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DISTRICT I

August 7, 2013

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

2013AP849-NM	In re the termination of parental rights to Eliel G., a person under the age of 18: State v. Jennifer M. (L.C. #2011TP141)
2013AP850-NM	In re the termination of parental rights to Eliezer G., a person under the age of 18: State v. Jennifer M. (L.C. #2011TP142)
2013AP851-NM	In re the termination of parental rights to Luis G., a person under the age of 18: State v. Jennifer M. (L.C. #2011TP143)
2013AP882-NM	In re the termination of parental rights to Eliel G., a person under the age of 18: State v. Luis G.. (L.C. #2011TP141)

2013AP883-NM	In re the termination of parental rights to Eliezer G., a person under the age of 18: State v. Luis G. (L.C. #2011TP142)
2013AP884-NM	In re the termination of parental rights to Luis G., a person under the age of 18: State v. Luis G. (L.C. #2011TP143)

Before Fine, J.

Jennifer M. and Luis G. appeal the orders terminating their parental rights to Eliel G., Eliezer G., and Luis G.¹ The appellate lawyers for Jennifer M. and Luis G. filed no-merit reports pursuant to *Anders v. California*, 386 U.S. 738 (1967), *Brown County v. Edward C.T.*, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998) (per curiam), and WIS. STAT. RULES 809.107(5m) and 809.32.² Luis G. responded; Jennifer M. did not. After considering the no-merit reports, Luis G.’s response, and conducting an independent review of the Records, this court agrees that

¹ Throughout the remainder of this opinion, “Luis G.” will refer to the appellant father and “Luis” alone will refer to the son of Jennifer M. and Luis G. Additionally, we note that Jennifer M.’s name is spelled as Jenniffer at times in the Records. To be consistent, we will use the spelling set forth in the caption. Lastly, this court, on its own motion, previously consolidated the no-merit appeals in *State v. Jennifer M.* with the no-merit appeals in *State v. Luis G.* given that the Records overlap. As a result of the consolidation, we briefly extended the decisional deadline. See WIS. STAT. RULE 809.82(2)(a); *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 694, 530 N.W.2d 34, 39 (Ct. App. 1995).

² Randall E. Paulson, Esq., filed a no-merit report on behalf of Jennifer M. Patrick Flanagan, Esq., filed a no-merit report on behalf of Luis G.

With his no-merit report, Paulson included a certification advising that he “informed [Jennifer M.] that the transcripts and circuit court case record will be forwarded at [her] request.” The court observes that a person pursuing a no-merit appeal from an order terminating parental rights is entitled to a copy of the transcripts and the record on appeal without making a request. See WIS. STAT. RULE 809.107(5m). RULE 809.107(5m) required Paulson “to serve on the client-parent a copy of the transcript and the record on appeal at the same time that the no-merit report is served on the client-parent.” This court notes, however, that when he filed his no-merit report, Paulson advised in a letter to this court that he “previously provided copies to Ms. Jennifer M. of the transcripts and court [R]ecord from each case.” Based on Paulson’s representation, it appears then that Jennifer M. received the materials she was entitled to under the statute.

further proceedings would lack arguable merit. Therefore, the orders terminating the parental rights of Jennifer M. and Luis G. are summarily affirmed.³

BACKGROUND

In April of 2011, the State petitioned to terminate Jennifer M.'s and Luis G.'s rights to their twin sons, Eliel G. and Eliezer G., who were born on September 4, 2008, and their son Luis, who was born on March 28, 2010.

As it related to Luis, the petition alleged that the statutory grounds to terminate Jennifer M.'s parental rights were child abuse and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(5) & (6). The alleged statutory grounds to terminate Luis G.'s parental rights to Luis were abandonment, child abuse, and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(1)(a)2., (5), & (6).

As it related to the twins, the petition alleged that the statutory grounds to terminate Jennifer M.'s parental rights were abandonment, child abuse, and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(1)(a)2., (5), & (6). The alleged statutory grounds to terminate Luis G.'s parental rights to the twins were abandonment, child abuse, failure to assume parental responsibility, and prior involuntary termination of parental rights to another child. *See* WIS. STAT. § 48.415(1)(a)2., (5), (6) & (10).

³ After Luis G. filed his response, he sent a letter to this court asserting that he was missing documentation that Flanagan claimed to have sent him. Consequently, this court ordered Flanagan to re-submit the requested documents and procure proof of delivery. Flanagan complied with our order and forwarded tracking information reflecting that delivery of the materials sought by Luis G. occurred both on June 20, 2013, and again on July 18, 2013. In our order, we gave Luis G. additional time to file a supplemental response; he did not do so.

The circuit court subsequently granted the State's motion to file amended petitions alleging that, in addition to the original grounds, Jennifer M.'s and Luis G.'s parental rights to Eliel G., Eliezer G., and Luis should be terminated because they continued to be children in need of protection or services. *See* WIS. STAT. § 48.415(2).

Jennifer M. and Luis G. stipulated to continuing need of protection or services as a ground for the termination of their parental rights to all three children, and the circuit court granted the State's motion to dismiss the additional grounds alleged in the original petition. At the dispositional hearing, the circuit court found that termination of Jennifer M.'s and Luis G.'s parental rights was in the best interests of the children.

DISCUSSION

The no-merit reports filed on behalf of Jennifer M. and Luis G. present variations of the same issues: (1) the validity of Jennifer M.'s and Luis G.'s stipulation to the continuing need of protection or services as a ground for termination; and (2) whether the circuit court properly exercised its discretion when it concluded that termination of Jennifer M.'s and Luis G.'s parental rights was in the best interest of the children. Additionally, the no-merit report submitted on behalf of Luis G. addresses whether his trial lawyer's performance was constitutionally deficient.

To the extent they overlap, we address issues raised by Jennifer M. and Luis G. together, tying in related issues raised by Luis G. in his response where appropriate.

Stipulations as to Grounds

On the date set for trial, Jennifer M. and Luis G. stipulated to the continuing need of protection or services ground for the termination of their parental rights to Eliel G., Eliezer G., and Luis. Before accepting an admission to facts alleged in a termination of parental rights petition, the circuit court must comply with the requirements of WIS. STAT. § 48.422(7). ***Oneida Cnty. Dep’t Soc. Servs. v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 497, 762 N.W.2d 122, 124–125. The statute requires the circuit court to: (1) address the parent and determine that the admission is made voluntarily and understandingly; (2) establish whether any promises or threats were made to elicit an admission; (3) establish whether a proposed adoptive parent for the child 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 admission. Sec. 48.422(7). “Additionally, the parent must have knowledge of the constitutional rights given up by the plea.” ***Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d at 498, 762 N.W.2d at 125.

Here, the transcript reveals comprehensive colloquies by the circuit court—first, with Jennifer M., immediately followed by a separate individualized colloquy with Luis G.—establishing that the admissions were voluntarily and understandingly made and were not the result of promises (beyond the promise from the State that the grounds other than continuing need of protection or services would be dismissed), threats, or coercion. Both Jennifer M. and Luis G. were made aware of the constitutional rights they were giving up.

Following the colloquies, the State proceeded to establish a factual basis for the continuing need of protection or services ground by showing four things: that the children were

adjudged to be in need of protection or services and were placed outside the parent's home for a cumulative period of six months or longer pursuant to one or more court orders containing required termination warnings; that the relevant agency—here, the Bureau of Milwaukee Child Welfare—made a reasonable effort to provide court-ordered services; that the parent failed to meet the conditions for the children's safe return to the home; and that there is a substantial likelihood that the parent will not meet the conditions within the nine-month period following the fact-finding hearing. *See* WIS. STAT. § 48.415(2)(a); *see also* WIS JI—CHILDREN 324A.

The State presented testimony from the ongoing case manager assigned to provide services to the children. The case worker testified that she was involved with the twins' cases beginning in January of 2010. The Bureau's file revealed that the twins were detained days after their birth in September of 2008 because Jennifer M. was incarcerated based upon a conviction for physical abuse to another of her children. The twins were returned to Jennifer M. on July 29, 2009. The Bureau, however, continued to be involved in their supervision.

Early in January of 2010, over the Bureau's and the State's objections, the circuit court terminated the dispositional orders under which the Bureau was providing services. Later that month, Jennifer M. took Eliel G. to the hospital and reported that he was having seizure-like symptoms. Medical staff subsequently determined he had retinal hemorrhaging, multiple fractures, and a brain injury indicative of physical abuse. He was also failing to thrive. The twins were subsequently re-detained.

Jennifer M. and Luis G. were arrested in connection with Eliel G.'s injuries and have been in custody ever since.⁴ Luis, born two months after the twins were re-detained, was detained upon his release from the hospital. At the time of the hearing in August of 2012, the children had been in out-of-home care for more than two years.

Children in need of protection or services dispositional orders for all three children were entered on November 4, 2010. The case worker testified to the attempts she made to provide services to Jennifer M. and Luis G. while they were incarcerated, which included sending monthly letters updating them on their children and speaking with the institutions to determine what services were available. The case worker was informed by personnel at Luis G.'s institution that no services (other than learning English as a second language) would be available to him until he was closer to his release date. When the case worker attempted to get an update from Luis G.'s institution, she learned that he refused to sign a release of information; as such, she did not know what, if anything, he had participated in since her last inquiry.

When the case worker contacted the institution where Jennifer M. was incarcerated in early 2011, she was told that that it could not provide individual therapy as ordered by the court and that it did not offer parenting or nurturing classes due to a lack of funding. Jennifer M. was later transferred to a work release facility, which did not offer any services. The case worker attempted to provide individual therapy to Jennifer M., but the work release facility—after

⁴ The judgments of conviction are in the Records. Jennifer M. pled no-contest to child neglect (consequence is bodily harm). Following a jury trial, Luis G. was convicted of one count of child abuse (recklessly causing great bodily harm), one count of child neglect (consequence is great bodily harm), and one count of child neglect (consequence is bodily harm).

previously approving the request—told the case worker that it would not be able to accommodate the therapy.

The case worker testified that Jennifer M.’s and Luis G.’s incarceration prevented them from meeting the conditions required for the return of their children. Jennifer M.’s release date was January of 2014 and Luis G.’s release date was in 2022. Given the release dates, the case worker testified that neither Jennifer M. nor Luis G. would be able to satisfy the conditions of return in the nine months following the hearing.

Based on psychological evaluations performed on both Jennifer M. and Luis G. in 2012 and the family’s history with the Bureau, the case worker concluded that even if the two were released within the next nine months, it was unlikely they would be able to meet the requisite conditions of return.

Jennifer M. agreed with most of the case worker’s testimony but there was one exception: Jennifer M. believed she was deprived of individual therapy based on the case worker’s failure to stay in touch with the correctional institution’s social worker.⁵

Luis G.’s trial lawyer took issue with the case worker’s statement to the effect that Luis G. was unwilling to allow for the release of his records from the institution. He informed the circuit court that Luis G.’s actions were based on a lack of understanding as to what was going on, not a purposeful intent to deprive the circuit court of information. His trial lawyer went on to

⁵ As Jennifer M.’s appellate lawyer points out, even if the circuit court had credited this contention, there would be no arguable basis to claim that the State failed to prove the “reasonable efforts” element. Given that Jennifer M. will be incarcerated through January of 2014, he writes that the services the Bureau “provided were limited by that reality.” This court agrees.

confirm the case worker's statement that other than learning English, no other programming would be available to Luis G. until closer to his release date.

Taking into account the documentation that had been submitted and "incorporate[ing] in total" the case worker's testimony, the circuit court concluded that the State had met its burden with respect to the four aspects of continuing need of protection or services as to the three children. Regarding the Bureau's efforts, the circuit court found that it "did everything that [it] could do." The circuit court noted that if Jennifer M. and Luis G. had not been incarcerated, they would have been able to participate in the programming that was required, but given their incarcerated status, the programming that was ordered was not available to them. The circuit court acknowledged that someone might argue that Jennifer M. and Luis G. did not have the opportunity to satisfy the conditions of return because they were incarcerated, but went on to state: "[T]hey are in prison because of behavior and conduct that got them charged with a crime, convicted and sentenced by a judge to prison. So ... they're where they're at because of criminal behavior that they engaged in, and that's not on the Bureau. That's on them." The circuit court then found both parents unfit.

In his response, Luis G. challenges the circuit court's finding that the Bureau made reasonable efforts to provide court-ordered services. He claims that because he and Jennifer M. were incarcerated, the Bureau was unwilling to provide services for him to meet the conditions of return. According to the terms of the children in need of protection or services dispositional order, Luis G. was to obtain services for anger management, parenting, and nurturing, and participate in individual therapy. Similarly, Jennifer M. was to obtain services for parenting and nurturing and participate in individual therapy. An addendum to the order, however, made clear

that “[d]uring any period of incarceration ... services required to be provided by the B[ureau] for that parent shall be limited to services that are available within the correctional institution.”

WISCONSIN STAT. § 48.415(2)(a)2.a. provides: “[R]easonable effort’ means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child ... and other relevant circumstances of the case.” The circuit court’s finding that the Bureau made a reasonable effort given the relevant circumstances—namely the incarceration of both parents based on their abuse and neglect of Eliel G.—does not present an issue of arguable merit.

In addition, Luis G. argues that he did not fully understand the implications of waiving his right to a jury trial during the grounds phase of the proceedings, even though he admits that he “professed to understanding everything.” To support his argument that he did not knowingly and intelligently stipulate to grounds, he points to his statement during the proceedings that he cannot read and write English, can only read and write “a little bit” in Spanish, and did not attend school. Luis G. claims “[t]he proceedings were too complex for me to understand and at many times I []was agreeing just to agree because I figured that’s what was expected of me.” Additionally, Luis G. asserts that at one point, his trial lawyer wanted to sever his case from Jennifer M.’s but that Luis G. let Jennifer M. make the decision to keep the cases together because he “was greatly confused.” According to Luis G., his decision to allow his wife, Jennifer M., to prompt him into making decisions shows that he did not voluntarily stipulate to grounds.

As the no-merit report submitted on his behalf points out, Luis G. was assisted by an interpreter during the court proceedings. This court further notes that during Luis G.'s colloquy, the circuit court repeatedly asked Luis G. whether he had any questions, whether he needed more time to think about what he was doing or talk to his lawyer, and whether he was confused. Luis G. never expressed any confusion, and to the extent he had difficulty explaining himself, he brought it to the circuit court's attention.⁶ The Records do not support Luis G.'s purported lack of understanding.

⁶ The following exchange reflects the lengths the circuit court went to in order to ensure Luis G.'s understanding that he was giving up his right to a jury trial:

THE COURT: ... And can you tell me why do you want to do this stipulation to grounds as opposed to having a jury trial or a court trial? What's the reason for your decision?

[Luis G.'s trial lawyer]: May I have a moment?

THE COURT: You can consult with him.

....

[Luis G.'s trial lawyer]: Thank you, Judge. I've had the time to have a brief colloquy thanks to the interpreter.

THE COURT: Sure. And do you want to tell me why you want to do this stipulation to grounds.

[Luis G.]: Because I don't want to lose the right to my kids.

THE COURT: But why are you giving up your right to a jury trial or a court trial?

[Luis G.]: I don't know how to explain it to you.

THE COURT: Well, let me ask you this. Let me ask it this way. When you're doing this stipulation to grounds, what you're telling me is, *You know, Judge, I'm not an idiot. I know the State can prove this continuing CHIPS ground, so why waste time having a jury trial or a court trial? I understand this ground can be proven, and I want to fight the battle that needs to be fought, and that is in the dispositional phase. I*

(continued)

This court concludes there is no arguable merit to challenging the validity of either Jennifer M.'s or Luis G.'s stipulations as to grounds.

Discretionary Decision to Terminate Parental Rights

Both no-merit reports address whether the circuit court properly exercised its discretion in deciding that it was in the children's best interests to terminate Jennifer M.'s and Luis G.'s parental rights. The ultimate decision whether 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, 857 (Ct. App. 1996). The best interests of the child is the prevailing factor. WIS. STAT. § 48.426(2). In considering the best interests of the child, the circuit court must consider: (1) the likelihood of adoption after termination; (2) the child's age and health; (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) the child's wishes; (5) the duration of the parent's separation 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." Sec. 48.426(3).

In its oral decision, the circuit court addressed these six statutory factors in a careful and thoughtful manner, and it concluded that termination of Jennifer M.'s and Luis G.'s parental

agree, yeah, the kids are in continuing need of protection and services, but my rights shouldn't be terminated. It's not in my children's best interest. Is that why you're doing this?

[Luis G.]: Yes. For the very same thing.

rights was in the children's best interests. The circuit court found that the likelihood of adoption for all three children was high. As to Eliel G. and Eliezer G., the circuit court found that they were first detained in 2008, reunited with their parents in 2009, and re-detained in 2010. At the time they were re-detained, their health was compromised but the court found that the twins had made a remarkable recovery thanks to the efforts of the caregivers they were placed with. The circuit court also found that Luis was flourishing thanks to the care he was receiving in his placement with Jennifer M.'s sister.

The circuit court concluded that the children did not have substantial relationships with either Jennifer M. or Luis G., and that the relationships they did have when they were all in the home together were bad ones. The circuit court explained: "Abuse and neglect is a relationship, but it's a harmful relationship. It's a frightening relationship. And that's the relationship that Eliel and Eliezer had with their parents." Meanwhile, Luis had never lived with his parents. The circuit court found that "it would be extremely harmful and detrimental *not* to sever the legal relationship" between the children and their parents. (Emphasis added.) The circuit court noted that the children's caregivers had expressed that they would, however, foster continuing relationships with both maternal and paternal family members so long as they were safe and healthy.

Acknowledging that the children had not expressed their wishes, the circuit court nevertheless found that the testimony that Eliel G. had punched a picture of his mother, "speaks volumes." The circuit court further found that the children were happy in their placements and pointed out that the long-standing duration of the children's separation from their parents was due to the abuse and neglect perpetrated by Jennifer M. and Luis G. The circuit court concluded it was clear that the children would enter a more stable, permanent, and most importantly—a

safe—family relationship as a result of termination. Consequently, it found that termination was in the best interests of the children.

In his response, Luis G. argues that the Bureau did not give proper consideration to placing the twins with family members.⁷ Insofar as this argument relates to the circuit court's consideration of whether it would be harmful to sever the children's relationships with biological family members, the Records make clear that this was carefully considered. The circuit court heard from the case worker that she considered both maternal and paternal family members when looking at placement for the twins but concluded that no one was appropriate. Additionally, it took note of the case worker's testimony that the paternal relatives, in particular, did not understand the significant ongoing needs the twins had given the history of abuse. The circuit court also heard directly from six of Luis G.'s relatives during the dispositional phase of the proceedings and described their testimony as follows:

[T]hey don't believe that [Luis G.] harmed Eliel. They believe family should take care of family. And they also in their testimony indicated they would see no problem letting [Luis G.] have a relationship with these boys[, w]hich expresses a total lack of understanding of the need to protect the children from harm.

In summary, the circuit court found that all six WIS. STAT. § 48.426(3) factors indicated that termination was in the children's best interests. The circuit court's well-reasoned decision reflects a proper exercise of discretion. *See Gerald O.*, 203 Wis. 2d at 152, 551 N.W.2d at 857 (A court "properly exercises its discretion when it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a

⁷ Luis G. focuses exclusively on the twins' placement. Presumably this is because Luis was placed with and anticipated to be adopted by Jennifer M.'s sister.

reasonable judge could reach.”). An appellate challenge to that determination would lack arguable merit.

Trial Lawyer’s Performance

Finally, the no-merit report submitted on behalf of Luis G. addresses whether his trial lawyer’s performance was constitutionally deficient and concludes that there is no basis for such a challenge. This court agrees.

An independent review of the Records reveals no other potential issues of arguable merit.⁸

Upon the foregoing, therefore,

IT IS ORDERED that the orders terminating the parental rights of Jennifer M. and Luis G. are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Randall E. Paulson, Esq., and Patrick Flanagan, Esq., are relieved of any further representation of Jennifer M. and Luis G. in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

⁸ “An appellate court is not a performing bear, required to dance to each and every tune played on appeal.” *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978). To the extent we do not address some of the plethora of issues raised by Luis G., this court deems them to lack sufficient merit or importance to warrant individual attention. *See ibid.*