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DISTRICT I

July 28, 2017

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

2017AP1003-NM	State of Wisconsin v. M. B. F. (L.C. # 2015TP64)
2017AP1004-NM	State of Wisconsin v. M. B. F. (L.C. # 2015TP65)
2017AP1005-NM	State of Wisconsin v. M. B. F. (L.C. # 2015TP66)

Before Kessler, J.¹

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¹ These appeals, which were consolidated by order of this court, are decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The parental rights of the children's fathers were terminated and are not at issue in these appeals.

M.B.F. appeals the orders terminating her parental rights to three of her children, A.J.F., E.J.F., and G.L.F. M.B.F.'s appellate counsel, Dennis Schertz, has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32 and *Brown County v. Edward C.T.*, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (per curiam). M.B.F. was served with a copy of the report and advised of her right to file a response but has not done so. Upon consideration of the no-merit report and an independent review of the records as mandated by *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32, we conclude there are no issues that would have arguable merit for appeal. Therefore, the orders terminating M.B.F.'s parental rights are summarily affirmed. See WIS. STAT. RULE 809.21.

BACKGROUND

On March 11, 2015, the State petitioned to terminate M.B.F.'s parental rights to three of her children, A.J.F., E.J.F., and G.L.F. As grounds for termination, the petitions alleged the children were in continuing need of protection or services (continuing CHIPS) under WIS. STAT. § 48.415(2) and M.B.F. had failed to assume parental responsibility under § 48.415(6). The court granted the State's motion for a directed verdict on question one of the special verdict forms: i.e., whether there were CHIPS orders in place for all three children.² Following trial, the jury found that grounds existed to terminate on both grounds. The trial court then found M.B.F. unfit and concluded that termination was in the children's best interests.

The no-merit report addresses whether there would be any arguable merit to challenge the trial proceedings and the sufficiency of the evidence, trial counsel's performance, or the trial

² M.B.F.'s trial counsel acknowledged that there was no evidence in dispute on that question.

court's finding that termination of M.B.F.'s parental rights was in the children's best interests. We agree with appellate counsel that there would be no merit to further proceedings or an appeal based on these or any other issues, as we will briefly explain below.

This court begins by noting that there were numerous delays and that the trial and the dispositional hearing were held outside of mandatory time limits. However, the trial court found good cause for continuing the matters. WISCONSIN STAT. § 48.315(2) permits extensions of the mandatory time limits under the circumstances presented in this case. *See id.* In addition, M.B.F.'s failure to object to the continuances forfeits any challenge to the trial court's competency to act. *See* § 48.315(3).

Next this court addresses whether the evidence was sufficient for the jury to find that grounds existed to terminate M.B.F.'s parental rights.³ "Grounds for termination must be prove[d] by clear and convincing evidence." *Ann M.M. v. Rob S.*, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993). This court gives significant deference to the jury's verdict and may not overturn it if any credible evidence supports what the jury has found. *See Deannia D. v. Lamont D.*, 2005 WI App 264, ¶9, 288 Wis. 2d 485, 709 N.W.2d 879.

Our review of the record of the jury trial indicates that the State presented detailed evidence relating to the conditions the CHIPS court set for the children's return and the many efforts made to assist M.B.F. in meeting the conditions of return. This included, at one point, having two case managers to provide extra support and continuity to M.B.F. The State

³ M.B.F.'s original trial was declared a mistrial because her attorney became ill while it was underway.

highlighted M.B.F.'s shortcomings when it came to meeting the conditions established for the safe return of her children and stressed that the Bureau of Milwaukee Child Welfare (now known as the Division of Milwaukee Child Protective Services) had been involved with M.B.F. and the children for four years and nine months, making it unlikely that M.B.F. would be able to meet the conditions within the nine-month period following the conclusion of the hearing. The jury additionally heard evidence of M.B.F.'s failure to assume parental responsibility for the children. The parties presented testimony from twelve witnesses spanning four days.

During trial, M.B.F.'s trial counsel raised a *Daubert* challenge to forensic psychologist Dr. Kenneth Sherry's proposed testimony, arguing that Dr. Sherry's methods were not reliable because he relied on unsubstantiated information from the Bureau.⁴ The trial court held a hearing and concluded, after applying the correct legal standard and the proper factors, that Dr. Sherry's status as an expert was sufficiently established. Dr. Sherry then testified before the jury about the testing he performed on M.B.F. and his conclusion that she suffered from a personality disorder. There would be no arguable merit to challenging the trial court's decision to permit this testimony. See *Seifert v. Balink*, 2017 WI 2, ¶92, 372 Wis. 2d 525, 888 N.W.2d 816, *reconsideration denied* (WI Mar. 14, 2017) (No. 2014AP195).

Finally, this court turns to the issue of whether there would be any merit to challenging the trial court's decision to terminate M.B.F.'s parental rights. The decision to terminate a parent's rights is discretionary and the best interest of the child is the prevailing standard.

⁴ *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Gerald O. v. Cindy R., 203 Wis. 2d 148, 152-53, 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 findings on the record and explicitly discussed each of the statutory factors. The trial court acknowledged that A.J.F. and E.J.F. had a substantial relationship with M.B.F., but said that it was not convinced that this was true for G.L.F. Although it found that it would be harmful to A.J.F. and E.J.F. to sever the relationship with M.B.F., the trial court stressed the proposed adoptive parents' intention to continue to allow the children to see M.B.F. and her extended family. The trial court found it was in the children's best interests that M.B.F.'s parental rights be terminated.

The trial court's findings on all six statutory factors 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.

This court's independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the orders terminating M.B.F.'s parental rights to A.J.F., E.J.F., and G.L.F. are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of M.B.F. in these matters. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals