



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 5

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

FROM: Margit Kelley, Staff Attorney

RE: Proposal to Revise a Ground for Involuntary Termination of Parental Rights

DATE: November 8, 2012

This Memo describes a suggestion provided to the committee by the Wisconsin State Public Defender's Office (SPD) to revise the ground for an involuntary termination of parental rights (TPR) based on a person's failure to assume parental responsibility. This Memo describes the current statute, its history, and recent case law interpreting the statute and also sets forth the SPD's recommendation to amend the statute.

BACKGROUND

Current Law

The TPR ground of failure to assume parental responsibility is established by proving that the parent has not had a substantial parental relationship with the child. "Substantial parental relationship" is defined as the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child.

In evaluating whether the person has had a substantial parental relationship with the child, the court may consider whether the person has ever expressed concern for or interest in the child's support, care, or well-being; whether the person has neglected or refused to provide care or support for the child; and whether, with respect to the father, the parent has ever expressed concern for or interest in the mother's support, care, or well-being during her pregnancy. [s. 48.415 (6), Stats.]

2005 Wisconsin Act 293

Prior to 2005 Wisconsin Act 293, this ground required that the parent had “**never** had a substantial relationship with the child.” The Special Committee on Adoption and Termination of Parental Rights Law recommended that this ground be changed to “**not** had a substantial relationship.”

According to the committee’s report to the Legislature, this change was recommended because the committee heard testimony suggesting that requiring a showing that the person had **never** had a substantial relationship with the child could be difficult if the parent had ever shown any interest or had any contact with the child. [Special Committee on Adoption and Termination of Parental Rights Law, *Wisconsin Legislative Council Report to the Legislature*, July 25, 2005, p. 11, available at: http://legis.wisconsin.gov/lc/committees/study/prior/files/2005/rl_2005_07.pdf.] Based upon the committee’s recommendation, the law was amended to provide that a failure to assume parental responsibility is established by proving that the parent **has not had** a substantial parental relationship with the child.

Tammy W.-G. v. Jacob T. (In re Gwenevere T.)

In 2011, the Wisconsin Supreme Court issued a decision interpreting the change from “**never** having had a substantial relationship” to “**not** having had a substantial relationship” with the child. The Court concluded that the statute prescribes a totality-of-the-circumstances test, requiring the fact-finder to consider any support or care, or lack thereof, that the parent provided the child throughout the child’s entire life, which may include a fact-finder’s review of the reasons why a parent was not caring for or supporting the child, and exposure of the child to a hazardous living environment. [*Tammy W.-G. v. Jacob T. (In re Gwenevere T.)*, 2011 WI 30.]

Under the facts of this case, the father was an involved “stay at home” dad for the first four months of the child’s life. After the mother and father separated, the mother required that visits be supervised, because of the father’s alcohol abuse and drug abuse of marijuana, which the mother felt could affect the child’s safety. The father’s contacts with the child dwindled to two to three telephone contacts between 2007 and 2008, at most, and the mother filed the TPR petition in April of 2009. The Court found that the father had never sought assistance from the courts to have contact or placement and, since the separation, had not provided any financial or material support for the child or taken any steps to set up child support, although he had offered money to the mother after the separation that was refused.

In this case the jury was asked if the father had “failed to assume parental responsibility” for the child, and the jury’s verdict was that he had failed to do so. The Court found that there was sufficient evidence to support the jury’s verdict. The Court cited the “four-and-a-half years” of the child’s life during which the father had no actual custody and provided no financial or material support compared to the care and support that he provided “for only the first four months” of the child’s life.

The Court found the father’s limited contacts with the child supported the jury’s finding that he had not demonstrated a substantial parental relationship with the child. The Court acknowledged that the mother’s requirement for supervised visits may have been frustrating to the father, but stated that it did not excuse him from his parental responsibilities or give him a “free pass” on those responsibilities.

In reviewing the language of the statute, the Court concluded that a parent's actions throughout the entirety of the child's life should be considered when determining whether the person has assumed parental responsibility. The Court noted that the phrase "have not had" is not limited by a specific time period, and gives latitude for the fact-finder to consider the entirety of the child's life in determining if the parent's actions have been sufficient to find that he has assumed parental responsibility. The Court also noted that the words "significant" and "daily" in regard to protection and care of the child suggest more than a brief assumption of parental responsibility in a short portion of the child's life.

SUGGESTION FOR COMMITTEE'S CONSIDERATION

The committee has received a suggestion from the SPD to consider revising the ground of a failure to assume parental responsibility by repealing the change from 2005 Wisconsin Act 293 and instead reinstating the requirement for the fact-finder to find that the person had "never" had a substantial relationship with the child.

The amendment to s. 48.415 (6), Stats., could appear as follows:

(6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have **not never** had a substantial parental relationship with the child.

(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has **ever** expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has **ever** expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

MSK:ksm