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DISTRICT IV

October 31, 2024

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

2024AP1761-NM In re the termination of parental rights to C.K., a person under the age of 18: Dane County DHS v. J.H. (L.C. # 2023TP50)

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).

J.H. appeals the circuit court order terminating his parental rights to C.K. Attorney Ellen Krahn, appointed counsel for J.H., has filed a no-merit report pursuant to WIS. STAT. RULE 809.107(5m). J.H. was sent a copy of the report and has not filed a response. Based on

[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.

this court's consideration of the report and an independent review of the record, I conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, I summarily affirm the circuit court's order. *See* WIS. STAT. RULE 809.21.

"Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the first phase, called the "grounds" phase, the petitioner must prove by clear and convincing evidence that at least one of the grounds enumerated in WIS. STAT. § 48.415 is present. ***Id.***, ¶¶24-25. If grounds exist, the court must find the parent unfit, and the proceedings move to the second phase. WIS. STAT. § 48.424(4); ***Steven V.***, 271 Wis. 2d 1, ¶¶25-26. In the second phase, often referred to as the "dispositional phase," the court must decide if it is in the child's best interest that the parent's rights be terminated. ***Steven V.***, 271 Wis. 2d 1, ¶¶26-27.

Here, Dane County filed a petition to terminate J.H.'s parental rights to C.K. alleging multiple grounds of parental unfitness. One of the grounds was continuing denial of periods of physical placement or visitation under WIS. STAT. § 48.415(4). The elements of that ground are:

> (a) That the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.

Sec. 48.415(4).

The circuit court granted partial summary judgment to the County on this ground based on undisputed evidence that J.H. was denied physical placement and visitation for more than one year under a CHIPS order entered on September 1, 2022, containing the required notice concerning the grounds to terminate J.H.'s parental rights.[2] The court also rejected an argument by J.H. that finding him unfit under this statutory ground would be unconstitutional because his incarceration made it impossible for him to comply with the CHIPS order. Finally, the court held a dispositional hearing and concluded that the termination of J.H.'s parental rights was in C.K.'s best interest.

Before turning to the issues addressed in the no-merit report, I first note that there is no issue of arguable merit relating to the statutory deadlines governing termination of parental rights proceedings. Although the circuit court extended some deadlines, in each instance the court found good cause for doing so. *See* WIS. STAT. § 48.315(2) (allowing for continuances based on a showing of good cause).

Turning to the no-merit report, the report first addresses whether the circuit court properly granted partial summary judgment to the County on the unfitness ground of continuing denial of periods of physical placement or visitation under WIS. STAT. § 48.415(4). I agree with counsel that there is no arguable merit to this issue. Our supreme court has concluded that "[a]n order granting partial summary judgment on the issue of parental unfitness where there are no facts in dispute and the applicable legal standards have been satisfied" is permissible. ***Steven V.***, 271

[2] The other grounds alleged in the petition were dismissed.

Wis. 2d 1, ¶5. Here, there was undisputed evidence showing that the County satisfied the elements of this unfitness ground.

The no-merit report next addresses whether there is arguable merit to J.H.'s claim that it was unconstitutional to find him unfit under WIS. STAT. § 48.415(4) because his incarceration made it impossible for him to comply with the CHIPS order. For the reasons I now explain, I agree with counsel that there is no arguable merit to this issue.

J.H.'s constitutional claim is based on ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845. In ***Jodie W.***, our supreme court concluded that "a parent's incarceration does not, in itself, demonstrate that the individual is an unfit parent," and that "a parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit." ***Id.***, ¶49.

Relying on ***Jodie W.***, J.H. argued in the circuit court that his incarceration made it impossible to comply with the requirements for physical placement or visitation under the CHIPS order, which included requirements that he complete sex offender programming, domestic violence programming, and AODA treatment. According to J.H., his incarceration made it impossible to complete the required programming and treatment because of prison wait lists.

However, the record shows that J.H. was out of custody within twenty-two days after the CHIPS order was issued. Within five days of being out of custody, J.H. was back in custody on a probation hold and because of a new criminal charge for which he was ultimately convicted. If J.H. had not engaged in new criminal conduct and had remained out of custody, he would have had over eleven months to complete the required programming and treatment. He therefore lost

the opportunity to comply with the CHIPS order and was found unfit at least in part because of his own actions and not, in the words of ***Jodie W.***, due to his incarceration "standing alone." *See* ***Jodie W.***, 293 Wis. 2d 530, ¶49; *see also* ***Portage Cnty. DHHS v. C.S.***, No. 2022AP1090, unpublished slip op., ¶28 n.4 (WI App Feb. 23, 2023) (rejecting a constitutional defense based on ***Jodie W.*** because "it was not simply [the parent]'s initial incarceration that kept him from meeting the conditions of return or that led to an unfitness determination; it was also, among other things, his continued criminal conduct and probation violations").

The no-merit report next addresses whether the circuit court erred during the dispositional phase of proceedings. I agree with counsel that there is no arguable merit to this issue. "The ultimate decision whether to terminate parental rights is discretionary." ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The circuit court must consider the factors set forth in WIS. STAT. § 48.426, giving paramount consideration to the best interest of the child. ***Id.*** at 153-54. Here, the record shows that the circuit court expressly considered each of these factors in light of the relevant evidence, made a number of factual findings based on that evidence, and reached a reasonable decision to terminate J.H.'s parental rights to C.K.[3]

This court's review of the record discloses no other arguably meritorious issues for appeal.

[3] I note that the question of whether the petitioner has a burden of proof at the dispositional phase and, if so, whether the burden is preponderance of the evidence or clear and convincing evidence, is currently pending before our supreme court. *See* ***State v. H.C.***, No. 2023AP1950, unpublished slip op. ¶¶16-36 (WI App March 5, 2024), *review granted* Sept. 11, 2024. However, based on the record in this case, I am persuaded that the circuit court would have ordered the same disposition regardless of the burden of proof. Accordingly, there is no issue of arguable merit relating to the burden of proof.

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ellen Krahn is relieved of any further representation of J.H. in this matter.

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

Samuel A. Christensen
Clerk of Court of Appeals