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THE CLOCK IS TICKING: DO THE TIME LIMITS IN WISCONSIN'S TERMINATION OF PARENTAL RIGHTS CASES SERVE THE BEST INTERESTS OF CHILDREN?

THOMAS J. WALSH*

I. INTRODUCTION

In his novel *Oliver Twist*, Charles Dickens tells the story of an infant in 19th Century England who was orphaned at birth and starts his life out with very uncertain prospects: "[H]e was badged and ticketed, and fell into his place at once—a parish child—the orphan of a workhouse—the humble, half-starved drudge—to be cuffed and buffeted through the world—despised by all and pitied by none."¹ While "parish children" and "workhouse" children are not part of our early twenty-first century experience, the notion of a young child living in very uncertain circumstances and being pitied by few can be found in our current foster care system in Wisconsin.

Promoting the best interests of children by protecting them from abuse, neglect, and unsanitary conditions has been a goal of the Wisconsin Children's Code (Chapter 48 of the Wisconsin Statutes) for quite some time. Providing that protection in a timely manner has also been a paramount objective. For quite a number of years, Chapter 48 has provided a time line structure for all termination of parental rights court cases from the filing of the petition to the final hearing by the court to decide the best interests of the child. Recently, the Wisconsin

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legislature has taken additional steps to ensure that not only will termination of parental rights cases move along quickly once filed, but also that agencies in charge of foster care arrangements will move even more quickly to file termination of parental rights petitions. This was done when the Wisconsin legislature passed the Adoption and Safe Families Act.²

At first glance, these laws seem to benefit children because they require that an action be filed promptly and moved quickly through the court system to arrive at finality. However, when looked at in more depth, the timelines that existed in the Children's Code prior to the passage of the Adoption and Safe Families Act had the potential to run at cross purposes with the timelines in the Act.

The purpose of this Article is to propose changes to the time limit structure governing termination of parental rights proceedings under Chapter 48 of the Wisconsin Statutes. It does so by first discussing the statutory time limits that are in effect for termination of parental rights cases in the State of Wisconsin. It also surveys the case law which has addressed and refined the time limits set forth in the Children's Code. These time limits are reviewed in the context of whether they promote or prevent the policy objectives set forth in the Wisconsin Children's Code. Next, this Article discusses the Wisconsin Adoption and Safe Families Act, which took effect on June 17, 1998.³ It looks at the reasons for this law's enactment and how the time limits contained in the Act promote the goals of the Wisconsin Children's Code. Finally, this Article proposes changes that need to be made in the current termination of parental rights time line structure in order to more successfully promote the best interests of the children involved in this process.

II. HISTORICAL PERSPECTIVE

For many years in the beginning of our country's history, society presumed that parents always acted in the best interests of their children and that the government should not interfere with the parent's authority.⁴ Many view the New York case of Mary Ellen Wilson in 1873 as the "beginning of state intervention on behalf of abused and

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neglected children.\textsuperscript{5} In that case, Mary Ellen Wilson had suffered from child abuse at the hands of her foster parents.\textsuperscript{6} Through efforts of a visitor to the home, Mary Ellen was eventually removed from the house and provided protection by the New York Society for the Prevention of Cruelty to Animals.\textsuperscript{7} This case led to increased awareness of abused and neglected children, and to the passage of state laws throughout the country to allow the state to intervene on behalf of such children.\textsuperscript{8} These laws attempted to protect children from abuse and neglect, and allowed local officials to remove children from that environment.\textsuperscript{9} "In 1899 the first juvenile courts were established in Chicago."\textsuperscript{10} One of the central duties of the juvenile court judges "was to determine placement and treatment decisions for dependent and delinquent children."\textsuperscript{11} In the 1920s, state and federal reform legislation was initiated to help change the focus from institutionalizing children to placing abused and neglected children in family foster homes.\textsuperscript{12}

In Wisconsin, an official Children's Code was first enacted in 1929.\textsuperscript{13} The Wisconsin State legislature amended that Code in 1955\textsuperscript{14} and then made major revisions to the Code in 1978.\textsuperscript{15} The 1978 revision included some very specific policies and goals, which were meant to guide any court seeking to interpret the procedures and time limits set forth in that chapter. The legislature advised any court that embarked on an effort to apply Chapter 48 that "the best interests of the child or unborn child shall always be of paramount consideration."\textsuperscript{16} Furthermore, the legislature instructed that the terms of Chapter 48 "shall be liberally construed"\textsuperscript{17} to effectuate certain express legislative purposes.\textsuperscript{18}

6. See id.
7. See id. at 394-95.
8. See id. at 395.
9. See id.
10. Id.
11. Id.
12. See id.
14. See 1955 Wis. Laws 575; see also PLUM & CRISAFI, supra note 13, at 1.
15. See 1977 Wis. Laws 354; see also PLUM & CRISAFI, supra note 13, at 1.
17. Id.
18. Wisconsin Statutes § 48.01, sets forth certain policies and goals sought to be achieved by the Children's Code. The ones that are most germane to a termination of parental rights case include:
In addition to setting forth explicit policies and goals, the Wisconsin legislature made some significant changes to the Children's Code, including a new category to reference children that needed assistance from the government. This new category was entitled "Children In Need of Protection and Services," also referred to with the acronym "CHiPS." The CHiPS label replaced the use of such labels as "dependant," "neglected," or "children in need of supervision."

The 1978 revision was also significant because it added certain time limits that were to be followed by the courts when dealing with matters involving juvenile delinquents, adoptions, "CHiPS" cases, and termination of parental rights cases. Prior to these revisions, there were essentially no time limits. A child in the juvenile court system was "subject, at the court's discretion, to the original dispositional order until his or her eighteenth birthday." Because there were no time limits on cases involving children who were victims of neglect or abuse,

(a) ... The courts and agencies responsible for child welfare should also recognize that instability and impermanence in family relationships are contrary to the welfare of children and should therefore recognize the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family. . . .

(bg) 1. To ensure that children are protected against the harmful effects resulting from the absence of parents or parent substitutes, from the inability, other than financial inability, of parents or parent substitutes to provide care and protection for their children and from the destructive behavior of parents or parent substitutes in providing care and protection for their children.

(gg) To promote the adoption of children into safe and stable families rather than allowing children to remain in the impermanence of foster or treatment foster care.

(gr) To allow for the termination of parental rights at the earliest possible time after rehabilitation and reunification efforts are discontinued in accordance with this chapter and termination of parental rights is in the best interest of the child.

(gt) To reaffirm that the duty of a parent to support and maintain his or her child continues during any period in which the child may be removed from the custody of the parent.

Id.

19. See Wis. Stat. § 48.13 (1997-98). Under section 48.13 of the Wisconsin Statutes, a child can be adjudged to be in need of protection and services for a variety of reasons including being the victim of abuse or neglect or the unavailability of a parent. See id. Once adjudicated as CHiPS, a child is under the supervision of the court for a period of up to one year. See Wis. Stat. § 48.355(4) (1997-98). The court places conditions on the parents that have to be met before the child is returned to them. See Wis. Stat. § 48.355(2) (1997-98). If the conditions have not been met by the time the order expires, the order can be extended for another year. See Wis. Stat. § 48.365(2g) (1997-98).


the court could set its orders for any length of time it wanted.22

One of the main reasons that these time limits were passed was to protect the due process rights of children.23 Prior to the passage of the 1978 Children's Code revisions, the Wisconsin Council of Criminal Justice adopted juvenile justice standards for consideration by the Wisconsin legislature when reforming the Code.24 The Wisconsin Council of Criminal Justice had specifically addressed the need for some form of time guidelines for cases governed by the Code. In its subgoal Number 12.4, the Wisconsin Council of Criminal Justice indicated that "[t]o ensure speedy adjudication of juvenile matters, time limits shall be set as to the maximum time allowed between identified critical stages within the adjudication process."25

In analyzing the legislative history of the 1978 revision, one court noted:

The analyses of 1977 AB 874 by the legislative council and the legislative reference bureau confirm that the legislature intended to protect the child's right to procedural due process, which it believed was mandated by judicial decision, by ensuring a speedy disposition of allegations affecting the child.26

In 1995, another major revision occurred in the Wisconsin Children's Code.27 The provisions relating to juvenile delinquency were severed from the provisions relating to CHiPS and termination of parental rights.28 The creation of Chapter 938 of the Wisconsin Statutes

22. See id.
23. See id.; see also In re R.H. III, 433 N.W.2d 16, 25-26 (Wis. Ct. App. 1988) (Dykman, J., dissenting). Dykman noted that the due process rights of children in CHiPS cases is different than the due process rights of children in delinquency cases. See id. He indicated that the majority opinion cited a delinquency case when it indicated that "an untimely dispositional order infringes upon a juvenile's liberty interest in being free from involuntary confinement." Id. at 26. (citations omitted). He noted that in a CHiPS case such as R.H., the child has "no interest at all in being returned to an environment where he will be neglected or abused, let alone a liberty interest in such a 'right."' Id. Judge Dykman indicated that the real "right" at issue in the R.H. case is the "right" of the child to "avoid abuse and neglect." Id. (emphasis in original).
25. Id. at 80.
highlighted the differences between the child who was a victim of abuse
and neglect and the child who was a delinquent. Until that point, the
Children's Code had governed a range of cases including delinquencies,
termination of parental rights, adoptions, and children in need of
protection and services. Clearly, these children are not similarly
situated and the safeguards needed by some of them are not the
safeguards needed by all of them. Chapter 938 recognized that
delinquency cases are different from termination of parental rights
cases, adoptions, and CHiPS cases.

III. TERMINATION OF PARENTAL RIGHTS AND TIME LIMITS

A. Time Limits and Their Purpose

As stated above, termination of parental rights cases are currently
governed by Chapter 48 of the Wisconsin Statutes. They have no basis
in the common law and are entirely statutory creations. Despite the
statutory nature of these actions, understanding the various appellate
court interpretations of the process is as important to successfully
conclude such an action as understanding the statutes themselves.
Furthermore, failure to conduct a careful review of the case law relating
to time limits has the potential to cause problems in successfully
pursuing a termination of parental rights case or, for that matter, any
case governed by Chapter 48 of the Wisconsin Statutes.

The 1978 revision to the Wisconsin Children's Code included
specific time limitations for the various court processes governed by the
Code. While these time limits were passed predominantly to protect
the due process rights of children, the appellate courts have reminded us
that the rights of parents cannot be ignored. It becomes somewhat of a
balancing act. "The rights of the parent must be accorded a high order

29. See id. at 13.
31. See PLUM & CRISAFI, supra note 13, at 58.
32. See id.
33. See infra notes 59-73 and accompanying text.
34. See, 1977 Wis. Laws 354; see also In re B.J.N. & H.M.N., 469 N.W.2d 845, 849 (Wis.
    Ct. App. 1991); see generally Stephen W. Hayes & Michael J. Morse, Adoption and
    Termination Proceedings in Wisconsin: Straining the Wisdom of Solomon, 66 MARQ. L. REV.
    referencing the importance of the rights of children the court did not mean to "imply that the
    legislature in enacting the revised Children's Code was not concerned with the due process
    rights of parents").
of respect and must be considered paramount until circumstances show that the parent has forfeited these rights."36 Nevertheless, the courts have informed us that the rights of the children are superior to the rights of the parents when interpreting the Children's Code. "[W]here the parent's interest and the child's interest conflict the child's interest must control."37

The time limits for termination of parental rights cases, which are set forth in Chapter 48, are quite clear. Once a petition to terminate parental rights is filed, the initial hearing on the petition must be held within 30 days.38 At the hearing, the court must determine if the petition will be contested by any of the parties.39 If the petition is contested, the court must set a date for a fact-finding hearing which is to take place within 45 days of the initial hearing.40 All parties have a right to a fact-finding hearing to a jury.41 If the jury determines that the facts alleged in the petition are true, then the jury decides whether grounds for the termination of parental rights exist.42 The court decides whether it is in the best interest of the child to have parental rights terminated after receiving evidence on the appropriate dispositions.43 If either the court or the jury finds grounds to terminate parental rights, evidence on the appropriate disposition may be received immediately or at a later hearing, but if a later date is set, it must be within 45 days of the end of the fact-finding hearing.44

These time lines are not simply guidelines that the courts have to make a good faith effort to follow. Rather, the courts have viewed these time limits as strictly mandatory.45 If a court does not follow the time lines in Chapter 48, it loses competency to proceed any further on the

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36. In re T.R.M., 303 N.W.2d 581, 584 (Wis. 1981) (citing In re Fish, 17 N.W.2d 558 (Wis. 1945)); see also In re Kywanda F., 546 N.W. 2d 440, 445 (Wis. 1994) (noting that the time limits set forth in the Wisconsin Children's Code were enacted to protect not only the due process rights of the children, but also the parents).

37. In re the Adoption of R.P.R., 291 N.W.2d 591, 594 (Wis. Ct. App. 1980) (citation omitted).


39. See id.


42. See id.

43. See id.


45. See In re Termination of Parental Rights of J.L.F., 484 N.W.2d 359, 361-62 (Wis. Ct. App. 1992) (noting that "the legislative intent that the time limit is to be considered mandatory is plainly ascertainable from the language of the statutes involved").
termination of parental rights case pending before it.\textsuperscript{46}

\section*{B. Exceeding the Time Limits}

The Wisconsin Supreme Court has distinguished between losing "competency" to proceed and lacking "jurisdiction" to proceed. The jurisdiction of Wisconsin courts is conferred upon them by the state constitution and not by the legislature.\textsuperscript{47} The time limits set forth in Chapter 48 are legislatively created. The courts have determined, therefore, that failure to comply with those time limits is not a loss of the court's ability to adjudicate the kind of case before it, but the loss of the ability to adjudicate the specific case before it. This loss of power is referred to as loss of "competence."\textsuperscript{48} Whatever the name given to this loss of power, once the statutory time limits are exceeded, the court is no longer able to proceed on the termination of parental rights petition.

Generally speaking, the courts have also indicated that the parties cannot stipulate to an extension of the time limits under Chapter 48, nor can they waive the time limits by failing to object to a violation of the time line.\textsuperscript{49} While it would appear from the statutory and case law that there are no exceptions to the strict time lines, the Children's Code does provide that the time lines can be exceeded in certain situations.

\section*{C. Delay, Extensions, and Continuances}

Section 48.315 of the Wisconsin Statutes sets forth certain circumstances under which the mandatory time lines can be exceeded.\textsuperscript{50}

\begin{quote}
48. \textit{Id.}
49. \textit{See id.} at 854.
50. Section 48.315 of the Wisconsin Statutes states:

\begin{quote}
(1) The following time periods shall be excluded in computing time requirements within this chapter:

(a) Any period of delay resulting from other legal actions concerning the child or unborn child and the unborn child's expectant mother, including an examination under s. 48.295 or a hearing related to the mental condition of the child, the child's parent, guardian or legal custodian or the expectant mother, prehearing motions, waiver motions and hearings on other matters.

(b) Any period of delay resulting from a continuance granted at the request of or with the consent of the child and his or her counsel or of the unborn child by the unborn child's guardian ad litem.

(c) Any period of delay caused by the disqualification of a judge.

(d) Any period of delay resulting from a continuance granted at the request of the
While this set of guidelines for extensions and continuances seems to be very straightforward and specific, it is actually fraught with pitfalls and uncertainty. Seven of the eight subsections set forth in section (1) indicate that "[a]ny period of delay" resulting from the problem set forth in that subsection, will not be counted in calculating the time requirements in Chapter 48 of the Wisconsin Statutes.\footnote{51} The case law, however, indicates otherwise.

In the case of\textit{ In re Joshua M.W.},\footnote{52} which was a delinquency case, the Wisconsin Court of Appeals addressed an extension of time for a substitution of judge under section 48.315(1)(c) of the Wisconsin Statutes. In that case, a delinquency petition was filed on October 16, 1992.\footnote{53} A plea hearing was scheduled before a circuit court judge on November 9, 1992.\footnote{54} At the plea hearing, the juvenile filed a request for a substitution of the judge under Section 48.315(1)(c) of the Wisconsin Statutes.\footnote{55} A new judge was assigned on November 16, 1992 and a new

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\footnote{51} WIS. STAT. § 48.315(1) (1997-98). The eighth subsection speaks of "[a] reasonable period of delay" when the court needs to join another child into the case. WIS. STAT. § 48.315(g) (1997-98).

\footnote{52} 507 N.W.2d 141 (Wis. Ct. App. 1993).

\footnote{53} See id. at 142.

\footnote{54} See id.

\footnote{55} See id.
plea hearing was held on December 1, 1992. The time between the filing of the petition and the actual plea hearing was 46 days. Joshua argued that the request for reassignment of judge made on November 9 tolled the time limits until November 17, but that when the 24 days between the filing of the petition and the request for reassignment was added to the 15 days after the reassignment and before the actual plea hearing, the time limits were exceeded. The court disagreed with that interpretation, noting section 48.315(1)(c):

provides that the time required to schedule the plea hearing before a substituted judge is excluded from the computation of the thirty-day time period, provided the delay is caused by the disqualification and is not unreasonable. The delay caused by the need to properly send out any statutorily mandated notices and to rearrange the calendars of the court, the parties and counsel to accommodate the required hearing is a reality of the substitution process and will not deprive the court of competency to act, provided the delay is not unreasonable.

While a reading of Section 48.315(1)(c) and the above passage from Joshua appears to indicate that any amount of delay in scheduling such hearings is permissible, the Joshua court indicated that an indefinite delay in the amount of time for scheduling such hearings was not permissible:

Because the legislature has provided for thirty- and ten-day time periods within which plea hearings must be conducted, depending on whether the juvenile is in custody, we conclude that a delay by the newly-assigned judge exceeding thirty or ten days after the assignment is unreasonable as a matter of law, unless the court finds good cause for granting a continuance under sec. 48.315(2), Stats.

This language has the potential to cause severe problems in termination of parental rights cases and, in fact, any other case governed by the time limits in Chapter 48. The language in the statute refers to "any period of delay" caused by the substitution of a judge, but the

56. See id. at 142-43.
57. See id. at 143.
58. Id. at 144.
59. Id. at 144-45 (emphasis added).
Joshua court held that "as a matter of law" any period of delay is not permissible. Given that six of the other seven subsections contain similar language, it is likely that they will be subject to a similar restriction. The Joshua case is a "trap" for anyone who has not reviewed it because it delineates a mandatory time line which is not included in the statute. Joshua has the potential to cause an inadvertent violation of the time limits for anyone that tries to schedule a hearing after a substitution of judge.

In the case In re the Termination of Parental Rights to Everett W.O., Taylor J.O., Brandon R.O., the "Joshua trap" actually occurred. In that case, a petition for termination of parental rights was filed on July 17, 1998. At the plea hearing on August 11, 1998, April O. requested a substitution of judge and the matter was adjourned for a new judge to be assigned. No pleas were taken. On August 18, 1998, an order assigning the case to a new judge was entered. On August 25, 1998, the court sent out notices to all parties indicating that a new plea hearing would be held before the newly assigned judge on September 25, 1998. The plea hearing occurred and a jury trial was scheduled. The matter proceeded to a jury trial without objection, and the jury found that grounds existed to terminate the parental rights of the mother. Subsequently, the mother's parental rights were terminated by the court at a disposition hearing. In the court of appeals the mother argued that, despite her failure to object at the time of the September 25, 1998 plea hearing, the time limits of Chapter 48 were violated because more than thirty days passed between the filing of the petition and the plea hearing.

Despite the fact that April O. had requested the judicial substitution, Joshua indicates that if the matter is not back on the court's calendar within thirty days after the reassignment, the time limits have been violated unless good cause is shown under 48.315(2). No findings had been made by the court regarding the calendaring of the plea hearing on

61. See id. at *1.
62. See id.
63. See id.
64. See id.
65. See id.
66. See id.
67. See id. at *2.
The court of appeals remanded the matter for further proceedings on the issue of the reassignment and rescheduling. It ordered the trial court to conduct an evidentiary hearing on the reasons for the delay. If there was not "good cause," then the matter may need to be dismissed. This despite the fact that a full jury trial and contested disposition hearing were held. The "Joshua trap" caught the scheduling clerks, the court, and the parties off guard.

The potential for this problem exists under any of the other similarly worded subsections under section 48.315 of the Wisconsin Statutes. While appearing to be very straightforward, section 48.315 is open to a great deal of interpretation.

D. Procedural Requirements and "Good Cause" for Delay

A close reading of section 48.315 suggests that subsection (2) provides certain procedural requirements that need to be followed in order to successfully delay a case which is proceeding under Chapter 48. Continuances will be granted only for good cause and "only for so long as is necessary." Further, such hearings must be held "in open court" and "on the record." Upon review, it appears that subsection (2) was designed to provide procedural structure to any continuance granted under subsection (1). However, this is not necessarily the case.

The Wisconsin Supreme Court has indicated that the specific set of circumstances for delays, extensions, and continuances which are set forth in section 48.315(1) are governed by the procedural requirements of section 48.315(2). The court of appeals, however, viewed the matter differently in the more recent unpublished case In re the Termination of Parental Rights of Nicholas J.K. and Jeremy R.J. In that case, a petition was filed to terminate the parental rights of the mother and the separate father of each child. The mother and the father of Nicholas appeared at the July 13, 1998 fact finding hearing and chose not to contest the

69. See Everett, 1999 WL 387806, at *3.
70. See id.
71. See id.
72. See id.
73. See id. at *1.
75. Id.
76. See In re G.H., 441 N.W.2d 227, 232 (Wis. 1989) (noting that "the enumerated specific circumstances of sec. 48.315(1) are governed by sec. 48.315(2)").
78. See id. at *1.
facts set forth in the petition, which alleged that grounds existed to terminate their parental rights. They did, however, wish to contest the dispositional portion of the case. The court set a disposition hearing for August 24, 1998. On August 11, 1998, the attorney for Nicholas's father sent a letter to the court requesting an adjournment to allow for a psychological examination of the father and Nicholas. The letter indicated that all attorneys of record had been contacted and had agreed to the adjournment. The fact finding hearing was then adjourned and rescheduled to October 16, 1998.

The parents' rights were subsequently terminated and the mother appealed. She alleged, inter alia, that the adjournment for the psychological evaluation was not a proper adjournment because it had not been granted "in open court" nor "on the record" as required by Section 48.315(2) of the Wisconsin Statutes. Therefore, she alleged, the time limits had been exceeded and the case ought to be dismissed.

The court declined to view the matter that way. While the court did agree that "the continuance from August 24 to October 16 was invalid under [section] 48.315(2) because it was not granted in open court or during a telephone conference on the record, the continuance was proper under [section] 48.315(1)(b) because it was granted with all parties consent." Thus, the court of appeals concluded that the procedural requirements of being "on the record" and "in open court" which are set out in section 48.315(2), do not necessarily apply to the enumerated specific circumstances set forth in section 48.315(1). This is directly contrary to what the court stated in In re G.H. Furthermore, if the requirements of subsection (2) do not apply to the circumstances listed in subsection (1), to what do they apply? The court in G.H. provides some assistance on that issue.

The court in the case of In re G.H. provided further detail about the applicability of subsection (2). It indicated that "the statutory list of

79. See id.
80. See id.
81. See id.
82. See id.
83. See id.
84. Id.
85. See id.
86. Id.
87. See id. at *2.
88. 441 N.W.2d 227, 232 (Wis. 1989).
89. Id.
specific circumstances [contained in subsection (1)] does not proscribe all other grounds for extending time deadlines. A continuance may be granted directly under section 48.315(2). 90 In essence, the court indicated that under section 48.315(1) of the Wisconsin Statutes, the essential requirement needed to extend the time limits of Chapter 48 was "good cause." Therefore, Section 48.315 as a whole provides a specific list of reasons for allowing a delay in Chapter 48 cases and provides that "good cause" is a separate and distinct reason. This type of interpretation of the tolling statute, of course, opens the door to a number of different interpretations and a variety of "good" reasons to extend the time limits. 91

Thus, the procedural requirements of section 48.315(2) apply, at least, to "good cause" delays under that subsection and may apply to delays covered by subsection (1). But even these requirements have been blurred. Subsection (2) requires that continuances be granted "in open court" and "on the record." 92 In the case In re Victoria R, 93 a CHiPs petition was filed in the Circuit Court for Waukesha County on November 18, 1993. 94 The required plea hearing was conducted on December 7, 1993, within the thirty-day deadline. 95 The mother informed the court that she intended to hire an attorney. 96 The court indicated that the time limits were tolled for that purpose and set the matter over for a pre-trial conference on December 20, 1993. 97 Until this

90. Id. at 232.
91. See In re J.R., 449 N.W.2d 52, 55-56 (Wis. Ct. App. 1989) (holding a continuance for "good cause" can be granted for the reason of "court congestion"); see also In re J.L.W., 420 N.W.2d 398, 400-01 (Wis. Ct. App. 1988) (holding that an extension of time beyond the filing deadlines is "good cause" if the social worker who caused the delay acted in good faith); In re D.S.P., 458 N.W.2d 823, 827 (Wis. Ct. App. 1990) (holding that a continuance for fifteen months to allow the child to be placed in foster care with visitation set up for the parents is sufficiently "good cause" if both parents are present, represented by attorneys, agree to the arrangements and waive the time limits); In re G.H., 441 N.W.2d 227, 232 (Wis. 1989) (holding that "good cause" exists to grant an adjournment when one of the parent's attorneys withdraws from representation four days before a contested fact finding hearing in front of a jury); In re F.E.W., 422 N.W.2d 893, 895 (Wis. Ct. App. 1988) (holding that "good cause" existed to grant an extension of the time limits for filing a delinquency petition where the file was inadvertently lost for a period of time exceeding the time limits if: (1) the party seeking the extension "has acted in good faith"; (2) no prejudice to the opposing party has occurred; and (3) "the dilatory party took prompt action to remedy the situation").
94. See id. at 490.
95. See id.
96. See id.
97. See id. at 490-91.
point, the proceedings had been held with a court reporter present. On December 20, 1993 a pre-trial was held without a court reporter, but the clerk kept a minute sheet. The minute sheet indicated that the mother appeared and requested a guardian ad litem be appointed for the minor child. The minute sheet said nothing about tolling of the time limits for any particular period of time. Further court appearances occurred and further delays occurred for various reasons, including a request by the State for a psychological evaluation of the minor child. One of those hearings, on February 18, 1994, was reported by a court reporter and the rest were not. The fact-finding hearing was not held until June 27, 1994. The mother appealed, claiming that the time limits were exceeded after December 20, 1993 because the continuances were not granted "on the record" and "in open court."

The court of appeals rejected that argument noting that the "good cause" finding did not need to be recorded by a court reporter. Rather, the court distinguished between "recording" a court proceeding and "reporting" a court proceeding: "[I]t is obvious that 'reporting' and 'recording' are two different concepts. Not only are they defined in different terms, but 'recording' is mandatory as to all proceedings, whereas 'reporting' is not." Therefore, a clerk's minute sheet of a juvenile court proceeding is a sufficient record to satisfy the recording requirement of section 48.315(2).

It is plain from the above case law that something else is at work in these cases. While courts have adamantly indicated that the time limits in Chapter 48 are mandatory, the specific circumstances that are surviving judicial scrutiny seem to suggest that they are not. The policy at work here seems to be that while due process for parents and children is of the utmost importance, parties who have been afforded a full and fair opportunity to be heard are going to have a difficult time derailing a juvenile court case because of a technical time limit violation. Nowhere

98. See id. at 490.
99. See id. at 491.
100. See id.
101. See id.
102. See id.
103. See id.
104. See id.
105. Id. at 492.
106. See id. at 493.
107. Id.
108. See id.
can the need to follow this type of policy be seen more clearly than in termination of parental rights cases. The recently enacted Adoption and Safe Families Act seems to be a legislative endorsement of such a policy.

IV. THE ADOPTION AND SAFE FAMILIES ACT

One of the goals of Chapter 48 of the Wisconsin Statutes is to "preserve the unity of the family, whenever appropriate, by strengthening family life through assisting parents and the expectant mothers of unborn children, whenever appropriate, in fulfilling their responsibilities as parents or expectant mothers."\(^\text{109}\) While Chapter 48 seeks to help families obtain the services they need to operate effectively, the courts have indicated that even if parents obtain those services, their children's interests may be best served if the children stay in foster care.\(^\text{110}\)

Studies have shown that while the length of a child's average stay in foster care may be decreasing, such a stay is, nevertheless, not a short one. A nation-wide study conducted in 1987 showed that the average length of a child's stay in foster care in 1977 was 2.4 years.\(^\text{111}\) In 1980, that number had decreased to 2.1 years; in 1982, it had fallen to 1.7 years.\(^\text{112}\) By 1985, a child's stay in foster care had dropped to 1.5 years on average.\(^\text{113}\) While these national numbers appear to provide some glimmer of hope, numbers released by Congress in 1997 seem to indicate that the trend has reversed.\(^\text{114}\) Furthermore, the actual number of children in foster care is continuing to rise.\(^\text{115}\) In 1997, the estimated number of children in foster care was thought to be 500,000.\(^\text{116}\) This was due partly to the large number of children re-entering the system.

Re-entry is a problem. Between thirteen percent and forty-five percent of children who are reunited with their biological parents after

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110. See In re Nadia S., 581 N.W.2d 182 (Wis. 1998) (holding that there was no "legal presumption" that parents who complied with their court ordered CHiPS conditions should have their children returned to them and that applying the principle of "best interests of the child" may lead to the conclusion that a child should remain in foster care even if the parents have completed their CHiPS conditions).
111. See Litzelfelner & Petr, supra note 5, at 392.
112. See id.
113. See id.
114. See 143 Cong. Rec. 2740 (1997) (indicating that the average stay in foster care nation wide is almost three years).
115. See Litzelfelner & Petr, supra note 5, at 392.
being in foster care become victims of abuse again.\textsuperscript{117} Significantly, one commentator has noted that "of all placement options, reunification fails most to be free from abuse and to yield developmental well-being."\textsuperscript{118}

Despite this low rate of success for reunification, lengthening a child's stay in foster care is not the answer. One court noted that "[c]hildren often view foster-home placement as a punishment for something they have done."\textsuperscript{119} Lengthening the term of the foster care placement may simply compound the child's feeling of punishment. While foster care placement may eventually become an adoptive home for the child and provide the stability that the child needs, approximately twenty-five percent of the children in foster care experience three or more placements while they are in the system.\textsuperscript{120} These nation-wide statistics are rather alarming and call into question the ability of the foster care system, on its own, to alleviate the problems resulting from an abusive or neglectful home.

The statistics for the State of Wisconsin are not much better than the nation-wide statistics. The number of children in foster care in the State of Wisconsin has increased significantly from the middle of the 1980s.\textsuperscript{121} From 1987 to 1997, the foster care and special needs adoption caseloads for Wisconsin social workers doubled from 4,941 to 9,806.\textsuperscript{122} In an effort to praise the high quality of Wisconsin's foster homes, Governor Tommy Thompson noted that "[j]ust putting a child in a stable family environment can have very positive results."\textsuperscript{123} Nevertheless, foster home placement in Wisconsin provides no more of a final solution for these children than it does in any other state. Therefore, in 1998 a bill was introduced in the Wisconsin legislature which resulted in a law providing quicker transitions for children from the uncertain future of foster homes into more permanent adoptive homes.

On February 3, 1998, Representative Gard introduced a bill in the Wisconsin Legislature, co-sponsored by Senator Burke and subsequently known as the Wisconsin Adoption and Safe Families Act,

\begin{itemize}
\item \textsuperscript{117} See Litzelfelner & Petr, \textit{supra} note 5, at 392.
\item \textsuperscript{118} Id. at 392-93.
\item \textsuperscript{119} \textit{In re R.H.}, 433 N.W.2d 16, 22 (Wis. Ct. App. 1988).
\item \textsuperscript{120} See Litzelfelner & Petr, \textit{supra} note 5, at 393.
\item \textsuperscript{121} See \textit{Wanted: Foster Parents}, GREEN BAY PRESS-GAZETTE, Sept. 10, 1999, at B-1 (citing statistics from the Wisconsin Department of Public Health).
\item \textsuperscript{122} See id. Special needs children include those who are older than five years, siblings who need to stay together, and children with physical, emotional, or behavior problems.
\item \textsuperscript{123} Id. (citation omitted).
\end{itemize}
that provided *inter alia*:

an agency or district attorney, corporation counsel or other appropriate official designated under s. 48.09 shall file a petition under s. 48.42(1) to terminate the parental rights of a parent or the parents of a child, or, if a petition under s. 48.42(1) to terminate those parental rights has already been filed, the agency, district attorney, corporation counsel or other appropriate official shall join in the petition, if any of the following circumstances apply:

(a) The child has been placed outside of his or her home, as described in s. 48.365(1), for 15 of the most recent 22 months.

(b) A court . . . has found . . . that the child was abandoned when he or she was under one year of age . . .

This bill was introduced in order to conform state law with recently enacted federal legislation. In 1997, the United States Congress passed the Federal Adoption and Safe Families Act of 1997. The main purpose of this law is to increase the number of adoptions in the United States as a whole. Congress noted that there was "universal agreement that adoption is preferable to foster care and that the nation's children would be well served by a policy that increases adoptions." A three-fold strategy was put in place to promote an increase in adoptions nationwide. First, Congress proposed that when certain "aggravated circumstances "existed, the states would not need

124. Act of June 2, 1998, act 237, 1997 Wis. Laws 1666, 1701. The act, subsequently codified as Wisconsin Statute Section 48.417, also provided that a petition for termination of parental rights must be filed by the state if a court finds that a parent has committed one of a specifically enumerated list of crimes against a child of the offending parent. See id.

125. See 1997 Drafting Request received by Gordan M. Malaise, Wisconsin Legislative Reference Bureau drafting attorney, on December 15, 1997. See also, Draft LRB-4563/1 of proposed legislation by the Legislative Reference Bureau (noting that the bill "makes various changes relating to children in out-of-home care, termination of parental rights and adoptions to conform Wisconsin law to Title IV-E of the Federal Social Security Act, as affected by the Adoption and Safe Families Act of 1997").


127. See 143 Cong. Rec. 2739 (1997). The legislative history of this act reflects that "while adoption was the permanency goal for 15% of foster children in 1990, only 8% of the children who left care in that year were adopted. In addition, the median age of children in foster care has dropped to 8.6 years in 1990 from 12.6 years at the end of 1982. The emerging statistical picture shows that young children are spending substantial portions of their childhood in a system that is designed to be temporary"). Id. at 2744.

128. Id. at 2740.

129. While the specific list of aggravated circumstances "was left up to the states, an
to provide "reasonable efforts" to assist in the reunification of families that have abused or neglected their children. This measure was taken based upon the arguments of some observers that the uncertainty which the "reasonable efforts" standard injects into the process makes state prosecutors reluctant to start termination of parental rights proceedings. Second, federal law provides actual cash to states that increase the number of adoptions on a yearly basis. The law provides that each state would receive a $4,000.00 incentive payment ($6,000.00 for special needs children) for each adoption above the number of adoptions recorded in the state for the previous year. Third, for children who have been in foster care for fifteen of the last twenty-two months, the law requires the states to move toward terminating parental rights.

These goals appear to be a recognition by the United States Congress that in many states, social worker caseloads divert attention from children who are safely placed in foster care to children who are in more critical, often life-threatening, conditions. While it is certainly important to focus on the children in the most dire need, children in non-critical situations cannot be ignored. Both federal and state versions of the Act require that all children in foster care be attended to and that even if the child resides in a safe foster home placement, steps need to be taken to discontinue that placement as soon as possible to allow for adoption.

This law essentially informs the various Departments of Health and Human Services throughout Wisconsin that children cannot simply sit in foster care waiting for parents to comply with CHIPS court orders. Note, however, that the Adoption and Safe Families Act was not intended to create a new ground for termination of parents' parental rights. Rather, one of the grounds under section 48.415 would still

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130. Id. Generally, when children are removed from the care of their parents and placed in foster care for abuse or neglect, current state laws require the states to make "reasonable efforts" to help reunite these children with their parents. In a termination of parental rights case, one of the most difficult elements to prove to a jury is the "reasonable efforts" element because it is so subjective.


133. See id.


136. Drafter's Note by Wisconsin Legislative Reference Bureau drafting attorney.
need to be present in order to pursue termination. Thus, there may be circumstances under which the requisite number of months have passed, but the grounds for a termination of parental rights do not exist. Therefore, both federal and state versions do not require the various county Departments of Health and Human Services to file such petitions under certain circumstances. In Wisconsin, the petitions need not be filed if:

(a) The child is being cared for by a relative of the child.
(b) The child's permanency plan indicates that termination of parental rights to the child is not in the best interests of the child.
(c) The agency primarily responsible for providing services to the child and the family under a court order has not provided to the family of the child, consistent with the time period in the child's permanency plan, the services necessary for the safe return of the child to his or her home.  

While the exceptions to the rule, particularly section 48.417(2)(b), tend to swallow the rule, the Adoption and Safe Families Act sets forth a very clear policy on the part of the United States Congress and the Wisconsin State legislature—children need permanency and they do not have the time to wait for unmotivated parents. This policy seems to suggest that the legislature would not like to see a technicality in the time line requirements derail an otherwise procedurally valid termination of parental rights case. However, given the view by the courts that the time line restrictions are "mandatory" rather than simply "directive," something needs to be changed or cases such as In re the Termination of Parental Rights to Everett W.O., Taylor J.O., Brandon R.O.  and In re the Termination of Parental Rights of Nicholas J.K. and Jeremy R.J.  will result in children either being returned to their parents prematurely or remaining in foster care for a period of time exceeding the number of months allowed under the Adoption and Safe Families Act.


138. See supra notes 60-73 and accompanying text.

139. See supra notes 77-88 and accompanying text.
V. TIME LIMITS AND THE NEED FOR CHANGE

A. The Problem

The policies set forth by the Wisconsin Children's Code as well as the federal and state Adoption and Safe Families Act seem to be at odds with a plain language view of the time limit structure in Chapter 48. The Adoption and Safe Families Act tells us that after a certain period of time, the state must give up on the parents and terminate their parental rights. However, the courts have strictly interpreted the time limits in Chapter 48 and, on occasion, required the dismissal of cases governed by that Chapter if the time limits are violated. A situation could certainly be imagined where grounds exist to terminate parental rights and the state is required to file such a petition under the Adoption and Safe Families Act but, in the process of the termination case, the time limits are violated and the matter is dismissed.

This is not to say that termination of parental rights cases should be forced through the system with no provision for the appellate courts to review and reverse for violations of due process safeguards. In fact, termination of parental rights cases have been dismissed for violations of due process safeguards. Such reversals should continue to occur because due process violations negatively impact a parent or child's ability to defend themselves in these cases. However, time limit violations of a few days causes no prejudice or adverse affect on a parent or child's ability to defend themselves.

B. Time Limits in Chapter 938 and F.E.W. Analysis

Given this strict judicial interpretation of the time limits, it is interesting to note that one of the significant changes made in the Juvenile Justice Code when it was severed from Chapter 48 in 1995, was


141. See In re the Termination of Parental Rights of Brittany Ann H., No. 8-3033, 1999 WL 90023 (Wis. Ct. App. Feb. 24, 1999) (unpublished opinion) (reversing a termination of parental rights order for failure of the juvenile court to give proper termination of parental rights warnings during the CHIPS case pursuant to Wis. STAT. § 48.356); see also In re Jason P.S., 537 N.W.2d 47 (Wis. Ct. App. 1995) (finding that it was a denial of due process to terminate parental rights on grounds substantially different than those about which the parent was warned under Wis. STAT. § 48.356); In re the Termination of Parental Rights to M.A.M., 342 N.W.2d 410, 414 (Wis. 1984) (holding that the trial court erred by not informing the parents of their right to a jury trial and to representation by counsel).
the change in the section relating to permissible reasons for delays, continuances, and extensions. Section 938.315(3) indicates that "[f]ailure to comply with any time limit specified in this chapter does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction." In addition, section 938.315(3) states: "[f]ailure to object to a period of delay or a continuance waives the time limit that is the subject of the period of delay or continuance." These types of legislative directives are clearly contrary to the vast majority of case law that has developed since the 1978 Children's Code revision brought time limits into existence. This would appear to be a recognition on the part of the legislature that strict construction of the statutes relating to time limits can sometimes cause tragic results. Furthermore, such strict rules of construction often lead appellate courts to find imaginative ways to structure arguments that bypass the statutes when circumstances justify it.

For example, *In re F.E.W.* is a pre-1995 Chapter 48 case involving a child alleged to be delinquent under Section 48.25(2)(a). At that time, section 48.25(2)(a) provided in relevant part:

If the proceeding is brought under s. 48.12, 48.125 or 48.13, the district attorney, corporation counsel or other appropriate official shall file the petition, close the case, or refer the case back to intake within 20 days after the date that the intake worker's recommendation was filed. A referral back to intake may be made only when the district attorney, corporation counsel or other appropriate official decides not to file a petition or determines that further investigation is necessary. . . . If the case is referred back to intake for further investigation, the appropriate agency or person shall complete the investigation within 20 days. If another referral is made to the district attorney, corporation counsel or other appropriate official, it shall be considered a new referral to which the time limits of this subsection shall apply. The time limits in this subsection may only be extended by a judge upon a showing of good cause under s. 48.315. . . . The court shall dismiss with prejudice a petition which was not timely filed unless the court finds at the plea

142. WIS. STAT. § 938.315(3) (1997-98).
143. Id.
144. When the legislature created Chapter 938 it could have very easily amended section 48.317 to make flexible time lines in both codes. However, for whatever reason, the legislature chose not to inject that flexibility into Chapter 48.
hearing that good cause has been shown for failure to meet the
time limitations. ¹⁴⁶

Thus, if the time limits were exceeded under this section of the
Children's Code, the court would be required to apply a "good cause"
analysis under section 48.315.

The facts in that case show that on February 17, 1987 crime reports
on a juvenile named F.E.W. were received by the intake worker.¹⁴⁷ The
intake worker referred the reports to the district attorney on February
19, 1987.¹⁴⁸ On March 10, 1987, the district attorney determined that
more information was needed, and the reports were returned to police
for that purpose.¹⁴⁹ On March 10 or 11, the police picked up those
reports in the district attorney's office.¹⁵⁰ According to section
48.25(2)(a) of the Wisconsin Statutes, the police were to have returned
them to the district attorney within twenty days (March 31) if they still
wanted to pursue the matter under the Juvenile Code. If the reports
were not returned, the court would be required to dismiss any
subsequently filed petition for violating the time limits.¹⁵¹

Those reports were not returned within the appropriate time.¹⁵²
Rather, the reports were inadvertently left in Racine County Circuit
Court Branch V and were not found until April 20, 1987 when the
district attorney just happened to see them there.¹⁵³ Three days later, on
April 23, 1987, the district attorney filed the petition.¹⁵⁴ The trial court
allowed the petition to proceed saying only that "[t]he best interests of
the juvenile do not dictate that he not be held accountable for his act
because of the fact that a petition was filed three days late."¹⁵⁵ An
appeal was filed.¹⁵⁶

The court of appeals indicated that "[w]hen addressing other time
limits in the juvenile code, we have noted that the best interest of the
child is the paramount consideration. We are to liberally construe the

¹⁴⁷ See id.
¹⁴⁸ See id.
¹⁴⁹ See id.
¹⁵⁰ See id.
¹⁵¹ See id. at 895.
¹⁵² See id. at 894.
¹⁵³ See id. at 894.
¹⁵⁴ See id.
¹⁵⁵ See id. at 895.
¹⁵⁶ See id. at 894.
juvenile code to effect its objectives and to serve this end." The court then went on to discuss what must be considered in making a "good cause" determination:

In addition to the paramount consideration of the best interest of the child, we conclude that additional relevant factors to a "good cause" determination are: (1) that the party seeking the enlargement of time has acted in good faith; (2) that the opposing party has not been prejudiced; and (3) whether the dilatory party took prompt action to remedy the situation. In a footnote of that opinion, the court went on to explain the meaning of "good cause" even further. It noted:

these three additional factors also enter into considerations of "excusable neglect" for purposes of civil proceedings. Despite our borrowing of these factors, we stress that the law of excusable neglect does not and should not govern "good cause" determinations pursuant to sec. 48.25(2)(a), Stats. This is because a "good cause" determination requires application of the additional, and most important, factor already discussed the best interest of the child. Therefore, fact situations constituting excusable or inexcusable neglect for purposes of civil proceedings do not control a "good cause" question under the statute at issue here.

Subsequently, this type of "good cause" analysis was cited favorably by the Wisconsin Supreme Court in In re G.H. The G.H. case was a CHIPS case where "good cause" was found for exceeding the time limits. However, the court did not go through a full analysis of the factors set forth in F.E.W. Rather, the court in the G.H. case found that "good cause" existed to exceed the time limits in Chapter 48 and simply cited the standard in F.E.W. as the accepted method of analysis.

The analysis of the F.E.W. court is significant because in it, the court

157. Id. at 895 (citation omitted).
158. Id.
159. Id. at 895 n.1 (citation omitted).
160. 441 N.W.2d 227, 232 n.12 (Wis. 1989).
161. See id. at 232.
162. See id.
163. See id.
found "good cause" when the only reason for delay was someone's negligence in losing a file and not finding it until after the time limits lapsed. The decision is clearly contrary to several of the other decisions by the appellate courts in that it applies a "prejudice" and "good faith" analysis rather than requiring the search for some articulable "good cause" under section 48.315. The trial court and the court of appeals obviously had a desire to keep this case going and conducted a "result oriented" type of analysis.

Despite this new method of analysis, the reason for the result in F.E.W. seems to be due more to the fact that it was a delinquency case rather than to the fact that a different type of "good cause" analysis was used. The enactment of Chapter 938 was caused in great measure by the inability of the Wisconsin Children's Code, set out in Chapter 48, to deal with the increasing number of juvenile crimes that were occurring in Wisconsin. It is very possible that the sense of futility associated with simply dismissing a juvenile delinquency petition for no other reason than that a file was misplaced caused the court in F.E.W. to decline the request for dismissal. As mentioned above, the court's rationale for failing to dismiss the delinquency petition was simply its own view that the juvenile's best interests dictated that he be held accountable for his actions.

Under the current structure of section 938.315, the dispute in F.E.W. might not have occurred. Section 938.315(3) sets forth the sanctions that a court could impose if the time limits are not followed. Under the new Juvenile Justice Code, the court in F.E.W. could grant a continuance for "good cause," "dismiss the petition with or without prejudice, release the juvenile from secure or non-secure custody or . . . grant any other relief that the court considers appropriate." The time limits and continuance statutes under Chapter 938 were drafted in such a way to provide flexibility and discretion to a court. This is what is lacking in the current Children's Code.

165. See, e.g., In re Victoria R., 549 N.W.2d 489 (Wis. Ct. App. 1996) (holding that psychological evaluation is "good cause"); In re Joshua M.W., 507 N.W.2d 141 (Wis. Ct. App. 1993); In re J.R., 449 N.W.2d 52 (Wis. Ct. App. 1989) (holding that "court congestion" is "good cause"); In re of D.S.P., 458 N.W.2d 823 (Wis. Ct. App. 1990) (holding that if both parents are present, represented by counsel and agree to the extensions and waive the time limits then "good cause" exists); In re G.H., 441 N.W. 2d 227 (Wis. 1989) ("good cause" exists for substitution of attorneys).
166. See Barry & Ladwig, supra note 28 at 12-13.
167. See F.E.W., 442 N.W.2d at 895.
Clearly, the time limit structure of Chapter 48 was ill equipped to deal with the problem of rising juvenile crime. It was drafted with the intent of covering too many different types of matters. No flexibility was granted for the innocent procedural mistake of the court or prosecutor. The result of a misstep is dismissal or, if the trial court feels strongly enough about the case, a creative attempt to find "good cause" to exceed mandatory time lines.

Furthermore, while it might seem that section 938.315 makes the time limits in the Juvenile Justice Code meaningless, the rules governing the extension of the time limits contained in section 938.315 do not negate the meaning of Chapter 938 time limits because, as stated above, specific sanctions are provided for any violations. These sanctions, however, provide the court with options for delinquency cases, cases which are too important to be dismissed for non-prejudicial procedural mistakes.

Termination of parental rights matters are equally important and have results which are different than the other types of cases governed by that chapter, such as CHIPS cases. One commentator noted that "[p]robably no proceeding has a more serious impact on a family than one involving a termination of parental rights. The finality of an order terminating parental rights and its effect on the family unit is substantial." In those cases involving termination of parental rights for children who are currently in the court system, the children are most likely already in foster care. A procedural violation that causes a dismissal of a termination of parental rights case can cause a child to remain in foster care for a longer period of time while awaiting the filing of a new petition. Furthermore, CHIPS orders have a duration of one year. After a petition to terminate parental rights is filed, a maximum usage of the time lines could cause a period of 120 days to elapse before the trial court terminates parental rights. If a court grants a petition to terminate parental rights and an appeal ensues, a maximum usage of appeals time lines could cause another 170 days to pass before the court...
of appeals decides the issue.\textsuperscript{173} This is a total of 290 days from start to finish.\textsuperscript{174} If a request for extension of the underlying CHiPS order has not been made in the trial court, a dismissal of the termination of parental rights petition in the court of appeals could result in a child being returned home, and the county Department of Human Services would be ill prepared to commence another termination of parental rights case because the CHiPS order expired. Thus, a child would remain in foster care for an even longer period of time as the county starts the CHIPS process over. Time limits in termination of parental rights cases need to be treated differently than time limits for other types of cases governed by Chapter 48. The goals of a termination of parental rights case and the ramifications of dismissal of such cases on technicalities are too serious to view them as if they are like any other Chapter 48 case.

\textbf{C. Summary of Changes Needed}

The legislature should change the procedures governing termination of parental rights cases in Wisconsin to allow the legislative purposes set out in Chapter 48 and in the Adoption and Safe Families Act to be realized rather than frustrated. Specifically, the section of Chapter 48 governing delays, extensions and continuances should be amended to adopt the flexibility of section 938.315. The most important aspect of that section is the directive that failure to follow the time lines will not result in a court's loss of competency to proceed. This type of draconian solution to a time limit violation does not benefit the children involved in the process because it does not allow the substance of the matter to be addressed by the court. By insuring that a simple time limit violation will not cause a loss in competency, the courts can be provided with the option to mete out an appropriate and measured sanction for a time

\begin{footnotesize}
\begin{enumerate}
\item[173.] \textit{See} WIS. STAT. § 808.04(7m) (1997-98) (stating that an appealing party has 30 days from the entry of judgment terminating parental rights in order to file a notice of intent to appeal); \textit{see also} WIS. STAT. § 809.107(2)-(6) (1997-98) (After filing a notice of intent to appeal the appealing party has 15 days in which to order a transcript. The court reporter then has 30 days to prepare the transcript and deliver it to the parties including filing it with the trial court. The appealing party must file a docketing statement and notice of appeal within 30 days after receiving the transcript. The appealing party then has 15 days to prepare a brief; the responding party has 10 days after that to file a responsive brief. The appealing party has 10 more days to file a reply brief, and the court of appeals has 30 days to make a decision after the reply brief is received).
\item[174.] The Congressional Budget Office noted that, nation-wide, the termination of parental rights process can take from 90 days to several years. \textit{See} 143 Cong. Rec. 2756 (1997).
\end{enumerate}
\end{footnotesize}
limit violation. Revising section 48.315 to reflect this change would promote the best interests of all children involved in the system.

Equally important to a time limit revision is the provision in Chapter 938 that the time limits are waived if an objection is not timely raised. A revision such as this is needed in Chapter 48 because it will prevent situations in which a time line violation is raised for the first time on appeal, several months after the occurrence of the violation and several months after all the issues were fully tried by a jury. This is precisely the problem that is seen in the case of In re the Termination of Parental Rights to Everett W.O., Taylor J.O., Brandon R.O. 175

When Chapter 938 was severed from Chapter 48, it took with it the concept of "good cause" for delaying a court proceeding. 176 However, as discussed above, the concept of "good cause" can be subject to different interpretations. Therefore, this concept needs to be refined by the legislature. The analysis of In re F.E.W. is similar to an excusable neglect standard in civil matters. 177 This should to be the standard that is universally applied to time line violations under Chapter 48. 178 Again, this would avoid the harsh result of dismissal while allowing the court the ability to consider whether any party was actually prejudiced in any way by the delay.

Even if the Wisconsin legislature does not enact a more flexible interpretation of the time limits in Chapter 48, the appellate courts can accomplish effective changes in the time limit problem by revising the way they view the current time limits. Specifically, courts need to view the time limits in Chapter 48 as "directory" rather than "mandatory." In In re R.H., the court of appeals reversed a delinquency matter under the pre-1995 version of Chapter 48 because the time limits were violated. Judge Dykman dissented from the majority's view. He set forth the analysis that needs to be undertaken when determining

176. See WIS. STAT. § 938.315(2) (1997-98).
177. See supra notes 58-59 and accompanying text (indicating that the factors for analyzing "good cause" under Wisconsin Statutes Section 48.315(2) are the same as those that enter into an "excusable neglect" analysis in civil cases).
178. The term "excusable neglect" is used in civil actions, particularly in the context of setting aside judgements that have already been granted against a party. The section governing such situations is WIS. STAT. § 806.07(1)(a) (1997-8). "Excusable neglect is not synonymous with neglect, carelessness or inattentiveness." J.L. Phillips & Assoc., Inc. v. E. & H. Plastic Corp., 577 N.W.2d 13, 19 n.5 (Wis. 1998) (quotation and citation omitted). Generally speaking, "excusable neglect" is the type of neglect that might have been made by the reasonably prudent person under the same or similar circumstances. See id.
whether statutory time limits are "directory" or "mandatory." He concluded that the time limits set out in the statute that was at issue, Section 48.31(7), should be construed as directory, not mandatory. By following the analysis of Judge Dykman in R.H., the appellate courts in the State of Wisconsin could provide the needed flexibility to the time lines in termination of parental rights cases.

VI. CONCLUSION

The courts and professionals that deal with children have recognized that children view time differently than adults. Unlike adults, who measure the passing of time by clocks and calendars, children have their own built-in sense based on the urgency of their instinctual and emotional needs. What seems like a short wait to an adult can be an intolerable separation to a young child to whom a week can seem like a year, and a month forever.

The time line structure of Chapter 48, especially in the context of termination of parental rights cases, needs to be modified to more effectively reflect the needs of children. Mandatory timelines that can cause dismissal several months after the violation when no one bothered to object and no one was prejudiced, serve no one's best interests except the uninvolved parent looking for the last straw on appeal. Generally speaking, parents who have not complied with their court ordered

179. See In re R.H. III, 433 N.W.2d 16, 25 (Wis. Ct. App. 1988); (citing Karow v. Milwaukee County Civil Serv. Comm., 263 N.W.2d 214 (Wis. 1978)). The relevant factors for a court to consider in evaluating the effect of failure to follow statutory time lines are:

(1) "shall" is presumed mandatory; (2) the legislature's clear intent; (3) the legislature's failure to state the consequences of noncompliance; (4) whether the failure to observe time limits results in an injury or wrong; (5) the consequences resulting from one construction or the other; (6) the nature of the statute; (7) the evil to be remedied and the general object to be accomplished by the legislature.

Id.

180. See id. In applying the factors of Karow, Judge Dykman indicated that: (1) construing "shall" as directory carries out the legislature's intent to consider the child's best interests as paramount; (2) the legislature did not provide that failure to follow the time limits in the section at issue would deprive the court of competency to proceed; (3) as a result of the decision of the majority, R.H. would be returned to a home that a jury found to be neglectful and one that would seriously endanger R.H.'s health; (4) the evil sought to be remedied is having R.H. in a dangerous situation, while the general object to be accomplished is to provide the parents with directions on how to improve their role as parents. See id. Upon reaching these conclusions, Judge Dykman determined that the time limits should be construed as directory. Id. at 27.

181. Id. at 23 (quoting Model Statute for Termination of Parental Rights).
CHiPS conditions are looking to delay the termination of parental rights time lines as long as possible to give them more chances to finish complying with their conditions and look good for a jury. It runs contrary to sound, child-oriented, policy to let parents attempt to do such a thing and take advantage of an inadvertent delay in the process. The Adoption and Safe Families Act does not promote such strategies nor do the express goals of the Wisconsin Children's Code. However, until the time limit policy in Chapter 48 is changed, those very strategies will be used and will have the potential to keep children in foster care much longer than anyone would like to see.