

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT X

Case Nos. XXXXAPXXX NM & XXXXAPYYY NM

In re the termination of parental rights to Jackie S. & John S., each a person
under the age of 18:

BAY COUNTY DEPARTMENT OF HEALTH & HUMAN
SERVICES,

Petitioner-Respondent,

v.

JANE S.,

Respondent-Appellant.

On Notice of a No Merit Appeal from the Orders Terminating
Parental Rights, Entered in the Bay County Circuit Court,
the Honorable Grover Cleveland Presiding

NO MERIT BRIEF OF RESPONDENT-APPELLANT
PURSUANT TO WIS. STAT. RULE 809.107(5m)

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant

STATEMENT OF ISSUES

1. Did the circuit court err in granting partial summary judgment to the petitioner regarding grounds for the petition?
2. Did the circuit court erroneously exercise its discretion in determining that termination of parental rights was in the best interests of the children?

STATEMENT OF THE CASE AND FACTS

Bay County filed petitions on August 19, 2008, asking the circuit court to terminate Jane S.'s parental rights to Jackie S. and John S., twins born October 27, 2006. (1A; 1B).¹ The petitions alleged two grounds for termination: continuing denial of physical placement or visitation and commission of a serious felony against one of the person's children. (1A:1; 1B:1); *see also* Wis. Stat. § 48.415(4) & (9m).²

The county moved for partial summary judgment against Jane regarding both grounds for termination. (17A). As to the commission of a serious felony, the county attached to the motion a certified judgment of conviction indicating that, on April 27, 2006, Jane was convicted in the Bay County

¹ This brief labels citations to record materials from the Jackie case (XXXXAPXXX) as "A" and citations to record materials from the John case (XXXXAPYYY) as "B." The brief cites to documents in common with reference to the "A" file.

² The petitions also sought the termination of the father's rights to the twins, but, as the father is not a party to this appeal, this brief will not discuss the termination proceedings against him except to the extent that they affected the proceedings against Jane. (*See* 1A; 1B).

Circuit Court of neglect of a child, causing death, contrary to Wis. Stat. § 948.21(1). (19A:4). It also attached an affidavit of the social worker assigned to the case stating that the victim of that crime had been Jane's daughter. (19A:1-2). As to visitation, the county attached dispositional orders from CHIPS proceedings in which the Bay County Circuit Court, on March 12, 2007, had suspended visitation between Jane and the twins. (19A:5-60). The affidavit of the social worker stated that the court had not modified the visitation orders since issuing them. (19A:2).

At a hearing on the motion for partial summary judgment, Jane argued that she had pleaded no contest in the neglect case because she thought it would help her keep her children, but that the evidence had been unclear as to the cause of her daughter's death. (66A:4). Regarding visitation, Jane argued that the only basis for the denial of visitation had been her incarceration and therefore it could not serve as a ground for termination. (66A:4). The court granted the motion regarding both grounds for termination. (66A:6, 10).

After the court granted the county's motion, there was a long delay in the case during which the father of the twins, who is not a party to this appeal, attacked a default judgment against him, proceeded toward a trial, filed an interlocutory appeal, then later voluntarily terminated his parental rights. (68A; 69A; 70A; 71A; 72A). During this delay, Jane did not ask to proceed directly to a dispositional hearing regarding her own parental rights or otherwise object to the delay. (*See* 68A; 69A; 70A; 71A; 72A).

On June 9, 2010, the court presided over a dispositional hearing. Faye Dunaway testified that she was the twins' social worker. (73A:4). The twins were taken from Jane at birth because Jane was in prison. (73A:5). They had

lived in the same foster home for 43 months, which was the length of their entire lives. (73A:5). The twins had no disabilities and their foster parents wanted to adopt them. (73A:6). They last had contact with Jane on February 14, 2007, after which the court had suspended visitation. (73A:6-7).

Ms. Dunaway testified that the twins' maternal grandparents visited them once a month for about an hour, supervised by the foster parents, but that they did not have a substantial relationship with them. (73A:7). She stated that they did not have contact with any other extended family members and that it would not be harmful to terminate their relationships with them. (73A:8). Ms. Dunaway said that Jane would be incarcerated until 2013 and that termination would give Jackie and John a more stable life. (73A:8).

Ms. Dunaway further testified regarding other relatives that had inquired about taking the twins. She said that, at birth, both the maternal grandmother and Jane's former mother-in-law had expressed interest in custody, but the decision was made to place the twins in foster care. (73A:10-11). Later, Jane recommended one of her brothers but that brother never contacted the social worker and did not initiate the process of attaining placement. (73A:11-12). Another brother asked to become involved after the termination proceedings were underway. (73A:12).

The foster father testified that Jackie and John were nearly four years old, that he had helped to facilitate visits with their maternal grandparents, and that they recognized their grandparents. (73A:16-17). He said that he and his wife wanted to adopt the twins and that they planned to continue to allow them to see their grandparents and to tell them about their birth family as they got older. (73A:18).

Jane made a statement on her own behalf. She said the social worker had never made an effort to give the twins to relatives in order to keep the family together. (73A:22). Jane noted that her rights to her other, older children had been terminated but those children were adopted by family members. (73A:24). She said that her relatives had sought placement but the county had never followed through with them. (73A:24).

Before issuing its decision, the circuit court, the Honorable Grover Cleveland presiding, questioned the social worker regarding her decision not to place Jackie and John with family. (73A:26-27). He noted that, in adoption proceedings, the adoption court would consider any petition filed by family members. (73A:32-34).

The court found that termination was appropriate because Jane had been convicted of a violent crime against another child, and Jackie and John had never known Jane and needed stability. (73A:33-34). It stated that it had considered the factors regarding grounds for termination and it was clear they had been met. (73A:34). The court signed orders terminating Jane's rights to the twins, which stated the grounds for termination and the factors relevant to the termination decision. (59A:3-4; 55B:3-4). Attached to the orders were addendums describing in greater detail the grounds for the court's finding that termination was in the children's best interests. (59A:5-7; 55B:5-7).

ISSUES THAT MIGHT BE RAISED ON APPEAL AND WHY THEY ARE WITHOUT MERIT

- I. Did the Circuit Court Err in Granting Partial Summary Judgment to the Petitioner Regarding Grounds for the Petition?

A termination proceeding involves two steps – grounds and disposition. The first step includes a fact-finding hearing to determine whether grounds exist for the termination of parental rights. Wis. Stat. § 48.424.

However, the state supreme court has concluded that “summary judgment may be employed in the grounds phase of a termination of parental rights proceeding when there is no genuine factual dispute that would preclude finding one or more of the statutory grounds by clear and convincing evidence.” *Oneida County Dep’t of Soc. Servs. v. Nicole W.*, 2007 WI 30, ¶14, 299 Wis. 2d 637, 728 N.W.2d 652 (citing *Steven V. v. Kelley H.*, 2004 WI 47, ¶¶28-44, 271 Wis. 2d 1, 678 N.W.2d 856). That court noted that “[s]ome statutory grounds for unfitness . . . are expressly provable by official documentary evidence, such as court orders or judgments of conviction.” *Steven V.*, 271 Wis. 2d 1, ¶ 37. Among other subsections, the court specifically cited to § 48.415(9m), regarding commission of a serious felony against one of the person’s children, as an example. *Id.*

Under § 48.415(9m)(a), the petitioner can prove commission of a serious felony against one of the person’s children by showing “that a child of the person whose parental rights are sought to be terminated was the victim of a serious felony and that the person whose parental rights are sought to be terminated has been convicted of that serious

felony as evidenced by a final judgment of conviction.” § 48.415(9m)(a). A “serious felony” includes the “commission of a violation of s. 948.21 . . . that resulted in the death of the victim.” § 48.415(9m)(b)3.

Here, the county’s motion for partial summary judgment was appended with a certified judgment of conviction indicating that, on April 23, 2006, Jane was convicted of “Neglecting a Child (Cause Death),” in violation of “948.21(1).” (19A:4). It was also appended with an affidavit signed by the social worker on this case, stating that the victim of this crime was Jane’s daughter. (19A:1-2). At the hearing on the motion, Jane did not dispute the conviction or the identity of the victim, but argued that the court should nevertheless hold a trial on the ground for termination because it was not clear that Jane had, in fact, caused her daughter’s death. (66A:4). Because § 48.415(9m)(a) does not require a TPR petitioner to prove any of the facts underlying the relevant criminal conviction, only the presence of a final judgment of conviction, the court was permitted to reject this argument and grant partial summary judgment.

It is not clear that the court properly granted partial summary judgment regarding visitation, which was the second ground for termination. However, given that, upon the finding of any ground, the court must find the parent unfit and proceed to disposition, any error regarding the second ground was harmless. *See Steven V.*, 271 Wis. 2d 1, ¶25.

Therefore, any appeal challenging the court’s decision regarding the grounds phase would be without arguable merit.

II. Did the Circuit Court Erroneously Exercise Its Discretion in Determining that Termination of Parental Rights Was in the Best Interests of the Children?

Once statutory grounds for termination have been found to exist, the question of whether termination should be ordered is one which lies within the trial court's discretion. *In the Interest of K.D.J.*, 163 Wis. 2d 90, 104, 470 N.W.2d 914 (1991). The applicable standard is the best interest of the child. Wis. Stat. § 48.426(2); *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶23, 246 Wis. 2d 1, 629 N.W.2d 768. In considering the interests of the child, the court must consider the court report filed by the applicable agency and the evidence presented at the hearing and weigh:

- (a) The likelihood of the child's adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- (d) The wishes of the child.
- (e) The duration of the separation of the parent from the child.
- (f) 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.

§ 48.426(1) & (3).

Here, the court's oral decision to terminate was brief. It noted that it had considered the statutory factors and found that the county had met those factors, and that Jackie and John needed stability. (73A:33-34). The court's written orders enumerated those factors and the addendums provided detailed reasons for termination. (59A; 55B). The addendums stated that the twins were in good health, that their foster parents wanted to adopt them, and that they were likely to be adopted. (59A:5-6; 55B:5-6). They stated that the twins did not have a substantial relationship with either parent or their extended family members and it would not be harmful to sever these relationships. (59A:5; 55B:5). The addendums noted that the twins were too young to understand the proceedings, that they had been separated from their parents since birth, that termination would lead to more stable and permanent family relationships, and that continuation of the child in the home of either parent would be contrary to their welfare. (59A:5-6; 55B:5-6). Also, the addendums discussed the factual basis for Jane's conviction for neglect of a child, namely, that Jane suffocated her infant daughter by trying to breastfeed while under the influence of alcohol, and losing consciousness. (59A:6-7; 55B:6-7).

As such, the record demonstrates that the court exercised discretion in making its termination decision and therefore any appeal challenging that decision would be without arguable merit.

CONCLUSION

For all of the reasons stated, undersigned counsel has concluded that any grounds which might arguably support an appeal in this matter would be frivolous and without arguable merit. Therefore, counsel respectfully requests that the court release her from further representing the respondent-appellant in this matter.

Dated this 17th day of September, 2010.

Respectfully submitted,

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant

**CERTIFICATION IN COMPLIANCE
WITH 809.32(1)(b)**

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have forwarded the transcripts and court record to my client. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this 17th day of September, 2010.

Signed:

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant

**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this no-merit brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic no-merit brief is identical in content and format to the printed form of the no-merit brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this no-merit brief filed with the court and served on all opposing parties.

Dated this 17th day of September, 2010.

Signed:

[NAME OF ATTORNEY]
[State Bar No.]

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Attorney for Respondent-Appellant