State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

☞Appendix A

LRB BILL HISTORY RESEARCH APPENDIX

☞ The drafting file for

2011 LRB–4288 (For: Senator Lazich)

has been transferred to the drafting file for

2013 LRB–2901 (For: Senator Lazich)

RESEARCH APPENDIX -

PLEASE KEEP WITH THE DRAFTING FILE

Date Transfer Requested: 08/09/2013 (Per: GMM)

☞ The attached draft was incorporated into the new draft listed above. For research purposes the attached materials were added, as a appendix, to the new drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

2011 DRAFTING REQUEST

Bill

Received: **04/26/2012**

Received By: **gmalaise**

Wanted: **As time permits**

Companion to LRB:

For: **Mary Lazich (608) 266-5400**

By/Representing: **Andrew Hanus**

May Contact:

Drafter: **gmalaise**

Subject: **Children - TPR and adoption**

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Lazich@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Terminationof parental rights; waiver of right to counsel for failure to appear without just cause

---

Instructions:

See attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	gmalaise 05/09/2012	scalvin 05/11/2012		_____ _____			
/1			rschluet 05/14/2012	_____ _____	srose 05/14/2012		

FE Sent For:

<END>

2011 DRAFTING REQUEST

Bill

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Instructions:

See attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	gmalaise	1 sae 05/10/12					

FE Sent For:

<END>

Malaise, Gordon

From: Hanus, Andrew
Sent: Thursday, April 19, 2012 9:42 AM
To: Malaise, Gordon
Subject: Draft Request: Addition to 48.23

Hi Gordon,

I just left you a voicemail regarding this draft. Sen. Lazich would like a bill drafted to take care of the problem described by Judge Foley in the attached document. As you will see, the problem occurs when parents facing a TPR request counsel but then abandon the proceedings. Their lawyers then face the difficult position of trying to represent a client they may have never met.

Judge foley suggests some language at the bottom of the first page. If you think that language will work well, please draft it. Otherwise, let me know if you have any questions or concerns.

Thanks,

Andrew Hanus
Sen. Lazich's Office
6-5400

CHRISTOPHER R. FOLEY
Circuit Court Judge, Br. 14
Children's Court Center, Room 1410
10201 W. Watertown Plank Road
Milwaukee, Wisconsin 53226
(414) 257-7277

June K. Teeguarden
Court Reporter

Sandy Ocepek
Deputy Clerk

April 10, 2012

Honorable Mary Lazich

State Senator

P.O. Box 7882

Madison, Wisconsin 53707

Honorable Samantha Kerkman

State Representative

P.O. Box 8952

Madison, Wisconsin 53708

RE: Wisconsin Statute 48.23---Right to Counsel in TPR Litigation

Dear Senator Lazich and Representative Kerkman:

I am enclosing herewith a copy of an email I forwarded to Senator Lazich recently. It may have been lost in the blizzard of communications that are received by your office.

The email, in conjunction with the article I authored for the Wisconsin Lawyer Magazine, is self-explanatory. While I am an ardent advocate of the right to representation in termination of parental right litigation, it is an embarrassingly silly use of precious public resources to have a lawyer who cannot find or communicate with their client continue to appear and be paid for appearing in proceedings that their clients clearly have abandoned.

Hence, as noted in the email, I would propose that 48.23 (2) be amended by adding the following two sentences at the end. "A parent in an involuntary termination of parental rights proceeding who has appeared and been ordered to appear in person for all further hearings who fails to

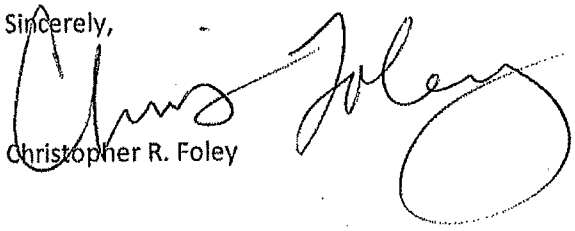
appear without just cause waives the right to counsel and to appear by counsel. Repeated failure to appear in person is presumed to be without just cause."

I have tweaked the language just a bit from the email. In particular, I have used the term waives rather than forfeits to be consistent with the existing language of the statute.

As I indicated, it is my belief that this change should be unnecessary and a non-appearing parent waives the right to counsel and to appear by counsel by conduct. However, the Court of Appeals failed to adopt that rationale. I strongly feel the legislature needs to intervene to resolve this wasteful use of funds which should be used to assist parents who wish to fully participate in this type of critically important litigation.

I sincerely appreciate your anticipated assistance in this regard.

Sincerely,



Christopher R. Foley

Sandy Ocepek - Fwd: Right to Counsel in TPR

From: Christopher Foley
To: Sandy Ocepek
Date: 4/10/2012 11:43 AM
Subject: Fwd: Right to Counsel in TPR
Attachments: Shirley e. article.doc

>>> Christopher Foley 3/8/2012 1:30 PM >>>
Senator:

Many thanks for the sibling visitation and sibling adoptive placement bills you have introduced. I should have sought you help on this issue earlier, but better late than never.

At present, 48.23, in essence provides that in an involuntary termination of parental rights proceeding, if a parent appears in the proceeding they must appear by counsel unless they knowingly and voluntarily waive counsel. Good policy; good law. But here is the problem.

We often have parents appear in TPR proceedings; request counsel through the public defender; then never reappear. In this worst case scenario, the lawyer has never spoken to the client; has no direction from the client; I don't believe the lawyer can ethically continue to represent the parent (because they cannot provide competent representation---see the article which was published in substantially this form in the Wisconsin Lawyer Magazine). Yet, in what I consider to be an extremely tortured reading of a Supreme Court decision---Shirley E., the Wisconsin Court of Appeals has said the lawyer can't withdraw and we can't let them withdraw. (See article). What is extremely troubling to me is that we have long recognized the idea of waiver by conduct---which is what a parent does in these circumstances---and the court of appeals refused to even consider that interpretation. The asinine result of this is that we pay lawyers to sit around, often during two more hearings, when they can't represent the client effectively and literally say nothing other than I have no direction from the my client.

This scenario can play out in less egregious scenarios as well. The client may reappear; meet with the lawyer; communicate for some time with the lawyer; then cease all contact and not reappear at the final pretrial or trial date. Again, the lawyer is put in an impossible situation and public funds are expended for asinine purposes.

Do not get me wrong. I think Shirley E. is good law. Parents who are communicating with their lawyer and can't attend a hearing (or hearings) for legitimate reasons should be authorized to appear by counsel and should not be defaulted. But parents who do not reappear and don't communicate with their lawyer waive (by conduct) their right to counsel and to appear by counsel by conduct. The problem is by the time the courts figure this out ....
The Supreme Court refused to take the Darrell K. case which would have given them the opportunity to straighten this out. Justice Roggensack dissented on the denial of the petition for review.

Hence, I would suggest that the following sentences be added to 48.23. A parent in an involuntary termination of parental rights who has been ordered to appear in person for all hearings and fails to appear without just cause forfeits the right to counsel and the right to appear by counsel. Repeated failure to appear is presumed to be without just cause.

I would deeply appreciate your assistance in this regard and would be happy to discuss the matter with you or your staff if that would be helpful.

Hope all else is well.

Chris Foley
Circuit Judge

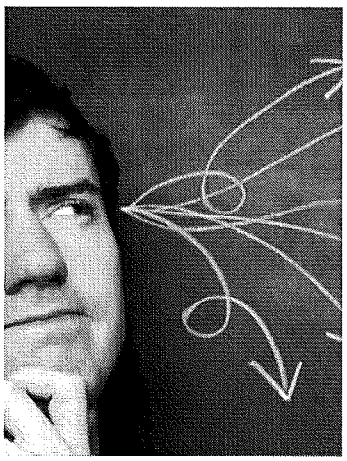
Wisconsin Lawyer

Vol. 84, No. 8, August 2011

'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 to provide adequate representation. To continue representation violates professional conduct rules. To not continue representation violates statutory law. It's a classic 'Catch 22.'

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



*by **Christopher R. Foley***

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 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 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.

default - violation of ct order must be egregious or bad faith

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. 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 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]

Waiver/Forfeiture of Counsel by Conduct

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

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]

Waiver by conduct

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

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.

Can't competently represent if parent doesn't personally appear

[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.

COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1910 **Cir. Ct. No. 2009TP104**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MARQUISE L., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DARRELL K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Reversed and remanded.*

¶1 KESSLER, J.[1] Darrell K. appeals from an order terminating his parental rights to Marquise L. He argues that the trial court violated his right to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

counsel when it allowed trial counsel to withdraw and exit the courtroom, found Darrell in default, and then proceeded to hear testimony supporting the termination of Darrell's parental rights while he was unrepresented. We agree.

BACKGROUND

¶2 Darrell K. is the biological father of Marquise L., born in September 2007. Marquise was born prematurely at twenty-four weeks and tested positive for cocaine and barbiturates at birth. Marquise suffered, and continues to suffer, from significant medical issues. He remained in the hospital for approximately four months following his birth. On January 2, 2008, Marquise was taken into protective custody after the Bureau of Milwaukee Child Welfare received neglect referrals pertaining to Marquise's mother, Angela L.[2] After Marquise was discharged from the hospital, he was placed in the foster home of Ralph G. and Jennifer H.

¶3 On June 27, 2008, Darrell was determined to be the biological father of Marquise through a paternity test. Though Darrell lived in Texas at the time of Marquise's birth, he was aware that Angela was pregnant and that the child was possibly his. He returned to Wisconsin upon learning that Angela had given birth.

¶4 On April 21, 2009, the State filed a petition to terminate Darrell's parental rights. The petition alleged two grounds for termination: (1) continuing CHIPS[3] pursuant to WIS. STAT. § 48.415(2)(a);[4] and (2) failure to assume parental

[2] The parental rights of Marquise's mother, Angela L., were terminated at the same time as Darrell's rights. The termination of Angela L.'s rights is not the subject of this appeal.

[3] CHIPS is an acronym for children in need of protection or services.

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

responsibility pursuant to WIS. STAT. § 48.415(6).[5] Darrell attended the initial hearing, stated that he wanted to contest termination of his parental rights, and was referred to the public defender's office for an attorney. On July 20, 2009, Darrell appeared with Attorney Nick Toman, who appeared for Darrell's appointed counsel, David Lang. A motion hearing date was set for September 21, 2009. Darrell did not appear at that hearing, though Attorney Lang did. The State indicated that it would seek default judgment if Darrell missed another court date. Darrell did not appear at the grounds hearing held on October 14, 2009, and Attorney Lang informed the court that he had filed a motion to withdraw as counsel. Attorney Lang stated that he had been unable to have any contact with Darrell, though he sent Darrell numerous letters and made multiple attempts at phone contact. The trial court granted the motion to withdraw and allowed Attorney Lang to leave. The court found Darrell in default for failing to appear and then heard testimony from the ongoing case manager, Michelle Bachman, who testified as to the grounds for terminating Darrell's parental rights. The trial court found that grounds existed for finding Darrell an unfit parent.

¶5 After determining that grounds existed for terminating Darrell's parental rights, the trial court set October 19, 2009, for the dispositional hearing. Darrell attended this hearing without counsel and was again referred to the public defender's office. On December 3, 2009, Darrell's new counsel, Mary Mountin, appeared in court for a motion to vacate the default judgment. Darrell did not attend this hearing and the motion was denied. The dispositional hearing began on

[5] A CHIPS dispositional order was entered on April 18, 2008, pursuant to WIS. STAT. § 48.355. The order outlined a number of conditions Darrell was to meet in order to have Marquise placed in his home.

February 15, 2010 and concluded on March 26, 2010.[6] Darrell was present with Attorney Mountin for all of the dispositional hearing dates and he testified at each hearing. On March 29, 2010, the trial court issued a letter decision terminating Darrell's parental rights.[7] This appeal follows.

DISCUSSION

¶6 At issue is whether the trial court violated Darrell's statutory right to counsel when it allowed fact-finding to occur at the grounds phase of a termination of parental rights proceeding without the presence of Darrell's counsel. Darrell asserts that because the trial court allowed his first appointed attorney to withdraw prior to fact-finding, his right to counsel pursuant to WIS. STAT. § 48.23(2) was denied. Both the State and the guardian ad litem argue that because Darrell was represented by counsel at the dispositional hearings and had the opportunity to testify, cross-examine witnesses and present evidence as to grounds at those hearings, he was not effectively deprived of his right to counsel. The State alternatively argues that if we find error, the error was harmless, as Darrell had the opportunity to cure it by participating in the dispositional phase. The guardian ad litem contends that Darrell waived his right to counsel at the grounds phase by failing to appear and also that a *per se* rule requiring a parent's right to counsel at all phases in a termination of parental rights case is inappropriate since the trial court must balance the interest of the child with the interests of the State and the parent. We disagree with both the State and the

[6] Attorney Mountin renewed the motion to vacate the default judgment at the dispositional hearings, however, the motion was denied.

[7] The merits of the trial court's order terminating Darrell's parental rights were not raised in this appeal.

guardian ad litem and conclude that Darrell's right to counsel was violated, the error was not harmless and that the legislature, by statute, has already balanced the rights of parents and their children in the context of involuntary termination proceedings.

I. Darrell's statutory right to counsel at the grounds phase.

¶7 Termination of parental rights proceedings consist of two phases. The first phase, the grounds phase, is a fact-finding hearing held to "determine whether grounds exist for the termination of parental rights." WIS. STAT. § 48.424(1)(a). At this time, "'[t]he petitioner must prove the allegations [supporting grounds for termination] in the petition for termination by clear and convincing evidence.'" *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶22, 246 Wis. 2d 1, 629 N.W.2d 786 (citation omitted). At the grounds phase, "the parent's rights are paramount." *See* ***id.*** If grounds exist to find the parent unfit, the trial court advances to the dispositional phase. WIS. STAT. § 48.424(4). At the dispositional phase, the trial court considers the best interest of the child and makes a determination as to placement. ***Evelyn***, 246 Wis. 2d, ¶23.

¶8 Because of the critical nature of termination proceedings, WIS. STAT. § 48.23(2) provides parents with a right to counsel. The statute states:

> **RIGHTS TO COUNSEL.** Whenever a child is the subject of a proceeding involving a contested adoption or the involuntary termination of parental rights, any parent under 18 years of age who appears before the court shall be represented by counsel; but no such parent may waive counsel. Except as provided in sub. (2g), a minor parent petitioning for the voluntary termination of parental rights shall be represented by a guardian ad litem. If a proceeding involves a contested adoption or the involuntary termination of parental rights, *any parent 18 years old or older who appears before the court shall be represented by counsel; but the parent may waive counsel provided the*

> *court is satisfied such waiver is knowingly and voluntarily made.*

(Emphasis added).

¶9 The Wisconsin Supreme Court, in ***State v. Shirley E.***, 2006 WI 129, 298 Wis. 2d. 1, 724 N.W.2d 623, discussed at length the unequivocal statutory right of parents to counsel at termination proceedings. In ***Shirley E.***, the mother, Shirley, failed to personally appear at her plea hearing because she resided in Michigan and could not afford to travel to Wisconsin, though she was represented by counsel at the hearing. ***Id.***, ¶9-12. She appeared by phone at the next hearing and was warned by the judge that she would be found in default if she did not personally appear at the following court date. ***Id.***, ¶12. Shirley was found in default at the following hearing for failing to appear personally. ***Id.***, ¶13. She continued to miss court dates, though her attorney attended all of them and indicated that she wanted to continue to represent Shirley as they had kept in contact. ***Id.***, ¶¶15-17. Nonetheless, the trial court relieved counsel of her duties, dismissed her from the courtroom, and held the grounds phase and dispositional phase without Shirley or her attorney. ***Id.***, ¶17 n.8, ¶18.

¶10 The Wisconsin Supreme Court ruled that the trial court erred in dismissing Shirley's attorney and in finding Shirley in default when she was unrepresented throughout the hearings. The court held "[t]he legislative goal of securing a fair procedure is not served unless a parent is given the opportunity to be heard in a meaningful time and in a meaningful manner." ***Id.***, ¶49. The trial court here, in noting that Attorney Lang was in an "impossible situation," granted his motion to withdraw and Attorney Lang left the courtroom. Darrell was found in default and the trial court proceeded to hear only the State's unchallenged evidence before finding Darrell unfit. In ***Shirley E.***, the 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." *See* ***id.***, ¶41.

II. Waiver.

¶11 The guardian ad litem contends that Darrell waived his right to counsel by failing to appear in court and by not cooperating with his counsel. ***Shirley E.*** rejected the argument that non-cooperation and non-attendance can constitute a waiver of counsel, stating: "If the legislature wanted the right to counsel to be contingent upon a parent's appearance in person, it could have expressly stated so." ***Id.***, ¶44. Further, the statute is clear that parents over 18 years of age may waive this statutory right to counsel *if* it is a knowing and voluntary waiver. Determination of whether a waiver is knowing or voluntary is the responsibility of a trial court to determine by "careful questioning." ***Id.***, ¶57.

¶12 It is clear from the record that Darrell never waived his right to counsel. Darrell never stated that he wished to proceed without counsel. In fact, after missing the grounds hearing, he appeared in court and was returned to the public defender's office for appointment of new counsel. There is nothing in the record that supports a finding that Darrell ever knowingly or voluntarily waived his right to counsel.

III. Representation at the dispositional phase as a cure of error at the grounds phase.

¶13 Both the State and the guardian ad litem contend that Darrell was not totally deprived of his right to counsel as he was represented at the dispositional hearings and was able to testify as to grounds during the dispositional hearings. While it is true that the factual findings made at the grounds phase were

readdressed at the dispositional phase, the statute does not permit us to substitute representation at one stage for representation at another. The statute addresses the right to counsel during *all* termination proceedings, not separately at the individual stages. Further, the language of the statute is mandatory. ("In statutory construction, the use of the word 'shall' is usually construed as mandatory, while the word 'may' is generally construed as permissive." ***State v. McKenzie***, 139 Wis. 2d 171, 176-77, 407 N.W.2d 274 (Ct. App. 1987)). Darrell's right to counsel at the grounds phase was mandatory, unless knowingly and voluntarily waived.

¶14 We cannot agree that Darrell's representation at the dispositional phase cured the error that occurred at the grounds phase. To accept the State's argument would essentially render Darrell's lack of counsel at the grounds phase a harmless error because counsel was later supplied. Our supreme court rejected that alternative in ***Shirley E.*** when it held that the "denial of the statutory right to counsel ... constitutes *structural* error." ***Id.***, ¶63 (emphasis added). This error, the court continued, is a "prejudicial error per se" and undermines the "fairness and integrity of the judicial proceeding that the legislature has established for termination proceedings." ***Id.***, ¶¶63, 64. Therefore, a harmless error analysis is inappropriate for evaluating whether a parent's right to counsel was violated by a lack of representation at one of the two critical stages in the termination proceedings.

¶15 While it may strain the allocation of limited judicial resources to conduct another grounds hearing at which Darrell is represented by counsel, the statute and case law are clear: regardless of the difficult situation in which the attorney was placed, Darrell was entitled to representation when the grounds hearing took place. Although we are sympathetic to the issues counsel and trial courts face when parents do not maintain contact with their counsel or when

parents fail to attend hearings, neither ***Shirley E.*** nor the statute permit representation at one stage of an involuntarily termination proceeding to cure the lack of representation at the other.

IV. The rights of Marquise.

¶16 Finally, the guardian ad litem argues that it is not in the child's best interest to stretch out this matter and, therefore, we must balance the best interest of the child against the right of a parent to counsel at termination proceedings. We disagree.

¶17 The entire Children's Code is intended to promote the best interest of a child. *See* WIS. STAT. § 48.01(1). One of those interests is the presumed interest of the child to remain with his or her parents. *See* § 48.01(1)(a). Hence, the statutory grounds which permit the parental bond to be legally destroyed require proof of what many would consider appalling parental misconduct. *See* WIS. STAT. § 48.415. Unless the parent(s) are afforded a fair and meaningful opportunity to fully participate in the proceedings, with counsel, during the State's attempt to establish that misconduct, and to meaningfully challenge the State's assertions with the assistance of counsel, a child's best interests in the broadest sense have not been truly protected. The existence of a two-step process in which the first step focuses on both the parent's conduct and the parent's interest in preserving parental bonds, while the second step focuses on the best interest of the child as to physical placement, reflects the legislative determination that both steps are separately necessary to promote the best interest of the child. Given the significant familial interests at stake, the best interest of the child and a parent's right to counsel go hand-in-hand.

¶18 We are cognizant that the placement planning for Marquise has been delayed by this appeal and may be further delayed by the remand and necessary hearing. However, we note that Attorney Mountin filed two motions to vacate the default judgment. Had either of those motions been granted, much of the delay which has occurred might well have been avoided.

¶19 We conclude that the trial court erred when it allowed fact-finding to occur at the grounds phase of the termination of parental rights proceeding without the presence of Darrell's counsel. We reverse and remand for a new fact-finding hearing.

By the Court.—Order reversed and remanded for further proceedings consistent with this opinion.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-4288/?
GMM...:...:...

IN 5/9

a parent (18) 18 years of age or over

however, Current law does not permit a parent parent under 18 years of age to waive counsel in a contested adoption or involuntary proceeding

T PR

Ken Cat

AN ACT ...; **relating to:** waiver of a parent's right to counsel in a contested adoption or an involuntary termination of parental rights proceeding for failure to personally appear as ordered by the juvenile court without just cause.

at any age

Analysis by the Legislative Reference Bureau

Under current law, in a proceeding involving a contested adoption or an involuntary termination of parental rights (TPR), a parent ~~18 years of age or older~~ who appears before the court assigned to exercise jurisdiction under the Children's Code (juvenile court) must be represented by counsel, except that the parent may waive counsel if the juvenile court is satisfied that the waiver is knowingly and voluntarily made. ~~The Wisconsin Supreme Court, in *State v. Shirley E.*, 2006 WI 129, 298 Wis. 2d 1, held that the requirement that a waiver of the right to counsel be knowingly and voluntarily made does not permit a parent 18 years of age or over who has been ordered to appear in person at a hearing in a TPR proceeding to waive her right to counsel by not appearing in person as ordered.~~

This bill provides that a parent who has appeared before the juvenile court in a contested adoption or involuntary TPR proceeding is considered to have waived his or her right to counsel and to appear by counsel in the proceeding if the juvenile court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding and the parent fails to appear in person as ordered without just cause. The bill also provides that repeated failure by a parent to appear in person as ordered by the juvenile court is presumed to be without just cause.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 48.23 (2) of the statutes is renumbered 48.23 (2) (a) and amended to read:

48.23 **(2)** (a) ~~Whenever a child is the subject of~~ In a ~~proceeding involving a contested adoption or~~ the ~~an involuntary termination of parental rights, any parent under 18 years of age who appears before the court shall be represented by counsel~~; ~~but no such parent may waive counsel~~. Except as provided in sub. (2g), a minor parent petitioning for ~~the~~ a voluntary termination of parental rights shall be represented by a guardian ad litem. ~~If~~

(b) In a proceeding ~~involves~~ involving a contested adoption or ~~the~~ an involuntary termination of parental rights, any parent ~~18 years old or older~~ who appears before the court shall be represented by ~~counsel; but the~~ counsel, except as follows:

1. ~~The~~ parent may waive counsel ~~provided~~ if the court is satisfied ~~such~~ that the waiver is knowingly and voluntarily made.

History: 1977 c. 354, 355, 447, 449; 1979 c. 300, 356; 1987 a. 27; 1987 a. 383; 1989 a. 31; Sup. Ct. Order, 151 Wis. 2d xxv (1989); 1989 a. 56, 107; 1991 a. 263; 1993 a. 377, 385, 395, 451, 491; 1995 a. 27, 77; 1997 a. 292; 1999 a. 9, 149; 2001 a. 103; 2005 a. 344; 2009 a. 94.

SECTION 2. 48.23 (2) (b) 2. of the statutes is created to read:

48.23 **(2)** (b) 2. ~~The~~ parent is considered to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding and the parent fails to appear in person as ordered without just cause. Repeated failure by a parent to appear in person as ordered is presumed to be without just cause.

SECTION 3. Initial applicability.

contested
Contested adoption or an involuntary

(1) WAIVER BY PARENT OF RIGHT TO COUNSEL BY FAILURE TO APPEAR. This act first applies to a parent who on the effective date of this subsection is ordered to appear in person at a hearing in a termination of parental rights proceeding.

(END)

State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-4288/1
GMM:sac:rs

2011 BILL

AN ACT ***to renumber and amend*** 48.23 (2); and ***to create*** 48.23 (2) (b) 2. and 48.23 (2) (b) 3. of the statutes; **relating to:** waiver of a parent's right to counsel in a contested adoption or an involuntary termination of parental rights proceeding for failure to personally appear as ordered by the juvenile court without just cause.

Analysis by the Legislative Reference Bureau

Under current law, in a proceeding involving a contested adoption or an involuntary termination of parental rights (TPR), a parent who appears before the court assigned to exercise jurisdiction under the Children's Code (juvenile court) must be represented by counsel, except that a parent 18 years of age or over may waive counsel if the juvenile court is satisfied that the waiver is knowingly and voluntarily made. Current law, however, does not permit a parent under 18 years of age to waive counsel in a contested adoption or involuntary TPR proceeding.

This bill provides that a parent of any age who has appeared before the juvenile court in a contested adoption or involuntary TPR proceeding is considered to have waived his or her right to counsel and to appear by counsel in the proceeding if the juvenile court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding and the parent fails to appear in person as ordered

without just cause. The bill also provides that repeated failure by a parent to appear in person as ordered by the juvenile court is presumed to be without just cause.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 48.23 (2) of the statutes is renumbered 48.23 (2) (a) and amended to read:

48.23 **(2)** RIGHT OF PARENT TO COUNSEL. (a) ~~Whenever a child is the subject of a proceeding involving a contested adoption or the involuntary termination of parental rights, any parent under 18 years of age who appears before the court shall be represented by counsel; but no such parent may waive counsel.~~ Except as provided in sub. (2g), a minor parent petitioning for ~~the~~ a voluntary termination of parental rights shall be represented by a guardian ad litem. ~~If~~

(b) In a proceeding ~~involves~~ involving a contested adoption or ~~the~~ an involuntary termination of parental rights, any parent ~~18 years old or older~~ who appears before the court shall be represented by ~~counsel; but the~~ counsel, except as follows:

1. A parent 18 years of age or over may waive counsel ~~provided~~ if the court is satisfied ~~such~~ that the waiver is knowingly and voluntarily made.

SECTION 2. 48.23 (2) (b) 2. of the statutes is created to read:

48.23 **(2)** (b) 2. A parent under 18 years of age may not waive counsel.

SECTION 3. 48.23 (2) (b) 3. of the statutes is created to read:

48.23 **(2)** (b) 3. Notwithstanding subds. 1. and 2., a parent is considered to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding and the parent fails to appear in person as ordered without just cause. Repeated

failure by a parent to appear in person as ordered is presumed to be without just cause.

SECTION 4. Initial applicability.

(1) WAIVER BY PARENT OF RIGHT TO COUNSEL BY FAILURE TO APPEAR. This act first applies to a parent who on the effective date of this subsection is ordered to appear in person at a hearing in a contested adoption or an involuntary termination of parental rights proceeding.

(END)