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October 28, 2015

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

2015AP1806-NM	In re the termination of parental rights to X.M., a person under the age of 18: State of Wisconsin v. T.M. (L.C. #2014TP250)
2015AP1807-NM	In re the termination of parental rights to B.M., a person under the age of 18: State of Wisconsin v. T.M. (L.C. #2014TP251)

Before Reilly, P.J. [1]

In these consolidated cases, T.M. appeals from orders terminating her parental rights to two children. Appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULES

[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.

809.107(5m) and 809.32, ***Anders v. California***, 386 U.S. 738 (1967), and ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (per curiam). T.M. received a copy of the report, was advised of her right to file a response, and has elected not to do so. Upon consideration of the no-merit report and an independent review of the record, we conclude that the orders may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

X.M. and B.M. have been placed outside of T.M.'s home pursuant to court orders since July 2013, and were adjudicated as children in need of protection or services by dispositional orders entered in February 2014. On September 22, 2014, the State filed petitions to terminate T.M.'s parental rights to both children on grounds of continuing need of protection or services and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2) and (6). The initial appearance was adjourned to allow T.M. to obtain counsel.

Trial counsel appeared without T.M. at the adjourned initial appearance and requested judicial substitution on T.M.'s behalf. A new judge was assigned and the matter was recalled that afternoon. Due to transportation problems, T.M. appeared by telephone. The trial court informed T.M. of her procedural rights and ordered that she (1) maintain contact with her attorney, (2) cooperate with the discovery process, (3) comply with all court orders, and (4) personally appear on time at all court hearings. The court warned T.M. that the failure to comply with these orders could result in a default finding and allow the court to take further action without T.M.'s input, including the discharge of her attorney.

T.M. failed to appear at the next hearing, a December 11, 2014 permanency plan review. The trial court took the State's motion for default judgment under advisement. At the

February 2, 2015 pretrial conference, T.M. was not present in person but appeared for the latter part of the hearing by telephone. The trial court was informed that T.M. lived in Racine and had recently appeared for her deposition, but was unable to travel to court due to the inclement weather and road conditions. The court agreed to leave the upcoming trial date on the calendar and emphasized to T.M. that if she failed to appear, she could be found in default and the court could proceed immediately to disposition. T.M. appeared for trial on February 16, 2015. At the parties' request, the court adjourned the matter to allow T.M. to meet with the foster family and decide how to proceed. In open court, the trial court scheduled a status hearing for March 4, 2015, and a trial date of April 13, 2015. T.M. indicated on the record that she was agreeable to the new trial date.

T.M. did not appear at the March 4, 2015 status hearing, and her attorney was unable to provide an explanation. On the State's motion,[2] and after finding that T.M.'s failure to appear was egregious and without a clear and justifiable excuse, the trial court found T.M. in default subject to the State's proof of unfitness grounds. The upcoming April 13, 2015 trial date was converted to a "prove-up" and dispositional hearing. T.M. did not appear on April 13, 2015, and after considering the State's proffered evidence, the trial court found that both unfitness grounds were established by clear and convincing evidence. The dispositional hearing was adjourned to that afternoon, at which time the State presented evidence relevant to the children's best interests. When it was time for T.M.'s attorney to examine the witness, the following exchange occurred:

[2] The State indicated that if T.M. appeared for disposition and made a request, it would move to vacate the default finding and permit T.M. to voluntarily relinquish her parental rights.

> Trial Counsel: And, Your Honor, as I said earlier, my last communication with [T.M.] was approximately 7:00 o'clock this morning. It was my understanding that she would have been present this morning for that hearing. I don't really have any clear direction from her relative to how she wishes me to proceed. And I guess I'm kind of at a loss as to what my role is because she's given me no clear direction as to a contested disposition.
>
> The Court: So you don't have an understanding of what your client's wishes are?
>
> Trial Counsel: I honestly do not know what her wishes are relative to, I guess, this portion of the proceedings moreso than the earlier proceedings.
>
> The Court: Do you wish to be discharged from further representation of [T.M.] given those facts?
>
> Trial Counsel: I think that her not being present and my inability to communicate. I did attempt a follow-up call with her by telephone, and I did not reach her, renders me unable to really represent her—her interest at this time.

The court found that T.M. had waived her right to representation and discharged counsel. After finding that termination was in the children's best interests, the trial court entered orders terminating T.M.'s parental rights.

The no-merit report addresses the trial court's exercise of discretion in granting the default judgments, the adequacy of the evidence supporting each unfitness ground, the trial court's discharge of T.M.'s trial counsel at the dispositional hearing, and the trial court's decision that termination was in the children's best interests.

We conclude that there is no arguably meritorious challenge to the entry of the trial court's default judgments. First, the court properly exercised its discretion in finding T.M. in default based on her failure to comply with existing court orders requiring that she personally appear on time at every hearing. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶17-18, 246 Wis. 2d 1, 629 N.W.2d 768 (in a TPR action, the trial court may, in its discretion, find a party in

default as a sanction for failing to comply with a court order). Having been apprised of the scheduled date in open court, and without explanation, T.M. failed to appear as ordered on March 4, 2015. In determining that T.M.'s conduct was egregious and without justification, the trial court applied the correct legal standard to the facts of record, including T.M.'s prior violations of the court's orders, and reached a rational conclusion. Second, the trial court properly determined that the State established by clear and convincing evidence T.M.'s unfitness under WIS. STAT. § 48.415 (2, and (6). *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶¶24-26 (before entering a default judgment, the trial court must take sufficient evidence to support a finding that grounds have been established by clear and convincing evidence). The no-merit report adequately discusses the evidence offered in support of each ground. Our review of the record confirms appellate counsel's conclusion that any challenge to the sufficiency of the evidence supporting the trial court's unfitness findings would be without arguable merit.

Next, we conclude that the trial court properly discharged trial counsel from representation. WISCONSIN STAT. § 48.23(2)(b)3. allows a trial court to presume that a parent has waived her right to counsel if, after being ordered to appear in court, the parent fails to appear and the trial court finds that failure to be egregious and without a justifiable excuse. Under § 48.23(4m), the trial court may discharge counsel "[i]n any situation under this section … in which a parent is presumed to have waived his or her right to counsel." Here, it is presumed that T.M. waived her right to counsel when she was ordered but failed to appear at the March 4, 2015 hearing, and the trial court found that failure to be egregious and without a justifiable excuse. At disposition, based on T.M.'s conduct and after seeking input from trial counsel, the court

permissibly determined that T.M. waived her right to counsel. There is no arguably meritorious challenge to the trial court's decision discharging counsel under § 48.23(4m).[3]

We also agree with appointed counsel's analysis and conclusion in the no-merit report that the trial court properly exercised its discretion in terminating T.M.'s parental rights at disposition. *See* ***State v. Margaret H.***, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 475. The court correctly applied the best interests of the child standard, *see* WIS. STAT. § 48.426(2), and specifically referenced and considered all of the factors set forth in § 48.426(3). The no-merit report adequately discusses the trial court's well-reasoned decision, and our review of the record confirms that any challenge to the trial court's exercise of discretion would be without arguable merit.

In addition to the potential issues discussed by appellate counsel, the record establishes that all of the statutory deadlines were met or properly extended for good cause.[4] We have discovered no other arguably meritorious grounds for an appeal.

Upon the foregoing reasons,

IT IS ORDERED that the orders terminating parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

[3] The no-merit report also addresses whether there exists a non-frivolous constitutional challenge to WIS. STAT. § 48.23. Counsel's analysis applies the proper legal standards and we agree with the conclusion in the no-merit report that there is no arguably meritorious constitutional challenge to the discharge of T.M.'s trial counsel.

[4] Further, the failure to object to a continuance "waives any challenge to the court's competency to act during the period of delay or continuance." WIS. STAT. § 48.315(3).

IT IS FURTHER ORDERED that Attorney Christine M. Quinn is relieved from further representing T.M. in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals