PAT STRACHOTA

STATE REPRESENTATIVE

Testimony on Termination of Parental Rights – 2/6/14

When a situation arises that requires the termination of an individual's parental rights by the state, they are afforded the right to legal counsel. Whether it is publically or privately funded, that fundamental right exists.

However, when an individual discontinues their participation in the proceedings, it creates a problem. Under current law, when an individual quits participating in court proceedings dealing with the termination of parental rights, the appointed counsel is required to continue representing them. The representation by counsel does not cease, simply because the individual is not an active participant. Because it is entirely possible that the assigned counsel has not had any communication with their client, it creates an ethical problem. Termination of parental rights cases present a unique situation. Because an individual has the right to counsel, even when the individual doesn't communicate that they wish to waive that right, the court can proceed and counsel must remain. Not only does this create the ethical dilemma, it wastes taxpayer money.

This bill, establishes a procedure that allows counsel to withdraw from a termination of parental rights case when the parent stops participating in the proceedings. If the individual repeatedly fails to appear, the court can then accept the waiver of counsel. SB 504 and AB 664 help make court proceedings more efficient, correct a legal absurdity, and continue protecting an individuals' constitutional right to counsel in termination of parent rights proceedings. Additionally, the State Bar of Wisconsin registered in favor of this bill as well.

Concerns have been raised regarding some aspects of this bill, and we are working to address them through an amendment.

Section 5 will have additional language to ensure a party's conduct can result in waiver in a motion to vacate or a motion to reopen. It can be argued that the current bill language accomplishes this. The new line will make clear appointed counsel may be forfeited if the same egregious disregard for the court or non-cooperation occurs in the post judgment proceedings.

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Mary Lazich

State Senator - Senate District 28

Assembly Committee on Judiciary
Assembly Bill 664 and Senate Bill 504 Testimony
February 6, 2014

Good morning committee members and thank you for your attention to Assembly Bill 664 (AB 664) and Senate Bill 504 (SB 504).

When the state moves to terminate the parental rights of an individual, the individual is afforded the right to counsel. In many instances, the person will rely on publically funded counsel.

A problem arises at the time a person fails to continue participating in the termination of parental rights proceedings. In most situations that a person has a right to counsel, like criminal cases, the defendant not showing up results in the case put on hold.

In termination of parental rights proceedings, the case continues regardless of the parent being present. Because the parent is entitled to counsel until the parent knowingly and intelligently waives their right to counsel, appointed counsel must continue representation. The continued representation creates ethical problems and unnecessary waste. Counsel must continue and must be at court appearances without any contact or direction from their client.

AB 664 and SB 504 create a procedure to allow counsel to withdraw from a termination of parental rights case at the time the parent ceases to participate in the proceedings. If the parent does not appear repeatedly, the court would be allowed to accept the waiver of counsel. AB 664 and SB 504 will help streamline court proceedings, correct a legal absurdity, and continue to protect individuals' rights to counsel in termination of parent rights proceedings.

Thank you for your attention to AB 664 and SB 504.

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CHRISTOPHER R. FOLEY
CIRCUIT JUDGE
901 N. 9TH ST.
MILWAUKEE, WISCONSIN 53233

February 5, 2014

Honorable Jim Ott
Chairman, Assembly Committee on the Judiciary
P.O. Box 8953
Madison, Wisconsin 53708

RE: AB 664

Dear Chairman Ott:

I write to strongly urge passage of AB 664. While it had been my hope to appear and testify in person in support of the bill, as I did with respect to the senate counterpart, SB 504, I have 22 motions after verdict scheduled for hearing on Monday regarding the O'Donnell Park trial that resulted in a $39 million dollar verdict. I simply cannot take a half day to travel to Madison again.

Termination of parental rights involves, in my mind, the most fundamental liberty interest that individuals possess. In appropriate deference to that liberty interest, the legislature has mandated that parents who "appear" and oppose a petition for termination of parental rights "shall be represented by counsel" absent a knowing and voluntary waiver of that right. Wisconsin Statute sec. 48.23 (1). While in logic, one might assume that "appear" anticipates the parent's consistent and continuous appearance at and participation in the numerous hearings that contested termination proceedings entail, that is clearly not the law. State v. Shirley E., 2006 WI 129. A parent who appears and requests the appointment of counsel, but who then disappears and fails to follow the court's order to appear in person for all hearings, continues to appear and counsel must continue to represent that parent. The parent's lawyer ends up representing an empty chair (often through the course of several hearings) with no knowledge of the parent's position with respect to the proceeding and no ability to fulfill their ethical duty to zealously and competently represent the interests of their client. I have enclosed two articles from the

Wisconsin Lawyer Magazine that sets forth in greater detail the legal background and significant difficulties presented in this scenario.

At a time when we struggle to provide competent representation for parents who appear, fully engage the process and struggle mightily to preserve their parental relationship with their child/ren, it is inane to be paying lawyers to represent the interests of parents who have disappeared; are egregiously violating a court order to appear in person for hearings or risk default; who often times are simply acknowledging by their nonappearance that they cannot safely and competently parent their child and want them to attain a safe, loving home through adoption---a fact they cannot muster the strength to acknowledge in a voluntary consent to termination of parental rights.

I strongly reiterate that it is imperative that we maintain a fair process; maintain appropriate protection of the parent's fundamental liberty interest by affording counsel to parents who appropriately participate in the process. We cannot take short cuts in adjudicating such momentous issues; hence the bill allows default of a disappearing parent and discharge of their counsel only if a court has ordered them to appear in person and found that such failure to appear (usually more than one failure to appear) is egregious and without justifiable excuse. It also reinstates the right to counsel for a parent who, having failed to appear and been defaulted, subsequently appears and maintains they can show some legitimate reason for their failure(s) to appear. Those protections assure appropriate representation for participatory parents; guard against the system looking to "short cut" the process; but assures timely and safe permanence for our abused and neglected children when a parent can't or won't fulfill their responsibilities in assuring a fair process.

I appreciate the legislature's consideration of these thoughts and again emphasize that this is a repetitive problem (some permutation of this issue has been addressed by the Wisconsin Supreme Court three times in the last ten or so years and innumerable times by the Wisconsin Court of Appeals) that substantially impacts our ability to assure timely permanence through adoption to our abused and neglected children and the expenditure of limited public resources in highly inappropriate circumstances.

Sincerely,

Christopher R. Foley
Circuit Judge

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THE OFFICIAL PUBLICATION OF THE STATE BAR OF WISCONSIN

OCTOBER 2013 VOLUME 86 NUMBER 8

Read/Post Comments

As I See It: The Murky Case of the Disappearing TPR Parent

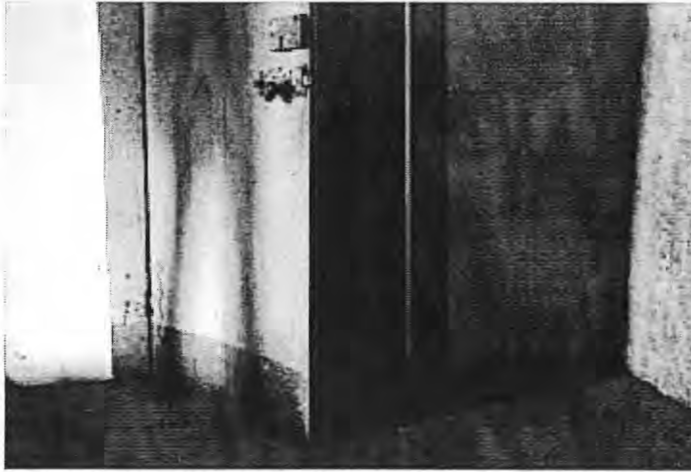
Courts may sanction parents who fail to appear in termination-of-parental-rights proceedings by ordering that judgment be imposed against them, but use of this default mechanism must be approached carefully, especially when parents do not have counsel.

CHRISTOPHER R. FOLEY

In the August 2011 *Wisconsin Lawyer* ("Ethical Dilemma in TPR Litigation"), this author discussed the ethical issues encountered by counsel for respondent parents in involuntary termination-of-parental-rights (TPR) proceedings when the parent fails to appear and provide direction to counsel. Although legislation (discussed below) has been introduced that will, if enacted, substantially alleviate those problems, issues relating to respondent parents who do not appear or who disappear continue to vex lawyers and judges.

The most recent evidence in this regard is the Wisconsin Supreme Court decision in *Dane County Department of Health Services v. Mable K.*[1] In *Mable K.*, the respondent parent initially appeared and contested the petition for TPR. She complied with the court's order to personally appear for hearings until the second day of the jury trial. The circuit court, believing the parent could be defaulted for failing to appear at trial despite the presence of her lawyer, granted the petitioner's motion for default

judgment and terminated the mother's parental rights. At the conclusion of an extremely convoluted appellate process, the Wisconsin Supreme Court reversed the order.



This article seeks to clarify, to the extent possible, when a parent in an involuntary TPR proceeding is appropriately defaulted for failure to appear or as a sanction for failure to obey a court order to appear in person at hearings on the petition (or other court orders).[2] It also highlights the presently existing constraints on the default sanction when the "disappearing" parent is represented by counsel.

Recurring Issues in Involuntary TPR Proceedings

Scenario 1. A properly served parent fails to appear at the initial hearing on a petition for involuntary termination of parental rights. Is he or she subject to default? If so, can the court address both the grounds and dispositional phase of the proceedings at the first hearing?

Christopher R. Foley, *Marquette 1978, is a Milwaukee County Circuit Court judge.*

Scenario 2. A properly served parent appears by phone, requests appointment of counsel, secures counsel through the public defender, and contests the petition. The parent then fails to appear in person for subsequent hearings despite orders to personally appear, but his or her lawyer does appear. Is the parent subject to default for failure to appear (or on some other basis) and, if so, may the lawyer for the defaulted parent further participate in the proceedings?

Or, a properly served parent appears and secures counsel; he or she contests the petition and then complies with the order of the court to appear for multiple hearings before trial but then fails to appear on the second day of trial. Can he or she be defaulted for failure to appear at trial? Can he or she be defaulted on another basis? Does the circuit court have some other viable alternative to address the parent's behavior?

Scenario 3. A properly served parent appears at the first hearing on an involuntary TPR petition and requests an adjournment to secure counsel through the Office of the State Public Defender (SPD). Although ordered both to reappear at the adjourned plea hearing and to go to the SPD to complete the appointment process, the parent does neither. Is he or she defaultable at the adjourned plea hearing?

While the supreme court has addressed the issue of nonappearing and disappearing parents in involuntary TPR proceedings three times in the last 12 years (*Evelyn C.R. v. Tykila S.*,[3] *State v. Shirley E.*,[4] and *Mable K.*), much remains uncertain as to the appropriate response of a circuit court in the context of the disappearing parent and (to a lesser extent) the nonappearing parent.

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The Nonappearing Parent (Scenario 1)

Somewhat surprisingly, even in the most obvious of circumstances, there is no clearly stated authority to default a properly served respondent parent who fails to appear in an involuntary TPR proceeding. No specific provision of chapter 48 explicitly states that such a parent may be defaulted for failure to appear and contest the petition. Nevertheless, the authority unquestionably exists.

Only one Wisconsin appellate decision, an unpublished court of appeals decision, has traced the imprecise legislative path authorizing default of a properly served and nonappearing parent.[5] The court noted that the summons required to be served on a respondent parent pursuant to Wis. Stat. section 48.42 requires that the parent be advised to appear and the "parental rights of a parent or alleged parent who fails to appear may be terminated." The same statute requires notice of appellate rights be contained in the summons "if the court terminates parental rights." Finally, the court noted that Wis. Stat. section 48.422(3) provides that if a petition for involuntary TPR is not contested, the court "shall hear testimony in support of the allegations" at the plea hearing.

The court went on to note that chapter 48 proceedings, including TPR proceedings, are civil in nature and the rules of civil procedure apply in the absence of a different specified procedure in chapter 48.[6] Because no other procedure is specified, Wis. Stat. section 806.02(1) authorized default because the respondent parent had failed to timely appear and join issue (that is, contest the petition).

Before leaving this less difficult area of analysis, there are two issues worthy of note for attorneys and, in particular, trial judges. First, when the petition is not contested (whether by default, admission, or a no-contest plea), the court is obligated to hear testimony in support of the petition to determine whether one or more grounds for involuntary TPR have been proved to a reasonable certainty by clear and convincing evidence.[7] This evidentiary requirement fulfills both the statutory duty and the requirements of the Due Process Clause.[8] This testimonial requirement has evaded the attention of trial judges on several occasions,[9] and it is improper to simply rely on the contents of the petition to fulfill this obligation because the statute requires testimony in support of the allegations.

Second, and more concerning, the *Kimberly B.* court asserted that a circuit court may not proceed to disposition on

Time Limits in Termination of Parental Rights Proceedings

Attorneys should consider discussing the following timeline with clients and identifying the points when their presence will be required.

Pretrial Time Limits

- A termination-of-parental-rights (TPR) proceeding begins with the filing of a petition. A summons and copy of the petition must be personally served on the parent at least seven days before the initial hearing.[1]
- If the parent makes a timely objection to the petition, the initial hearing must be held within 30 days after the petition is filed.[2]

Time Limits Related to Proceedings

- If the petition is uncontested at the initial hearing or if a default finding is made, the

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default when the properly served parent fails to appear and contest the petition at the hearing on the petition. TPR proceedings are two-phased proceedings; in the first phase, the petitioning party must prove grounds exist to terminate the respondent parent's parental rights.[10] Upon proof of grounds, and the required finding of parental unfitness, the court proceeds to disposition and a determination of whether termination serves the best interests of the child.[11] Citing to *State v. Shirley E.* (discussed at length below and involving circumstances in which a respondent did appear in the action and was defaulted as a sanction), the *Kimberly B.* court affirmatively asserted that the default for failure to appear in response to the summons would have to be limited to the grounds phase; the dispositional phase would have to be adjourned.[12]

Again noting the decision is unpublished and not binding precedent,[13] and with due respect to an otherwise very well written opinion, in the author's view, this is a clearly incorrect reading of the applicable statutes. As the decision itself noted, the summons must advise the parent that failure to appear may result in termination of parental rights. More important, as the court also noted, if the petition is not contested, the court must hear testimony in support of the allegations in the petition pursuant to Wis. Stat. section 48.422(3). Finally, Wis. Stat. section 48.424(4) provides that if grounds are found by the court, the court "shall proceed immediately to hear evidence ... related to dispositions."

Shirley E. involved an originally appearing parent defaulted as a

court may immediately take testimony supporting the petition.

- If the petition is contested at the initial hearing, the court must schedule a fact-finding hearing within 45 days after the initial hearing.[3]
- Motions to suppress evidence illegally obtained must be made before the fact-finding hearing and other motions capable of pretrial determination may be made before the fact-finding hearing.[4]
- At the fact-finding hearing, the jury determines whether there are grounds to terminate parental rights. For a list of grounds for involuntary TPR, see Wis. Stat. section 48.415.
- Following the fact-finding hearing, if the jury finds grounds to terminate parental rights, the court will find the parent unfit and immediately move to disposition, unless the parties stipulate to set over or a dispositional report is needed.[5]
- If a dispositional report is needed, a dispositional hearing must be held within 45 days after the fact-finding hearing.[6]
- At the dispositional hearing, the court hears evidence needed to determine whether the TPR is in the child's best interest. The court must enter one of the permissible dispositions within 10 days after taking evidence.[7]

Postdisposition Time Limits

- If a plea was entered, motions based on defects in institution of proceedings, lack of probable cause on the face of the petition, insufficiency of the petition, or invalidity of the statute(s) on which the petition is founded must be made within 10 days after the plea hearing or are waived.[8]
- A parent that consents to or does not contest TPR may bring a motion for relief from the judgment within 30 days after entry of the judgment.[9]

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sanction. Because she had appeared, and continued to appear by counsel, she was entitled to participate in both the grounds and dispositional phases even though she was not physically present.[14] In that a *Kimberly B.* parent never appears and contests the petition, assuming grounds are proved in the default hearing, the statutes strongly presume that the court should move immediately to the dispositional phase.[15] There is, to my knowledge, no statutory or precedential bar to this one-hearing procedure.

The Disappearing Parent (Scenario 2)

As discussed in the previous "Ethical Dilemma" article, the disappearing client is a frequent and more problematic issue for both trial judges and counsel. The parent, having initially appeared, may then not reappear or may reappear initially and then disappear, either of which might violate not only the court's order requiring personal appearance but also the requirement to maintain contact with counsel and meet discovery obligations.[16]

In ordinary civil litigation, counsel would address this circumstance by motion to withdraw. I have previously suggested that such a motion is mandated because the lawyer is almost invariably incapable of competent representation and because continued representation results, arguably, in violation of the Rules of Professional Conduct.[17]

Although counsel in TPR litigation is still well advised to make such a motion, circuit courts are prohibited from allowing withdrawal pursuant to *Shirley E.*'s interpretation of Wis. Stat. section

- A TPR is final and appealable under Wis. Stat. § 808.03(1). The parent must file a notice of intent to pursue relief from the judgment of the trial court within 30 days after the judgment is entered.[10] For other time limits applicable to appeal, see Wis. Stat. section 809.107.
- If no adoption order has been entered, the parent may petition for rehearing within one year on the ground that new evidence has been discovered affecting the advisability of the original adjudication.[11]
- If an adoption order is entered within one year after the TPR order, a petition for rehearing must be filed before the date the adoption order is filed or within 30 days after entry of the TPR order, whichever is later.[12]

Note: Certain periods of delay are excluded in computing time requirements. For a discussion of these exclusions, see Wis. Stat. section 48.315 (1).

Note: The Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963, and the Wisconsin Indian Child Welfare Act, Wis. Stat. § 48.01(2), provide additional procedures and protections for parents of Indian children. Please refer to the acts for additional information.

This timeline was excerpted from 2 *Wisconsin Attorney's Desk Reference* ch. 23 (State Bar of Wisconsin PINNACLE 4th ed. 2011). This book is available in print or online through Books UnBound.

Endnotes

[1] Wis. Stat. § 48.42(4)(a).

[2] Wis. Stat. § 48.422(1).

[3] Wis. Stat. § 48.422(2).

[4] Wis. Stat. § 48.297(1), (3).

[5] Wis. Stat. § 48.424(4).

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48.23, which provides that a parent who has appeared in involuntary TPR litigation "shall appear by counsel" absent a knowing and voluntary waiver. To date, appellate courts have not accepted waiver by conduct (that is, disappearance and noncommunication with counsel) as a basis to allow withdrawal.

Assembly Bill 152 has been introduced and would amend Wis. Stat. section 48.23 to provide that an egregious and without-justifiable-excuse violation of an order to appear in person would constitute waiver of counsel and permit counsel to withdraw. However, under current law, counsel must continue to represent the disappearing parent until conclusion of the proceedings.

[6] *Id.*

[7] Wis. Stat. § 48.427(1).

[8] Wis. Stat. § 48.297(2).

[9] Wis. Stat. § 48.46(2).

[10] Wis. Stat. § 808.04(7m).

[11] Wis. Stat. § 48.46(1).

[12] Wis. Stat. § 48.46(1m).

It is clear that a parent not personally present but appearing by counsel "appears" in the proceeding and may not be defaulted for failure to appear at trial.[18] Such an individual therefore is not defaultable for failure to appear at trial pursuant to Wis. Stat. section 806.02 (5), as the *Mable K.* circuit court apparently assumed.

However, it is equally clear that a court can sanction the parent for violation(s) of the court's order to personally appear.[19] The sanction may include default, but only if the violation is egregious or in bad faith.[20] The appellate courts have emphasized as well that default judgment in the grounds phase as a sanction can only be granted upon compliance with the dictates of Wis. Stat. section 48.422 (3) (discussed above); testimony (and other evidence) to establish the existence of grounds to terminate parental rights to the requisite standard of certainty by appropriate evidence is required.

The interplay of the authority to sanction by default judgment with the *Shirley E.* mandate that the disappearing parent continue to be represented by counsel has rendered the default judgment process in this context unique. Justice Prosser, in his concurrence in *Shirley E.*, noted that circuit courts are prohibited from sanctioning the disappearing parent by a "true default judgment," because that interplay – interpreted in *Evelyn C.R.* and *Shirley E.* – proscribes "limit[ing] the role of the parent's attorney in the fact-finding proceedings." This process "effectively denies the circuit court the authority to sanction an uncooperative parent."[21]

Nevertheless, if the parent's conduct is egregious or in bad faith and the court chooses default judgment as a sanction, the defaulting parent's lawyer must be permitted to present evidence and cross-examine the witnesses offered by the petitioning party.[22] In addition, counsel for the defaulting parent must be permitted to participate in the dispositional hearing if grounds are found.[23]

Theoretically, the constraints on default judgment as a sanction could be avoided through the use of a different sanction for violation of the court's order to appear. Wisconsin Statutes section 804.12(2)(a)3. authorizes a court to strike out the pleadings of a disobedient party as a sanction. In *Rao v. WMA Securities*,[24] the court stated that if that sanction is imposed, the court proceeds to default judgment pursuant to Wis. Stat. section 806.02 in that "no issue of law or fact has been joined."[25] If the

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disappearing and noncompliant parent's contest posture is stricken, pursuant to *Rao*, the process of default for a nonappearing parent would arguably apply.

However, the circuit court would then face the *Shirley E.* conundrum. Despite the fact that the parent's contest posture has been stricken, the parent has appeared in the proceeding and, absent waiver, must appear by counsel. Thus, presumptively counsel would have to be allowed to participate in the default proceedings.

One can only speculate whether other sanctions authorized by Wis. Stat. section 804.12(2) would avoid the proscriptions on the vitality of the default sanction of which Justice Prosser complained. Authorized sanctions include taking "designated facts ... to be established for the purposes of the action in accordance with the claim of the party obtaining the order;" and "refusing to allow the disobedient party to support or oppose designated claims or defenses, ... or introducing designated matters in evidence." While on their face such sanctions would warrant limiting the role of the disobedient parent's counsel in the remainder of the proceedings, given the *Shirley E.* and *Mable K.* holdings, in my view, circuit courts would be ill-advised to pursue that course.

The *Mable K.* court strongly implied that the circuit court could have sanctioned the disappearing parent by striking her jury demand.[26] The *Rao* court specifically held that conduct on the part of a litigant warranting a sanction pursuant to Wis. Stat. section 804.12 can operate as a waiver of the right to a jury trial.[27] This alternative at least avoids the prospect of the parent's lawyer trying the grounds phase to a jury with an empty chair as a client, a possibility the inanity of which was insightfully noted by Judge Maryann Sumi in the *Evelyn C.R.* circuit court proceedings.[28]

In summary, pending any legislative modification of Wis. Stat. section 48.23, if a parent's noncompliant behavior in the Scenario 2 context meets the egregious/bad faith standard for default, circuit courts are best advised to strike any existing jury demand and grant default as a sanction and also to allow defense counsel to participate in the (remaining) grounds and dispositional phases to the extent they are able.

The Hybrid: Appearing/Disappearing Parent Who Fails to Contest (Scenario 3)

Finally, although the issue posed by scenario 3 actually involves a disappearing parent, many might view it as involving a nonappearing parent. That scenario raises probably the most perplexing problem for trial judges. The parent who appears in court and requests the appointment of counsel has "appeared" in the proceeding.[29] In that he or she has appeared, pursuant to *Shirley E.*, he or she must appear by counsel absent waiver. However, the parent has no counsel *and has not contested the petition*. While one might assume that the parent waives counsel by conduct,[30] the *Shirley E.* court and the court of appeals have implicitly questioned this rationale.[31]

Taken to its theoretical extreme, the *Shirley E.* interpretation of Wis. Stat. section 48.23 could require the circuit court to appoint counsel pursuant to section 48.23(3) and have them represent clients they have never met nor communicated with (unless efforts on their part to locate and engage the parent are successful). *Evelyn C.R.*, *Shirley E.*, and *Mable K.* all involved parents who had appeared and were subsequently defaulted as a sanction for failure to appear;[32] one can only speculate whether default

without counsel for the disappearing parent who has failed to contest the petition (join issue under Wis. Stat. section 806.01) is foreclosed in this scenario. In truth, I have never assumed that it is.

An Impending Solution

As earlier noted, Assembly Bill 152 is presently pending in the Wisconsin Legislature. It is the product of the Legislative Study Committee on Permanency for Young Children in the Child Welfare System, convened at the request of Sen. Mary Lazich and Rep. Samantha Kirkman.

The bill would amend Wis. Stat. section 48.23 to provide that violation of a court order to appear in person by an adult respondent parent, if egregious and without justifiable excuse, presumptively waives the parent's right to counsel and to appear by counsel.[33] Discharge of counsel would then be permitted and "true default" could be imposed as a sanction when the parent's noncompliant behavior warrants. The legislation presumes that consecutive missed appearances are egregious and without justifiable excuse. As a final safeguard, the bill restores the right to be represented by counsel (which can again be waived by conduct) in a motion to vacate or for reconsideration of the default judgment.

In my view, this amendment of the statute strikes the appropriate balance in protecting the fundamental liberty interests of parents who engage and are invested in the TPR process while guarding against inappropriate expenditure of limited public funds on behalf of parents who are not fulfilling their responsibilities in the process.

Conclusion

As I indicated in my earlier article, "Circuit courts and all attorneys must be ever mindful of the sacred and fundamental liberty interest at stake in TPR litigation.... Appellate courts appear to be highly sensitive – appropriately so – to any suggestion that circuit courts are looking for short cuts in addressing issues of this magnitude."

On the other hand, when resources are stretched beyond reasonable limits and the legal system struggles to provide appropriate representation for parents actively engaged in the process, it seems inane that lawyers (almost all appointed at public expense) are being paid to represent clients they have never met or with whom they have long ago lost contact and who, in direct violation of court orders, fail to appear. It is nonsensical to pay lawyers to represent empty chairs.

This assumes, of course, that the lawyer has been rendered incapable of competent representation because of the client's conduct; if the lawyer has not, as was the circumstance in *Shirley E.*, the parent's conduct would not warrant the sanction of default (although perhaps warranting other sanctions) and counsel should fully participate as directed by the client.[34]

In my experience, default hearings pursuant to the dictates of *Shirley E.* and requiring the participation of counsel for parents who do not appear in violation of a court order are not overly burdensome on the courts. Counsel, as a result of lack of direction or communication from their client, have little capacity to substantively participate in the proceeding. However, the costs associated with providing representation for parents whose volitional and egregious conduct warrants default as a sanction are wholly unjustified.

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Most important, repeated delays, including delays related to the appellate process[35] often occasioned by disappearing parents and the courts' efforts to appropriately respond to such conduct, deprive all parties, most notably the children who are the subject of the proceedings, timely resolution of the litigation and appropriate permanence for those children. For that reason alone, it is my sincere hope that the legislature will amend Wis. Stat. section 48.23 to bring clarity and timeliness to this process.

Endnotes

[1] *Dane Cnty. Dep't of Human Servs. v. Mable K. (In re Termination of Parental Rights to Isaiah H.),* 2013 WI 28, 346 Wis. 2d 396, 828 N.W.2d 198.

[2] The article addresses violations of orders to appear in person for hearings on petitions for involuntary TPR. Violations of discovery obligations or orders to maintain reasonable contact and communication with counsel could also form the basis for sanctions.

[3] *Evelyn C.R. v. Tykila S. (In re Termination of Parental Rights to Jayton S.),* 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768.

[4] *State v. Shirley E. (In re Termination of Parental Rights to Torrance P. Jr.),* 2006 WI 129, 298 Wis. 2d 1, 724 N.W.2d 623.

[5] *Kenosha Cnty. Dep't of Human Servs. v. Kimberly B. (In re Termination of Parental Rights to Kaylee B.),* No. 2008AP1715, 2008 WL 5234343 (Wis. Ct. App. Dec. 17, 2008) (unpublished limited precedent opinion).

[6] *Steven V. v. Kelley H. (In re Termination of Parental Rights to Alexander V.),* 2004 WI 47, ¶ 32, 271 Wis. 2d 1, 678 N.W.2d 856); Wis. Stat. § 801.01(2).

[7] Wis. Stat. §§ 48.422(3), 48.31.

[8] *Evelyn C.R.*, 2001 WI 110, ¶ 21, 246 Wis. 2d 1. In *Santosky v. Kramer*, 455 U.S. 745, 769 (1982), the U.S. Supreme Court determined that the Due Process Clause required proof of parental unfitness by clear and convincing evidence to justify termination of parental rights.

[9] *See, e.g., Evelyn C.R.*, 2001 WI 110, 246 Wis. 2d 1; *Waukesha Cnty. v. Steven H. (In re Termination of Parental Rights of Brittany Ann H.),* 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607; *Brown Cnty. Dep't of Human Servs. v. Antonio E.G. (In re Termination of Parental Rights to Cierra M.G.)*, No. 2007AP77, 2007AP78, 2007 WL 824030 (Wis. Ct. App. March 20, 2007); *Sheboygan Cnty. Dep't of Health & Human Servs. v. Michele L.S. (In re Termination of Parental Rights to Paige C.S.),* 2006AP1965, 2007 WL 755003 (Wis. Ct. App. March 14, 2007) (unpublished limited precedent opinion).

[10] *Steven V.*, 2004 WI 47, ¶ 24, 271 Wis. 2d 1; Wis. Stat. §§ 48.422(2), 48.424(1), (3).

[11] *Steven V.*, 2004 WI 47, ¶ 26, 271 Wis. 2d 1; Wis. Stat. §§ 48.424(4), 48.426, 48.427.

[12] *Kimberly B.*, No. 2008AP1715, 2008 WL 5234343, ¶ 2, n.2.

[13] Wis. Stat. § 809.23(3).

[14] *Shirley E.*, 2006 WI 129, ¶¶ 43-56, 298 Wis. 2d 1.

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[15] Wis. Stat. section 48.424(3), which creates the presumption that the court will immediately move to the dispositional phase if grounds are proved, allows adjournment of the dispositional phase if notice requirements of the Indian Child Welfare Act have not been met, all parties agree to the adjournment, or the court report has not been received.

[16] Absent an order to appear in person, the respondent parent is at liberty to appear by counsel. SCR 11.02; *Evelyn C.R.*, 2001 WI 110, ¶ 17, 246 Wis. 2d 1. Hence, it is imperative that, absent unusual circumstances, courts direct the personal appearance of respondent-parents at all hearings. It is also highly advisable to order that they cooperate with the discovery process and maintain reasonable contact/communication with their lawyer.

[17] *See* SCR 20:1.1, 20:1.16(a)(1).

[18] *Evelyn C.R.*, 2001 WI 110, ¶ 17, 246 Wis. 2d 1; *Shirley E.*, 2006 WI 129, ¶¶ 13 n.3, 32, 49, 298 Wis. 2d 1; *Mable K.*, 2013 WI 28, ¶ 66, 346 Wis. 2d 396.

[19] Wis. Stat. §§ 802.10(7), 804.12(2)(a), 805.03; *Evelyn C.R.*, 2001 WI 110, ¶ 17, 246 Wis. 2d 1.

[20] *Shirley E.*, 2006 WI 129, ¶ 13 n.3, 298 Wis. 2d 1; *Mable K.*, 2013 WI 28, ¶ 69, 346 Wis. 2d 396.

[21] *Shirley E.*, 2006 WI 129, ¶¶ 83-84, 298 Wis. 2d 1 (Prosser, J. concurring).

[22] *Id.* ¶ 50.

[23] *Id.* ¶¶ 50-51, 53-55; *Mable K.*, 2013 WI 28, ¶¶ 50-57, 346 Wis. 2d 396.

[24] *Rao v. WMA Secs. Inc.*, 2008 WI 73, ¶ 37, 310 Wis. 2d 623, 752 N.W.2d 220.

[25] The court did not cite the specific subsection of Wis. Stat. section 806.02 to which it referred; however, the language is from section 806.02(1).

[26] *Mable K.*, 2013 WI 28, ¶ 67, 346 Wis. 2d 396.

[27] *Rao*, 2008 WI 73, ¶ 55, 310 Wis. 2d 623.

[28] *Evelyn C.R.*, 2001 WI 110, ¶ 8, 246 Wis. 2d 1.

[29] *Artis-Wergen v. Artis-Wergen*, 151 Wis. 2d 445, 444 N.W.2d 750 (Ct. App. 1989) (citing *McLaughlin v. Chicago, M., St. P. & P. Ry.*, 23 Wis. 2d 592, 594, 127 N.W.2d 813 (1964)).

[30] *Cf. State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996).

[31] *Shirley E.*, 2006 WI 129, ¶ 57, 298 Wis. 2d 1; *State v. Darrell K. (In re Termination of Parental Rights to Marquise L.)*, 2010AP1910, 2010 WL 4151979 (Wis. Ct. App. Oct. 19, 2010) (unpublished opinion not citable per section 809.23(3)).

[32] While both *Mable K.* and *Evelyn C.R.* involved parents who appeared and contested the petition, a close reading of *Shirley E.* appears to suggest that the parent never contested the petition for TPR. Whether an appearing parent who fails to contest can be defaulted pursuant to Wis. Stat. section 806.02(1) was not directly addressed.

[33] The *Shirley E.* court noted that the legislature, in the existing version of Wis. Stat. section 48.23, had failed to condition the right to counsel on the personal appearance (or continuing personal appearance) of the respondent parent. *Shirley E.*, 2006 WI 129, ¶¶ 43-46, 298 Wis. 2d 1.

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[34] *Cf. Shirley E.*, 2006 WI 129, ¶ 13 n.3, 298 Wis. 2d 1.

[35] The *Mable K.* dissent bitterly noted that the TPR petition in that case had been in the litigation and appellate process for three years when the case was remanded for a new trial. *Mable K.*, 2013 WI 28, ¶ 120, 346 Wis. 2d 396 (Ziegler, J., dissenting).

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AUGUST 2011 VOLUME 84 NUMBER 8

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'Catch 22' Ethical Dilemma for Defense Counsel in TPR Litigation

Losing one's parental rights is a serious matter, which is why representation by counsel and appearance and participation by parents is required in termination of parental rights litigation. But defense counsel face an ethical dilemma when a court denies a motion to withdraw because a parent's conduct makes it impossible for counsel to provide adequate representation. To continue representation violates professional conduct rules. To not continue representation violates statutory law. It's a classic "Catch 22."

CHRISTOPHER R. FOLEY

- Juggling a Lawyer's Obligations Under the Professional Conduct Rules

The recent Wisconsin Court of Appeals decision in *State v. Darrell K.*,[1] broadly interpreting the Wisconsin Supreme Court's decision in *State v. Shirley E.*,[2] has created an ethical dilemma for circuit

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courts and defense counsel in termination of parental rights (TPR) litigation. The statutory mandate that a parent who has appeared in an involuntary TPR proceeding shall appear by counsel absent a knowing and voluntary waiver requires circuit courts to deny motions to withdraw even when defense counsel is wholly incapable of providing competent representation because the client's conduct has rendered counsel incapable of "preparation reasonably necessary for the representation."[3]

Factual Scenario

Imagine that you have been appointed to represent a respondent-parent in an involuntary TPR proceeding.[4] The problem is you have never met your client; he appeared in court pro se at the original hearing and requested State Public Defender (SPD) representation. The court ordered him to reappear for all subsequent hearings and maintain contact with the lawyer appointed to represent him to assist in preparing a defense of the matter. When he failed to appear at the next scheduled plea hearing, you skillfully convinced the slightly irritated judge to again adjourn the plea hearing.

You have written to your client twice but received no response, and the client did not respond to the voice mail message you were able to leave before his cell phone was disconnected. The child welfare workers also have been unsuccessful in contacting him. You anticipate the petitioner will move for a default judgment and that Judge Irritated (no longer slightly) is not going to adjourn the matter again. You realize that if this ends badly, you might receive a letter from the Office of Lawyer Regulation (OLR) or the appellate counsel's accusation of ineffective assistance. You want to be released from the representation, and you send the notice of motion to withdraw to the client, scheduling it to be considered at the next hearing on the TPR petition. You intend to again seek a continuance if the client does not appear but need that "out" when the judge refuses to again adjourn. No judge could possibly expect you to continue to represent this client under the circumstances, right? What could possibly go wrong?

Guess again! *Darrell K.* holds that it is reversible error for a court to grant a motion to withdraw even in the face of counsel's assertions that counsel cannot provide competent representation.

Competent Representation, the Nonappearing Client, and Default Judgments

The fact situation above is not atypical. In the worst-case scenario – as set forth above – the parent, after having been ordered to reappear and applying for counsel through the SPD, never reappears; does not communicate with counsel; and, obviously, does not communicate his objectives for the litigation and other directions required by SCR 20:1.2. This scenario puts defense counsel in a particularly difficult ethical quandary.

It is likely the county will make a motion for default for failure to appear and contest the petition, often in conjunction with a motion to sanction the parent by default for violating the order to appear (discussed

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below).[5] Although the parent's appearance and request for counsel would intimate that the parent wishes to contest the petition, the client has not provided specific direction in that regard or relating to substitution of judge or demand for a jury determination. Hence, in the author's view, it would be unethical under SCR 20:1.2 for the lawyer to contest the petition for TPR on behalf of the client. However, if the lawyer does not contest the petition, she or he might justifiably anticipate a complaint to the OLR or a later claim that the lawyer was ineffective. Such a complaint, absent other considerations, would have no merit.[6] But withdrawal, in the author's view, although both logical and ethically required, cannot be authorized.

In other instances, the client may reappear; consult with counsel and provide initial direction; and then, in violation of the court order, fail to appear at subsequent hearings or appear for a deposition or otherwise cooperate with discovery and fail to communicate with her lawyer or provide even a modicum of assistance in preparing a defense of the matter. In this scenario, the county will probably bring a motion for default as a sanction for egregious or bad-faith violation of the court's order. The Wisconsin Supreme Court has affirmed the power of a circuit court to find a parent in default in TPR proceedings for egregious or bad-faith violations of court orders, including orders to appear in person for hearings.[7]

The default sanction is authorized by Wis. Stat. section 804.12(2), but, as emphasized in *Evelyn C.R.*, is appropriate only in instances of egregious or bad-faith violations of court orders. In this scenario, because counsel is wholly incapable of providing competent representation to the client as to the default motion or as to the merits of the litigation, counsel is, again in the author's view, ethically obligated to withdraw.[8] However, as noted, the *Darrell K.* court has now held that allowing withdrawal violates the dictates of *State v. Shirley E.* and is reversible error. Hence, defense lawyers are obligated to provide incompetent representation in violation of the Rules of Professional Conduct.

The *Shirley E.* Decision

Indigent, residing out of state, and prohibited from travelling out of state without permission of corrections authorities, Shirley E. repeatedly failed to appear personally for hearings on the TPR petition despite court orders requiring her to do so. Her only actual appearance was by phone. However, counsel that Shirley had secured through the SPD appeared on her behalf for all hearings. Quite notably, Shirley had been in contact with the lawyer, who was adamant that she could and should competently represent Shirley's interest despite Shirley's failure to personally appear.

The circuit court granted the petitioner's motion for default as a sanction as a result of Shirley's failure to appear in person. In conjunction with the default finding, and over the repeated objections of Shirley's counsel, the circuit court discharged counsel and excluded her from the grounds-phase "prove up"[9] and dispositional-phase hearing.[10] Shirley's parental rights were terminated.

The supreme court reversed the order. The court said that although a nonappearing parent could be found to have defaulted if the violation was egregious or in bad faith, Wis. Stat. section 48.23 requires that a parent appearing in an involuntary TPR proceeding "shall be represented by counsel" absent a knowing and voluntary waiver. Shirley had appeared and did not waive counsel: thus, the discharge of her lawyer violated her statutory right to be represented by counsel, requiring reversal of the order.[11]

Circuit courts and all counsel must be aware that the supreme court seriously questioned the propriety of the default sanction for failure to personally appear. It noted the absence of a finding that the violation of the court order was egregious or in bad faith and pointed out that the circuit court ordered the sanction the first time the parent had failed to appear in person after having been ordered to do so. Live 1

The supreme court noted that the issue of the egregious nature of Shirley's conduct was not before it.[12] Taking that cue, in *Rock County DHS v. Daphnea W.*,[13] the court of appeals reversed a termination order resulting from a default finding in which the circuit court failed to find (and could not reasonably find) that the parent's failure to appear was egregious or in bad faith.

The *Darrell K.* Decision

In *State v. Darrell K.*, the attorney attempted to withdraw, in contrast to *Shirley E.*, in which the court discharged the attorney.[14]

Darrell K. appeared for the first plea hearing and requested appointment of counsel. He appeared with counsel at an adjourned plea hearing, denied the petition, and demanded a jury trial in the grounds phase of the proceedings. He was ordered to appear in person for all subsequently scheduled hearings, be on time, maintain contact with his lawyer, and comply with discovery obligations.

Darrell failed to appear for the next two scheduled hearings, including a final pretrial hearing. His counsel filed and notified Darrell of a motion to withdraw from the representation. Counsel's affidavit indicated that he had had no contact with Darrell despite sending five letters to him and trying three times to contact him by phone (by the time of the hearing, counsel estimated, he had attempted 10 telephone contacts). One week before trial, counsel indicated that he had been unable to secure any trial preparation information, including the identity of witnesses, and was incapable of competently representing the client's interest.

After opining that *Shirley E.* was not controlling, the circuit court granted the motion to withdraw and found Darrell in default for egregious violations of the court's orders. The petitioner offered prove-up testimony, and the court found Darrell to be unfit. The court then adjourned the matter for a dispositional hearing. Darrell appeared; the dispositional hearing was adjourned and Darrell was re-referred for appointment of counsel. New counsel filed a motion to vacate the default judgment. Darrell failed to appear for the hearing on the motion to vacate, and the court denied the motion. Darrell appeared with counsel and participated in the next scheduled dispositional hearing. The court determined that termination and adoption served the child's best interests and terminated Darrell's parental rights.

The court of appeals reversed. Without noting a distinction between discharge of counsel who asserted a right and ability to represent the client's interest despite the client's absence from the hearing and withdrawal of counsel who asserted that he was incapable of providing competent representation of the client's interest, the court stated: "[T]he [*Shirley E.*] court held that this procedure violated a parent's statutory right to representation by stating that '[a] [trial] court [has] no power to bar the parent or parent's counsel from participation at the fact-finding stage.'"[15]

The Ethical Quandary

As emphasized in *Shirley E.* and *Darrell K.*, Wis. Stat. section 48.23(2) mandates that a parent who appears in an involuntary termination proceeding be represented by counsel absent a knowing and voluntary waiver. Specifically, the statute requires that "any parent 18 years old or older who appears before the court (in an involuntary termination of parental rights proceeding) shall be represented by counsel."[16]

However, a lawyer is ethically obligated to provide competent representation, which includes being adequately prepared for the representation.[17] A lawyer must abide by the client's decisions concerning

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the objectives of representation and consult with the client as to the means by which the objectives are to be pursued. In cases involving deprivation of liberty, the lawyer must consult with and abide by the client's decisions regarding the plea to be entered and the exercise or waiver of the right to jury.[18] A lawyer who cannot provide competent representation is obligated to withdraw from representation because continued representation would result in a violation of the Rules of Professional Conduct.[19]

Lawyers whose efforts to communicate with their clients have been unsuccessful and who have no guidance from their client as to the objectives of representation, the identity and location of necessary witnesses, and the like clearly are not capable of providing competent representation. As noted, a particular ethical quandary arises when the client never appears with or communicates with counsel because that client has not directed counsel whether to contest the petition, demand a jury, or request substitution of judge, which are all decisions that the client must make before the plea hearing concludes.[20] In *Darrell K.*, because of the client's complete lack of responsiveness to counsel's communication attempts and the client's nonappearance, counsel was wholly unprepared to address pretrial and trial issues and provide competent representation. Hence, in each scenario, an ethical duty to withdraw arises.[21]

Christopher Foley, *Marquette 1978, is a Milwaukee County Circuit Court judge.*

Waiver/Forfeiture of Counsel by Conduct

The absolute language of the right-to-counsel statute lies at the core of this quandary. Does the requirement that the parent appear by counsel absent a knowing and voluntary waiver require counsel to continue representation in violation of the Rules of Professional Conduct or the court to require continued representation in the face of counsel's assertion that he or she cannot provide competent representation?

The *Shirley E.* court never confronted the withdrawal issue. *Shirley E.* implicitly rejected an interpretation of "appears" as encompassing a continuing duty to appear personally (as is the common order of the court) or by counsel capable of providing competent representation.[22] One can logically argue that a client who fails to maintain contact with his or her lawyer, fails to appear for deposition, and repeatedly fails to personally appear for hearings, all in violation of the court's orders, triggering an obligation on the part of the lawyer to seek to withdraw, no longer "appears" under the language of the statute.[23]

More important, the concept of waiver/forfeiture of the right to counsel by the client's conduct has long been recognized in Wisconsin:

"In such a situation, a waiver of counsel ... occurs, not by virtue of a defendant's express verbal consent to such procedure, but rather by operation of law because the defendant has deemed by his own actions that the case proceed accordingly."[24]

Justice Steinmetz noted in *Cummings* that continued representation may have resulted in a violation of defense counsel's ethical obligations.

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The *Cummings* court emphasized that waiver/forfeiture of counsel can only occur in unusual circumstances, most often involving a client's manipulative and disruptive conduct amounting to a deliberate choice to proceed without counsel. In such circumstances, motions for default as a sanction and motions to withdraw as counsel are contingent on findings of egregious or bad-faith violations of court orders to appear, maintain contact with counsel, and cooperate with the discovery process, which are the substantial equivalent of manipulative and disruptive conduct. Most courts in TPR litigation also forewarn litigants that default – the loss of the right to fight against termination – can result from violations of the court order.[25]

It is worthy of mention that *Cummings* addressed the waiver/forfeiture of a constitutional right to counsel as opposed to a statutory right to counsel, which attends termination proceedings.

Appellate courts in some states have embraced the waiver/forfeiture of counsel by conduct in TPR cases. Noting that the parent's lawyer could not "effectively or ethically represent" the respondent parent in view of her lack of contact and failure to appear, the Washington appellate court approved a trial court order allowing counsel to withdraw and resultant default of the respondent-parent.[26] In circumstances strikingly similar to those in *Darrell K.*,[27] counsel was allowed to withdraw due to a lack of contact, nonresponsiveness to communication from counsel, failure to respond to a motion to withdraw and, ultimately, failure to appear for trial. Termination was granted by default.[28] The Ohio Court of Appeals reached a similar result for similar reasons in *In re C.H.*[29]

Conclusion

Pending further guidance from the Wisconsin appellate courts, circuit courts and counsel for nonappearing and noncommunicative respondent-parents will continue to struggle with the inherent conflict between the mandate that the parent appear by counsel and the ethical duty to withdraw when counsel is incapable of providing competent representation. In situations in which clients do not appear or communicate, the attorney should seek an adjournment to continue to attempt to communicate with and secure the appearance of the client. In conjunction with that adjournment request, the attorney should argue that the noncompliant behavior does not warrant the sanction of default. Circuit courts and all attorneys must be ever mindful of the sacred and fundamental liberty interest at stake in TPR litigation and proceed with due regard to that interest. Appellate courts appear to be highly sensitive – appropriately so – to any suggestion that circuit courts are looking for short cuts in addressing issues of this magnitude.

However, when those arguments fail and the court is satisfied that default is warranted based on the client's egregious or bad-faith violations of the court order, counsel is, in the author's view, duty bound to move to withdraw because counsel cannot competently represent the client.[30] However, circuit courts, under current case law, should deny the motion. At that point, counsel should make a record that the absence of communication and direction as to the client's objectives in the litigation leaves counsel with no ability to offer any valid input for or from the client.[31] Some counsel, faced with this ethical dilemma, have vigorously attacked the quality of the petitioners' proof through cross-examination – most often in regard to the reasonable efforts of child welfare agencies to provide parents with court-mandated services to assist the parent in meeting the conditions of safe return in continuing need of protection and services cases. However, the suggestion that these efforts can or do

rise to the level of "zealous [and] competent" representation and "effective assistance"[32] dumbs down the concept of competent representation beyond any bounds of reason.

Until appellate courts either further address whether withdrawal is permitted when a lawyer is incapable of competent representation or embrace the waiver of counsel through egregious or bad-faith violations of court orders, circuit courts are obligated to require counsel to continue representing the respondent-parent even though counsel is incapable of providing competent representation as required by the Rules of Professional Conduct.

Endnotes

[1] *State v. Darrell K.*, 2010AP1910 (Wis. Ct. App. Oct. 19, 2010) (unpublished slip op).

[2] *State v. Shirley E.*, 2006 WI 129, 298 Wis. 2d 1, 724 N.W.2d 623.

[3] SCR 20:1.1.

[4] Wis. Stat. section 48.23(2) and (4) mandates representation by counsel in an involuntary termination of parental rights proceeding absent a knowing and voluntary waiver and obligates the State Public Defender to provide representation for indigent parents. Obviously, the ethical dilemma addressed in this article can also arise in the instance of retained counsel.

[5] Wis. Stat. § 48.422(3); *Kenosha County DHS v. Kimberly B.*, No. 2009AP1715 (Wis. Ct. App. Dec. 17, 2008) (unpublished slip op.).

[6] *Van Hout v. Endicott,* 2006 WI App 196, 296 Wis. 2d 580, 724 N.W.2d 692.

[7] *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶ 17, 246 Wis. 2d 1, 629 N.W.2d 768.

[8] SCR 20:1.1, 20:1.16(a)(1).

[9] Wis. Stat. section 48.422(3) requires a court to hear testimony in support of the allegations in the petition to warrant a finding that grounds exist to terminate parental rights and the resultant finding, pursuant to Wis. Stat. section 48.424(4), that the parent is unfit.

[10] TPR proceedings are two-phase proceedings. If grounds for TPR are proved and the resultant unfitness finding made, the court proceeds to determine at a dispositional hearing whether termination serves the best interests of the child. Wis. Stat. §§ 48.424(4), 48.426, 48.427. *Shirley E.* emphasized defense counsel's ongoing duty to represent a defaulted respondent-parent in the dispositional phase. 2006 WI 129, ¶¶ 55-56, 298 Wis. 2d 1.

[11] Justice Prosser's concurrence noted that the absent parent who is permitted to participate in the proceeding through counsel is not subjected to a sanction of a "true default judgment." *Shirley E.*, 2006 WI 129, ¶ 83, 298 Wis. 2d 1.

[12] *Shirley E.*, 2006 WI 129, ¶ 1, 298 Wis. 2d 1.

[13] *Rock County DHS v. Daphnea W.*, 2005AP2618 (Wis. Ct. App. Jan. 19, 2006) (unpublished slip op.).

[14] The author was the trial judge in *Darrell K.* Upon remand, the matter was assigned to another judge and, as of this writing, is pending before that judge.

[15] *Darrell K.*, 2010AP1910, ¶ 10 (citing *Shirley E.*, 2006 WI 129, ¶ 41, 298 Wis. 2d 1).

[16] Wis. Stat. section 48.23(2) also mandates representation for minor parents but prohibits waiver of the right to counsel by those parents.

[17] SCR 20:1.1. Quite appropriately, but somewhat ironically in this context, the Wisconsin Supreme Court has emphasized that the right to be represented by counsel in TPR proceedings necessarily implies the right to be represented by effective counsel, that is, counsel capable of providing competent representation. *Shirley E.*, 2006 WI 129, ¶¶ 37-38, 298 Wis. 2d 1.

[18] SCR 20:1.2.

[19] SCR 20:1.16(a)(1).

[20] Wis. Stat. § 48.30(2).

[21] Attorneys often seek and secure adjournments to allow them to communicate with clients and adequately prepare for hearings. However, this issue ordinarily arises in the context of a finding that the client's repeated failure to appear, maintain contact with the lawyer, and meet discovery obligations is egregious or in bad faith. Hence, in that context, continuance requests are to no avail.

[22] *Shirley E.*, 2006 WI 129, ¶ 32, 298 Wis. 2d 1. Citing *Evelyn C.R.*, 2001 WI 110, ¶ 17, 246 Wis. 2d 1, the *Shirley E.* court stated that a respondent-parent who was not physically present "appeared" in the proceeding through counsel. While the ability of that lawyer to competently represent the respondent-parent's interest in the parent's absence appears suspect, that issue apparently was never raised or addressed in either the circuit or the appellate court.

[23] Wis. Stat. section 804.12, which authorizes sanctions for failure to comply with court orders, allows a court to impose a default judgment but also authorizes a court to strike the noncompliant party's pleading. Arguably, if that sanction is imposed in conjunction with the default judgment, the parent has no longer "appeared" in the action.

[24] *State v. Cummings,* 199 Wis. 2d 721, 752, 546 N.W.2d 406 (1996) (quoting *State v. Woods,* 144 Wis. 2d 710, 715-16, 424 N.W.2d 730 (Ct. App. 1988)).

[25] The absence of warning of the consequence was a premise of Justice Geske's dissent in *Cummings. Id.*

[26] *In re Dependency of A.G.,* 968 P.2d 424 (Wash. Ct. App. 1998).

[27] The motion for withdrawal was granted at the trial date in *A.G.* as opposed to the date of the final pretrial in *Darrell K.* In all other respects, the factual circumstances are strikingly similar.

[28] *In re Dependency of E.P.,* 149 P.3d 440 (Wash. Ct. App. 2006).

[29] *In re C.H.,* 834 N.W.2d 401 (Ohio Ct. App. 2005). These cases were cited by attorney Deanna Weiss in the Legal Aid Society's brief and petition for review in *Darrell K.*

[30] *Sherman v. Heiser,* 85 Wis. 2d 246, 270 N.W.2d 397 (1978), mandates notice to the client of the motion to withdraw.

[31] As noted above, the *Shirley E.* court emphasized that counsel for the parent had a continuing duty to represent the parent in both the grounds phase and the dispositional phase of the proceedings.

[32] *Shirley E.*, 2006 WI 129, ¶¶ 37, 38, 298 Wis. 2d 1.

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February 6, 2014

Chairman Jim Ott
Assembly Judiciary Committee
P.O. Box 8953
Madison, WI 53708

Dear Assembly Judiciary committee members,

Thank you for having this hearing on Assembly Bill 664. The State Public Defender is opposed to the bill as drafted but does suggest a change that would better balance the best interests of the child with the best interests of the family.

One day several years ago, there was a hearing scheduled in a Termination of Parental Rights (TPR) case. It was winter, and there had been a significant storm. The county had shut down their public transportation at the last minute. A mother was relying upon public transportation to get to that hearing at which the court would decide whether to terminate her parental rights. She did not make it to court. The court refused to continue the hearing, and explained:

> *I am not responsible for her transportation. I recognize there is no public transportation anywhere in the County, but I am not responsible for her transportation. We live in a rural county ... and there is adverse weather—if people don't like the weather in (this) County, Wisconsin let them move to Florida, but meanwhile, we have a calendar to call.*

The court refused to continue the hearing and proceeded to take testimony.

The parent in this case is typical of many parents who are at risk of having their parental rights terminated. They often lack the resources the rest of us enjoy. Many are poor, lack meaningful employment, and do not have ready access to transportation. Some have untreated mental illnesses, and some are hungry or even homeless. Although the vast majority of parents facing these challenges parent well, some families struggle with these issues and become involved in the child welfare system.

Sometimes these challenges lead to parents missing court, and courts and attorneys have struggled with how to proceed in a TPR hearing when a parent is not present. Aside from potential due process issues, it creates inefficiencies in the system and delays the path to permanency. These delays and challenges must be balanced with the fact that the termination of a parent's rights is, as many courts have noted, a "civil death penalty."

It is because the stakes are so high that the legislature has established a parent's right to counsel in TPR proceedings. The legislature's directive has been clear: a parent has the right to representation in court unless there is a knowing and voluntary waiver of that right. Depriving a parent of the statutory right to counsel in a TPR proceeding deprives the parent of a basic protection without which a TPR proceeding cannot reliably serve its function.

The rights of parents must, in turn, be balanced with the best interests of children. When a parent does not attend a TPR hearing, the court must decide whether to proceed without the parent or schedule a hearing for another day. Although delays in proceedings are not generally in the best interest of children, a brief delay may ultimately be in the best interest of the family.

AB 664 seemingly balances these competing interests by providing the court with the option of finding that a parent has waived their right to counsel by failing to attend a hearing as ordered without clear and justifiable excuse. This, presumably, allows a court to proceed with the hearing and avoid additional delays.

The bill as drafted, however, creates an unintended consequence. Current statute s. 48.427 allows a parent to present evidence at the dispositional hearing. Under AB 664, if a parent fails to appear as ordered, not only can the court enter a default judgment as the grounds for termination, the court can proceed to disposition without a parent or a parent's attorney, meaning that no one is able to present evidence on the respondent's behalf at the dispositional hearing.

The Wisconsin Supreme Court has held that a circuit court may not deny a parent in a TPR proceeding the right to counsel even after the court enters a default judgment as a sanction for that parent's failure to attend a hearing as ordered by the court. In the *Shirley E.* case, the Supreme Court concluded that a circuit court erred when it dismissed a parent's attorney because the parent failed to attend a hearing as ordered by the court. The Court held that the attorney should have been allowed to participate in both the fact-finding hearing and the dispositional hearing.

In that case, Justice Prosser noted in his dissent that he believed the court should have been allowed to proceed with the fact-finding hearing without the attorney present, but agreed with the majority opinion that Shirley E.'s attorney should have been allowed to participate in the dispositional hearing because the statute allows any party to present evidence relevant to the issue of disposition.

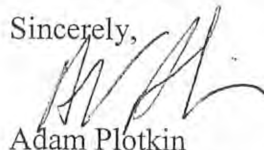
There is a simple fix to the issue in the bill highlighted by the Shirley E. case. If additional language were added requiring that the dispositional hearing be held on a different day from the hearing in which the individual is determined to have waived counsel and a default judgment is entered, a parent would have the opportunity to present evidence relevant to the disposition in the case and the proposal would strike a balance between the due process rights of the parent with the best interests of the child.

The concept behind our recommendation is to have the same delay between fact-finding and disposition currently allowed for in s. 48.424(4) to avoid commencing permanency planning or placement only to have a justifiable reason be given and the process halted - something which would likely not be in the best interests of the child.

The SPD understands and agrees that the best interests of the child must be paramount. Proponents feel those interests are best served by getting to permanency as fast as possible. The SPD suggests that the child's interests are better served by taking a few days between default and disposition prior to placement to potentially avoid an appellate court decision long after the placement has been made.

We are happy to assist the authors or this committee in drafting an amendment which would incorporate our suggestions. Thank you again for hearing our concerns on Assembly Bill 664.

Sincerely,



Adam Plotkin
Legislative Liaison, Office of the State Public Defender

February 6, 2014

TO: Honorable Members
Assembly Committee on Judiciary

FR: Attorney Mary Sowinski
Immediate Past Chair
Children & the Law Section

Attorney Henry J. Plum
Legislative Committee Chair
Children & the Law Section

RE: support for 2013 Assembly Bill 664

The Children & the Law Section of the State Bar of Wisconsin is comprised of attorneys who have a special interest in laws that affect children. Section members include judges, court commissioners, prosecutors, guardian's ad litem, agency attorneys, public defenders and private practice attorneys who represent various parties including children, parents, and grandparents as well as agencies that serve children. We share your interest in finding solutions to protect the best interests of children.

The Section supports AB 664 which proposes to amend Wis. Stats. §48.23(2) that allows for the mandatory appointment of counsel for parents in involuntary Termination of Parental Rights (TPR) cases but also allows for the court to find that parents who failed to appear in court as ordered may be found to have waived their right to counsel.

Involuntary Termination of Parental Rights (TPR) cases are serious matters, and the Children & the Law Section supports the legal representation of parents in these proceedings, including 'Effective Assistance of Counsel' when such representation occurs.

Under current law and many decades of case law, if a parent in an involuntary TPR has been properly notified of the date, time and location of the court hearing but fails to appear, the judge may proceed to receive evidence despite the parent's absence to decide whether the petition for TPR should be granted. Unfortunately, the current statute also requires that when a parent appears at the first TPR proceeding, requests an attorney but then fails to appear or participate in future hearings, the court must still allow the appointed attorney to appear on the parent's behalf. This taxpayer-funded attorney must continue despite the fact that the parent has no contact whatsoever with the attorney.

This situation, which occurs all too often, presents multiple problems for the Courts and all Legal Counsel involved with no clear resolution absent a change in state law. The Wisconsin Supreme Court and Appellate Court have ruled that withdrawal of the lawyer appointed to represent the parent is inadvisable ***not*** for constitutional reasons, but based on the wording of the current statute. This is problematic for two reasons. First, it requires much more time for the court to

hear the TPR case with the attorney involved even though the parent is no longer participating. Second, forcing the lawyer to continue the representation without a client to provide direction creates ethical and legal problems which place a cloud on the finality of the Court's decision. The legal risk of appointed counsel continuing to represent a non-participating and non-directing client in an Involuntary TPR creates the potential for reversible error based on an 'ineffective assistance of counsel' claim. The impact of such a claim, if successful, provides the parent with a right to a new trial in the TPR proceedings. This result is costly and time consuming because of the rescheduling of the trial, recalling of witnesses, and repeating the presentation of evidence. ***However, and more importantly, it significantly delays a final decision in the child's life, by placing the child's status in limbo. This result is contrary to the child's best interest.***

AB 664 provides a procedural remedy to the Court when faced with a parent who fails to participate in the proceedings or respond to appointed counsel in an involuntary TPR:

- Allows the court to determine whether a parent has effectively waived the parent's right to counsel as a result of the non-participating parent's actions or behavior. This legislation clarifies that the failure of the parent to appear is presumed to be egregious conduct without clear and justifiable excuse that would allow the court to dismiss the appointed counsel's representation. The court's ability to make such a finding for a non-participating parent in a TPR case is well grounded in the case law and current statute, so this concept is nothing new. This bill simply adds it to the statute related to the appointment of counsel.
- Requires the court to admonish the parent to appear at all subsequent scheduled hearings with the added warning that failure to appear as ordered by the court, in the absence of clear and justifiable good cause, can result in the court proceeding to decide whether the petition for TPR should be granted.
- Continues to require the State to provide clear and convincing evidence that there are grounds and reasons for the TPR, whether or not the parent and/or an attorney for the parent are participating in the proceedings.

AB 664 does not infringe on the parent's due process right to participate or the right to be represented by an attorney in an involuntary TPR case. It does prevent the parent who asserts a right and then fails to participate in subsequent hearings from delaying and holding the entire TPR process hostage by simply not acting.

The Children & the Law Section thanks Senator Lazich and Representative Strachota for their leadership on this bill and thanks this committee for your interest in this matter as well as other issues which the Children & the Law Section believe are important to children and families. We urge you to support Assembly Bill 664.

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The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

If you have questions about this memorandum, please contact Sandy Lonergan, Government Relations Coordinator, at slonergan@wisbar.org or (608) 250-6045.50