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DISTRICT II

October 9, 2019

To:

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

2019AP1344-NM	In re the termination of parental rights to L.M.T., a person under the age of 18: Racine County HSD v. J.D.T. (L.C. #2018TP21)
2019AP1345-NM	In re the termination of parental rights to E.T., a person under the age of 18: Racine County HSD v. J.D.T. (L.C. #2018TP22)
2019AP1346-NM	In re the termination of parental rights to L.T., a person under the age of 18: Racine County HSD v. J.D.T. (L.C. #2018TP23)

Before Reilly, P.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) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Attorney Eileen T. Evans, appointed counsel for J.D.T., has filed a no-merit report in these consolidated appeals of orders terminating J.D.T.'s parental rights to L.M.T, E.T., and L.T. *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 of insufficiency of the evidence to support summary judgment as to grounds or a challenge to the circuit court's decision that termination of J.D.T.'s parental rights was in L.M.T., E.T., and L.T.'s best interest. J.D.T. was sent a copy of the report, but has not filed a response. Upon our independent review of the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. We affirm.

On June 25, 2018, the Racine County Human Services Department filed petitions to terminate J.D.T.'s parental rights to L.M.T, E.T., and L.T. One of the alleged grounds for termination was abandonment under WIS. STAT. § 48.415(1)(a)2. The elements of abandonment under that provision are "[t]hat the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by [law] and the parent has failed to visit or communicate with the child for a period of 3 months or longer." *See* § 48.415(1)(a)2. The Department moved for partial summary judgment on the abandonment ground, and the circuit court granted the motion. The court then held a dispositional hearing and determined that the termination of J.D.T.'s parental rights was in each child's best interest. The court entered orders terminating J.D.T.'s parental rights.

The no-merit report first addresses whether there would be arguable merit to a claim that there was insufficient evidence to support summary judgment as to grounds for termination. We

agree with counsel's assessment that an argument that the evidence was insufficient to support summary judgment would lack arguable merit.

Partial summary judgment may be granted as to grounds when there is no genuine issue of material fact in dispute and the State is entitled to judgment as a matter of law. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶6, 271 Wis. 2d 1, 678 N.W.2d 856; WIS. STAT. § 802.08(2). Here, J.D.T. did not dispute that L.M.T, E.T., and L.T. had been placed outside the home by one or more court orders containing the required notice. Additionally, J.D.T.'s summary judgment submissions confirmed the Department's allegations that J.D.T. had failed to visit or communicate with any of the children for a period of three months or longer.

J.D.T. argued in his summary judgment submissions that there were disputed factual issues as to whether he had good cause for failing to visit or communicate with L.M.T, E.T., and L.T. and failing to communicate with the Department about the children. WISCONSIN STAT. § 48.415(1)(c) provides, in relevant part, that:

> (c) Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:
>
> 1. That the parent had good cause for having failed to visit with the child ….
>
> 2. That the parent had good cause for having failed to communicate with the child ….
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
>
> a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified … or … with the agency responsible for the care of the child during the time period specified ….

> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified ….

J.D.T. asserted that he repeatedly asked for opportunities to see his children during the relevant time period, July 2016 to October 2017, but that the Department denied those requests. J.D.T. asserted that "he was incarcerated or homeless due to struggling to find treatment for his mental illness (bipolarism, of which one clear example exists from his public suicide attempt) during the vast majority of the time period in question," and that he did not have funds to purchase stamps during his incarceration.

J.D.T.'s summary judgment submissions did not create a genuine issue of material fact as to J.D.T.'s good cause for failing to communicate with the Department about the children for a period of three months or longer. J.D.T.'s submissions did not allege any communication between J.D.T. and the Department about the children between December 21, 2016, and August 21, 2017. J.D.T. did not dispute the Department's evidence that he was incarcerated from December 28, 2016 to January 4, 2017, and February 16, 2017, to August 21, 2017. J.D.T.'s only asserted reason for failing to contact the Department about the children during the times he was not incarcerated between December 21, 2016, and August 21, 2017, was that he was struggling with homelessness and mental illness. However, J.D.T. did not set forth any specific facts explaining how his homelessness and mental illness prevented him from having any contact with the Department. Because J.D.T.'s submissions were insufficient to establish a genuine issue of material fact as to good cause, there would be no arguable merit to a claim that the circuit court erred by granting summary judgment as to grounds.

The no-merit report also addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its discretion by determining that termination of J.D.T.'s parental rights was in each child's best interest. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996) (court's decision that termination of parental rights is in child's best interest is reviewed for an erroneous exercise of discretion). The evidence at the dispositional hearing included evidence that each child had been removed from his or her parents' care shortly after birth; that none of the children had seen J.D.T. in more than two years; that each child had been placed in a foster home for most of the child's life; that the children were bonded to their foster parents; and that each child was likely to be adopted by his or her current foster parents following termination of J.D.T.'s parental rights. The court considered the factors set forth in WIS. STAT. § 48.426(3) and determined that termination of J.D.T.'s parental rights was in each child's best interest. We agree with counsel's assessment that an argument that the circuit court erroneously exercised its decision would lack arguable merit.

Finally, we briefly address one other issue not discussed in the no-merit report. J.D.T.'s counsel stated at the initial hearing on the petitions that J.D.T. was contesting all three petitions, and then stated that J.D.T. was requesting judicial substitution. The court stated that it granted the request for judicial substitution. However, after the hearing, J.D.T.'s counsel submitted a written request for judicial substitution to the clerk of the circuit court, and the circuit court denied the request. The court explained that the request for substitution was insufficient because it was not submitted in writing to the clerk of the circuit court before or during the plea hearing. *See* WIS. STAT. §§ 48.29(1) and 48.30(2); ***Brown County DHS v. Terrance M.***, 2005 WI App 57, ¶¶11-13, 280 Wis. 2d 396, 694 N.W.2d 458. Because a parent is required to file a written request with the clerk of the circuit court prior to the conclusion of the plea hearing, it would be

wholly frivolous to argue that the circuit court erred by denying J.D.T.'s request for substitution that was filed after the hearing at which J.D.T. entered his plea contesting the petitions. We also discern no arguable merit to a claim that J.D.T.'s trial counsel was ineffective by failing to properly request judicial substitution. *See* ***State v. Damaske***, 212 Wis. 2d 169, 197-99, 567 N.W.2d 905 (Ct. App. 1997) (to raise a successful claim of ineffective assistance of counsel based on counsel's failure to file a request for judicial substitution, a defendant must allege prejudice by showing that the judge's "handling of [the] case rendered the proceeding fundamentally unfair, or that [the judge] was not impartial (citation omitted)).

Upon our independent review of the record, we have found no other arguable basis for reversing the orders terminating J.D.T.'s parental rights. We 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 orders terminating J.D.T.'s parental rights are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Eileen T. Evans is relieved of any further representation of J.D.T. 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