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June 28, 2017

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

2017AP322-NM	In re the termination of parental rights to S.A.E., a person under the age of 18: S.K. v. S.E. (L.C. # 2016TP15)
2017AP323-NM	In re the termination of parental rights to K.M.E., a person under the age of 18: S.K. v. S.E. (L.C. # 2016TP16)

Before Lundsten, J.[1]

S.E. appeals orders terminating his parental rights to his children S.A.E. and K.M.E. Attorney Eileen Evans has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.107(5m) and RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744

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

(1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987). The no-merit report addresses whether mandatory deadlines were met; whether the mother's attorney should have been disqualified for an alleged conflict of interest; the sufficiency of the evidence to support the determination of grounds; and the circuit court's exercise of discretion at the dispositional phase. S.E. was sent a copy of the report, and has not filed a response.[2] 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. In addition to the issues raised by counsel, we address jury waiver and amendment of the petitions as possible issues, but conclude they also lack merit.

Mandatory Deadlines

The Children's Code sets a number of mandatory deadlines for cases involving termination of parental rights. *See* WIS. STAT. §§ 48.422(1) (initial hearing on petition shall be held within 30 days to inform parties of their rights and determine whether any party will contest the petition); 48.422(2) (fact-finding hearing on grounds shall be held within 45 days after the initial hearing on the petition); 48.424(4) (if grounds for termination are found, court shall proceed immediately to disposition unless the court is still waiting for a report on the history of the child or all parties agree to have a separate dispositional hearing, which must be held no more than 45 days after the fact-finding hearing on grounds). These deadlines may be extended if a

[2] On April 14, 2017, just over a week after filing the no-merit report, counsel advised this court that S.E. had been released from jail and had a new address. In that letter, counsel asked (although no motion was filed) that this court give S.E. 15 days, either from service of the notice of the filing of counsel's no-merit report or from this court's decision on consolidation, for S.E. to file a response to counsel's no-merit report. We note that the consolidation order had already been issued a month earlier, on March 3, 2017. Given that two months have now passed since this court sent notice of the filing of counsel's no-merit report to S.E.'s new address, we are satisfied that S.E. has had more than an adequate opportunity to respond to counsel's no-merit report.

continuance is granted on the record for good cause, or without an objection. WIS. STAT. § 48.315(2) and (3).

Here, the initial appearance was adjourned by two days to allow S.E. to appear telephonically from prison. The parties subsequently waived the time limits for the fact-finding hearing, and the court found that accommodation of the parties' schedules, discovery, and the court's congested calendar provided good cause for a continuance. We agree.

Disqualification of Opposing Counsel

S.E. moved to disqualify the mother's attorney on the basis that she had worked as a team member in the county's drug court program during a period of time about a decade earlier when S.E. had been participating in the program. S.E. argued that the attorney was bound by an ethical obligation of confidentiality to him as a "former client" under SCR 20:1.9(a)(2).

The mother's attorney responded that she did not "represent" S.E. within the meaning of the rule; that she had no personal recollection of S.E. and would not have had access to S.E.'s health care records in the drug court because she was not the "team leader"; that no information from the drug court would be relevant to the grounds phase of the TPR proceeding; that, if any information about S.E.'s prior participation in the drug court was relevant at disposition, the mother would presumably have knowledge of that same information, anyway, because she had been married to S.E. at the time; and that nothing in the attorney's participation in drug court would inhibit her ability to represent her current client, the mother.

The court first observed that drug courts were a developing area of the law across the nation that might not be addressed fully by existing ethical rules. The court then noted that the county's own drug court program required team members to include a judge, a prosecutor, and a public defender. The court felt that there could be a conflict of interest with an active participant

in the program under the structure of the county's drug court, but was not convinced that there was any conflict of interest with a past participant of the program. The court held that the ethical rule did not apply because the mother's attorney had not actually represented S.E. and because the current TPR proceeding did not involve a substantially related matter. We agree with counsel that there is no basis to challenge the court's ruling on disqualification.

Jury Waiver

There is a statutory right to a jury trial in a termination of parental rights case. WIS. STAT. § 48.422(4); ***Steven V. v. Kelley H.***, 2004 WI 47, ¶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. *See* **Walworth Cty. DHHS v. Andrea L.O.**, 2008 WI 46, ¶55, 309 Wis. 2d 161, 749 N.W.2d 168. Here, S.E. requested a trial to the court, but the court did not conduct a colloquy with S.E. because the mother requested a jury trial. The mother later withdrew her jury request at the final pretrial conference. At that time, the court conducted a colloquy with the mother, and S.E.'s attorney made a record that he had previously gone over S.E.'s right to a jury trial with him. S.E.'s counsel reiterated that S.E. had not requested a jury trial. Since S.E. never requested a jury trial, the court did not need to conduct a colloquy.

Amendment of the Petitions

The original petitions alleged two grounds for termination: abandonment, under WIS. STAT. § 48.415(1)(a), and failure to assume parental responsibility, under § 48.415(6). After depositions had been completed, the mother dropped the ground of failure to assume parental responsibility because counsel did not believe that the ground could be proven if a parent had ever had a substantial relationship with the child. However, about three weeks later, counsel discovered a more recent case holding otherwise, and moved to reinstate the ground of failure to

assume parental responsibility with a second amended petition. The circuit court granted leave for the second amendment, reasoning that S.E. was put on notice of that ground with the original complaint and was not prejudiced by the reinstatement of that ground since he had conducted discovery while the claim was still active. We see no basis on which to challenge the circuit court's exercise of discretion.

Sufficiency of the Evidence

In order to prove the termination ground of abandonment, the mother needed to show: (1) that S.E. left the child with another person; (2) that S.E. knew or could discover the whereabouts of the child; and (3) that S.E. failed to visit or communicate with the child for a period of six months or longer. WIS. STAT. § 48.415(1)(a)3.

As to the first element of leaving the children with another person, a Wood County Sheriff's Department employee testified that S.E. had spent 616 nights in the county jail since 2004, a DOC records supervisor testified that S.E. had been in prison from March 30, 2010, to July 14, 2011, and the mother testified that she was the sole care provider for the children during all of the periods during which S.E. was incarcerated in jail or prison.

As to the second element of knowing the whereabouts of the children, S.E. testified that he had never sought a court order for visitation because he had an agreement with the children's mother that she would always allow him to be a part of the children's life. S.E. also testified that he had periodically sent and received letters to and from the children and had spoken to them on the phone over the years. The only reasonable inference from that and similar testimony was that S.E. knew the children were living with their mother.

As to the third element of failing to visit or communicate with the children for a period of six months, the circuit court accepted the testimony of the mother and found that S.E. did not

have anything more than incidental contact with the children by sending birthday and Christmas cards between November of 2012 and May of 2013, a period when he was not in prison.

Given that there was ample evidence to support the ground of abandonment, it is unnecessary to consider whether there was also sufficient evidence to support the ground of failure to assume parental responsibility.

Disposition

At the dispositional hearing, a circuit court is 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 circuit court did so. The court emphasized that the mother's husband had bonded with the children over a period of years, was a stable presence in their lives, and wanted to adopt them; that the children had expressed interest in taking their stepfather's last name and the older child had indicated that she did not wish to resume contact with S.E.; that termination would not be harmful because the children had not had any substantial contact with S.E. for most of their lives; and a formal legal relationship was not necessary for the paternal grandmother to continue to have an annual visit with the children with the mother's consent. In sum, the record shows that the circuit 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 S.E.'s parental rights to S.A.E. and K.M.E. are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Eileen Evans is relieved of any further representation of S.E. in these matters. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals