



# Mary Lazich

State Senator - Senate District 28

## **Senate Committee on Judiciary and Labor Senate Bill 207 and Assembly Bill 664 Testimony January 30, 2014**

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

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.

SB 504 and AB 664 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. SB 504 and AB 664 will help streamline court proceedings, correct a legal absurdity, and continue to protect individuals' constitutional rights to counsel in termination of parent rights proceedings.

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



# PAT STRACHOTA

STATE REPRESENTATIVE

## Testimony on Termination of Parental Rights – 1/30/14

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. Currently, 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.

## CHILDREN & THE LAW SECTION

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January 30, 2014

TO: Honorable Members  
Senate Committee on Judiciary and Labor

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 Senate Bill 504

The Children & the Law Section (CLS) 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 SB 504 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 Child Law Section of the State Bar (CLS) 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



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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.**

SB 504 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.

SB 504 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 Senate Bill 504.

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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](mailto:slonergan@wisbar.org) or (608) 250-6045.50



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Governor Scott Walker  
Secretary Eloise Anderson

Secretary's Office

Date: January 30, 2014

To: Members of the Senate Committee on Judiciary and Labor

From: Sara Buschman, Assistant Deputy Secretary

Re: Department Position on Senate Bill 504

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Under current law, a parent involved in a contested adoption or an involuntary termination of parent rights must be represented by counsel. If over 18, the parent may waive their right to counsel. A parent under 18 may not waive their right to counsel.

SB 504 presumes that a parent, regardless of age, has waived the right to counsel if the parent repeatedly fails to appear in person for proceedings of an involuntary TPR or contested adoption.

The issue of waiving the right to counsel was discussed in the 2012 Legislative Council Study Committee on Permanency for Young Children in the Child Welfare System. The Legislative Council Study Committee approved a modified version of SB 504, which applied the new provision only to parents aged 18 years and older.

The Department supports the compromise reached in the Legislative Council Study committee. While it is reasonable to apply this standard to a parent who is an adult, the Department views that it is not reasonable to apply this standard to a minor parent, who is less than 18 years old. Youth under 18 years old do not have fully developed and mature judgment and are likely to lack an understanding of the court process(es) and their implications. For these reasons, youth may not attend a TPR or adoption process, despite the critical and lasting impacts of the court decisions on the youth.

The Department views that the current protection afforded youth that the right to counsel cannot be waived is appropriate and should be maintained.