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Representative Samantha Kerkman, Chair
Special Committee on Permanency for Young Children in the Child Welfare System
315 North, State Capitol
Madison, WI 53707

Dear Chair Kerkman,

In reviewing Memo No. 4, *Proposals to Revise Certain Grounds for Involuntary Termination of Parental Rights*, an additional topic for the committee's consideration could be addressing the temporal component of failure to assume parental responsibilities issue raised by the Wisconsin Supreme Court's decision in *Tammy W-G v. Jacob T.*

In 2004-05, the Special Committee on Adoption and Termination of Parental Rights took up a proposal to amend one of the grounds for termination involving "failure to assume parental responsibility." A suggestion was made to incorporate a temporal component--i.e. that the parent failed to or did not assume parental responsibility for some specific period of time. The committee rejected the proposal, agreeing that this provision was intended to apply to parents who had not ever had a parental relationship, not to those whose parental relationship was merely disrupted or curtailed for a period of time such as is the case when "abandonment" is the alleged ground. As a compromise, the committee agreed to change the key trigger provision from "have never had" a substantial parental relationship to "have not had" a substantial parental relationship. The intent was to account for the a hypothetical situation involving de minimis contact or assumption of parental responsibility (e.g. being present for birth and holding the child in the hospital but having no further contact or parental relationship). This minor change was incorporated into 2005 Wisconsin Act 293, and the law worked as planned until May 2011.

The Wisconsin Supreme Court's 5-2 decision in *Tammy W-G v. Jacob T.*, 2011 WI 30 (decided May 17, 2011), interpreted the minor change made by 2005 Act 293 to mean the opposite of what the committee and legislature intended. Under the court's interpretation in *Tammy W-G.*, the fact-finder must now examine the totality of the circumstances including "...any support or care, or lack thereof, the parent provided the child throughout the child's life." The impact of this decision has changed how TPR cases are charged and litigated. It lowers the government's or plaintiff's burden when it seeks to terminate a parental relationship. It means that fathers and mothers who have parented their child for months or even years now can and do have their rights terminated under the expanded "failure to assume" provision. And, unlike when "abandonment" is the alleged ground, when "failure to assume" is alleged the defense of "good cause" is not available. That is, in a "failure to assume" case the parent being terminated is not allowed to show that there were good reasons for lack of contact or involvement, such as when a parent seeking to terminate the rights of the other parent makes visitation or contact impossible or so burdensome that continued parenting by the other becomes impractical or impossible.

The impact the court's decision has had is demonstrated by the facts of the *Tammy W-G* case itself. In *Tammy W-G*, parents Jacob and Tammy had been living together in Hibbing, Minnesota for about a year

when their daughter was born in January 2005. For the first two months after their child's birth the two shared parental responsibilities. Tammy acknowledged that Jacob changed and fed his daughter and provided financial support. After two months Tammy got a job. For the two months after that, Jacob was a stay-at-home dad with full parental responsibility while Tammy was at work. The two planned to move back to their previous home in Illinois June 2005. Instead, however, in May 2005 Tammy moved out, took their daughter and moved in with a new boyfriend, Douglas G.

Jacob and Tammy initially agreed to a shared custody plan whereby their child would live with each parent for alternating two-month blocks until the child was of school age. The plan was never implemented because Tammy changed her mind and refused. Thereafter, Tammy allowed only brief supervised visits. Jacob moved to Illinois as planned to find work and made the six-to-seven-hour trip from his home in Illinois to northern Minnesota two or three times to visit his daughter in 2006. Jacob offered financial support but Tammy refused, saying she wanted Jacob out of her life. There were no more personal visits after November 2006, but Jacob made phone calls to his daughter in 2007-08.

Jacob spoke with his daughter and Tammy on his daughter's birthday in January 2009. Jacob tried to plan a visit for February '09 but Tammy refused, telling Jacob she would see him in court. By this time Tammy and Douglas G. were married and living in Wisconsin. Tammy filed a private TPR action with "failure to assume" as the sole statutory ground. Tammy's attorney was allowed to argue that Jacob had not assumed parental responsibility within the past two years. The jury voted 11-1 in favor of termination. Jacob appealed, the court of appeals certified the case to the Supreme Court, and the Supreme Court affirmed.

Many more *Tammy W-G* -like parents have had their rights terminated on the "failure to assume" ground despite having previously been the sole or co-caregiver for months or even years. The *Tammy W-G* decision circumvents the use of other grounds that would be more appropriate and legislatively sanctioned for the involuntary termination of parental rights, such as abandonment, which better protect the due process rights of the respondent and allow the parent to demonstrate "good cause" as a defense.

The change that was made to the "failure to assume" law was simple; we substituted one word in Wis. Stat. § 48.415(6)(a), changing "never" to "not," and we struck one word from § 48.415(6)(b). Attached is draft legislation, LRB 2217, which would reverse the statutory change that was re-interpreted by the Supreme Court contrary to the intentions of the 2005 Special Committee on Adoption and Termination of Parental Rights.

Sincerely,

Adam Plotkin
Legislative Liaison

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