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May 29, 2015

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

2015AP602-NM	In re the termination of parental rights to Janitza R., a person under the age of 18: State v. Claribelys R. (L.C. # 2013TP260)
2015AP603-NM	In re the termination of parental rights to Juniel A., a person under the age of 18: State v. Claribelys R. (L.C. # 2013TP261)
2015AP604-NM	In re the termination of parental rights to Janelly R., a person under the age of 18: State v. Claribelys R. (L.C. # 2013TP262)

Before Blanchard, P.J.¹

Claribelys R. appeals orders terminating her parental rights to Janitza R., Juniel A., and Janelly R. Attorney Karen Lueschow has filed a no-merit report seeking to withdraw as

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

appellate counsel. See WIS. STAT. RULE 809.32; *Anders v. California*, 386 U.S. 738, 744 (1967); *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429. The no-merit report addresses whether the evidence was sufficient to support the circuit court's findings regarding parental unfitness and the best interests of each child. The report also addresses whether Claribelys's due process rights were violated when the court proceeded with terminations of her parental rights after it found that she was not competent and appointed a guardian ad litem. Finally, the report addresses whether there would be any arguable merit to challenging the court's decision to find Claribelys in default as a sanction for egregious violation of court orders. Claribelys was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

Milwaukee County initiated this action by filing petitions for termination of Claribelys's parental rights to Janitza R., Juniel A., and Janelly R. on the basis of the children being in continuing need of protection and services (CHIPS) and Claribelys's failure to assume parental responsibility. It appears from the records that all of the statutory deadlines were met or properly extended for good cause, and that required notices were given. Claribelys was advised of her rights in the proceedings, including the right to counsel, the right to contest the petition, the right to substitute judges, and the right to a fact-finding hearing by a jury or to the court.

Claribelys waived her right to a jury trial. There is a statutory right to a jury trial in a termination of parental rights case. WIS. STAT. §§ 48.422(4), 48.31(2), 48.424(2); *see also Steven V. v. Kelley H.*, 2004 WI 47, ¶¶3-4, 271 Wis. 2d 1, 678 N.W.2d 856. Courts are urged to engage in a colloquy to determine that a withdrawal of a jury demand is knowing and voluntary.

Walworth Cnty. Dep't of Health & Human Servs. v. Andrea L.O., 2008 WI 46, ¶46, 309 Wis. 2d 161, 749 N.W.2d 168. The court did so here, ascertaining that Claribelys understood the positive and negative aspects of a jury trial and a court trial. Claribelys confirmed on the record that she wanted a court trial. The guardian ad litem appointed for Claribelys did not object to her waiving her right to a jury trial and told the court that he believed the waiver was in Claribelys's best interest. We are satisfied that there would be no merit to challenging the waiver on appeal.

Sufficiency of the Evidence-Continuing CHIPS

In order to establish the termination ground of continuing CHIPS, the county needed to show: (1) that each child had been adjudged in need of protection and services and placed outside the home for six months or more pursuant to a court order containing statutory notice of TPR proceedings; (2) that the county department of health and human services had made reasonable efforts to provide the services ordered by the court; (3) that the parent failed to meet the conditions established for the safe return of each child; and (4) there was a substantial likelihood that the parent would not meet the conditions within the next twelve months. *See* WIS. STAT. § 48.415(2); WIS JI—CHILDREN 324. The county introduced the prior court orders needed to prove the first element as exhibits. To prove the second element, it elicited testimony from the social worker who served as Claribelys's case manager. The case manager testified that the county had provided Claribelys with parenting assistance services, opportunities to complete a parenting course and attend family drug treatment court, domestic violence counseling, and individual therapy. With regard to Claribelys's progress toward meeting the conditions of return and likelihood of future progress, her case manager testified that Claribelys had relapsed into using illegal substances, missed numerous scheduled visits with her children, failed to complete

the parenting course, was unsuccessfully discharged from the program that provided domestic violence counseling, failed to take medications for her mental health issues, allowed her domestic abuser to continue to be around her and the children, and failed to maintain a healthy home. We are satisfied that the evidence was sufficient for the court to find that all of the required continuing CHIPs elements had been established, such that the issue would be without arguable merit on appeal.

Sufficiency of the Evidence-Failure to Assume Responsibility

In order to establish the termination ground of failure to assume parental responsibility, the county needed to show, as to each child, that Claribelys had not developed a substantial relationship with the child, meaning the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child. *See* WIS. STAT. § 48.415(6); WIS JI—CHILDREN 346. The county introduced testimony from Claribelys’s case worker that, except for a three-month period when she was living at Meta House, a residential treatment facility, Claribelys had never been responsible for the daily supervision of the children. The case worker also testified that Claribelys violated Meta House’s rules by using cocaine and by allowing her abuser, a convicted sex offender, to be around her and the children. We are satisfied that the evidence was sufficient for the court to find that all of the required elements for failure to assume parental responsibility had been established.

Due Process-Competency

The no-merit report also addresses the issue of whether Claribelys’s due process rights were violated when the court terminated her parental rights after finding that she was not

competent and needed a guardian ad litem (GAL) to protect her rights. We agree with counsel's assessment that the issue would be without arguable merit on appeal.

It is well established that convicting an accused person of a crime while he or she is incompetent is a violation of due process. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). However, the Wisconsin Supreme Court has held that termination of parental rights proceedings are civil, not criminal, in nature. *M.W. v. Monroe Cnty. Dep't of Human Servs.*, 116 Wis. 2d 432, 442, 342 N.W.2d 410 (1984). WISCONSIN STAT. § 48.235(1)(g) requires that the trial court appoint a GAL for

a parent who is the subject of a termination of parental rights proceeding, if any assessment or examination of a parent that is ordered under s. 48.295(1) shows that the parent is not competent to participate in the proceeding or to assist his or her counsel or the court in protecting the parent's rights in the proceeding.

A circuit court's decision about competency will be upheld unless it is clearly erroneous. *State v. Byrge*, 2000 WI 101, ¶46, 237 Wis. 2d 197, 614 N.W.2d 477.

The records do not demonstrate clear error on the competency issue. In this case, Claribelys's attorney raised concerns about her competency. The court ordered an evaluation pursuant to WIS. STAT. § 48.295(1) and appointed a provisional GAL pursuant to WIS. STAT. § 48.235(1)(g). The evaluator's report recommended the appointment of a GAL and, after reviewing the report, the court noted that, although Claribelys had a general sense of the different parties involved in the proceeding, she also had processing and retention issues that her evaluator identified as being a result of compromised mental abilities. The court then converted the provisional GAL appointment into a more permanent appointment for the remainder of the proceedings.

The record demonstrates that the court explained the GAL's role to Claribelys. The GAL confirmed for the court that he was familiar with the statutory limitations of his role in a TPR proceeding. The GAL had frequent contact with Claribelys between court dates. The GAL also provided assistance to the court and to Claribelys's adversary counsel, consistent with WIS. STAT. § 48.235(5m)(a). In light of all of the above, we agree with counsel that there would be no arguable merit to arguing on appeal that Claribelys's due process rights were violated when the court terminated her parental rights after finding that she was not competent and when the court appointed a GAL to protect her rights in the proceeding.

Due Process-Default Judgment

The no-merit report also addresses the issue of whether Claribelys's due process rights were violated when the circuit court found her in default and struck her posture in contesting the facts alleged, as a sanction for her failure to comply with court orders requiring her appearance in court. A circuit court has both inherent authority and statutory authority under WIS. STAT. §§ 802.10(7) and 805.03 to sanction parties for failing to obey court orders. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768. "The decision whether to enter a default judgment is a matter within the sound discretion of the circuit court." *Id.*, ¶18.

Here, when the circuit court granted the State's motion, during the trial, to strike Claribelys's contest posture and enter a default fact-finding judgment, the court explained its reasoning for doing so and made findings regarding her absences. The court cited two separate court orders directing Claribelys to be personally present for every court appearance. The court also noted that, when the court last broke in the middle of trial, Claribelys had been on the witness stand and had been reminded on the record of the date for continuing the trial.

Nonetheless, she failed to appear. She did not call her attorney, her GAL, her case worker, or the court to inform them that she would not be present. The court stated that, due to Claribelys's failure to appear, the fate of the three children involved was being "held hostage." The court found that Claribelys had egregiously violated court order without any justifiable excuse, found her in default, and proceeded with the prove-up portion of the hearing. In light of the court's findings, articulated on the record, we agree with Claribelys's counsel that there would be no merit to arguing that the circuit court erroneously exercised its discretion when it entered a default finding.

Disposition

At the dispositional hearing, the trial court was required to consider such factors as the likelihood of the children's adoption, the age and health of the children, the nature of the children's relationship with the parents or other family members, the wishes of the children, and the duration of the children's separation from the parent, with the prevailing factor being the best interests of the children. WIS. STAT. § 48.426(2) and (3). The record shows that the trial court did consider these factors on the record as to each child. The court noted the high likelihood of adoption and the comparatively lesser harm to the children in severing the parental relationship rather than continuing it, and concluded that termination of parental rights was in the best interests of each child. In short, the record shows that the trial court reasonably applied the proper legal standard to the facts of record when reaching its disposition.

We have discovered no other arguably meritorious grounds for an appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the orders terminating Claribelys R.'s parental rights to Janitza R., Juniel A., and Janelly R. are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Karen Lueschow is relieved of any further representation of Claribelys R. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals