June 26, 2012

To: Legislative Study Committee On Permanency for Young Children in the Child Welfare System.

From: Judge Chris Foley

RE: Impediments to Timely Permanence for Young Children in the Child Welfare System

INTRODUCTION

I wish to offer some observations based upon my 20+ years of child welfare law experience in the hopes that it will be of some benefit to the committee. However, I emphasize that my observations are based upon my experiences in Milwaukee and may not represent the experience (or recommendations) of other judges in Milwaukee and certainly in other parts of Wisconsin. It is a given that the issues facing the child welfare system in Milwaukee are different than those faced in other counties. These observations (and recommendations) need to be considered with that perspective in mind.

Quite frankly, this got more lengthy than I anticipated. I apologize for that.

15 OUT OF 22 MONTHS. WISCONSIN STATUTE SEC. 48.417.

Present law contains a powerful tool to assure timely permanence for young children in the child welfare system. I do not believe that child welfare players, judges, commissioners, lawyers, social workers, parents, faithfully adhere to the mandates of the 15 out of 22 months rule to the detriment of our children.

If a child is in out of home care for 15 continuous months (the actual rule is 15 out of the most recent 22 months---but most commonly it is 15 continuous months) the State or County is required to file a petition seeking termination of parental rights unless there are compelling circumstances justifying a determination not to pursue termination. The most common compelling circumstance is that the child is living with a fit and willing relative who does not wish to adopt, although the failure to make reasonable efforts to assist the parent in resolving the safety concerns; the absence of existing grounds to TPR; and other compelling circumstances are set forth.

As indicated, in my experience, we are not faithfully adhering to this rule. I am still frequently litigating cases in which children have been in our care for 3-5 years at the time the petition was filed and in which there clearly was no basis not to pursue timely termination under the rule. The failure to do so, leaving the children as the rope in the tug of war for protracted periods, is remarkably damaging to them. While I think that primary responsibility for this lies with the agencies and prosecutors (and I hear, anecdotally that in other counties the lack of prosecutorial resources is often a factor here), I also fault the judiciary as the requirements of this statute should be a prime focus of discussions at permanency plan reviews and it is my perception that it is not.[1]

I am aware that active consideration has been given to shortening this 15 month period for younger children. One of the significant concerns that will arise is the viability of tpr grounds under a shorter time frame. One of the most common grounds plead for termination of parental rights is continuing need of protection and services. Wisconsin Statute sec. 48.415 (2). To establish that ground, the State or County must prove reasonable efforts to provide the services the court ordered to assist the parent in meeting the conditions of safe return. Sadly, Chips orders which establish the conditions of safe return and services to be provided to assist the parent in meeting those conditions are not rendered until the child has been out of the home for 4-6 months. If the mandated filing requirement was reduced to, for instance, 9 months for younger children, the petitioner would not be able to prove reasonable efforts since the services would have only been in place for a very brief period.[2] Whatever changes the committee may make in this regard will have to give due consideration of this issue.

NO REASONABLE EFFORTS CASES. WISCONSIN STATUTE SEC. 48.355 (2d).

Again, it is my belief that an existing provision of the law that represents an effective tool for achieving more timely permanence for younger children is often unrecognized and dramatically underutilized.

Under current law, child welfare authorities are not required to make efforts to safely reunify a child with a parent if that parent has failed in the responsibilities of parenthood in an egregious manner in the past---such as murdering or attempting to murder the child's other parent; has been convicted of seriously sexually or physically abusing the child or a sibling of the child; has previously had their parental rights to another child involuntarily terminated. If a court makes a finding at any stage of a Chips proceeding---and it should be made at the very

[1] Under the auspices of the Children's Court Improvement Project, all judges in Wisconsin will attend training on the importance of the permanency planning process and the importance of timely permanence for children.

[2] Local practice again has some significant bearing here. In Milwaukee, we implement services for willing parents almost immediately after the temporary physical custody hearing and while the Chips case is in process. This is much better practice as the parent is most traumatized and motivated to address safety concerns at that point. However, I am told that this is not common practice and the implementation of services most often awaits resolution of the Chips case---often, as noted, 4-6 months out.

first hearing, the TPC hearing---that it is a no reasonable efforts case, the court is mandated to hold a permanency plan determination hearing within 30 days. Absent a compelling circumstance, TPR and adoption is likely to be the permanency goal and reasonable efforts must then be undertaken to achieve the permanency goal, Wisconsin Statute sec. 48.38 and the State or County must file a petition for termination of parental rights within 60 days. Wisconsin Statute sec. 48.417 (again, absent compelling circumstances).

I believe that this is a too often overlooked provision in the child welfare process and, as a result, delays timely termination and adoption for our children.

There is one anomaly that I would point out to the committee which may be appropriate to address. A prior involuntary termination of parental rights is a basis to find that reasonable efforts to safely reunify are not required. 48.355 (2d). It does trigger the obligation to hold a permanency determination hearing within 30 days and, if the court determines that TPR and Adoption is the appropriate permanency goal, the agency must make reasonable efforts to achieve that permanency goal. 48.38 (4m). However, unlike when the no reasonable efforts finding is based upon murder of the other parent or serious abuse of the child or a sibling (or abandonment/relinquishment), a prior involuntary TPR does not mandate a filing of a TPR petition. 48.417 (2). I am not sure of the basis of this legislative disparity---perhaps the legislature felt that prior involuntary TPR parents should be given a new chance with subsequently born children while the others should not or they may have recognized that there may not be a basis to find the new child in need of protection and services and, therefore, there may not be a basis to terminate rights at to that child.

As many of you are aware, prior involuntary termination of parental rights was made a basis for termination as to a subsequently born child some time ago. Wisconsin Statute sec. 48.415 (10). I believe that this must have been in part premised upon a desire to provide more timely permanence for young children whose parents had repeatedly borne or fathered children; failed in their responsibilities; and had their parental rights terminated as a result. However, as the present prior involuntary ground exists, the new child must be found to be in need of protection and services within 3 years of the prior involuntary termination order. Often times, child welfare authorities do not believe that there is a basis to take a new child into custody even when there has been a recent termination.

It may be appropriate for the committee to amend our current law to provide that a prior involuntary termination of parental rights within 3 years is a basis to find a newborn child in need of protection and services, Wisconsin Statute sec. 48.13. The State or County could then use that “automatic” chips grounds to dovetail with the prior involuntary termination ground.

I do think that such amendments would withstand constitutional scrutiny although I would anticipate a challenge based upon Stanley v. Illinois that a chips finding based solely upon a prior involuntary (notably limited to within 3 years) lacks an individualized determination of unfitness. However, I believe that such a challenge would not succeed. In addition, such a statute would deprive the parent of the opportunity to assert in jurisdictional phase of the Chips proceeding and in the grounds phase of the termination proceeding (but not in the dispositional phase of either the Chips of the TPR) that they had addressed their parenting deficiencies and could safely parent the newborn. On that basis, I have some reservations about this course. However, as noted, it would not deprive the parent from doing so in either the dispositional phase of the Chips or TPR. If the committee chose this course and the statutes were so amended, it would be a very effective tool in achieving timely permanence for children as in the Chips and the TPR proceeding summary judgment would be available in the jurisdictional/grounds phase and the only significant litigation would occur in the dispositional phase. The mandated filing requirement, 48.417, should also be amended if these steps were taken.[3]

While I have stated my reservations about this course, I do believe that the dispositional hearing in either phase would sufficiently protect a parent who had truly addressed the prior safety concerns[4] and it would be a very effective and timely tool in dealing with parents who had serially failed in their parental responsibilities.

I would also strongly recommend that the Committee recommend to the legislature that 48.355 (2d)---the no reasonable efforts statute---be amended. The statute presently provides that if the no reasonable efforts standards apply a court "need not" require reasonable efforts to prevent removal or safely reunify a child with the birth parent. I strongly believe the no reasonable efforts statute should be strongly presumptive. I would propose that the language be amended to state the court "shall not" require reasonable efforts to prevent removal or safely reunify "unless the court finds that safe reunification serves the best interests of the child." I am told anecdotally that some (perhaps lots) of judges are hesitant to make no reasonable efforts findings even when the standard applies. If the standard applies, I believe the law should strongly presume that safe reunification is not an appropriate plan and that the expedited path to alternative permanence should be pursued.

[3] A possible alternative that would address the "too wide a net" and lack of opportunity of a parent to demonstrate prior parenting deficiencies had been successfully resolved would be to require that a court make a finding of probable cause to believe that the parent could not safely parent the newborn within 3 years of the prior tpr as an additional element of the prior involuntary chips ground.

[4] Agency and prosecutorial discretion would also provide some protection for parents who had successfully addressed prior safety risks.

FATHERS

Let me be clear that there is no bigger advocate of the need to timely identify and engage fathers when children come into the child welfare system. Identifying and engaging fathers opens the entire constellation of paternal relatives, including the fathers themselves, as potential placement resources and a support network for the child. Hence, I wholeheartedly support all of the programs recently implemented to engage fathers of children (both those in and out of the child welfare system).

However, fathers who have never shouldered any significant responsibility for the daily supervision, education, protection and care of their children-- who have done the deed and blithely ignored the possibility that they may have fathered a child-- can't show up 2 years into a child welfare case and say they now want to be dad. Wisconsin law and the Constitution do not require that we accord them all rights given to legally recognized parents in TPR litigation.[5]

In a series of cases in the late 70s and early 80s (Stanley, Caban, Lehr and Quilloin), the United States Supreme Court determined that legally recognized parents (married, adjudicated, now, acknowledged) fathers were all afforded full protection of their relationship to their children. They also recognized that a father of a child who had acted as a father but was not married to the mother was afforded full protection of his interest in the relationship and his parental rights could be terminated only upon an individualized showing of unfitness.

Duly and appropriately concerned that a father who wanted to establish and maintain a parental relationship with their out of wedlock child might be thwarted in those efforts by the mother (sometimes---often times—mother's thwart fathers for very good reasons, most commonly DV---in which case the father thwarts himself), the Lehr Court opined that states had a constitutional duty to protect the father's opportunity to develop a relationship with their child (and gain full protection of that relationship) and concluded that the putative father registry adequately protected that interest. The Lehr court went on to say that fathers who blithely ignore the possibility that they have fathered a child and fail to demonstrate a commitment to the responsibilities of parenthood forfeit any constitutionally protected interest in their relationship to a child despite their biological tie. Noting one arguable concern---one I suggest this committee clarify---I strongly believe this is the law in Wisconsin. The problem is that no one knows it and we routinely let fathers who have clearly forfeit any protected interest interfere with the achievement of timely permanence for children in the child welfare system.

Wisconsin protects the interest of married, adjudicated and acknowledged fathers in both Chips and TPR proceedings. Parents, including all these categories of fathers, receive

[5] These comments relate almost exclusively to alleged fathers in termination of parental rights cases arising out of underlying Chips proceeding. Extensive efforts are required and undertaken to identify, engage and adjudicate fathers in those earlier proceedings.

notice of these proceedings. Pursuant to the Lehr line of cases, we maintain a putative father registry, 48.025, and we summon men who have filed a declaration of paternal interest or who may be the father of the child based upon information provided to the court. Those men are accorded the right to prove their paternity. Wisconsin Statute sec. 48.299 (6) and 48.42 (2) (b). However, when a man appears and proves paternity, he may "further participate in the TPR proceeding only if he filed a declaration of paternal interest or has lived in a familial relationship with the child. Wisconsin Statutes sec. 48.423 and 48.42 (2) (b). If he is only the biological father and done nothing to meet parental responsibilities, he is deprived of standing to contest the petition as he has forfeit any recognized and protected interest in his relationship to his biological child. 48.423, 48.42 (2) (b).

While I sincerely believe that is the law, it is clearly not common practice (alleged fathers who have never acted in any way as a father frequently show up and are accorded full due process rights significantly protracting TPR litigation) and there is a basis to argue that it is not a correct reading of the law. The legislature was remarkably unclear in this regard and I think it imperative that we clarify this.

The problem lies primarily in 48.423. It provides, as noted above, that if an alleged father appears and proves his paternity in TPR litigation, he further participates in the litigation only if he meets the conditions in 48.42 (2) (b).[6] This accords full standing to fathers who filed a timely declaration of paternal interest and a father who lived in a familial relationship with the child and, hence, acted like a father. Those requirements are clearly an effort to comply with Lehr dictates. The problem is that the cross reference to 48.42 (2) (b) embraces alleged fathers as well, which is nonsensical.

There can be no alleged father at this point. The statute applies only when paternity has been established. The father, nor any other man, at that point can be an alleged father. So the cross reference to the subsection that purports to give standing to an alleged father gives standing to someone who does not and cannot exist at that point. Additionally, if the statute is read to give full standing to all alleged fathers, the exclusionary language ("further participates only if") excludes no one and that language is completely meaningless.

In summary, it is my belief that the legislature, in response to the Stanley/Lehr line of cases, mandated the following with respect to alleged fathers. They must be given notice of the TPR proceeding. 48.42 (2) (b). If they appear, paternity must be addressed and resolved. 48.423. If his paternity is established, he is a full participant in the proceedings only if he filed a timely declaration of paternal interest or acted as a father in their child's life (or, as a matter of constitutional law, if he has been thwarted in sincere, diligent and prompt attempts to act as a

[6] There is a further reference to another statute dealing solely with out of state fathers which is almost never applicable and addresses primarily the potential that a father's sincere and diligent efforts to meet parental responsibilities was thwarted by the mother.

father). If a man has just engaged in the behavior; blithely ignored any potential of fatherhood; and never done anything as a dad or to determine if he was a dad, he has forfeit any interest and no further due process protections are implicated. I strongly believe that is the law; should remain the law; and the Committee should make that clear by amending the cross-reference to 48.42 (2) (b) to specifically state the now established father further participates only if he meets a conditions specified in 48.42 (2) (b) (1) or (3).

JURY TRIALS

This issue will no doubt arise.

Wisconsin is one of only four states that presently allow jury determinations in Chips and TPR litigation. Significant attempts to eliminate that right have failed, most recently during the Doyle administration.

I personally believe that that delays occasioned by the right to a jury are a significant impediment to achieving timely permanence for children. It is not uncommon in Milwaukee County for both of the TPR courts to calendar 5 or more TPR trials on the Monday of trial weeks. As a direct result, it is not at all uncommon for it to take a year or more after filing for a TPR case to be litigated to conclusion (by statute, absent good cause, the case should be fully litigated within 4 months). I would indicate that I was recently at a meeting with a group of judges representative of the diverse jurisdictions in Wisconsin and was surprised that the majority of judges did not believe that it was a significant impediment.

At least based upon my experience, the belief that a jury actively bars inappropriate and improvident termination is not justified. In child welfare related terminations (rather than private terminations), I would estimate juries find grounds in trials far in excess of 90% of the time---probably in excess of 95% of the time. This is consistent with a recent study in Arizona in which 17 termination of parental rights cases were tried to a jury and only one case was successfully defended.[7] In addition, in my experience, theories of defense in TPR litigation are primarily "legal" in nature, i.e. did the child welfare agency make reasonable efforts to provide the services the court ordered to assist the parent in meeting the conditions of safe return. Those theories of defense tend to be more comprehensible and palatable to judges as opposed to jurors who are often overwhelmed by facts relating to compromised safety of the children.

[7] Arizona enacted a right to a jury determination in TPR in December, 2003 with a sunset provision in December, 2006, unless reauthorized. Based upon the study, the right to a jury was not reauthorized. It is also worthy of note from that study that 167 jury demands were made in the first year after the right to jury was enacted but only 17 actually were tried to a jury. The remainder were tried to the court; the parents consented; or the parents defaulted; or the State withdrew the petition.

For all of those reasons, I would support legislation rescinding the right to a jury trial in both Chips and TPR proceedings.