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May 23, 2016

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D. W.

L. Z.

R. Z.

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

2016AP589-NM — In re the termination of parental rights to J.W, a person under the age of 18: R.Z. and L.Z. v. D.W. (L.C. # 2015TP21)

Before Kessler, J.[1]

D.W. appeals from an order terminating his parental rights to son J.W. Appellate counsel, Jeff T. Wilson, 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

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

809.107(5m) & 809.32. D.W. was advised of his right to file a response, and he has responded.[2] Based upon this court's independent review of the record, the no-merit report, and the no-merit response, we conclude that an appeal would lack arguable merit. Therefore, the order terminating D.W.'s parental rights is summarily affirmed.

BACKGROUND

J.W. was born on May 7, 2005. He lived with his mother, K.S., and his father, D.W., until some time in 2007 when K.S. and D.W. separated. K.S. initiated a paternity action in 2007. In 2007 and 2008, D.W. had regular phone and face-to-face contact with J.W. In 2008, K.S. and D.W. became embroiled in a custody dispute within the context of the paternity case.

On October 1, 2009, the date on which a custody report was due to be filed with the paternity court, K.S. was murdered by a hitman whom D.W. had hired. D.W. was charged with first-degree intentional homicide as a party to a crime. He was convicted and sentenced to life imprisonment without the possibility of extended supervision. This court affirmed D.W.'s conviction, and the supreme court denied a petition for review.

After his mother's death, then-four-year-old J.W. was placed with his maternal aunt, L.Z., and her husband, R.Z. They were the closest relatives geographically, and J.W. had been to the Z. home many times for holidays and other celebrations. During the pendency of his

[2] The response, forwarded to this court by counsel, refers to the parties by their full names. We have redacted our file copy, but we remind counsel, and inform D.W., that documents required by law to be confidential shall refer to individuals only by one or more initials or other appropriate pseudonym or designation. *See* WIS. STAT. RULE 809.81(8) (eff. July 1, 2015).

criminal trial, D.W. stipulated to L.Z. and R.Z. obtaining guardianship of J.W., who has lived with the Z. family since his mother's death.[3]

After the supreme court denied D.W.'s petition for review, R.Z. and L.Z. filed the underlying petition to terminate D.W.'s parental rights to J.W. The petition alleged multiple grounds, including continuing denial of periods of placement or visitation, failure to assume parental responsibility, and homicide of a parent. *See* WIS. STAT. § 48.415(4), (6), & (8). On July 10, 2015,[4] R.Z. and L.Z. moved for summary judgment on the parental-homicide ground, supported by various court documents. The circuit court granted partial summary judgment on that ground. Following a dispositional hearing, the circuit court terminated D.W.'s parental rights.

DISCUSSION

Counsel raises two potential issues for appeal: whether it was appropriate for the circuit court to grant summary judgment on the homicide ground and whether the circuit court erroneously exercised its discretion in terminating D.W.'s parental rights. We have identified two additional potential issues: whether the circuit court failed to observe mandatory timelines, thereby losing competency, and whether there was error because D.W. appeared by video for the hearings. D.W.'s response raises an issue of ineffective assistance of counsel.

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[3] As a result of D.W. agreeing to the guardianship, a CHIPS (child in need of protection or services) petition was dismissed.

[4] The petition was presented in the circuit court at a hearing on July 10, 2015, but not filed with the clerk of the circuit court until July 15, 2015.

A. Competency

After a petition to terminate parental rights is filed, the circuit court has thirty days to hold an initial hearing and ascertain whether any party wishes to contest the petition. WIS. STAT. § 48.422(1). If a party contests the petition, the court must set a fact-finding hearing to begin within forty-five days of the initial hearing. WIS. STAT. § 48.422(2). If grounds for termination are established, the court is to proceed with an immediate disposition hearing, although that may be delayed up to "no later than [forty-five] days after the fact-finding hearing" if all the parties agree. *See* WIS. STAT. § 48.424(4)(a).

These statutory time limits cannot be waived. *See* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. Continuances, however, 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. *See* WIS. STAT. § 48.315(3).

The termination petition was filed on April 28, 2015. The only hearing that was timely commenced in line with statutory requirements was the initial hearing on May 22, 2015. There is no express adjournment of any hearing for cause. However, neither D.W. nor his attorneys[5] raised any objections, so we consider whether there is any arguable merit to a claim of ineffective assistance of counsel for failing to make objections to the continuations or late hearings. *See* ***Oneida Cty. Dept. of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652 (right to effective assistance of counsel in termination proceedings). To

[5] Attorney Paul G. Bonneson represented D.W. through the summary judgment hearing and was then replaced by Attorney Virginia M. Stuller.

demonstrate ineffective assistance of counsel, a person must show that counsel was both deficient and prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Although only one of the hearings in this matter complied with statutory timelines, it is evident that all delays were for cause. The May 22, 2015 initial hearing was timely commenced within thirty days of the petition's filing. After D.W. requested counsel, the matter was adjourned to June 26, 2015, and then again to July 10, 2015, to facilitate the appointment of counsel. At the July 10 hearing, D.W. indicated he wished to contest the petition.

Also on July 10, 2015, R.Z. and L.Z. presented their summary judgment motion to the circuit court. A hearing on the motion thus served as the fact-finding hearing. The motion hearing was scheduled for August 28, 2015, the forty-ninth day, but this very short delay was clearly a function of coordinating the circuit court and counsels' schedules.

With the parties' agreement, the disposition hearing was originally set for September 18, 2015, within forty-five days of the fact-finding hearing as required. However, on the scheduled date, D.W.'s attorney moved to withdraw at D.W.'s request. The disposition hearing was ultimately scheduled for November 19, 2015, which appears to have been the earliest possible date after the appointment of successor counsel.

Based on the foregoing, it is evident that any objections to the continuances would have been overruled, and an attorney is not ineffective for failing to make meritless objections. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). Accordingly, there is no arguable merit to a claim that trial counsel was ineffective for failing to object to continuances or delays or to otherwise challenge the circuit court's competency to proceed.

B. Videoconferencing

D.W. appeared at each hearing in this matter by videoconferencing from prison, rather than being transported to appear in person. At the close of the summary judgment hearing, D.W.'s attorney asked to make a record.

> [COUNSEL]: I have only one thing I'd like to make a record about. [D.W.] has informed me that he does not wish to be produced in court for any hearings in this case.
>
> THE COURT: It's not my intention to have him produced other than by video.
>
> [COUNSEL]: Okay. I'd like to make a record on this because there's gonna be testimony taken so he would technically have a right to be here.
>
> THE COURT: Well, it's a civil matter, sir. It's not a criminal case.

The circuit court's comments suggest it believed that D.W. did not have a right to be physically present for the disposition or any other hearing. But a respondent in a WIS. STAT. Ch. 48 proceeding "is entitled to be physically present in the courtroom at all trials and … dispositional hearings." *See* WIS. STAT. § 885.60(2)(a). The right to be present stems not only from the statute but, in some instances, from the constitutional right of due process as well. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 701-02, 530 N.W.2d 34 (Ct. App. 1995).

However, the right to be present can be waived, *see* ***State v. Soto***, 2012 WI 93, ¶2, 343 Wis. 2d 43, 817 N.W.2d 848, provided the waiver is knowing, intelligent, and voluntary, *see* ***State v. Klessig***, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997). Here, both of D.W.'s attorneys made a record of his desire to appear by video rather than being produced in person. D.W. was directly asked about his desires and his understanding of the difficulties of communicating with counsel when appearing by video. He acknowledged the potential difficulties and was

unwavering in his preference to avoid being brought to the county. Accordingly, we conclude there is no arguable merit to any issue stemming from D.W.'s manner of appearance.

C. Summary Judgment on Grounds

There are two parts to termination-of-parental-rights proceedings. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. The first part involves grounds for the termination, and the petitioner must prove by clear and convincing evidence that one of the statutory grounds for termination exists. *See* ***id.*** If grounds are proven, the circuit court finds the respondent parent unfit, *see* WIS. STAT. § 48.424(4), and the matter proceeds to disposition, *see* ***Steven V.***, 271 Wis. 2d 1, ¶25. Thus, we next consider the first issue raised by counsel—whether the circuit court erred in granting summary judgment to R.Z. and L.Z. in the grounds phase.

Partial summary judgment is available in termination-of-parental-rights proceedings. *See* ***id.***, ¶¶5-6. Summary judgment may be employed "when there is no genuine factual dispute that would preclude finding one or more of the statutory grounds by clear and convincing evidence." *See* ***Nicole W.***, 299 Wis. 2d 637, ¶14.

As noted earlier, the termination petition alleged, among other things, homicide of a parent under WIS. STAT. § 48.415(8). This ground required proof that "a parent of the child has been a victim of first-degree intentional homicide in violation of s. 940.01 … and that the person whose parental rights are sought to be terminated has been convicted of that intentional [homicide] … as evidenced by a final judgment of conviction." *See* § 48.415(8)

As part of the affidavit in support of summary judgment, R.Z. and L.Z. attached copies of: the paternity judgment establishing K.S. and D.W. as J.W.'s parents; the judgment convicting D.W. of first-degree intentional homicide as party to a crime, contrary to WIS. STAT. § 940.01;

this court's decision, which noted that K.S. was the homicide victim and affirming the conviction; and the supreme court order denying the petition for review. D.W. did not dispute any of the above facts relative to the specifics of the WIS. STAT. § 48.415(8) grounds for termination. He did, however, note that he had petitioned a federal court for a writ of *habeas corpus*, implying that summary judgment was not appropriate because the conviction might not be final.

The circuit court concluded that the pending writ petition "does not obviate" the homicide ground for termination, and we agree. A judgment of conviction is final for purposes of WIS. STAT. ch. 48 when appeals as a matter of right have been exhausted. *See* ***Monroe Cty. v. Jennifer V.***, 200 Wis. 2d 678, 689-90, 548 N.W.2d 837 (Ct. App. 1996). The only appeal as a matter of right to which D.W. was entitled was an appeal to this court; a petition to the federal court for a writ of *habeas corpus* is a collateral attack, not an appeal of right. Accordingly, once the supreme court denied review, the judgment of conviction was indisputably final for purposes of WIS. STAT. § 48.415(8) grounds, so there were no genuine issues of material fact related to grounds for termination. There is no arguable merit to a claim that the circuit court erred in granting partial summary judgment.[6]

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[6] Relatedly, we note that neither the circuit court's oral pronouncement nor the order on summary judgment prepared by the petitioners included a finding of unfitness. *See* WIS. STAT. § 48.424(4) ("If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit."). The finding of unfitness is important because termination cannot be had without it. *See* ***Sheboygan Cty. DHHS. v. Julie A.B.***, 2002 WI 95, ¶22 n.8, 255 Wis. 2d 170, 648 N.W.2d 402.

(continued)

D. Termination

The other issue appellate counsel discusses is whether there is any arguable merit a to a claim that the circuit court erroneously exercised its discretion in terminating D.W.'s parental rights during the disposition phase of the termination proceedings. *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).

However, once grounds are satisfactorily established, the circuit court has no discretion to do anything other than find the parent unfit. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶25, 271 Wis. 2d 1, 678 N.W.2d 856. Moreover, the circuit court did expressly enter a finding that D.W. was unfit near the end of the disposition hearing, prior to explaining its termination decision. The unfitness finding is also memorialized in the final order. Accordingly, there is no issue of arguable merit arising from the fact that the circuit court did not expressly find D.W. unfit until the disposition hearing. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶32, 246 Wis. 2d 1, 629 N.W.2d 768.

Here, the circuit court noted its belief that J.W. was likely to be adopted after termination. It believed this would be true even if the anticipated adoption by R.Z. and L.Z. failed to happen for some reason.

The circuit court noted that J.W., who had discovered his mother's body, had some struggles when he first arrived at the Z. home, including dreams about "bad guys." However, based on testimony from L.Z. and an in-chambers interview of J.W., the circuit court believed that J.W. was in a much better place. He was happy and healthy with no physical impediments. The circuit court also noted that whether there are still emotional impediments remained to be seen, but J.W. seemed to have great defensive mechanisms.

The circuit court determined that J.W.'s mother was "not a mystery" to him, and he recognized that L.Z. was her sister even though he now called L.Z. "mom." However, J.W. had less understanding and knowledge of his father. While D.W. had argued that the reason he had no contact with J.W. was because of a no-contact order, the circuit court noted that the reason that order exists is because of D.W.'s "role and responsibility in the murder of his son's mother." The circuit court also considered whether J.W. had substantial relationships with his paternal grandparents, who saw J.W. regularly while K.S was alive but had no face-to-face contact with him after January 2009. The circuit court observed that it "did not find much statement" by J.W. regarding those grandparents, and commented that from J.W.'s perspective, he did not know those people. Thus, the circuit court concluded it would not be harmful to sever the relationship with D.W. or other legal familial relationships stemming from D.W.'s rights as the father.

As noted, J.W., who was about ten and one-half years old at the time of disposition, met with the circuit court judge in chambers. The circuit court determined it was "very clear to me that he wants to be a recognized member of the Z[.] family."

The circuit court found that the duration of J.W.'s separation from D.W. was "overwhelmingly significant." At the time of the hearing, they had been apart for about two-thirds of J.W.'s life. The circuit court commented that it did not seem harmful to sever a legal tie "which in reality has been severed for years."

Finally, the circuit court commented again that J.W. was looking for affirmation that he is part of a family, and noted that J.W. would be likely to "move to a condition of permanence" as a result of the termination. It thus terminated D.W.'s parental rights.

Based on the foregoing, there is no arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating D.W.'s parental rights. The decision demonstrates a careful consideration of required factors, and no additional improper facts.

E. Ineffective Assistance of Counsel

In his response, D.W. complains that his attorney was ineffective for failing to call his parents or their attorneys to testify at the disposition hearing. He asserts that his parents "had lots of knowledge to [D.W.] and his son" and the attorneys "had intimate knowledge of issues with establishing rights (ie grandparents rights) to keep relations" with J.W. Thus, D.W. thinks his parents and their attorneys should have been called so that they could testify about attempts to maintain a relationship with J.W., and how those attempts were thwarted by R.Z. and L.Z. "in order to alienate" J.W. from his paternal grandparents.

As noted earlier, a party claiming ineffective assistance must show both that counsel was deficient and that the deficiency prejudiced the defense. *See* ***Strickland***, 466 U.S. at 687. The party claiming ineffective assistance must make sufficient showing on both components to prevail on the claim. *See* ***id.*** at 697. Here, we conclude that the record demonstrates no prejudice from counsel's failure to call D.W.'s parents or their attorneys.

The record indicates that D.W.'s parents' last face-to-face contact with J.W. was in January 2009, when K.S. was still alive, and that it was K.S.—not R.Z. and L.Z.—who began scaling back on the grandparents' visitation.[7] Further, the best interests of the child is the "polestar" of all determinations under WIS. STAT. ch. 48. *See* ***David S. and Geraldine S. v. Laura S. and Michael R.***, 179 Wis. 2d 114, 149, 507 N.W.2d 94 (1993). The only express factor in the best-interests determination that relates to grandparents is consideration of whether the child has substantial relationships with the parent or other family members. *See* WIS. STAT. § 48.426(3)(c). In deciding J.W.'s best interests, the circuit court explained:

> So the fact that you have - - you have grandparents who appear to be interested and traveled to visit, who come for Christmas, who do things in support of are all positives, and so I want to recognize that from [D.W.'s] parents' perspective, but I think that at least to a degree I have found that to be the case up and to the point of … October 1st.
>
> ….
>
> What I do find of moment is the fact that … the grandparents have had no contact, no involvement with this grandchild since January of 2009. This child is now ten and a half years fold, and they certainly had no legal bar. There wasn't a no-contact order … [and] his parents certainly had capacities to enter

[7] K.S. had apparently grown concerned about the possibility of parental abduction and was worried that D.W.'s parents might assist him in getting J.W. out of the country.

> expressions[[8]] greater than he did following the events of October 1st, 2009, and didn't, and whether they filed for grandparent visitation and withdrew it and *whatever the back drop of that is it doesn't matter.*
>
> *The reality from [J.W.'s] perspective is that he doesn't know these people. He is not connected to these people. Therefore he has no significant relationship with these people.* I'm somewhat sad about that … but the reality is exactly as I've stated it.

(Emphasis added.)

To demonstrate prejudice from his attorney's failure to call his parents or their attorneys, D.W. would have to show prejudice from that failure, which requires showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694.

However, the circuit court's comments reflect that the reasons why J.W. lacked a substantial relationship with his grandparents were less important compared to the simple fact that he had no such relationship with them. Our confidence in the result of the proceeding is not undermined by counsel's failure to call D.W.'s parents or their attorneys.[9] *See* ***id.*** There is no

[8] Both the social worker and the guardian *ad litem* in the paternity/custody case indicated that D.W.'s parents had never contacted them directly to request visitation with J.W.

[9] That the social worker and guardian *ad litem* from the paternity/custody case had testified about certain events that caused K.S.'s worry over parental abduction, and D.W.'s parents' possible roles in those events. The circuit court allowed this information to come in, but expressly noted in its termination decision that it was not considering these facts because it did not believe them to be adequately substantiated. We observe that calling D.W.'s parents to testify would have opened them up to examination on these topics.

arguable merit to a claim of ineffective assistance of counsel for failure to call D.W.'s parents or their attorneys to testify.[10]

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Jeff T. Wilson is relieved of further representation of D.W. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[10] D.W. also claimed a due process violation, arguing counsel's failure to call these witnesses deprived him of the right to present a defense. Due process guarantees a parent the right to be heard and the right to present a defense. *See* ***Brown Cty. v. Shannon R.***, 2005 WI 160, ¶67, 286 Wis. 2d 278, 706 N.W.2d 269. However, given that the possible scope of the witnesses' testimony was not particularly relevant to the circuit court's determination, there can be no sustainable claim that D.W. was deprived of the right to present a defense. *See* ***State v. Muckerheide***, 2007 WI 5, ¶18, 298 Wis. 2d 553, 725 N.W.2d 930 ("We determine as a matter of constitutional fact whether the exclusion of evidence offered by a defendant violated the constitutional right to present a defense.").