COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP670 **Cir. Ct. No. 2008TP46**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO TORIE J., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TROY J.,

RESPONDENT-APPELLANT,

ROXIE P.,

RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 FINE, J. Troy J. appeals the order terminating his parental rights to Torie D. J. He claims that the circuit court, the Honorable Christopher R. Foley, presiding, should have disqualified itself from the dispositional phase of the matter because Judge Foley's daughter was then working for the Legal Aid Society of Milwaukee, non-profit, non-governmental entity at which Torie's guardian *ad litem* was also employed. The case comes to us on undisputed facts as set out and framed by the parties' stipulation. We affirm.[1]

I.

¶2 Torie was born in September of 2006. Mr. J.'s parental rights to her were terminated by an order entered in July of 2009.[2] The facts underlying the termination of Mr. J.'s parental rights to Torie are not at issue on this appeal. Rather, the only issue is whether Judge Foley was disqualified from presiding over the disposition phase because his daughter, Rebecca A. Foley, Esq., works in the guardian *ad litem* office of the Legal Aid Society at Children's Court.

¶3 The Legal Aid Society was founded in 1916, and gives free legal services to persons who cannot afford to hire a lawyer. It is a nonstock, not-for-

[1] This matter first came to us as a no-merit appeal filed in March of 2010 on Troy J.'s behalf by Christine M. Quinn, Esq. *See* WIS. STAT. RULES 809.107(5m); 809.32. We rejected the no-merit appeal because we determined that Mr. J.'s contention that Judge Foley should have recused himself "would not lack arguable merit." An Assistant State Public Defender succeeded Ms. Quinn as Tory J.'s appellate lawyer. Although a notice of appeal that references Judge Foley's October of 2010 order denying Troy J.'s motion seeking to disqualify Judge Foley does not appear to be in the Record, we have jurisdiction over the appeal from that order as well. *See* WIS. STAT. § 808.04(8) ("If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.").

[2] The order also terminated the parental rights of Torie's mother. That matter is not before us.

profit corporation organized under WIS. STAT. ch. 181. It is run by an independent board of directors, none of whom is a representative of Milwaukee County. As phrased by the stipulation, "[n]o official of Milwaukee County directs, supervises, reviews or evaluates the performance of [Society] staff attorneys who act as guardians ad litem."

¶4 The Legal Aid Society has provided guardian *ad litem* services to courts in Milwaukee County since 1941, and, since 1970, provides under contract with Milwaukee County, guardian *ad litem* services at Children's Court. The Society is, as agreed-to in the stipulation, "compensated for its guardian ad litem work based on the volume of appointments it accepts, not on the outcome of cases with which it is involved, and no incentives or bonuses are paid to [the Society] or any guardian ad litem based on the results of individual cases."

¶5 The stipulation further recounts:

> Each year, judges in the Children's Court Division appoint the Legal Aid Society of Milwaukee to serve as guardian ad litem for approximately 4,000 children in individual cases involving guardianships, children in need of protection or services, and termination of parental rights. Upon receipt of an appointment, [the Society]'s Chief Staff Attorney assigns each new case to an individual staff attorney based on experience, workload, vacation schedules, and other relevant factors.

¶6 Termination of parental rights is a two-step process. First, a fact-finder decides whether there are facts that justify governmental interference in whatever relationship there is between the birth-parent and his or her child. *See* WIS. STAT. §§ 48.415, 48.424; ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999). If there are grounds to terminate a person's parental rights to a child, the trial judge then determines whether those rights should be terminated. WIS. STAT. §§ 48.424(3), (4); 48.426; 48.427.

Chronology is important here, and we set out the pertinent events as stipulated-to by the parties or that are otherwise undisputed:

- In May, June, and July of 2008, Ms. Foley was a law student and worked as an unpaid intern with the Legal Aid Society at Children's Court. During that time, she observed but did not participate in proceedings involving this case, which was then assigned to a judge other than Judge Foley.

- On August, 1, 2008, Judge Foley began his Children's Court assignment.

- At the end of May of 2009, Judge Foley presided over a bench-trial in the first phase of the termination-of-parental-rights matter involving Torie. He found that the State had proven all of the grounds alleged in the petition to terminate Mr. J.'s parental rights to Torie. Mr. J. does not challenge that finding.

- Ms. Foley graduated from law school, and, in June of 2009, she learned that there was an opening at the Legal Aid Society's Children's Court guardian *ad litem* office. She applied and was interviewed for the job at the end of June of 2009. She was offered the job and accepted, and the Legal Aid Society sent her a confirming letter dated July 2, 2009. She has never either participated in any Children's Court case assigned to Judge Foley, and, at least since her graduation from law school, she has never discussed any of Judge Foley's Children's Court cases with him. By the same token, Judge Foley has never discussed any of Ms. Foley's Children's Court cases with her. Further, Legal Aid Society lawyers

involved in Children's Court matters do not discuss their cases with Ms. Foley. Ms. Foley had nothing to do with Torie's termination-of-parental-rights case.

- On July 9, 2009, Judge Foley presided over the disposition phase of Torie's termination-of-parental-rights case. At that time, he told everyone in the case about Ms. Foley's employment with the Legal Aid Society and indicated that he could and would be impartial. Mr. J.'s trial lawyer objected to Judge Foley hearing the case.

- The only Legal Aid Society lawyer who has acted as Torie's guardian *ad litem* is Carol C. Petersen, Esq.

The parties stipulated that "[n]either Ms. Foley nor Judge Foley has any financial interest in the outcome of this case."

II.

¶7 As we have seen, the parties do not dispute any of the material facts. Further, resolution of this appeal turns on the application of WIS. STAT. § 757.19. Accordingly, our review is *de novo*. *See* ***Trustees of Ind. Univ. v. Town of Rhine***, 170 Wis. 2d 293, 298–299, 488 N.W.2d 128, 130 (Ct. App. 1992) ("Statutory construction is a question of law. Likewise, the application of a statute to an undisputed set of facts presents a question of law.") (citation omitted). Section 757.19 provides, as pertinent here:

> **(2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> (a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.

> (b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.
>
> (c) When a judge previously acted as counsel to any party in the same action or proceeding.
>
> (d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.
>
> (e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.
>
> (f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

Section 757.19(2)(a)–(f) are clearly inapplicable. Also, Mr. J. apparently concedes, as he must, that § 757.19(2)(g) does not apply because Judge Foley has determined that he could and would be impartial in cases where Legal Aid Society lawyers appear before him as guardians *ad litem*. *See* ***Donohoo v. Action Wisconsin Inc.***, 2008 WI 110, ¶27, 314 Wis. 2d 510, 528, 754 N.W.2d 480, 489 (recusal under § 757.19(2)(g) is required only when a judge determines that he or she cannot be impartial). Thus, we turn to § 757.19(2)(a).

¶8 Disqualification under WIS. STAT. § 757.19(2)(a) "as it applies to government attorneys is to restrict its scope to only the attorney of record and any other attorneys who appear or participate in the case. It certainly does not include every government attorney who happens to be employed in the same county office or governmental department." ***State v. Harrell***, 199 Wis. 2d 654, 659–660, 546 N.W.2d 115, 117 (1996) (footnote omitted). In that case, Crystal Harrell sought to

disqualify under § 757.19(2)(a) a judge from hearing her case because the judge's wife was an assistant district attorney in the judge's county even though she did "not participate in, or help prepare, the case." ***Harrell***, 199 Wis. 2d at 657, 546 N.W.2d at 116. ***Harrell*** applies equally to the Legal Aid Society here.

¶9 First, unlike a private law firm, where partners and associates share to varying degrees the profits earned by the firm, the Legal Aid Society is non-profit and, as the parties have stipulated, its lawyers like Ms. Foley are paid a straight salary that does not depend on the results of cases where Legal Aid Society guardians *ad litem* appear. Thus, we, like ***Harrell***, need not consider a situation where the person within the degree of consanguinity set out in WIS. STAT. § 757.19(2)(a) "was a partner in a private law firm that represented one of the parties." ***Harrell***, 199 Wis. 2d at 659 n.5, 660, 546 N.W.2d at 117 n.5. We also do not consider whether ***Harrell*** applies to associates or other non-equity lawyers employed by a private law firm appearing before the judge whose recusal is sought under § 757.19(2)(a). *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue needs to be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

¶10 Second, although the Preamble to Wisconsin's Code of Judicial Conduct, SCR 60, indicates that it is not to be "invoked by lawyers or litigants for mere tactical advantage in a proceeding," the Code "state[s] basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct." As the brief of the Legal Aid Society as guardian *ad litem* here points out, SCR 60.04(4)(e)2 can help illumine the word "counsel" in WIS. STAT. § 757.19(2)(a), and, consistent with ***Harrell***, it provides, that unless the parties waive their right to

object: "a judge shall recuse himself or herself in a proceeding when the facts … establish … [that] … the judge's spouse, or a person within the third degree of kinship of either of them … [*i*]s *acting as a lawyer in the proceeding.*" (Emphasis added.) *See* ***State v. Meeks***, 2003 WI 104, ¶¶54, 60, 263 Wis. 2d 794, 821, 823, 666 N.W.2d 859, 873–874 (using SCR 20:1.6 to shed light on a lawyer's duties to his or her client under WIS. STAT. RULE 905.03, even though the Preamble to SCR 20 then provided that "the rules of professional responsibility 'are not intended to govern or affect judicial application of either the attorney-client privilege or work product privilege.'" ***Meeks***, 2003 WI 104, ¶85, 263 Wis. 2d at 833, 666 N.W.2d at 879 (Sykes, J., dissenting)). Ms. Foley has not acted as a lawyer in this proceeding. Thus, she has not acted as "counsel," § 757.19(2)(a), in this proceeding.

¶11 Third, the crux of WIS. STAT. § 757.19(2)(a) is that the judge is disqualified when he or she gets a tangible or intangible benefit because the persons within the section's degree of sanguinity are in a position to gain from the judge's exercise of his or her duties. Here, as we have seen, the parties stipulated that neither Judge Foley nor his daughter had "any financial interest in the outcome of this case." Mr. J. argues, however, that because Judge Foley sent an email to his colleagues and some others when his daughter accepted her position with the Legal Aid Society that he was proud of her and her desire for public service, that the psychic benefit he got from her employment is a sufficient disqualifier.[3] We disagree; there is no evidence in the Record, nor does Mr. J.

[3] Judge Foley wrote: "I cannot put into words the inordinate pride Deb and I feel [by his daughter's decision to join the Legal Aid Society]. … When your child chooses to emulate your professional efforts---particularly in an arena that touches the soul of a community---the pride, joy and humility you feel is unspeakable."

(continued)

allege that whatever proud-father feelings Judge Foley had and has stems in any way from the appearance of another lawyer employed by the Legal Aid Society as Torie's guardian *ad litem*. Although Mr. J. writes that Ms. Foley's employment with the Legal Aid Society added "prestige" to the Society, irrespective of whether that is true or not true (and there is no evidence in the Record one way or the other), the Legal Aid Society's "prestige" does not benefit Judge Foley.

¶12 Fourth, a guardian *ad litem* in a Children's Court case, unlike a lawyer seeking a result for a client, seeks no outcome but what WIS. STAT. § 48.01(1) requires, namely the "best interests" of the child. *See* WIS. STAT. § 48.235(3)(a) ("The guardian ad litem shall be an advocate for the best interests of the person or unborn child for whom the appointment is made. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of that person or the positions of others as to the best interests of that person or unborn child."). Under the stipulation here, there is nothing that even suggests that Ms. Foley or Judge Foley would benefit in anyway (other than as the law requires) by Ms. Foley's colleagues' successful fulfillment of their guardian *ad litem* responsibilities, or any ruling that Judge Foley may make in any case where a Legal Aid Society lawyer is appearing before him as a guardian *ad litem*.

¶13 Similarly, although we agree with Mr. J. that the appearance of impartiality must, perforce, be a component of WIS. STAT. § 757.19(2)(a) insofar as the word "counsel" is concerned, there is nothing here, as there was nothing in ***Harrell***, that indicates that Ms. Foley's mere employment by the Legal Aid

Society taints the necessary confidence we all must have in the judicial process. This is somewhat analogous to the denial by the Honorable Stephen R. Reinhardt of the United States Court of Appeals for the Ninth Circuit of the request that he recuse himself from the "same-sex marriage" case pending before a panel to which he was assigned, ***Perry v. Schwarzenegger***, because it was alleged that his wife's associations with various groups and causes, and her expressions of opinions that might bear on the case would make Judge Reinhardt's impartiality suspect. ***Id.***, No. 10-16696, 2011 WL 17699, at *1 (9th Cir. Jan. 4, 2011). Judge Reinhardt denied the motion, and explained:

> My wife's views, public or private, as to any issues that may come before this court, constitutional or otherwise, are of no consequence. She is a strong, independent woman who has long fought for the principle, among others, that women should be evaluated on their own merits and not judged in any way by the deeds or position in life of their husbands (and vice versa). I share that view and, in my opinion, it reflects the status of the law generally, as well as the law of recusal, regardless of whether the spouse or the judge is the male or the female. My position is the same in the specific case of a spouse whose views are expressed in the capacity of an officer, director, or manager of a public interest or advocacy organization that takes positions or supports legislation or litigation or other actions of local, state, or national importance.

Ibid. Of course, Judge Reinhardt's assertion that his "wife's views … are of no consequence" refers, we assume, to matters affecting Judge Reinhardt's judicial responsibilities and not their other interactions. By the same token, that Judge Foley is proud that his daughter is working for the Legal Aid Society, and that the guardians *ad litem* employed by the Society who appear before him are trying to achieve what the law requires, that is, the "best interests" of children, does not mean, contrary to Mr. J.'s implication, that Judge Foley must be disqualified from all cases where Society lawyers appear as guardians *ad litem*.

¶14 Fifth, although it is true that if the Children's Court judges ever perceived that the Legal Aid Society's lawyers were not responsibly fulfilling their guardian *ad litem* responsibilities, the judges might seek to have Milwaukee County's contract with the Society terminated and that Ms. Foley's job might then be in jeopardy, a similar concern would underlie the situation in ***Harrell*** because if the public perceived that the district attorney's office in which the judge's wife worked was doing a shoddy job of protecting the community because of rulings the judge might make, the district attorney might lose the next election and the judge's wife could then possibly lose her position. That alleged financial "benefit" is, however, so tenuous that it is not even clear that the ***Harrell*** court considered it; certainly, there is nothing in the majority or concurring opinions that indicates that it did.

¶15 As noted, Mr. J.'s only challenge to the order terminating his parental rights to Torie is that Judge Foley should have disqualified himself from the disposition phase. Accordingly, having determined that recusal was not required, we affirm.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.