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DISTRICT I

February 10, 2015

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

2014AP2188-NM State of Wisconsin v. Ernest W.
(L.C. 2013TP161)

Before Curley, P.J.¹

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

Consideration of this case was delayed in part because the appeals for the child's mother and father share an appellate record. We will extend the deadline for deciding this case to the date of this order. See *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995) (we may extend the time to issue a decision in a TPR case).

Ernest W. appeals from a trial court order terminating his parental rights to Tamijah W.² Ernest W.'s appointed attorney, Gina Frances Bosben, has filed a no-merit report. *See Brown County v. Edward C.T.*, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998) (per curiam); *see also* WIS. STAT. RULES 809.107(5m) and 809.32. Ernest W. has not filed a response. This court has considered counsel's report and has independently reviewed the record. This court agrees with counsel's conclusion that an appeal would lack arguable merit. Therefore, the order terminating Ernest W.'s parental rights is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Tamijah W. was born in November 2009. She initially lived with her married parents in another state. By August 2010, she was living in a domestic violence shelter in Milwaukee with her mother, Tamara B. She was removed from Tamara B.'s care based on allegations of neglect and Tamara B.'s mental instability. A CHIPS order was entered in September 2010 and Tamijah W. was placed in the care of a foster mother. The conditions for return included classes and various forms of treatment for both parents. For example, Ernest W. was ordered to undergo AODA programming and batterers intervention programming.

In March 2012, Tamijah W. was returned to her parents, who were again living together. She was re-detained in July 2012 for numerous reasons, including Ernest W.'s "untreated AODA issues" and allegations that Ernest W. physically abused Tamijah W. Tamijah W. again went to live with the same foster mother, with whom she continues to reside.

² The parental rights of Tamijah W.'s mother, Tamara B.—who is Ernest W.'s wife—were also terminated. Tamara B.'s rights are not at issue in this appeal and will not be addressed.

In May 2013, the State moved to terminate the parental rights of both parents. The State alleged two grounds to terminate Ernest W.'s parental rights: abandonment (no visits or communication for three or more months) and continuing CHIPS. *See* WIS. STAT. § 48.415(1)(a)2. & (2). Ernest W. participated in the litigation, appearing at each court hearing. He ultimately pled no contest to the abandonment ground and the continuing CHIPS ground was dismissed. The trial court conducted a personal colloquy with Ernest W., accepted his no-contest plea, and heard testimony from a family case manager that supported the trial court's finding that there was a factual basis for the abandonment ground alleged in the petition.

The case proceeded to a contested dispositional hearing. Although Ernest W. did not testify, he made a brief statement to the court, indicating that he believed he and Tamara B. "got ourselves back on track going to the meetings, everything" and asked the trial court to "give us another chance." Ultimately, the trial court determined that terminating Ernest W.'s parental rights was in Tamijah W.'s best interests. This appeal follows.³

The no-merit report addresses three issues: (1) whether Ernest W.'s no-contest plea was knowingly, intelligently, and voluntarily entered; (2) whether the trial court erroneously exercised its discretion when it decided to terminate Ernest W.'s parental rights; and (3) whether Ernest W.'s trial counsel provided ineffective assistance. We agree with appellate counsel that

³ This appeal was delayed in part so that appellate counsel could listen to oral arguments for a post-disposition motion filed in the trial court by Tamara B., which was ultimately denied by the trial court. The motion sought a new dispositional hearing based on Tamara B.'s post-disposition decision to divorce Ernest W. and the post-disposition denial of her requests for in-person visits with Tamijah W. Ernest W.'s appellate counsel did not discuss the motion in her no-merit report. We have reviewed the transcripts of the post-disposition proceedings and we have not identified any issue of merit related to Ernest W.'s appeal. Therefore, we will not further discuss Tamara B.'s post-disposition proceedings.

there would be no merit to raising these issues in a post-disposition motion or on appeal, and we will briefly address each of the potential issues counsel has identified.

We begin with Ernest W.'s decision to enter a no-contest plea to a single ground for termination: abandonment. In *Brown County DHS v. Brenda B.*, our supreme court summarized the applicable legal standards:

A parent who chooses to enter a no contest plea during th[e grounds] phase is giving up valuable protections and must have knowledge of the rights being waived by making the plea.

The principles and analysis of *Bangert* apply.⁴ The [trial] court must engage the parent in a colloquy to ensure that the plea is knowing, voluntary, and intelligent. This colloquy is governed by the requirements of [WIS. STAT.] § 48.422(7) and notions of due process.

If the parent can later show that the colloquy was deficient and also alleges that he or she did not know or understand the information that should have been provided, that parent has made a prima facie case that the plea was not knowing, voluntary, and intelligent. At that point, the burden shifts to the petitioner to demonstrate by clear and convincing evidence that the parent knowingly, voluntarily, and intelligently pled no contest.

Brenda B., 2011 WI 6, ¶¶34-36, 331 Wis. 2d 310, 795 N.W.2d 730 (citations omitted).

Consistent with *Brenda B.*, the trial court conducted an extensive colloquy with Ernest W. The trial court addressed Ernest W.'s understanding of the rights he was giving up, told him that it would decide at the dispositional hearing—after hearing evidence from the parties—whether to terminate his parental rights or dismiss the petition, and explained that the focus at the dispositional hearing would be on Tamijah W.'s best interests. The trial court established that no

⁴ See *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

threats were made to force Ernest W. to enter a no-contest plea. The trial court also confirmed that Ernest W. understood that if his no-contest plea was accepted, the trial court would “make a statutorily required finding of unfitness.” In short, the transcript demonstrates that the trial court complied with the dictates of WIS. STAT. § 48.422(7), *Brenda B.*, and *Oneida County DSS v. Therese S.*, 2008 WI App 159, 314 Wis. 2d 493, 762 N.W.2d 122.

As part of its compliance with WIS. STAT. § 48.422(7), the trial court heard testimony from the family case manager concerning the factual basis for the abandonment ground. The trial court accepted the manager’s testimony that Ernest W. had no contact with Tamijah W. between November 7, 2012 and March 1, 2013, and it found that the State had proven the abandonment ground by clear, convincing, and satisfactory evidence. *See* WIS. STAT. § 48.31(1). The manager’s testimony supports that finding. There would be no merit to challenging Ernest W.’s no-contest plea or alleging that there was no factual basis for the finding that Ernest W. abandoned Tamijah W. as outlined in WIS. STAT. § 48.415(1)(a)2.

The second issue is whether there would be any merit to challenging the trial court’s decision to terminate Ernest W.’s parental rights. The decision to terminate a parent’s rights is discretionary and the best interests of the child is the prevailing standard. *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The trial court considers multiple 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, there would be no merit to challenging the trial court's exercise of discretion. The trial court made detailed findings based on testimony from service providers. It considered the statutory factors and found that each one weighed in favor of termination. The trial court said that the likelihood of adoption by the foster mother was "very great." The trial court recognized that Tamijah W., who was age four at the time of the dispositional hearing, had lived seventy percent of her life with the same foster mother. The trial court recognized that Tamijah W. "is an extremely challenged special needs child" based on her medical and developmental issues, but it said that those issues were being appropriately addressed by the foster mother and were not a barrier to adoption. The trial court also found that when Tamijah W. was first removed from her parents' care, "she was a very sickly child" and, after returning to her parents' care, "had to be removed again because of the same issues of neglect and abuse."

The trial court found that Tamijah W. had a substantial relationship with both Tamara B. and Ernest W., but it said that "it is a relationship where the parents don't bear the responsibility." The trial court said that it would not harm Tamijah W. "to sever the legal relationship" because the foster mother had indicated that she wants Tamijah W. to continue to have a relationship with them. The trial court said that Tamijah W. did not have substantial relationships with any other relatives.

The trial court said that the child was unable to express her wishes, but had “shown her bond, her de facto umbilical cord is with” the foster mother. The trial court’s finding was supported by testimony from the foster mother, the family case manager, and the bonding expert. Finally, the trial court found that Tamijah W.:

“will be able to enter [into] a more stable and permanent family relationship as a result of the termination” taking into account the poor circumstances of the child’s life on the two time frames when the child lived with [her parents] and how wonderful it has been and how special needs are attended to ... with [her foster mother].

(Quoting WIS. STAT. § 48.426(3)(f).)

Ultimately, the trial court found that, having considered the statutory factors, termination of Ernest W.’s parental rights was in Tamijah W.’s best interests. The trial court’s findings are supported by the record and reflect a proper exercise of discretion. An appellate challenge to the trial court’s exercise of discretion would lack arguable merit.

Finally, the no-merit report states that appellate counsel has not identified anything in the record indicating that trial counsel was ineffective. We, too, have not identified an issue of merit with respect to trial counsel’s performance, which included a detailed closing argument in which counsel explained how Ernest W.’s progress with AODA issues and parenting issues justified maintaining the legal relationship, rather than terminating Ernest W.’s parental rights.

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

Upon the foregoing,

IT IS ORDERED that Attorney Gina Frances Bosben is relieved of any further representation of Ernest W. on appeal.

IT IS FURTHER ORDERED that the order terminating Ernest W.'s parental rights is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals