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July 30, 2014

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

2014AP687-NM

In re the termination of parental rights to David-Lee W. L., a
person under the age of 18: Wood Co. DHS v. Ebony L.
(L.C. # 2013TP10)

Before Neubauer, P.J.¹

Ebony L. appeals from a circuit court order terminating her parental rights to David-Lee W. L. Ebony L.'s appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.107(5m). Upon consideration of the report and an independent review of the record, we

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

summarily affirm the order because there are no issues that would have arguable merit for appeal.² WIS. STAT. RULE 809.21.

Multiple orders of this court have addressed the fact Ebony L.'s counsel has not had contact with her since March 2014 when they spoke about this appeal and her options. Since then, counsel's attempts to locate Ebony L. have been unavailing. Mail sent by counsel to the address provided by Ebony L., including Ebony L.'s copy of the no-merit report and orders sent by this court, has been returned as undeliverable. The mailing address and telephone number counsel has for Ebony L. are no longer valid. In response to orders of this court, counsel investigated Ebony L.'s whereabouts, but she has not been located. Therefore, we proceed in this appeal without a response to the no-merit report from Ebony L. We also acknowledge that Ebony L. may not receive a copy of this opinion affirming the order terminating her parental rights. However, this situation is of Ebony L.'s own making.³ Further delay in this appeal would be contrary to the intent that appeals in termination of parental rights cases should be expedited. WIS. STAT. RULE 809.107.

The Wood County Department of Human Services petitioned to terminate Ebony L.'s parental rights on the grounds that David-Lee W. L. was a child in continuing need of protection or services. WIS. STAT. 48.415(1)(a)2. A jury found grounds for termination, and the circuit court thereafter terminated Ebony L.'s parental rights after a dispositional hearing.

² Our June 18, 2014 order set out good cause to extend the time to decide this appeal due to the difficulties with locating Ebony L. WIS. STAT. RULES 809.107(5m) and 809.82(2).

³ Ebony L. had a responsibility to remain in contact with her appellate counsel.

The no-merit report addresses: (1) whether an issue with arguable merit arises from service of the petition and summons upon Ebony L. shortly before the first hearing on the termination of parental rights petition, (2) whether trial counsel was ineffective when Ebony L. declined to contest three of the four elements of the continuing CHIPS ground for termination leaving in dispute only whether Ebony L. would be substantially likely to meet the conditions for the child's return to her home in nine months, and (3) whether the evidence was sufficient to show that Ebony L. was not substantially likely to complete the conditions for return within nine months. The no-merit report contains a correct statement of the law governing these issues and properly applies the law to the facts. We agree with appellate counsel that these issues would not have arguable merit for appeal.

We conclude that the evidence supports the jury's verdict that there were grounds to terminate Ebony L.'s parental rights. The jury found that David-Lee W. L. was a child in need of protection or services who had been placed outside Ebony L.'s home for six months or longer pursuant to orders containing the termination of parental rights warnings, Wood County Department of Human Services made a reasonable effort to provide court-ordered services, Ebony L. failed to meet the conditions for her child's return, and it was not substantially likely that Ebony L. would meet those conditions within nine months following the jury trial. WIS. STAT. § 48.415(2)(a).

“When reviewing a jury's verdict, we consider the evidence in the light most favorable to the verdict.” *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶39, 333 Wis. 2d. 273, 797 N.W.2d 854. At trial, evidence was taken from Ebony L.'s probation officer, child welfare and social work professionals, Ebony L., and a family friend. The jury's findings regarding the grounds to terminate Ebony L.'s parental rights are supported in the trial record. We conclude that no

arguable merit could arise from a challenge to the sufficiency of the evidence of the continuing CHIPS ground to terminate Ebony L.'s parental rights.

The no-merit report fails to address the circuit court's decision at disposition to terminate Ebony L.'s parental rights. Counsel was obligated to address possible appellate issues arising from the record and state why the issues do not have arguable merit. Future no-merit reports may be rejected if they do not fulfill the purpose of WIS. STAT. RULE 809.32.

The decision to terminate parental rights is within the circuit court's discretion. *B.L.J. v. Polk Cnty. Dep't of Soc. Servs.*, 163 Wis. 2d 90, 104, 470 N.W.2d 914 (1991). The circuit court must consider the statutory factors to determine if termination is in the child's best interests. WIS. STAT. § 48.426(3). The record in this case indicates that the court considered the appropriate factors: the likelihood of the child's adoption after termination, the child's lack of substantial family relationships, the lack of harm if those family relationships were severed, the duration of the parent-child separation, and future stability for the child as a result of the termination. The court's findings in support of termination were not clearly erroneous, WIS. STAT. § 805.17(2), and all of the factors weighed in favor of the court's discretionary determination that it was in the child's best interests to terminate Ebony L.'s parental rights.

The no-merit report addresses whether trial counsel was ineffective when Ebony L. declined at the jury trial to contest three of the four elements of the continuing CHIPS ground for termination. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a posttermination motion in the circuit court. See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether the record

supports counsel's conclusion that an ineffective assistance of trial counsel claim would lack arguable merit. *State v. Allen*, 2010 WI 89, ¶88, 328 Wis. 2d 1, 786 N.W.2d 124 (broad scope of no-merit review suggests that we "should identify issues of arguable merit even if those issues were not preserved in the circuit court, especially where the ineffective assistance of postconviction counsel was the reason those issues were not preserved for appeal").

Even though Ebony L. did not contest all of the elements, evidence was presented on all four elements of the continuing CHIPS ground. The Wood County Department of Human Services met its burden to establish grounds to terminate, and Ebony L. received a jury finding on the elements she did not contest. *See Walworth Cnty. Dep't of Health & Human Servs. v. Andrea L.O.*, 2008 WI 46, ¶3, 309 Wis. 2d 161, 749 N.W.2d 168.

Our review of the record does not reveal a basis for an ineffective assistance of trial counsel claim. Ebony L. has not alerted this court to any claim regarding trial counsel's representation. The record indicates that Ebony L.'s counsel vigorously represented her. On this record, an ineffective assistance of trial counsel claim would lack arguable merit for appeal.

We have considered whether an issue with arguable merit arises because on two occasions, Ebony L. appeared by telephone with her counsel present in the courtroom. Ebony L. was unable to come to the courtroom for the first hearing on the termination of parental rights petition because she was recovering from a serious injury. Although she attended the jury trial, Ebony L. was unable to come to the courtroom for the disposition hearing due to health issues.

A parent's due process rights in a termination of parental rights proceeding are not violated by appearing by telephone, and whether the parent was able to meaningfully participate depends upon the facts of each case. *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 701-02,

530 N.W.2d 34 (Ct. App. 1995). In both instances, we conclude that despite appearing by telephone, Ebony L.'s due process right to "meaningfully participate" in the termination of parental rights proceedings was not violated. See *Waukesha Cnty. Dep't of Health & Human Servs. v. Teodoro E.*, 2008 WI App 16, ¶10, 307 Wis. 2d 372, 745 N.W.2d 701 (Ct. App. 2007). On each occasion, the circuit court confirmed the necessity of Ebony L.'s appearance by telephone and that she was satisfied with the arrangements for her appearance by telephone. We conclude that Ebony L.'s appearances by telephone do not create an arguably meritorious issue for appeal.

We have considered whether there would be any arguable merit to a claim that the court failed to comply with mandatory WIS. STAT. ch. 48 time limits, thereby losing competency to proceed. See *State v. April O.*, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. Continuances are permitted "upon a showing of good cause in open court ... and only for so long as is necessary." WIS. STAT. § 48.315(2). Failure to object to a continuance waives any challenge to the court's competency to act during the continuance. Sec. 48.315(3). The record shows that the circuit court found good cause to toll the time limits, and Ebony L. did not object. There would be no arguable merit to a challenge to the circuit court's competency to proceed based on a failure to comply with statutory time limits.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any issues with arguable merit for appeal. Because we conclude that there is no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the order terminating Ebony L.'s parental rights, and relieve Attorney Michael D. Zell of further representation of Ebony L. in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael D. Zell is relieved of further representation of Ebony L. in this matter.

Diane M. Fremgen
Clerk of Court of Appeals