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DISTRICT IV

February 8, 2024

To:

Hon. Lisa A. McDougal
Circuit Court Judge
Electronic Notice

Stacy Kleist
Clerk of Circuit Court
Richland County Courthouse
Electronic Notice

Theresa Anne Carey
Electronic Notice

Amy Elizabeth Forehand
Electronic Notice

Michael Windle
Electronic Notice

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

2023AP454 In the interest of K.L.M., a person under the age of 18: Richland County Health & Human Services v. D.M.K. (L.C. # 2014JC34)

Before Taylor, 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).

D.M.K. appeals an order denying her petition for a waiver of fees and costs under WIS. STAT. § 814.29(1). Based upon my review of the briefs and the record, I conclude that this case

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

is appropriate for summary disposition, and for the reasons below, I summarily reverse. *See* WIS. STAT. RULE 809.21(1).[2]

D.M.K. is the mother of K.L.M. K.L.M. has severe autism, and both of his parents have mild cognitive disabilities. In October 2014, when K.L.M. was eight years old, Richland County Health and Human Services (the "Department") commenced child in need of protection and services ("CHIPS") proceedings, alleging that K.L.M.'s parents were unable or unwilling to provide for his needs. In addition to appointing a guardian ad litem to represent K.L.M. in the CHIPS proceedings, the circuit court appointed counsel to represent K.L.M.'s parents. *See* ***State v. Tammy L.D.***, 2000 WI App 200, ¶24, 238 Wis. 2d 516, 617 N.W.2d 894 ("[T]he juvenile courts of this state have the discretionary authority on a case-by-case basis to appoint counsel for a parent in a CHIPS case."). The costs of appointed counsel for K.L.M.'s parents have been borne by Richland County. *See* ***State v. Dean***, 163 Wis. 2d 503, 515, 471 N.W.2d 310 (Ct. App. 1991) (when the court appoints counsel other than a state public defender, the county bears counsel's costs).

By dispositional order issued in February 2015, K.L.M. was found in need of protection or services, and since that time has primarily been in institutional placement. There have been ongoing disputes about proper care for K.L.M.

Attorney Carey was appointed in 2019 as counsel for D.M.K. after her prior counsel withdrew. Like the other attorneys appointed to work on this case, Carey regularly submitted

[2] WISCONSIN STAT. RULE 809.21(1) provides that, "upon its own motion or upon the motion of a party," this court "may dispose of an appeal summarily."

requests for payment, and the circuit court granted those requests. At a June 2022 hearing, the court questioned whether it was appropriate for K.L.M.'s parents to continue to have court-appointed counsel. After a discussion with the parties, the court terminated the appointment for K.L.M.'s father but kept in place D.M.K.'s court-appointed counsel.

In August 2022, Attorney Carey submitted a request for payment of several months of her fees and costs. In September 2022, Carey submitted a letter to the circuit court inquiring as to the status of that outstanding payment. At a hearing in November 2022, the court recognized that it had not approved Carey's payment request and informed the parties that it had decided to terminate the attorney appointment for D.M.K. By way of explanation, the court said that K.L.M.'s current guardian ad litem had taken a "collaborative approach" and was working well with the parents, and, in any event, K.L.M. was nearing adulthood in November 2023. The court also said that "some of [Carey's] billing has been excessive" and that Richland County "can't afford any extra money for appointed attorneys unless there's a very solid justification for that." Carey said that, notwithstanding the termination of her paid appointment, she would continue to represent D.M.K. pro bono. A week after the November 2022 hearing, Carey submitted an updated final invoice and an explanation of the hours billed from October 2021 through November 2022.

On November 15, 2022, the circuit court issued an order formally terminating D.M.K.'s attorney appointment and directing Richland County to pay Attorney Carey $13,948.10, rather than the $21,133.48 Carey had requested. The court stated that it had reduced payment by $7,185.38 because the requested amount was "excessive" and included "fees generated for work that lay beyond the scope of the attorney's appointment."

D.M.K., still represented by Attorney Carey pro bono, appealed the November 15, 2022 order terminating her attorney appointment and awarding Carey reduced fees. I refer to this appeal, ***Richland County HHS v. D.M.K.***, No. 2022AP2190, as the "underlying appeal." D.M.K. submitted a petition for waiver of fees and costs associated with the underlying appeal based on her indigency. The circuit court denied D.M.K.'s petition. The court acknowledged that D.M.K. was indigent, but determined that fee waiver was inappropriate because D.M.K. had "not stated a meritorious claim, defense, or appeal." D.M.K. now appeals the court's order denying her fee waiver petition. Proceedings in the underlying appeal have been stayed pending resolution of this matter.

A litigant's request for a waiver of fees and costs in a civil case is governed by WIS. STAT. § 814.29(1). In ***State ex rel. Girouard v. Circuit Court for Jackson County***, 155 Wis. 2d 148, 454 N.W.2d 792 (1990), our supreme court concluded that, under § 814.29(1), a litigant is entitled to a fee waiver if the litigant is indigent and the appeal has arguable merit. *See* ***Girouard***, 155 Wis. 2d at 159.[3] Whether a claim has arguable merit is a question of law reviewed de novo. ***State ex rel. Hansen v. Circuit Ct. for Dane Cnty.***, 181 Wis. 2d 993, 998, 513 N.W.2d 139 (Ct. App. 1994).

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[3] The continuing applicability of the standard set forth in ***State ex rel. Girouard v. Circuit Court for Jackson County***, 155 Wis. 2d 148, 454 N.W.2d 792 (1990), has been called into question. *See* ***State v. Boruch***, No. 2018AP152, unpublished slip op. (WI App May 19, 2020) (determining that "an amendment to the statute from which the ***Girouard*** court derived its 'arguable merit' test, WIS. STAT. § 814.29(1)(c), has clarified the proper test for determining whether an indigent party is entitled to the waiver of a transcript fee," and instead "[t]he proper test now is whether the party's proposed action states a claim upon which relief may be granted"). However, D.M.K. relies on ***Girouard***'s arguable merit test, and the Department does not argue in favor of a different standard. Accordingly, I do not reach this issue and apply ***Girouard***'s arguable merit test based on the Department's concession. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (a party's failure to refute an argument may be taken as a concession).

The Department does not dispute that D.M.K. is indigent. Therefore, the sole issue before me is whether the underlying appeal has arguable merit. Based on D.M.K.'s affidavit in support of the fee waiver petition, the underlying appeal raises essentially two issues: (1) did the circuit court err by reducing Attorney Carey's fees?; and (2) did the court err by terminating Carey as court-appointed counsel for D.M.K.?[4] As to the fee reduction issue, the parties dispute, among other things, whether D.M.K. has standing to appeal the reduction of Carey's fees, or whether that issue may only be raised in a separate action by Carey. I do not address the parties' arguments on this issue, because, as explained below, I conclude that there is arguable merit to D.M.K.'s second claim—that the court erred by terminating her attorney's appointment. *See* ***Barrows v. American Fam. Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").[5]

D.M.K. contends that the circuit court erroneously exercised its discretion when it terminated Attorney Carey's appointment. The Department does not argue that this claim of erroneous exercise of discretion lacks arguable merit on its face; rather, the Department argues that D.M.K.'s claim cannot prevail on appeal due to forfeiture and lack of standing. Specifically, the Department argues that: (1) D.M.K. failed to object to the court's termination of her attorney's appointment and therefore forfeited this claim on appeal; and (2) after Carey's

[4] The WIS. STAT. § 814.29(1) inquiry focuses on the allegations in the affidavit in support of the fee waiver petition. *See* § 814.29(1)(c) ("The court may deny the request for [fee waiver] if the court finds that the affidavit states no claim, defense or appeal upon which the court may grant relief.").

[5] D.M.K. argues that, under ***Girouard***, 155 Wis. 2d 148, if any legal points in the entire appeal are arguable, "then the appeal has 'arguable merit' and must proceed." The Department does not respond to this argument, and I deem it conceded. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

appointment was terminated, she agreed to continue to represent D.M.K. pro bono. Therefore, D.M.K. was not aggrieved by the court's decision and lacks standing to appeal.

As to the Department's first argument, even assuming that D.M.K.'s claim contesting the termination of her court-appointed attorney is forfeited, the Department has failed to explain why this claim would therefore lack arguable merit. Wisconsin appellate courts may, in their discretion, address forfeited issues, and they sometimes do. *See, e.g.*, ***State v. Wilson***, 2017 WI 63, ¶51 n.7, 376 Wis. 2d 92, 896 N.W.2d 682 (noting that "it is within this court's discretion to disregard alleged forfeiture and consider the merits of any issue" and choosing to address a forfeited issue). The Department cites no law for its position that an argument lacks arguable merit solely on the basis of forfeiture. Nor does the Department contend that an appellate court would decline to address D.M.K.'s purportedly forfeited claim.[6]

As to the Department's second argument, the Department has not persuaded me that D.M.K. unarguably lacks standing to appeal the termination of her attorney's court appointment. A party to a case has standing to appeal a decision when that party is "aggrieved in some appreciable manner" by the decision, and a person is "aggrieved" if the decision "bears directly and injuriously upon his or her interests." ***Koller v. Liberty Mut. Ins. Co.***, 190 Wis. 2d 263, 266, 526 N.W.2d 799 (Ct. App. 1994). "The law of standing in Wisconsin is construed liberally,"

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[6] Relatedly, the Department notes that D.M.K.'s notice of intent to seek postdisposition relief in the underlying appeal does not state that D.M.K. intends "to dispute the termination of Attorney Carey's appointment." The Department's implied argument appears to be that D.M.K. cannot challenge the circuit court's order on any grounds other than those specified in the notice of intent. To the extent that the Department intends to make such an argument, I do not address it because it is undeveloped and unsupported by citation to legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this court need not address arguments not developed or not supported by citation to authority).

McConkey v. Van Hollen, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855, and injury to even a "trifling interest" may suffice, ***Fox v. DHSS***, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983).

The Department's argument that D.M.K. lacks standing relies on the premise that D.M.K. has no interest in maintaining a court-appointed attorney when that same attorney has agreed to provide legal services pro bono. The Department has not persuaded me that an argument challenging this premise would lack arguable merit. Pro bono work can be a substantial burden on an attorney, and there is at least arguably an inherent risk that an attorney working pro bono may spend less time on a pro bono client's case, or seek to withdraw from representation entirely, if financial concerns or other disruptions require that attorney to focus instead on paying clients. *See, e.g.*, ***Lipscomb v. General Foods Corp.***, 615 F. Supp. 254, 258 (W.D. Wis. 1985) (noting that pro bono representation "can represent a significant financial commitment," not only due to "lost opportunity for remunerative work," but also because the attorney may need to bear litigation costs that the client would otherwise pay). Accordingly, it is at least arguable that D.M.K. has an interest in maintaining paid court-appointed counsel, notwithstanding counsel's representation that she will continue representing D.M.K. pro bono.

For all these reasons, I conclude that there is arguable merit to the underlying appeal, and I therefore reverse the circuit court's order denying D.M.K.'s petition for waiver of fees and costs.[7]

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[7] The briefing of both parties neglects certain appellate rules, and I ask the parties to be mindful of these rules in the future. Specifically, the parties do not consistently support assertions by citation to the record or legal authority, as required by WIS. STAT. RULE 809.19(1)(d) and (e). Additionally, the parties' briefs do not comply with RULE 809.19(8)(bm), which addresses the pagination of appellate briefs. *See* RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use "Arabic numerals with sequential numbering starting at '1' on the cover"). This rule has recently been amended,

(continued)

IT IS ORDERED that the circuit court's order is summarily reversed pursuant to WIS. STAT. RULE 809.21(1).

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

Samuel A. Christensen
Clerk of Court of Appeals

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see S. CT. ORDER 20-07 (eff. July 1, 2021), and the reason for the amendment is that briefs are now electronically filed in PDF format, and are electronically stamped with page numbers when they are accepted for e-filing. As our supreme court explained when it amended the rule, the new pagination requirements ensure that the numbers on each page of a brief "will match … the page header applied by the eFiling system, avoiding the confusion of having two different page numbers" on every page of a brief.