TO: Representative Suzanne Jeskewitz
Chairperson, Special Committee on Adoption and Termination of Parental Rights

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FROM: DDA Patrick J. Kenney
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RE: **POSSIBLE DISCUSSION POINTS FOR CHAPTER 48**

The following are suggestions for changes to Chapter 48, which our office believes will promote efficient and timely processing of TPR cases, and better accommodate the needs of the biological and adoptive families of the children that we serve:

I. TECHNICAL CHANGES

1. FUTURE CONTACT WITH BIOLOGICAL SIBLINGS

Problem: Wis. Stats. § 48.433 allows parents involved in TPR proceedings to register their contact information with the state. The statute also provides that adoptive children may, when they reach the age of 21, access this information if they wish to contact their biological parents. There is no provision in the statute that allows biological siblings this same right.

Solution: Amend the statute to allow biological siblings of adoptive children to register with the state in addition to biological parents.

2. VOLUNTARY TPR BY PHONE OR VIDEOCONFERENCING

Problem: Wis. Stats. § 48.41(2) requires that if it would be "difficult or impossible" for a parent in a TPR proceeding to appear in person, they must appear before an embassy or consular official or a judge or military judge to voluntarily terminate their parental rights. This is problematic in several respects. First, it requires that that official/judge from another jurisdiction apply Wisconsin law in determining whether the appropriate voluntary questions are asked.

Second, if the parent is in the custody of the federal prison system or another state for criminal purposes, we have no authority to have them produced to our jurisdiction (or into the presence of any "consular official or judge" in another jurisdiction) for the hearing. We have attempted to request production of inmates from the federal prison system. However, because TPR's are civil proceedings, the federal prison system refuses to accommodate this request for security reasons. We have also faced situations where parents simply cannot afford to travel from where they live to Milwaukee to enter their voluntary in person. This requirement has forced us to take the voluntary by phone in direct contradiction to the statute, default the parent and involuntarily terminate their parental rights despite their request to voluntarily do so; or, schedule a trial and involuntarily terminate their rights.

Solution: Amend the statute to allow a court to accept a voluntary termination of a parent's rights by phone or videoconference. It is not clear why the current prohibition is in the statute, other than to make certain that the judge finding a parent had voluntarily consented to the termination of their parental rights would have adequate opportunity to ascertain whether the parent was under duress of any kind. Given current technology, there is no reason that this cannot be done short of a personal appearance. Even by phone, the court could still make

adequate inquiries of the parent to determine that they were in fact the parent in question and that their decision was voluntary.

3. NOTICE IN SAFE HAVEN CASES

Problem: There are several concerns regarding the relinquishment statute (Wis. Stats. § 48.195), which allows parents to anonymously relinquish their newborns to medical or law enforcement personnel without suffering criminal consequences for abandoning their child.

First, we have always been concerned that the statute provides no requirement that the person giving up the child establish that they are, in fact, the parent of the child, which runs the risk of having family members or others fraudulently relinquishing the child in opposition to one or both of the parents.

Second, there is no requirement that the non-relinquishing parent be identified or served with any notice of any kind that the State is taking custody of the child. This may engender constitutional claims by the non-relinquishing parent if they become aware that the child has been relinquished to the State.

Third, Wis. Stat. § 48.195(2) prohibits the State from seeking identifying information about the parents, however, there is no provision in the notice portion of the CHIPS or TPR stature that exempts the State from providing notice to the parents of these proceedings. Accordingly, we have been publishing legal notices for relinquishment parents: "To: Mother, Baby Jane Safehaven, born January 1, 2004, and any unknown father." Because there is no publishing requirement in the CHIPS portion of the statute, there is no notice option readily available, unless the parent has chosen to provide their identity to the person to whom they relinquished the baby.

Unfortunately, providing notice when the parent is identified presents its own dilemma. Our sense is that most of the parents who relinquish their newborns do so in part because they do not want family members to know about the child. In order to notice them of the CHIPS/TPR proceedings, we are required by statute (Wis. Stats. § 48.42(2m) and Wis. Stats. § 48.27) to send them certified mail or have them personally served with a summons and a copy of the TPR/CHIPS petition. This may present considerable problems for the relinquishing parent, who may be under the impression that she/he would have no further contact regarding the child.

Solution: Solving the first two concerns (the potential for fraud and preserving the rights of the unidentified parent) is difficult if not impossible to do without abrogating the statutory prohibition on seeking the identity of the relinquishing and non-relinquishing parent. Hopefully, if any constitutional challenge were made to the adoption of a relinquished infant, an appellate court would find that the Legislature's interest and specific findings regarding the need for protecting these infants outweigh the constitutional rights of the non-relinquishing parent. Part of this legal analysis would likely hinge on what attempts, if any, were made during the CHIPS and TPR proceedings to notify both parents of their right to participate in the proceedings and the consequences if they chose not to do so. While it may be that the rules to be promulgated by the Department of Health and Human Services may attempt to address these issues, because they have not yet been completed it is uncertain whether or not they will. Accordingly, several simple corrections may be helpful:

First, amend Wis. Stats. § 48.195(3) to read that in addition to a phone number, the emergency personnel receiving the relinquished baby must provide the parent with written information explaining that the child will be adopted in approximately 6 months if they take no

further action, that they have a right to participate in the proceedings if they chose to do so, and that the non-relinquishing parent has a right to participate as well.

Second, exempt the State from sending notice by certified mail and personal service in relinquishment cases (See Wis. Stats. § 48.27 and § 48.42(2m)), and instead require publication for both the relinquishing and non-relinquishing parent in both CHIPS and TPR proceedings.

4. NOTICES BY APPELATE COUNSEL OF ABANDONMENT OF APPEAL

Problem: The majority of parents who contest TPR proceedings at the trial court level also exercise their right to file a Notice of Intent to appeal the termination of their parental rights. In some of these cases, the appellate counsel declines to file an appeal after the initial Notice of Intent to appeal is filed, for a variety of reasons. The current statute places no obligation on that appellate counsel to notify the parties that the appeal will not be filed.

Under the current system, we have taken the initiative to contact the appellate counsel when they have missed the applicable deadlines for subsequent appellate timelines to find out why. Unfortunately, many attorneys refuse to answer our questions regarding whether the appeal has been abandoned because they consider that information to be "privileged." The current system causes adoptions to be delayed, sometimes by many months, while we sort out whether all of the transcripts have been received by appellate counsel, whether appellate counsel is intending to file an appeal and just missed the deadline, and trying to have the case called back into court so that we have an adequate record for the trial court to determine that the appeal has been abandoned.

Solution: Amend Wis. Stats. § 809.107(5) to require appellate counsel in TPR cases to notify the parties and the trial court within 30 days of the receipt of the last transcript that they have chosen not to file a Notice of Appeal.

5. APPEALS OF ALJ RULINGS RELATED TO LICENSING

Problem: Under current law, the Bureau of Milwaukee Child Welfare has taken the position that they do not have the right to challenge decisions of administrative law judges in circuit court. Accordingly, there are circumstances where a foster parent will have their license revoked by the licensing agency, only to appeal to the ALJ and have their license returned. While there are circumstances where this may be appropriate, in some cases review of the ALJ's decision by circuit court would be preferable and appropriate.

Solution: Specifically grant the BMCW the right to circuit court review.

II. CHANGES TO INVOLUNTARY GROUNDS FOR TERMINATION

1. FAILURE TO ASSUME PARENTAL RESPONSIBLITY

Problem: Wis. Stats. § 48.415(6) requires the Petitioner to prove that a parent has "never" had a substantial parental relationship with the child, in order to establish that involuntary ground for termination of parental rights. In addition, the jury instruction (Children's JI-346) directs the jury to consider, in finding whether a parent has "never" established a substantial parental

relationship, whether the parent has ever expressed an interest in the care and well-being of a child.

The word "never" in the context of the statute and the jury instruction is fraught with ambiguity and potential for jury misunderstanding. For example, we have lost several cases alleging this ground when the parent has been incarcerated and therefore NOT caring for the child during the child's entire life, having been incarcerated from before the child's birth until the date of the TPR trial. When jurors were asked how they could make such a finding, they responded that they considered the expressions of interest (letters to social workers or foster parents from prison) as sufficient evidence to defeat the allegation given the language of the statute and the jury instruction.

In addition, there is considerable ambiguity in the term "never" given that there is no indication whether the Legislature intended it in the quantitative or the qualitative sense. For example, what if a father changed his child's diaper for two years, and when he did so also has sexual contact with the child? Certainly during the several seconds that he was changing the diaper he was acting as a parent. However, were those moments of changing the diaper in and of themselves sufficient to establish parental responsibility despite the sexual assault?

Solution: Remove the word "never" from Wis. Stats. § 48.415(6). Instead, ask that the Petitioner prove that the parent failed to have a substantial parental relationship with the child at the time that the TPR petition was filed. A substantial parental relationship is defined as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child."

2. TIME PERIOD FOR PROSPECTIVE PRONG - CONTINUING CHIPS

Problem: Wis. Stats. § 48.415(2) provides that a ground for involuntary termination of parental rights can be proven if: the child has been on a foster care order for six months or longer; the foster care agency has made reasonable efforts to assist the parent in completing the court-ordered conditions (included in the foster care order) for the return of their child to their home; the parent has not completed those conditions; and, the parent is substantially unlikely to complete the conditions in the 12-month period following the trial. This final prong of the four-part test requires the jury to predict whether the parent will complete the conditions based upon the parent's conduct in the past, particularly while their child has been in foster care.

This statute was adopted in 1993, before Congress passed and the State Legislature codified the Adoptions Safe Families Act. ASFA anticipates the filing of a TPR when a child has been in foster care for 15 of the last 22 months, and the adoption of that child when the child has been in foster care for 24 months. Wis. Stats. § 48.415(2), however, anticipates that a child could be in foster care for 15 months plus whatever time it takes to process the TPR, and the parent could still be allowed 12 months to complete their court conditions. This timeline is in excess of what ASFA contemplates, and is inconsistent with the premise that children need to be placed in foster care for a minimal period of time.

Solution: Change the prospective prong of the continuing CHIPS ground from a 12-month period to a 3-month period to reflect ASFA's accelerated timelines.

3. APPLICATION OF GROUNDS TO ALLEGED FATHERS

Problem: There are currently eleven different grounds for involuntary termination of parental rights. Only two of the grounds (Wis. Stats. § 48.415(6), failure to assume parental responsibility and Wis. Stats. § 48.415(9), parenthood by sexual assault), specify that they apply to the parent or the person who may be the parent. The other grounds simply refer to "the parent," which is defined by Ch. 48 to be the biological mother, and presumed or adjudicated father, or the adoptive parent (Wis. Stats. § 48.02(13)). Our best estimate is that over half the TPR's processed in Milwaukee County involve cases where no man has been legally declared the father of the child in question, and therefore the father is known in the proceedings as the "alleged father."

Accordingly, it is clear from the statutory language that those two grounds apply to alleged fathers as well as mothers and presumed or adjudicated fathers. None of the other grounds include such language, and therefore defense attorneys raise this issue on appeal when any ground other than failure to assume parental responsibility or parenthood by sexual assault is found against the father. Despite this, our office has proceeded on several of the other grounds against alleged fathers for a variety of reasons. For example, the failure to assume parental responsibility ground is a very fact intensive question to litigate, and generally requires a lengthy trial with a variety of witnesses. A number of the other grounds, if they expressly applied to alleged fathers, are much less cumbersome to prove. Unfortunately, alleging those grounds at this time opens up the issue for appeal, requiring time-consuming responses to those challenges. While no appellate court has ever denied a TPR of an alleged father for using these grounds, there is no published case on record that would definitively resolve the issue.

Solution: Add language to each of the other nine grounds, or to the definitions found in Wis. Stats. § 48.40, that specifically apply all involuntary grounds to "any person who may be the father of the child."

4. ADDITIONAL GROUND - INCARCERATION BEYOND ASFA TIMELIMITS

Problem: Many of the involuntary TPR's processed by our office involve incarcerated parents. In some of those cases, the parent is serving a lengthy prison sentence, most often for homicide or egregious sexual assault.

With a few exceptions (if the victim of the crime is the child in question or a sibling, or was the child's other parent, for example) the only involuntary ground for termination of the parental rights of these individuals is continuing need of protection and services, commonly referred to as continuing CHIPS (Wis. Stats. § 48.415(2)). This ground allows for a finding that grounds exist for termination if the parent is substantially unlikely to complete the court conditions detailed in the foster care order within 12 months of the trial. Because all parents are required to have a safe and suitable home for the child by Milwaukee County foster care orders, any parent who would be incarcerated for more than 12-months after the trial would be unable to complete the condition, and therefore grounds would exist.

However, this ground also requires that the court or jury find that the BMCW made "reasonable efforts" to assist the parent in completing their court conditions. This requirement is problematic in these cases for two reasons. First, what efforts are considered "reasonable" when the parent may be incarcerated for 20, 40 or 60 years and therefore will NEVER be available to provide a home for their child. Second, is it sound public policy to expect BMCW employees to

expend any time, effort or resources working with parents who will NEVER be a placement option for their child?

Solution: Add a ground to Wis. Stats. § 48.415 that would allow for the involuntary termination of the parental rights of any parent who has been convicted of a crime and whose sentence is in excess of the ASFA time limit of 15 months (as evidenced by a final judgment of conviction).

III. SUBSTANTIVE CHANGES TO INCREASE EFFICIENCY OF LITIGATION

1. RIGHT TO JURY TRIAL IN TPR AND CHIPS CASES

Problem: Wis. Stats. § 48.31(2) and Wis. Stats. § 48.424(2)) grant parents the right to a jury trial. Appellate courts have repeatedly found that the right to a trial by jury is not a constitutional requirement in these civil cases, as it is in criminal cases. (Please see letter from Wisconsin District Attorneys Association, attached hereto.)

Solution: Remove the language granting parents a right to a jury trial from the statute, and provide instead that trials be conducted by the court.

2. THE ROLE OF GAL'S APPOINTED FOR INCOMPETENT PARENTS

Problem: Current statute and case law authorize courts to appoint Guardians ad litem for parents who are not competent to participate in TPR cases. Unfortunately, these cases do not specify what role that GAL is to play in the proceedings. This results in different court's applying

different rules for the GAL's participation. In many cases this results in adding significant time and expense to the proceedings with no corresponding increase in the protection of the rights of the parent.

Solution: Develop specific language as to the role of a parent's GAL in a contested TPR/CHIPS proceeding. Specify that a psychological evaluation must be completed to determine a parent's competency if that competency is questioned by any party or the court, for the limited purpose of determining whether the parent: is in need of a GAL to assist the court and her adversary counsel in protecting her rights to due process; and, may consent to a voluntary termination of her parental rights, a stipulation to the grounds for termination, or a waiver of her right to a trial. Clarify that this evaluation is admissible at a grounds trial if the allegation is that the child is in continuing need of the protection and services of the court, for the purposes of allowing the jury or court to determine whether the parent is likely to complete their court conditions in the months following the trial. Also clarify that the evaluation is admissible as to the best interest phase of the proceedings. Finally, specify that the GAL does not have the right to participate in the trial as a distinct party (calling witnesses, giving opening statements and closing arguments, etc.), but is only charged with providing information and assistance to the court in protecting the rights of the incompetent parent.

3. PRESUME THE ADMISSABILITY OF PSYCHOLOGICAL EVAULATIONS

Problem: Current law provides that a court in a CHIPS proceeding may order a physical, psychological, mental, developmental, or AODA evaluation of any parent or child and establishes procedures for doing so. There is no statute, however, that establishes whether or not

these evaluations are admissible as evidence in CHIPS/TPR proceedings, or whether client/patient privilege applies to these reports. (See Wis. Stats. 48.295) Considerable time and effort is currently being spent in pre-trial proceedings at the circuit court level debating whether the information shared by the parent and any diagnosis or findings of the examiner are admissible into evidence, particularly in TPR trials. This information is often crucial information, given that it includes details regarding the parent's drug and alcohol use, as well as IQ and other data regarding whether the parent is intellectually able to parent his/her child. Also, these evaluations also provide the basis for the CHIPS court's inclusion of specific orders for the parent to complete in order to have their children returned to their care, and subsequent allegations of involuntary grounds for TPR if the parent fails to complete those conditions.

Solution: Establish an evidentiary presumption in Wis. Stats. § 48.295 that statements made by the parents for completion of the evaluations, results of tests conducted for the evaluation, and any diagnosis and recommendations offered in the evaluations are not subject to privilege (See Wis. Stats. §905.01), and therefore are admissible as evidence at both the ground's and best-interest phase of the TPR proceeding.

4. THE USE OF *HABEAS* PETITIONS TO CHALLENGE TPR ORDERS

Problem: A recent unpublished decision by District III of the Wisconsin Court of Appeals found that a late filing of a Notice of Intent to Appeal by a parent's appellate counsel was appropriate

cause for a *habeas* claim, as the child was being held "in custody" by foster care officials. To our knowledge, this is the first Wisconsin appellate court case to find that habeas procedures applied to TPR proceedings, and only one other state (California) allows the application of *habeas* procedures to TPR proceedings.

While this case was unpublished and therefore cannot be used as precedent, it is the cause of considerable concern. Current appellate procedure in TPR cases include accelerated time lines in recognition of the State's interest in getting children out of the foster care system and adopted by loving, committed families. *Habeas* claims would considerably extend those time lines. In addition, there is currently no deadline for filing a habeas claim, which technically leaves open the possibility that parents could file these claims well after a child is adopted, potentially putting the adoption of the child in question.

Solution: Specify that the appellate provisions of § 809.107 and the corresponding appellate procedural statutes are the only option for challenging a CHIPS and/or TPR order, and that *habeas* petitions are not appropriate for review of CHIPS/TPR cases.

Thank you.