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**DISTRICT I**

November 12, 2013

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP2070-NM

In re the termination of parental rights to Aiden C., a person under the age of 18: State of Wisconsin v. Martez W.  
(L.C. #2011TP243)

Before Kessler, J.<sup>1</sup>

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Martez W. appeals from a trial court order terminating his parental rights to Aiden C. Martez W.'s appointed attorney, Patrick Flanagan, has filed a no-merit report. *See Brown County v. Edward C.T.*, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998) (per curiam); *see also* WIS. STAT. RULES 809.107(5m) and 809.32. Martez W. has filed a response.<sup>2</sup> This court has considered counsel's report and Martez W.'s response and has independently reviewed the record. This court agrees with counsel's conclusion that an appeal would lack arguable merit. Therefore, the order terminating Martez W.'s parental rights is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Aiden C. was conceived while both of his parents were patients at the Milwaukee County Mental Health Complex. He was detained at birth and has never lived with either parent.<sup>3</sup> Instead, he was placed in a potential adoptive home and has remained with that family pursuant to a CHIPS order.

Because both of Aiden C.'s parents were patients at the time of his conception, and his mother is legally incompetent, a criminal investigation was conducted. DNA testing identified Martez W. as Aiden C.'s father. Ultimately, no criminal charges were pursued against Martez W. because the State did not believe it could prove beyond a reasonable doubt that Martez W. knew that Aiden C.'s mother was incompetent and that Martez W. was legally responsible for his actions, given Martez W.'s own mental health issues.

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<sup>2</sup> Martez W.'s typewritten response, which was written in the first person, does not contain a handwritten signature. Because this is an expedited termination-of-parental-rights appeal and all indications are that Martez W. filed the response, we will accept it as Martez W.'s response to the no-merit report.

Martez W. learned that he had a son during the criminal investigation, when Aiden C. was about ten months old. At that time, Martez W. was living in the community. He began having weekly, one-hour supervised visits with Aiden C. about three months later, in May 2011, which continued through October 2011. According to a case manager, Martez W. attended “the majority” of the visits, but missed visits sporadically. The visits were suspended in October 2011 after Martez W. missed two visits that month, failed to attend a meeting to discuss the missed visits, and thereafter lost contact with the case manager.

Meanwhile, in July 2011, the State filed a petition to terminate Martez W.’s parental rights, alleging that he had failed to assume parental responsibility. *See* WIS. STAT. § 48.415(6). Counsel was appointed for Martez W. In addition, when the trial court expressed concerns about Martez W.’s competency, it appointed a guardian ad litem for Martez W.<sup>4</sup>

On May 31, 2012, the trial court reinstated supervised visits for Martez W., which began in July 2012. Martez W. was allowed to visit with Aiden C. for two hours every other week, and the visits were therapeutic visits supervised by a therapist. The trial court said that if Martez W. missed a single visit, all future visits would be cancelled. Martez W. had two visits with Aiden C. in July 2012 and one in August 2012, but visits were suspended after he missed a subsequent visit in August 2012.

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<sup>3</sup> The parental rights of Aiden C.’s mother were also terminated. Those rights are not at issue in this appeal and will not be discussed.

<sup>4</sup> The Honorable Michael Malmstadt, Reserve Judge, presided over the hearing where a guardian ad litem was appointed for Martez W. The Honorable John J. DiMotto presided over all other hearings and issued the order terminating Martez W.’s parental rights.

In September 2012, the case proceeded to a contested court trial on the single ground for termination: failure to assume parental responsibility. The family case manager, Cira Verhage, testified about her interactions with Martez W. She said that during Martez W.'s visits with Aiden C. in 2011 and 2012, he had minimal contact with Aiden C. Instead, he watched Aiden C. play. Verhage said that Martez W. frequently fell asleep during the visits<sup>5</sup> and that one time, he was talking on his telephone during the visit.

Verhage said that Martez W. had been offered services including a parenting class, a nurturing class, home management courses, housing assistance, and the services of a parenting aide. While Martez W. completed the parenting class, he failed to complete the others. Further, at times Verhage lost contact with Martez W., who also missed a court date while the termination case was pending.<sup>6</sup>

Verhage said that Martez W. has not had contact with Aiden C. outside of the supervised visits and has never lived with him. She said Martez W. has not provided for "Aiden C.'s daily supervision, education, protection, or care," indicating that the only thing Martez W. ever brought to Aiden C. was a pair of shoes. She also expressed concern about Martez W.'s aggression, noting that Martez W. "has been admitted to the Mental Health Complex due to aggressive outbursts" and has admitted to Verhage "that he sometimes has trouble controlling his anger."

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<sup>5</sup> Martez W. later testified that the medication he takes for his mental illness makes him sleepy and that he was sleepy for another visit due to working until early in the morning.

<sup>6</sup> Martez W. was defaulted twice: once for not appearing in court and once for appearing late, but the trial court vacated both defaults.

Martez W. testified that he had made progress toward being able to parent his son. For instance, he applied for and was awarded Supplemental Security Income, secured a place to live, and pays his bills. As for missing an August 2012 visit, Martez W. said that he did not know that the visit was scheduled and that he was unable to attend because he was in Detroit. Martez W. also said that he had consistently taken his medication and had not been sent to the Mental Health Complex in nearly a year.

The State and Aiden C.'s guardian ad litem both argued that the State had shown that Martez W. failed to assume parental responsibility. The trial court agreed and found Martez W. to be unfit. *See* WIS. STAT. § 48.424(4). In doing so, the trial court found that Martez W.'s visits with Aiden C. "haven't gone that well" because Martez W. "didn't have the ability or the understanding to implement what he learned" in the parenting class. The trial court found that Martez W.'s decision in August 2012 to go to Detroit when he should have realized that he would miss his visit with his son "shows ... a lack of understanding for the needs of a child." The trial court acknowledged that Martez W. loves his child, but found that while Martez W. "has really tried, he doesn't have a substantial parental relationship with his son" and has "not accepted nor exercised significant ... supervision, education, protection and care for the child."

At the dispositional hearing, Aiden C.'s foster mother testified about Aiden C.'s health and growth. She said that Aiden C. had lived with her and her husband since birth and that Aiden C. is "thriving." She said that the only special care he receives is some speech therapy. She also said that Aiden C. has not had any contact with his biological relatives.

Verhage testified about her observations of Aiden C. with his foster family. She said that Aiden C. is "doing very well" and that the foster family is committed to raising him.

Verhage also testified about efforts to explore Aiden C.'s biological relatives as potential foster parents. She said that "none of them were interested in placement" and that they told her "they felt [it would be] best [if] he stayed where he is." Verhage said the relatives also "didn't express any interest[] in visiting or meeting Aiden."

The trial court found that termination of Martez W.'s parental rights was in Aiden C.'s best interests. This appeal follows.

The no-merit report addresses three issues: (1) whether there is "sufficient credible evidence to support the trial court's finding of parental unfitness"; (2) whether the record supports the trial court's decision to terminate Martez W.'s parental rights; and (3) whether Martez W. received the effective assistance of trial counsel. We agree with appellate counsel that there would be no merit to challenge the finding of unfitness or the decision to terminate Martez W.'s parental rights, or to allege trial counsel ineffectiveness.

To establish that Martez W. failed to assume parental responsibility, the State had to prove that Martez W. had "not had a substantial parental relationship with the child." *See* WIS. STAT. § 48.415(6)(a). Section 48.415(6)(b) explains that "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." The statute provides, as relevant here, that in determining "whether the person has had a substantial parental relationship with the child," the court may consider numerous factors, "including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child." *See id.*

When reviewing a challenge to the sufficiency of the evidence, we consider all credible evidence and reasonable inferences from the evidence in the light most favorable to the verdict. *See* WIS. STAT. § 805.14(1). We will affirm unless there is no credible evidence to sustain the verdict. *See id.* Here, the evidence presented at the court trial was sufficient to sustain the trial court's finding that Martez W. had not had a substantial parental relationship with Aiden C. This evidence included testimony that Martez W. did not actively engage with Aiden C. during his visits with him, that he had not completed all the courses and programs recommended to him, and that he had not provided for Aiden C.'s care, education or protection on a daily basis. While Martez W. provided shoes for Aiden C. at one supervised visit, he did not provide any other support for Aiden C. Martez W. also never had Aiden C. for an overnight visit or an unsupervised visit and never provided for Aiden C.'s day-to-day needs. It was within the trial court's factfinding role to determine that Martez W. had not had a substantial parental relationship with Aiden C. Because the record supports the trial court's findings, there would be no merit to challenging the sufficiency of the evidence on this ground for termination.

Next, we consider whether there would be any merit to challenging the trial court's decision to terminate Martez W.'s parental rights. The decision to terminate a parent's rights is discretionary and the best interest of the child is the prevailing standard. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The court considers multiple factors, including, but not limited to:

- (a) The likelihood of the child's adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

(c) 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.

(d) The wishes of the child.

(e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

WIS. STAT. § 48.426(3).

Here, there would be no merit to challenging the trial court's exercise of discretion. The trial court considered the statutory factors and found that each one weighed in favor of termination. For example, the trial court said that the likelihood of adoption by the foster parents was "very, very high." The trial court also noted that the child had no substantial relationships with his parents or other biological relatives. It noted that Aiden C. was too young to express his wishes, but said that he has a good relationship with his foster parents, their extended family, and another child in the home. The trial court said that Aiden C. had been with his foster parents for his entire life and that Aiden C. would have a more stable family relationship if the termination were granted. The trial court's findings are supported by the record and reflect a proper exercise of discretion. An appellate challenge to the trial court's determination would lack arguable merit.

In his response to the no-merit report, Martez W. states: "I love my child with all my heart ... [and] I really [want] to take care of my son." He notes that he has gotten used to his medication and experiences less drowsiness. He also explains that he has moved into a better apartment and has a working vehicle. This court does not doubt Martez W.'s love for his son,



but Martez W.'s continued progress does not negate the trial court's findings that Martez W. failed to assume parental responsibility for Aiden C. and that termination was in Aiden C.'s best interests. The record supports the trial court's findings and exercise of discretion, and it is not for this court to substitute its judgment for that of the trial court. For these reasons, we are not convinced that Martez W.'s response has raised an issue of arguable merit.

Finally, the no-merit report states that appellate counsel has not identified anything in the record indicating that trial counsel was ineffective. We, too, have not identified an issue of merit with respect to trial counsel's performance, which included significant cross-examination of Verhage.

This court's independent review of the record discloses no other issues of arguable merit. Therefore,

IT IS ORDERED that the trial court order terminating the parental rights of Martez W. is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Patrick Flanagan is relieved of any further representation of Martez W. in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*