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DISTRICT II

February 6, 2013

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

2012AP2453-NM	In re the termination of parental rights to Sasha A. M., a person under the age of 18: Winnebago County DHS v. Wyverna R. W. (L.C. # 2012TP1)
2012AP2454-NM	In re the termination of parental rights to Terry T. M., a person under the age of 18: Winnebago County DHS v. Wyverna R. W. (L.C. # 2012TP2)
2012AP2455-NM	In re the termination of parental rights to Antoinette T. T., a person under the age of 18: Winnebago County DHS v. Wyverna R. W. (L.C. # 2012TP3)
2012AP2456-NM	In re the termination of parental rights to Wyverna J.T., a person under the age of 18: Winnebago County DHS v. Wyverna R. W. (L.C. # 2012TP4)
2012AP2457-NM	In re the termination of parental rights to Asia M. T., a person under the age of 18: Winnebago County DHS v. Wyverna R. W. (L.C. # 2012TP5)

Before Neubauer, P.J.[1]

In these consolidated cases, Wyverna appeals from orders terminating her parental rights to five children. Wyverna's appellate counsel has filed a no-merit report and a supplemental no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). Wyverna received a copy of the reports, was advised of her right to file a response, and has elected not to do so. Upon consideration of the reports and an independent review of the record, we conclude that the orders may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal.[2] *See* WIS. STAT. RULE 809.21.

Wyverna's five children were adjudicated in need of protection and services (CHIPS) and placed outside the home pursuant to a dispositional order under WIS. STAT. § 48.345. Several months later, in August 2010, the CHIPS court entered a revised dispositional order under WIS. STAT. § 48.363, suspending visitation between Wyverna and her children. The County subsequently filed petitions to terminate Wyverna's parental rights to each child, and trial counsel was appointed to represent Wyverna. On the County's motion, the trial court granted partial summary judgment on the ground that Wyverna was denied visitation with her children

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Cases appealed under WIS. STAT. RULE 809.107 "shall be given preference and shall be taken in an order that ensures that a decision is issued within 30 days after the filing of the appellant's reply brief…." *See* WIS. STAT. RULE 809.107(6)(e). By prior order, we set the deadline for this court to issue its decision until thirty days after receipt of the supplemental no-merit report. The supplemental no-merit report was filed on December 21, 2012, and a decision from this court was due on January 22, 2013. Conflicts in this court's calendar and the need to review the supplementary no-merit brief have resulted in a short delay. 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) ("the 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, 39 (Ct. App. 1995). We extend our deadline accordingly.

for over one year pursuant to an unmodified court order. *See* WIS. STAT. § 48.415(4). After the dispositional hearing, the trial court entered orders terminating Wyverna's parental rights.

Counsel's no-merit report addresses whether the trial court properly granted partial summary judgment at the fact-finding phase, and whether the trial court properly exercised its discretion at disposition. Summary judgment may be granted at the fact-finding stage of a termination proceeding where there are no facts in dispute and the applicable legal standards have been satisfied. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶5, 271 Wis. 2d 1, 678 N.W.2d 856. In this case, the County's summary judgment motion alleged that there was no genuine issue of material fact as to whether Wyverna was unfit under WIS. STAT. § 48.415(4), which permits an unfitness finding where a parent has been denied periods of placement or visitation by a court order under WIS. STAT. § 48.345 or WIS. STAT. § 48.363, containing the notice requirements under WIS. STAT. § 48.356(2),[3] and where at least one year has elapsed since the order's issuance without a subsequent modification permitting physical placement or visitation. In support, the summary judgment motion attached the original and revised CHIPS dispositional orders placing the children outside the home and denying visitation. Also attached was an affidavit from a supervising case manager stating that the order denying visitation established conditions for the reinstatement of visits and had remained unmodified since its August 23, 2010 entry. Wyverna did not file any response or opposing affidavits.

[3] WISCONSIN STAT. § 48.356(2) requires that the written order contain notice of any grounds for termination of parental rights (TPR) which may be applicable and of the conditions for return or reinstatement of visitation.

In his initial no-merit report, appellate counsel concluded that the summary judgment motion established that there were no disputed facts and the trial court properly granted partial summary judgment. During our independent review of the record, this court discovered that neither the conditions of return nor the termination warnings were attached to the underlying CHIPS orders in the appellate record. Because termination under WIS. STAT. § 48.415(4) requires a dispositional order containing notice under WIS. STAT. § 48.356(2), this court ordered appellate counsel to file a supplemental no-merit report addressing the implications of the lack of written notice. Our order stated that appellate counsel should provide us with any relevant documents discovered in the underlying CHIPS records.

Thereafter, appellate counsel filed a supplemental no-merit report asserting that he had reviewed the children's CHIPS files in the circuit court and obtained certified copies of the dispositional orders. Counsel confirmed that the written conditions of return and the TPR warnings were attached. Counsel provided this court with copies of each child's original dispositional order and indeed, each contained the requisite notice under WIS. STAT. § 48.356(2). Counsel's supplemental no-merit report also represented that the written conditions for reinstating visitation were attached to the revised CHIPS orders. The supplemental no-merit report concluded that, given the existence of the requisite notice in the underlying orders, there was no meritorious challenge to the trial court's order granting partial summary judgment.

We agree with appellate counsel that given the conditions of return and TPR warnings attached to the dispositional orders, there is no merit to an argument challenging the trial court's partial summary judgment. There is no dispute that the children were placed outside the home and that Wyverna was denied visitation pursuant to court orders. There is no dispute that the

original and revised dispositional orders were qualifying orders under the plain language of WIS. STAT. § 48.415(4), and that the original dispositional order contained the requisite WIS. STAT. § 48.356(2) notice. *See* ***Waushara County v. Lisa K.***, 2000 WI App 145, ¶10, 237 Wis. 2d 830, 615 N.W.2d 204 (where the original CHIPS order contained the written conditions of return and TPR warnings, there was adequate notice under § 48.356(2), even though the last CHIPS order entered prior to termination failed to include the warnings). There is no dispute that the order denying visitation was in existence for over one year and had never been modified. Wyverna did not file any opposing affidavit, and the record does not otherwise disclose the existence of a "genuine issue as to any material fact regarding the asserted grounds for unfitness." ***Steven V.***, 271 Wis. 2d 1, ¶6.

Appellate counsel next addresses whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating Wyverna's parental rights at the dispositional hearing. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). At the summary judgment hearing eight days earlier, the County requested immediate disposition pursuant to WIS. STAT. § 48.424(4). Trial counsel asked for more time in order to "prepare an argument as what would be the best interests of the children." With Wyverna present, the court scheduled the dispositional hearing for June 28, 2012, at 8:00 a.m. Wyverna failed to appear at the scheduled dispositional hearing. When the trial court inquired as to Wyverna's nonappearance, trial counsel stated that Wyverna had missed an appointment with him earlier in the week which she failed to reschedule, and had called at around 7:30 a.m. that morning claiming to have a medical problem. Trial counsel reported that he tried but was unable to get more detail from Wyverna. Trial counsel represented that Wyverna stated she would be

unable to attend the dispositional hearing. The court stated "[t]hose aren't good enough reasons not to be here."

The no-merit report acknowledges Wyverna's absence from the dispositional hearing but concludes that it was not error for the trial court to proceed given her presence in court when the matter was scheduled, the lack of a sufficient reason for her absence, her history of prior missed appearances, and the notion that no prejudice has been demonstrated as a result of her nonappearance. The no-merit report also addresses the potential argument that trial counsel's comments might be construed as an adjournment request, triggering an analysis of whether the trial court properly exercised its discretion in denying the adjournment.

We agree with appellate counsel's conclusion that no arguably meritorious issue could arise from the trial court's decision to proceed to disposition in Wyverna's absence. First, we do not construe trial counsel's explanatory comments as a motion to adjourn, and the trial court cannot be faulted for failing to grant relief never sought. Second, we agree with appellate counsel's conclusion that assuming an adjournment was requested, the trial court properly exercised its discretion in denying the adjournment. *See* ***State v. Leighton***, 2000 WI App 156, ¶¶27-28, 237 Wis. 2d 709, 616 N.W.2d 126 (concluding that whether to grant or deny an adjournment is left to the trial court's sound discretion and setting forth six nonexclusive factors for consideration). Trial counsel was at the dispositional hearing to represent and advocate for Wyverna, so she was not left without a voice. Counsel was unable to verify that Wyverna actually had a medical problem that interfered with her attendance at the hearing and especially in light of previous missed hearings, the trial court could conclude there was a dilatory purpose for the adjournment request. Wyverna failed to demonstrate the existence of a legitimate reason

for the delay, and the record provides ample support for the trial court's decision to proceed in her absence.

Finally, counsel's no-merit report addresses whether the trial court properly exercised its discretion at disposition in determining that termination was in the children's best interests. During the dispositional phase, the trial court was required to consider the best interests of the children, taking into consideration the following factors: the likelihood of the child's adoption after termination, the age and health of the child, the nature of the child's relationship with the parent or other family members and whether it would be harmful to the child to sever these relationships, the wishes of the child, the duration of the separation of the parent from the child, and whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination. *See* WIS. STAT. § 48.426(3). The court heard testimony from the ongoing case manager relevant to these statutory factors. After considering the testimony and facts of record in light of the appropriate statutory factors, the trial court concluded that termination was in each child's best interests. The court stated its reasoning on the record. We agree with counsel's assessment that any argument that the trial court erroneously exercised its discretion by ordering termination would be without merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the orders terminating Wyverna's parental rights. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we affirm the orders terminating Wyverna's parental rights and relieve Attorney Lenonard Kachinsky of the obligation to represent Wyverna R. W. further in these matters.

Upon the foregoing reasons,

IT IS ORDERED that the orders terminating parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Lenonard Kachinsky is relieved from further representing Wyverna R. W. in these matters.

Diane M. Fremgen
Clerk of Court of Appeals