



# Wisconsin State Public Defender

315 N. Henry St. - 2<sup>nd</sup> Floor  
PO Box 7923 Madison, WI 53707-7923  
Office Number: 608-266-0087 / Fax Number: 608-267-0584  
www.wisspd.org

Kelli S. Thompson  
State Public Defender

Michael Tobin  
Deputy State  
Public Defender

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.

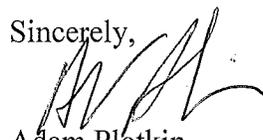
The SPD understands and agrees that the best interests of the child must be paramount.

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.

February 6, 2014

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,

A handwritten signature in black ink, appearing to read 'A. Plotkin', written over the word 'Sincerely,'.

Adam Plotkin

Legislative Liaison, Office of the State Public Defender