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January 7, 2014

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

2013AP1991-NM	In re the termination of parental rights to Daveyanna W.M., a person under the age of 18: State of Wisconsin v. Flossie M. (L.C. #2011TP276)
2013AP1992-NM	In re the termination of parental rights to Breyonna M., a person under the age of 18: State of Wisconsin v. Flossie M. (L.C. #2011TP277)
2013AP1993-NM	In re the termination of parental rights to D'Angeles M.C., a person under the age of 18: State of Wisconsin v. Flossie M. (L.C. #2012TP55)

Before Fine, J.

Flossie M. appeals from orders terminating her parental rights to daughters Daveyanna W.M. and Breyonna M. and son D'Angeles M.C. Appellate counsel, John R. Breffeilh, Esq., has filed a consolidated no-merit report. *See* ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998) (per curiam); *see also* WIS. STAT. RULES 809.107(5m) and 809.32. Flossie M. has not responded to the no-merit report, and her guardian *ad litem*, Robb Marcus, Esq., has declined to file a separate response, concluding that Flossie M.'s best interests have been served by adversary counsel in the trial and the subsequent appeal. *See* WIS. STAT. § 48.235(7). Based on our independent review of the Records and the no-merit report, we agree that an appeal would lack arguable merit. The orders terminating Flossie M.'s parental rights are therefore affirmed. *See* WIS. STAT. RULE 809.21.

Daveyanna and Breyonna were detained on March 10, 2010. Daveyanna was about eight and one-half years old and Breyonna was about two and one-half years old. The children were deemed in need of protection or services on August 16, 2010, and placed outside Flossie M.'s home.[1] The State filed the termination petitions on September 7, 2011, alleging a continuing need for protection or services and failure to assume parental responsibility as grounds. *See* WIS. STAT. § 48.415(2) & (6).

[1] Flossie M. had prior contacts with the Bureau of Milwaukee Child Welfare between 2002 and 2008—among other things, both Daveyanna and Breyonna had been born drug-affected because of Flossie M.'s cocaine use—but Flossie M. either refused to cooperate with the Bureau or refused access to the children.

D'Angeles was born, drug-affected, on October 28, 2011, and detained at birth. He was adjudicated in need of protection or services on January 18, 2012. The State filed a termination petition on February 28, 2012, alleging failure to assume parental responsibility as grounds. Later, the State amended the petition to include continuing need for protection or services as grounds when the requisite time had elapsed.

Flossie M. originally requested a jury trial, but later agreed to plead no contest to the failure-to-assume grounds. The continuing-need-for-protection-or-services grounds would be dismissed. Following a dispositional hearing, the circuit court terminated Flossie M.'s parental rights to all three children.

Appellate counsel raises four potential issues, the first of which is whether there is any arguable merit to a claim the circuit court failed to comply with mandatory time limits, thereby losing competency to proceed. *See* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 668, 607 N.W.2d 927, 928. After a petition to terminate parental rights is filed, the circuit court has thirty days to hold an initial hearing. WIS. STAT. § 48.422(1). If a party contests the petition, the circuit 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 circuit court is to proceed with an immediate dispositional hearing, although that may be delayed up to "no later than forty-five days after the fact-finding hearing" if all parties agree. *See* WIS. STAT. § 48.424(4)(a).

These statutory time limits cannot be waived. ***April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d at 668, 607 N.W.2d at 928–929. 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).

Our review of the Records satisfies us that the time limits were either followed or adjourned for sufficient cause. Daveyanna and Breyonna's cases in particular had somewhat lengthy delays, although much of the wait time was so that D'Angeles's case could catch up to his sisters' cases. In addition, part of a subsequent plea to grounds called for the dispositional hearing to be held out ninety days so that Flossie M. had a chance to demonstrate sobriety and increase her visitation. In any event, there were no objections to any continuances in this case. Accordingly, there is no arguable merit to a claim the circuit court lost competency to proceed for noncompliance with the statutory time frames.

The second issue counsel raises is whether the termination petitions satisfy the pleading requirements of WIS. STAT. § 48.42(1). Based upon this court's independent review of the petitions, we agree with counsel's analysis: the petitions contain the information required by statute. There would be no arguable merit to a challenge to their sufficiency.

The third potential issue counsel raises is whether the circuit court "establish[ed] that there were sufficient grounds to terminate Flossie M.'s parental rights, resulting in a finding of unfitness." (Capitalization omitted.) This is actually a two-part question, and the first part is whether Flossie M. sufficiently stipulated or pled no contest to the grounds portion of the case.

Before accepting a no-contest plea to a termination petition, the circuit court must personally examine the parent about what is happening and assure that the admission is

voluntary. *See* WIS. STAT. § 48.422(7); ***Oneida County Dept. of Soc. Servs. v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 497, 762 N.W.2d 122, 124–125. Thus, the circuit court must: (1) address the parent and determine that the admission is made voluntarily, with an understanding of the nature of the acts alleged in the petition and the potential dispositions; (2) establish whether any promises or threats were made to secure the plea; (3) establish whether a proposed adoptive resource for the children has been identified; (4) establish whether any person has coerced a parent to refrain from exercising his or her parental rights; and (5) determine whether there is a factual basis for the admission of facts alleged in the petition. *See* WIS. STAT. § 48.422(7). The circuit court must also ensure that the parent understands the constitutional rights the parent is giving up, *see* ***Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d at 498, 762 N.W.2d at 125, and that the plea will result in a finding of parental unfitness, *see* ***id.***, 2008 WI App 159, ¶10, 314 Wis. 2d at 499, 762 N.W.2d at 125.

Our review of the Records satisfies us that the circuit court complied with WIS. STAT. § 48.422(7). The circuit court then went to the second step and determined that there was a sufficient factual basis to establish the grounds for the termination petitions. Failure to assume parental responsibility "shall be established by proving that the parent … [has] not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a). A substantial parental relationship "means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b). When the fact-finder evaluates whether a person has had such a relationship with the child, the fact-finder may consider such factors including but not limited to "whether the person has

expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child[.]" ***Ibid.***

To establish the factual basis for the petition, the State called family case manager Sandra Crafton to testify. She testified that the girls had been detained after Flossie M. arrived intoxicated at the police station with Breyonna. Flossie M. would not reveal Daveyanna's location. Crafton testified that Flossie M. repeatedly missed visitation, especially when she was not receiving inpatient drug treatment. She explained that Flossie M. provided no financial support for the children. Further, Flossie M. failed to attend doctor appointments for the children and often refused necessary medical treatment for the children. In fact, the Bureau had been forced to seek temporary guardianship of Daveyanna when Flossie M. refused certain treatment. Flossie M. had also refused to learn exercises to treat D'Angeles's torticollis and the flat spot on his head. There was also testimony about the extent of Flossie M.'s drug use, including that the children had all been born drug-affected. In addition to Crafton's testimony, the State introduced various documents from the children in need of protection or services proceedings, not to prove that as grounds but for a larger picture of Flossie M.'s "relationship" with the children. Our review of the Records satisfies us that Flossie M. had not "accept[ed] and exercise[d] … significant responsibility for the daily supervision, education, protection and care of the child[ren]." There is no arguable merit to a challenge to the sufficiency of the evidence to support the factual basis for the petitions.

Finally, appellate counsel discusses whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating Flossie M.'s parental rights.

See ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). Bearing in mind that the children'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). The circuit court found as follows.

Breyonna and D'Angeles's adoptions were a "done deal." The adoptive resource had been approved. The same resource had planned to adopt Daveyanna, but determined that would be unsafe for Breyonna and D'Angeles: Daveyanna had emotional and behavioral issues that were exacerbated by Flossie M.'s insistence to Daveyanna that Flossie M. was doing everything she could to get the children returned to her, and Daveyanna had decompensated to the point of

requiring inpatient treatment.[2] Nevertheless, the case manager testified that terminating Flossie M.'s parental rights to Daveyanna would likely increase the likelihood of adoption by severing the toxic relationship with Flossie M. and allowing Daveyanna to move on.

D'Angeles had been detained at birth and had "flourished" in the adoptive placement. His torticollis had been successfully treated. His asthma issues, related to his adenoids, had been treated, despite Flossie M.'s reluctance to authorize surgery. Breyonna, detained at two-and-one-half years old, had some behavioral issues that resolved since her detention. The case manager testified that once Breyonna had settled into the adoptive placement, "you can just see a relief with her," and she was less guarded and more like a kid again. Daveyanna, detained at eight-and-one-half years, had "deep-rooted dysfunction" stemming from her mother, but the circuit court believed this could be addressed over time.

The circuit court noted that D'Angeles had no relationship with Flossie M. and that Breyonna's relationship was not substantial. Thus, it would not be harmful to sever their relationships with Flossie M. Daveyanna's relationship with Flossie M. was substantial, but that relationship itself was harmful, so termination would not be. The children had no relationship

[2] Daveyanna had been moved to inpatient treatment shortly before the dispositional hearing. The State thus suggested that perhaps the circuit court should withhold a ruling on Daveyanna's fate because it was not sure what her adoption status would be. The guardian *ad litem* for the children explained how the court could decide to either withhold a ruling or proceed. Both the State and the guardian agreed the decision was up to the court. Flossie M. indicated she had no objection to severing Daveyanna's disposition from that of her siblings. Ultimately, the circuit court decided the dispositional hearing would proceed as to all three children, and it would assess Daveyanna's situation by application of the statutory factors in light of the evidence. We discern no error in the decision to proceed.

with any other biological relatives. The circuit court also noted that in the absence of adoption, Daveyanna's relationship to Breyonna and D'Angeles would be terminated. However, the adoptive family welcomed ongoing contact with Daveyanna and still hoped to be a resource for her in the future.

D'Angeles was too young to express his wishes. Daveyanna wanted to return to her mother, but the circuit court suspected this might be because she felt a need to take care of Flossie M.—when Flossie M. reported that her home had been burglarized and food stolen, Daveyanna stopped eating and started stealing money to give to Flossie M. to buy food. Breyonna appeared excited for adoption, even asking the case manager when it would happen.

Daveyanna had been out of Flossie M.'s care for nearly twenty-five percent of her life. Breyonna had been out of Flossie M.'s care for nearly half of her life. D'Angeles had been out of Flossie M.'s care his entire life.

The circuit court concluded that D'Angeles and Breyonna, whose adoption was all but certain, would "absolutely" enter a more stable and permanent family relationship if Flossie M.'s parental rights were terminated. As for Daveyanna, who was not ready for adoption, the case manager opined that Flossie M. would never be able to successfully meet the conditions of return and, if her rights were not terminated, Daveyanna would remain in foster care until she aged out of the system. The circuit court thus concluded that terminating Flossie M.'s parental rights to Daveyanna would give her the best chance to achieve permanence.

We discern no erroneous exercise of discretion in these findings and conclusions. There is no arguable merit to a challenge to the circuit court's termination decisions.

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

Upon the foregoing, therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that John R. Breffeilh, Esq., is relieved of further representation of Flossie M. in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals