



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

April 19, 2016

To:

Hon. Michael R. Fitzpatrick
Circuit Court Judge
Rock County Courthouse
51 S. Main Street
Janesville, WI 53545

Kitty McGowan
Clerk of Circuit Court
Lafayette County Courthouse
626 Main Street
Darlington, WI 53530

Daniel R. Bartholf
Voegeli, Ewald & Bartholf Law Offices
P.O. Box 56
Monroe, WI 53566-0056

Ann T. Bowe
The Gettelman Mansion
2929 W Highland Blvd
Milwaukee, WI 53208

Sheila S. Kelley
Kopp McKichan, LLP
P.O. Box 253
Platteville, WI 53818-0253

A. W. 380173
Wisconsin Secure Program Facility
P.O. Box 9900
Boscobel, WI 53805-9900

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

2016AP324-NM

In re the termination of parental rights to J.L.W., a person under the age of 18: Lafayette County Human Services Department v. A.W. (L.C. # 2015TP3)

Before Lundsten, J.¹

A.W. appeals an order terminating his parental rights to his daughter, J.L.W. Attorney Ann Bowe has filed a no-merit report seeking to withdraw as 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). A.W. was sent a copy of the report

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

and has filed a response. Upon reviewing the entire record, as well as the no-merit report and response, I agree with counsel's assessment that there are no arguably meritorious appellate issues.

On September 7, 2012, when J.L.W. was two years old, there was a fire in the house that she lived in with her parents. J.L.W.'s three brothers were killed in the fire, as was an unborn sibling. J.L.W.'s mother, S.W., was badly burned and went into a coma. J.L.W. was placed into foster care on September 10, 2012.

A.W. was taken into police custody in September 2012 and was charged in connection with the fire. He was convicted, after entry of guilty pleas, of first-degree intentional homicide, arson of a building, and felony murder, and is currently serving a life sentence. A.W. filed a postconviction motion to withdraw his plea, but the motion was denied. An appeal of the criminal case is currently pending as Appeal No. 2015AP1366-CR.

On October 9, 2012, the Lafayette County Circuit Court entered a dispositional order adjudicating J.L.W. to be a child in need of protection or services (CHIPS) and approving out-of-home placement. The CHIPS dispositional order provided that two conditions must be met prior to J.L.W. being returned to A.W.'s home. First, that A.W. "resolve all criminal matters, be exonerated of all criminal charges as to doing intentional harm to [J.L.W.], [J.L.W.'s] deceased siblings and [S.W.], and be released from incarceration." Second, that A.W. refrain from contact with J.L.W. "until such time as he may be exonerated of all criminal charges related to allegations of intentional harm against [J.L.W., S.W.] and [J.L.W.'s] deceased siblings." A.W. did not challenge or seek modification of the dispositional order. J.L.W. was reunited with her mother, S.W., in April of 2014, and now resides with S.W. and S.W.'s husband.

On April 24, 2015, the State filed a petition for termination of A.W.'s parental rights. A copy of the dispositional order from the CHIPS case was attached to the petition. The petition did not specify a subsection of WIS. STAT. § 48.415, but listed the elements of § 48.415(4), continual denial of physical placement or visitation, as the grounds for the petition. The State moved for partial summary judgment as to the grounds for the petition, and the circuit court granted the motion, finding that A.W. was an unfit parent.

A.W. argues in his no-merit response that the CHIPS order was entered in violation of his due process rights because he was imprisoned at the time of the CHIPS proceedings and did not have the ability to appear in court. However, the CHIPS dispositional order and the corresponding record of the CHIPS proceedings are not before us on appeal. Although it is undisputed that A.W. received a copy of the dispositional order shortly after the order was entered, A.W. did not appeal the CHIPS order, nor did he seek modification of its terms. Therefore, he may not now challenge the dispositional order in the CHIPS case. *See Oneida Cty. DSS v. Nicole W.*, 2007 WI 30, ¶22, 299 Wis. 2d 637, 728 N.W.2d 652 (an order or judgment is presumed valid and binding unless reversed or annulled in a proper proceeding).

I also agree with counsel's assessment that there would be no arguable merit to challenging the TPR order on the basis that A.W. did not receive the TPR warnings required by WIS. STAT. § 48.356. A.W. first made this argument in the circuit court in the context of a motion to dismiss, which was denied, and now renews the argument in his no-merit response. As stated above, A.W. received a copy of the dispositional order in the CHIPS case shortly after the order was entered. The CHIPS order had form JD-1753, Notice Concerning Grounds to Terminate Parental Rights, attached to it. Several boxes appear on the form, with each box

corresponding to a ground for termination of parental rights. Only the box next to the ground of continuing need of protection or services is checked.

A.W. argues that, because the box next to the ground of “Continuing Denial of Periods of Physical Placement or Visitation” is not checked, he did not receive warning of the possibility of the termination of his parental rights on that ground. This argument is negated by the form itself, which states the following at the top:

Your parental rights can be terminated against your will under certain circumstances. A list of potential grounds to terminate your parental rights is given below. Those that are check-marked may be most applicable to you, although you should be aware that if any of the others also exist now or in the future, your parental rights can be taken from you.

While form JD-1753 specifically drew attention to the ground of continuing need of protection or services with a check mark, the form clearly states that other grounds may provide the basis for termination of parental rights. In *Nicole W.*, 299 Wis. 2d 637, our supreme court concluded that an order that did not check the box next to the particular ground that was the basis for an involuntary termination of parental rights, but instead listed all possible grounds, was no basis for nullifying the effect of the order. *Id.*, ¶24. In light of all of the above, I am satisfied that A.W. received the written TPR warnings required by WIS. STAT. § 48.356, such that any argument to the contrary would be without arguable merit on appeal.

Next, I agree with counsel’s assessment that there would be no arguable merit to challenging the circuit court’s grant of partial summary judgment in the grounds phase of the TPR proceedings. In order to establish grounds for continuous denial of periods of physical placement or visitation in this case, the State was required to prove (a) that A.W. had been

denied visitation under a CHIPS dispositional order and (b) that at least one year had elapsed since the order was issued and the court had not subsequently modified the order so as to permit periods of physical placement or visitation. *See* WIS. STAT. § 48.415(4).

In support of its motion for summary judgment, the State submitted the affidavit of social worker and case manager for the family Melissa Wirtz, which provided that she had delivered a copy of the CHIPS dispositional order to A.W. on October 9, 2012, and that the order had not been modified since that date. As referenced above, the CHIPS order prohibited A.W. from having contact with J.L.W. until such time as he may be exonerated of all criminal charges related to allegations of intentional harm against J.L.W., her mother, and her siblings. There was no dispute that A.W. had not had contact with J.L.W. since the CHIPS order was entered.

In his no-merit response, A.W. asserts that Wirtz's credibility should be questioned because she testified that A.W. was taken into custody on September 10, 2012. A.W. asserts that the actual date he was taken into custody was September 8, 2012. A.W. misunderstands the nature of summary judgment. The court does not assess credibility of evidence in this context. The question would have been whether assertions in the affidavit are disputed. Viewed this way, A.W. presents nothing more than a dispute as to whether he was taken into custody on September, 10, 2012, or two days earlier. This difference is inconsequential. The exact date that A.W. was taken into custody in September 2012 is immaterial to the issue of whether grounds existed for termination of his parental rights based upon continuous denial of periods of physical placement or visitation after the CHIPS order was entered in October 2012.

There would also be no arguable merit to challenging the circuit court's conclusion in the dispositional phase that termination of A.W.'s parental rights was in J.L.W.'s best interests. At

the dispositional hearing, the circuit court was required to consider such factors as the likelihood of the child's adoption, the age and health of the child, the nature of the child's relationship with the parents or other family members, the wishes of the child, and the duration of the child's separation from the parent, with the prevailing factor being the best interests of the child. WIS. STAT. § 48.426(2) and (3). The record shows that the court did so and concluded that termination of A.W.'s parental rights was in J.L.W.'s best interests. The court noted, among other factors, that J.L.W. had been in poor health and that her mother, S.W., and her stepfather had the ability to provide her with a stable environment and meet her medical needs. The court also noted that J.L.W. had a good relationship with her stepfather and that there was a high likelihood of her stepfather adopting her. In addition, the court noted that J.L.W. had not had contact with A.W. for over half of her life and that J.L.W.'s contact with A.W.'s family had been unhealthy for J.L.W. In short, the record shows that the circuit court reasonably applied the proper legal standard to the facts of record when reaching its disposition.

I have discovered no other arguably meritorious grounds for an appeal. I 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 order terminating A.W.'s parental rights to J.L.W. is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals