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August 5, 2013

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

2013AP1336-NM In re the termination of parental rights to Tyler E., a person under the age of 18: State of Wisconsin v. Mark E. (L.C. #2012TP73)

Before Fine, J.

Mark E. appeals an order terminating his parental rights to his son, Tyler E. Appellate counsel, Leonard D. Kachinsky, Esq., filed a no-merit report. *See* ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (*per curiam*); *see also* WIS. STAT. RULES 809.107(5m) and 809.32. Counsel advised Mark E. of his right to respond, but Mark E.

has not responded. Based upon an independent review of the Record and the no-merit report, this court concludes that an appeal would lack arguable merit. Therefore, the order terminating Mark E.'s parental rights is summarily affirmed.

Tyler was born June 5, 2008. The State filed a child-in-need-of-protection-or-services petition in January 2011. The petition alleged that Mark E. and Tyler's mother, Angie S., neglected, refused, or were unable to provide Tyler with necessary care. *See* WIS. STAT. § 48.13(10). The circuit court found the parents were unable to provide care for Tyler and adjudicated him in need of protection and services on May 18, 2011.

Tyler was placed in the care of his maternal grandmother, Carrie W.[1] Conditions of Tyler's return required Mark E. to: demonstrate an ability to deal with anger and frustration without violence and demonstrate an understanding of the effect a violent relationship with Angie S. would have on Tyler; recognize unsafe situations for Tyler—specifically, the behavior or actions of others which might result in Tyler being unsafe; obtain a reliable source of income so as to be able to provide for Tyler's needs; and demonstrate a commitment to a drug-free environment by refraining from the use of illegal drugs and unprescribed prescription medications.[2] Tyler was removed from Carrie W.'s care when she was evicted from her home

[1] Carrie W. had cared for Tyler off and on since he was five months old. Prior to the underlying child-in-need-of-protection-or-services matter, Carrie W. had petitioned for, and received, temporary guardianship of Tyler. The reasons for the dismissal of the guardianship petition are immaterial to this appeal.

[2] Mark E. smoked marijuana and took prescription medication, including morphine, without a valid prescription, but did not view his drug use as a problem and refused drug treatment.

and unable to secure a stable residence.[3] He was ultimately placed in the foster home of Candy and Robert D.

The termination-of-parental-rights petition was filed on March 29, 2012. It alleged abandonment, continuing need for protection or services, and failure to assume parental responsibility as grounds for termination against both parents. *See* WIS. STAT. §§ 48.415(1), (2), (6). Mark E. ultimately agreed to stipulate to the continuing protection-or-services ground; the other two grounds were dismissed. Disposition was adjourned until after Angie S.'s jury trial.[4] At the end of the dispositional hearing, the circuit court determined that termination of the parents' rights was in Tyler's best interests.

Counsel identifies three potential issues for appeal, each of which he concludes lack arguable merit: whether there were any procedural defects in the proceedings, whether the circuit court properly accepted Mark E.'s stipulation to grounds, and whether the circuit court properly exercised its discretion in terminating Mark E.'s parental rights to Tyler. We agree with counsel's conclusions that these issues lack arguable merit.

The first potential issue counsel raises is whether there were any "procedural defects" in the case. Counsel identifies eight statutory sections he believes are applicable and asserts,

[3] Carrie W. was also not entirely forthcoming regarding her family's dynamics, and she refused to comply with the Bureau of Milwaukee Child Welfare's licensing process. For those reasons, Carrie W. was not further considered for Tyler's placement.

[4] The jury found all three grounds existed as to Angie S.

without meaningful discussion, that the circuit court "complied with all of them in this case."[5] Counsel thus concludes that there would be "no basis for claiming that Mark [E.] was not advised of his procedural rights as required or that delays in the proceedings … were for any reasons that did not constitute good cause."

We agree. The termination petition satisfied the pleading requirements of WIS. STAT. § 48.42(1). The circuit court properly advised Mark E. of his right to judicial substitution, *see* WIS. STAT. § 48.29, though Mark E. declined to exercise that right. Also, the circuit court properly complied with statutory timelines and did not lose competency to proceed. *See* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 668, 607 N.W.2d 927, 928. Specifically, there are certain timelines for the initial hearing, fact-finding heading, and disposition hearing set by statute. *See* WIS. STAT. §§ 48.422(1)–(2) and 48.424(4)(a). These time limits cannot be waived, ***April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d at 668, 607 N.W.2d at 928–929, but continuances are permitted upon a showing of good cause and only for as long as is necessary, WIS. STAT. § 48.315(2). Here, each continuation was for cause, like allowing Mark E. and Angie S. to retain counsel, and there were no objections to the continuances. *See* WIS. STAT. § 48.315(3). Thus, there is no arguable merit to a claim of any procedural defects.

The next issue counsel raises is whether the circuit court properly accepted Mark E.'s stipulation/admission to the continuing-need-for-protection-or-services ground in the termination petition. Before accepting a no-contest plea to a termination petition, the circuit court must

[5] *See* WIS. STAT. §§ 48.29, 48.299, 48.30, 48.315, 48.42, 48.422, 48.424, and 48.427. However, at least one of these sections is inapplicable: § 48.30 addresses plea hearings relative to child-in-need-of-protection-or-services petitions, not termination petitions.

explain things to the parent under WIS. STAT. § 48.422(7). *See* ***Oneida County Department of Social Services v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 497, 762 N.W.2d 122, 124–125. The circuit court must: (1) address the parent and determine that the admission is made voluntarily, with an understanding of the nature of the acts alleged in the petition and the potential dispositions; (2) establish whether any promises or threats were made to secure the plea; (3) establish whether a proposed adoptive resource for the children has been identified; (4) establish whether any person has coerced a parent to refrain from exercising his or her parental rights; and (5) determine whether there is a factual basis for the admission of facts alleged in the petition. *See* WIS. STAT. § 48.422(7). The parent must also be aware of the constitutional rights being surrendered with the admission. *See* ***Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d at 498, 762 N.W.2d at 125.

Our review of the Record satisfies us that the circuit court properly followed WIS. STAT. § 48.422(7) and that Mark E. knowingly, intelligently, and voluntarily entered the stipulation to grounds. *See* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 51, 233 Wis. 2d 344, 364, 367, 607 N.W.2d 607, 617–618.

The circuit court reviewed with Mark E. the nature of the continuing-need-for-protection or services ground, including the conditions of return imposed by the prior protection-or-services order.[6] It confirmed that Mark E. understood he was not agreeing to a termination disposition, and it explained the potential dispositions that could occur. The circuit court additionally confirmed that Mark E. understood he would be found unfit as a result of his stipulation.

[6] In fact, the circuit court reviewed all three of the grounds that had been alleged against Mark E.

The circuit court inquired whether Mark E. was taking any medication or had mental health issues that might impede his ability to understand the proceedings. It inquired about Mark E.'s level of education. It asked whether Mark E. had enough time to review the matter with counsel. It confirmed that no promises or threats had been made to secure the stipulation, and that no one had attempted to coerce Mark E. to refrain from exercising his parental rights. The circuit court further confirmed that an adoptive resource had been identified for Tyler.

The circuit court then heard evidence in support of the factual basis for the continuing-need-for-protection-or-services ground in the petition. *See* WIS. STAT. § 48.422(7)(c). When a termination petition alleges as grounds for termination that a child is in continuing need of protection and services, the State must prove the following:

> First, the child must have been placed out of the home for a cumulative total of more than six months pursuant to court orders containing the termination of parental rights notice. Second, the [applicable agency] must have made a reasonable effort to provide services ordered by the court. Third, the parent must fail to meet the conditions established in the order for the safe return of the child to the parent's home. Fourth, there must be a substantial likelihood that the parent will not meet the conditions of safe return of the child within the [nine]-month period following the conclusion of the termination hearing.

Walworth County Department of Health & Human Services v. Andrea L.O., 2008 WI 46, ¶6, 309 Wis. 2d 161, 165, 749 N.W.2d 168, 170; *see also* WIS. STAT. § 48.415(2)(a) and 2005 Wis. Act 293, § 20. The State has the burden to show that grounds for termination exist by clear and convincing evidence. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶22, 246 Wis. 2d 1, 16, 629 N.W.2d 768, 775.

In this case, ongoing case manager Andrea Bauknecht testified regarding these factors. Our review of her testimony satisfies us that the State offered sufficient evidence to support the

continuing-need-for-protection-or-services ground as alleged in the petition. There is no arguable merit to a challenge to the circuit court's acceptance of Mark E.'s stipulation in the fact-finding phase.

Finally, appellate counsel discusses whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating Mark E.'s parental rights. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). Bearing in mind that the child's best interests are the primary concern, *see* WIS. STAT. § 48.426(2), the circuit court must also consider factors including, but not limited to:

> (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.

WIS. STAT. § 48.426(3).

Here, the circuit court concluded there was a "very great" likelihood Tyler would be adopted. Candy and Robert D. were approved to adopt Tyler, and expressed their commitment to doing so. Tyler had been out of his parents' care since January 2010, a "substantial period" by the time of the March 2013 disposition hearing, and nothing healthwise was an impediment to

the adoption. Tyler was too young to express a preference for his placement, but the results of a bonding study ordered by circuit court showed that Tyler had an "emerging secure attachment" to Candy and Robert D.

The circuit court concluded that Tyler's relationship with Mark E. was close to, but not quite, a substantial one. It concluded that Tyler's relationship with his mother was more of a friendship than a parent-child bond. The circuit court noted that there were good relationships between Tyler and both of his grandmothers—as noted, he had been placed with his maternal grandmother, Carrie W., for a period, and the circuit court credited Carrie W. for Tyler's ability to form any emotional attachments at all. Tyler's paternal grandmother, Julie E., had briefly supervised visits between Tyler and Mark E., and she attempted to gain guardianship of him as an alternative to termination.[7] However, the circuit court concluded that it would not be harmful to sever these legal relationships because it was convinced that Candy and Robert D. would continue to facilitate the familial relationships so long as they were appropriate for Tyler. The circuit court based this determination on the fact that Candy and Robert D. had adopted two other children and had kept the relationship with the children's biological family open. As Candy D. explained, they believed those relationships important for the children to know not only who they are, but also who they were.

[7] Julie E.'s supervision was terminated when her decision-making was called into question. For example, though Mark E. did not have a license and was not supposed to be driving Tyler around because his drug use made it unsafe, Julie E. would allow Mark to drive Tyler to the store. Julie E. additionally tended to minimize Mark E.'s problems, including denying that he had a drug problem. For those reasons, Julie E. was also excluded as a placement for Tyler.

The circuit court also noted that termination would allow Tyler to enter a more stable and permanent relationship. The parents had not made progress on the conditions of return.[8] Safety became a concern in past kinship placements. Tyler was developing a secure attachment to the foster family, and that type of permanence was important. Ultimately, the circuit court concluded that termination was in Tyler's best interests—he was being put first, given 24/7 attention, and would have the opportunity for an ongoing relationship with his grandparents and both parents, something the circuit court deemed a "triple win" for Tyler. There is no arguable merit to a challenge to the circuit court's exercise of discretion in terminating Mark E.'s parental rights.

Our independent review of the Record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Leonard D. Kachinsky, Esq., is relieved of further representation of Mark E. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[8] Mark E. would have difficulty with some of the conditions, as he had been convicted of homicide by negligent use of a motor vehicle and was sentenced in February 2003 to four years' initial confinement and three years' extended supervision.