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March 31, 2014

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

2014AP163-NM	In re the termination of parental rights to Eugenia P., a person under the age of 18: State of Wisconsin v. Jennifer D. (L.C. #2012TP186)
2014AP310-NM	In re the termination of parental rights to Eugenia P., a person under the age of 18: State of Wisconsin v. David P. (L.C. #2012TP186)

Before Kessler, J.[1]

Jennifer D. and David P. appeal an order terminating their parental rights to Eugenia P.[2] The state public defender appointed Attorney Carl W. Chesshir as appellate counsel for Jennifer D., and the state public defender appointed Attorney Dennis Schertz as appellate counsel for David P. Both attorneys filed and served 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), and WIS. STAT. RULES 809.107(5m) and 809.32. Neither Jennifer D. nor David P. submitted a response. We have considered counsels' no-merit reports, and we have independently reviewed the shared record. We conclude that further proceedings would lack arguable merit, and we summarily affirm the order terminating the parental rights of Jennifer D. and David P.[3]

BACKGROUND

Eugenia P., born on May 20, 2011, is the non-marital child of Jennifer D. and David P. The State detained Eugenia P. at birth, and she never lived with her parents. On May 24, 2011, a

[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.

[2] The State filed one petition seeking to terminate the parental rights of both Jennifer D. and David P., and the circuit court entered one final order terminating their parental rights. Jennifer D. and David P. each filed an appeal; those appeals share a single circuit court record. In the interest of judicial efficiency, we consolidated the appeals on our own motion for dispositional purposes.

[3] The Honorable John J. DiMotto presided over the termination of parental rights proceedings underlying these appeals.

circuit court placed her in the custody of the Bureau of Milwaukee Child Welfare upon findings that Jennifer D.'s parental rights to two older children were previously terminated, that "[Jennifer D.] has an IQ of 64, and [that,] in previous psychological evaluations[,] it has been found that [she] cannot manage a child in an independent fashion." The temporary order further includes circuit court findings that David P. has an older child who is placed with a maternal aunt, that David P. "has cognitive issues," and that he acknowledges he is a "slow learner" who is unable to read. On September 30, 2011, the same circuit court found that Eugenia P. was a child in need of protection or services (CHIPs).[4]

On July 11, 2012, the State filed a petition to terminate the parental rights of Jennifer D. and David P., alleging that they failed to assume parental responsibility for Eugenia P. and that she remained a child in continuing need of protection or services. *See* WIS. STAT. §§ 48.415(6), 48.415(2). In the petition, the State alleged that Jennifer D. and David P. are cognitively limited individuals who lack the capacity to care for a child. The State further alleged that Jennifer D. and David P. live in "hoarder-type conditions" that include reported "severe clutter, animal feces, and insect infestation," and that the "EMTs who took [Jennifer D.] to the hospital for the child's birth had a difficult time getting into the home because of the messy[,] dirty conditions."

Jennifer D. and David P. contested the allegations in the petition for some time and requested a trial. On June 24, 2013, however, Jennifer D. and David P. both stipulated that Eugenia P. continued to be a child in need of protection or services, and the circuit court granted the State's motion to dismiss the alternate ground for terminating parental rights. At the

[4] The Honorable Stephanie Rothstein presided over the juvenile court proceedings leading to the finding that Eugenia P. was a child in need of protection or services.

dispositional hearing on November 5, 2013, the circuit court found that terminating the parental rights of Jennifer D. and David P. was in Eugenia P.'s best interest.

COMPLIANCE WITH STATUTORY TIME LIMITS

We first consider whether David P. and Jennifer D. could raise an arguably 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. 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. WIS. STAT. § 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." WIS. STAT. § 48.424(4).[5]

When the 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." WIS. STAT. § 48.315(2). Failure to object to a continuance, however, "waives any challenge to the court's competency to act during the period of delay or continuance." WIS. STAT. § 48.315(3).

[5] The deadlines in WIS. STAT. §§ 48.422(1)-(2) and 48.424(4) are subject to an exception applicable to American Indian children that is not relevant here.

Here, 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 continuance and neither Jennifer D. nor David P. objected to any period of delay. Accordingly, they 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.***

STIPULATION TO GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

On June 24, 2013, the date set for trial, Jennifer D. and David P. both decided to stipulate that grounds existed under WIS. STAT. § 48.415(2)(a) for terminating their parental rights to Eugenia P. Before accepting an admission of facts alleged in a termination of parental rights petition, the circuit court must comply with the requirements of WIS. STAT. § 48.422(7). *See* ***Oneida Cnty. DSS v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 762 N.W.2d 122. 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. WIS. STAT. § 48.422(7).

The circuit court's duties when accepting an admission that grounds exist for termination of parental rights also include the obligation to tell the parent that, during the dispositional stage of the proceedings, "the court will hear evidence ... and then will either terminate the parent's rights or dismiss the petition if the evidence does not warrant termination." ***Therese S.***, 314 Wis. 2d 493, ¶16. Further, "the court must inform the parent that '[t]he best interests of the child

shall be the prevailing factor considered by the court in determining the disposition.'" ***Id.*** (citation omitted; brackets in ***Therese S.***). Additionally, "the parent must have knowledge of the constitutional rights given up by the plea." ***Id.***, ¶5. Finally, "parents must understand that acceptance of their plea will result in a finding of parental unfitness." ***Id.***, ¶10.

The record here establishes compliance with the requirements of WIS. STAT. § 48.422(7) and ***Therese S.*** The circuit court placed both Jennifer D. and David P. under oath and conducted comprehensive individual colloquies with each of them about their decisions to stipulate to the existence of grounds for termination of their parental rights.

The circuit court explained—first to Jennifer D. and then to David P.—the two-part procedure in a termination of parental rights case. The circuit court explained that in the first phase of the proceeding, the State is required to prove that grounds exist to terminate parental rights and that the fact finder in the first phase would be either a judge or a jury. Both parents said that they understood. The circuit court told the parents about their rights to present testimony, call witnesses, and cross-examine any witnesses called by the State. Jennifer D. and David P. both said that they understood. The circuit court told Jennifer D. and David P. that they were giving up the right to a trial on the question of whether Eugenia P. was a child in continuing need of protection or services but that each parent would have the opportunity to present testimony and witnesses on the question of whether termination of parental rights was in Eugenia P.'s best interest. Jennifer D. and David P. said that they understood, and both of them confirmed that they had not been threatened or promised anything to induce them to concede that grounds existed for termination of their parental rights.

The circuit court discussed with Jennifer D. and David P. that the State must prove certain elements at trial to establish that Eugenia P. is a child in continuing need of protection and services as defined in WIS. STAT. § 48.415(2)(a). Specifically, the State must present clear and convincing evidence that: (1) the child was adjudged to be in need of protection or services and placed outside the home for six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law; (2) the agency responsible for the care of the child and the child's family made reasonable efforts to provide the services ordered by the court; (3) the child's parent has not met the conditions established for the child's safe return to the parent's home; and (4) a substantial likelihood exists that the child's parent will not meet those conditions within nine months after the hearing. *See* ***id.***; *see also* WIS. STAT. § 48.31(1) (stating the burden of proof). The circuit court explained the elements to Jennifer D. and David P., and the circuit court established that both parents understood the elements and the State's burden of proof.

Both Jennifer D. and David P. testified that they were not married to each other but that they lived together. Both denied being under the influence of any drugs or alcohol. Jennifer D. and David P. assured the circuit court that each had had the opportunity to review with counsel the allegations in the petition seeking termination of parental rights and to discuss with counsel the decision to stipulate that grounds existed for the termination of those rights.

The circuit court told Jennifer D. that it would find her to be an unfit parent upon accepting her stipulation. Jennifer D. said that she understood. The circuit court similarly told David P. that it would find him to be an unfit parent upon accepting his stipulation, and David P. also said that he understood.

The circuit court also questioned the trial lawyers representing Jennifer D. and David P. The attorneys assured the circuit court that they had fully discussed with their clients the rights at stake, the possible defenses, and the procedures involved in a hearing to dispute whether grounds exist for terminating parental rights. Counsel for Jennifer D. told the circuit court that, in counsel's opinion, Jennifer D. understood the elements that the State would have to prove, the rights she waived, and the nature of the proceeding, and that counsel did not know of any "threats, promises, force or coercion used" to induce Jennifer D. to stipulate that grounds existed for termination of her parental rights. Counsel for David P. similarly told the circuit court that, in counsel's opinion, David P. understood "the pros and cons" of stipulating, the "rights he has and is giving up," and that he was "freely, voluntarily, intelligently and understandingly" entering the stipulation.

Following the circuit court's colloquies with Jennifer D., David P., and their lawyers, the State presented testimony and evidence that Eugenia P. was a child in continuing need of protection or services. *See* ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶¶53, 56, 233 Wis. 2d 344, 607 N.W.2d 607 (even when petition to terminate parental rights is uncontested, circuit court must nonetheless hear testimony in support of the allegations in the petition).

Robert Themmes testified that he is the ongoing family case manager assigned to provide services to Eugenia P. and her parents. He testified that Eugenia P. was the subject of a CHIPs proceeding that resulted in a finding that she was a child in need of protection or services. He further testified that he was in the courtroom during the CHIPs proceeding when the court placed Eugenia P. outside of her parents' home pursuant to an order that contained termination of parental rights warnings. The circuit court then received in evidence certified copies of the orders entered in the CHIPS case.

The dispositional order entered in the CHIPs matter on September 30, 2011, included findings that Jennifer D. and David P. have "cognitive limitations that result in diminished and compromised parenting abilities and daily functioning to an extent that they could not handle the responsibilities of full time care of an infant child without assistance." The order also included the conditions that Jennifer D. and David P. were required to fulfill before Eugenia P. could be placed in their care. The conditions included, *inter alia*: (1) "articulat[ing] a plan on how to protect Eugenia [P.] and meet [her] daily physical, medical and developmental needs"; (2) "demonstrat[ing] the ability to safely provide [for] the daily physical, medical and developmental needs [of] Eugenia [P.]"; and (3) "demonstrat[ing] the ability to have a safe, suitable[,] and stable home."

Themmes testified that neither parent had satisfied the conditions necessary to permit Eugenia P. to return to her parents' home, and therefore she remained in foster care. Themmes said that Jennifer D. and David P. had supervised visits with Eugenia P. under the auspices of several social service agencies, but that Jennifer D. and David P. "continue[d] to be unable to satisfy the condition of articulating how they will regularly continually meet Eugenia's needs and keep her safe." Themmes explained that neither Jennifer D. nor David P. knew how to react "when a safety concern arises," and that "when [safety concerns] do arise and they are unexpected, [Jennifer D. and David P.] are unable to demonstrate how to keep Eugenia safe." Themmes also opined that, although the condition of Jennifer D.'s and David P.'s home had "slight[ly] improve[ed] from the beginning of the case," the change was "not significant ... as far as cleanliness." Themmes further testified that Jennifer D. and David P. had "tried to meet the[] conditions for almost two years" but "those conditions have not been met and things have not changed significantly." *See* ***LaCrosse Cnty. DHS v. Tara P.***, 2002 WI App 84, ¶14, 252 Wis. 2d

179, 643 N.W.2d 194 (long history of failing to satisfy conditions for return of child to parent's care is evidence tending to show that parent is unlikely to meet the conditions in the future). Finally, Themmes told the circuit court that the State had identified an adoptive resource for Eugenia P.

At the conclusion of the hearing, the circuit court found a factual basis for Jennifer D.'s and David P.'s stipulations that Eugenia P. was a child in continuing need of protection or services. The circuit court accepted each parent's stipulation, and found that Jennifer D. and David P. were unfit parents.

The record establishes that Jennifer D. and David P. each knowingly, voluntarily, and intelligently stipulated that Eugenia P. was a child in continuing need of protection and services. The State supported the allegations contained in the petition. The circuit court properly concluded that Jennifer D. and David P. were unfit parents. We are satisfied that further appellate proceedings regarding this issue would lack arguable merit.

DISCRETIONARY DECISION TO TERMINATE PARENTAL RIGHTS

We next consider whether Jennifer D. and David P. could mount an arguably meritorious challenge to the decision to terminate their 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 determining the best interests of the child, a circuit court must 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." WIS. STAT. § 48.426(3).

The State presented testimony at the dispositional hearing from Themmes, from Colleen P., who is the foster mother and adoptive resource for Eugenia P., and from Renee L. Genin, a licensed clinical social worker who conducted a bonding study to assess the relationships that Eugenia P. has with her biological and her foster parents. David P. testified on his own behalf. At the conclusion of the testimony, the circuit court considered each of the statutory factors in light of the evidence presented.

The circuit court first found that Colleen P. and her husband, Steven P., are committed to adopting Eugenia P., and the circuit court noted that Colleen P. and Steven P. have adopted Jennifer D.'s two older children. The circuit court considered Eugenia P.'s age and health, taking into account Themmes's description of Jennifer D.'s and David P.'s home as "extremely unclean" and an unsafe environment for a child. The circuit court further noted that Eugenia P. had never lived with her biological parents and that the foster parents had addressed her speech delays and assisted her in becoming "a relatively healthy child."

The circuit court next found that Eugenia P. had no relationship with her extended biological family on either her mother's or her father's side with the exception of her two half-siblings who have been adopted by Colleen P. and Steven P. The circuit court therefore concluded that terminating the parental rights of Jennifer D. and David P. had no potential to harm any relationship that Eugenia P. had with her extended biological family.

The circuit court also discussed the results of the bonding study that Genin conducted. The circuit court acknowledged that Jennifer D. and David P. love Eugenia P., but the circuit court credited Genin's assessment that neither Jennifer D. nor David P. were "attuned" to Eugenia P. and further credited Genin's view that a caregiver's attunement is critical to a child's healthy maturation. In Genin's opinion, neither Jennifer D. nor David P. can interpret or respond to Eugenia P.' s cues, and, therefore, "a secure attachment relationship cannot develop." The circuit court also accepted Genin's conclusion that Eugenia P.'s "real attachment" is to her foster family. The circuit court therefore determined that Eugenia P.'s relationships with Jennifer D. and David P. are not substantial and that severing those relationships would not be harmful to Eugenia P.

Finally, the circuit court found that termination of Jennifer D.'s and David P.'s parental rights would permit Eugenia P. to enter into a more stable and permanent family relationship. The circuit court observed that Eugenia P. is fully integrated into her foster family's household, and the circuit court determined that terminating parental rights would ensure that Eugenia P. could remain in the home where she has lived with her primary caregivers and biological half-siblings throughout all but a few weeks of her life. The circuit court concluded that, in light of the statutory factors, the best interests of Eugenia P. required terminating the parental rights of Jennifer D. and David P.

The record shows that the circuit court properly exercised its discretion. The circuit court examined the relevant facts, applied the proper standard of law, and used a rational process to come to a reasonable conclusion. *See* ***Gerald O.***, 203 Wis. 2d at 152. An appellate challenge to the circuit court's decision to terminate the parental rights of Jennifer D. and David P. would lack arguable merit.

JENNIFER D.'S ABSENCE FROM THE COURTROOM DURING THE DISPOSITONAL HEARING

We next consider whether Jennifer D. could mount an arguably meritorious challenge to the order terminating her parental rights because she was absent from the courtroom during the dispositional hearing. A parent has the right to participate meaningfully in proceedings to terminate his or her parental rights, and this right to participate requires the parent's personal presence or its functional equivalent. *See* ***State v. Lavelle W.***, 2005 WI App 266, ¶8, 288 Wis. 2d 504, 708 N.W.2d 698. A parent, however, may knowingly waive this right. *See* ***id.*** Here, Jennifer D. asked for permission to leave the courtroom during the dispositional hearing because she feared that she would be overcome by emotion during the proceedings. The circuit court conducted a colloquy with her regarding her wishes. She assured the circuit court that she voluntarily elected to limit her participation in the proceedings and understood how her absence from the courtroom would affect her ability to hear the testimony and communicate with her attorney. The circuit court confirmed that Jennifer D.'s trial attorney would remain in the courtroom and participate on Jennifer D.'s behalf. The circuit court then granted Jennifer D.'s request and permitted her to wait in the hallway during the hearing, explaining that she could return to the courtroom anytime if she wished to do so. The record thus reflects that Jennifer D. knowingly elected to limit her participation in the proceedings. A party "'cannot be heard to complain of an act to which [s]he deliberately consents.'" ***Nehls v. Nehls***, 2012 WI App 85, ¶14, 343 Wis. 2d 499, 819 N.W.2d 335 (citation omitted). Further appellate proceedings regarding this issue would be frivolous within the meaning of ***Anders***.

LACK OF GUARDIANS *AD LITEM* FOR JENNIFER D. AND DAVID P.

We next consider whether Jennifer D. and David P. could pursue meritorious challenges to the order terminating their parental rights on the ground that the circuit court did not appoint guardians *ad litem* for them. We are satisfied that any such challenge would lack arguable merit. Trial counsel for each parent described for the circuit court early in the instant proceedings the steps taken by each lawyer to determine his or her client's competency and whether to request appointment of a guardian *ad litem*. Each lawyer advised the circuit court that his or her client could assist with preparation of the case and that appointment of a guardian *ad litem* was therefore unwarranted. Additionally, the record shows that a psychologist assessed both Jennifer D. and David P. during the CHIPs proceedings and, based on the assessments, the parties did not request a guardian *ad litem* for either parent in those proceedings. *Cf.* WIS. STAT. § 48.235(1)(g) (requiring appointment of a guardian *ad litem* for a parent who is subject to termination of parental rights if any assessment or examination reveals that the parent is not competent to participate in the proceeding or to assist his or lawyer or the court in protecting the parent's rights). Finally, the record shows that Jennifer D. and David P. live together in the community and function as a family unit without day-to-day supervision. Further proceedings based on absence of guardians *ad litem* for Jennifer D. and David P. would be frivolous within the meaning of ***Anders***.

TRIAL COUNSELS' EFFECTIVENESS

Appellate counsel for David P. examines whether David P.s trial counsel was constitutionally ineffective and concludes that no arguably meritorious basis exists for such a challenge. This court independently concludes that the record offers no basis for challenging

trial counsel's effectiveness. We are also satisfied that no arguably meritorious basis exists in the record to challenge the effectiveness of Jennifer D.'s trial counsel.

Based on an independent review of the record, we conclude that no additional issues warrant discussion. Any further proceedings would be without arguable merit.

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

IT IS FURTHER ORDERED that Attorney Carl W. Chesshir is relieved of any further representation of Jennifer D. on appeal. *See* WIS. STAT. RULE 809.32(3).

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of David P. on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals