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July 1, 2014

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

2014AP77-NM State v. Ray B. (L.C. #2012TP000259)

Before Brennan, J.[1]

Ray B. appeals from a circuit court order terminating his parental rights to Nevaeh P.[2] Ray B.'s appointed attorney, Colleen Marion, has filed a no-merit report. *See* ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (per curiam); *see also* WIS. STAT. RULES 809.107(5m) and 809.32. Ray B. has not filed a response. This court has considered counsel's report and has independently reviewed the record. This court agrees with counsel's conclusion that an appeal would lack arguable merit. Therefore, the order terminating Ray B.'s parental rights is summarily affirmed. *See* WIS. STAT. RULE 809.21.

BACKGROUND

Nevaeh P. was born in March 2010. She lived with her mother and her mother's family until November 2011, when the State filed a petition for protection or services against both parents. The petition alleged that Nevaeh P.'s parents had significant cognitive limitations and were unable to care for Nevaeh P. The circuit court found Nevaeh P. to be a child in need of protection or services (CHIPS).

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

This case shares a record with Case No. 2013AP2854, which involves the order terminating the parental rights of Nevaeh P.'s mother. The court previously advised the parties that sharing records may prevent this court from resolving one or both of the appeals within the deadline imposed by WIS. STAT. RULE 809.107(6)(e). We may extend that deadline pursuant to WIS. STAT. RULE 809.82(2)(a) for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). Good cause is found and this court now extends the decisional deadline for this matter through the date of this decision.

[2] The Honorable Mark A. Sanders entered the order terminating Ray B.'s rights to Nevaeh P. The Honorable Pedro A. Colon accepted Ray B.'s stipulation as to grounds and found him unfit.

In October 2012, the State moved to terminate Ray B.'s rights on two grounds: continuing CHIPS and failure to assume parental responsibility.[3] *See* WIS. STAT. § 48.415(2) & (6). Based on his cognitive limitations, a guardian *ad litem* was appointed for Ray B. in addition to his adversary counsel.

Ray B. participated in the litigation, appearing at each court hearing. Initially, his counsel expressed to the court that Ray B. wanted to voluntarily terminate his parental rights to Nevaeh P. Counsel advised that Ray B. had previously voluntarily terminated his parental rights to another child, and as a result, had some familiarity with the process. During his colloquy with the circuit court, Ray B. informed the court that he wanted additional time to talk about his decision with his counsel and guardian *ad litem*. The court subsequently adjourned the hearing to give Ray B. time to think and to allow for the appointment of counsel for Nevaeh P.'s mother.

At the adjourned hearing, the parties informed the court that Ray B. no longer wanted to voluntarily terminate his rights.

At the final pretrial hearing, counsel for Ray B. advised that he had recently learned that Nevaeh P.'s foster mother—who had adopted Ray B.'s son—was ready, willing, and able to also adopt Nevaeh P. In light of this information, counsel informed the court that Ray B. was prepared to voluntarily terminate his rights to Nevaeh P. Counsel, however, asked that the hearing not take place until the previously scheduled grounds trial date so that he would have an opportunity to prepare with Ray B. in advance. Meanwhile, Nevaeh P.'s mother would be moving forward with her trial on that date.

[3] The State also moved to terminate the rights of Nevaeh P.'s mother on the same grounds.

On the grounds trial date, Ray B.'s counsel advised the court that he had learned Ray B. no longer wanted to voluntarily terminate his rights to Nevaeh P. Counsel explained that Ray B. told him this the day before and that counsel was "in a bind" because he had not subpoenaed witnesses or prepared for a jury trial. Following a recess, the court explained that it would not be adjourning the trial. While acknowledging the difficulties counsel may have with his client, the circuit court noted there were overlapping witnesses to be called by the State and Ray B. and further explained that the trial had been set for a long time and that a "whole week of resources [was] committed to this trial including the [j]ury, including preparation of many witnesses."

While waiting for the jury, the circuit court made the following remarks:

> We did talk about how to proceed today; and Connie [Nevaeh P.'s mother] and Ray, we're expecting to have a trial. That is what you requested and we want to honor your rights.
>
> But also after looking at the file, I think that if your wish is to have Nevaeh back or have Nevaeh be taken care of by someone or have Nevaeh be adopted by someone, you can argue that at disposition.
>
> Your attorneys have informed me that they are willing to do that.
>
> In fact, Mr. Bockhorst [counsel for Ray B.] indicates there may be some family members that you think are capable and able to take care of your child.
>
> And this is really hard for everyone. I understand. It's about babies and we care about them and they're babies; and so I know it's very difficult for you, but I want you to consider that. It will be outside of the presence of the jury for whatever that may be worth.
>
> It is also a hearing where the rules of evidence, that is the rules I have to govern myself by and the attorneys have to govern themselves by are looser. That way you can make more arguments. They're allowed to make more arguments in a much easier fashion and they can just as well argue that Nevaeh can be taken care of by whomever you think should be that person.

> I can tell you … you'll get a very fair hearing about all that I will decide after listening to all the parties.
>
> I think the advantage of that is that if you wish, I can give you an adjournment. You can come back and talk about what alternatives there are. I don't know if it's a family member.
>
> This is my file; okay? I know that the file is much bigger. You guys have a very full story about your relationship with Nevaeh; and that relationship, there are some good parts and some really difficult parts. I want you to consider that. That will avoid having to go through a formal trial in front of members that we chose from the community.
>
> They're randomly chosen so it's fair, and they'll be fair to you also; but I think if the ultimate goal here is for you to argue that either Nevaeh should come home with either of you, that Nevaeh should be taken care of by someone else, or that Nevaeh should be adopted, you'll still have that right under disposition; and your attorneys know how to do this and you don't have to have the trial.

Following a short break, Ray B. stipulated to the failure-to-assume-parental-responsibility ground. The circuit court conducted a colloquy with Ray B. during which it explained and confirmed Ray B.'s understanding of the ground to which he was stipulating, informed Ray B. of the rights he was giving up and the State's burden of proof, and established that Ray B. had discussed his decision with his counsel and his guardian *ad litem*. The circuit court confirmed that Ray B. understood it would have to declare him an unfit parent as a result of the stipulation and that at the dispositional phase in the proceedings, its focus would be on Nevaeh P.'s best interests. Ray B. advised the court that he had not been threatened or promised anything in exchange for his stipulation, that he was voluntarily entering into the stipulation, and that he was satisfied with his counsel's representation.

The circuit court also heard testimony from a family case manager, which resulted in a finding that there was a factual basis for the failure-to-assume-parental-responsibility ground

alleged in the petition. The circuit court accepted Ray B.'s stipulation, found him unfit, and dismissed the continuing-CHIPS ground.

The case proceeded to a dispositional hearing. Although there are indications in the record that paternal relatives were interested in having placement of Nevaeh P., neither the relatives nor Ray B. testified during the hearing. Nevaeh P.'s foster mother, who was also raising Ray B.'s son, testified that she wanted to adopt Nevaeh P. Following this testimony, Ray B.'s attorney informed the court:

> [Ray B.'s counsel]: Ray endorses the idea of [the foster mother] adopting Nevaeh. He is not prepared nor able to do a voluntary [TPR], the questioning is just a little too emotional for him.
>
> THE COURT: I understand.
>
> [Ray B.'s counsel]: However, he does not want to contest the disposition….
>
> THE COURT: Is that right, Mr. B[.]?
>
> Mr. [B.]: Yes.

Ultimately, the circuit court determined that terminating Ray B.'s parental rights was in Nevaeh P.'s best interests. This appeal follows.

DISCUSSION

The no-merit report addresses three issues: (1) whether the circuit court adhered to statutory time limits; (2) whether Ray B.'s stipulation to the failure-to-assume-parental-responsibility ground was made knowingly and voluntarily and whether there was sufficient evidence to support it; and (3) whether the circuit court erroneously exercised its discretion when it decided to terminate Ray B.'s parental rights. We agree with appellate counsel that there

would be no merit to raising these issues in a postdisposition motion or on appeal, and we will briefly address each of the potential issues counsel has identified.

We begin with the statutory time limits. We have examined the record and we agree with counsel that at each hearing a continuance was granted, the circuit court had good cause to do so. *See* WIS. STAT. § 48.315(2). At times, continuances were based on Ray B.'s desire to further discuss the option of a voluntary TPR with counsel. Other continuances were based on the parties' various scheduling conflicts, including those of Ray B.'s counsel and guardian *ad litem*. Further, Ray B. did not object to any of the extensions. *See* § 48.315(3). There would be no merit to asserting that the circuit court failed to follow the statutory rules concerning time limits.

Next, we address Ray B.'s decision to stipulate to a single ground for termination: failure to assume parental responsibility. Our supreme court has summarized the applicable legal standards:

> A parent who chooses to enter a no contest plea during th[e grounds] phase is giving up valuable protections and must have knowledge of the rights being waived by making the plea.
>
> The principles and analysis of ***Bangert*** apply.[4] The circuit court must engage the parent in a colloquy to ensure that the plea is knowing, voluntary, and intelligent. This colloquy is governed by the requirements of WIS. STAT. § 48.422(7) and notions of due process.
>
> If the parent can later show that the colloquy was deficient and also alleges that he or she did not know or understand the information that should have been provided, that parent has made a prima facie case that the plea was not knowing, voluntary, and intelligent. At that point, the burden shifts to the petitioner to

[4] *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

> demonstrate by clear and convincing evidence that the parent knowingly, voluntarily, and intelligently pled no contest.

Brown Cnty. DHS v. Brenda B., 2011 WI 6, ¶¶34-36, 331 Wis. 2d 310, 795 N.W.2d 730 (citations omitted; some formatting altered).

We have considered whether the circuit court's comments, which preceded Ray B.'s decision to stipulate, somehow coerced him to give up his right to a jury trial. It appears that the circuit court was trying to explain the purpose of the dispositional hearing and to ensure that it was properly addressing the parents' concerns. Certainly, with the benefit of a guardian *ad litem* and counsel to assist him, Ray B. knew he had the option of going to trial—having changed his mind twice about voluntarily terminating his rights during the underlying proceedings. Moreover, neither Ray B. nor his counsel claimed that he had assumed parental responsibility.

The record shows Ray B.'s competence and understanding. During its colloquy with Ray B., the circuit court learned that he had graduated from high school, where he was in special education classes. Ray B. was employed at Old Navy, a job he obtained through the Milwaukee Center for Independence, and had worked there for two years. At this point in the colloquy, the circuit court disclosed that it had watched a video about Ray B. that documented "what a good worker and a good person he has been throughout that work history." Additionally, the circuit court confirmed that Ray B. could read and speak English.

The circuit court also addressed Ray B.'s understanding of the rights he was giving up and detailed the failure-to-assume-parental-responsibility ground. The circuit court established that no promises or threats were made to force Ray B. to enter the stipulation. Additionally, the circuit court explained to Ray B. that as a result of his admission, the circuit court would have to

declare him an unfit parent. The circuit court further advised that during the dispositional phase that would follow, it would consider Nevaeh P.'s best interests.

In ***Brenda B.***, the court explained: "To render a plea knowing, voluntary, and intelligent, we conclude that the parent must be informed of the two independent dispositions available to the circuit court. That is, the court may decide between dismissing the petition and terminating parental rights." ***Id.***, ¶56. Here, the circuit court's statements that as a result of Ray B.'s admission it would find him unfit and that it would consider Nevaeh P.'s best interests during the dispositional phase, in conjunction with its earlier statements to Nevaeh P.'s parents about what would happen at the dispositional hearing, satisfied ***Brenda B.***

As set forth above, the circuit court explained to Ray B. and Nevaeh P.'s mother:

> if the ultimate goal here is for you to argue that either Nevaeh should come home with either of you, that Nevaeh should be taken care of by someone else, or that Nevaeh should be adopted, you'll still have that right under disposition; and your attorneys know how to do this and you don't have to have the trial.

From this, Ray B. would have known that during the disposition phase, the court would either be terminating his rights to Nevaeh P. or dismissing the petition. Thus, this case is distinguishable from ***Oneida County DSS v. Therese S.***, 2008 WI App 159, ¶20, 314 Wis. 2d 493, 762 N.W.2d 122, where the court concluded earlier statements by the circuit court were inadequate because they were not directed at the mother and did not convey the standards to be applied at the dispositional stage. Moreover, there is no indication in the record before this court that Ray B. did not understand the potential dispositions. *See* ***id.***, ¶6 (to invalidate a no-contest plea, parent must make prima facie showing that the circuit court violated its mandatory duties and allege he

or she did not know or understand the information that should have been provided at the hearing).[5]

Additionally, as part of its compliance with WIS. STAT. § 48.422(7), the circuit court heard testimony from the family case manager concerning the factual basis for the stipulation.[6] The circuit court heard that Nevaeh P. had never resided with Ray B. and that prior to Nevaeh P.'s detention, Ray B.'s contact with her was sporadic. After Nevaeh P. was detained, visits with her were set up for Ray B. and when he had regular visits, "they go pretty good." However, the case manager relayed that Ray B. was no longer having visits "due to a phone issue or he had to work, or something happens where he's not able to have a visit."

The case manager also explained that there were concerns about Ray B.'s ability to care for Nevaeh P. on a full-time basis. At the time, Ray B. lived with his mother who ensured that his own needs were met. The case manager testified that a parenting assistant was provided to Ray B. in an effort to assist in his interactions with Nevaeh P., and while there was progress on that front, there was "no progress in prompting of daily care, so feeding, clothing and bathing, changing, those kinds of things."

[5] This court further notes that the circuit court did not "[e]stablish whether a proposed adoptive parent of the child ha[d] been identified" during the colloquy itself. *See* WIS. STAT. § 48.422(7)(bm). However, doing so would have been redundant given that the circuit court had previously been informed that Nevaeh P.'s foster mother, who had previously adopted Nevaeh P.'s brother, was ready, willing, and able to also adopt Nevaeh P.

[6] The circuit court allowed Ray B. to leave for this portion of the proceedings. *See generally* ***State v. Lavelle W.***, 2005 WI App 266, ¶8, 288 Wis. 2d 504, 708 N.W.2d 698 (a parent can waive personal presence at a proceeding to terminate his or her parental rights).

The circuit court accepted the case manager's testimony. It found that the State had proven the failure-to-assume-parental-responsibility ground by clear, convincing, and satisfactory evidence, and consequently, found Ray B. unfit. *See* WIS. STAT. § 48.424(4). Ray B.'s stipulation and the case manager's testimony support these findings. There would be no merit to challenging Ray B.'s stipulation or alleging that there was no factual basis for the stipulation.

The third issue is whether there would be any merit to challenging the circuit court's decision to terminate Ray B.'s parental rights. The decision to terminate a parent's rights is discretionary and the best interests of the child is the prevailing standard. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The circuit court considers multiple 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).

Here, there would be no merit to challenging the circuit court's exercise of discretion. As noted, Ray B. did not contest the disposition and endorsed the foster mother's adoption of Nevaeh P. The circuit court considered the statutory factors and found that they weighed in favor of termination.

For example, the circuit court found that the likelihood of Nevaeh P.'s adoption was high given the foster mother's "clear desire" to do so. Additionally, the circuit court noted that Nevaeh P. was receiving therapy and medication to meet her needs and that she was considered healthy at the time of the disposition. The circuit court commented on Nevaeh P.'s substantial relationship with both of her parents and with her biological brother. Although it concluded that there would be harm to severing Nevaeh P.'s relationship with her parents, the court found the harm would be limited by the fact that the foster mother had agreed to allow contact to continue with the parents. The court found it would be more harmful to sever Nevaeh P.'s relationship with her brother, "which seem[ed] to be the most constant and present relationship" Nevaeh P. had had, than it would be to sever her relationship with her parents. Nevaeh P., who was three at the time of the disposition, was too young to actively express her wishes, but the court accounted for the testimony that she was sometimes sad when leaving her mother and that Nevaeh P. was otherwise doing well in her foster mother's home and seemed happy. With the duration of the separation approaching two years, the court noted that this was two-thirds of Nevaeh P.'s life. The court found that the conditions of Nevaeh P.'s placement with her foster mother were positive and allowing her to continue there would allow her to remain with her brother while still having the opportunity to see her parents.

Ultimately, the circuit court found that, having considered the statutory factors, termination of Ray B.'s parental rights was in Nevaeh P.'s best interests. The circuit court's

findings are supported by the record and reflect a proper exercise of discretion. An appellate challenge to the circuit court's exercise of discretion would lack arguable merit.

Upon the foregoing,

IT IS ORDERED that Attorney Colleen Marion is relieved of any further representation of Ray B. on appeal.

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

Diane M. Fremgen
Clerk of Court of Appeals