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August 24, 2016

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

2016AP739-NM

In re the termination of parental rights to L.H., a person under the age of 18: State of Wisconsin v. E. R. T. (L.C. # 2015TP24)

Before Hagedorn, J.¹

E.R.T. appeals from an order terminating her parental rights to her daughter. Her appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32. E.R.T. was served with a copy of the report and advised of her right to file a response.

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

No response has been received from E.R.T. Based upon an independent review of the no-merit report and circuit court record, this court concludes that no issue of arguable merit could be raised on appeal and affirms the order.

E.R.T. was just shy of her fifteenth birthday when her daughter was born. Her daughter was taken into care by the Bureau of Milwaukee Child Welfare on November 20, 2013, after E.R.T. left the near one-year old with a stranger. The petition for termination of parental rights was filed February 21, 2015. On May 18, 2015, E.R.T. stipulated to the continuing need of protection and services ground alleged in the termination petition. The disposition hearing was set to be heard in September in order to give E.R.T. additional time to make progress on the conditions of return.² A contested disposition hearing was conducted on December 2, 2015. The evidence was that E.R.T.'s daughter had been living with the same foster parents who were an adoptive resource. In her testimony, E.R.T. acknowledged that she could not care for her daughter at the present time, but she felt she was making progress on establishing herself in adulthood such that she could have her daughter with her in the future. E.R.T. asked that a guardianship be established. The court determined that a guardianship would not provide the child with needed permanence and that the termination of E.R.T.'s parental rights was in the child's best interests.

² Under WIS. STAT. § 48.315(2), continuances of WIS. STAT. ch. 48 time limits are allowed “upon a showing of good cause in open court.” “Failure to object to a ... continuance waives any challenge to the court’s competency to act during the ... continuance.” Sec. 48.315(3). Each time a hearing was continued or set beyond the statutory time limit, the circuit court found cause to extend the time limit and no objection was made. There is no arguable merit to any claim related to the failure to comply with the statutory time limits.

After an appeal was filed, the case was remanded to the circuit court for a hearing on a postdisposition motion. The motion alleged that after the disposition hearing, the foster mother told E.R.T. that she only wanted a guardianship and that the children's bureau had essentially forced her to testify that she wanted to adopt the child. E.R.T. sought a new disposition hearing on the ground of newly discovered evidence "affecting the advisability of the court's adjudication." See WIS. STAT. § 48.46(1m). E.R.T. failed to appear at the hearing on the motion. The circuit court denied the motion for failure to prosecute but also indicated that the motion did not provide a basis to question the adjudication because the likelihood of adoption by the current foster parents was only one of several factors the court considered.³

After the filing of a petition for termination of parental rights and the completion of preliminary matters, "a contested termination proceeding involves a two-step procedure." *Sheboygan Cty. DHHS v. Julie A.B.*, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. The first step is a fact-finding hearing which determines whether grounds exist to terminate the parent's rights. *Id.* If grounds for termination are found to exist, the circuit court must find that the parent is unfit. *Id.*, ¶26. Here E.R.T. stipulated that grounds for termination existed. The second phase is the dispositional phase. *Id.*, ¶28. The court must determine whether the parent's rights should be terminated. *Id.* The best interest of the child is the prevailing factor considered by the circuit court in making this decision. WIS. STAT. § 48.426(2). In determining the best interests of the child, the circuit court is required to consider the agency report and the factors

³ At the hearing, no testimony was taken. However, the circuit court asked the foster mother if she wanted to adopt the child. The foster mother indicated that she did want to adopt.

enumerated in § 48.426(3). *Julie A.B.*, 255 Wis. 2d 170, ¶4. It is also entitled to consider other factors, including factors favorable to the parent. *Id.*

Counsel's no-merit report addresses as potential appellate issues whether the circuit court met its obligations under WIS. STAT. § 48.422(7) in accepting E.R.T.'s stipulation to the continuing need of protection and services ground, whether E.R.T.'s stipulation was knowingly and voluntarily made, whether the dispositional decision was an erroneous exercise of discretion or otherwise failed to consider the best interests of the child, and whether the denial of the postdisposition motion was a proper exercise of discretion. Our review of the record confirms counsel's conclusion that these potential issues lack arguable merit. With one exception discussed below, the no-merit report sets forth an adequate discussion of the potential issues to support the no-merit conclusion and we need not address them further.

The no-merit report concludes that the circuit court properly exercised its discretion in denying the postdisposition motion on remand from this court. To the extent that the conclusion is based on an examination of whether the circuit court properly exercised its discretion in denying the motion for a failure to prosecute because E.R.T. failed to appear, we cannot readily accept the conclusion. The record does not reflect what notice was given of the hearing and whether E.R.T. was warned that her failure to appear could result in denial of the motion for failure to prosecute.⁴ Notice is a due process requirement. See *Neylan v. Vorwald*, 124 Wis. 2d 85, 95, 368 N.W.2d 648 (1985) (due process is lacking where there is "no advance actual notice

⁴ E.R.T. was informed at hearings held April 16, 2015, and July 27, 2015, that she needed to appear at scheduled hearings or face possible default judgment. At the postdisposition hearing, E.R.T.'s attorney indicated that she had informed E.R.T. about the hearing and the need to attend. We need not consider whether these facts establish sufficient notice.

of dismissal which contains a clear standard or definition of what constituted ‘the failure to prosecute’”); *Theis v. Short*, 2010 WI App 108, ¶23, 328 Wis. 2d 162, 789 N.W.2d 585 (before imposing the drastic sanction of dismissal, advanced notice that a party’s conduct might result in dismissal is required to satisfy due process requirements). Although a potential due process issue may exist as to denial of the motion for the failure to prosecute, the circuit court also found that the postdisposition motion did not provide grounds to reopen the case. The circuit court’s ruling on that basis was a proper exercise of discretion. See *Schroud v. Milwaukee Cty. Dep’t of Pub. Welfare*, 53 Wis. 2d 650, 654, 193 N.W.2d 671 (1972) (it is within the discretion of the circuit court to grant a new hearing on the ground of newly discovered evidence). As the circuit court observed, the foster mother’s expression at the disposition hearing of her desire to adopt the child was but one factor the circuit court considered in finding that termination of parental rights was in the child’s best interest. The circuit court explained at the disposition hearing why guardianship was not in the child’s best interest. That the foster mother may have felt pressured to pursue adoption was not enough to undermine the circuit court’s reasons for the termination of E.R.T.’s parental rights. No issue of arguable merit exists regarding the denial of the postdisposition motion.

Our review of the record discloses no other potential issues for appeal. Accordingly, we accept the no-merit report, affirm the order terminating E.R.T.’s parental rights, and discharge appellate counsel of the obligation to represent E.R.T. further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Christine M. Quinn is relieved of any further representation of E.R.T. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals