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DISTRICT II

August 21, 2019

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

2019AP87-NM Waukesha County DH&HS v. E.E. (L.C. #2017TP46)

Before Neubauer, C.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).

E.E. appeals from a circuit court order terminating her parental rights to L.D. (hereafter the child). E.E.'s appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.107(5m). E.E. received a copy of the report, and she filed a response to it. Appellate

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

counsel filed a supplemental no-merit report addressing issues raised in E.E.'s response. Upon consideration of the no-merit reports and E.E.'s response and after an independent review of the record, we summarily affirm the order because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The Waukesha County Department of Health and Human Services petitioned to terminate E.E.'s parental rights. E.E. pled no contest to grounds that the child was in continuing need of protection and services. *See* WIS. STAT. § 48.415(2). After a dispositional hearing, the circuit court terminated E.E.'s parental rights. The circuit court denied E.E.'s postdisposition motion seeking to withdraw her no contest plea because she did not understand the consequences of the plea and because her trial counsel was ineffective in relation to the entry of her plea and at disposition.

The no-merit report addresses: (1) whether the requirements of WIS. STAT. § 48.422(7) were met when E.E. pled no contest to grounds that the child was in need of continuing protection and services; (2) whether the circuit court properly exercised its discretion in determining that it was in the child's best interest to terminate E.E.'s parental rights; and (3) whether trial counsel was ineffective. The no-merit report contains a correct statement of the law governing these issues and properly applies the law to the facts. We agree with appellate counsel that these issues would not have arguable merit for appeal.

The no-merit report fails to address whether there were any procedural defects in the proceeding.[2] We have independently considered whether there would be any arguable merit to a claim that there were procedural defects in the proceeding or that the circuit court failed to comply with mandatory WIS. STAT. ch. 48 time limits, thereby losing competency to proceed. ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. Continuances are permitted "upon a showing of good cause in open court … and only for so long as is necessary[.]" WIS. STAT. § 48.315(2). Failure to object to a continuance waives any challenge to the court's competency to act during the continuance. Sec. 48.315(3). The record reveals that the circuit court found good cause to toll the ch. 48 time limits on several occasions, and E.E. did not object. We see no procedural defects in the proceeding.

Before taking a parent's no contest plea to the grounds for terminating parental rights, the circuit court must conduct a colloquy with the parent in accordance with WIS. STAT. § 48.422(7). ***Oneida County Dep't. of Soc. Servs. v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 762 N.W.2d 122. The court must determine that the parent's admission is made voluntarily, and that the parent understands "the nature of the acts alleged in the petition and the potential dispositions," along with the constitutional rights waived by the parent's decision not to contest the grounds for termination. ***Id.*** (citation omitted). The court must also "[e]stablish whether any promises or threats were made" and that the admission has a factual basis. ***Id.*** (citation omitted). The parent must understand that the plea to grounds "will result in a finding of parental unfitness." ***Id.***, ¶10. The court must inform the parent that at the second stage of the termination

[2] Counsel was obligated to address possible appellate issues arising in the case and state why the issues do not have arguable merit.

proceeding, the court will hear evidence that will result in either the termination of the parent's rights or dismissal of the termination petition. ***Id.***, ¶16. "[T]he 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; second alteration in original).

The record establishes that the circuit court conducted a proper colloquy with E.E. before accepting her no contest plea to the ground for termination. The circuit court advised E.E. of her rights in the proceeding, the rights waived by her no contest plea to the ground for terminating her parental rights,[3] and the possible dispositions. The court also confirmed that no threats or promises had been made and that E.E. understood the proceedings and that she would be found to be unfit. There was a factual basis for E.E.'s no contest plea.

E.E. challenged the entry of her plea via postdisposition motion. The circuit court found that E.E. understood the consequences of her plea including that she would be found to be unfit and that this determination would carry through to the disposition hearing. Because the circuit court's finding is supported in the record, we reject E.E.'s claim in her response to counsel's no-merit report that she did not enter a knowing, voluntary and intelligent plea to the ground for termination.

On the record before this court, we conclude that E.E.'s no contest plea was knowingly, and voluntarily and intelligently entered. We agree with counsel's conclusion that an appellate challenge to the entry of E.E.'s plea would lack arguable merit.

[3] Among the rights identified by the circuit court was E.E.'s right to have a trial on the grounds for terminating her parental rights.

The decision to terminate parental rights is within the circuit court's discretion. ***State v. Margaret H.***, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 475. The circuit court must consider the statutory factors to determine if termination is in the child's best interests. WIS. STAT. § 48.426(3). Credibility determinations were for the circuit court to make. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (circuit court "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony") (citation omitted).

The record in this case confirms that the circuit court applied the best interests standard and considered the appropriate factors: the likelihood of the child's adoption after termination, the child's age and health, the child's substantial family relationships and whether it would be harmful to sever those relationships, the duration of the parent-child separation, and future stability for the child as a result of the termination. The circuit court considered E.E.'s insufficient progress in meeting the conditions that would permit reunification and rejected E.E.'s request that a guardianship be established over the child because such an arrangement would provide neither certainty nor stability for the child, goals that would be achieved if E.E.'s parental rights were terminated. The court also considered that the adoptive resource, the child's maternal grandmother, intended to maintain the child's connections to her biological family, including E.E. The court's findings in support of termination were not clearly erroneous. *See* WIS. STAT. § 805.17(2). The guardian ad litem supported termination of E.E.'s parental rights, an opinion upon which the circuit court placed great weight. We conclude that the circuit court properly exercised its discretion when it determined that the best interests of the child required terminating E.E.'s parental rights. We agree with counsel that an appeal on this basis would lack arguable merit.

After her parental rights were terminated, E.E. alleged ineffective assistance of trial counsel for not objecting to future contact testimony during the dispositional hearing: the adoptive resource, the maternal grandmother, testified that she intended for the child to remain in contact with E.E. as long as E.E. remained drug-free. Testimony of this nature may be considered by the circuit court in its discretion as it evaluates the impact of legally severing a child's family relationships. ***Margaret H.***, 234 Wis. 2d 606, ¶29.[4] Trial counsel did not perform deficiently when counsel failed to object to this testimony. *See* ***State v. Wheat,*** 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have been rejected).

We next address E.E.'s objection to the social worker's testimony about her drug relapse which occurred less than a month before E.E. entered her no contest plea to the grounds to terminate her parental rights. E.E. contends that information about her relapse was disclosed during the parties' mediation session and should not have been revealed to the court. E.E. further complained that her trial counsel did not object to this evidence. At the postdisposition motion hearing, the circuit court found that the social worker had an independent basis for learning about E.E.'s relapse.[5] For this reason, the circuit court properly concluded that E.E. was not prejudiced by trial counsel's failure to object to testimony allegedly derived from mediation. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694 (to succeed

[4] The circuit court acknowledged that the adoptive resource's intentions to maintain contact with E.E. were not enforceable.

[5] The social worker testified that she learned about the relapse from E.E.'s relatives and from automated circuit court records.

on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial).

We address E.E.'s claim that trial counsel was ineffective for not arguing that E.E. faced an impossible condition for reunification because E.E.'s sober living residence did not permit the child to live with her. This was not a case in which the circuit court found E.E. unfit based on an impossible condition of return. *Cf.* ***Kenosha County D.H.S. v. Jodie W.***, 2006 WI 93, ¶56, 293 Wis. 2d 530, 716 N.W.2d 845 (parent could not be deemed unfit solely because the parent was incarcerated). During disposition, the circuit court did not place weight on E.E.'s status as a resident of a sober living facility. Rather, the circuit court considered numerous factors and found that E.E. had not made sufficient progress in meeting several of her conditions for reunification. In testimony the circuit court found credible, the social worker stated that those conditions included taking steps to manage her mental health, sharing accurate information about her treatment progress, managing her substance abuse, creating a proper living environment for the child (focusing on stability in housing and relationships that might impact the child), and avoiding criminal conduct. The circuit court deemed E.E. not consistently credible in her testimony. The circuit court had multiple bases for finding that E.E. did not make sufficient progress in her conditions during the approximately twenty-seven months the child was subject to a CHIPS order and living with relatives. This issue lacks arguable merit for appeal.

In her response, E.E. claims that the social worker did not conduct regular visits so that she could credibly testify about the relationship between E.E. and the child. The child was living with her maternal grandmother and having visits with E.E. The social worker opined that the mother-child relationship was not substantial such that it would be harmful to sever it.

At the dispositional hearing, the circuit court found that a substantial mother-child relationship existed, but the court noted that the connection would continue because the child was going to remain in the family. Maternal grandmother is the adoptive resource, and she wants E.E. to remain in the child's life as long as E.E. is drug-free. Based on the record, we conclude that the circuit court was fully informed about the relationship between E.E. and the child and made its termination decision based on all of the evidence, including E.E.'s failure to meet her conditions and the guardian ad litem's recommendation to terminate E.E.'s parental rights.[6]

Our independent review of the record did not disclose any issues with arguable merit for appeal. Because we conclude that there is no arguable merit to any issue that could be raised on appeal, we affirm the order terminating E.E.'s parental rights and relieve Attorney Karen Lueschow of further representation of E.E. in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[6] For this reason, we reject any suggestion that E.E. was prejudiced by the manner in which trial counsel examined the social worker about her contact with E.E. and the child.

IT IS FURTHER ORDERED that Attorney Karen Lueschow is relieved of further representation of E.E. in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals