September 22, 2004

To: Members of Legislative Study Committee on TPR and Adoption

From: Chris Foley

RE: Declarations of Paternal Interest; Abandonment and Failure to Assume Parental Responsibility

I am sorry that I was unable to participate in the meeting last week. An emergency matter in my court prevented me from traveling to Madison on that date.

I am enclosing a letter that I authored to Secretary Frank, with copies to Secretary Nelson, which sets forth my position with respect to a number of issues that will be addressed by the committee. The most significant of these is in regard to proposed amendments to our Declaration of Paternal Interest statute (referred to in other states as a putative father registry). The letter, and the A.N. decision (involving a beautiful little girl I will be visiting next week), succinctly and passionately set forth my position and the reasons supporting that position. I urge you to read both documents.

I do want the committee to be aware, however, that I have already met and exchanged additional correspondence with Secretary Nelson in regard to this issue. The Secretary, while sharing my grave concerns regarding the delays occasioned by unidentified or alleged father issues in achieving adoption for children, does not support my view. She feels that my proposal does not provide sufficient protection to a father of a child born out of wedlock. She is further concerned that one of the areas of criticism of our child welfare system in the recently-completed Child and Family Service Reviews (federal audit) was a failure to identify and engage fathers in their children's lives. While I respectfully disagree, I appreciate her concerns.

In view of those concerns, I have offered a compromise position to this effect. If a child who is the subject of a termination proceeding is a non-marital child; no declaration of paternal interest has been filed; notice has been provided to alleged and unknown fathers in underlying child welfare proceedings (Chips) and they failed to appear and participate in those proceedings, then there would be no obligation to provide notice to an alleged or unknown father in the related termination of parental rights proceeding. I do not speak for the Secretary; however, it was my belief that she found this proposal far more palatable. I point these concerns out because there is some validity to the fairness concerns (I still believe that "register, register, register" is the ultimate

protection for a father) and in view of the concerns raised at the conclusion of our first meeting relating to political viability of the proposals we put forth. However, I have to point out to the committee that this leaves a large number of "private" terminations and adoptions outside the coverage of any amended statute.

I personally view the other issues addressed as much less controversial. The abandonment ground---with its incomprehensible shifting and lowering burden of proof---needs to be promptly amended (it is long past due). I take the same position with respect to the removal of the word never from the failure to assume parental responsibility statute.

I appreciate your consideration of my input on these issues. Feel free to contact me if you have questions or concerns. I look forward to seeing you at the next meeting.

Mr. Matthew Frank
Secretary, Department of Corrections
3099 E. Washington Av.
P.O. Box 7925
Madison, Wisconsin 53707-7925

RE: Putative Father Registry

Dear Secretary Frank:

I enjoyed our meeting the other day and am quite grateful for your interest in and support for our proposal to establish a family drug court in Milwaukee. I believe you are aware that we are knee deep into the planning process for the grant application and implementation of the court. Ms. Morgan will be joining us on Monday for the initial planning meeting with representatives of most of the agencies whose participation will be critical to successful implementation. I am also quite anxious to meet with you and Secretary Nelson to address the funding concerns referenced in my e-mail of the other day.

However, my focus in this letter is a subject we touched on briefly in our initial meeting and in anticipation of the Governor's consideration of policy initiatives for children in foster care. While perhaps a technical issue, it is one that often substantially delays termination of parental rights and the related adoption proceedings, renders some adoptions subject to potential legal attack and wastes significant state resources with little or no logical or legal rationale.

Succinctly stated, I advocate the adoption of a statutory provision similar to that in Illinois placing the responsibility on a putative father to register his paternal interest in a child within a limited period of time after the birth of a child or forfeit that interest. See 750 ILCS sec. 50/12.1 (b). In conjunction with that change, I advocate abolition of the notice requirement in sec. 48.42 (2) (b) 2, Wis. Stats. As you are aware, we presently maintain a registry of declarations of paternal interest, but it does not specifically

provide that a failure to register forfeits one's paternal interest. In fact, it does not even place a time limitation on when a putative father can file a declaration of interest, other than to indicate that it must be filed prior to the termination of the declarant's parental rights. Section 48.025 Wis. Statutes.

I enclose herewith a copy of a redacted version of a decision I recently completed which brings home the perils that exist under our present scheme for adoptive children and parents (and potential adoptive children and parents). It has been some time since I lost sleep over a case; I lost lots of sleep over this one. While the case resolved in the manner that I sincerely believe the law dictated and served the best interests of this child, quite frankly the emotional turmoil and legal machinations this child and family endured should not have been necessitated. In addition, while an appeal was not undertaken in this case, if it had been, the child and family would have endured a further protracted period of uncertainty. If an appellate court disagreed with my interpretation of the law, we might have seen the Baby Richard scenario all over again.

By way of a second example, I recently delayed finalization of a termination of parental rights proceeding in which the mother of a four year old non-marital child consented to the termination of her rights in anticipation of adoption by her mother. It was a loving and courageous act premised on her conclusion that she could not presently, and into the foreseeable future, provide a safe, loving, nurturing home for her child. However, we had not provided notice to the man believed to be the child's father (we actually had; however, an address we believed to be in Outagamie County was actually in Calument County). The matter has been delayed in order to again notice this man who has never met this child; never declared his paternal interest; never paid support for the child, etc., etc., etc. He is wanted on a warrant for sexual assault of a child.[1] We will now be attempting both personal service and publication notice for this person at a cost of approximately $60 for local publication. Out of state publication has been reported to cost as much as $800.

In recent years there has been a new emphasis on the responsibilities of fathers. I applaud that emphasis and the resultant efforts of some fathers to meet their responsibilities to their children. When that does happen, the interests of everyone, most importantly the child(ren), are served. However,

[1] I am not commenting on the merits of litigation which is still pending before me. I took the consent for another judge who will have responsibility for future hearings.

I sincerely believe that we have gone beyond the point in this country where men can engage in the behavior that could produce a child; blithely ignore the potential consequences; then show up at a later point when they think it might be neat to play dad and insist their rights be recognized and protected. The United States Supreme Court has emphatically stated to fathers in these circumstances that if you are going to stand up as a father, you have to do it immediately and consistently. Lehr v. Robertson, 463 U.S. 248 (1983). If you do not, you have no right to assert or protect.

As you may or may not be aware, the passage of the Adoption and Safe Families Act has already dramatically increased the number of termination of parental rights and adoption cases in this county and state. Milwaukee County finalized over 570 adoptions of former foster children in 2003. The amount of time, effort, and resources presently required to attempt to identify, locate, notify and adjudicate alleged fathers who have never demonstrated the slightest interest in fulfilling their responsibilities to their children is illogical, if not disgraceful. When we do accomplish all of that, the nearly universal result is the termination of the paternal interest they never asserted and which, in the child's and the law's view, they had long ago forfeited. When we accomplish it by default, there is always that miniscule level of doubt and concern that an adoptive placement will be disrupted. While the doubt is miniscule, it did happen in A.N.'s case. The time, effort and resources unnecessarily dedicated to this issue in these cases are not, in any sense, miniscule.[2] We need to make this change for the sake of these children and the people that actually do meet the responsibilities of parenthood for them, their adoptive parents.

I also want to emphasize, as I am sure you are aware, remedial legislation of this nature will in no way curtail continuing efforts to enforce support obligations. It will not prohibit a father who learns of his child's existence at a point in time after the registration cutoff from pursuing the establishment of his interest and thereafter assuming his responsibilities (unless, of course, his rights have been terminated and the child has been adopted). The remedial legislation would simply obviate the need to hunt down fathers who have never demonstrated any commitment to the responsibilities of fatherhood.[3]

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[2] These efforts are not only necessary in termination of parental rights cases; they are necessary in all abuse and neglect proceedings as well.

[3] I advocate the elimination of the notice requirement set forth in sec. 48.42 (2) (b) (2), Wis. Stats.; I do not advocate the elimination of the notice requirement of sec. 48.42 (2) (b) (3), Wis. Stats. Where a court has

Lastly, as to this issue, I am fully cognizant of the fact that mothers sometimes actively attempt to prevent a father from learning of a pregnancy or establishing a relationship with a child. Often they do this for very valid reasons--drug abuse, domestic violence. Often they do it for invalid reasons--spite. However, if this legislation were enacted, a father has the ultimate responsive tool to any effort on the part of a mother to deprive him of the opportunity to step forward and assume the responsibilities of parenthood---register, register, register!!!! Our children need permanent, loving, nurturing homes. Obviously that should be in the homes of their biological families if at all possible. However, the quintessential characteristic or good parenting is the ability and willingness to give priority to the needs of your child over your own real or perceived needs on a virtually full time basis. If you can't do that, you can't qualify and children should not and will not wait while adults figure out their priorities.

As long as I have your attention on issues relating to termination of parental rights cases, I'll seek the assistance of the administration in remedying two other troublesome issues in this area. One of the grounds for involuntary termination of parental rights is abandonment. Section 48.415 (1), Wisconsin Statutes. In the most common scenario presented in litigation under this statute, a child is in foster care has been determined to be abused and neglected. The parent(s), who has/have been warned of the potential for termination of parental rights if they do not visit or communicate, disappears from the child's life for a minimum period of three months. If those facts are established, abandonment has been proven. However, the statute provides an affirmative defense to the parent(s) if they can prove "good cause".

While others might disagree, I firmly support the concept that an absence of good cause should be a necessary showing to establish abandonment.[4] I simply do not see the need to make this an affirmative defense. The State ought to bear the burden of proving an absence of good cause in order to establish the abandonment.

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information that a person who may be the father of the child is living in a familial relationship with the child, we should be required to notice that person even if he has failed to register.

[4] I have heard the argument that any good cause should be considered only in the dispositional phase of a tpr proceeding. I don't agree.

Under the present affirmative defense scheme, we have a switching burden of proof relating to the defense. If the first elements are proven, the burden shifts to the parent(s) to prove "good cause". Not only does the burden shift, it lowers. While the petitioner must meet the middle burden of proof (clear and convincing evidence), the parent need only meet the lowest (preponderance of the credible evidence). I am enclosing a copy of the uniform jury instruction for the abandonment ground. In all honesty, for jurors, it is at best confusing, if not incomprehensible.

I certainly appreciate what I perceive to be the rationale for making good cause an affirmative defense. A parent is ordinarily the only person who can explain why they failed to visit or communicate with their child. However, it does not necessarily follow that the petitioner can't prove the absence of good cause or gage the existence of such prior to trial. Both in the investigation process and, in particular, in the discovery process there is ample opportunity to gather information/evidence to establish the absence of good cause. While in theory it might be better to have the parent bear the burden, the present statutory language and scheme makes the process confusing and virtually unworkable.

Lastly, sec. 48.415 (6), Wis. Stats. makes Failure to Assume Parental Responsibility a ground for termination of parental rights. It requires the petitioning party establish that the respondent parent "never had a substantial parental relationship" with their child. Substantial parental relationship is defined as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." This is a frequently plead ground for termination of parental rights, particularly with children who have been placed in foster care.

The use of the term "never" in this statute is troublesome and dramatically misleading. The fact that a parent may have been June Cleaver or Doctor Huckstable for a week or even a month of a child's two-year existence should not defeat a claim made under the statute. The relationship is not substantial because it is so insignificant in length. Yet we hear over and over again defense lawyers arguing: "never means never". The term is misleading and unnecessary.

I appreciate the Governor's and his administration's interest in these issues and your consideration of my input. I would be happy to answer any

questions that you or your staff may have in regard to these issues. Feel free to contact me at the number listed above.

Sincerely,

Christopher R. Foley
Circuit Judge

CC: Secretary Helene Nelson, Department of Health and Family Services,
All CCC Judge and Commissioners (without attachments)

313 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABANDONMENT: PLACEMENT AND FAILURE TO VISIT OR COMMUNICATE FOR THREE MONTHS [WIS. STAT. § 48.415(1)(a)2.]

The petition in this case alleges that (child) has been abandoned which is a ground for termination of parental rights. Your role as jurors will be to complete the special verdict form which consists of six questions.

Questions 1 and 2 read as follows:

1. Was (child) placed, or continued in a placement, outside the (parent)'s home pursuant to a court order which contained the termination of parental rights notice required by law?
2. Did (parent) fail to visit or communicate with (child) for a period of three months or longer?

As to these two questions, the petitioner (_____) must satisfy you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that your answer to each of the two questions should be "yes."

Before you may answer question 1 "yes," the petitioner must prove that (child) has been placed, or continued in placement, outside (parent)'s home pursuant to a court order that contained the termination of parental rights notice required by law.

[Add the following language if there is no dispute as to this element: Because there is no dispute in the evidence as to this question, I have answered this question. My answer has no bearing whatsoever on what your answers should be to the other questions in the special verdict form.]

Before you may answer question 2 "yes," (petitioner) must prove that (parent) failed to visit or communicate with (child) for a period of three months or longer. This means that (parent) did not visit and did not communicate with (child) for three months or longer. Incidental

contact between (parent) and (child) does not prevent you from finding that the (parent) failed to visit or communicate. Incidental contact means insignificant contact or contact which occurred merely by chance. In calculating any period during which visitation did not occur, you should not include any period during which (parent) was prohibited by judicial order from visiting with (child). In calculating any period during which communication did not occur, you should not include any period during which (parent) was prohibited by judicial order from communicating with (child).

If you answer questions 1 and 2 "yes," abandonment has been established unless (parent) proves certain facts. Questions 3 through 6 of the special verdict address these facts and read as follows:

Questions 3-6 apply to the period of 3 months or longer as determined in question 2.

Answer question 3 only if your answers to questions 1 and 2 are "yes."

3. Did (parent) have good cause for having failed to visit with (child) during that period?

Answer question 4 only if your answer to question 3 is "yes":

4. Did (parent) have good cause for having failed to communicate with (child) during that period?

Answer question 5 only if your answer to question 4 is "yes":

5. Did (parent) communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

Answer question 6 only if your answer to question 5 is "no":

6. Did (parent) have good cause for having failed to communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

(Parent) has the burden of satisfying you to a reasonable certainty by the greater weight of the credible evidence that your answer to questions 3 through 6 should be "yes."

In determining if good cause existed as stated in questions 3, 4, and 6, you may consider whether the (child)'s age or condition would have made any communication meaningless; whether

(parent) had a reasonable opportunity to visit or communicate with (child) or communicate with (_____), who had physical custody of (child) [or the agency responsible for the care of the child during the time period]; attempts to contact (child); whether person(s) with physical custody of (child) prevented or interfered with efforts by (parent) to visit or communicate with (child); any other factors beyond (parent)'s control which prevented or interfered with visitation or communication; and all other evidence presented at this trial on this issue.

I want to emphasize to you that as to questions 1 and 2, the burden is on (petitioner) to satisfy you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that your answer should be "yes." If it becomes necessary for you to answer questions 3 through 6, the burden is on (parent) to satisfy you to a reasonable certainty by the greater weight of the credible evidence that your answer should be "yes." "By the greater weight of the credible evidence" is meant evidence which when weighed against the evidence opposed to it has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of your belief.

If you have to guess what the answer to any question in the special verdict should be after discussing all the evidence which relates to the question, the party having the burden of proof as to that question has not met the required burden of proof.

SPECIAL VERDICT

1. Was (child) placed, or continued in a placement, outside the (parent)'s home pursuant to a court order which contained the termination of parental rights notice required by law?

Answer:_____

Yes or No

2. Did (parent) fail to visit or communicate with (child) for a period of three months or longer?

Answer:_____

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Yes or No

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Answer:_____

Yes or No

Answer question 6 only if your answer to question 5 is "no":

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Answer:_____

Yes or No

September 22, 2004

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From: Chris Foley

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