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January 25, 2017

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

2016AP1232-NM In re the termination of parental rights to A. R. W., a person under the age of 18: State of Wisconsin v. D. A. (L.C. # 2013TP370)

Before Hagedorn, J.[1]

D.A. appeals from an order involuntarily terminating his parental rights to his biological daughter, A.R.W. Appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32, ***Anders v. California***, 386 U.S. 738 (1967), and ***Brown Cty. v. Edward***

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

C.T., 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (per curiam). D.A. received a copy of the report, was advised of his right to file a response, and has elected not to do so.[2] Upon consideration of the no-merit report and an independent review of the record, we conclude that the order 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.

A.W. gave birth to A.R.W. in 2003.[3] D.A. was involved during the first five months of the pregnancy but discontinued contact after A.W. told him he was not the biological father. In December 2005, A.R.W. was removed from her mother's home and adjudicated a child in need of protection or services (CHIPS). In 2006, pursuant to a court ordered paternity test, D.A. was adjudicated A.R.W.'s biological father. Around this same time, D.A. was arrested and held in custody for charges involving the sexual assault of a child. He was convicted of child sexual assault by a jury and, in June 2006, received a bifurcated sentence including ten years of initial confinement. A.R.W. was returned to her mother's care in February 2009.

In December 2011, A.R.W. was again removed from A.W.'s care and placed outside the home pursuant to a CHIPS dispositional order entered May 15, 2012, and revised on April 11,

[2] We previously granted D.A.'s motions seeking to extend the time to file a response to counsel's no-merit report, most recently, to November 17, 2016. Thus, an opinion from this court was due December 19, 2016. *See* WIS. STAT. RULE 809.107(6)(e). Conflicts in this court's calendar and the fact that this matter shares a record with appeal Nos. 2016AP122 and 2016AP125 have resulted in a short delay in the opinion's release. It is therefore necessary for this court to sua sponte extend the deadline for a decision in this case. *See* WIS. STAT. RULE 809.82(2)(a) ("[T]he court upon its own motion … may enlarge or reduce the time prescribed by these rules or court order for doing any act …."); ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). We extend our deadline accordingly.

[3] The parental rights of A.W., the child's mother, were involuntarily terminated in separate proceedings, and the circuit court's order was recently affirmed on direct appeal. ***State v. A.W.***, No. 2016AP122, unpublished slip op. (WI App Dec. 8, 2016).

2013. D.A. was involved in the CHIPS action and was given court ordered conditions of return. On November 21, 2013, the State filed a petition to involuntarily terminate both parents' rights to A.R.W. As to D.A., the grounds alleged were continuing CHIPS under WIS. STAT. § 48.415(2), and failure to assume parental responsibility under § 48.415(6). D.A. chose to represent himself along with standby counsel. The parents' cases were eventually severed and following a multi-day court trial, D.A. was found unfit on both grounds. After a dispositional hearing spanning several days, the circuit court terminated D.A.'s parental rights. This no-merit appeal follows.

The no-merit report first addresses whether any issue of arguable merit arises from D.A.'s decision to waive his right to a jury trial. *See* WIS. STAT. § 48.422(4). The right to a jury trial in a TPR case is statutory, not constitutional. *See* ***Steven V. v. Kelly H.***, 2004 WI 47, ¶34, 271 Wis. 2d 1, 678 N.W.2d 856. In accepting a parent's withdrawal of his or her demand for a jury trial, the circuit court is not required to engage in a personal colloquy on the record. ***Racine Cty. Human Servs. Dep't v. Latanya D.K.***, 2013 WI App 28, ¶21, 346 Wis. 2d 75, 828 N.W.2d 251. Here, D.A. waived his right to a jury trial on the record after informing the circuit court he had considered the issue for several weeks and believed the circuit court judge to be fair. We agree with appellate counsel's analysis and conclusion that any challenge to the withdrawal of D.A.'s jury trial demand would be without arguable merit.

The no-merit report also addresses the sufficiency of the evidence supporting the circuit court's unfitness findings. We agree that there is no arguably meritorious challenge to the circuit

court's unfitness finding on either ground.[4] In order to establish the continuing CHIPS ground, the State needed to show by clear and convincing evidence that (1) A.R.W. was adjudged in need of protection or services and placed outside the home for six months or more pursuant to a court order containing the TPR notice required by law, (2) Milwaukee County made reasonable efforts to provide the services ordered by the court, (3) D.A. failed to meet the conditions established for the safe return of A.R.W., and (4) there was a substantial likelihood that D.A. would not meet the conditions within the next nine months. *See* WIS. STAT. § 48.415(2); WIS JI—CHILDREN 324A.

The trial evidence established that A.R.W. was placed outside the home for well over six months and that the revised April 11, 2013 order contained the requisite TPR warnings as to D.A. Over time, D.A. had three different case workers through Milwaukee County. The circuit court determined that though the case workers' efforts were at times thwarted by the Department of Corrections, at least two of D.A's case workers made reasonable efforts to provide court ordered services to D.A. The circuit court also found that though D.A. had made progress on some of his conditions of return, he failed to meet certain critical conditions, such as completing sex offender treatment. Finally, aside from his other unfulfilled conditions, the circuit court found there was a substantial likelihood that D.A. would not complete sex offender treatment within the next nine months. The circuit court's decision as factfinder is supported by a reasonable view of the credible evidence. *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752.

[4] While two unfitness grounds were pled in the petition, the circuit court only needed to find that one was established in order to find D.A. unfit. Regardless, we address both grounds alleged and conclude that each was supported by sufficient evidence.

Similarly, we conclude that the circuit court acting reasonably could have found by clear and convincing evidence that D.A. failed to assume parental responsibility for A.R.W.. In order to establish this ground, the State needed to show that D.A. did not have a substantial parental relationship with A.R.W., meaning the acceptance and exercise of significant responsibility for her daily supervision, education, protection, and care. *See* WIS. STAT. § 48.415(6). D.A. had reason to believe he was A.R.W.'s father but took no steps to establish paternity while he was out of custody from 2003 to 2006. Once he was adjudicated, D.A. had no contact with A.R.W. until she was removed from her mother's care for the second time, in 2011. Though the court agreed that thereafter, D.A. made a concerted effort to be a part of A.R.W.'s life, the court found it did not rise to the level of a substantial parental relationship. The evidence was sufficient to support the circuit court's finding.

Next, the no-merit report addresses whether D.A.'s court-ordered conditions of return were impossible to meet in violation of D.A.'s substantive due process rights. *See* ***Kenosha Cty. DHS v. Jodie W.***, 2006 WI 93, ¶¶19, 49, 293 Wis. 2d 530, 716 N.W.2d 845 (a parent's incarcerated status does not in itself demonstrate unfitness, and "a parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit"). As discussed in counsel's no-merit report, the circuit court found that D.A. failed to meet several conditions of return and further determined that D.A. could have met these conditions, such as sex offender treatment, despite his incarceration. We are satisfied that the no-merit report properly analyzes this issue as without merit and will not address it further.

Finally, there is no arguable merit to a claim that the circuit court erroneously exercised its discretion when it terminated D.A.'s parental rights at disposition. The court correctly

applied the best interests of the child standard and considered the factors set forth in WIS. STAT. § 48.426(3). The circuit court considered at some length whether terminating D.A.'s parental rights would enable A.R.W. to enter into a more stable and permanent family relationship, observing it was difficult to predict both the likelihood of A.R.W.'s adoption and whether D.A. would eventually be able to serve as a placement resource. Ultimately, the court found that termination would allow for more predictability and afford A.R.W. a greater degree of stability. The court's discretionary decision to terminate D.A.'s parental rights demonstrates a rational process that is justified by the record. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

In addition to the potential issues discussed by counsel, we note that it appears from the record that all of the statutory deadlines were met or properly extended for good cause and that required notices were given. We have discovered no other arguably meritorious grounds for an appeal. Accordingly, we accept the no-merit report, affirm the order terminating D.A.'s parental rights, and discharge appellate counsel of the obligation to represent D.A. further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the order terminating D.A.'s parental rights to A.R.W. is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Christine M. Quinn is relieved from further representing D.A. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals