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August 7, 2013

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

2013AP1153-NM In re the termination of parental rights to Selena K., a person under the age of 18: State of Wisconsin v. Sherry K. (L.C. #2011TP361)

Before Curley, P.J.[1]

Sherry K. appeals an order terminating her parental rights to Selena K. Attorney Duke J. Lehto filed a no-merit report on Sherry K.'s behalf pursuant to ***Anders v. California***, 386 U.S.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

738 (1967); ***Brown Cnty. v. Edward C. T.***, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998); WIS. STAT. RULE 809.107(5m); and WIS. STAT. RULE 809.32(1). Sherry K. did not respond. We have reviewed counsel's no-merit report and we have independently reviewed the record.[2] We agree with appellate counsel's conclusion that an appeal would lack arguable merit. Therefore, we summarily affirm the order terminating Sherry K.'s parental rights.

Selena K., born on May 5, 2011, is the nonmarital child of Sherry K. and a man believed to be Hector A. On December 8, 2011, the State filed a petition to terminate Sherry K.'s parental rights to Selena K.[3] As grounds, the State alleged that: (1) Sherry K. had failed to assume parental responsibility for Selena K.; and (2) during the three years prior to Selena K.'s birth, a circuit court terminated Sherry K.'s parental rights to another child. *See* WIS. STAT. § 48.415(6), (10).

According to the petition, Selena K. "was detained for her safety less than three weeks after birth," and a circuit court found her to be a child in need of protection or services on

[2] The record reached us in some disarray. The record index reflects that the record contains forty-nine items but that those items are numbered 1 through 50 because the clerk did not assign the number 46 to any item. The record, meanwhile, lacks an item numbered 47 but contains an item numbered 46, which corresponds to index item No. 47. Record item No. 13, "Questionnaire for Permanency Plan Review," appears in the record as a stand-alone document although it contains text and a file-stamp revealing that the document was filed as an attachment to record item No. 14, a notice of permanency plan review hearing. Exhibit B in support of record item No. 12, a motion for summary judgment, is attached to record item No. 14. We recognize that the work of the circuit court clerk in assembling the record is governed by short deadlines in termination of parental rights matters, but we urge the clerk to assemble records with due care. Moreover, we remind appellate counsel that, in no-merit proceedings, we expect counsel to take appropriate steps to assist this court in conducting the review of the record. At the very least, such steps should include noting in the no-merit report that anomalies exist in the record and explaining the nature of those anomalies.

[3] The petition also initiated proceedings to terminate the parental rights of Hector A. and any unknown biological father of Selena K. The order terminating the parental rights of Hector A. and any unknown biological father is not before us.

August 15, 2011. Pursuant to that finding, the circuit court ordered her placed outside of Sherry K'.s home. Further, the petition includes allegations that, during the first weeks of Selena K.'s life, Sherry K. failed to bathe Selena K. or to launder her clothing, and that Sherry K. repeatedly slept in a bed with her infant daughter despite warnings about the danger of doing so. The State went on to allege that Sherry K. has an I.Q. between seventy-two and seventy-nine, and that her functioning is further impaired by her failure to take necessary steps to manage her psychiatric disorders.

Statutory time limits

Appellate counsel does not discuss whether Sherry K. could mount a 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." *See* WIS. STAT. § 48.315(2). Failure to object to a continuance, however, waives any challenge to the circuit court's competency to act during the period of delay or continuance. *See* § 48.315(3).

In this case, the circuit court on multiple occasions granted continuances that extended the proceedings beyond the statutory deadlines. On each such occasion, however, the circuit court found good cause for the extension. Moreover, Sherry K. did not object to any of the continuances. Accordingly, she cannot mount an arguably meritorious challenge to the circuit court's competency to proceed based on failure to comply with statutory time limits. *See* ***id.***

Partial summary judgment as to grounds for termination of parental rights

We next consider whether Sherry K. could mount an arguably meritorious claim that the circuit court erroneously granted the State partial summary judgment on the question of whether grounds existed to terminate her parental rights. Summary judgment procedure may be used in the grounds phase of a termination-of-parental rights case. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶28-44, 271 Wis. 2d 1, 678 N.W.2d 856. Summary judgment is appropriate when no genuine issues of material fact exist and one party is entitled to judgment as a matter of law. *See* ***Racine Cnty. Human Servs. Dep't v. Latanya D.K.***, 2013 WI App 28, ¶17, 346 Wis. 2d 75, 828 N.W.2d 251. In this case, the State moved for summary judgment based on the allegation that Sherry K. was an unfit parent pursuant to WIS. STAT. § 48.415(10). The statute provides that a prior involuntary termination of parental rights to a child is grounds for terminating parental rights to a second child if the State proves: "(1) the child who is the subject of the [termination of parental rights] petition has been adjudged to be in need of protection or services … and (2) within the three years prior to that adjudication a court has terminated the parent's rights to another child in an involuntary termination proceeding." *See* ***Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶18, 299 Wis. 2d 637, 728 N.W.2d 652. The State may use official court documents to prove unfitness under § 48.415(10). *See* ***Steven V.***, 271 Wis. 2d 1, ¶37.

Here, the State provided the necessary documentary proof that a circuit court had involuntarily terminated Sherry K's parental rights to another child within three years of Selena K.'s birth and that a circuit court had found Selena K. in need of protection or services within three years after the prior termination order. Specifically, the State filed: (1) a certified copy of an order entered on October 15, 2009, showing that the circuit court involuntarily terminated Sherry K.'s rights to her two-year-old son on the ground that he was in continuing need of protection or services; and (2) a certified copy of an order entered in August 2011 finding that Selena K. was a child in need of protection or services. Sherry K.'s trial counsel admitted that any response opposing the State's motion for summary judgment would be frivolous.

No arguably meritorious basis exists for a challenge to the circuit court's grant of partial summary judgment in light of the certified court orders that established the grounds for termination under WIS. STAT. § 48.415(10). *See* ***Steven V.***, 271 Wis. 2d 1, ¶37. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Appointment of a guardian ad litem for Sherry K.

We next consider whether Sherry K. could pursue a meritorious challenge to the circuit court order appointing her a guardian *ad litem* for purposes of the dispositional hearing, given that no professional who evaluated her determined that she was incompetent. *See* WIS. STAT. § 48.235(1)(g) (requiring appointment of guardian ad litem for a parent who is subject to termination of his or parental rights if any assessment or examination reveals that the parent is not competent). Any such challenge would be frivolous. Sherry K. moved for the appointment of a guardian *ad litem* and could not contest the order granting her motion. *See* ***State v.***

Scherreiks, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (litigant cannot attack a ruling that he or she sought).

Moreover, the circuit court may appoint a guardian *ad litem* "in any appropriate matter" under ch. 48. *See* WIS. STAT. § 48.235(1)(a). The decision rests in the discretion of the circuit court. *See* Judicial Council Note, 1990, § 48.235 (providing that § 48.235(1) "indicates when a guardian *ad litem* is to be appointed, leaving broad discretion to the court for such appointments"). A reviewing court will sustain a discretionary decision if the record shows that the circuit court exercised discretion and a reasonable basis exists for the circuit court's determination. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493. Here, Sherry K.'s trial counsel drew the circuit court's attention to findings in a psychological evaluation revealing that "Sherry K.[] is an extremely compromised individual" with an I.Q. in the 70's and a history of mental illness. The circuit court determined that appointing a guardian *ad litem* would assist the circuit court in reaching a valid decision and would ensure the protection of Sherry K.'s best interests during the proceedings. In light of the record, we are satisfied that Sherry K. could not mount an arguably meritorious challenge to the circuit court's discretionary decision to appoint a guardian *ad litem* for her in this proceeding.

Discretionary decision to terminate parental rights

We next consider whether Sherry K. could mount a meritorious challenge to the order terminating her parental rights. The decision to terminate parental rights lies within the circuit court's discretion. ***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. WIS. STAT. § 48.426(2). In considering the best interests of the child, courts consider: (1) the likelihood of adoption after termination;

(2) the age and health of the child; (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." *See* § 48.426(3).

The State presented testimony from Maria P., who is Selena K.'s foster mother, and from Renee Dodge, the ongoing case manager for Sherry K. and her family. Sherry K. testified on her own behalf, and she also called two of her friends to testify. Additionally, the circuit court admitted as evidence two psychological evaluations of Sherry K. prepared by Dr. Kenneth Sherry.

Preliminarily, we observe that Sherry K. could not mount an arguably meritorious claim that the circuit court should not have considered the psychological evaluations prepared by Dr. Sherry. The rules of evidence do not govern at a dispositional hearing held in a termination of parental rights matter, and hearsay evidence may be admitted at such hearings if it has demonstrable circumstantial guarantees of trustworthiness. *See* WIS. STAT. § 48.299(4)(b). Accordingly, no basis exists to challenge the circuit court's order admitting the reports as evidence.

The circuit court considered the testimony and evidence presented at the dispositional hearing in light of the statutory factors set out in WIS. STAT. § 48.426(3). The circuit court found that Selena K.'s foster family is committed to adopting Selena K., that the family has been

approved to adopt her, and that the family will adopt her. The circuit court found that Selena K., who was twenty-two months old at the time of the hearing, was too young to express her wishes, but the circuit court also found that she was "thriving" in the foster placement where she has lived for all but nineteen days of her life.

The circuit court found that Sherry K. and Selena K. had lived apart for almost all of the child's life. The circuit court recognized that Sherry K. has had positive interactions with Selena K. during visits, but the circuit court explained that the interactions are short term, and that Sherry K. is not able to fully satisfy the safety concerns required to care for a young child for extended periods of time. The circuit court added that Sherry K. "even has difficulty caring for herself," and the circuit court noted the conclusion of Dr. Sherry that Sherry K. "does not have the psychological capacity to parent independently." The circuit court concluded that the good visits Sherry K. enjoyed with Selena K. did not amount to a substantial relationship with the child. The circuit court further found that Selena K. has no relationship with her other relatives and that she will not be harmed by severing her legal connections to her biological family.

Finally, the circuit court concluded that Selena K. would be able to enter more permanent and stable family relationships if the circuit court terminated Sherry K.'s parental rights. The circuit court observed that Selena K was living in a healthy and stable foster home and that the conditions in the home were likely to continue to benefit her. Additionally, the circuit court took into account the testimony of Maria P. that she and her husband were committed to allowing Sherry K. to maintain contact with Selena K. The circuit court concluded that Selena K. "potentially will have the best of all possible worlds if she's adopted by the [foster family]" because that family appears likely to nurture her relationship with Sherry K. in appropriate ways.

The record shows that the circuit court properly exercised its discretion when it ordered Sherry K.'s parental rights terminated. The circuit court considered the relevant facts, applied the proper standard of law, and reached a reasonable conclusion. *See* ***Gerald O.***, 203 Wis. 2d at 152. An appellate challenge to that determination would lack arguable merit.

Our independent review of the record discloses no arguably meritorious basis for an appeal of the order terminating Sherry K.'s parental rights. Any further proceedings would be wholly frivolous within the meaning of ***Anders***.

Therefore,

IT IS ORDERED that the order terminating Sherry K.'s parental rights to Selena K. is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Duke J. Lehto is relieved of any further representation of Sherry K. on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals