



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 2

TO: MEMBERS OF THE SPECIAL COMMITTEE ON PERMANENCY FOR YOUNG CHILDREN IN THE CHILD WELFARE SYSTEM

FROM: Margit Kelley and Melissa Schmidt, Staff Attorneys

RE: Termination of Parental Rights When Child is in Need of Protection or Services

DATE: July 17, 2012

This Memo provides information requested by members of the Special Committee on Permanency for Young Children in the Child Welfare System at the June 27, 2012 meeting. The Memo presents information on the process for an action to terminate parental rights for a child who has been in need of protection or services. In particular, the Memo describes the grounds for involuntary termination of parental rights (TPR), the timelines for such an action, and the adjudication process, including the right to a jury trial.

GROUND FOR TPR

A person's parental rights may be involuntarily terminated only if certain grounds are met that demonstrate the parent is unfit.

According to the U.S. Department of Health and Human Services' Administration for Children and Families, each state is responsible for establishing its own statutory grounds, which vary by state. The grounds commonly include severe or chronic abuse or neglect; abuse or neglect of other children in the household; abandonment; long-term mental illness; long-term alcohol or other drug abuse; failure to support or maintain contact with the child; and involuntary termination of the rights of the parent to another child. [*Grounds for Involuntary Termination of Parental Rights*, Child Welfare Information Gateway, February 2010.]

Under Wisconsin law, in order to terminate a person's parental rights, a court or a jury must first find that one or more of the following grounds exist:

- Abandonment, including a parent's failure to visit or communicate with the child for three months or more while the child is placed outside the home by court order.
- Relinquishment of the child within 72 hours of the child's birth.
- Continued need of protection or services after the responsible agency has made reasonable efforts to provide the services ordered by the court. This ground requires all of the following findings:
 - The child has been placed outside the home for a cumulative total period of six months or longer.
 - The parent has failed to meet the conditions established for the safe return of the child.
 - There is a substantial likelihood that the parent will not meet those conditions in the next nine months.
- The child has been adjudicated to be in need of protection or services and placed outside the home on three or more occasions, and the conditions requiring placement outside the home were caused by the parent.
- Continued parental disability with inpatient treatment for a cumulative total period of at least two of the last five years, under a condition that is likely to continue indefinitely, and the child is not being provided with adequate care by a relative, parent, or guardian.
- Continued denial by a court of physical placement or visitation to a parent for at least one year or more.
- A pattern of physically or sexually abusive behavior that is a substantial threat to the health of the child.
- Failure to assume parental responsibility, by showing that the person has not had a substantial parental relationship with the child.
- A relationship between the parents that is closer than second cousins.
- Homicide or solicitation of homicide of the other parent.
- Sexual assault by the father that resulted in conception of the child.
- Commission of a serious felony against the person's child, or commission of child trafficking against any child.
- Prior involuntary TPR to another child of the parent.

If a court, or a jury, find that grounds for TPR exist, the court must declare the parent to be unfit and then determine whether TPR is in the best interests of the child. This process is described in more detail, below.

Adjoining States' Grounds of Continuing Need of Protection or Services

The states adjoining Wisconsin each structure the possible bases for involuntary TPR differently, though there are commonalities. For example, each of the adjoining states allows grounds based on abandonment, and involuntary TPR of another child.

The states adjoining Wisconsin also each have a ground that is comparable to a child's continuing need for protection or services. Each version of this type of ground reflects the federal requirement that reasonable efforts be made to reunify the family. The grounds are as follows:

- **Illinois:** The parent has failed to make reasonable efforts to correct the conditions that were the basis for the removal of the child; or to make reasonable progress toward the return of the child within nine months after an adjudication of neglect or abuse. [s. 750 ILCS 50/1. D. (m), Ill. Comp. Stat.]
- **Iowa:** Services offered to the parent have failed to correct the circumstances that led to the adjudication for the child to be in need of assistance; a child who is age four or older has been in out-of home care for at least 12 of the past 18 months and cannot safely be returned home; or a child who is age three or younger has been in out-of-home care for at least six of the past 12 months and cannot safely be returned home. [s. 232.116 1. d., f., and h., Iowa Code.]
- **Michigan:** Six months after the initial dispositional order, the parent has failed to correct the conditions that led to an adjudication of child abuse or neglect, and there is no reasonable likelihood that the conditions will be corrected within a reasonable time considering the child's age. The parent must have been given a reasonable opportunity to rectify the conditions that brought the child to the court's jurisdiction. [s. 712A.19b. (3) (c)., Mich. Comp. Laws.]
- **Minnesota:** Reasonable efforts have failed to correct the conditions leading to the child's placement out of the home. A failure to correct the conditions is presumed if the child has been placed outside the home for a cumulative period of 12 months within the preceding 22 months. For a child under age eight at the time the petition for protection or services was filed, a failure to correct the conditions is presumed if the child has been placed outside the home for six months, unless the parent has maintained regular contact with the child and is complying with the out-of-home placement plan. [s. 260C.301 Subd. 1. (b) (5), Minn. Stat.]

These grounds that seem comparable to Wisconsin's TPR ground of continuing need of protection or services are separate from grounds addressing a parent's continuing disability due to mental illness or due to alcohol or other drug abuse.

TIMELINE FOR FILING A TPR PETITION

Wisconsin Law

Wisconsin law provides a timeline for when a TPR petition must be filed under a number of circumstances. If a child in need of protection or services has been placed outside the home for 15 of the most recent 22 months, the agency must file a petition to terminate parental rights. Any time while the child was a runaway from the out-of-home placement or was residing in a trial reunification is not counted in the 15-month period. [s. 48.417 (1) (a), Stats.]

If a court finds that a child was abandoned while under one year of age, the agency must file a petition to terminate parental rights within 60 days after the child was found to have been abandoned. [s. 48.417 (1) (b), Stats.] Also, if a court finds that a parent has committed or attempted murder of the child's other parent, or committed an assault crime that resulted in great or substantial bodily harm to the child or another child of the parent, the agency must file a TPR petition within 60 days after the court has determined that this circumstance exists and that therefore no reasonable efforts are required to return the child to the home. [s. 48.417 (1) (c) and (d), Stats.]

However, a petition to terminate parental rights is not required within the above timeframes in any of the following circumstances:

- The child is being cared for by a fit and willing relative.
- TPR is not in the best interests of the child, as described and documented in the child's permanency plan.
- The services necessary for the safe return of the child to the home have not yet been provided within the time period prescribed in the permanency plan.
- The services necessary to prevent the breakup of an Indian child's family have not yet been provided within the time period prescribed in the permanency plan.
- Grounds for involuntary TPR do not exist.

[s. 48.417 (2), Stats.]

Federal Law

Wisconsin law giving the timeline for filing an action for TPR is based on federal law. The Adoption and Safe Families Act of 1997 (ASFA) provides that a petition for TPR "shall" be filed under any of the following circumstances:

- The child has been in foster care for 15 of the most recent 22 months.
- The child is an abandoned infant.
- The parent has committed murder of another child of the parent; committed voluntary manslaughter of another child of the parent; aided or abetted, attempted, conspired, or solicited such a murder or manslaughter; or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent.

ASFA provides exceptions, and does not require filing of a TPR action, if the child is being cared for by a relative; the welfare agency has documented a compelling reason why TPR would not be in the best interests of the child; or the agency has not provided services that are necessary for the child's safe return to the home. [P.L. 105-89 s. 103; 42 U.S.C. 675 (5) (E).]

Adjoining States

The timelines for filing a TPR petition in states adjoining Wisconsin are as follows:

Illinois: The period of time in foster care is a ground for TPR if a child has been in foster care for 15 months out of any 22-month period, unless the parent can prove that it is more likely than not that it will be in the best interests of the child to be returned to the home within six months from the date the TPR petition was filed. The calculation of the 15-month time period does not include any periods in which the custodian or guardian failed to make reasonable efforts to reunify the child with the family. [s. 750 ILCS 50/1. D. (m-1), Ill. Comp. Stat.]

Iowa: Requires that a petition for TPR be filed by the end of the child's 15th month of foster care placement out of the most recent 22-month period, unless the child is being cared for by a relative; there is a documented, compelling reason that filing TPR would not be in the best interests of the child; or the Department of Human Services has not provided services that are necessary for the child's safe return to the home and a limited extension is necessary to complete the services. [s. 232.111. 2. a. (1) and b., Iowa Code.]

Michigan: Allows a petition for TPR to be filed if a child remains in foster care after the six-month review hearing or the 12-month permanency planning hearing from the date the child was removed from the home. [s. 712A.19b. (1), Mich. Comp. Laws.]

Minnesota: Requires that a petition for TPR, or petition to transfer permanent physical custody to a relative, be filed if the child has been in out-of-home care for 15 of the most recent 22 months, unless there is a compelling reason that filing TPR would not be in the best interests of the child, or the responsible social services agency has not provided reasonable efforts necessary for the child's safe return to the home. [s. 260C.301 Subd. 4., Minn. Stat.]

INVOLUNTARY TPR ADJUDICATION PROCESS

The Wisconsin statutes provide that a hearing on a TPR petition must be held within 30 days after the petition is filed. At this hearing, the court must determine whether any party wishes to contest the petition, and must inform the parent of the right to request a jury trial. If the petition is contested, the court must set a date for a fact-finding hearing within the next 45 days, unless the parties agree to commence the hearing immediately. [s. 48.422, Stats.]

At the fact-finding hearing, the court or a jury must determine whether any grounds for TPR exist. If the hearing is to a jury, the jury determines only whether any grounds for TPR have been proven. If it is determined that TPR grounds exist, the court must find the parent unfit, and then determine whether or not the termination should be granted in the best interests of the child. This hearing to determine if TPR is in the best interests of the child (the dispositional hearing) must commence immediately after the fact-finding hearing, or within the next 45 days if the parties agree or the child's history report has not yet been received. [s. 48.424 (3) and (4), Stats.] The court must enter the final TPR order within 10 days of the dispositional hearing. [s. 48.427 (1), Stats.]

A parent has a right to an attorney for the involuntary TPR process, and if the parent is unable to afford counsel, an attorney may be assigned by the State Public Defender or appointed by the court. [s. 48.23 (2) and (4), Stats.]

The hearings are closed to the public, and may exclude the child, although a child 12 years of age or older is a party to the action, as are a child's guardian, guardian ad litem, and legal custodian (if appointed). [ss. 48.42 (2) (c) and (e), and 48.424 (2), Stats.] The court must allow a foster parent or other physical custodian of the child to make a written or oral statement during a hearing that is relevant to the determinations, though the foster parent or other physical custodian is not a party to the proceedings. [ss. 48.42 (2g) (am), and 48.427 (1m), Stats.]

After a judgment for involuntary TPR is entered by a court, the parent may petition the court for a rehearing only on the ground that new evidence has been discovered affecting the advisability of the court's adjudication. The petition for rehearing must be filed within one year of the judgment, or sooner if a court is granting an adoption. [s. 48.46 (1m), Stats.]

A parent may appeal the judgment for involuntary TPR as a matter of right. [s. 48.43 (6), Stats.] Appeal rights are lost if notice of intent to appeal is not filed within 30 days of the final judgment. [s. 809.107 (2) (bm), Stats.] Wisconsin provides expedited timelines for appeal from TPR judgments that move the case through the appeals process more quickly than other cases, such as requiring the appellant to file their brief within 15 days of the filing of the record. The court of appeals is also required to give preference to a TPR case, and to issue its decision within 30 days after filing of all briefs. [s. 809.107 (6), Stats.]

Other States' Use of Jury Trial for TPR

According to the National Center for Juvenile Justice (NCJJ), Wisconsin is among five states that permit or require a jury trial for TPR cases. The other states are Oklahoma, Texas, and Wyoming, with Virginia using an "advisory jury." The remaining states have case law, statutes, local court rules, or common practice that specifically prohibits a jury trial in TPR cases. [Szymanski, L., *Is a Jury Trial Ever Available in a Termination of Parental Rights Case?*, NCJJ Snapshot Vol. 16 No. 3 (March 2011).]

Arizona presents a unique case because it granted parents the right to a jury trial for TPR cases for a three-year trial period, and the outcomes were studied by the Arizona Supreme Court. Arizona allowed the right to a jury trial for TPR cases from December 18, 2003, through December 31, 2006, and does not currently allow the right to a jury trial.

The Arizona Supreme Court, Administrative Office of the Courts, analyzed the second year of the allowed jury trials and issued a report presenting data on the frequency, resolutions, and timeliness of both types of TPR trials (to a court or to a jury). Some of the report's findings are not relevant to Wisconsin, and it is not clear how comparable the experience in Arizona is to the experience in Wisconsin. Nonetheless, the findings may be helpful to committee discussion.

Among the Arizona report's findings, it was noted that certain parental or case characteristics were more likely to result in a jury trial request. These included chronic substance abuse by parents, parental mental illness, "time in care" cases where children had been in out-of-home placement for extended periods, and parental involvement in the criminal justice system. [Siegel, G.C., and Robbins, M., *Termination of Parental Rights by Jury Trials in Arizona: A Second Year Analysis*, Arizona Supreme Court, Administrative Office of the Courts, Finding No. 3 (December 16, 2005).]

Other results of the Arizona analysis that may be relevant to the committee include finding that:

- Many requested jury trials were never held; 86% of jury trial requests had not resulted in completed jury trials. In contrast, 66% of court trial requests resulted in completed court trials. [Finding Nos. 6 and 7.]
- Fifty-seven percent of TPR jury trial cases in Maricopa County for which potential jurors were summoned to court actually resulted in a completed jury trial, which was below the county's completion rate of 83% for all other types of jury trials. A "substantial number" of jury trials were cancelled on the first day they were set to commence. [Finding No. 8.]
- Jury trials had taken an average of 113 days from the point of a child's permanency hearing to completion or verdict, versus 148 days for court trials. [Finding No. 9.]
- Direct costs for jury trials were "substantially higher" than direct costs for court trials, with a 76% higher cost per jury trial case in Pima County. This figure does not include the cost for juror duty pay. [Finding No. 10.]
- Jury trials had an adverse effect on court calendars whether or not they occurred. [Finding No. 13.]
- It had been difficult in Maricopa County to hold jury trials within 90 days of the permanency hearing as required by Arizona Court Rule. [Finding No. 14.]
- Jury trials posed "substantially higher" workload demands (three to 10 times more than court trials for most key parties), though the report notes that part of the workload increase could have been due to the history of little to no jury trial experience. [Finding No. 15.]
- The majority of court and jury trials were appealed, but jury trials had more elements that could lead to a mistrial. [Finding No. 16.]

Overall, the report found mixed opinions regarding whether or not parents should have the right to request a jury trial for an involuntary TPR action. [Finding No. 20.]

The full report on the second year analysis of Arizona's TPR jury trial experience is available at: <http://www.azcourts.gov/LinkClick.aspx?fileticket=OI8ZEF-JWOI%3d&tabid=2023>.

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