



WISCONSIN LEGISLATIVE COUNCIL LEGAL MEMORANDUM

Termination of Parental Rights

Under current law, “termination of parental rights” (TPR) means that all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed, pursuant to a court order. Parental rights may be terminated either voluntarily or involuntarily.

VOLUNTARY TPR

The juvenile court (“court”) may terminate parental rights with the parent’s consent. The court may accept voluntary consent to TPR only under the following conditions:

1. The parent appears at the hearing on the TPR petition and gives his or her consent. Before accepting the consent, the judge must explain the effect of TPR and question the parent to ensure that the consent is informed and voluntary.
2. If the court finds that it would be difficult or impossible for the parent to appear in person at the hearing on the TPR petition, the court may accept written consent as given before an embassy or consul official, a military judge or a judge of court in another county or state or in a foreign jurisdiction.
3. A person who may be the father of a nonmarital child may also consent to TPR by signing a written, notarized statement that he has been informed of and understands the effect of TPR and voluntarily disclaims any rights to the child,

including the right to notice of TPR proceedings.

4. If the TPR proceeding is held prior to a proceeding for adoption by the child’s stepparent, or if the child’s birth parent is a resident of a foreign jurisdiction, the parent may also consent to the TPR by filing an affidavit stating that the parent has been informed of and understands the effect of a TPR order and voluntarily disclaims all rights to the child, including the right to notice of TPR proceedings.

The capacity of a parent to give voluntary and informed consent may be an issue in a voluntary TPR proceeding. This issue may be raised by a guardian ad litem (GAL) representing the child’s best interest, who must inform the court of any reason to doubt the parent’s capacity. The court must then determine whether the parent is capable of giving informed and voluntary consent. If the court finds that the parent is incapable of knowingly and voluntarily consenting, the court must dismiss the TPR proceeding. Such a dismissal, however, does not preclude an involuntary TPR. [s. 48.41, Stats.]

INVOLUNTARY TPR

Under current law, the grounds for involuntary TPR are as follows:

Abandonment

Abandonment is established by proving any of the following:

1. The child has been left without care or support and the petitioner has investigated the situation and has been unable to find either parent for 60 days.
2. The child has been left by the parent without care or support in a place or manner that exposes the child to substantial risk of great bodily harm.¹
3. A court has found that the child was abandoned in a children in need of protection or services (CHIPS) proceeding² or that the parent committed criminal abandonment of the child when the child was under one year of age.
4. A court has placed the child, or continued placement, outside the parent's home and the parent has not visited or communicated with the child for at least three months.
5. The parent left the child with another person, knows or could discover the whereabouts of the child and has not visited or communicated with the child for at least six months.

Current law specifies that *incidental contact* between a parent and child does not preclude the court from finding that the parent has failed to visit or communicate with the child under items 4. and 5., above. Also, the time periods under those provisions do not include any periods during which the parent is prohibited by a court order from visiting or communicating with the child.

Also under current law, abandonment is *not* established under items 4. and 5., above, if the parent proves both of the following by a preponderance of the evidence:

1. Good cause for having failed to visit with the child throughout the time period specified.
2. Good cause for having failed to communicate with the child throughout the time period specified.

If the parent proves good cause for having failed to communicate with the child, the parent must show that he or she either: (a) communicated about the child with the person who had physical custody of the child or with the agency responsible for the care of the child; or (b) had good cause for not communicating about the child.

Relinquishment

Relinquishment is shown by proving that the parent voluntarily relinquished custody of the child when the child was 72 hours old or younger.

Continuing Need of Protection or Services

Continuing need of protection or services is established by proving any of the following:

1. The child has been adjudged CHIPS and placed, or continued in placement, outside of the home; the agency responsible for the care of the child has made a reasonable effort³ to provide the services to the family; the child has been placed outside the home for a cumulative total of at least six months; the parent has not met the established conditions for safely returning the child to the home; and there is a substantial likelihood that these conditions will not be met within 12 months.
2. On at least three occasions the child has been adjudicated CHIPS due to abuse or neglect or being at substantial risk of abuse or neglect and, in connection with each of those adjudications, has been placed outside the home due to conditions caused by the parent.

Continuing Parental Disability

Continuing parental disability is established by proving all of the following:

1. The parent is presently, and for at least two of the previous five years has been, an inpatient at a hospital, licensed treatment facility or state treatment facility due to mental illness or developmental disability.
2. The parent's condition is likely to continue indefinitely.
3. The child is not receiving adequate care by a relative with legal custody, a parent or a guardian.

Continuing Denial of Periods of Physical Placement or Visitation

Continuing denial of periods of physical placement or visitation is established by proving all of the following:

1. The parent has been denied physical placement by a court order in an action affecting the family (e.g., a divorce) or denied visitation under the Children's Code or the Juvenile Justice Code.
2. It has been at least one year since the parent was denied physical placement or visitation and the court has not modified its order.

Child Abuse

Child abuse is established by proving a pattern of physically or sexually abusive behavior by the parent which is a substantial threat to the child's health and either of the following:

1. The parent has killed or injured a child and has been, consequently, convicted of a felony.
2. The child has been removed from the parent's home pursuant to a CHIPS order due to abuse or a substantial risk of abuse of the child.

Failure to Assume Parental Responsibility

Failure to assume parental responsibility is established by proving that the parent never had a substantial parental relationship with the child. "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 relationship with the child, the court may consider whether the person has expressed concern for or interest in the child's support, care or well-being has neglected or refused to provide care or support; 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.

Incestuous Parenthood

Incestuous parenthood is established by proving that the parent is also related, either by blood or adoption, to the child's other parent in a degree of kinship closer than second cousin.

Homicide or Solicitation to Commit Homicide of Parent

Homicide or solicitation to commit homicide of a parent is established by proving that one of the child's parents has been a victim of first- or second-degree intentional homicide, first-degree reckless homicide or a comparable crime under federal or another state's law, or has been the intended victim of a solicitation to commit first-degree intentional homicide or a comparable crime under federal or another state's law, and that the person whose parental rights are sought to be terminated has been convicted of that offense.

Parenthood as a Result of Sexual Assault

Parenthood as a result of sexual assault is established by proving that the child was conceived as a result of sexual assault. Conception as a result of sexual assault may be

proved by evidence of conviction or other evidence indicating that the person who may be the father of the child committed, during a possible time of conception, a sexual assault against the mother of the child.

If the child was conceived as a result of first- or second-degree sexual assault of a child, the child's mother may address the court regarding her desire for the termination of the father's parental rights.

Commission of a Serious Felony Against One of the Person's Children

Commission of a serious felony⁴ against one of the person's children is established by proving that a child was the victim of a serious felony committed by the parent as evidenced by a conviction.

Prior Involuntary TPR to Another Child

Prior involuntary TPR is established by proving both of the following:

1. The child has been adjudged to be CHIPS based upon having been abandoned, abused or neglected.
2. Within the three years prior to the CHIPS adjudication, a court has ordered involuntary TPR with respect to another child.

[s. 48.415, Stats.]

PETITION FOR TPR

Filing

A TPR proceeding is initiated by a petition filed by the child's parent, an agency (i.e., Department of Health and Family Services (DHFS) or a county department of human or social services of a licensed child welfare agency) or a person designated by the county board of supervisors.

An agency or the district attorney, corporation counsel or a person designated by the county

supervisors must file a TPR petition, or join in an existing petition, if any of the following circumstances apply:

1. The child has been placed outside of his or her home for 15 of the last 22 months, not including any period during which the child was a runaway from an out-of-home placement or the first six months of any period during which the child was returned home for a trial visit.
2. The child was abandoned when under one year of age.
3. The parent committed, aided or abetted the commission of, or solicited, conspired or attempted to commit first- or second-degree intentional homicide, first-degree reckless homicide or felony murder against his or her child.
4. The parent committed a violation of substantial or aggravated battery; first- or second-degree sexual assault; first- or second-degree sexual assault of a child; repeated acts of sexual assault of the same child; or child abuse resulting in great bodily harm to the child or another of the parent's children.

An agency or the district attorney (DA), corporation counsel or other appropriate official need not file or join a TPR petition, however, if any of the following circumstances apply:

1. The child is being cared for by a fit and willing relative.
2. The child's permanency plan⁵ indicates and provides documentation that TPR is not in the child's best interest.
3. The agency providing services to the child and family has not provided the family, consistent with the time period in the child's permanency plan, with the services necessary for the safe return of the child to his or her home.

4. Grounds for involuntary TPR do not exist.

[s. 48.417, Stats.]

Visitation or Contact Rights

If a TPR petition is for an involuntary TPR, the petitioner may also petition the court for a temporary order prohibiting the person whose parental rights are sought to be terminated from visiting or contacting the child. In doing so, the petitioner must allege facts that show that prohibiting visitation or contact would be in the child's best interest.

The court may issue a temporary order *ex parte* or hold a hearing on whether to issue an injunction. A temporary order remains in effect until an injunction hearing may be held and suspends any similar orders under a CHIPS or juveniles in need of protection or services (JIPS) order. The court must hold the hearing on or before the date of the hearing on the TPR petition. The court may grant the injunction if it finds it would be in the best interest of the child.

Current law further provides that the court must issue a temporary order and injunction prohibiting visitation or contact if the parent has been convicted of first- or second-degree intentional homicide of the child's other parent. This provision does not apply if the court determines by clear and convincing evidence that visitation or contact would be in the child's best interests. The court must consider the child's wishes in making that determination.

Who Must be Served the Summons Petition

The petitioner must ensure that summons and the petition are served upon the following:

1. The parent or parents of the child, unless they have waived the right to notice.
2. A person who may be the father, if the child is a nonmarital child who is not adopted and whose parents do not subsequently

intermarry and paternity has not been established.

3. The child's guardian, GAL and legal custodian.
4. A substitute care provider, excluding foster parents.
5. The child, if 12 years of age or older.

[s. 48.42 (2), Stats.]

In addition, the petitioner must notify any foster parent, treatment foster parent or other physical custodian of all hearings on the petition. The first notice must be written and mailed. Subsequent notice may be by telephone at least 72 hours before the time of the hearing.

The court must give a foster parent, treatment foster parent or other physical custodian an opportunity to be heard at the hearing by presenting a written or oral statement that is relevant to the issues to be determined at the hearing. Current law specifies that such a person does not become a party to the proceeding, however. Also, failure to give notice to a foster parent or physical custodian does not deprive the court of jurisdiction. If a foster parent or physical custodian is not given notice, the person may request a rehearing prior to the entry of an order dismissing the petition or terminating the parental rights. If the request is made, the court must order a rehearing. [s. 48.42 (2g), Stats.]

Current law provides one exception to the notice requirement. Notice is not required for a person who may be the father of a child conceived as a result of sexual assault. This exception applies if a physician attests to a belief that a sexual assault has occurred or if the putative father has been convicted of sexual assault for conduct which may have led to the child's conception. These fathers do not have standing to appear and contest a TPR petition. This provision does not apply, however, to a putative father who was under age 18 at the time of the sexual assault. [s. 48.42 (2m), Stats.]

Manner of Serving Summons and Petition

Generally, a copy of the summons and TPR petition must be served personally upon the parties, if known, at least seven days before the date of the hearing. If with reasonable diligence a party cannot be served, the notice must be published in a newspaper. The petitioner must choose a newspaper that is likely to give notice. This is determined by considering, if known, the residence of the party; the residence of relatives of the party; or the last known location of the party. Along with information concerning the proceedings and the hearing, a newspaper notice must contain the following:

1. The name of the party to whom notice is given.
2. A description of the party.
3. The former address of the party.
4. The approximate date and place of conception of the child.
5. The date and place of the birth of the child.

The notice may not include the mother's name unless she consents. Also, the notice may not contain the name of the child unless the court finds that this information is essential to give notice to the father. [s. 48.421, Stats.]

RIGHT TO COUNSEL

Under current law, in an involuntary TPR proceeding, any minor parent who appears before the court must be represented by counsel and may not waive counsel. A minor parent who petitions for voluntary TPR must be represented by a GAL.

An adult parent involved in an involuntary TPR proceeding must also be represented by counsel. An adult parent may waive counsel, however, if the court is satisfied that the waiver is made knowingly and voluntarily. [s. 48.23 (2), Stats.]

The court must refer a parent who has a right to be represented by counsel to the State Public Defender who must appoint counsel without a determination of indigency. Such parents are still entitled, however, to retain counsel of their own choosing at their own expense. [s. 48.23 (4) and (5), Stats.]

GAL REPRESENTATION

The court may appoint a GAL in any appropriate matter under the Children's Code. In addition, in certain TPR proceedings, the court must appoint a GAL.

First, the court must appoint a GAL for a minor parent petitioning for voluntary TPR. The GAL must interview the minor parent, investigate the reason for the TPR, assess the voluntariness of the consent and inform the minor parent of his or her rights and of the alternatives to, and the effect of, TPR.

Second, the court must appoint a GAL for any child who is the subject of a TPR proceeding if the child is the subject of a contested adoption proceeding or a proceeding to appoint a relative as a guardian. [s. 48.235 (1) (a), (b) and (c) and (5), Stats.]

COURT REPORT BY AN AGENCY

If the TPR petition is filed by an agency, or if the court orders an agency report, the agency must file a report with the court that includes all of the following:

1. The social history of the child.
2. The child's medical record including: (a) the medical and genetic history of the birth parents and any information about the child's grandparents, aunts, uncles, brothers and sisters; (b) a report of any medical examination of either birth parent within the last year; (c) a report of the child's prenatal care and medical condition at birth; and (d) the medical and genetic history of the child

and any other relevant medical and genetic information.

3. A statement of the facts supporting the need for TPR.
4. If the child has been previously adjudicated CHIPS, a statement of the steps taken to remedy conditions in the family and the parent's cooperation. If the child has been removed from the home, the report should also include the reasons why the child cannot be returned safely to the family.
5. A statement of other services which might allow the child to return home safely.
6. A statement applying the standard and factors, as described below, to the case before the court.
7. If the report recommends TPR for both of the child's parents or the only living or known parent, a statement regarding the likelihood the child will be adopted.
8. If an agency determines it is unlikely the child will be adopted, or adoption would not be in the child's best interests, a plan for a permanent family setting for the child.

The agency must prepare the medical record within 60 days after the date of the TPR petition. [s. 48.425, Stats.]

HEARING ON THE PETITION

The hearing on the 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 parties of their right to a jury trial and the rights of a putative party to paternity.

If the petition is contested, the court must set a date for a fact-finding hearing that is within 45 days after the hearing on the petition, unless all of the parties agree to commence with the hearing immediately.

In a case in which a child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry and paternity has not been established, the court must hear testimony concerning the paternity of the child. Based on this testimony, the court must determine whether all interested parties who are known have been notified as required. If they have not, the court must adjourn the hearing and order appropriate notice. If the court determines that it would substantially increase the likelihood of notice and the petitioner has not already published notice or the publication used was not sufficient, the court must adjourn the hearing for a period not more than 30 days and order notice. If the court determines that constructive notice will not substantially increase the likelihood of notice, the court must proceed with the hearing.

Before accepting an admission of the alleged facts in a petition, the court must do all of the following:

1. Address the parties present and determine that the admission is voluntary, with understanding of the nature of the acts alleged and the potential dispositions.
2. Establish whether any promises or threats were made to elicit an admission and alert all unrepresented parties that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.
3. Establish whether a proposed adoptive parent of the child has been identified.
4. Make inquiries to satisfactorily establish that there is a factual basis for the admission.

[s. 48.422, Stats.]

RIGHTS OF PERSONS ALLEGING PATERNITY

If a man who alleges that he is the father appears at the hearing on the TPR petition and wishes to contest the TPR, the court must schedule a hearing on the issue of paternity or, if all parties agree, immediately commence

hearing testimony regarding paternity. The court must inform the man claiming to be the father of right to his counsel. The man must prove paternity by clear and convincing evidence. [s. 48.423, Stats.]

FACT-FINDING HEARING

The purpose of the fact-finding hearing is to determine whether grounds exist for TPR in those cases in which the termination is contested.

The hearing may exclude the child and is closed to the public.

If the hearing is to a jury, the jury may only decide whether any grounds for TPR have been proven. The court must decide what disposition is in the best interests of the child.

If grounds for TPR are found by the court or jury, the court must find the parent unfit; however, such a finding does not preclude dismissal of the petition. The court must then proceed immediately to hear evidence and motions relating to the disposition. The court may consider disposition or schedule the dispositional hearing within 45 days if either of the following conditions exist:

1. All parties to the proceeding agree.
2. The court has not yet received a report on the child's history from an agency and now directs the agency to prepare this report.

If the court delays making a disposition, it may transfer temporary custody of the child to an agency for placement of the child until the dispositional hearing. [s. 48.424, Stats.]

STANDARD AND FACTORS

Current law specifies the standard and factors the court must consider in making a decision about the appropriate disposition.

Standard

The best interests of the child is the prevailing factor considered by a court in determining the disposition of all TPR proceedings.

Factors

In considering the best interests of the child, the court must consider the following:

1. The likelihood of the child's adoption.
2. The age and health of the child, both at the time of the disposition and, if applicable, at the time of removal from the home.
3. Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
4. The wishes of the child.
5. The duration of the separation of the parent from the child.
6. Whether the child will be able to enter into a more stable and permanent family relationship as a result of the TPR, considering the child's current placement, the likelihood of future placements and the results of prior placements.

[s. 48.426, Stats.]

DISPOSITIONS

At the dispositional hearing, any party may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations. After receiving evidence, the court must enter a disposition within 10 days.

In addition to any evidence presented to the court, the court must give the foster parent, treatment foster parent or other physical custodian of the child an opportunity to make a written or oral statement relevant to the issue of disposition.

The court may enter any of the following dispositions:

1. Dismiss the petition if the evidence does not warrant the TPR.
2. Order TPR of one or both parents.
3. If the rights of both parents or of the only living parent are terminated and if a guardian has not been appointed either: (a) transfer guardianship and custody of the child pending adoptive placement to a county department; a licensed child welfare agency; DHFS; a relative with whom the child resides, if the relative has filed a petition to adopt the child or is a kinship care relative; or an individual who has been appointed guardian of the child by a court of a foreign jurisdiction; or (b) transfer guardianship of the child to an agency and custody of the child to an individual in whose home the child has lived for at least 12 consecutive months immediately prior to the TPR or to a relative.

If the court enters a TPR order, the court must do all of the following:

1. Inform each birth parent whose rights have been terminated of current law permitting access for medical and other information regarding a child's birth parent following TPR.⁶
2. Forward to the DHFS: (a) the name and date of birth of the child whose birth parent's rights have been terminated; (b) the names and current addresses of the child's birth parents, guardian and legal custodian; and (c) the medical and genetic information obtained.

[s. 48.427, Stats.]

APPEAL

Only a parent who has consented to a TPR or who did not contest a petition for involuntary TPR and whose rights were terminated may file a motion with the court for relief from the judgment. Such a motion must be based on one of the following grounds:

1. Mistake, inadvertence, surprise or excusable neglect.
2. Newly discovered evidence which entitles the parent to a new trial (i.e., material evidence that has come to the parent's notice after trial, despite diligence in seeking it, that would probably change the result of the trial).
3. Fraud, misrepresentation or other misconduct of an adverse party.
4. The judgment is void.
5. A prior judgment on which the judgment is based has been reversed or otherwise vacated.

A motion for relief must be filed within 30 days after the entry of the TPR judgment unless the parent files a notice of his or her intent to file an appeal within 30 days after the entry of the TPR judgment, in which case the motion must be filed within 30 days of receiving the trial transcript.

The motion does not affect the finality or suspend the TPR order or judgment. These motions and appeals to the court of appeals are the exclusive remedies for a parent to obtain a new hearing in a TPR proceeding. [s. 48.46, Stats.]

This memorandum was prepared on September 5, 2002, by *Anne Sappenfield, Senior Staff Attorney.*

¹ “Great bodily harm” is defined under current statutes to mean bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury. [s. 939.22 (14), Stats.]

² In a CHIPS proceeding, the juvenile court has jurisdiction over a child who is alleged to be CHIPS for specified reasons such as having been abused, neglected or abandoned. If the court determines that a child is CHIPS, the court may order services for the child and his or her family and may place the child outside of the child’s home.

³ In this provision, “reasonable effort” means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.

⁴ In this provision, “serious felony” means any of the following:

- a. The commission of, the aiding or abetting of, or the solicitation, conspiracy or attempt to commit, a violation of first- or second-degree intentional homicide, first-degree reckless homicide, felony murder or a violation of the law of any other state or federal law, if that violation would be a violation of one of those offenses if committed in this state.
- b. The commission of a violation of substantial or aggravated battery to an unborn child, first- or second-degree sexual assault, sexual assault of a child, repeated sexual assault of a child, intentional or reckless child abuse causing great bodily harm, sexual exploitation of a child, incest with a child or soliciting a child for prostitution or a violation of the law of any other state or federal law, if that violation would be a violation of one of those offenses if committed in this state.
- c. The commission of a violation of child neglect or a violation of the law of any other state or federal law, if that violation would be child neglect if committed in this state, that resulted in the death of the victim.

⁵ If a child is found to be CHIPS and placed outside of his or her home, the agency that placed the child or that is assigned primary responsibility by the court for providing services for the child must prepare a written permanency plan. This is a plan designed to ensure that a child is reunified with his or her family whenever appropriate, or that the child quickly attains a placement or home providing long-term stability. [See s. 48.38, Stats.]

⁶ Under current law, the following individuals may be permitted access to medical and genetic information filed by a child’s birth parent under certain circumstances:

- a. An adoptee or individual whose birth parents’ rights have been terminated who is 18 years of age or older.
- b. An adoptive parent of an adoptee.
- c. The guardian or legal custodian of an adoptee or individual whose birth parents’ rights have been terminated.
- d. The offspring of a person under item 1., if 18 years of age or older
- e. An agency or social worker assigned to provide services to an adoptee or individual whose birth parents’ rights have been terminated. [See s. 48.432, Stats.]