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June 7, 2018

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

2018AP538-NM In re the termination of parental rights to N.H., a person under the age of 18: State of Wisconsin v. D.K. (L.C. # 2016TP254)

Before Blanchard, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

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

Attorney Karen Lueschow, appointed counsel for D.K., has filed a no-merit report in this appeal concerning termination of D.K.'s parental rights to N.H. *See* WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a claim that the circuit court judge was biased or failed to properly exercise her discretion in determining that termination of D.K.'s parental rights was in N.H.'s best interests. D.K. was sent a copy of the report, and has filed a response. Upon my independent review of 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. I affirm.

On August 8, 2016, the State petitioned to terminate D.K.'s parental rights to N.H. As grounds, the petition alleged that D.K. had failed to assume parental responsibility for N.H. under WIS. STAT. § 48.415(6). D.K. contested the petition and waived his right to a jury trial. After a trial to the court, the court found that grounds for termination existed based on failure to assume parental responsibility and found D.K. unfit. After the dispositional hearing, the court found that termination of D.K.'s parental rights was in N.H.'s best interests. The court entered an order terminating D.K.'s parental rights to N.H.

I note as an initial matter that the no-merit report fails to address whether there would be arguable merit to a challenge to the circuit court's finding that grounds existed to terminate D.K.'s parental rights, which is an obvious potential issue that should be considered. D.K. argues in his no-merit response that the circuit court's finding as to grounds was not supported by sufficient evidence, but counsel has not filed a supplemental no-merit report addressing sufficiency of the evidence.

Failure to assume parental responsibility is established by proof that the parent has not had a substantial parental relationship with the child. WIS. STAT. § 48.415(6)(a); ***State v. Bobby G.***, 2007 WI 77, ¶45, 301 Wis. 2d 531, 734 N.W.2d 81. "Substantial parental relationship" for purposes of the statute is "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b). "[A] fact-finder must look to the totality-of-the-circumstances to determine if a parent has assumed parental responsibility." ***Tammy W–G. v. Jacob T.***, 2011 WI 30, ¶22, 333 Wis. 2d 273, 797 N.W.2d 854. Further, "[w]hen applying [the totality-of-the-circumstances] test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life." ***Id.***, ¶73. Grounds for termination must be established by clear and convincing evidence. *See* WIS. STAT. §§ 48.424 and 48.31(1). This court upholds a circuit court's factual findings unless they are clearly erroneous. ***State v. Raymond C.***, 187 Wis. 2d 10, 14, 522 N.W.2d 243 (Ct. App. 1994).

At the trial as to grounds, the State presented the following evidence. N.H. was born on October 24, 2015, and was placed in the care of the Division of Milwaukee Child Protective Services (DMCPS) shortly after he was born. In early November 2015, N.H.'s mother provided D.K.'s name to the assigned family case manager. The family case manager contacted D.K. on November 16, 2015, and D.K. stated that he had learned he was N.H.'s father and had taken a DNA test to confirm his paternity. The case manager informed D.K. that there was a child in need of protection or services (CHIPS) hearing for N.H. scheduled for November 30, 2015. D.K. indicated that he did not plan to attend the hearing due to outstanding warrants for his arrest and his work schedule. The case manager informed D.K. that, at the November 30 hearing, she would request a DNA test to confirm D.K.'s paternity. The case manager spoke with D.K. again

on November 19, 2015, and D.K. requested that the case manager pursue placement of N.H. with D.K.'s relative, G.K. D.K. did not appear at the November 30 hearing for N.H.

The case manager contacted D.K. again on December 16, 2015, and informed him that the DNA results confirmed his paternity of N.H. D.K. requested that the case manager contact G.K. The case manager contacted G.K. the next day, and G.K. stated that she would talk with D.K.

The case manager met in person with D.K. on December 21, 2015. They discussed an assessment process to start D.K.'s involvement, and scheduled an assessment meeting for January 12, 2016. D.K. did not attend the scheduled meeting. D.K. committed two burglaries in early January 2016, was arrested, and remained incarcerated since that time. The case manager attempted to arrange visitation between D.K. and N.H., but was unable to do so due to restrictions at the prison. The case manager also made attempts to engage G.K. in the licensing process. G.K. showed some interest but did not follow through with the procedure. D.K. never met N.H., made any decisions as to his medical treatment, or provided him with any financial support. D.K. wrote letters to N.H., in which he asked N.H. how he was doing. D.K. did not ask the case manager how N.H. was or make any inquiry into N.H.'s medical care or education.

D.K. testified that he obtained a DNA test to establish paternity on the day he learned that he might be N.H.'s father, that D.K. told the case manager that he wanted G.K. to have placement of N.H., and that he was unable to attend the January 12 meeting because he was already incarcerated at that point. D.K. testified that he requested visitation with N.H. but was not allowed visits, and that he wrote letters to N.H. on a regular basis.

D.K. argues that the circuit court's finding that D.K. failed to assume parental responsibility was "harsh and unconstitutional." D.K. points out that the circuit court ordered the parties to brief the issues of whether D.K.'s criminal conduct and resulting incarceration in January 2016 was sufficient to establish failure to assume responsibility, and whether it would be unconstitutional to terminate D.K.'s parental rights based solely on D.K.'s criminal conduct and resulting incarceration. D.K. argues that his counsel's brief established that there was insufficient evidence to establish grounds for termination.

D.K.'s counsel's brief argued that the evidence was insufficient to support a finding that D.K. failed to assume parental responsibility. It asserted that evidence as to the following established that D.K. assumed parental responsibility: D.K. made efforts to establish his paternity soon after N.H. was born; D.K. provided DMCPS with a name of a relative for DMCPS to consider for placement; D.K. met with a case manager to begin his involvement with N.H., but was shortly thereafter incarcerated; and after his incarceration D.K. maintained contact with DMCPS about N.H. and made efforts to have contact with N.H. The brief argued that there was no evidence other than D.K.'s incarceration to support a finding of failure to assume parental responsibility and that D.K. had made every attempt possible to assume parental responsibility within the limits of his incarceration. The brief argued that it would be unconstitutional to terminate D.K.'s parental rights based on a failure to assume parental responsibility, because it would be impossible for D.K. to exercise daily supervision and care of N.H. during his incarceration. *See* WIS. STAT. § 48.415(6) (failure to assume); ***Kenosha County Dep't of Human Servs. v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845 (providing that it is unconstitutional to rely solely on a parent's incarceration to find the parent unfit).

The circuit court found, however, that the State provided evidence beyond D.K.'s significant criminal conduct and resulting incarceration to establish that D.K. had failed to assume parental responsibility. The court found that, in addition to D.K.'s January 2016 criminal conduct and incarceration, the following evidence established that D.K. failed to assume parental responsibility: prior to January 2016, D.K. failed to address his bench warrants from previous misdemeanor cases so that he could come to court in connection with N.H.'s CHIPS case; D.K. failed to engage in the CHIPS case, thus missing an opportunity to promptly engage in services and visitation; during the time when D.K. knew that he was N.H.'s father and before D.K. was incarcerated, D.K. failed to provide any financial support or gifts for N.H.; while D.K. was incarcerated, D.K. failed to inquire specifically into N.H.'s medical care and development; and D.K.'s conduct while incarcerated caused him to be placed in segregation, further restricting D.K.'s ability to have contact with N.H. The court also took into consideration the fact that, after D.K. learned that he was N.H.'s father, D.K. committed two serious crimes, one while in possession of a firearm. In sum, the court determined that there was sufficient evidence, which included but was not limited to D.K.'s criminal conduct and incarceration, to establish that D.K. had failed to assume parental responsibility. Accordingly, a contention that the court's finding as to grounds was unconstitutional or not supported by sufficient evidence would lack arguable merit.

The no-merit report addresses whether there would be arguable merit to a claim that the circuit court judge was biased. *See* ***Murray v. Murray***, 128 Wis. 2d 458, 463, 383 N.W.2d 904 (Ct. App. 1986) ("Due process requires that a neutral and detached judge preside over any civil or criminal action or proceeding. If the judge evidences a lack of impartiality, whatever its origin or justification, the judge cannot sit in judgment.") (citations omitted). I conclude that

nothing in the record, no-merit report, or no-merit response would support a non-frivolous claim that the judge was biased. *See* ***State v. Gudgeon***, 2006 WI App 143, ¶¶20–24, 295 Wis. 2d 189, 720 N.W.2d 114 (claim of judicial bias must show either subjective bias, meaning that the judge has "personal doubts as to whether [he or she] can avoid partiality to one side," or objective bias, meaning that "a reasonable person could question the judge's impartiality," and must overcome the presumption that the judge was fair and impartial).

The no-merit report also addresses whether there would be arguable merit to a challenge to the circuit court's exercise of discretion in determining that termination of D.K.'s parental rights was in N.H.'s best interests. *See* WIS. STAT. §§ 48.426 and 48.427. At the dispositional hearing, D.K. testified that he believed it was in N.H.'s best interests for the court to appoint G.K. as N.H.'s guardian rather than terminate D.K.'s parental rights. He testified regarding recent visits he was able to have with N.H. at the prison. He testified that he was dedicated to raising N.H. when he finished his prison sentence. G.K. testified that she had been unable to follow through with the licensing process earlier due to personal issues, but that she was now ready to take placement of N.H. and wished to do so. N.H.'s foster mother testified that N.H. was placed with her at five days old and had remained with the family for more than two years, and that N.H. was part of her family and that she was committed to adopting him. The case manager testified that G.K. had initially expressed interest in having placement of N.H., but had failed to follow through with the process. The case manager testified that G.K. had recently begun the licensing process but was not yet approved for placement. The case manager stated that she believed it would be detrimental for N.H. to change placement from the only family he had ever known at two years old. The circuit court applied the facts to the required statutory factors under WIS. STAT. § 48.426(3) and determined that termination of D.K.'s parental rights

was in N.H.'s best interests. In doing so, the circuit court expressly considered D.K.'s recommendation of a guardianship with G.K. as an alternative disposition and determined that a change in placement at that point in N.H.'s life would not be in N.H.'s best interests. I agree with counsel that a challenge to the court's decision would lack arguable merit.

D.K. argues that the circuit court's finding that termination of his parental rights was in N.H.'s best interests was "harsh and unconstitutional." D.K. contends that the circuit court should have instead ordered a guardianship, as advocated by D.K.'s counsel. However, as explained, the circuit court properly exercised its discretion to determine that termination was in N.H.'s best interest. It would be wholly frivolous to argue that the court erroneously exercised its discretion by failing to order a guardianship rather than termination of D.K.'s parental rights or that the disposition violated D.K.'s constitutional rights.

D.K. also argues that there were insufficient attempts to reunify N.H. with biological family during the circuit court proceedings. D.K. asserts that G.K. expressed an interest in taking responsibility for N.H. when N.H. was less than two months old, but that G.K. did not meet N.H. until N.H. was nine months old and G.K. was not granted visits with N.H. until N.H. was nearly two years old. He asserts that G.K. was always willing to take guardianship of N.H. and should have been allowed to do so. D.K. also asserts that there were twenty-four days between D.K. learning that he was N.H.'s father and D.K.'s arrest, and that DMCPS should have allowed D.K. visits with N.H. during that time. He argues that DMCPS's alleged failure to provide visits prior to D.K.'s incarceration interfered with D.K. developing a parental relationship with N.H.

However, the trial evidence established that DMCPS contacted G.K. and attempted to engage her in the licensing process, and G.K. failed to follow through. Evidence also established that DMCPS informed D.K. that there was a CHIPS hearing scheduled for N.H. when N.H. was about a month old, prior to D.K.'s arrest, and that D.K. did not attend the hearing. Evidence also established that D.K. engaged in conduct that caused him to be arrested when N.H. was about two months old, causing D.K. to be unable to engage in the assessment process that DMCPS had initiated to begin D.K.'s involvement in N.H.'s life. I discern no arguable merit to further proceedings based on D.K.'s assertion that attempts to reunify N.H. with biological family were inadequate.

Upon my independent review of the record, I have found no other arguable basis for reversing the order terminating D.K.'s parental rights. I conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Karen Lueschow is relieved of any further representation of D.K. in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals