



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

September 3, 2015

To:

Hon. Rebecca Lynn Grassl Bradley
Circuit Court Judge
Judge Swanson, Children's Court
10201 W. Watertown Plank Rd.
Wauwatosa, WI 53226

Dan Barlich
Juvenile Clerk
Children's Court Center
10201 W. Watertown Plank Rd.
Milwaukee, WI 53226

John Richard Breffeilh
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4105

Claire Starling
Assistant District Attorney
10201 Watertown Plank Rd.
Wauwatosa, WI 53226

Anne M. Abell
Legal Aid Society of Milw, Inc.
10201 W. Watertown Plank Rd.
Milwaukee, WI 53226-3532

Bureau of Milwaukee Child Welfare
Arlene Happach
635 N. 26th St.
Milwaukee, WI 53233-1803

K. S.
2147 S. Winchester, Unit 113
Milwaukee, WI 53207

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

2015AP1431-NM

In re the termination of parental rights to A. R., a person under the age of 18: State of Wisconsin v. K. S. (L.C. # 2014TP143)

Before Lundsten, J.

K.S. appeals an order terminating her parental rights to A.R. Attorney John Breffeilh has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULES 809.107(5m); 809.32¹; *Anders v. California*, 386 U.S. 738, 744 (1967); *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987). The no-merit report

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

addresses whether the State adhered to the statutory time limits, whether the petition satisfied the requirements of WIS. STAT. § 48.42(1), whether the circuit court properly exercised its discretion when it found K.S. in default, whether the evidence was sufficient to find that grounds existed for termination of K.S.'s parental rights, and whether the court properly exercised its discretion in terminating K.S.'s parental rights. K.S. was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

Statutory Time Limits

The record reflects that all of the mandatory time limits set forth in Ch. 48, WIS. STATS., were complied with or were properly extended for good cause. Therefore, we agree with counsel's assessment that there would be no arguable merit on appeal to arguing that the State failed to comply with the statutory time limits.

Petition For Termination Of Parental Rights

The petition filed by the State on June 3, 2014, alleged two grounds for termination of parental rights: abandonment and failure to assume parental responsibility, contrary to WIS. STAT. § 48.415(1)(a)2. and 48.415(6). In support of these grounds, the petition alleged the following facts. A.R. was detained on April 14, 2013, because he tested positive for Oxycodone at birth. A.R. never returned to his parental home. K.S. had a long history with child protective services, during which she "demonstrated a pattern of leaving her children in the care of others for extended periods of time, as well as of drug use and domestic violence." Further, the petition alleged that K.S. had not contacted A.R. since September 9, 2013. We are satisfied, upon review

of the petition, that there would be no merit to an argument that the petition failed to satisfy the content requirements set forth in WIS. STAT. § 48.42(1).

Default Judgment

In a termination of parental rights case, it is within the circuit court's discretion to find a party in default as a sanction for failing to comply with a court order. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶¶17-18, 246 Wis. 2d 1, 629 N.W.2d 768. In this case, K.S. did not appear at the initial appearance on July 1, 2014, as required by WIS. STAT. § 48.422. The State filed proof of notice by publication. A.R.'s grandmother, who was present at the hearing, informed the court that she had sent a Facebook message to K.S. to let her know about the hearing. The grandmother knew the message had been received by someone with access to K.S.'s Facebook account because the message was marked as having been viewed, but K.S. did not respond. The social worker provided the court with the last number she had used to contact K.S., in March of that year. The court attempted to reach K.S. at that number, but there was no answer, so the court left a message. Both the State and A.R.'s grandmother informed the court that they did not believe K.S. would appear because she was absconding from probation.

The court found that the State had made due and diligent efforts to serve K.S., and that further attempts would be fruitless. The court then found K.S. to be in default, subject to "prove-up," and indicated that it would "consider lifting" its default judgment if K.S. appeared with an explanation for her absence. The court's decision is consistent with the law regarding default in termination of parental rights cases. Although a circuit court may find a party in default, the court may not enter a judgment as to grounds without holding an evidentiary hearing and finding

the alleged grounds for termination by clear and convincing evidence. *See Evelyn C.R. v. Tykila S.*, 246 Wis. 2d 1, ¶24.

K.S. did appear at a later date and filed a motion to vacate the default judgment, alleging that she was never personally served with a summons and petition and that the State failed to exercise due diligence in ascertaining K.S.'s correct contact information prior to publishing the summons. The circuit court held a hearing on the motion, at which the State argued that it had satisfied the requirements of WIS. STAT. § 806.02 because it initially attempted to serve K.S. personally and by mail before publishing the summons. The State also informed the court that K.S.'s social worker had received an email from K.S. indicating K.S.'s unwillingness to appear in court because there was a warrant for her arrest. The State requested that the court deny the motion to vacate the default judgment, and the guardian ad litem joined in the State's position. The court again found that the State had made due and diligent efforts to notify K.S. of the court proceedings. The court further found that K.S. had actual notice of the initial appearance, which prompted K.S. to withdraw her motion to vacate the default judgment. Based on all of the above, we agree with counsel's assessment that any claim that the circuit court erroneously exercised its discretion by finding K.S. in default would lack arguable merit.

Sufficiency Of The Evidence

In order to prove the termination ground of abandonment, the State needed to show: (1) that the child was placed, or continued in a placement, outside the parent's home by a court order which contained the termination of parental rights notice required by law; and (2) that K.S. failed to visit or communicate with the child for a period of three months or longer. *See* WIS. STAT. § 48.415(1)(a)2.; WIS JI-CHILDREN 313. In order to establish the termination ground of

failure to assume parental responsibility, the State needed to show that K.S. had not developed a substantial relationship with the child, meaning the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child. *See* § 48.415(6); WIS JI-CHILDREN 346.

The State introduced certified copies of a CHIPs order filed June 10, 2013, in support of the grounds of abandonment and failure to assume parental responsibility. The State also introduced testimony from Mary Laboo, K.S.'s case manager from Children's Hospital Wisconsin Community Services. Laboo testified that A.R. was detained at birth because he tested positive for Oxycodone. The circuit court entered a CHIPs order on June 10, 2013. Certified copies of the CHIPs documents were filed with the court. Laboo testified that K.S. knew where A.R. had been placed, but that K.S. had not contacted A.R. from September 9, 2013, to June of 2014. According to Laboo, K.S. was absconding from probation during that time period. Laboo also testified that K.S. has had ongoing drug and alcohol issues dating back to 2005 and that K.S. had been offered services to help her become sober. However, shortly after A.R. was born, K.S. absconded from Meta House, where she had been receiving treatment. Laboo also testified that, when A.R. was born, K.S. did not have any source of income and did not have a home. She further testified that K.S. had never provided financially for A.R. or been responsible for his daily supervision, education, protection, or care.

The circuit court found that the State had established the grounds of abandonment and failure to assume parental responsibility by clear and convincing evidence. We are satisfied as to the sufficiency of the evidence, based upon our own independent review of the record, and that any challenge to the court's findings in the grounds phase of the termination of parental rights proceeding would be without arguable merit.

Disposition

At the dispositional hearing, the circuit court was required to consider such factors as the likelihood of the child's adoption, the age and health of the child, the nature of the child's relationship with the parents or other family members, the wishes of the child, and the duration of the child's separation from the parent, with the prevailing factor being the best interests of the child. WIS. STAT. § 48.426(2) and (3). The record shows that the court considered these factors on the record, with the best interests of the child being the prevailing factor. The court noted that A.R. had been living with his aunt and uncle since he was four months old and that it was very likely they would adopt him if K.S.'s parental rights were terminated. The court considered the fact that A.R. was almost two years old, had been living with his aunt and uncle most of his life, and referred to them as mom and dad. The court also noted that A.R. had never resided with his biological parents and did not have a substantial relationship with either of them, and that it would not be harmful to A.R. to sever those relationships. Based on all of these factors, the court concluded that it was in A.R.'s best interest to terminate K.S.'s parental rights. In short, the record shows that the circuit court reasonably applied the proper legal standard to the facts of record when reaching its disposition.

We have discovered no other arguably meritorious grounds for an appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

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

Diane M. Fremgen
Clerk of Court of Appeals