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**DISTRICT IV/I**

June 29, 2016

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

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2016AP571-NM

In re the termination of parental rights to G. T. D., a person under the age of 18: Clark County Department of Human Services v. M. B. D. (L.C. # 2015TP1)

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

M.D. appeals an order terminating her parental rights to G.D. Attorney Gina Frances Bosben was appointed to represent M.D. and filed a no-merit report. *See Brown County v. Edward C.T.*, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998); *see also* WIS. STAT. RULES

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<sup>1</sup> 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) & 809.32. M.D. responded to the no-merit report.<sup>2</sup> After reviewing the no-merit report and the response, and after conducting an independent review of the record, we conclude that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the order terminating M.D.'s parental rights. *See* WIS. STAT. RULE 809.21.

G.D. was born on February 27, 2009. G.D. has resided outside his mother's home since February 29, 2012, when he was taken into custody for being neglected. On July 13, 2012, G.D. was found to be in need of protection and services (CHIPS). The CHIPS orders were renewed periodically thereafter until January 15, 2015, when the Clark County Department of Human Services petitioned to terminate M.D.'s parental rights to G.D. The County alleged that two grounds existed to terminate M.D.'s parental rights: (1) G.D. continued to be in need of protection and services; and (2) M.D. failed to assume parental responsibility for G.D. *See* WIS. STAT. § 48.415(2) and (6). After a trial held June 30 to July 2, 2015, a jury found that the County had established both grounds for termination. On November 16, 2015, the court held a contested dispositional hearing. The court found that it was in G.D.'s best interest to terminate M.D.'s parental rights.

The no-merit report first addresses whether there was sufficient evidence to support the jury's verdict that grounds for termination existed. "When reviewing a jury's verdict, we consider the evidence in the light most favorable to the verdict." *Tammy W-G. v. Jacob T.*, 2011

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<sup>2</sup> Attorney Bosben moved to extend the deadline for M.D. to file a response. Clark County objected. We retroactively grant the one-week extension and consider the response based on Attorney Bosben's explanation that her letter to M.D. incorrectly informed M.D. that she had thirty days to file the response.

WI 30, ¶39, 333 Wis. 2d 273, 797 N.W.2d 854, citing *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

At trial, Tina Arzt testified that she is a social worker employed by the Clark County Department of Social Services. She testified that G.D. was taken into custody and placed in foster care on February 29, 2012, when the police responded to a call regarding an unidentified child, who was wandering around alone. The child was not wearing pants or a diaper even though the temperature outside was below freezing. Arzt testified that the police identified the child as G.D., who had just turned three at the time. Arzt testified that when she and the police arrived at G.D.'s home, it was filthy. They found human feces on the kitchen floor and in front of the refrigerator. There were cigarette butts and broken pieces of wood on the floor. Arzt told the jury that she saw a chair that had been pushed up toward the counter, on which there was a steak knife that G.D. could reach. Arzt testified that the police found M.D. asleep in bed. M.D. explained that she had been sick and thought someone else was watching the child.

Glenda Carlson, the supervisor of Children and Family Services at the Clark County Department of Social Services, testified that she is the primary social worker assigned to M.D.'s case. Carlson testified at length about the services that the County provided to M.D. to help her meet the conditions for G.D.'s return to her home, including transportation to doctor's appointments, to counseling appointments and to visit G.D. Carlson testified that the County provided oversight during the visits and guidance to M.D. to assist her in learning to positively parent G.D. Carlson testified that M.D. struggled to provide G.D. with structure and appropriate supervision. Carlson testified that often there would be "parallel play," with M.D. involved in an activity on one side of the room, while G.D. was involved in an activity on another side of the room. M.D. would attempt to get G.D. to do the things that she was interested in doing, rather

than joining him in his play. Carlson testified that M.D. missed many visits and often did not call to confirm or to cancel visits. Carlson testified that of the two hundred visits that were scheduled between M.D. and G.D. over the years, M.D. attended only fifty-eight percent of the visits and was present for only twenty-three percent of her scheduled phone calls.

Carlson also testified that the County provided M.D. with assistance to help her maintain a safe and stable residence by giving her items like electrical outlet covers and child safety gates. She testified that the County attempted to provide M.D. with home management skills, establishing routines for activities like cleaning, doing dishes and mopping, but M.D. moved from place to place so frequently that it was difficult to provide intense services in this regard. Carlson testified that the longest M.D. lived in one location was four months, and none of the places she lived were deemed safe or appropriate for G.D. Based on her experience working with M.D., Carlson testified that she did not believe that M.D. had the ability to meet the conditions for return of G.D. in the next nine months.

Debra Miller testified that she was one of the social workers from Clark County assigned to work with M.D. She testified that the longest period of time M.D. lived in the same house was four to five months from November 2012 to March 2013. She testified that she inspected that apartment three times to see if visits could begin there with G.D., but the home was not safe. There was exposed wiring on all the floors of the home, dangerous chemicals within easy reach, and floor tacks from places where M.D. had removed the carpet. Miller testified that she tried to assist M.D. in addressing the safety issues, explaining to her what needed to be done to remedy the problems and providing her with supplies and furnishings. She testified that M.D. had a difficult time comprehending what she was required to do and needed constant contact and reminders.

Dr. Brian Stress, a psychologist, testified that he has extensive experience with family therapy, including evaluating the ability of people to parent. Dr. Stress told the jury about the tests and other tools he used to evaluate M.D. Dr. Stress diagnosed M.D. with borderline impaired intellectual functioning, and said that her limited academic skills, her cognitive deficits, and her significant difficulties relating to comprehension and auditory processing memory made her unable to make effective decisions about G.D.'s safety and his well-being. He further testified that she did not have the ability "to receive, evaluate, and communicate decisions regarding care ... and living arrangements" for G.D. He testified that she made poor decisions that placed her and others at risk.

Lynn Hoornstra testified that she is a psychotherapist who worked with M.D. and G.D. for seven months. She testified that M.D. had difficulty understanding G.D.'s needs and had difficulty putting forth the effort necessary to address his needs. Hoornstra testified that her most significant concern about M.D.'s parenting was her lack of insight and lack of ability to follow through to provide the structure G.D. needed.

Louis Herbert, who was G.D.'s foster father for two-and-a-half years, testified about G.D.'s behavior and his interactions with M.D. during the time G.D. lived with him and his family. Herbert testified that G.D. had aggressive, disruptive behaviors that were very difficult to address, particularly in the beginning. Herbert testified that M.D. would occasionally attend G.D.'s doctor appointments and school appointments, but that she often did not phone G.D. as scheduled and was generally not very involved in his life. Herbert also testified that G.D. rarely asked about his mother, doing so only three times during the period he lived with Herbert and his family.

Based on the trial testimony, some of which is summarized above, there was ample evidence to support the jury's verdict. The jury found that G.D. had been placed outside M.D.'s care for longer than six months pursuant to CHIPS orders, that the County had made reasonable efforts to provide M.D. with services to help her meet the court ordered conditions for G.D.'s return, that M.D. had not met the conditions, and there was a substantial likelihood that she would not meet the conditions within the next nine months. *See* WIS. STAT. § 48.415(2). There was also ample evidence to support the jury's finding that M.D. failed to assume parental responsibility for G.D. because she had not accepted and exercised significant parental responsibility for G.D.'s daily supervision, education, protection and care based on the totality of the circumstances throughout G.D.'s life. *See* § 48.415(6). There would be no arguable merit to an appellate claim that there was not sufficient evidence to support the jury's verdict.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion in denying M.D.'s lawyer's request for a continuance before the trial. "A continuance shall be granted by the court only upon a showing of good cause in open court ... and only for so long as necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases." WIS. STAT. § 48.315(2). Whether to grant a continuance is committed to the circuit court's discretion. "To be sustained, a discretionary determination must be the result of a rational mental process where the facts of record and law relied upon are stated and considered together to achieve a reasoned and reasonable decision." *Rodak v. Rodak*, 150 Wis. 2d 624, 631, 442 N.W.2d 489 (Ct. App. 1989).

M.D.'s lawyer moved for a continuance one week before trial, arguing that M.D. should receive updated psychological evaluations. The County objected. The circuit court denied the

motion on the grounds that trial was imminent, the termination petition had been filed six months earlier, and the psychologists would testify at trial, and could therefore be cross-examined about when the evaluations were done and whether the information was stale. At trial, M.D.'s lawyer did, in fact, cross-examine Stress and Hoornstra about the dates of their evaluations and their current relevance, thus allowing the jury to assess the weight to be given to the information they provided. There would be no arguable merit to a claim that the circuit court misused its discretion in granting the continuance.

The no-merit report next addresses whether the circuit court properly exercised its discretion at the disposition hearing in deciding that it was in G.D.'s best interests to terminate M.D.'s parental rights. The ultimate decision whether to terminate parental rights is committed to the circuit court's discretion. *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The best interests of the child is the prevailing factor. WIS. STAT. § 48.426(2). In considering the best interests of the child, the circuit court shall consider: (1) the likelihood of adoption after termination; (2) the age and health of the child; (3) whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever those relationships; (4) the wishes of the child; (5) the duration of the separation of the parent from the child; and (6) 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. *See* § 48.426(3).

At the dispositional hearing, the circuit court heard testimony from G.D.'s foster father, the social worker, and M.D. The circuit court also considered the guardian ad litem's report. The circuit court found that G.D., who was six years and nine months old, had been living

outside his mother's home for over half of his life, since he was three years old, and no longer had a substantial relationship with her. The court found that G.D.'s foster father, who is G.D.'s maternal uncle, and his wife were providing G.D. with a structured, stable and loving environment in which G.D. was thriving. The court found that G.D.'s foster family understood his special needs and had a willingness and ability to respond to those needs. The circuit court found that G.D.'s foster family worked hard to promote his well being, taking him to his doctor's appointments, his therapy appointments, his dentist and engaging with his school. The circuit court found that G.D. had begun learning to control his aggressive behaviors since living with his foster family and was learning the academic, social and emotional skills he needed. The circuit court also found that G.D.'s foster family would very likely adopt him.

The circuit court found that G.D. expressed that he would like for his home with his foster parents to be his "forever house," which the court said showed that G.D. was very comfortable with his foster family and wanted to remain with them. The court found that G.D.'s foster father would facilitate G.D.'s relationship with his biological brother, who was living with another foster family, and would help him develop relationships with his extended biological family, including M.D., to the extent it was appropriate, even though the family members lived in a different state. Based on these findings, the court properly exercised its discretion in concluding that termination of M.D.'s parental rights was in the child's best interest. *See Gerald O.*, 203 Wis. 2d at 152 (A circuit court "properly exercises its discretion when it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach."). An appellate challenge to that determination would lack arguable merit.



The no-merit report addresses whether M.D. received effective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). After reviewing the transcripts of the circuit court proceedings, we agree with the no-merit report's conclusion that M.D.'s lawyer fully advocated for M.D.'s position and did not perform deficiently. There would be no arguable merit to a claim that M.D. received ineffective assistance of trial counsel.

In her response to the no-merit report, M.D. states that she has made improvements in her living situation and would like to take care of G.D. She explains that she has maintained employment since August 26, 2015, has maintained stable housing, has taken parenting classes, and now knows how to take care of herself when she is having issues with her mental health. She also states that she has been financially stable. While the recent improvements M.D. has made in her living situation are certainly positive, they do not provide a legal basis for challenging the order terminating her parental rights. The jury properly found grounds to terminate her parental rights *based on her inability to meet the conditions for G.D.'s return prior to the trial held on June 30 to July 2, 2015.*

M.D. also states in her response that she felt unprepared for her trial and believes that some of the information and documentation the County provided about her visits with G.D. was inaccurate. M.D.'s lawyer properly cross-examined the County's witnesses about M.D.'s attendance at her visits with G.D. M.D.'s complaints do not provide grounds for appellate relief. Our independent review of the record reveals no other potential issues. We therefore conclude that there is no arguable basis for reversing the order terminating M.D.'s parental rights. Any further proceedings would be without arguable merit.

IT IS ORDERED that the order terminating M.D.'s parental rights is summarily affirmed.  
*See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Gina Frances Bosben is relieved of any further representation of M.D. on appeal.

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