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January 16, 2018

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

2017AP2218-NM In re the termination of parental rights to M.S.:
State of Wisconsin v. C.S. (L.C. # 2015TP346)

Before Brennan, P.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] This appeal is 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.

C.S. appeals from an order terminating his parental rights to son M.S. Appellate counsel, Brian C. Findley, has filed a no-merit report. *See* ***Brown Cty. v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (per curiam); *see also* WIS. STAT. RULES 809.107(5m), 809.32. C.S. has not responded. Based upon an independent review of the record and the no-merit report, this court concludes that an appeal would lack arguable merit. The order terminating C.S.'s parental rights is therefore summarily affirmed.

BACKGROUND

Then-six-year-old M.S. was detained in November 2014 after police spotted him wandering along Wisconsin Avenue at 9:30 p.m., alone and crying hysterically. M.S. told the police his father's friend had been watching him but left to go to the clubs; M.S. was trying to get to his aunt's house but did not know her address or phone number.[2] Police obtained M.S.'s address from a piece of mail he had and took him home. M.S. told them he was always alone and showed them marks on his legs from bedbugs. He grabbed at an officer's pockets, asking for candy because he said he had not eaten in two days. M.S. was adjudicated a child in need of protection or services (CHIPS) on February 25, 2015, and placed outside his father's home.

A petition to terminate C.S.'s parental rights was filed December 21, 2015, alleging three grounds for termination: abandonment, continuing CHIPS, and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(1)(a)1m., (2), (6). C.S. originally contested the petition and requested a jury trial. Later, he agreed to enter a no-contest plea to grounds. In exchange,

[2] M.S.'s mother, whose rights were also terminated in the underlying case, had left M.S. with C.S. when M.S. was an infant and has played no role in his upbringing. At the time of the termination proceedings, in which she did not appear, she was believed to be living in Indiana.

the State would agree to have the dispositional hearing set out at least ninety days so that C.S.'s brother could be further investigated as a possible placement resource.[3]

The circuit court accepted C.S.'s no-contest plea to the continuing-CHIPS ground, holding a hearing for the State to produce evidence in support of that ground. After the dispositional hearing, the circuit court entered a written order terminating C.S.'s parental rights. C.S. appeals.

DISCUSSION

I. Mandatory Timelines/Competency

Appellate counsel discusses four potential issues, but we first consider whether there is any arguable merit to a claim that the circuit court failed to comply with mandatory time limits, thereby losing competency to proceed. *See* WIS. STAT. §§ 48.422(1)-(2) & 48.424(4)(a); *see also* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. The statutory time limits cannot be waived, *see* ***April O.***, 233 Wis. 2d 633, ¶5, but continuances are permitted for good cause "and only for so long as is necessary[,]" *see* WIS. STAT. § 48.315(2). Failure to object to a continuance waives any challenge to the court's competency to act during the continuance. *See* WIS. STAT. § 48.315(3).

Some of the hearings in this case were not expressly adjourned for cause, but no objection was raised. Our review of the record satisfies us that good cause exists for each delay,

[3] C.S.'s brother had come to officials' attention late in the termination process, and there was initially some difficulty contacting him. Ultimately, C.S.'s brother was not utilized as a potential placement based on his self-expressed concerns about his ability to properly care for M.S. in light of the needs of his own children.

so any objections would have been meritless and overruled. The primary cause for delay was accommodating attorney schedules, and the delay in holding the dispositional hearing was agreed to by the parties to investigate a possible relative placement for M.S. There is no arguable merit to any challenge related to mandatory timelines or the circuit court's competency.

II. Plea to Grounds

The first issue counsel addresses is whether C.S.'s plea to the continuing-CHIPS ground for termination was knowing, intelligent, and voluntary. Stated another way, we examine whether the circuit court properly complied with WIS. STAT. § 48.422.

Before accepting a no-contest plea to a termination petition, the circuit court must engage the parent in a colloquy under WIS. STAT. § 48.422(7). *See* ***Oneida Cty. Dept. of Soc. Servs. v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 762 N.W.2d 122. Thus, the circuit court must: (1) address the parent and determine that the admission is made voluntarily, with an understanding of the nature of the acts alleged in the petition and the potential dispositions; (2) establish whether any promises or threats were made to secure the plea; (3) establish whether a proposed adoptive resource for the child has been identified; (4) establish whether any person has coerced a parent to refrain from exercising his or her parental rights; and (5) determine whether there is a factual basis for the admission of facts alleged in the petition. *See* WIS. STAT. § 48.422(7). The circuit court must also ensure that the parent understands the constitutional rights he or she is giving up with the plea, *see* ***Therese S.***, 314 Wis. 2d 493, ¶5, and that the plea will result in a finding of parental unfitness, *see* ***id.***, ¶10.

We largely agree with counsel's assessment that the circuit court complied with the requirements set out in ***Therese S.*** and WIS. STAT. § 48.422. We did not locate a portion of the

colloquy where the circuit court identified an adoptive resource, contrary to counsel's representation that the circuit court had done so. However, this omission does not render the plea unknowing: the record at the time included a recent permanency plan, which the parties and court should have reviewed, identifying M.S.'s foster family as the adoptive resource. In all other aspects, the circuit court complied with the requirements for accepting a parent's no-contest plea to grounds for termination.

Related to the colloquy, counsel asserts that the circuit court "did make one error" when it told C.S. that, at disposition, the State would have to show "by clear and convincing evidence that it's best to terminate your parental rights and allow adoption." Counsel asserts that "the burden of proof at disposition is a preponderance of evidence not clear and convincing." Counsel acknowledges that an explanation of the burden of proof is not a specified requirement for a plea colloquy under WIS. STAT. § 48.422(7), but asserts that "arguably a plea cannot be knowing, intelligent, and voluntary without knowing the applicable burdens of proof."

In fact, ***Therese S.*** requires the court to inform a parent "of the statutory standard the court will apply at the [disposition] stage." *See* ***id.***, 314 Wis. 2d 493, ¶16. But the standard of which the parent is to be informed is not "preponderance of the evidence." Rather, "the court must inform the parent that '[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition[.]'" ***Id.*** (citation omitted; first set of brackets in ***Therese S.***). The circuit court here properly informed C.S. that "best interests" would be the controlling standard; there is no further requirement relative to burdens of proof. There is no arguable merit to a challenge to the validity of C.S.'s no-contest plea or the circuit court's colloquy regarding the plea.

III. Factual Basis for the Plea

As noted, the circuit court had to determine whether a sufficient factual basis existed for C.S.'s plea to the continuing-CHIPS ground for termination. When a termination petition alleges as grounds for termination that a child is in continuing need of protection and services, the State must prove the following:

> First, the child must have been placed out of the home for a cumulative total of more than six months pursuant to court orders containing the termination of parental rights notice. Second, the [applicable county department] must have made a reasonable effort to provide services ordered by the court. Third, the parent must fail to meet the conditions established in the order for the safe return of the child to the parent's home. Fourth, there must be a substantial likelihood that the parent will not meet the conditions of safe return of the child within the [nine]-month period following the conclusion of the termination hearing.

Walworth Cty. DHHS v. Andrea L.O., 2008 WI 46, ¶6, 309 Wis. 2d 161, 749 N.W.2d 168; *see also* WIS. STAT. § 48.415(2)(a) and 2005 Wis. Act 293, § 20. The State has the burden to show that grounds for termination exist by clear and convincing evidence. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶22, 246 Wis. 2d 1, 629 N.W.2d 768.

Counsel concludes that the State offered sufficient evidence, and we agree. The State introduced as exhibits the applicable documents from the CHIPS proceeding, including the order with the termination warnings that placed M.S. outside his home. The case manager testified about efforts to provide court-ordered services and C.S.'s failure to meet the conditions for M.S.'s return. The case manager also explained why she believed C.S. would be unable to meet the conditions for the return within the nine months following the termination hearing. There is no arguable merit to a challenge to the factual basis for C.S.'s plea to the continuing-CHIPS ground.

IV. The Termination Decision

We next discuss whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating C.S.'s parental rights. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). Bearing in mind that the child's best interests are the primary concern, *see* WIS. STAT. § 48.426(2), the court must also consider 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).

Seven witnesses testified at the dispositional hearing. The State called the foster mother and the ongoing case manager. C.S. testified himself and also called his probation officer, his therapist, his brother, and a visitation worker to testify. After the hearing, the circuit court issued a written decision. It found that M.S. was "certainly adoptable," noting he was "highly bonded with" the foster family and implicitly concluding that M.S. was likely to be adopted by that family.

The circuit court commented that M.S.'s "age and health considerations … cut both ways" but ultimately weighed in favor of termination. The court observed that M.S. has "5 or 6 medical/mental health professionals involved in his life" and multiple medications to manage issues including ADHD, sleep disorders, and enuresis. Under the foster family's commitment to M.S., those concerns were being managed and had begun to improve. The same level of commitment was not present from C.S.

The circuit court acknowledged that M.S. had a "recognized and valued relationship" with C.S., but observed that M.S. had also developed a "critical" relationship with the foster family. But C.S. had "violated the duty to care for and protect" M.S. by allowing him to be unsupervised and by engaging in drug activity that he should have known would remove him from M.S.'s life. C.S.'s psychological profile suggested an "ongoing limited ability to make sound and reasoned judgments: a proclivity to act impulsively under stress, and; compromised cognitive abilities." The circuit court thus implicitly concluded that terminating C.S. and M.S.'s relationship would not be harmful because it determined that the facts of this case showed that C.S. simply could not safely parent M.S.

The circuit court noted M.S.'s wishes were "confused and conflicted." Though M.S. looked forward to visits with C.S. and expressed sadness about C.S., M.S. had also expressed a desire to remain with his foster mother.

The circuit court acknowledged that M.S. had spent the first six years of his life with his father. However, M.S. had spent the last twenty-five months with his foster family and he had virtually no contact with C.S. in the six months preceding the dispositional hearing.

Finally, the circuit court determined that M.S. would enter a more stable family relationship if C.S.'s rights were terminated. In particular, the court noted that further poor decision-making and "irrational/antisocial decisions" by C.S., of which the threat was "significant," "would again stand this child's life on its head if [M.S.] were reunified" with C.S.

The circuit court's factual conclusions are adequately supported by the record. We therefore discern no arguably meritorious claim that the circuit court erroneously exercised its discretion when deciding to terminate C.S.'s parental rights in light of these facts.

V. Ineffective Assistance of Trial Counsel

As a separate issue, appellate counsel discusses whether trial counsel was "ineffective for failing to object to evidence of foster parent intent to allow future visitation" at the dispositional hearing, noting that such evidence is arguably "fundamentally unfair" because it "detract[s] from the court's statutory duty to consider" whether the child has substantial relationships with the parent or other family members and whether it would be harmful to sever those relationships.

Any such claim would be frivolous because, as counsel notes in the no-merit report, the circuit court "may afford due weight to an adoptive parent's stated intent to continue visitation with family members[.]" ***State v. Margaret H.***, 2000 WI 42, ¶29, 234 Wis. 2d 606, 610 N.W.2d 475. Further, based on the circuit court's written opinion, it does not appear that the court gave any weight to the foster parent's testimony about the possibility of allowing C.S. to visit his son. Thus, trial counsel was not deficient for failing to object to testimony a circuit court is allowed to consider, and C.S. did not suffer any prejudice from the lack of objection. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. There is no arguable merit to a claim of ineffective assistance of trial counsel. *See* ***id.***

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

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Brian C. Findley is relieved of further representation of C.S. in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Diane M. Fremgen
Acting Clerk of Court of Appeals