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April 6, 2017

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

2017AP112-NM In re the termination of parental rights to M.O.:
S.W. v. D.O. (L.C. # 2016TP6)

Before Brennan, P.J.[1]

D.O. appeals an order terminating his parental rights to M.O. Appointed appellate counsel, Dennis Schertz, filed a no-merit report pursuant to ***Brown Cty. v. Edward C.T.***, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998), and WIS. STAT. RULE 809.107(5m) (2015-16).[2]

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16).

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

D.O. filed a response. We have considered counsel's no-merit report and D.O.'s response, and we have independently reviewed the record. We conclude that further proceedings would lack arguable merit. Therefore, we summarily affirm the order terminating D.O.'s parental rights to M.O.

On March 18, 2016, S.W. filed an amended petition to terminate the parental rights of D.O. to their son, M.O., who was thirteen years old. The petition alleged three grounds for termination: (1) abandonment; (2) failure to assume parental responsibility; and (3) incestuous parenthood. *See* WIS. STAT. §§ 48.415(1), (6), (7). On September 16, 2016, the circuit court granted S.W.'s motion for partial summary judgment on the ground of incest and found that D.O. was therefore an unfit parent. *See* WIS. STAT. § 48.424(4). S.W. then withdrew the other two grounds for termination. The circuit court immediately proceeded to the dispositional phase of the proceeding. After S.W. testified and counsel presented arguments, the circuit court concluded that termination was in M.O.'s best interest and entered an order terminating D.O.'s parental rights.

The no-merit report first addresses whether the circuit court properly granted S.W.'s motion for partial summary judgment. Summary judgment must be granted if the evidence demonstrates "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Grounds exist to terminate parental rights to a child if the petitioner shows incestuous parenthood. *See* WIS. STAT. § 48.415(7). Here, the court ordered DNA testing to determine whether D.O. is the father of both S.W. and her child, M.O. The results showed that the probability that D.O. is S.W.'s biological father **is greater than 99.9 percent** as compared to an untested, unrelated random man of the Caucasian population. The results also showed that the probability that D.O. is

M.O.'s biological father **is greater than 99.99 percent** compared to an untested, unrelated random man of the Caucasian population. In addition to the DNA testing, the court noted that M.O. had been convicted of incest on April 26, 2006, in Clark County case No. 2005CF36. Based on the DNA tests and the conviction, the circuit court properly granted partial summary judgment, concluding that S.W. was entitled to judgment as a matter of law because grounds to terminate M.O.'s parental rights exist due to incestuous parenthood. There would be no arguable merit to a claim that the circuit court erred in granting the petitioner's motion for partial summary judgment.

The no-merit report next addresses whether D.O. received effective assistance from his trial counsel. To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Based on our review of the record, we agree with the no-merit report that D.O.'s trial counsel represented him vigorously and skillfully. Counsel filed pretrial motions and insured that D.O. meaningfully participated in court proceedings. There would be no arguable merit to a claim that D.O. received ineffective assistance of counsel.

The no-merit report next addresses whether the circuit court misused its discretion in determining that it was in M.O.'s best interest that D.O.'s parental rights be terminated. 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 interest. 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 those 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).

At the dispositional hearing, S.W. testified and the attorneys for the parties presented arguments. 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 M.O. was thirteen years old and had significant health issues, which were being addressed in his home with S.W. The circuit court found that M.O. would be adopted by S.W.'s husband, who had been his stepfather for many years. The circuit court found that M.O. had a substantial familial relationship with S.W. and his stepfather, but did not have a substantial relationship with D.O., who has been incarcerated for ten years. The circuit court noted that on the advice of M.O.'s therapist, he had not been told—and thus could not give his opinion—about the termination proceedings. The circuit court found that M.O. would enter into a more permanent and stable relationship with his mother and her husband if the termination petition were granted. The circuit court therefore concluded that it would be in M.O.'s best interest to terminate D.O.'s parental rights.

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 D.O.'s parental rights would lack arguable merit.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court lost competency to proceed. The circuit court loses competency to proceed if it fails to meet mandatory statutory time limits. *See* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. The circuit court must hold an initial hearing within thirty days of the filing of the petition. WIS. STAT. § 48.422(1). Where, as here, 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 must hold the dispositional hearing within forty-five days after the fact-finding hearing. WIS. STAT. § 48.424(4). 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).

In this case, the circuit court on several occasions granted continuances that extended the proceedings beyond the statutory deadlines, but the circuit court did so for good cause. There would be no arguable merit to a challenge to the circuit court's competency to proceed based on failure to comply with statutory time limits. *See* ***id.***

D.O. argues in his response to the no-merit report that he did not agree with the DNA results. Regardless of whether D.O. agreed with the results, they were properly considered by the circuit court in deciding S.W.'s motion for summary judgment. D.O.'s disagreement with the results does not present grounds for an appellate challenge.

D.O. next contends in his response that the "minimum criteria for valid [DNA] results" were not met because the laboratory used only fifteen "markers." D.O. contends that most laboratories use fifty markers. D.O.'s assertions are incorrect. A New York court recently explained how DNA testing works and why DNA testing focuses on fifteen particular spots in the genome:

> DNA defines who we are. Who we are depends on the genetic contributions of our natural parents. Each parent contributes half of our genetic coding, in that each provides half of the DNA at each point in our genetic map. That entire map is included in the nuclei of most cells in our bodies. But nature has it that parental contributions vary, even as to most siblings. Apart from identical twins, no one has a DNA profile that is the same as anyone else's.
>
> Law enforcement puts that to use. Under the right circumstances, standard DNA analysis tells whether cells left at a crime scene contain a particular person's DNA. The entirety of the DNA in the cells need not be examined. It is enough to look on the genome at 15 places chosen for this purpose [due to their great variability from person to person]—each of those places being called a "locus," plural "loci"—to determine whether there is a match between a crime scene and a DNA sample and the DNA of a suspect.

People v. Collins, 15 N.Y.S.3d 564, 566 (2015) (footnote omitted). Although the court's discussion is in the context of a criminal case, the same analysis is used to determine paternity—matching the loci of the child to that of the parent. Because the laboratory here used fifteen loci when it conducted the DNA test in accord with established protocol, there would be no arguable merit to a claim that the DNA testing was not valid.

D.O. also argues in his response that he is infertile. He contends that because he cannot have children, "I have no [P]arental [R]ights to terminate." While this argument could be interpreted as a concession from D.O. that he does not object to the order terminating his parental rights, we have nevertheless searched the record for arguably meritorious issues but have

identified no additional issues that warrant discussion. Any further proceedings would be without arguable merit.

IT IS ORDERED that the order terminating D.O.'s parental rights to M.O. is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of D.O. on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals