlining how one would predict whether it's likely a parent will be incarcerated for a substantial period.

AB627 will have a disproportionate impact on families of color due to the systemic disparities in the criminal legal system. A 2020 study by the Wisconsin Court System found that Black, Native American, and Latino men are significantly more likely to receive prison sentences than their white counterparts—28 percent, 34 percent, and 19 percent more likely, respectively. Allowing for

TPR on the grounds of incarceration alone, when no other abuse or neglect may have occurred with that particular parent, unnecessarily severs the connection between a child and their family and would do so at higher rates for children of color who are already disproportionally represented in the child welfare system. The ambiguous elements in this TPR ground would exacerbate this disparate impact in addition to leading to inconsistent application of the law across the state.

Finally, a significant bond and relationship may exist or can be formed between an incarcerated parent and their child. Though that parent is unable to provide daily care while incarcerated, they are able to exercise their parental responsibility by signing necessary consent forms, maintaining contact through letters, phone calls, and visitation, and being emotionally available for their child, and the parent may reunify with their child and continue parenting them upon release.

The child welfare system frequently interacts with families that include parents who are incarcerated during the course of a CPS case. This legislation would result in an increase in TPR filings for cases in which one or both parents are incarcerated or have a prior history of incarceration. In alignment with principles embodied in Family First, passed by Congress in 2018, DCF is committed to the strategic vision of keeping children safely with their families or communities. While incarcerated, a parent is serving a sentence for a previous law violation, which rarely relates to abuse or neglect; using the incarceration as grounds for TPR doubly punishes that parent and would cause unnecessary emotional harm to the child. Increasing the amount of TPR fillings will also perpetuate existing mistrust of the intention of the child welfare system as outlined in Chapter 48, making it more difficult to partner with families who may be able to safely support their children.

Assembly Bill 628

DCF opposes AB628, which eliminates the right to a jury trial in a TPR proceeding. The right to parent one's child is one of the most treasured and fundamental rights. Because of the constitutional rights at stake and the permanence of the decision, termination of a parent's rights is often referred to as the "civil death penalty." It is DCF's view that Wisconsin should be proud of the complete and thorough legal protections provided in this state to birth families when determining if TPR is necessary and appropriate. Jury trial is seen as a legitimate and necessary component of the criminal legal system for individuals accused of crimes, facing deprivation of physical liberty. Similar to jury trial usage in other legal proceedings, it is important to allow for

the opportunity to have an unbiased group of one's peers to assess the case history and current facts of the case prior to termination of this monumental liberty interest.

Parents involved in the child welfare system often feel that the system and its players are stacked against them. They're not wrong. A parent may feel inappropriately judged or that unfair assumptions are made about them due to their previous history or current struggles. These feelings may extend to their case workers, judges, and guardians ad litem who are likely to align with the local child welfare agency. In many Wisconsin counties, parents do not have the assistance of counsel during CHIPS proceedings and worry about being accurately portrayed during these critical proceedings. While many parents choose not to request a jury trial, the opportunity for trial by jury allows for individuals without preconceived opinions to serve as the independent fact-finder in TPR cases. Allowing for the parent the option for a jury to determine their fate in a proceeding that could establish the grounds for the legal termination of their fundamental right to parent—and their child's fundamental right to familial association—is absolutely necessary and reduces the likelihood of appeal.

Assembly Bill 629

DCF is testifying for information on AB629, which establishes a legally enforceable post-adoption contact agreement. Under the bill, the court must consider the terms of such an agreement when considering the TPR dispositional factor of the impact on the child of severing the child's relationship with the parent or other relative. After the approval of an agreement, an adoptive parent may agree to modify or may petition to modify the agreement, and any party may petition the court for enforcement of the terms of the agreement after attempting mediation or an alternative dispute resolution with a mediator or arbitrator's fees paid equally by the parties.

DCF supports the concept of "open adoptions" when it is safe and freely supported by both the birth and adoptive parents, and many families in Wisconsin choose to continue supporting birth family relationships post-adoption. However, the bill treats adoptive parents differently than all other parents by limiting the adoptive parents' authority to make decisions about how and with whom their children spend time. Further, if a postadoption contact agreement can only be entered into at the time of TPR or adoption finalization, it creates a commitment that does not account for changes in relationships, stability, or circumstances that may occur after the child is stabilized in their adoptive home. Under the bill, the agreement is unenforceable during a period when a child has been placed outside of the adoptive parents' home under chapter 48 or 938 but does

not address how an agreement should be renegotiated if there is a disruption in the adoption and the child is placed within the child welfare system.

AB629 requires parties to first participate in mediation or arbitration proceedings before a motion to enforce could be filed with the court. From an equity lens, this requirement presents challenges for families who do not have the financial means to seek legal assistance for the creation of an agreement or pay for mediation or arbitration services when enforcement is needed. Notwithstanding the dispute resolution provisions, it is unclear how enforcement would be monitored and the repercussions of non-compliance.

DCF would recommend the following amendments to AB629 to address outstanding concerns:

1. Replace the establishment of a legally-enforceable post-adoption agreement with a non-legally binding post-adoption agreement to be used by birth parents and adoptive parents to establish mutual expectations and understanding of what a post-adoption contract could entail. Add a requirement in s. 48.84 for DCF to develop and publish on its website a voluntary post-adoption agreement template, to be used as a resource by families if desired, and a requirement that the training topics for pre-adoptive parents include the benefits of post-adoption contact between adopted children and birth parents.
2. Exclude the post-adoption contract as a consideration in a TPR decision and allow the post-adoption contact agreement to be concluded only at the adoption proceeding to (a) reduce the risk that a post-adoption contact agreement could be used to coerce a voluntary TPR and (b) avoid complications due to a change in pre-adoptive placement post-TPR.
3. Require signature of the agreement by the adopted child, if the child is 10 or older to ensure the agreement accounts for the child's wishes.
4. Clarify that a post-adoption contact agreement is not required before adoption may be finalized to ensure that discussions and negotiations of a post-adoption agreement do not delay an adoption and permanency for the child.
5. Clarify that a post-adoption agreement does not affect the legal parental decision-making rights of the adoptive parents.

Assembly Bill 630

DCF opposes AB630, which would allow a party to initiate a TPR proceeding by filing a motion in a CHIPS proceeding. Currently CHIPS and TPR cases are distinct proceedings. Under the bill, a parent would have the statutory right to legal representation in the CHIPS proceeding beginning when a TPR motion is filed.

The purpose of the CPS system is not to solely function as an adoption agency. CPS identifies safety risks to children, supports families to keep children in the home when safe to do so, temporarily places children in out-of-home care if necessary, and provides ongoing support to parents and families to build parental capacities and work towards reunification. It is incumbent upon the system to provide families the opportunity to engage in these supportive services prior to taking any drastic steps towards severing families' legal relationships.

As highlighted in previous testimony, parents in many Wisconsin counties do not have the right to an attorney during a CHIPS proceeding. As a result, concerns regarding the due process rights of the birth parent arise if a TPR proceeding is initiated at the CHIPS stage of a case. The bill may also result in the filing of a TPR motion at a time that would be procedurally at odds with other requirements in Chapter 48. A CHIPS petition is required to be filed within 72 hours (excluding Saturdays, Sundays, and legal holidays) of the temporary physical custody (TPC) hearing. Under AB630, there is no specified timeframe after a CHIPS proceeding is initiated in which a TPR motion may be filed. For example, the bill would permit a TPR being filed early on in a CHIPS case—before an Initial Assessment has concluded, before a disposition court report is written, or before a court enters a CHIPS dispositional order.

Under s. 48.356, when a court issues a CHIPS order placing a child outside of his or her home, the court must provide TPR warnings to the parent, both orally and in the written order, informing the parent of any grounds for termination of parental rights under s. 48.415 that may be applicable and of conditions necessary for the child to be returned to the home. Depending on whether specific timeframes and other requirements apply to a particular TPR ground, the filing of a motion for TPR could present due process concerns if parents are put in a position of having their parental rights terminated without having received the TPR warning and conditions from the court. Practically speaking, if a TPR motion is filed prior to a dispositional order being entered, a parent would not have time to understand what the present and/or impending danger threats and

conditions for return are, nor allow them to access the treatment services required by the dispositional order to work on behavior change to increase parental capacities.

Finally, in accordance with Indian Child Welfare Act (ICWA) federal regulations, a court must ask each participant at the commencement of voluntary or involuntary child-custody proceedings whether they know or have reason to know that the child is an Indian child. Maintaining distinct proceedings for CHIPS and TPR cases would ensure that the court would engage in this inquiry and ensure the petitioning party complies with ICWA notice provisions at the time the TPR proceeding is initiated.

As previously outlined, the decision to terminate a parent's rights and sever a child's familial ties is life-altering for everyone involved. It is not a decision that can or should be made as part of a CHIPS case without child welfare agencies first providing reasonable or active efforts to support families' reunification efforts.

Assembly Bill 631

DCF is testifying for information on AB631, which makes several changes to the Safe Haven law, including the following:

- Expanding the timeframe in which a parent may relinquish a newborn child to a law enforcement officer, emergency medical services practitioner, or hospital staff member from within 72 hours after birth to within 30 days of birth
- Allowing a parent of an Indian child to relinquish the child to a tribal official
- Requiring the person taking custody of the relinquished child to make a reasonable effort to
    - Provide the parent with a brochure noting the parent's right to anonymity; the steps a parent can take if they change their mind about relinquishment; an explanation of the importance of knowing the child's social and health history; an explanation of the importance to an Indian child of maintaining a social and cultural connection to their tribe; and a form on which to provide identifying information for each parent and information about the child's social and health history and tribal affiliation
    - Solicit information about the social and health history and any tribal affiliation of the child or, if the parent declines to provide the information, encourage the parent to submit the information to the county (or DCF in Milwaukee County) at a later date

    - Promptly transmit any information obtained relating to the tribal affiliation of the relinquished child to the local child welfare agency, which must promptly transmit the information to the tribal agent of the child's tribe
- Requiring the juvenile court (if the court finds that the child should continue to be held in custody) to transfer guardianship and legal custody of the child to the department, a licensed child welfare agency, or a county authorized to accept guardianship, for placement in a licensed foster home and order a finding that there is probable cause to believe that the child has been relinquished
- Requiring the proposed adoptive parent to sign a statement acknowledging that there is no guarantee that the adoption will be finalized
- Requiring that ICWA and the Wisconsin Indian Child Welfare Act (WICWA) must be followed in any child welfare proceeding regarding an Indian child relinquished under the Safe Haven law
- Requiring the district attorney or corporation counsel, at least 30 days after the child was relinquished and no later than 60 days after the juvenile court found probable cause that a child was relinquished, to file a petition to terminate the parental rights of a parent who has relinquished a child or join the petition if one has already been filed
- Requiring the person taking custody of the relinquished child to file a birth record for the child in addition to filing a foundling birth record for a live born infant of unknown parentage; further, the person filing the foundling birth record (or who knows of the filing of a birth record at the time of birth) must notify the state registrar that the two birth records are for the same child so the state registrar may impound a birth record
- Requiring the state registrar to impound the birth record filed at the time of birth (if located) instead of the foundling birth record

For context, there have been 114 documented cases of infants relinquished under the Safe Haven law since 2015, with 22 being the most documented in one year.

DCF appreciates the intent of the authors to address the pervasive challenge of appropriately identifying Indian children who enter the child welfare system. AB631 includes critically important provisions aimed at ensuring compliance with ICWA and WICWA when Indian children are relinquished—specifically, if an intake worker to whom a child is delivered knows or has reason to know that the child is an Indian child, the worker is required to notify the child's tribe and provides that ICWA shall apply to any child custody proceeding involving the child. However, the effectiveness of this provision depends on the likelihood of proper identification of an Indian child

at the time of relinquishment. While Section 13 of the bill requires a form to be provided to the parent to document information related to tribal affiliation, a parent is not required to disclose this information.

The identification and notice requirements are foundationally important for the purposes of ICWA and WICWA to be carried out. ICWA was first enacted 1978 in response significant evidence presented during congressional hearings showing that federal and state governments had policies of removing Indian children from their families and tribes in an attempt to assimilate these children into white culture through placement with white families or institutions. This practice of systematically removing and disconnecting Indian children for over 100 years caused immeasurable harm to Indian children and families and endangered the very existence of tribes and tribal governments. In spite of the additional protections that ICWA affords, it is still the case nationwide and in Wisconsin that Native families are significantly more likely to have their children removed and placed in out-of-home care than their white counterparts.

In reviewing the language of AB631, it is challenging to weigh the prospect of requiring disclosure of this information for greater likelihood of ICWA/WICWA compliance with the Safe Haven law's assurance of anonymity and confidentiality for the parent. DCF would defer to tribal nations as to whether the provisions in AB631 adequately addresses the identification issues in Safe Haven cases.

DCF would, however, like to raise a concern regarding a component of the bill that encroaches upon tribal sovereignty. The bill permits a child to be relinquished to a tribal official and requires the tribal official to deliver the relinquished child to an intake worker and to comply with other related statutory requirements. In addition to the lack of definition for who would qualify as a "tribal official," DCF questions the state of Wisconsin's authority over tribal nations and their representatives and whether imposing statutory requirements for tribal officials under this bill would violate tribal sovereignty.

Assembly Bill 632

DCF is testifying for information on AB632, which creates a duty for a TPR appellant to participate in the appeal and allows a party to petition the court to find the appellant has abandoned the proceeding if they do not fulfill their duty to participate.

Under AB632, the ambiguous concept of "participation" in a TPR appeal is likely to create confusion as parties and courts try to interpret whether or not that obligation has been met because current law already requires appellant parents to sign off on each phase of a TPR appeal. In April of 2018, significant statutory changes related to TPR appeal procedures became effective following the enactment of 2017 Wisconsin Act 258. In part, Act 258 requires an appellant to personally sign (1) a notice of intent to pursue post-disposition or appellate relief from a TPR judgment or order, which must be filed within 30 days after the entry of final judgment; (2) a notice of appeal for an appeal to the court of appeals, which must be filed within 30 days after service of the transcript or circuit court case record; and (3) a petition for review for an appeal to the Wisconsin Supreme Court, which must be filed with 30 days of the date of the court of appeals' decision.

Compared to filing deadlines in other civil and criminal appellate matters, the timelines established for TPR appeals are expedited. In a case where a parent appellant is represented by the State Public Defender (SPD) or other attorney, each of the three key filings listed above cannot occur without the parent expressing a position to their attorney and literally signing off. As is the case for TPR appeals and appellate practice generally, it is the role of the attorney (and not the client) to review transcripts and the trial record, identify any legal issues to raise on appeal, and draft appellate briefs. It is unclear how a parent could be expected to participate further in this process.

Pro se appellants can face insurmountable burdens to comply with TPR appeal procedures. In light of the monumental rights at stake for a parent and child, it is understandable that a pro se parent appellant strongly desires to appeal a TPR decision but does not have the resources or legal background to navigate the appellate procedure without the assistance of a trained advocate. After the personally signed intent to pursue post-dispositional relief is filed, a parent who is not appointed an attorney through SPD is on their own to review the trial record and identify legal issues worth raising, file the notice of appeal with the circuit court, pay the filing fee, draft

an appellate brief, and follow the procedures outlined in s. 809.107 regarding filing documents with the court and effectuating proper service of documents upon the other parties.

AB632 could potentially be amended to address circumstances involving a pro se appellant who fails to meet the deadlines outlined in the statute, providing an avenue for a party to file a motion requesting a hearing on the issue of whether the appellant has abandoned the appeal or whether the appeal will proceed. However, under current law there is nothing that precludes another party from filing a request for a hearing before the court on the issue of missed statutory deadlines.

In general, this series of bills creates additional avenues to terminate parental rights based on circumstances that are already accounted for in the law along with measures to expedite procedures that implicate important constitutional rights of parents and children. Without first taking steps to ensure access to representation and, by extension, meaningful participation in court proceedings from the beginning of a CHIPS case, many of these bills could have the unintended consequences of increasing TPR litigation and extending the time children spend in out-of-home care before achieving permanency.

Thank you for the opportunity to testify about this important legislation. We again thank the committee for the deep engagement on these issues and would be pleased to respond to any questions.

Child Protective Services (CPS) Process

No two child welfare cases are the same as family dynamics and stressors vary. While the below diagram provides a high-level overview of the CPS process, it is important to note that a child can be removed at any time if deemed unsafe. When a child is safe, a case can be closed at any step of the process.

Report is Made

A concerned citizen or mandated reporter suspects child abuse and/or neglect and contacts county or tribal child protective services agency.

Report is Assessed

Determine if the allegation meets the legal definition of child abuse and/or neglect as defined in Wisconsin's Children Code.

- Screened Out
- Screened In

Case is Assigned a Priority

This is based on the severity of the possible harm and how immediate the risk is to the child.

- Same day response
- 24 - 48 hours
- 5 business days

Case is Assigned to Child Welfare Professional

Child welfare workers have 60 days to complete an Initial Assessment, which includes interviews with the child and the parent(s), family members, and other adults who are in contact with the child, such as doctors and nurses, and completing a home inspection. There are two decisions that need to be made:

Maltreatment Finding: The determination of whether a maltreatment allegation has occurred (substantiated) or not (unsubstantiated). This finding does not determine what if any services will be offered.

Safety Decision: The determination of whether a child is safe or unsafe based on the safety assessment and analysis.

Maltreatment Finding

- Unsubstantiated
- Substantiated

Safety Decision

Child Can Safely Reside in the Home

The CPS agency may refer the family for voluntary CPS services or other community services, as needed.

Child Cannot Safely Reside in the Home

If the CPS worker determines that a child needs to be placed in OHC to ensure safety, the child is placed into OHC and a CHIPS order may be filed.

- Placement with relatives (preferred)
- Placement in a non-relative home
- Congregate Care

Whether a child remains in home or not, the child welfare worker is responsible for ensuring the family and child have access to services and supports needed to regain safety and child well-being. In consultation with the parent(s), the worker builds a plan to help monitor progress towards reunification and/or closing of the case.

If the family cannot meet the conditions of reunification and the child is in OHC for 15 of the last 22 months, or the goal is adoption, a Termination of Parental Rights (TPR) may be filed.

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Jon Padgham
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Assembly Committee on Family Law
Wednesday, December 1, 2021
Assembly Bills 626-632

Chair Magnafici and members,

Thank you for the opportunity to testify on this package of bills. My name is Adam Plotkin, Legislative Liaison for the State Public Defender's Office. Joining me is an attorney from our Madison office, Matt Giesfeldt. In addition to Attorney Giesfeldt's years of service as an attorney in these types of cases, he also serves as the Family Defense Practice Coordinator for the Public Defender's office. Several of the bills raise significant concerns for the practice of law and clients of the State Public Defender's (SPD) office.

The SPD is authorized to provide representation for children who are the subject of a Children in Need of Protection and Services (CHIPS) as well as the parents of children in CHIPS proceedings in five counties as part of a pilot program. In addition, we provide representation statewide in Termination of Parental Rights (TPR) proceedings and for parents only in Indian Child Welfare Act (ICWA) cases.

The SPD is just over three years into a five year pilot program that allows us to represent parents in any CHIPS case in five counties - Brown, Outagamie, Winnebago, Racine and Kenosha. So far we have made about 2750 appointments for parents in the pilot program under 2017 Act 253. The goal of providing representation for parents at the CHIPS stage is to increase the chances of success, reduce the number of termination proceedings, and increase the speed and permanency of placement.

Looking throughout the content of these bills, we are concerned about the impact the provisions will have on SPD clients, many of whom come from diverse backgrounds, have mental or cognitive issues, or have a history of trauma. Further, the racial disparities in the criminal justice system exist in the family law area as well. Our concern is that many of the obstacles that lead to overrepresentation of minority groups in the justice system are exacerbated by changes in this package. Oftentimes it appears that assumptions are made about the type of people involved in the adoption and foster care system. Many of the children who are removed from the home are older children of color who have a history of trauma and mental health or developmental issues.

In previous legislative sessions, the SPD has provided testimony about challenges in the family law system for standing committees and Legislative Council study committees. We discussed the importance of representing parents at CHIPS proceedings, the value of jury trials in TPR cases, and discovery issues which would all have an impact on the efficiency of cases in the family system while preserving the fundamental right of an adult to parent their child.

Following are comments related to bills in this package.

Assembly Bill 626 (grounds for finding a child in need of protection or services or for terminating parental rights)

AB 626 introduces a broad, subjective standard for a CHIPS petition that is unnecessary given other grounds in s. 48.13 that could be utilized.

The combination of the definition of "drug-affected child" with the criterion on page 3, lines 12-15 that is based on "the anticipated date that the child's permanency goal will be achieved" raises a concern. This date is established during a non-substantive hearing early on in the process when the parent does not likely have an attorney. Taken together, we are concerned that the bill will have a negative impact on the number of children placed out-of-home.

It is possible that parents may be less likely to seek substance abuse treatment for fear that their rights eventually may be terminated. Most importantly, the new TPR grounds is problematic in that it is a burden shift to the parent if the child is found to be drug affected. The burden shifting raises due process issues, and the language of the grounds requiring that the parent "maintain substantial compliance with a substance abuse treatment or recovery program" is vague. This is especially problematic in rural Wisconsin where treatment and recovery programs are hard to find, get into, or travel to.

Assembly Bill 627 (terminating parental rights based on the parent's incarceration)

This new ground raises several concerns. First, it asks a judge in the TPR proceeding to guess whether the criminal case is complete when there is often no way to know whether appeals may or may not be successful. There is no mechanism to allow for a termination to be undone if a person successfully appeals the criminal case. And even if there were, this will have unnecessarily created trauma for the child.

One specific language concern in the draft is on page 2, lines 10-11 which uses subjective language by allowing termination if the parent is "likely to continue to be incarcerated for a substantial period of the child's minority." This is open to different interpretation by courts county-by-county. The amendment which provides a definition of 4 years or more is helpful but does not address the underlying concerns about the general direction of the bill.

Another drafting concern is Section 2 which allows for a TPR petition to be filed on a currently incarcerated parent based on this new ground. In addition to the significant workload concern, the outcome or decisions made in the criminal case may likely have been different if this ground had been in place at the time of conviction. This raises constitutional due process issues in terms of not having provided notice in the prior case that is now leading to termination based on this new ground.

Assembly Bill 628 (elimination of a jury trial in a proceeding under the Children's Code)

The SPD does not agree that eliminating the right to a jury trial in a TPR will result in a decrease in time to disposition and will likely result in more involuntary TPR's and appeals.

I have included two charts with our testimony. The first shows the number of cases handled by the SPD broken down by disposition type in the from fiscal year 2013 through 2018. As you'll see in fiscal year 2018 for example, out of 565 appointments, 40 were concluded by jury trial. Just for clarity, our data reflects when a case is actually decided by which type.

The second chart shows the average number of days per disposition type also broken down showing Milwaukee alone, the other 71 counties, and statewide. The most telling statistic is to compare the average number of days to disposition statewide based on disposition type. It took 309 days to reach disposition when trying a case to the court, 279 days when trying it to a jury. The data does not support the contention that removing jury trials will decrease the amount of time a case takes to get to disposition.

We believe that what is at stake in a TPR case justifies the highest and one of the most treasured rights in the justice system - right to a trial by jury. Often called the "civil death penalty," a TPR proceeding uses the power of the state to end a parent's right to custody of their child. The U.S. Supreme Court has put the right of parenthood on equal footing with the rights of speech, association, and movement. The data indicate that removing jury trials is a drastic step to take given the limited scope of the impact they have on the system now. TPR proceedings should carry the same ability for a respondent to request a jury trial as a defendant in a criminal misdemeanor case.

Assembly Bill 629 (postadoption contact agreements)

AB 629 is a step towards open adoptions but raises concerns about meaningful access particularly for SPD clients. Section 4 of the bill deals with future enforceability of the provisions in the contact agreement. Unfortunately it requires mediation or arbitration - the costs of which are split by the birth and adoptive parents. For indigent individuals, this may put enforceability beyond their reach which means the contact agreement is not meaningful if the terms can be violated without consequence.

There are also questions about workload and future representation in modification or enforcement proceedings. It is unclear whether SPD would be allowed or required to provide representation for a proceeding that may be occurring months or years after the initial representation.

Finally, the bill does not make clear the status of the postadoption contact agreement if the adoption is disrupted.

Assembly Bill 630 (termination of parental rights by motion in CHIPS proceeding)

A majority of birth parents in a CHIPS proceeding are not represented by counsel. This creates not only due process concerns, but basic but important procedural questions. While AB 630 has taken into account the procedural issue of providing notice and allowing SPD to provide representation in a TPR case that is initiated by motion in a CHIPS proceeding, the bill would not increase the speed or efficiency of the system. It would still take the same amount of time to obtain the voluminous discovery in these types of cases and be in a position to proceed with the case. AB 630 will not have any practical effect on the system as it is now, especially since most CHIPS parents are currently unrepresented.

Assembly Bill 632 (duty to participate in an appeal of an order terminating parental rights)

The SPD provided extensive testimony on AB 632 when the Senate companion bill had a hearing. I have attached a copy of that testimony here for your reference. To summarize our concerns here, the bill as proposed includes language, particularly in Section 1, that raises

concerns related to definition and attorney-client privilege. The phrase "duty to participate" is not defined.

We have actively worked with the bill authors on the amendment introduced yesterday to address these concerns. We appreciate that the authors have been open to hearing and working on making changes to the bill.

Thank you again for the opportunity to speak today. Ultimately, the SPD and the other system actors you will hear from today want a very complicated system to work in the best interests of children but in a way that must balance the rights of parents to retain custody of their children. Many of the provisions in the package do not increase efficiency or permanency. There are changes to the system, many of consensus across disciplines, that were presented to the Adoption Task Force that would have a significant and positive impact.

Submitted by:
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Senate Committee on Human Services, Children & Families
2021 Senate Bill 601
Thursday, October 14, 2021

Mr. Chairman and members,

Thank you for allowing us to speak today on Senate Bill (SB) 601, which creates a "duty to participate" in appeals of termination of parental rights cases. The State Public Defender (SPD) understands the goals of the bill but has concerns with the language that is used to achieve those goals.

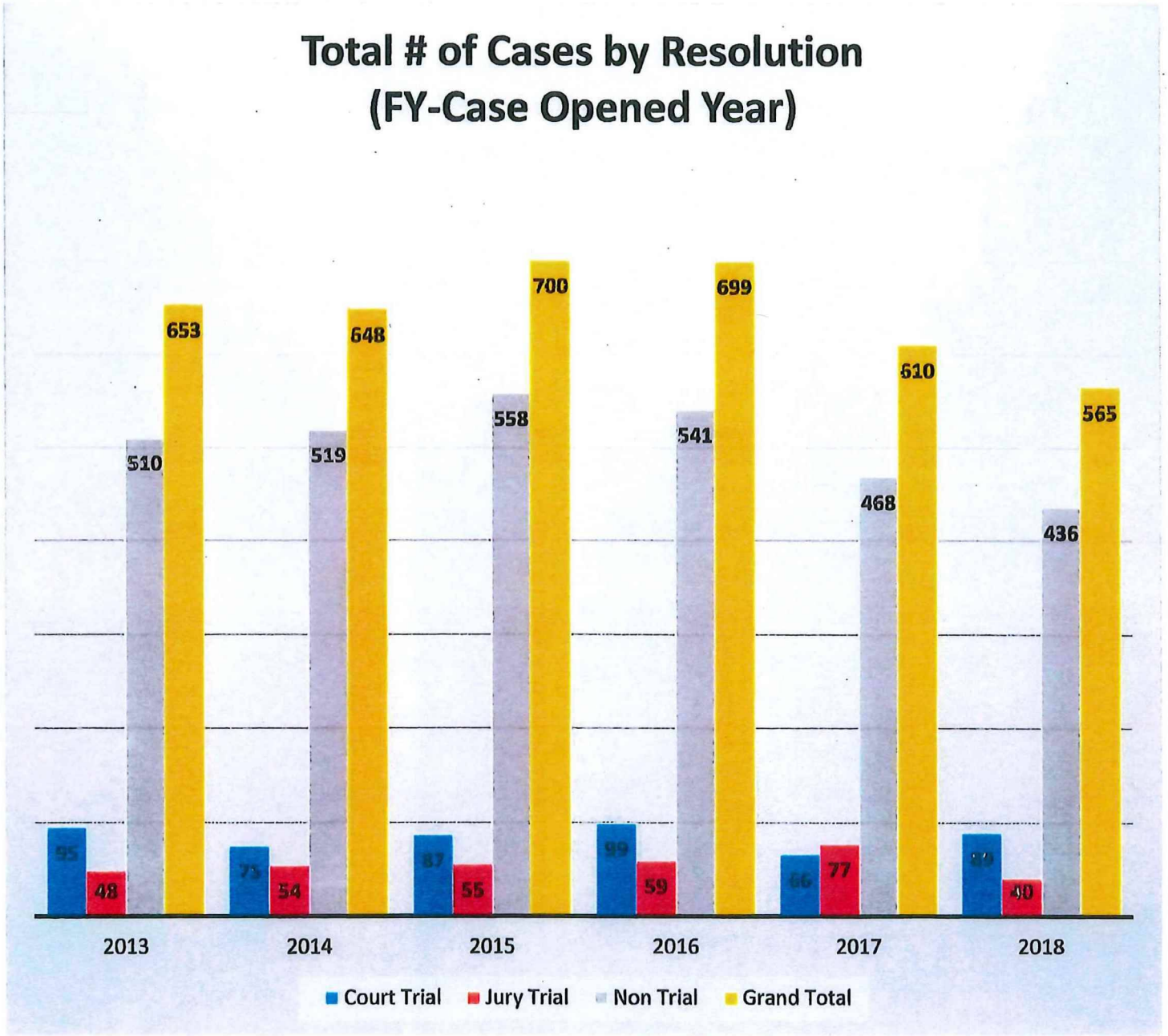
The SPD provides representation for parents in termination of parental rights (TPR) cases in circuit court as well as in appellate proceedings. After a circuit court reaches disposition in a TPR case, there is a defined statutory timeline for the various stages of the appellate process. At the end of that process is a statute that allows for the appellant to provide "notice of abandonment" of the case (s. 809.107(5)(am)). There are many reasons that an individual may wish to initiate the appellate process but then choose not to file additional material. Especially for an unrepresented person, following the complex appellate process can be challenging, including knowing about the notice of abandonment provision. Even when the appellant does not file a notice of abandonment, the direct appeal ends when the statutorily mandated deadlines in s. 809.107 lapse. However, it is understandable that the child welfare agency and any out-of-home guardian want to ensure finality before proceeding to adoption.

The bill as proposed includes language, particularly in Section 1, that raises concerns related to definition and attorney-client privilege. The phrase "duty to participate" is not defined. This leads to the possible outcome under the proposed language of SB 601 that the only way to inquire about whether a client has been participating in their appeal is to ask their attorney which is privileged information.

We have had initial conversations with the bill authors who are open to a conversation about a possible amendment to achieve the goal of the bill without legislatively creating ethical problems for attorneys. Broadly, our suggestion is to remove Section 1 from the bill. Then amend Section 4 to, in plain language, allow the appellate timeline to come to a conclusion first, then allow the corporation counsel or parent's attorney (in a private TPR) to file a motion with the court asking that the case be declared abandoned. The court would give notice to the appellant that the motion has been filed and give them 10 days to respond. If they do respond, a hearing is set. If they do not, the court can conclude the appeal has been abandoned.

This allows a process for formally concluding the appellate process if nothing has been filed to give finality and allow the next steps of the process to move forward, but does it in a way that does not negatively affect attorney-client privilege and also creates little additional work.

Again, it is our understanding that the authors are open to this possible amendment and we will work with them to get it drafted and introduced for the committee's consideration. Thank you again for the opportunity to appear today.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(FY-Case Opened Year)
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648
519
700
558
699
541
610
468
565
436
95
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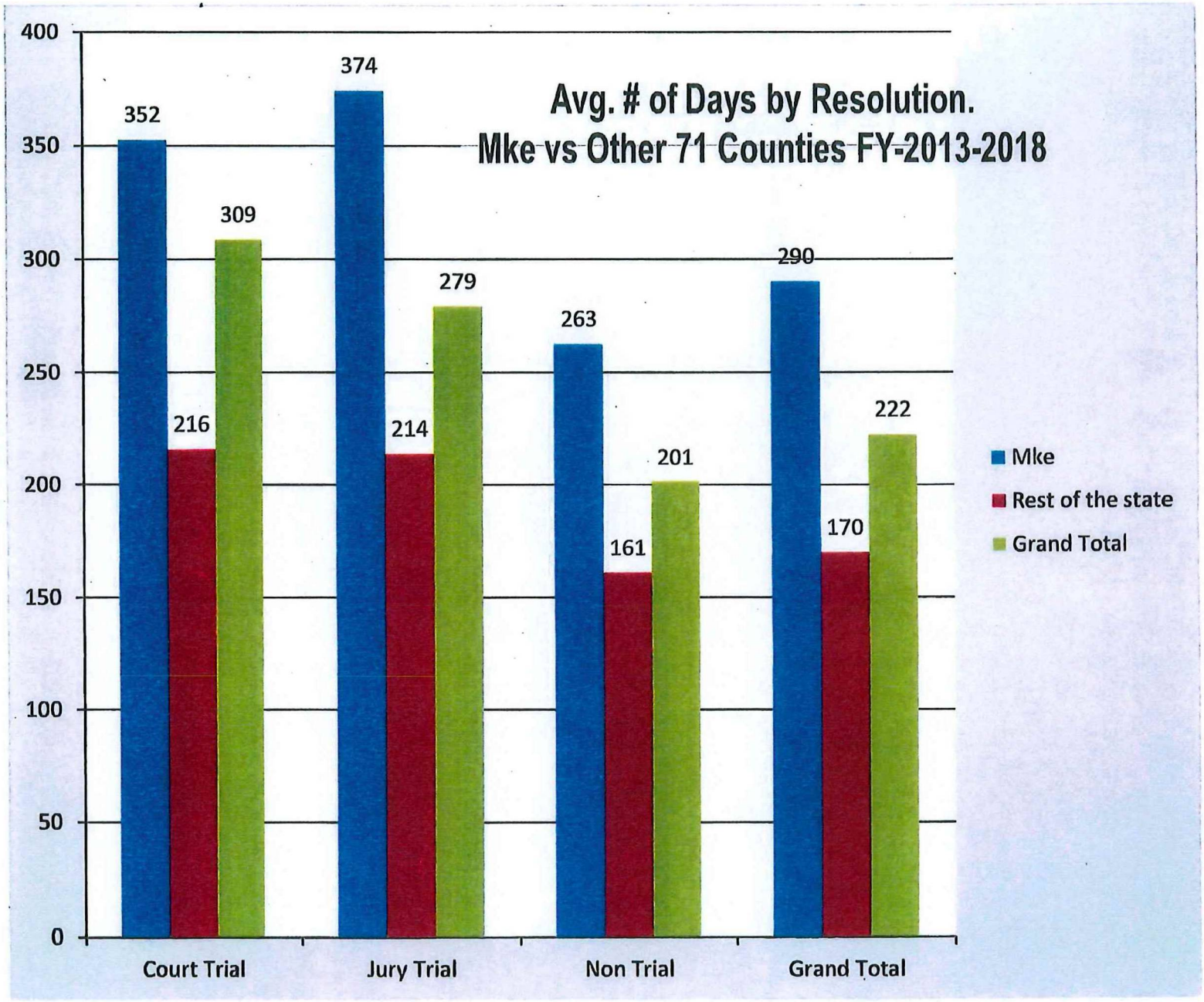
66
77
89
40
2013
2014
2015
2016
2017
2018
Court Trial
Jury Trial
Non Trial
Grand Total


Avg. # of Days by Resolution.
Mke vs Other 71 Counties FY-2013-2018
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350
300
250
200
150
100
50
0
352
216
309
374
214
279
263
161
201
290
170
222
Court Trial
Jury Trial
Non Trial
Grand Total
Mke
Rest of the state
Grand Total

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MEMORANDUM

TO: Honorable Members of the Assembly Committee on Family Law

FROM: Sarah Diedrick-Kasdorf, Deputy Director of Government Affairs

DATE: December 1, 2021

SUBJECT: Comments on Bills Related to TPR and Adoption – For Information Only

The Wisconsin Counties Association (WCA) thanks you for the opportunity to comment on the series of bills related to termination of parental rights (TPR) and adoption. Unfortunately, our experts are unavailable to attend the hearing today as the Wisconsin County Human Service Association (WCHSA) is hosting a summit on Children with Complex Needs.

WCA is happy to pull a team of experts together to discuss these bills in further detail with the committee as requested. In the interim, please find below comments from our county experts on the legislation listed on the hearing schedule. Please do not hesitate to contact the WCA office if you have any questions.

Assembly Bill 626 – grounds for finding a child in need of protection or services or for terminating parental rights

This bill creates a Drug Endangered Child (DEC) ground for CHIPS jurisdiction that requires either proof of prenatal exposure, as well as the filing of a petition within 18 months of the child's birth **or** proof that the child's "basic needs and safety have been adversely affected" by parents' chronic and severe use. The bill creates a very broad basis for jurisdiction, allowing a petition to be filed based on prenatal drug exposure up to 18 months after the fact. It requires that the child or mother test positive for non-medical drugs at time of birth, withdrawal symptoms in the child at birth, or developmental delays or symptoms during the child's first year that are attributed to exposure to a controlled substance. It does not require any additional showing that the child's needs are not being met, only that the child has certain symptoms associated with exposure to drugs or alcohol. So, if a child is diagnosed with Fetal Alcohol Syndrome at nine months of age, a CHIPS petition could be filed regardless of whether the parent was effectively meeting all of the child's needs at that time. It is assumed that most agencies and prosecutors

would choose not to file a petition where the child was being well cared for at the time of the diagnosis as a DEC, but the bill does not require there to be any showing of lack of care.

This bill also creates a TPR ground if there is proof that a *parent* has not made reasonable efforts to enroll in treatment within 90 days, **or** if they have not maintained substantial compliance with their recovery or treatment and there is substantial likelihood that the parent will not meet the conditions for return by the achievement date in the permanency plan. It is important to note that that makes the recommended and ordered date of achievement much more critical. Counties almost always just put in six months without a specific basis for doing so. If that date is used and a parent is not in recovery/treatment and meeting their CFR by that date, TPR grounds will exist. This requires parents to address their addiction issues very promptly upon a child being taken into custody.

Overall, this seems inconsistent with treating addiction from a medical or public health perspective. However, neglect based on addiction is very often resolved by parents getting sober; from that perspective, these cases are simple, if not easy. This bill highlights the tension between the process and time often necessary to recover from an addiction, and the child's need for prompt permanency. It should be noted that this version requires only reasonable efforts by parents, so a parent will not be penalized if a treatment slot is not immediately available.

Concerns have also been raised by counties with regard to the impact this legislation will have on pregnant women suffering from substance use issues attending appointments for prenatal care. That is a significant unintended consequence of this legislation.

Assembly Bill 627 – terminating parental rights based on the parent's incarceration

This bill creates a ground for TPR if the parent is likely to be in prison for "a substantial period of the child's minority." This makes sense, because TPR pursuant to Continuing Needs of Protection or Services is very difficult to prove for incarcerated parents based on the WI Supreme Court ruling in *Jodie W.* despite parents being wholly unavailable to care for their children. However, clarification is needed as to the definition of "substantial period of the child's minority."

The bill then goes further to say that the fact-finder may consider the parent's history of repeated incarceration in deciding if the parent is likely to be in prison for the majority of the child's minority. This means that a parent's rights could be terminated even if at the time of the TPR, the parent is in the community and doing well, IF the fact-finder is convinced that based on prior incarcerations, the parent will not remain in the

community. This raises significant concerns about the disproportionate impact that the criminal justice system has historically had on communities of color.

This also is similar to what the criminal justice system calls "other acts evidence." It is well settled that "character evidence" or evidence or prior behavior by a defendant is not admissible to prove the current specific incident of conduct, though it is admissible for a variety of other purposes including proving habit or character. In this bill, evidence of prior acts by a parent

would not be used to prove a specific episode of conduct that has already occurred; instead, it would be used to predict something that has not happened yet, substantially broadening the consideration for the fact-finder. This also raises the possibility, if not probability, of the implicit bias directly affecting the outcome. Counties predict parents would appeal adverse findings under this provision in every case.

Counties have also raised concern that this legislation will incentivize incarcerated parents to challenge jurisdiction during the CHIPS phase because if this TPR ground existed, incarcerated parents would likely challenge CHIPS jurisdiction knowing that a TPR petition is likely to follow.

Assembly Bill 628 – elimination of a jury trial in a proceeding under the Children's Code

This bill eliminates jury trials in a termination of parental rights (TPR) proceeding. It would likely make TPR trials faster and easier for prosecutors. However, this could lead to more requests for judicial substitution, a concern as the new judge could have little to no experience with TPR proceedings.

The proposed change could be good or bad depending on whether one believes that better decisions are achieved for families by a judge who knows the family or a judge that approaches a decision with a clean slate. Eliminating the jury trial option may also have the effect of families experiencing the court process as "unfair" because all decisions are made by a judge who may or may not have experience similar to that of the family.

Counties believe that a better argument could be made to eliminate jury trials in CHIPS cases, as opposed to TPR cases.

Assembly Bill 629 – postadoption contact agreements

This bill allows a proposed adoptive parent and a birth parent or other relative with whom a child has a substantial relationship to enter into an agreement for postadoption contact and allows a court to approve such an agreement.

According to our counties, postadoption contact could be a good thing; however, there are concerns:

- Who pays for the mediator?
- When a county petitions the court for TPR and recommends a caregiver as an adoptive resource, we trust that that caregiver will pursue the best interest of the child as it pertains to contact with biological parents. Some counties use non-binding mediation which has worked well.
- The financial implications for adoptive parents, such as attorney fees and cost of mediation, in situations when they or bio-parent petitions the court to revisit the agreement could be a deterrent to adoption.
- How will this affect the child possibly having a GAL/child welfare agency re-enter their life, how confusing and possibly traumatizing?
- The bill indicates that DCF or a county department would receive notice of hearings – what is a county's responsibility? Cases are closed at the county level upon TPR/adoption. Would the court require counties to do an investigation or submit a report? Counties prefer to be written out of the bill.
- Understanding that each judge views TPRs differently, would some judges require a written agreement in order to go forward? If so this could again deter foster parents from adopting.
- Instead of moving forward with the bill, one county suggested educating adoptive parents on the importance of relationships with birth parents.

Assembly Bill 630 – termination of parental rights by motion in a CHIPS proceeding

This bill allows a motion for termination of parental rights (TPR) to be filed in a proceeding in which it is alleged that a child is in need of protection or services. Counties are interested in this concept but raise the following:

- This bill allows for TPR by motion in a CHIPS case in any case where there is CHIPS jurisdiction. What is odd is that it also still permits filing a TPR as a separate action. Counties are not immediately sure what the value would be in being able to choose which procedure, and fear that will cause more confusion than anything. The procedures are essentially the same, so it does not make TPRs "easier" in any sense.

- This bill does require that if a TPR is filed as a motion in the CHIPS case parties may not exercise a right of judicial substitution unless they did not exercise that right at the time of the CHIPS filing. This would mean that parents would only have one chance to substitute judges where the TPR was filed as a motion in the CHIPS case, but would get a second chance outright if the TPR were filed as a stand-alone action. Courts would have to warn parents of that potential consequence of substituting judges when the CHIPS is filed.
- Bottom line, this is a procedural statute and counties can follow any procedure that the legislature sets. However, it might make more sense to mandate the TPR by motion process in cases in which CHIPS jurisdiction exists and leave the stand-alone TPR filing for privately-filed actions.
- There will be some implications for data collection for county agencies if the TPR becomes part of the CHIPS action, but that can be managed if necessary. It may also complicate parental representation since parents would get SPD in the CHIPS case at the point of filing of the TPR motion. It is not clear how or if that would affect the existing PRP representation.

Assembly Bill 631 – various changes to the safe haven law

This bill makes several changes to the state's Safe Haven law. While it may be a good idea to expand the Safe Haven window beyond the current 72 hours, it has been suggested that 30 days may be too long. A concern was raised with regard to the filing of a birth certificate and a county's ability to maintain confidentiality and not involve any identified father in the notification of proceedings.

A concern was also raised regarding the impact an attempt to solicit information from the mother at the time of relinquishment could have on the health and welfare of the child. More specifically, will an attempt to solicit information result in enough discomfort for a birth mother to the point the mother decides to forego a hospital birth, placing both the mother and child in danger.

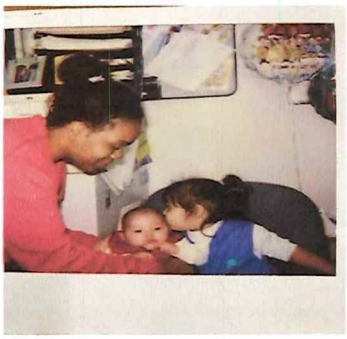
Assembly Bill 632 – duty to participate in an appeal of an order terminating parental rights

This bill creates a duty for an appellant who has filed an appeal of an order terminating his or her parental rights to participate in that appeal. This requirement may lead to a decrease in the number of appeals filed, creating more certainty for the children and families involved, as well as decreased costs for corporation counsel/district attorneys.

My daughter, Lici was 1 year old when I was initially arrested. Within days of my arrest, the GAL recommended that my daughter go through an assessment, as I was denied low bail and chances of me paying the amount of bail was unlikely. While I was presumed innocent, my daughter was in an assessment center for 6 months, my entire time in jail and my family was only allowed to see Lici in supervised visits. Shortly before going to prison in Taycheedah my daughter was returned back to my family though I was not able to see her. My daughter did not see me until she was 3 years old in prison.
My daughter did not recognize me when she saw me the first time.
The next time
Or the next time.
It was not until this time when my daughter was able to realize who I was.

That experience alone was not only devastating but just awful for me as a mother. The fact that my daughter spent every single day with me. To experience seeing my child not recognize me was very heartbreaking. I often wonder if she had not gone to that assessment center and instead was able to stay with our family would she have recognized me. I will never understand as a mother and human being how it would ever be appropriate for a system to make arrangements that keep children apart from the only people they know and just place them with strangers. It blows my mind that this Bill is considered the best solution for any child to be forced apart from Mom or Dad . The idea of losing your child is unbearable for any parent but to just take away your parental rights due to incarceration is just diabolical.

I hope that after you have heard my lived experience today you will consider the harm that this piece of legislation will cause the children and families of those incarcerated. What we need is more support for family reunification. How can we work together to secure a better outcome for children and families.



I'm a person who cares deeply about children, as a mother, grandmother, former court-appointed special advocate, and occupational therapist in the school system. And I know, from all of my professional education that caring for children means also caring for parents, doing everything possible to keep families together, barring egregious abuse or neglect. It is in the interest of that child for us to help that parent be the parent they need to be, not to cut them off forever from their child, often causing more harm. I strongly oppose AB627.

Reason #1 There are all kinds of reasons people are incarcerated. Shouldn't TPR be determined by what the nature of the offensive was, whether there was significant child abuse or neglect involved (often there is not)? Why should length of incarceration suddenly be the overriding factor. Should the 60 % who are in WI prisons right now as a result of a minor parole violation (known as revocation) now be subject to termination of their parental rights simply as a result of "substantial incarceration"? If you say yes, and this bill becomes law, being late for a parole meeting, getting revoked and resuming a long prison sentence could easily result in TPR for that parent. I am very disturbed by this and I hope you would too.

Reason #3 The term "substantial incarceration" is dangerously and irresponsibly ambiguous. That vague term, subject to anyone's interpretation could easily and randomly result in TPR for parents who are good parents, despite their incarceration.

Reason #4 The impact of TPR on the child/children.
The following paragraph references a 2007 article in Journal of Contemporary Legal Issues and a 2014 Health and Human Services Report:

Social scientists have found that termination of parental rights has a detrimental effect on children and puts a strain on the United States' already-taxed foster system. Studies have found [that]... there are thousands of children who are legally freed from their parents, but have not yet been adopted and are unlikely to ever be adopted.[14] A 2014 Adoption and Foster Care Analysis and Reporting System study discovered that there are nearly 59,000 youth in the US foster care system whose parents have had responsibilities terminated, but were waiting to be adopted.[15] The emotional toll that these long waiting times have on young children is immense, with higher reports of child depression and manic behaviors.

Reason #5: Let's spend our money on supporting families and children before anyone is incarcerated instead over using TPR, pushing more and more children into the foster care system, greatly increasing their odds of entering the juvenile justice system themselves.
The current cost of incarcerating each of those children at Lincoln Hills/Copper Lakes, for example, is a staggering $343,000 per year, over one third of a million dollars per year. I don't want my tax dollars going to pay for incarceration of children. I want to see my dollars going toward them and their families pro-actively - helping with drug addiction issues, food security, parenting skills, child care, job training, whatever is needed – all of the things to make that family succeed and avoid the carceral system altogether.

I am trusting this legislative body to use resources in that way, to help children by helping their whole families, not to further punish parents who were incarcerated for greatly differing reasons, but who could still all lose their parental rights forever simply by virtue of being incarcerated. Please do not allow AB627, which does not support and value the well being of vulnerable families and children to go forward.

Thank you,

Susan Andersen
Monroe, WI

MEMO

TO: WISCONSIN ASSEMBLY COMMITTEE ON FAMILY LAW

FROM: JULIE POEHLMANN-TYNAN, PH.D.

SUBJECT: OPPOSITION TO ASSEMBLY BILL 627

DATE: DECEMBER 1, 2021

I am a professor at the University of Wisconsin-Madison in the Human Development and Family Studies department and also a licensed psychologist in Wisconsin. I have been studying children with incarcerated parents and their families for the past 25 years and have authored or co-authored 5 edited volumes and more than 30 published papers or chapters on the subject. I am locally, nationally, and internationally recognized by my peers as an expert on the topic of children with incarcerated parents. Please note that the comments and opinions that follow are my own and do not reflect the views of my department, university, or funding sources.

In conducting research on families affected by parental incarceration over the past 25 years, I have interviewed hundreds of incarcerated parents, affected children, and children's caregivers—most of them from Wisconsin. I have observed dozens of visits between incarcerated parents and their children in corrections settings in Wisconsin, and I have conducted observations and assessments in the children's home environments during parental incarceration. I have also conducted program evaluations and designed and implemented interventions for children with incarcerated parents and their families. (This includes child-friendly visits at Taycheedah Correctional Facility and the Dane County Jail.) I was an advisor to Sesame Street in the creation and dissemination of their Emmy-nominated initiative called *Little Children, Big Challenges: Incarceration*, which includes multimedia materials for children affected by parental incarceration, and I am working with the national policy organization, ZERO TO THREE, on adapting their materials for military families for families affected by incarceration and immigration detention. I was on the Board of Directors for the International Coalition on Children with Incarcerated parents for a number of years as well and am currently on the planning committee for the annual National Conference on Children with Incarcerated Parents. I regularly give talks and webinars on the topic around the country and the world, and I teach a graduate and undergraduate course on children with incarcerated parents.

In my work, I have been struck by how much the incarcerated parents I have interviewed love and miss their children and how motivated they are to reunite with their children following incarceration. In a recent study, we found that many incarcerated parents are still able to coparent with their child's at-home caregiver during the incarceration period, including helping make decisions about the child's health, education, and well-being. In a series of studies, my research team has found that many children have positive contact with their incarcerated parents during the incarceration period, including video or in-person visits, phone calls, emails, and letters. Children typically express feelings of love during such contacts and, for children old enough to be interviewed, have expressed excitement about reuniting with their parent following incarceration.

At conferences and in preparing edited volumes, I also have spoken with many adults who experienced the incarceration of a parent when they were children. Most of the adults say that they valued contact with their incarcerated parent and were happy that they had the parent back in their lives after release from prison (see, for example, the chapter entitled "About Us, for Us, with Us: Collaboration as the Key to Progress in Research, Practice, and Policy" by Whitney Q. Hollins, Ebony Underwood, Tanya Krupat that was published in 2019 in the *Handbook on Children with Incarcerated Parents 2nd ed.*).

It is true that in some cases, like those involving child maltreatment or severe parental substance abuse, a parent's incarceration may provide some relief for children and families. However, that is rare and already covered in Wisconsin's existing grounds for termination of parental rights.

Mass incarceration has been a significant problem in the past several decades, not only nationally but in Wisconsin as well. According to national and local estimates, at least half of incarcerated individuals are parents of minor children, making mass incarceration a family issue. Incarceration is unequally distributed across the population as well, with many more poor children and Black children affected than their White or higher income peers—and these disparities are particularly pronounced in Wisconsin. Thus, it is important to consider how a proposed bill focusing on parental incarceration would disproportionately impact families of color and poor families.

Given these factors, I strongly oppose Wisconsin Assembly Bill 627 and think that its passage would negatively affect the well-being of children with incarcerated parents rather than helping them. It would hurt the functioning of families rather than supporting them—especially Black families and poor families. It would increase stigma around the incarceration of parents rather than improving the situation.

Please feel free to contact me at julie.poehlmanntynan@wisc.edu if you have any questions.

Sincerely,

Julie Poehlmann-Tynan, Ph.D.
Dorothy A. O'Brien Professor of Human Ecology
Professor, Human Development and Family Studies
Affiliate, Institute for Research on Poverty
Affiliate, Center for Healthy Minds
University of Wisconsin-Madison

wafca
partnering to improve lives

TO: The Honorable Members of the Assembly Committee on Family Law

FROM: Kathy Markeland, Executive Director

DATE: December 1, 2021

RE: **WAFCA Testimony on AB 626, AB 627, AB 629, and AB 630**

Thank you for the opportunity to provide written testimony on the various proposals placed before you today.

WAFCA is a statewide association that represents nearly fifty child and family serving agencies and advocates for the more than 200,000 individuals and families that they impact each year. Our members' services include family, group and individual counseling; substance use treatment; crisis intervention; outpatient mental health therapy; residential care, foster care and adoption programs, among others. A number of our member agencies serve children and families connected to the child welfare system and also facilitate both public and private adoptions.

As members of this committee well know, the family law arena is complex and issues surrounding parental rights and adoption are no exception. People of good will are going to differ on the specific processes and tools that contribute to the best outcome, but it's incumbent on us all to continue to grapple with these questions, grant special attention to inequities and disparities in our systems, and stay committed to continually improving our processes so all Wisconsin's children find their way to the safety of a permanent home.

With regard to the specific proposals before the Committee today, we have identified proposals we generally support and others that generate concerns.

WAFCA is concerned about the impact of **2021 Assembly Bill 626** and therefore opposes the bill as presented. We are proponents of children achieving permanency in a timely fashion; however, there are several factors present in our state currently that give us pause when it comes to adding "drug affected" as a grounds for CHIPS and TPR. Wisconsin's substance use treatment resources were struggling to keep pace with the addiction crisis prior to the pandemic. COVID has exacerbated the crisis and has also had a destabilizing effect on the behavioral health workforce. Establishing new timelines for accessing treatment may result in an untenable situation for women who want to parent and work toward recovery. Moreover, this practice would have a disproportionate impact on families of color given that they are over-represented in the child welfare system.

Wisconsin Association of Family & Children's Agencies
16 N. Carroll Street, Suite 750 | Madison WI 53703
Office: 608.257.5939 | Fax: 608.268.7258 | wafca.org

2021 Assembly Bill 627 raises similar concerns with regard to the potential to exacerbate disparities in our system, particularly in light of increased efforts within our child welfare system to sustain family connections. Adding grounds for termination to include parental incarceration would have a disproportionate impact on families of color given that they are over-represented in the child welfare system, have higher rates of incarceration, and also have longer sentences imposed. Additionally, the legislation provides that a court must find that it is likely that the parent will be incarcerated for a "substantial period of the child's minority"; however, it does not require the court to consider whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever those relationships. Incarceration alone does not mean that a child does not have a secure attachment to their parent. Severing that tie may cause more harm than the adversity experienced due to having a parent serving time.

As noted, children can benefit from sustained connections with their family of origin, which is why WAFCA supports the option provided under **2021 Assembly Bill 629**. Post-adoption contracts have been utilized successfully in other states. We appreciate the addition of this resource as an option to help facilitate open adoptions in Wisconsin for those families who wish to do so.

Finally, we offer support for **2021 Assembly Bill 630**. We believe that this bill may shorten timeframes and that it could be beneficial for a family's case to remain with the same judge. The legislation assures for parental access to legal representation during proceedings and appears to be a reasonable step to streamline court proceedings.

Again, we are grateful for the opportunity to share our thoughts with the Committee, and for the desire to seek solutions and system improvements that support positive outcomes for children and families. We look forward to the additional information that emerges from today's hearing which will advance our understanding of the opportunities presented by these proposals.

To:	Wisconsin Assembly Committee on Family Law
From:	Leslie D. Shear, Attorney and Clinical Professor (emeritus) Former Director of the Frank J. Remington Center's Family Law Project, University of Wisconsin Law School
Re:	Opposition to Assembly Bill 627
Date:	November 30, 2021

I am a retired clinical law professor and former director of the Family Law Project at the University of Wisconsin Law School. I am sending this memo and (hopefully) appearing at this Committee's hearing to register my strong opposition to this bill. Please note that my comments and opinions are my own, and do not reflect or represent the position of the University of Wisconsin Law School.

As a clinical law professor at the University of Wisconsin Law School for over 20 years, my job was to teach law students the practice of family law. Our clients were people in prison involved in a variety of family law proceedings, including divorce, paternity, child support, child custody and guardianship. Our program had a special arrangement with the Dept. of Corrections because they appreciate that family connections provide the ultimate motivation to succeed, and recognize that strong family connections translate into lower recidivism rates.

One of the first things I tried to impress upon my new law students was that their incarcerated clients—men and women, younger and older—were actually very much like them. I asked my students to consider what their lives might have been like if they'd come from abusive or neglectful upbringings? What if they'd had their first child at 17 or 18 (sometimes younger)? What if they'd never known one or both of their parents? What would their job or career prospects be without a high school degree and/or with drug or alcohol addiction, undiagnosed or untreated mental illness? What if they'd never seen or experienced security and possibilities?

While the vast majority of my students shared very few if any of those experiences, they were genuinely humbled and inspired by observing our clients work so hard to maintain their relationships with their children. They saw these parents write touching, loving letters; send colorful, hand-drawn cards to their young children; call their children to help with homework; make audio or video recordings reading books for their toddlers; send coloring book pages of their children's favorite cartoon characters; make sure their children would receive Christmas and birthday gifts on time; take parenting classes; read self-help books; take vocational or college courses; improve through psychological treatment and medication to heal from their own childhood trauma; and work hard to improve themselves so that they could be the parents they had not themselves had. And they saw the huge, glowing smiles of parents and kids in the photos taken against the colorful murals in the prison visiting rooms.

Even though they were behind prison walls and often very far away, these parents were determined to make a positive difference in their children's lives. The most common motivation was wanting their children to know that they always loved them, always wanted them, never gave up on them, and that the children were not the cause of the parent's absence. The parents knew those were important messages because they were ones of which they often had been deprived. And they were messages their children did, in fact, desperately need to receive. The children invariably wanted to know their parents, to ask questions, to connect, to see their own features in their parents' faces, to hear their voices, and to know they had taken the time to write, call or send gifts.

It is my opinion that this proposed legislation is unnecessary, as well as unconstitutional. There are already 12 grounds to terminate a parent's rights set out in Wis. Stats. sec. 48.415. What those grounds arguably have in common is that, on their face, they connect the parent's past behavior with his/her fitness as a parent. To the contrary, AB627 (and its corollary in the Senate) fails to do that, as it is based on the deeply flawed assumption that an incarcerated parent is, by definition, an unfit parent, and that s/he can NEVER play an important role in a child's life.

Termination of parental rights has been called the "death penalty" for parents. Not only do parents and children lose the legal right to continue their relationship, but children also lose their right to maintain relationships with grandparents, great-grandparents, and other extended family members, including half-siblings. In Wisconsin, terminations of parental rights (TPRs) are virtually irreversible on appeal. One of the very rare cases where there was reversal of a TPR was in Kenosha County Dep't of Human Servs. v. Jodie W. (In re Max G. W.), 2006 WI 93. In that case, the Wisconsin Supreme Court found that a TPR based on a parent's incarceration alone was unconstitutional.

Over the past twenty years I have personally witnessed hundreds of situations where a child's incarcerated parent—along with his/her family—not only was important, but was that child's main source of unconditional love, security, consistency, and stability. I have seen so many parents take advantage of every rehabilitative opportunity available to them, and then some. Often those parents became their child's primary caretakers upon their release, and when I check in years later, those children and their formerly incarcerated parents are thriving.

Rather than adding ways to more easily and permanently separate families and communities, we should focus our resources and efforts on educating, rehabilitating, and supporting parents in prison so that they can provide for their children when they get out. That is ultimately what is best for children, as well as for our communities.

Thank you for your time and consideration.

Sincerely,

Leslie D. Shear

Leslie D. Shear
Attorney (State Bar No. 1014506)
Email: Ldshear@wisc.edu
Phone: (715) 850-0694

LEGAL ACTION OF WISCONSIN

Providing free legal services to low-income Wisconsin clients since 1968 • Proporcionando servicios legales gratuitos a clientes de bajos ingresos en Wisconsin desde 1968

TO:	**Members of the Assembly Committee on Family Law**
FROM:	**Abby Bar-Lev Wiley, Legislative Director, Legal Action of Wisconsin; Robert Held, Family Law Priority Coordinator & Managing Attorney, Legal Action of Wisconsin**
RE:	**Impact of AB 627 on Legal Action's Clients**
DATE:	**December 1, 2021**

Thank you for the opportunity to comment on AB 627. Legal Action of Wisconsin (LAW) is a nonprofit law firm that provides free civil legal aid to low-income people in 39 of Wisconsin's southern counties. One of our priority areas is serving low-income, domestic abuse victims with their family law needs; we work to help victims become safe. Our Family Law attorneys may handle a variety of types of cases for domestic abuse victims, including domestic abuse and child abuse injunctions; divorce cases; maintenance and child support; child custody and placement; paternity, and modification of divorce, paternity, custody, placement, maintenance, or child support judgments, among other types of cases. We have concerns that AB 627 would have severe and negative impacts on the clients we serve and their families, particularly on those who are Black, Indigenous, and People of Color (BIPOC).

AB 627 Would Disproportionately Impact BIPOC Individuals and Their Families:

At Legal Action of Wisconsin, many of our low-income clients are involved with the justice system. Some end up incarcerated for varying lengths of time, but "termination of parental rights" is a punishment far beyond any sentence that could be issued. Moreover, a recent report found that one in every 36 Black adults in Wisconsin are incarcerated, which is a rate that is more than double the national average and is the highest rate in the nation. Therefore, if passed, AB 627 would have a grossly disproportionate impact on BIPOC families across the state.

AB 627 Asks Judges to Speculate on the Future, Inviting Further Bias into the Decision:

By asking courts to determine whether an individual is "likely to continue to be incarcerated for a substantial period of the child's minority," not only does the bill require judges to determine future events (something courts do not generally like to do), but it *requires* such determinations to be based not in fact but in bias and speculation—considerations that are also likely to disproportionately and negatively impact BIPOC families. Any good lawyer knows that past behavior does not dictate future results. The fact that someone has been incarcerated in the past does not mean that they will be incarcerated in the future, and neither is determinative of whether they are or can be a good parent to their child. If the state truly wanted to help children in families with an incarcerated parent, the legislature could consider bills that would lend support to the non-incarcerated parent, or fund free, quality pre-k across the state, or provide more opportunities and resources for transitioning an incarcerated parent back into society when he is close to release. Instead, this bill further punishes someone who is already incarcerated—a condition that the parent cannot change—by including that the very fact that they are incarcerated makes them unfit to parent.

AB 627 is Not Necessary & Removes Important Judicial Discretion:

In addition to disproportionately impacting BIPOC families and adding unnecessary punishment to those already incarcerated, the bill is simply not necessary. This bill represents a solution in search of a problem. Current law already allows for a TPR finding to include elements related to incarceration, such as failure to assume parental responsibility and abandonment. This bill unnecessarily removes judicial discretion, which is critical to understanding the nuances of a child's well-being and in making the ultimate decision about whether to take the grave step of removing a parent's right to their child. These decisions must be made on a

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case-by-case basis to ensure that the courts are not unduly taking away parental rights and violating a parent's substantive due process.

AB 627 Conflicts with Precedent & Constitutional Law:
In fact, in 2006 the Wisconsin Supreme Court in *In Re Termination of Parental Rights to Max G.W., 2006 WI 93* held that, "Substantive due process requires that the State's action to terminate Jodie's [the parent] parental rights be narrowly tailored to meet the State's compelling interest of protecting Max [a child] from an unfit parent." *Id.* at ¶ 55. Therefore, the court concluded that "the circuit court improperly deemed Jodie unfit solely by virtue of her status as an incarcerated person without regard for her actual parenting activities or the condition of her child," and found that the TPR not only violated state law, but the parent's substantive due process rights as protected by the U.S. Constitution. *Id.* AB 627 stands in contradiction to this Wisconsin Supreme Court decision.

Incarceration Does Not Mean that Someone Cannot Parent:
Although it is difficult and looks different than traditional families, incarceration itself does not mean that an individual cannot provide adequate parenting during or after incarceration. A parent may continue to communicate with children while incarcerated. While attempting to help get the child out of foster care, an incarcerated parent may be directing resources or coordinating care and other services for their children. The adoption and foster-care systems are already overly burdened. This bill would only swell those systems to a crisis point, while breaking apart BIPOC families across the state. At Legal Action of Wisconsin, we see every day how families are struggling to get by—we see families carry the burdens of poverty while desperately trying to provide for their families.

AB 627 Would be Harmful to Wisconsin Families:
AB 627 would do nothing to help parents or families. Rather, it would break families apart, create additional punishments on parents already incarcerated, and violate parents' constitutional substantive due process rights while removing judicial discretion and adding additional stress to already overburdened systems.

Thank you for your consideration.

Sincerely,

Abby Bar-Lev Wiley
Legislative & Compliance Director
Legal Action of Wisconsin

Robert Held
Family Law Priority Coordinator
Managing Attorney, Racine Office
Legal Action of Wisconsin

Milwaukee Child Abuse Prevention Services Coalition

"Strengthening the capacities of families to provide safe and healthy environments for their children"

Public Policy Committee

November 30, 2021

Rep. Magnafici	Rep. James	Rep. Plumer
Rep. Snyder	Rep. Edming	Rep. Duchow
Rep. Doyle	Rep. Conley	Rep. Drake

Members of the Assembly's Committee on Family Law:

We oppose AB627 relating to grounds for terminating parental rights (TPR) and creating a new ground for involuntarily terminating parental rights based on parental incarceration.

Members of the Public Policy Committee of the Milwaukee Child Abuse Prevention Services Coalition are health and social service providers, advocates, community volunteers, and staff of public assistance agencies who regularly work with low-income families. Many committee members work directly with families in child abuse and neglect prevention and family support programs.

Members of the committee have hundreds of years of combined experience and appreciate the societal interest in protecting children. However, society also has an interest in ensuring that children keep connections to their families, both of origin and extended, to preserve their connections to their culture and history.

Even though many children of parents who are incarcerated are young, there may well be an established attachment to the parent. Legally severing such attachment discounts the significance of a meaningful attachment that may have been established prior to the parent's incarceration. Additionally, legally severing parental rights when a parent is incarcerated may also sever connections to the parent's extended family that provides support and knowledge of family history and values as well as connections to one's culture.

What is particularly alarming about this proposed legislation is the racist underpinnings of its intent as well as the lack of recognition of how state laws and policies propel people of color and those who are experiencing mental illness into the corrections system. It also ignores the legislature's responsibility for creating the conditions and policies that have led to the disproportional mass incarceration of people of color, poor people, and those experiencing mental illness.

Additionally, data for Wisconsin's Department of Corrections pinpoints the racial disproportionality in the state's prison system by noting that 60% of Waupun Correctional Institution's population are African-American and 13% are other people of color (American Indian, Asian/Pacific Islander, and Latino). Equally noteworthy is that 59% of the people

incarcerated at Waupun have a mental health diagnosis. 45% of inmates at Waupun are incarcerated for their first offense in Wisconsin.

At Taycheedah Correctional Institution, Department of Corrections' data indicates that the population of those incarcerated is 22% African-American and 16% other people of color (American Indian, Asian/Pacific Islander, and Latina). Of those incarcerated at Taycheedah, 95% have a mental health diagnosis. Fully 44% of women incarcerated at Taycheedah are imprisoned for non-violent offenses that include property, drug, and other public order offenses. 63% of women incarcerated at Taycheedah are incarcerated for their first offense in Wisconsin. Over half of women, 58%, incarcerated in the US are mothers (prisonpolicy.org).

As aforementioned, the consequences of severing ties with family will be borne by children who are disproportionally children of color. A review of data indicates that African-American children in the US are 7.5 times more likely than white children to have a parent who is incarcerated (Wildeman, 2009).

By adding a condition for involuntary TPR that includes "repeated incarceration," the bill is especially strident. Revocation – being incarcerated for breaking the rules of supervision -- contributes to mass incarceration in Wisconsin. A large number of people who are revoked for breaking the rules of supervision have not committed a new crime.

As professionals who serve families in child abuse and neglect prevention and family support programs, we implore you to vote against this legislation in the Committee of Family Law deliberations.

Thank you for your consideration.

Public Policy Committee of
The Milwaukee Child Abuse Prevention Services Coalition

Contact: Mary Thomas
maryhthomas@att.net
(414) 236-5161

disabilityrights | WISCONSIN
Protection and advocacy for people with disabilities.

Date: December 1, 2021

To: Representative Magnafici, Chair, and Members of the Assembly Committee on Family Law

Re: Opposition to Assembly Bill 627

From: Phyllis Greenberger, Lead Advocate, Disability Rights Wisconsin

Disability Rights Wisconsin (DRW) is the designated Protection and Advocacy system for Wisconsinites with disabilities. We are charged with protecting and enforcing the legal rights of individuals with disabilities.

As part of our work, DRW has focused significant advocacy around the intersection of disability and the criminal justice system. We have focused both on individual and systems advocacy in the justice system because individuals with disabilities, particularly those with mental illness, are overrepresented in that system. According to the Wisconsin Department of Corrections statistics for October 2021, of those incarcerated, 40% of men and 91% of women have a mental health condition. Many of these individuals are parents as well; according to the U.S. Bureau of Justice Statistics (Parents in Prison and Their Minor Children: Survey of Prison Inmates, 2016), approximately half of the individuals who are incarcerated are parents. Assembly Bill 627 would disproportionately and unfairly impact parents who have mental illness and break the parental bond with their children without cause.

In addition, because a disproportionate number of inmates are people of color, the further unjust disparity would disadvantage parents of color and their children. While Black residents represent only 6 percent of Wisconsin's overall population, the Department of Corrections reports that in October of 2021, Black residents comprise 43 percent of the male prison population and 20 percent of the female prison population. Those who are Black and have mental health needs are at an even greater disadvantage due to additional discrimination they experience.

In addition to the burden on specific groups of people, AB627 makes a broad assumption that parents who are incarcerated are unable to parent and are a minimal factor in their children's lives. This notion does not have credibility. Over the years we have heard from incarcerated parents who are waiting to get into treatment groups so they can take care of mental health or substance use disorders and return to parenting in person. Many parents who are incarcerated work hard to keep in touch with their children, through visits, letters, photos and when possible, attending school meetings by phone. Wisconsin has some parenting programs for

incarcerated parents; continuing these, as well as access to technology and other policies that support relationships between parents and their children, is critical to maintaining the parental bond.

From the children's perspective, permanence is important, and many children can continue to have a strong permanent relationship with a parent who is incarcerated. If the parent is not maintaining a relationship and is not looking out for the needs of a child, there are already existing grounds for termination of parental rights. Under the Wisconsin Children's Code, some of those grounds include abandonment, continuing need of protection or services, child abuse, and failure to assume parental responsibility, among others. The additional ground proposed by this bill would sweep in parents who had no other grounds for termination and who have been able to maintain a meaningful relationship with their child despite incarceration. The proposed additional ground based on incarceration is unnecessary.

While DRW places a high priority on the safety and permanence for children with disabilities, including those who have had traumatic experiences, we see no evidence that this additional ground adds any protection. There are already many safety measures in the Children's Code, including adequate grounds for the termination of parental rights to protect a child. Stigmas related to mental illness and biases that impact people of color would result in a disproportionate effect on families of color and parents with mental health needs. AB627 will result in too great a possibility of discrimination *without any additional necessary protection for children*.

For all of these reasons, we urge you to vote against this bill.

December 1, 2021

Submitted testimony of Eve Dorman, Dane County Corporation Counsel to Assembly Committee on Family Law

Chair Magnafici and Members of the Assembly Committee on Family Law, thank you for having this hearing today providing an opportunity for input on a number of bills regarding potential changes to the child welfare system.

My name is Eve Dorman and I am the Legal Director for Permanency Planning for Dane County. I have been with the Corporation Counsel's Office for 18 years and lead a team of attorneys who prosecute Children in Need of Protection (CHIPS) cases and Termination of Parental Rights (TPR) cases for Dane County. Our goal is always to ensure child safety while working toward legal permanency.

Dane County has concerns with several of the proposals before you today. Some are specific concerns stemming from things like vague definitions that have the potential to cause real harm to families, but we are also concerned that some of these bills go against evidence-based efforts used by our county and the state to keep children with their families by providing support when parents need it. This approach focuses on the goal of keeping children out of the foster care system whenever possible. This approach is now supported by the federal government as well thanks to the Family First reforms signed into law in 2018. Family First was built by experts in the field based on years of research showing children do best when kept with their families and relatives. TPR and the trauma associated with it should be avoided if another safe solution can be found.

AB 626 – This bill seeks to create a new "drug-affected child" basis for CHIPS jurisdiction with a vague definition that could allow for a CHIPS petition to be filed simply on the basis of past drug exposure even if there are no concerns about current parenting. The bill does not require any wrongdoing by a parent and a child could fit this definition when a parent is doing everything possible to meet the child's needs.

Sec. 48.02(5e)(b) would define a drug-affected child as one whose "basic needs" have been "adversely affected" as a result of a substance use by a parent. This provision will pull more people into the system by broadening the definition for when a CHIPS petition can be used from "seriously endangering physical health" to "adversely affected."

State Statute Sec. 48.13(10), the neglect provision, already allows for a CHIPS petition where a parent fails to provide necessary care for any reason, not just drug abuse. Dane County has

not had trouble obtaining jurisdiction under this subsection when parents are abusing drugs in a way that interferes with their ability to parent.

The TPR provision in this bill requires parents to be enrolled and in "substantial compliance" with substance abuse treatment to avoid TPR. These provisions fail to acknowledge relapse as part of the process and could take children from parents who are trying and on their way to successfully eliminating drugs from their life, but had a setback. It is also not clear how long a parent would have to be out of compliance before a TPR petition could be filed or whether the parent would have to be out of compliance at the time of filing the petition. Finally, it creates a new predictor requirement, which the child welfare system is trying to eliminate. See, 2017 Wisconsin Act 256, codified at Sec. 48.415(2)(a)(3) Wis. Stat. Overall, this bill seems more about punishing people for past behavior than ensuring child safety and Dane County does not support it.

AB 627 – TPR based on incarceration. Dane County does not support using history as evidence to the likelihood of being incarcerated for a substantial time of a child's minority. And while some changes in this area could be needed where parents are genuinely unavailable due to lengthy periods of incarceration, the bill's reliance on a process that requires someone to predict future behavior is problematic given the racial disparities that already exist in the criminal justice system.

AB 628 – Eliminating jury trials in TPR cases. This is primarily a policy determination and prosecutors will follow whatever procedural framework is set. However, this bill removes the right to a jury only in cases that can permanently sever the legal relationship between parent and child – something recognized as a constitutional protected right requiring appointment of counsel. CHIPS cases on the other hand can only result in temporary interference with the constitutional right to parent one's children. TPR cases, with their more significant potential for government intrusion on a constitutional right, should have more measures built into them to protect the constitutional rights of parents than CHIPS cases. If you believe a jury trial right should be available, keep it in the TPR action and eliminate it in the CHIPS cases. If however, you choose to eliminate the jury trial, eliminate it in both actions.

AB 630 – TPR by motion in a CHIPS procedure. CHIPS procedures can be an overwhelming process for parents and allowing them to file for TPR during a CHIPS procedure might lead to impulsive and premature petitions filed by parents who are struggling. If allowing TPR filings during a CHIPS procedure is something the committee feels is needed, Dane County urges the committee to consider allowing only the prosecutors to initiate a TPR during a CHIPS procedure.

AB 631 – Changes to Safe Haven law. Dane County has concerns about extending the timeline for relinquishment out this far without additional supports in place for the infant, the family surrendering the child, and the agencies that accept the child from the parent.

Thank you for considering this testimony. I am happy to answer any questions that may come up after the hearing.

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To: Members of the Assembly - Committee on Family Law
Date: December 1st, 2021
From: Jenna Gormal, Director of Public Policy and Systems Change, End Abuse WI
Re: Opposition of AB 627 and AB 626

Dear Chairperson Magnafici and Members of the Assembly Committee on Family Law,

Thank you for the opportunity to provide testimony today. My name is Jenna Gormal, speaking on behalf of End Domestic Abuse Wisconsin (End Abuse), the statewide coalition representing domestic violence programs and the survivors they serve across Wisconsin.

We have concerns with two of the bills before you today:

AB 626

End Abuse opposes this legislation because it is likely to disadvantage survivors and create avenues to perpetuate abuse and control. Victimization by an intimate partner increases one's risk for depression, PTSD, substance use, and suicidality:

- 3 x more likely to develop PTSD, Major depressive disorder, or Self-harm
- 4x more likely to attempt suicide
- 6x more likely to develop a substance use dependency

Moreover, perpetrators of domestic violence often undermine a partner's mental health or substance use disorder treatment and recovery. 60% of the 3,224 National domestic violence hotline callers who had sought help for substance use said their partners had tried to prevent them from getting help. This legislation would punish survivors for their response to the violence they experience

Research has shown that family and community support are vital to increasing children's capacity for resilience and helping them recover and thrive. Crucial to a child's resiliency is the presence of a positive, caring, and protective adult in a child's life.

It is challenging, nearing impossible, to reverse the termination of parental rights after a decree. We know that reunification between parent and child is always the goal because severing that relationship has long-term and negative impacts. We do not terminate parental rights when parents cannot take care of their children effectively due to reasons of severe illness, and that should be the same here. Substance use disorder is a treatable illness.

We appreciate the consideration and inclusion of language in this bill that states that a "juvenile court may not order TPR if the parent is participating in a drug court program", yet barriers exist to accessing those programs.

Financial limitation is a significant barrier that prevents people from receiving treatment. Insurance can help cover the cost of substance abuse treatment, but many people remain uninsured. Women face several specific barriers to treatment, particularly around pregnancy and childcare. Many programs do not offer services for pregnant women or childcare. The relationship between DV, substance use disorder, and mental health, highlighted in the statistics mentioned above, illuminate another issue; of dual diagnosis: one of the barriers for those with a dual diagnosis is a lack of programs that can provide adequate treatment. Only 18% of substance abuse programs and 9% of mental health programs are equipped to treat co-occurring disorders properly. Moreover, there is a recognized shortage of mental health and substance abuse providers in rural areas, limiting access in these regions.

With this in mind, we believe that the legislature should take the opportunity to support children by ensuring that parents have access to mental health, substance use treatments, and other wrap-around supports. Survivors of violence often struggle to maintain housing due to the nature of domestic violence, and it is a primary barrier to leaving the person abusing them. We advise the legislature to protect the safety of children and the non-abusive parent by ensuring access to safe, affordable housing and by funding flexible financial assistance programs.

This will enable survivors to escape from violence and support their recovery and healing so that they can be the parent they long to be for their children.

While we understand and honor the intention of this bill, we urge the legislature to pause and revisit so as not to do more harm to survivors and their children.

AB 627

While we respect and understand the concern for the safety and well-being of vulnerable children, we do not believe that TPR based on incarceration supports survivors of violence and their children. In fact, we are concerned that this legislation would do more harm than good.

We understand that perpetrators of violence present a danger to children and that custody and placement decisions should be made in such a way that incorporates the significant adverse effects that proximity to an abusive parent has on the child's health and well-being. However, we also know that survivors of violence often accrue criminal records due to victimization and experience incarceration. As a result, abuse victims may be 'likely to be incarcerated for a substantial period of time.'

We believe it is also worth considering that Wisconsin ranks 2nd in the country for Black incarceration rates. We are one of only five states that incarcerate Black people over ten times the rate of whites - in fact, Black people in WI are incarcerated 11.5 times more than whites. Women are the fastest-growing segment of the prison population, and prisons hold some of the world's densest per-capita populations of trauma survivors.

Given this context, we feel that the language used in this bill relating to consideration of a parent's history of repeated incarceration is too vague and open to racial bias since BIPOC folks often receive harsher, longer jail time and sentences than white folks.

Finally, we are unclear how this supports survivors and their children if the abusive parent is incarcerated for a substantial period of the child's minority, since the convictions and history of incarceration would be factors against custody and placement in a family law case.

If you have any questions about End Domestic Abuse Wisconsin's position on these issues, don't hesitate to contact me at 608.237.3985 or jennag@endabusewi.org.