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October 27, 2016

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R. D. T.

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

2016AP1412-NM State of Wisconsin v. R. D. T. (L.C. # 2015TP16)

Before Kessler, J.

R.D.T. appeals an order terminating his parental rights to R.T.D.-T. Attorney Eileen T. Evans, appointed counsel for R.D.T., filed and served a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Brown Cty. v. Edward C.T.***, 218 Wis. 2d 160, 579 N.W.2d 293

(Ct. App. 1998), and WIS. STAT. RULES 809.107(5m) and 809.32 (2013-14).[1] R.D.T. submitted a response, to which Attorney Evans concluded a reply was not required. We have considered counsel's no-merit report and R.D.T.'s response, and we have independently reviewed the record. We conclude that further proceedings would lack arguable merit, and we summarily affirm the order terminating R.D.T.'s parental rights.

BACKGROUND

R.T.D.-T. was born March 24, 2009. She came to the attention of the Bureau of Milwaukee Child Welfare in August 2013, when her half-brother was taken into protective custody based on allegations that the mother of both children, T.R.D, was mentally ill, homeless, and abusive. The Bureau determined that R.T.D.-T. would be placed in the home of her father, R.D.T., under a written protective plan. On September 13, 2013, the family's ongoing case manager concluded that R.D.T. was not complying with the protective plan and detained R.T.D.-T. She spent approximately six weeks in a foster home before the State placed her with a treatment foster parent, E.H., in November 2013. In January 2013, a circuit court determined that R.T.D.-T. was a child in need of protection or services.

On January 20, 2015, the State filed a petition to terminate R.D.T.'s parental rights.[2] The petition alleged that R.T.D.-T. continued to be a child in need of protection or services and that R.D.T. had failed to assume parental responsibility for her. R.D.T. denied the allegations and

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The petition to terminate R.D.T.'s parental rights also sought termination of T.R.D.'s parental rights. The order terminating T.R.D's parental rights is the subject of a separate appeal, *see* ***State v. T.R.D.***, No. 2016AP1413, and is not at issue in the instant proceeding.

demanded a trial, but he eventually decided to stipulate that he had failed to assume parental responsibility for R.T.D.-T. After accepting his stipulation, the circuit court conducted a hearing and concluded that R.T.D.-T.'s best interests required terminating R.D.T.'s parental rights.

COMPLIANCE WITH STATUTORY TIME LIMITS

We first consider whether R.D.T. could raise an arguably meritorious claim that the circuit court failed to meet mandatory statutory time limits and thereby lost competency to proceed. *See* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. After a termination of parental rights petition is filed, the circuit court has thirty days to conduct an initial hearing and determine whether any party wishes to contest the petition. WIS. STAT. § 48.422(1). If a party contests the petition, the circuit court must set a date for a fact-finding hearing, which must begin within forty-five days of the initial hearing. WIS. STAT. § 48.422(2). If grounds for termination are established, the circuit court may delay the dispositional hearing until "no later than 45 days after the fact-finding hearing." WIS. STAT. § 48.424(4).[3]

When the statutory time limits cannot be met, continuances may be granted "only upon a showing of good cause in open court … and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases." WIS. STAT. § 48.315(2). Failure to object to a continuance, however, "waives any challenge to the court's competency to act during the period of delay or continuance." WIS. STAT. § 48.315(3).

[3] The deadlines in WIS. STAT. §§ 48.422(1)-(2) and 48.424(4), are subject to an exception applicable to Native American children that is not relevant here.

In this case, the circuit court on several occasions granted continuances that extended the proceedings beyond the statutory deadlines, but R.D.T. did not object. Further, the record shows that any continuances were granted for good cause and only for so long as necessary. Accordingly, R.D.T. cannot mount an arguably meritorious challenge to the circuit court's competency to proceed based on failure to comply with statutory time limits. *See* ***id.***

STIPULATION TO GROUNDS

On the date set for trial, R.D.T. told the circuit court he would stipulate that grounds for termination existed under WIS. STAT. § 48.415(6)—failure to assume parental responsibility. We therefore next consider whether R.D.T. could pursue an arguably meritorious challenge to the stipulation.

Before accepting an admission of facts alleged in a termination of parental rights petition, the circuit court must comply with the requirements of WIS. STAT. § 48.422(7). *See* ***Oneida Cty. DSS v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 762 N.W.2d 122. The statute requires the circuit court to: (1) address the parent and determine that the admission is made voluntarily and understandingly; (2) establish whether any promises or threats were made to elicit an admission; (3) establish whether a proposed adoptive parent for the child has been identified; (4) establish whether any person has coerced a parent to refrain from exercising parental rights; and (5) make such inquiries as satisfactorily establish a factual basis for the admission. *See* § 48.422(7).

The circuit court's duties when accepting an admission that grounds exist for termination of parental rights also include the obligation to tell the parent that, during the dispositional stage of the proceedings, "the court will hear evidence ... and then will either terminate the parent's

rights or dismiss the petition if the evidence does not warrant termination." ***Therese S.***, 314 Wis. 2d 493, ¶16. Additionally, "the court must inform the parent that 'the best interests of the child shall be the prevailing factor considered by the court in determining the disposition.'" ***Id.*** (citation and brackets omitted). Further, parents "must have knowledge of the constitutional rights given up by the plea," ***id.***, ¶5, and "must understand that acceptance of their plea will result in a finding of parental unfitness," ***id.***, ¶10.

Here, the circuit court placed R.D.T. under oath. The circuit court then conducted a comprehensive colloquy with him about the decision to stipulate to the existence of grounds for termination of his parental rights.

The circuit court established that R.D.T. had a high school equivalency diploma and was able to read. R.D.T. confirmed that he had read the petition seeking termination of his parental rights and understood the allegations it contained. The circuit court explained to R.D.T. the two-part procedure in a termination of parental rights case. The circuit court explained that in the first phase of the proceeding, the State is required to prove that grounds exist to terminate parental rights and that the fact-finder in the first phase would be either a judge or a jury. R.D.T. said he understood. The circuit court explained that the State must prove its allegations by evidence that is clear and convincing. *See* WIS. STAT. § 48.31(1). R.D.T. said he understood the burden of proof. The circuit court told R.D.T. about his rights to present testimony, call witnesses, and cross-examine any witnesses called by the State. He said he understood. The circuit court told R.D.T. that he was giving up the right to a trial on the question of whether he failed to assume parental responsibility but that he would have the opportunity to present testimony and witnesses during the second phase of the proceedings and to argue about what he believed was in his daughter's best interest. The circuit court explained that at the conclusion of

the dispositional hearing, the circuit court would "make a decision about what's in R.[T.D.-T]'s best interest." R.D.T. said he understood.

The circuit court reviewed what the State must prove at trial to establish failure to assume parental responsibility, namely, that the parent has not had a substantial parental relationship with the child. *See* WIS. JI–JUVENILE 346. The circuit court went on to explain to R.D.T. that absence of a substantial parental relationship means the parent did not "accept and exercise a significant degree of significant responsibility for the daily supervision, education, protection, and care" for the child. *See* ***id.*** R.D.T. said he understood. The circuit court also reviewed the elements that the State must prove to establish that R.T.D.-T. was a child in continuing need of protection and services, but the circuit court stated its understanding that R.D.T. was stipulating only that he failed to assume parental responsibility for her. R.D.T. confirmed that the circuit court correctly understood how he wanted to proceed. He assured the circuit court that he had not been threatened or promised anything in order to induce him to concede that grounds existed for termination of his parental rights.

The circuit court told R.D.T. that it would find him to be an unfit parent upon accepting his stipulation. R.D.T. said he understood.

The State filed a document declaring that the State had no knowledge of payments to R.D.T. by the adoptive resource. R.D.T. confirmed that he had not received any money in exchange for his stipulation.

The circuit court found that R.D.T. knowingly, intelligently, and voluntarily stipulated that grounds existed for termination of his parental rights pursuant to WIS. STAT. § 48.415(6).

With the agreement of all parties and their counsel, the circuit court then adjourned the proceedings.

When court reconvened, the State presented testimony that R.D.T. failed to assume parental responsibility for R.T.D.-T. within the meaning of WIS. STAT. § 48.415(6). *See* ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶¶53, 56, 233 Wis. 2d 344, 607 N.W.2d 607 (when petition to terminate parental rights is uncontested, trial court must nonetheless hear testimony in support of the allegations in the petition). Daniel Ohl testified that he was employed as the ongoing case manager for R.T.D.-T. and her family. Ohl explained that R.T.D.-T. was removed from R.D.T.'s home because the home was in disrepair, cluttered with dangerous objects, and was not a safe environment for a child. Ohl testified that removal was also required because R.D.T. permitted the child to have contact with her mother, which violated his agreement to prevent such contact in light of the mother's mental illness. Finally, Ohl testified that, during the two years following the child's removal from her father's home, R.D.T. proved unable to exercise control over her behavior during supervised visits, did not attend medical, dental, or therapy appointments for the child, and attended only two school-related meetings. The circuit court then found that R.D.T. was unfit on the ground that he failed to assume parental responsibility within the meaning of § 48.415(6). *See* ***Tammy W.-G. v. Jacob T.***, 2011 WI 30, ¶¶36-38, 333 Wis. 2d 273, 797 N.W.2d 854 (exposing child to hazardous living environment may support finding that parent failed to assume parental responsibility; degree of parent's involvement with child throughout the entirety of child's life also relevant).

The record establishes that R.D.T. knowingly, voluntarily, and intelligently stipulated to grounds for termination of his parental rights. The State supported the allegation that he failed to assume parental responsibility for R.T.D.-T. within the meaning of WIS. STAT. § 48.415(6). The

circuit court properly concluded that R.D.T. was an unfit parent. We are satisfied that further appellate proceedings regarding this issue would lack arguable merit.

DISCRETIONARY DECISION TO TERMINATE PARENTAL RIGHTS

We last consider whether R.T.D. could mount an arguably meritorious challenge to the decision to terminate his parental rights. The decision to terminate parental rights lies within the circuit court's discretion. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The prevailing factor is the child's best interests. WIS. STAT. § 48.426(2). In considering the best interests of the child, a circuit court must consider: (1) the likelihood of adoption after termination; (2) the age and health of the child; (3) "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"; (4) "[t]he wishes of the child"; (5) "[t]he duration of the separation of the parent from the child"; and (6) "[w]hether 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).

The evidence at the dispositional hearing included testimony from numerous witnesses including Mary Nervig, R.T.D.-T.'s therapist; E.H., the foster mother and adoptive resource for R.T.D.-T.; Lekesha Livingston, a foster care worker who managed R.T.D.-T.'s placement with E.H.; Rhonda Armon-Bent, R.D.T.'s therapist; Ohl; and Shauna Daul, the ongoing case manager who succeeded Ohl. R.D.T. testified on his own behalf and presented testimony from his sister, H.M. At the conclusion of the testimony, the circuit court considered each of the statutory factors in light of the evidence presented.

The circuit court found that E.H. was committed to adopting R.T.D.-T. and concluded that R.T.D.-T. is "highly likely" to be adopted. Turning to the child's age, the circuit court considered that she was nearly six-and-a-half years old at the time of the hearing. The court noted that her age might have reduced her adoptability but for E.H.'s commitment to adoption.

The circuit court considered R.T.D.-T.'s health, observing that R.T.D.-T. is physically healthy but that her "significant behavioral needs" are the "driving factors behind figuring out what's in [her] best interests." According to Nervig, R.T.D.-T. is "dysregulated" and unable to control her own behavior. The circuit court reviewed some of the evidence about the behavior, which included testimony describing "some of the most extreme behavioral outbursts that [the court has] seen." For example, Livingston, the home placement manager, explained that R.T.D.-T. is so violent that "it's like being assaulted by a child.... [If] you are a girl, she'll punch you in the chest or pull your hair. If you are a guy she'll kick you in the private area." Livingston described a meeting involving the child during which "everything was fine until the parents came." At that point, the child "crawled under the table," "tried to lick the bottom of [Livingston's] shoes," "sp[at[] on tissue and put[] it on the back of [the attendees'] necks," and could not be controlled. Ohl described an incident at the end of a visit between R.T.D.-T. and R.D.T. when R.T.D.-T. erupted into violence, kicking Ohl in the groin, poking him in the eye, scratching, spitting, throwing things, and ultimately requiring the intervention of the police.

The circuit court considered the child's wishes, taking into account R.T.D.-T.'s expression of interest in seeing and speaking to R.D.T. "but with the foster parent there." The court also noted that R.T.D.-T. referred to E.H. as "mom."

The circuit court considered whether R.T.D.-T. has a significant relationship with R.D.T. and the harm from severing any such relationship. In this regard, the circuit court acknowledged that visits between R.T.D.-T. and her father had positive aspects but ultimately triggered her to engage in violent and uncontrollable behaviors. Harkening back to Livingston's testimony that contact between R.T.D.-T. and her parents "causes chaos and confusion for her," the circuit court observed that the child had been doing well until she had renewed contact with her parents "and her behavior began to deteriorate." The circuit court concluded that R.T.D.-T. has a substantial relationship with R.D.T. but it is "not always a positive influence."

The circuit court then considered R.T.D.-T.'s relationship with other family members. The circuit court found that R.T.D.-T. has a relationship with her half-brother but the evidence failed to show that the relationship was substantial. The circuit court also found that R.D.T.'s sister, H.M., had developed a relationship with R.T.D.-T. before she was detained, but, in the court's assessment, the relationship consisted only of occasional visits and did not continue following the child's detention. The circuit court ultimately concluded that any harm caused by severing the legal relationship between R.T.D.-T. and her family would be alleviated by E.H.'s explicit commitment to allowing contact between R.T.D.-T. and her biological relatives if, in E.H.'s assessment, the contact would serve R.T.D.-T.'s best interests. *See* ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, ¶29, 234 Wis. 2d 606, 610 N.W.2d 475 (court may consider adoptive parent's promise to continue relationship with child's family of origin).

The circuit court then turned to the question of whether termination of R.D.T.'s parental rights would permit R.T.D.-T. to enter into a more stable and permanent family relationship, taking into account current, past, and potential future placements. The circuit court recognized that some possibility existed that R.D.T. might succeed in regaining placement, but the circuit

court viewed that possibility as unlikely. The circuit court pointed out that R.D.T.'s recent urinalyses consistently detected the presence of cocaine, morphine, and heroin metabolites. Indeed, Armon-Bent described R.D.T. as a "functioning addict" and testified that he had recently been discharged from a drug treatment program for noncompliance. The circuit court determined that R.D.T.'s substance abuse itself rendered a home with him "inherently less stable" than a home with E.H.

The circuit court also returned to the significance of R.T.D.-T.'s extraordinary outbursts and accepted the testimony of Nervig and other witnesses that E.H. was the only adult who could control R.T.D.-T.'s behavior. As the circuit court explained, E.H.'s voice can soothe R.T.D.-T., E.H.'s mere presence can calm the child, "some of it seems almost magical." The circuit court determined that E.H.'s ability to manage R.T.D.-T.'s behavior alone "enhances [the child's] stability."

The circuit court considered the possibility of a guardianship for R.T.D.-T. as an alternative to terminating R.D.T.'s parental rights. The circuit court recognized that R.D.T.'s sister, H.M., was willing to serve as guardian for R.T.D.-T., but the circuit court rejected such a guardianship because H.M. had limited contact with R.T.D.-T. and no history of successfully handling her extreme behaviors. As to a guardianship with E.H., the circuit court concluded that the potential for ongoing litigation and court involvement would undermine stability and therefore would not serve R.T.D.-T.'s best interests.

In the response to the no-merit report, R.D.T. takes issue with many of the circuit court's factual determinations. He asserts E.H. "held back interventions" that would have benefited the child and that R.T.D.-T.'s behavioral problems arose because she was removed from her

biological family. The circuit court, however, relied on Nervig's testimony that contact with the biological family triggers R.T.D.-T.'s anxiety and that E.H. is the child's "attachment object" who is able to resolve the child's behavioral crises. Similarly, while R.D.T. tells us he "know[s] for a fact that [the child] wants to be home with her family," the circuit court placed weight on Ohl's testimony that the child said she liked living with E.H., and on E.H.'s testimony that the child wants contact with her parents only if E.H. is present. Factual determinations rest with the circuit court and will not be disturbed unless clearly erroneous. *See* ***Gerald O.***, 203 Wis. 2d at 152-53. Because the circuit court's conclusions are supported by the testimony, an appeal based on challenges to the circuit court's findings of fact would lack arguable merit.

R.D.T. also complains that the length of time he has been separated from R.T.D.-T. should not be held against him because he attended many visits and completed many tasks required of him. The circuit court in fact recognized that R.D.T. "had periods of positive contact and visitation" with his daughter, but the circuit court weighed these against the periods of "near total separation" and the finding that R.T.D.-T. was placed outside of his home for "thirty percent of her life. The most recent thirty percent." The circuit court's consideration of the period of separation represents a reasonable exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether circuit court exercised discretion, not whether circuit court could have exercised discretion differently). An appeal based on challenges to the circuit court's assessment of this factor would lack arguable merit.

Finally, R.D.T. says in his response that losing placement of his daughter changed his life, caused him psychological problems, and led to his drug addiction. He goes on to describe the efforts he is currently making to avoid similar problems in the future and to create a stable home. While R.D.T. describes both tragic circumstances in his life and a longing to make

meaningful changes, the prevailing factor for the circuit court at a dispositional hearing is the best interest of the child. *See* WIS. STAT. § 48.426(2). The record shows that the circuit court explicitly recognized R.D.T.'s love for his daughter and his periods of successful visitation. The circuit court also recognized that R.D.T. had made some progress in therapy. The circuit court explained, however, that the totality of the evidence reflected that termination of his parental rights was in R.T.D.-T.'s best interest, and "focusing on what is in [R.T.D.-T.]'s best interests does not leave room for what's in ... [R.D.T.'s] best interests."

The record shows the circuit court properly exercised its discretion. The circuit court examined the relevant facts, applied the proper standard of law, and used a rational process to come to a reasonable conclusion. *See* ***Gerald O.***, 203 Wis. 2d at 152. An appellate challenge to the circuit court's decision to terminate R.D.T.'s parental rights would lack arguable merit.

Based on an independent review of the record, we conclude that no additional issues warrant discussion. Any further proceedings would be without arguable merit.

IT IS ORDERED that the order terminating R.D.T.'s parental rights is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Eileen T. Evans is relieved of any further representation of R.D.T. on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals