COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 01-1438-NM
01-1439-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**

DISTRICT III

NO. 01-1438-NM

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MARYAH MONIKA M., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES, ONEIDA INDIAN TRIBE, AND STATE OF WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES,

PETITIONERS-RESPONDENTS,

V.

ANTONIO M.,

RESPONDENT-APPELLANT,

TISA C.,

RESPONDENT-CO-APPELLANT.

NO. 01-1439-NM

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DANTE JOVAN M., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES, ONEIDA INDIAN TRIBE, AND STATE OF WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES,

PETITIONERS-RESPONDENTS,

V.

ANTONIO M.,

RESPONDENT-APPELLANT,

TISA C.,

RESPONDENT-CO-APPELLANT.

APPEALS from orders of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Tisa C. appeals orders terminating her parental rights to her two children and orders denying her post-termination motions. Tisa challenges the sufficiency of the evidence supporting the jury's finding beyond a reasonable doubt of the likelihood of serious emotional or physical damage to her children if they were in her care, as required by the Indian Child Welfare Act, 25 U.S.C. § 1912(f). She further argues that because she gave birth to her children, she has a substantial parental relationship with them as a matter of law, within the meaning of WIS. STAT. § 48.415(6). Therefore, she contends, she cannot be found

[1] These are one-judge appeals pursuant to WIS. STAT. RULE 809.23(1)(b)4.

to have failed to assume parental responsibilities. This court rejects Tisa's arguments.

¶2 In a consolidated case, Antonio M. appeals the orders terminating his parental rights. His counsel filed a no merit report, and Antonio has responded. We conclude that the record, together with the report and Antonio's response, do not reveal any issue of arguable merit. This court affirms the orders terminating Tisa's and Antonio's rights to both children.

I. Tisa's appeal

A. Background

¶3 In November 2000, petitions were filed to terminate Tisa's rights, alleging that her two children, Maryah and Dante, were born out of wedlock in 1996 and 1998 respectively, and resided in foster care. The petitions also alleged that the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, et seq., applied because the children were eligible for enrollment in, and Tisa was a member of, the Oneida Tribe of Indians of Wisconsin. The petitions further stated that the Brown County Human Services Department and the Oneida Indian Child Welfare Department had complied with the Act's requirements.

¶4 The petitions stated grounds for termination under WIS. STAT. § 48.415(2), including that the children were in need of continuing protection and services.[2] Additionally, the petitions alleged that serious emotional or physical

[2] WISCONSIN STAT. § 48.415, Grounds for involuntary termination of parental rights, provides:

(continued)

damage to the children was likely to result if the children were returned to the natural parents' custody.

> At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
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> ….
>
> (2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> 2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.
>
> (am) 1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).
>
> 2. That the conditions that led to the child's placement outside his or her home under each order specified in subd. 1. were caused by the parent.

¶5 At trial, Tisa testified she was fifteen when she gave birth to Maryah. On December 31, 1997, when Tisa was living in a foster home with Maryah, she ran away with her daughter. In January 1998, she was picked up by the police, placed in secure detention and then in shelter care. Her daughter was placed in foster care. From January 28 to July 20, Tisa lived at Marion House Group Home, a home for adolescent mothers and their babies. Maryah did not live with her, but remained in foster care.

¶6 In June 1998, when Tisa was sixteen, she gave birth to Dante. Tisa and Dante resided together at the Marion House. The director explained:

> We take moms under the age of 18, either during pregnancy or after they have delivered, and we bring them into the group home and we teach them parenting skills, independent living skills and social skills, and try to prepare them for the incredible task of parenting and also independent living. It's our goal that every mom would leave our place with the ability to parent their child, as well as they're independent.

¶7 Maryah, who remained in foster care, visited Tisa at Marion House for two to four hours at a time. The director explained that the objective was for Tisa and Maryah "to begin to establish that mother-daughter relationship and interaction." She stated that sometimes Marion House "is used to reunite mothers who have been separated from their children, and then we work on whatever the problems were that caused the separation in the first place." The director testified that Marion House was prepared to accommodate Tisa and both her children.

¶8 At the time, Marion House was the only group home in Brown County for adolescent moms and their babies. Every girl in Marion House had a program individually tailored to meet her needs, related to her own child. Tisa received programming in the toddler and infant care areas, but did not cooperate

with the programming. The director stated that "we had problems at every phase of the program."

¶9 In July 1998, due to conflicts with the staff, Tisa decided to leave Marion House without Dante. Dante was placed in foster care. Tisa refused placement at a residential facility in Stevens Point that would have allowed her to be placed with her children. Tisa remained in shelter care until September 19, 1998, when she was placed at the Oneida Boys and Girls Group Home.

¶10 On September 13, 1999, Tisa went to live with her adult cousin, Linda. Her children remained in foster care. Tisa lived with Linda for approximately two months and then lived "in between" Linda's house and her mother's home. Kay Reynolds, a social worker with the Brown County Department of Social Services, testified that after Tisa went to live with Linda, "there was then a period of time that she was very vague, and we did not know where she was staying. That was from November of '99 until March of 2000."

¶11 Brown County Department of Social Services worked closely with the Oneida Indian Tribe to offer Tisa a variety of services to assist her in parenting and visiting her children in foster care. Reynolds testified that Tisa was not consistent about visiting. There were times when Tisa missed visits without calling to cancel.

¶12 Debbie Foss, a service provider at the family center, stated that Tisa missed three scheduled parenting sessions with her children. These sessions were scheduled for September 25, October 2, and October 9, 2000. Tisa testified at trial that she did not contact the department or her tribal caseworker from September 18, 2000, to December 2000 to arrange visits with her children.

¶13 The department was concerned about the effect on the children when Tisa did not show up for scheduled visits: "We could not just keep bringing the children to the [family center] and have them either disappointed or having foster parents bringing these children back and forth … without Tisa responding." In November 2000, the department ended reunification efforts.

¶14 Pauline Gordon, who has a bachelor of science degree in social work, has worked as a caseworker for the Oneida Indian Child Welfare Department since 1994. Gordon testified at trial that she has been assigned to Tisa's case for quite some time. When asked whether it would be physically or emotionally harmful to the children to return them to Tisa's care, Gordon testified that it would be for a number of reasons. Gordon was concerned that Tisa did not have an adequate household to raise the children. Gordon explained that in order to determine whether the living environment was safe and suitable, she needed to learn who Tisa's living companion or companions were. Gordon testified that Tisa and her living companion were not cooperative in this regard.

¶15 Tisa's position was that it did not matter with whom she was living. She testified as follows: "[Y]ou shouldn't be looking at me and everybody else that I hang out [with] or that I have living at my apartment. That doesn't matter as long as I'm not drinking and smoking weed and stuff with this person."[3]

¶16 Gordon explained that when Tisa lived in the structured environment of a group home, Tisa "could do very well" in caring for her children, but when

[3] The record does not reveal that Tisa brought to the court's attention any objection to the reasonableness of the department's conditions for the return of her children.

she turned eighteen and began living independently, it seemed "like her children were put on the back burner …."

¶17 Gordon further testified that Tisa did not follow through with services offered, and she has not resolved problems stemming from her family of origin. Gordon acknowledged that Tisa never emotionally abused her children by yelling or screaming at them or belittling them, but "emotionally she hasn't been there for her children." She testified, "I've seen her being a loving mother to her children, and then other times I've seen her not even asking … about her children."

¶18 Reynolds testified that in March 2000, Tisa came to Reynold's office and advised that she had been staying with friends. Reynolds asked Tisa to bring in a lease for the apartment where she was staying, to provide information about the individual with whom she was living, and to ask the individual to come in to meet with Reynolds. Tisa did not comply with these requests.

¶19 The jury returned its verdict finding failure to assume parental responsibility and continuing need of protection or services. The jury also found that the requirements of the ICWA had been met. At the dispositional hearing, the court determined that it was in the children's best interests to order termination of Tisa's rights.

B. Discussion

¶20 Tisa argues that the evidence is insufficient to support the jury's findings beyond a reasonable doubt of the likelihood of serious emotional or physical damage to her children, as required by the ICWA, 25 U.S.C. § 1912(f). Tisa also contends that there is no Wisconsin case addressing the applicable

standard of review for evaluating the sufficiency of the evidence in an ICWA case where a finding must be proven beyond a reasonable doubt. This court disagrees.

¶21 To terminate parental rights, the ICWA requires "evidence proving beyond a reasonable doubt that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child …." ***In re D.S.P.***, 166 Wis. 2d 464, 480 N.W.2d 234 (1992). This burden necessitates proofs "including the testimony of qualified expert witnesses …." ***Id.*** Relevant testimony includes evidence showing "whether the continued custody of the child by the parents is likely to result in harm to the child." ***Id.*** at 479.

¶22 Although an action to terminate parental rights is civil, *see* ***State ex rel. Cramer v. Schwarz***, 2000 WI 86 ¶62, 236 Wis. 2d 473, 613 N.W.2d 591, this court looks to criminal case law by analogy:

> Although the trier of fact must be convinced that the evidence presented at trial is sufficiently strong to exclude every reasonable hypothesis of the defendant's innocence in order to find guilt beyond a reasonable doubt, this court has stated that that rule is not the test on appeal.
>
> ….
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> The test is not whether this court [is] convinced [of the defendant's] guilt beyond a reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true .... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted ....

State v. Poellinger, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990) (citation omitted).

¶23 Tisa's argument casts the record in the light most favorable to her. Also, she focuses on the lack of evidence of direct physical abuse. In doing so, she misses the focus of the trial, which was neglect. Under the applicable scope of appellate review, it is the jury's function, not this court's, to assess the weight and credibility of the evidence. ***Id.*** at 504.

¶24 There was evidence presented at trial that Tisa had feelings of love and affection for her children and, at times, provided motherly care for them. Nonetheless, there was evidence that, at other times, she failed to provide any care whatsoever. Evidence at trial permitted the jury to find that Tisa's care for her children had been so inconsistent that it essentially deprived the children of a home and a functioning parent. The jury could infer, beyond a reasonable doubt, that it was emotionally damaging to the children to deprive them of a home and a functioning parent.

¶25 Based upon Paula Gordon's testimony, the jury could have believed that long-term assistance from the department and the tribe did not enhance Tisa's ability to care for the children, despite the fact that she appears to genuinely love them. The jury could have believed that Tisa remained unable to cope with the demands of raising her children even with the variety of supportive services that have been made available to her in the past.

¶26 The record shows that the original CHIPS order placing Maryah was entered in January 1998 and was extended five times. Dante was placed in foster care one month after his birth. In an analogous context, it has been observed that to condemn a child "to go from foster home to foster home, waiting for a parental

relationship to come into existence for which the mother seems unwilling to take steps to make possible, is, it seems to us, 'seriously detrimental to the child.'" ***In re K.D.J.***, 163 Wis. 2d 90, 113, 470 N.W.2d 914 (1991) (citation omitted). While Tisa made some efforts at parenting, the jury could conclude that her efforts were not successful and, beyond a reasonable doubt, there was a likelihood of serious emotional or physical damage to her children if they were left in her care.

¶27 Next, Tisa argues that because she carried both children to term, the jury could not find that she did not have a substantial relationship with the children within the meaning of WIS. STAT. § 48.415(6).[4] She contends, "The mother-child bond is the most powerful known to man" and "this bond begins to form while the child is still in the womb." The jury separately deliberated and found that grounds existed for termination based upon a continuing need for protection and services.

[4] WISCONSIN STAT. § 48.415, Grounds for involuntary termination of parental rights, provides as additional grounds for involuntary termination of parental rights:

> (6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

See WIS. STAT. § 48.415(2). Because grounds exist under § 48.415(2), this court need not consider Tisa's challenge under § 48.415(6).

II. Antonio's appeal

¶28 Counsel for Antonio has filed a no merit report concluding that there is no arguable merit to any issue that could be raised on appeal from the orders terminating his parental rights to Maryah and Dante. *See* WIS. STAT. § 809.32; ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 579 N.W. 2d 293 (Ct. App. 1998). Antonio has responded to the report. Upon this court's independent review of the record and Antonio's response, it is satisfied that there is no issue of arguable merit. As a result, this court accepts the no merit report and relieves attorney Len Kachinsky of further obligation to represent Antonio in this matter.

¶29 The no merit report discusses whether the evidence supports the jury's verdict with respect to establishing grounds under WIS. STAT. ch. 48 to terminate Antonio's parental rights. It also discusses whether the trial court properly exercised its discretion when it terminated his rights.

¶30 Antonio's response raises the following issues: (1) ineffective assistance of counsel; (2) the jury deliberated for four and one half hours; (3) there was evidence of his positive parenting skills; (4) he provided money; (5) several counselors testified that during supervised visits he played with his children, gave them snacks, and they referred to him as "Daddy"; and (6) on May 11, 2001, he completed his parenting group at the Columbia Correctional Institution.

¶31 This court is satisfied that the no merit report correctly describes the record and analyzes the issues. There would be no arguable merit based upon the sufficiency of the evidence to support the verdict finding grounds to terminate

Antonio's parental rights based upon a continuing need for protection and services, pursuant to WIS. STAT. § 48.415(2). After his children were placed in foster care, the court ordered conditions for their return to their parents, including that Antonio maintain an adequate residence, keep his probation officer informed of his whereabouts and have regular visits with the children. He acknowledged that he received copies of the original and extension orders placing his children in foster care from January 1998 through the date of trial, February 2001.

¶32 The service providers testified at trial that Antonio did not meet these conditions. Antonio was incarcerated from February or March 1999 through December 8, 1999, and was reincarcerated on July 5, 2000. At the time of trial, he remained incarcerated at the Dodge Correctional Institution.

¶33 Before his incarceration, he lived at the Economy Inn and at an address with two different women. He never lived with Dante, and he lived with Maryah and Tisa for approximately two or three months Antonio's probation agent testified that Antonio did not keep him informed of where he was residing. The social worker who supervised the visits with the children testified that Antonio had three unexcused absences. His repeated failure to show up at the visits caused the children to be very disappointed and upset.

¶34 Antonio focuses on testimony that indicates that he had some positive parenting traits. It is the jury's function, not this court's, to resolve conflicts and assess weight to the evidence. ***Poellinger***, 153 Wis. 2d at 504. Here, it is evident that the jury was not persuaded by Antonio's testimony.

¶35 Antonio's challenge to the effectiveness of counsel is also without arguable merit. He does not clarify whether he desires to challenge trial or appellate counsel, or both. In any event, on the record before this court, neither

potential argument provides a basis for an appeal. There is no record of a ***Machner*** hearing, which is necessary for the appellate court to review trial counsel's performance. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Also, appellate counsel's performance is reviewed upon a ***Knight*** petition, not upon a direct appeal. *See* ***State v. Knight,*** 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

¶36 Finally, this court concludes that there would be no arguable merit to a challenge to the court's discretion exercised at the disposition hearing. The record discloses that the court carefully considered the factors under WIS. STAT. § 48.426(3). The trial court concluded that Antonio's relationship with his children was marginal at best: "[Y]ou made choices to be only marginally involved in the lives of the children. You made choices which resulted in your being unavailable for the children now. But progress wasn't substantial over time in any event."

¶37 The record demonstrates that the children are healthy and adoptable. The court noted that they have been separated from their parents for a substantial period of time; Maryah having lived in foster care for three years and Dante for over two and one-half years. The court determined that under the circumstances, it would not be harmful to either child to terminate Antonio's rights and would be contrary to their best interests to continue the parental relationship. Because the record supports the court's discretionary determination, it does not reveal any arguable basis for appeal.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.