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DISTRICT I

July 28, 2020

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

2020AP889-NM	In re the termination of parental rights to E.M., a person under the age of 18: State of Wisconsin v. S.M. (L.C. # 2019TP34)
2020AP890-NM	In re the termination of parental rights to S.M., a person under the age of 18: State of Wisconsin v. S.M. (L.C. # 2019TP35)
2020AP891-NM	In re the termination of parental rights to T.M., a person under the age of 18: State of Wisconsin v. S.M. (L.C. # 2019TP36)

Before Dugan, 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) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

S.M. appeals from orders terminating her parental rights to her daughter E.M., and her sons S.M.M.[2] and T.M. S.M.'s appellate counsel, Attorney Karen Lueschow, has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32. Attorney Lueschow served S.M. with a copy of the report and advised her of the right to file a response. S.M. has not filed a response. Based on our review of the no-merit report and our independent review of the circuit court records as required by ***Anders v. California***, 386 U.S. 738 (1967), this court concludes that S.M. could not raise any issues of arguable merit on appeal. We therefore summarily affirm the orders.

E.M., born July 25, 2014, S.M.M., born April 16, 2016, and T.M., born June 18, 2018, are the marital children of S.M. and H.M. In November 2017, before T.M.'s birth, the Division of Milwaukee Child Protective Services (the Division) investigated a report that on November 13, 2017, H.M. brandished a knife and slapped E.M. Further investigation revealed that H.M. had previously engaged in domestic abuse, including acts of violence targeting S.M.'s teenage daughter, C.V. The Division detained E.M. and S.M.M. and placed both children in the home of J.S. and A.S. on November 21, 2017.

On February 5, 2018, the circuit court found that E.M. and S.M.M. were children in need of protection or services (CHIPS), ordered that both children remain in the foster home of J.S. and A.S, and established conditions that S.M. was required to complete before she could regain placement of her children. The circuit court also warned S.M. that her parental rights could be terminated under certain circumstances, including a proceeding in which her children were found

[2] Although S.M.M.'s name as it appears in the caption of these matters does not include a middle initial, we use one in the text for clarity.

to be in continuing need of protection and services (continuing CHIPS). At the time of the February 5, 2018 hearing, Wisconsin law provided that a finding of continuing CHIPS required proof that: (1) the child was adjudged to be in need of protection and services and placed outside of the parent's home for a cumulative period of at least six months pursuant to one or more court orders that contained warnings about the grounds for termination of parental rights; (2) the agency responsible for the child's welfare made a reasonable effort to assist the parent in meeting the conditions of return; (3) the parent did not meet the conditions; and (4) a substantial likelihood existed that the parent would be unable to meet the conditions for return within a nine-month period after the hearing. *See* WIS. STAT. § 48.415(2) (2015-16); WIS JI—CHILDREN 324A (2018). The circuit court's warnings included this information.

On June 20, 2018, the Division detained T.M. forty-five hours after his birth and placed him in the home of C. McC. and M. McC. based on a determination that S.M. and H.M. had not taken adequate steps to control the violence in their home. On August 17, 2018, the circuit court found that T.M. was a child in need of protection or services, ordered that he remain in the foster home of C.McC. and M. McC., and established conditions that S.M. must complete to regain placement of T.M. The circuit court also warned S.M. that her parental rights could be terminated under certain circumstances that included a finding of continuing CHIPS as to T.M. The circuit court's warning included a description of the first three elements of continuing CHIPS previously described to S.M. in the February 5, 2018 proceeding. At the time of the August 2018 hearing, however, the law governing the fourth element of continuing CHIPS had been amended. Accordingly, the circuit court warned S.M. at the August 2018 proceeding that, as to the fourth element, the State would be required to prove that, if T.M. had been placed outside S.M.'s home for less than fifteen of the previous twenty-two months, a substantial

likelihood existed that S.M. would not meet the conditions of his return "as of the date on which [T.M.] will have been placed outside the home for fifteen of the most recent twenty-two months, not including any period during which [T.M.] was a runaway." *See* WIS. STAT. § 48.415(2)(a); WIS. JI—CHILDREN 324 (2020)

On March 5, 2019, the State filed petitions to terminate S.M.'s parental rights to E.M., S.M.M., and T.M.[3] As grounds, the State alleged continuing CHIPS and failure to assume parental responsibility. As to continuing CHIPS, the State alleged the first three statutory elements in WIS. STAT. § 48.415(2), and also alleged both: (1) a substantial likelihood that S.M. would not meet the conditions of return by the time each child had been out of S.M.'s home for fifteen of the most recent twenty-two months, *see **id.***; and (2) a substantial likelihood that S.M. would not meet the conditions of return within nine months after a fact-finding hearing, *see* WIS. STAT. § 48.415(2)(a)(2015-16).

On December 16, 2019, S.M. entered a no-contest plea to the allegation of continuing CHIPS as to each child. The circuit court accepted her pleas, found her to be an unfit parent, and dismissed the allegations that she had failed to assume parental responsibility.[4] Following a dispositional hearing in February 2020, the circuit court terminated S.M.'s parental rights in the best interests of the children.

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[3] The petitions also sought to terminate H.M.'s parental rights. The orders terminating H.M.'s parental rights are not before us, and we therefore do not consider those orders here.

[4] The circuit court judge who presided in the termination of parental rights proceedings was not the same circuit court judge who presided in the CHIPS proceedings.

Compliance with Statutory Time Limits

We first consider whether S.M. 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. *See* 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. *See* § 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." *See* 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 granted several continuances that extended the proceedings beyond the statutory deadlines, but S.M. did not object and therefore has waived that issue. *See* ***id.*** Accordingly, she cannot mount an arguably meritorious challenge to the circuit court's competency to proceed based on failure to comply with time limits. *See* ***id.***

No-Contest Plea to Grounds for Termination of Parental Rights

Before accepting a no-contest plea in the grounds phase of a termination of parental rights proceeding, the circuit court must conduct a colloquy with the parent in accordance with WIS. STAT. § 48.422(7), to ensure that the plea is knowing, intelligent, and voluntary. *See* ***Brown Cty. DHS v. Brenda B.***, 2011 WI 6, ¶¶34-35, 331 Wis. 2d 310, 795 N.W.2d 730. The statute requires the circuit court to: (1) address the parent and determine that the plea is made voluntarily and understandingly; (2) establish whether any promises or threats were made to elicit the plea; (3) establish whether a proposed adoptive parent for the children 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 plea. *See* § 48.422(7).

Additionally, when conducting a plea colloquy in the grounds phase of a termination of parental rights proceeding, the circuit court must ensure the parent's understanding that acceptance of the plea will result in a finding of parental unfitness. *See* ***Brenda B.***, 331 Wis. 2d 310, ¶43. The circuit court must also ensure the parent's understanding that at the later dispositional phase, the circuit court may dismiss the petition or terminate parental rights, *see* ***id.***, ¶66, and "the parent must be informed that ... [o]nce the parent is found to be unfit, it is the court's determination about what is best for the child rather than any concern about protecting the parent's right that drives the outcome" of the dispositional hearing. *See* ***id.***, ¶44. In conducting the colloquy, the circuit court is not required to follow a specific checklist. *See* ***id.***, ¶57. Rather, "[t]he questions to be asked depend upon the circumstances of the case." ***Id.*** Finally, when a petition to terminate parental rights is uncontested, the circuit court shall hear

testimony in support of the allegations in the petition. *See* ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶¶53, 56, 233 Wis. 2d 344, 607 N.W.2d 607.

Here, pursuant to the State's advisement and without objection from S.M., the circuit court determined that the proceedings were governed by WIS. STAT. § 48.415(2)(a) (2015-16). The circuit court then fulfilled its obligations in accepting S.M.'s no-contest pleas to continuing CHIPS under that statute. The circuit court explained the elements of continuing CHIPS under § 48.415(2)(a) (2015-16), and S.M. said that she understood those elements. She acknowledged that by pleading no contest to the allegations, she was surrendering a variety of constitutional rights, including the rights to contest the allegations, to call and cross-examine witnesses, and to have a jury trial on the grounds phase of the proceedings. The circuit court explained that as a consequence of S.M.'s no-contest pleas, she would be found to be an unfit parent as to each child and that termination was not the only possible disposition. S.M. assured the circuit court that she had not been threatened in any way and that she had not been promised anything to induce her no-contest pleas.

We have considered whether S.M. could pursue an arguably meritorious appellate challenge to the sufficiency of the colloquy on the ground that the circuit court did not establish the existence of a proposed adoptive resource for each child. We conclude that she could not do so. The information necessary to support a no-contest plea may be presented through testimony at proceedings other than the plea hearing. *See* ***Steven H.***, 233 Wis. 2d 344, ¶¶53, 58. Here, the State presented testimony about proposed adoptive resources at the dispositional hearing. In that proceeding, A.S. testified that she and her husband had served as the foster parents for E.M. and S.M.M. since November of 2017 and were committed to adopting both children. M. McC.

similarly testified that she and her husband had served as T.M.'s foster parents since June of 2018, and that they were committed to adopting T.M. There is no merit to pursuit of this issue.

We also conclude that the State presented sufficient evidence to support the allegations in the petitions. The State presented testimony from two family case managers: Jordan Jabeck, who had worked with S.M. and her family from November 2017 until September 2019; and Brogan Etten, who had worked with the family since September 2019. The State also presented certified copies of documents filed in the CHIPS proceeding for each child. The circuit court found that the testimony and other evidence established the four elements of continuing CHIPS under WIS. STAT. § 48.415(2)(a)(2015-16), namely: (1) the three children had all been placed outside S.M.'s home for more than six months—specifically, E.M. and S.M.M. had been placed outside S.M.'s home since November 2017 and T.M. had been placed outside S.M.'s home since June 2018—pursuant to an order that contained warnings about possible termination of parental rights; (2) the Division had made reasonable efforts to provide the services that the circuit court ordered in the CHIPS proceedings; (3) S.M. had failed to meet the conditions established for the safe return of the children to her home; and (4) a substantial likelihood existed that she would not meet the conditions within the nine month period following the hearing. *See* WIS JI—CHILDREN 324A (2018).

We have considered whether S.M. could pursue an arguably meritorious challenge to the orders based on the circuit court's decision to conduct the plea hearing and assess the evidence in light of the law governing continuing CHIPS as it existed under WIS. STAT. § 48.415(2)(a) (2015-16). That statute was no longer in effect when the State filed the petitions in these matters on March 5, 2019 because, effective April 6, 2018, the legislature amended the fourth element of

continuing CHIPS. *See* 2017 Wis. Act 256 (amending § 48.415(2)(a) to require proof that, if the child was placed outside the home for fewer than fifteen of the previous twenty-two months, a substantial likelihood existed that the parent would not meet the conditions of return as of the date the child would have been placed outside the home for fifteen of the previous twenty-two months); *see also* WIS JI—CHILDREN 324 (2020). We recently held that a circuit court presiding in a termination of parental rights matter must apply the law as it existed at the time that the petitioner files the petition seeking to terminate parental rights. *See* ***Dane Cty. v. J.R.***, 2020 WI App 5, ¶¶1-3, 390 Wis. 2d 326, 938 N.W.2d 614. Accordingly, the circuit court should have applied the amended statute to the proceedings here.

Nonetheless, the circuit court's error does not provide an arguably meritorious ground for an appellate challenge because the law that the circuit court applied was more advantageous to S.M. than the law that in fact governed the proceedings. *See* ***Dane Cty v. T.S.***, No. 2019AP415, unpublished slip op. ¶¶9-12 (WI App May 9, 2019) (explaining that "it could not possibly have been prejudicial to [the parent] for the court to have assigned to the County the greater burden" of satisfying WIS. STAT. § 48.415(2) (2015-16), rather than the lesser burden imposed by the amended version of the statute).[5] Moreover, the evidence that the circuit court accepted to prove the elements of § 48.415(2)(a)(2015-16), satisfied the fourth element of 48.415(2)(a) as amended. Specifically, the State showed that since at least August 2018, all of the children had been continuously placed outside S.M.'s home pursuant to a court order, and at the time of the plea hearing sixteen months later, S.M. had not satisfied the conditions of return.

[5] We cite ***Dane County v. T.S.***, No. 2019AP415, unpublished slip op. (WI App May 9, 2019), an unpublished authored opinion, for its persuasive value. *See* WIS. STAT. RULE 809.23(3)(b).

Accordingly, the record establishes that S.M. entered valid no-contest pleas to the allegations of continuing CHIPS as to E.M., S.M.M., and T.M., and the State supported the allegations in the petitions for termination of S.M.'s parental rights. The circuit court properly concluded that S.M. was an unfit parent. Further appellate proceedings regarding this issue would lack arguable merit.

Defect in Petition Underlying *State v. S.M.*, No. 2020AP891-NM

In the petition underlying ***State v. S.M.***, No. 2020AP891-NM, the State alleged that in the CHIPS proceedings concerning T.M., the circuit court informed S.M. about the fourth element of continuing CHIPS as it existed under WIS. STAT. § 48.415(2)(a) (2015-16). The record, however, contains a certified copy of the warnings that S.M. received when the circuit court entered a CHIPS order concerning T.M. on August 17, 2018. The warnings accurately reflect the elements of WIS. STAT. § 48.265(2), as amended by 2017 Wis. Act 256. [6]

Although the petition underlying appeal No. 2020AP891-NM erroneously describes the warnings that S.M. received, defects in pleadings must be disregarded when they do not affect the substantial rights of the parties. *See* ***Kitzman v. Kitzman***, 163 Wis. 2d 399, 403, 471 N.W.2d 293 (Ct. App. 1991). Here, we see no basis on which the error in the petition affected S.M.'s substantial rights. S.M received an accurate warning during the CHIPS proceeding concerning her risk of facing termination of her parental rights to T.M. under WIS. STAT. § 48.415(2). The

[6] For the sake of completeness, we add that all three petitions underlying S.M.'s consolidated appeals contained the allegation that S.M. received warnings in accordance with a prior version of WIS. STAT. § 48.415(2)(a). The allegation was correct in the petitions underlying ***State v. S.M.***, Nos. 2020AP889-90-NM.

circuit court in the termination proceedings nonetheless considered whether grounds existed to terminate her parental rights under a version of the statute that was more advantageous to S.M. than the version about which she was warned. Moreover, the evidence that the State presented in support of its allegations of continuing CHIPS satisfied the elements of both versions of the statute. Further pursuit of this issue would lack arguable merit.

Discretionary Decision to Terminate Parental Rights

We last consider whether S.M. could mount an arguably meritorious challenge to the decision to terminate her parental rights. The decision to terminate parental rights lies within the circuit court's discretion. *See* ***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. *See* WIS. STAT. § 48.426(2). In considering the best interests of the child, a circuit court must consider: (1) "[t]the likelihood of the child's adoption after termination"; (2) "[t]he 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"; (3) "[w]hether 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, the State presented testimony from Etten, from E.M.'s and S.M.M.'s foster mother A.S., and from T.M.'s foster mother M. McC. Additionally, S.M. and

H.M. both testified. 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.M., S.M.M., and T.M. were, respectively, five years old, three years old, and eighteen months old, and that all of the children were in good health. The circuit court found that E.M. had lived more than one-third of her life outside of S.M.'s home, and the other two children had not spent a meaningful portion of their lives with S.M. Conversely, the circuit court found that each child had lived continuously with his or her foster family since being removed from S.M.'s care, and the foster parents for each child wanted to adopt that child and were likely to do so.

The circuit court found that the children were too young to express meaningful wishes about their placement but that each child had a bond with S.M. The circuit court found that the foster families were not likely to maintain a significant relationship with S.M. if her parental rights were terminated, and the children would therefore suffer some hardship from severing their legal connections with her. The circuit court concluded, however, that any such hardship would be substantially less than the hardship that would arise from severing the bonds that each child had formed with his or her foster parents.

The circuit court next found that each child had a substantial relationship with his or her siblings, including C.V., but the circuit court concluded that the siblings' relationships would not be harmed by terminating S.M.'s parental rights. In reaching this conclusion, the circuit court noted that S.M.'s mother, V.V., had placement of C.V., and found that the foster families maintained a relationship with V.V. and nurtured relationships between all of the siblings, including C.V. In the circuit court's assessment, the foster families, C.V., and V.V., were all

strongly bonded with each other and would remain so if S.M.'s parental rights were terminated. Finally, the circuit court found that, in light of the long period of time that E.M., S.M.M., and T.M. had each lived with his or her foster family, termination of S.M.'s parental rights would permit the children to formalize their places in well-established family units and enter into more stable and permanent family relationships.

The record shows that 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 S.M.'s parental rights would lack arguable merit.

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

IT IS ORDERED that the orders terminating S.M.'s parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Karen Lueschow is relieved of any further representation of S.M. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals