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DISTRICT III

March 28, 2013

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Cynthia O.S.

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

2013AP73-NM

In re the termination of parental rights to Shariiya N. S., a person under the age of 18: Kenosha County Department of Human Services v. Cynthia O.S., Master J. P. (L.C. #2012TP40)

Before Brennan, J.¹

Cynthia O.S. appeals an order terminating her parental rights to Shariiya N.S. Appointed appellate counsel for Cynthia O.S., David J. Lang, has filed a no-merit report. See **Brown Cnty.**

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.

v. Edward C.T., 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998); *see also* WIS. STAT. RULES 809.107(5m) and 809.32. Cynthia O.S. was informed of her right to file a response to the no-merit report, but she has not done so.² After reviewing the no-merit report and conducting an independent review of the record, we conclude that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the order terminating Cynthia O.S.'s parental rights. *See* WIS. STAT. RULE 809.21.

Shariiya N.S. was born on August 19, 2010. Kenosha County Department of Human Services removed her from Cynthia O.S.'s care when she was four months old because she had an unexplained spiral fracture in her left leg. On February 21, 2011, the circuit court found Shariiya N.S. to be a child in need of protection and services (CHIPS). The CHIPS order listed various conditions that Cynthia O.S. had to meet to have Shariiya N.S. returned to her care and warned that her parental rights could be terminated if she did not meet the conditions for Shariiya N.S.'s return. On December 12, 2012, the CHIPS order was extended because Cynthia O.S. had not yet met the conditions.

On July 25, 2012, the State filed a petition to terminate Cynthia O.S.'s parental rights on the grounds that Shariiya N.S. continued to be in need of protection and services and Cynthia O.S. had failed to assume parental responsibility. *See* WIS. STAT. §§ 48.415(2) and (6). On August 24, 2012, Cynthia O.S. appeared at the initial hearing without an attorney. The hearing was adjourned so that Cynthia O.S. could contact the Office of the State Public Defender

² Cynthia O.S. has not contacted her appellate attorney despite his efforts to reach her by phone and by mail. Because it serves the best interest of the child, Shariiya N.S., to bring finality to this action by continuing with our appellate review, we decline to dismiss on the grounds that Cynthia O.S. has abandoned the appeal.

to seek representation. At the continued initial appearance on September 6, 2012, Cynthia O.S. appeared with her attorney and requested a different judge. The hearing was rescheduled before a different judge on September 25, 2012, but Cynthia O.S. failed to appear. Noting that Cynthia O.S. knew about the time and date of the hearing, the State moved for default judgment, but asked the circuit court to hold the motion in abeyance because there was some question whether Cynthia O.S. had failed to appear due to a medical problem.

On October 1, 2012, Cynthia O.S. again failed to appear, even though she was informed about the hearing by her caseworker. Cynthia O.S.'s attorney explained that he had not been able to contact Cynthia O.S. since September 6, 2012, and moved to withdraw. The circuit court denied his motion, concluding that Cynthia O.S. was entitled to representation even if she was not communicating with her attorney. The circuit court then granted default judgment against Cynthia O.S. On October 24, 2012, the circuit court held a prove-up hearing, at which Cynthia O.S. did not personally appear, and determined that grounds existed to terminate Cynthia O.S.'s parental rights on the grounds that Shariiya N.S. continued to be in need of protection and services.³ The circuit court immediately held a dispositional hearing and determined that it would be in Shariiya N.S.'s best interests if Cynthia O.S.'s parental rights were terminated.

³ The circuit court did not address the second ground for termination alleged in the petition, whether Cynthia O.S. failed to assume parental responsibility.

The no-merit report first addresses whether the circuit court properly exercised its discretion in deciding it was in Shariiya N.S.'s best interests to terminate Cynthia O.S.'s parental rights. The ultimate decision whether to terminate parental rights lies within the circuit court's discretion. *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The best interest of the child is the prevailing factor. WIS. STAT. § 48.426(2). In considering the best interests of the child, the circuit court must consider: (1) the likelihood of adoption after termination; (2) the age and health of the child; (3) whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever those relationships; (4) the wishes of the child; (5) the duration of the separation of the parent from the child; and (6) whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements. *See* WIS. STAT. § 48.426(3).

In its oral decision, the circuit court placed particular emphasis on the fact that two-and-a-half-year-old Shariiya N.S. had been living with her foster family the vast majority of her life, since she was four months old, and was happy, healthy and thriving in their home. The circuit court noted that Shariiya N.S. had a biological sibling in the home with whom she had a significant relationship and there was a strong likelihood that she would be adopted by her current foster family. The circuit court also noted that Shariiya N.S. did not have relationships with her paternal or maternal relatives and had visited with her mother only sporadically due to her mother's failure to attend scheduled visitations.⁴ Pointing out that the guardian *ad litem*

⁴ Shariiya N.S. has never met her biological father. His parental rights were also terminated.

recommended termination, the circuit court concluded that Shariiya N.S.'s interests would best be served by terminating her mother's parental rights and allowing her to be adopted by her foster parents. The circuit court's explanation for its decision shows that it properly exercised discretion in concluding that termination of Cynthia O.S.'s parental rights was in Shariiya N.S.'s best interest. *See Gerald O.*, 203 Wis. 2d at 152 (A court "properly exercises its discretion when it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach."). An appellate challenge to that determination would lack arguable merit.

The no-merit report next addresses whether there was credible evidence to support the circuit court's decision that there were grounds to terminate Cynthia O.S.'s parental rights. The petition alleged that grounds existed to terminate Cynthia O.S.'s parental rights because Shariiya N.S. continued to be in need of protection and services. To establish that Shariiya N.S. was a child in continuing need of protection and services, the State was required to prove that: (1) Shariiya N.S. was adjudged to be in need of protection and services and placed outside of the home for a cumulative period of at least six months pursuant to a circuit court order containing a warning that Cynthia O.S.'s parental rights could be terminated if she did not meet the conditions for her child's return; (2) Cynthia O.S. did not meet the conditions for the return of her child even though the State made reasonable efforts to assist her to meet those conditions; and (3) Cynthia O.S. was substantially unlikely to meet the conditions for Shariiya N.S.'s return within a nine-month period following the hearing. *See WIS. STAT. § 48.415(2)(a).*

Cynthia O.S.'s caseworker, Rachel Merino, testified that Shariiya N.S. had been placed outside of Cynthia O.S.'s home for nearly two years after being found to be in need of protection and services due to physical abuse. Merino testified that Cynthia O.S. did not satisfy many of the conditions necessary to permit Shariiya N.S. to return to her home, including maintaining regular visits with her, maintaining a stable residence, and learning better parenting skills. Merino also summarized the steps the Department had taken to assist Cynthia O.S. in completing the conditions for Shariiya N.S.'s return.

After hearing the evidence, the circuit court concluded that there was clear and convincing evidence to support the conclusion that there were grounds for termination based on Shariiya N.S.'s continuing need for protection and services. The circuit court found that Shariiya N.S. had been placed outside of Cynthia O.S.'s home for nearly two years, that the Department had made concerted efforts to provide services to Cynthia O.S. that would permit Shariiya N.S. to return to Cynthia O.S.'s home, and that Cynthia O.S. had nonetheless failed to meet the conditions established for Shariiya N.S.'s return. *See* WIS. STAT. § 48.415(2). In addition, the circuit court found that there was a substantial likelihood that Cynthia O.S. would not satisfy the conditions necessary for Shariiya N.S.'s return to Cynthia O.S.'s home within the nine months following the hearing. The evidence supports the circuit court's conclusions. An appellate challenge would lack arguable merit.

Our independent review of the record has revealed no other potential issues. We therefore conclude that there is no basis for reversing the order terminating Cynthia O.S.'s parental rights. Any further proceedings would be without arguable merit.

IT IS ORDERED that Attorney David J. Lang is relieved of any further representation of Cynthia O.S. on appeal.

IT IS FURTHER ORDERED that the order terminating the parental rights of Cynthia O.S. to Shariya N.S. is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals