WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 4

TO: MEMBERS OF THE SPECIAL COMMITTEE ON ADOPTION AND TERMINATION OF PARENTAL RIGHTS LAW

FROM: Anne Sappenfield, Senior Staff Attorney and Laura Rose, Deputy Director

RE: Options for Legislation Relating to Termination of Parental Rights

DATE: September 8, 2004

This Memo presents suggestions made at the August 24, 2004 meeting of the Special Committee on issues relating to termination of parental rights (TPR).

GROUNDS FOR INVOLUNTARY TPR

Failure to Assume Parental Responsibility

Current Law

Failure to assume parental responsibility is established by proving by clear and convincing evidence that the parent never had a substantial parental relationship with the child. "Substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child.

In evaluating whether the person has had a substantial relationship with the child, the court may consider whether the person has ever expressed concern for or interest in the child's support, care or well-being; whether the person has neglected or refused to provide care or support; and whether with respect to the father, the parent has ever expressed concern for or interest in the mother's support, care or well-being during her pregnancy. [s. 48.415 (6), Stats.]

Testimony received by the committee from the Department of Health and Family Services (DHFS) staff and Public Member Pat Kenney, indicate that requiring a showing that the person ***never*** had a substantial parental relationship with the child can be difficult if the parent ever showed any interest or had any contact with the child.

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Options

The options for legislation are:

- Remove the word "never" and instead require a showing that the parent failed to have a substantial parental relationship with the child at the time that the TPR petition was filed.

- Remove the word "never" and require a showing that the parent failed to have a substantial parental relationship with the child within a certain period of time preceding the filing of the TPR petition (e.g., within the previous six or 12 months).

- Retain current law.

Abandonment

Current Law

Abandonment is established by proving any of the following by clear and convincing evidence:

- The child has been left without care or support and the petitioner has investigated the situation and has been unable to find either parent for 60 days.

- The child has been left by the parent without care or support in a place or manner that exposes the child to substantial risk of great bodily harm or death.

- A court has found in a children in need of protection or services proceeding that the child was abandoned or has found that the parent committed criminal abandonment of the child when the child was under one year of age.

- A court has placed the child, or continued placement, outside the parent's home and the parent has not visited or communicated with the child for at least three months.

- The parent left the child with another person, knows or could discover the whereabouts of the child and has not visited or communicated with the child for at least six months.

Current law specifies that incidental contact between a parent and child does not preclude the court from finding that the parent has failed to visit or communicate with the child. Also, the time periods under those provisions do not include any periods during which the parent is prohibited by a court order from visiting or communicating with the child.

Abandonment is ***not*** established if the parent proves both of the following by a preponderance of the evidence:

- Good cause for having failed to visit with the child throughout the time period specified.

- Good cause for having failed to communicate with the child throughout the time period specified.

If the parent proves good cause for having failed to communicate with the child, the parent must show that he or she either: (1) communicated about the child with the person who had physical custody of the child or with the agency responsible for the care of the child; or (2) had good cause for not communicating about the child. [s. 48.415 (1), Stats.]

According to DHFS staff, it is confusing to parties and juries that the burden of proof is on the parent, instead of the state, to show that the parent had good cause for failing to visit or communicate with the child. Also, the ground of abandonment must be proven by clear and convincing evidence, while good cause for failing to visit or communicate must be proven by a preponderance of the evidence, a lower burden of proof.

Options

The options for legislation are:

- Require the state to show by clear and convincing evidence that the parent did not have good cause for failing to visit or communicate with the child.

- Retain current law.

RIGHT TO A JURY TRIAL IN TPR PROCEEDINGS

Current Law

Under current law, parents have the right to demand a jury trial for the fact-finding hearing in a TPR proceeding. According to DHFS staff, a request for a jury trial can significantly lengthen the TPR process.

Currently, approximately six states, including Wisconsin, provide the right to a jury trial in TPR proceedings. As discussed below, the Wisconsin Supreme Court has held that the right to a jury trial in TPR proceedings is a statutory right, not a due process requirement. [*In re the Termination of Parental Rights to Alexander V.; Steven V. v. Kelley H.*, 2004 WI 47; 271 Wis. 2d 1; 678 N.W. 2d 831 (2004).]

Options

The options for legislation are:

- Eliminate the right to a jury trial and instead have trials conducted by the court.

- Retain current law.

DEFINITION OF "RELATIVE" FOLLOWING A TPR

Current Law

In the Children's Code, "relative" is defined as a parent, grandparent, great-grandparent, stepparent, brother, sister, first cousin, nephew, niece, uncle, or aunt. This relationship may be by blood, marriage, or adoption. [s. 48.02 (15), Stats.]

It is clear in the statutes that adoption severs a child's relationship with all relatives in his or her birth family. [s. 48.92 (1), Stats.] The effect of TPR is not clear from the statutes. However, the Wisconsin Supreme Court has held that TPR severs these relationships as well. [*In re the Termination of Parental Rights to Darryl T.-H. and Durrell T.-H.*, 234 Wis. 2d 606, 610 N.W.2d 475, 480 (2000).]

DHFS staff has indicated that it would be helpful to have clarification as to who is a relative following a TPR for purposes of placement of children with a relative for adoption, kinship care payments, and licensing a relative's home as a foster home.

Options

The options for legislation are:

- Clarify the effect of TPR on relationships with members of the birth family for purposes of the Children's Code or portions of the Children's Code.

- Retain current law.

WISCONSIN SUPREME COURT DECISION ON CERTAIN PROCEDURAL ISSUES IN TPR PROCEEDINGS

Current Law

In the recent Wisconsin Supreme Court decision, *In re the Termination of Parental Rights to Alexander V.; Steven V. v. Kelley H.*, 2004 WI 47; 271 Wis. 2d 1; 678 N.W. 2d 831 (2004) (hereafter, "*Kelley H.*"), the Supreme Court addressed two issues: (1) whether summary judgment in the "unfitness" phase of a TPR case, where the statutory right to a jury trial exists, is available where the requirements of the summary judgment statute and the applicable legal standards in the TPR statute have been met; and (2) whether the court is required to advise any nonpetitioning party in a TPR case of his or her right to a continuance to consult with counsel about judicial substitution.

The relevant statutes are: s. 48.31 (2), Stats., relating to jury trial; and s. 48.422 (5), Stats., relating to a continuance to consult with counsel about judicial substitution. Copies of these statutes are attached to this memorandum.

The court concluded that:

1. The jury trial right in TPR cases is statutory and not mandated by due process. Therefore, it is subject to the provisions of the code of civil procedure, including the summary judgment procedure.

Due process requires a hearing and clear and convincing proof of unfitness, and a summary judgment procedure accommodates both. [*Kelley H.*, at 44.]

2. The circuit court does not have a statutory duty to inform a party in a TPR case of the right to a continuance to consult with counsel about judicial substitution, even though parties to TPR proceedings may request a continuance of the initial hearing to consult with counsel about judicial substitution, pursuant to s. 48.422 (5), Stats. [*Kelley H*. 2004 WI 47 at 50-52.]

The concurring opinion expressed concern that the statute does not provide enough protection for the liberty interests of parents in raising their children. This is because the statute requires parents to raise explanations, in the dispositional stage of a TPR proceeding, as to why their conduct does not make them unfit, as opposed to automatically requiring the court to consider factors that might favor the parents. The concurring opinion urged the Legislature to examine this statute to ensure the legitimacy of the process, given the significance of termination proceedings for parents, children, and society. [*Kelley H.*, at 59-60.]

Options

The options for legislation are:

- For summary judgment in the "unfitness" phase of TPR:
  - Modify or reverse the court's holding in *Kelley H.*, such as by prohibiting a summary judgment in the "unfitness" phase of a TPR proceeding, so that a jury makes the determination of whether there is a dispute as to the material facts of the case.
  - Require, at the dispositional phase of a TPR proceeding, that the court consider factors favorable to the parent, in addition to the factors relating to the best interest of the child, instead of requiring the parents to raise these factors themselves.
  - Retain current law, as clarified by the court in *Kelley H.*
- For informing a party of a right to request a continuance:
  - Modify or reverse the court's holding in *Kelley H.*, such as by requiring the court to inform a party in a TPR case of the right to a continuance to consult with counsel about judicial substitution.
  - Retain current law, as clarified by the court in *Kelley H.*, that parties to a TPR proceeding may request a continuance of the initial hearing to consult with counsel about judicial substitution, but the court is not required to notify the party of this right.

PERSONS ELIGIBLE TO PETITION FOR A TPR

Current Law

Section 48.417, Stats., currently provides that the following persons are entitled to file a petition for TPR: the child's parent, an agency (i.e., DHFS, a county department, a licensed child welfare

agency), or the district attorney, corporation counsel, or person designated by the county board of supervisors.

At the August 24, 2004 meeting of the Special Committee, Public Member Stephen Hayes suggested that the committee consider enlarging the group of people who can petition for TPR. He suggested that foster parents could be added as petitioners, if the child who is the subject of the TPR petition has been in foster care placement with the foster parents for a lengthy period of time.

Options

The options for legislation are:

- Add foster parents to the list of persons in s. 48.417, Stats., that are entitled to file a petition for the TPR, provided that the child who is the subject of the TPR petition has been in foster care placement with the petitioning foster parents for a lengthy period of time.

- Add other individuals, in addition to foster parents, to the list of persons that are entitled to file a petition for the TPR.

- Retain current law.

FILING OF NOTICE OF APPEAL AND INTENT TO APPEAL IN TPR CASES

Current Law

Current s. 808.04 (8), Stats., provides that if the record discloses that the judgment or order appealed from was entered after the notice of appeal was filed, the notice of appeal shall be treated as filed after such entry and on the day thereof. Currently, this provision affects a few TPR cases each year where a notice of intent to appeal (which is required in TPR cases, under s. 809.107, Stats.) is filed prior to the entry of the judgment or order. In those cases, the notice of intent to appeal is treated as being filed too early and in violation of s. 808.04 (8), Stats.

Options

The options for legislation are:

- Amend s. 808.04 (8), Stats., to provide that if the records disclose that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after such entry and on the day thereof.

- Retain current law.

TIME LIMIT ON FILING PETITION FOR RELIEF FROM ADOPTION ORDER

Current Law

In 1995, Illinois law was amended in response to the "Baby Richard" case. The "Baby Richard" case involved the interruption of an adoption of a young boy whose birth mother had placed him for adoption without notifying the birth father. The case went to the Illinois Supreme Court, which ruled in favor of the father and ordered the four-year old child to be removed from the adoptive parents' home, where he had resided since birth, and returned to the birth father.

In response to this decision, the Illinois Legislature enacted two changes to the Illinois adoption law. First, it required that in the event that a judgment order for adoption is vacated or a petition for adoption is denied, the court must promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings. The parties to the proceedings must be the petitioners to the adoption proceedings, the minor child, and any biological parents whose parental rights have not been terminated, and any other parties who have been granted leave to intervene in the proceedings. [750 Ill. Comp. Stat. Ann. 50/20.] A similar provision in Wisconsin law, s. 48.95, Stats., relating to the withdrawal or denial of petition, provides as follows:

> Except as provided under s. 48.839 (3) (b), if the petition is withdrawn or denied, the circuit court shall order the case transferred to the court assigned to exercise jurisdiction under this chapter and ch. 938 for appropriate action, except that if parental rights have been terminated and the guardian of the minor is the department, a licensed child welfare agency or a county department under s. 48.57 (1) (e) or (hm), the minor shall remain in the legal custody of the guardian.

Second, the Illinois law instituted a time limit for relief from final judgment or order. A petition for relief from a final order or judgment entered in an adoption proceeding, after 30 days from the entry of the order or judgment or otherwise, must be filed not later than one year after the entry of the order or judgment. [750 Ill. Comp. Stat. Ann. 50/20b]

Wisconsin does not appear to have a provision similar to the provision in Illinois law that requires any petition for relief from a final order or judgment in an adoption proceeding to be filed not later than one year after the entry of the order or judgment.

Options

The options for legislation are:

- Implement a provision similar to the Illinois provision that requires any petition for relief from an adoption order to be filed not later than one year after the entry of the order or judgment.

- Retain current law.

AS:LR:tlu