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March 3, 2015

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Lenora W.

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

2014AP2907-NM In re the termination of parental rights to Tommy C., a person under
the age of 18: State of Wisconsin v. Lenora W. (L.C. #2013TP289)

Before Curley, P.J.¹

Lenora W. appeals an order terminating her parental rights to Tommy C. Attorney
Pamela Moorshead, appointed counsel for Lenora W., filed and served a no-merit report pursuant

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

to *Anders v. California*, 386 U.S. 738 (1967), *Brown Cnty. 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 (2011-12). Lenora W. did not submit a response. We have considered counsel's no-merit report, and we have independently reviewed the record. We conclude that further proceedings would lack arguable merit, and we summarily affirm the order terminating Lenora W.'s parental rights.

BACKGROUND

Tommy C. was born to Lenora W. and Tommy C., Sr., on February 8, 2012, after twenty-four weeks' gestation.² Tommy C. weighed one pound, one ounce at birth. He had barbiturates in his system, and carried numerous diagnoses, including but not limited to respiratory distress syndrome, intrauterine drug exposure, apnea of prematurity, anemia of prematurity, thrombocytopenia, bronchopulmonary dysplasia, TPN cholestasis, ileal stricture, retinopathy of prematurity, suspected fetal alcohol syndrome, hypotension, candida UTI, gastroesophageal reflux, osteopenia of prematurity, enterococcus urosepsis and anal fistula. He was incubated until May 2012, when he was moved into a sterile crib at Children's Hospital.

In June 2012, while Tommy C. remained hospitalized, the State filed a petition alleging that he was a child in need of protection or services (a CHIPS petition). Certified copies of documents from that proceeding are in the record. They reflect that, on August 27, 2012, a circuit court commissioner ordered Tommy C. taken into temporary physical custody upon findings that Lenora W. used alcohol, cocaine, and THC throughout her pregnancy and that both

² Because Tommy C. and his biological father have the same name, we refer to Tommy C.'s biological father as Tommy C., Sr., throughout this opinion.

of Tommy C.'s biological parents engaged in ongoing substance abuse. The court commissioner further ordered Tommy C. held by the Bureau of Milwaukee Child Welfare in an approved foster home or treatment home. The next day, Children's Hospital discharged Tommy C., and the Bureau placed him in the home of Grady W. and his wife, Corliss W.

On October 9, 2012, the trial court presiding over the CHIPS proceeding found that Tommy C. was a child in need of protection or services because both of his parents "have severe unmet drug addiction issues that impede their respective ability to provide appropriate care for this very vulnerable child."³ Pursuant to the CHIPS order, Tommy C. remained placed outside of Lenora W.'s home in the care of Grady W. and Corliss W.

On October 1, 2013, the State filed a petition to terminate the parental rights of Lenora W., alleging that she had abandoned Tommy C. for periods of three months and six months, that Tommy C. was a child in continuing need of protection or services, and that Lenora W. had failed to assume parental responsibility for him.⁴ See WIS. STAT. §§ 48.415(1)(a)2-3., 48.415(2), 48.415(6). Lenora W. initially contested the allegations in the petition and requested a trial. On May 5, 2014, however, she stipulated that she had abandoned Tommy C. within the meaning of WIS. STAT. § 48.415(1)(a)2., admitting the allegations that she had no visits or communication with him for a period of at least three months during which he had continued in a placement outside of her home pursuant to a court order that contained the termination of parental rights notice required by law. See *id.* The trial court accepted her

³ The Honorable Karen Christenson presided over the CHIPS proceeding.

⁴ The petition also sought to terminate the parental rights of Tommy C., Sr. The order terminating his parental rights is not at issue in this appeal.

stipulation and dismissed the remaining grounds for termination of her parental rights. At the dispositional hearing on August 14, 2014, the trial court found that terminating her parental rights was in Tommy C.'s best interest.

COMPLIANCE WITH STATUTORY TIME LIMITS

We first consider whether Lenora W. could raise an arguably meritorious claim that the trial 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 trial 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 trial 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 trial 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 Native American children that is not relevant here.

Here, the trial court on several occasions granted continuances that extended the proceedings beyond the statutory deadlines. On each such occasion, however, the trial court found good cause for the continuance, and Lenora W. did not object to any period of delay. Accordingly, she cannot mount an arguably meritorious challenge to the trial court's competency to proceed based on failure to comply with statutory time limits. *See id.*

SUFFICIENCY OF THE PETITION

The no-merit report addresses whether the petition to terminate Lenora W.'s parental rights satisfied the requirements described in WIS. STAT. § 48.42(1). The statute provides that a petition must include the name, birthdate, and address of the child, the names and addresses of the child's parents, guardian and legal custodian, "a statement of the grounds for involuntary termination of parental rights under s. 48.415[,] and a statement of the facts and circumstances which the petitioner alleges establish these grounds." *See* § 48.42(1)(a)-(c). We have examined the petition, and we agree with appellate counsel that it includes the required information. There is no arguable merit to a claim that the petition did not comply with § 48.42(1).

STIPULATION TO GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

On May 5, 2014, the date set for trial, Lenora W. stipulated that, pursuant to WIS. STAT. § 48.415(1)(a)2., grounds existed for termination of her parental rights to Tommy C. Before accepting an admission of facts alleged in a termination of parental rights petition, the trial 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 trial 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. *See* § 48.422(7).

The trial 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. Additionally, "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). Further, parents "must have knowledge of the constitutional rights given up by the plea," *id.*, ¶5, and "must understand that acceptance of their plea will result in a finding of parental unfitness," *id.*, ¶10.

Here, the trial court placed Lenora W. under oath. The trial court then conducted a comprehensive colloquy with her about the decision to stipulate to the existence of grounds for termination of her parental rights.

The trial court established that Lenora W. had read the petition seeking termination of her parental rights, and Lenora W. confirmed that she understood the allegations it contained. She told the trial court that she had taken her prescribed medication the previous night as directed, that she was thinking clearly, and that she wanted to proceed with the hearing and stipulate that grounds existed for terminating her parental rights.

The trial court explained to Lenora W. the two-part procedure in a termination of parental rights case. The trial 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. Lenora W. said that she understood. The trial court explained that the State must prove its allegations by evidence that is clear and convincing. *See* WIS. STAT. § 48.31(1). Lenora W. said that she understood the burden of proof. The trial court told Lenora W. about her rights to present testimony, call witnesses, and cross-examine any witnesses called by the State. She said she understood. The trial court told Lenora W. that she was giving up the right to a trial on the question of whether she abandoned Tommy C. for a period of three months, but that she would have the opportunity to present testimony and witnesses during the second phase of the proceedings. Lenora W. said she understood. The trial court explained that it could terminate her parental rights or dismiss the petition at the close of the second phase of the proceedings and that the dispositional hearing “would focus on what is in Tommy [C.]’s best interests.” Lenora W. said that she understood.

The trial court reviewed the elements that the State must prove at trial to establish each of the four grounds alleged in the petition to terminate her parental rights. Lenora W. said that she understood the elements. The trial court then reiterated that Lenora W. was stipulating only that she abandoned Tommy C. as defined in WIS. STAT. § 48.415(1)(a)2. Lenora W. confirmed that she wanted to stipulate to that ground for termination of her parental rights. Lenora W. also confirmed that she had not been forced to give up her right to a trial, and she said that she had not been threatened or promised anything in order to induce her to concede that grounds existed for termination of her parental rights.

The trial court told Lenora W. that it would find her to be an unfit parent upon accepting her stipulation. Lenora W. said she understood.

The State advised the trial court that Tommy C.'s foster parents wanted to adopt him. Lenora W., by counsel, agreed and confirmed that the foster parents were an identified adoptive resource for Tommy C.

The trial court accepted Lenora W.'s stipulation that grounds existed for termination of her parental rights pursuant to WIS. STAT. § 48.415(1)(a)2., and dismissed the remaining grounds. At the request of the parties, the trial court adjourned the proceedings for testimony as to whether a factual basis existed for the stipulation. *See Waukesha Cnty. v. Steven H.*, 2000 WI 28, ¶¶53, 56, 233 Wis. 2d 344, 607 N.W.2d 607 (when petition to terminate parental rights is uncontested, trial court must nonetheless hear testimony in support of the allegations in the petition).

When court reconvened on August 14, 2014, Lenora W. was not present. Her trial counsel said that she did not intend to come to the hearing and that she had authorized her counsel to so advise the trial court and the parties. The trial court properly permitted her to appear only by counsel. *See State v. Shirley E.*, 2006 WI 129, ¶46, 298 Wis. 2d 1, 724 N.W.2d 623. The State then presented testimony that Lenora W. abandoned Tommy C. for a three-month period within the meaning of WIS. STAT. § 48.415(1)(a)2. Xavier Jensen testified that he is employed by Children's Hospital of Wisconsin Community Services as a family case manager. He testified that Tommy C. had been hospitalized or placed in out-of-home care throughout his life and that, from January 31, 2013, through August 19, 2013, Lenora W. had no contact with him nor did she communicate with him in any way. The trial court also received in evidence a certified copy of the order entered in the CHIPS proceeding on October 9, 2012, placing Tommy C. outside the home of Lenora W. The order includes the finding that Lenora W.

received notice of the grounds for termination of her parental rights and a copy of that notice, signed by Lenora W., is attached to the order.

The record establishes that Lenora W. knowingly, voluntarily, and intelligently stipulated that she abandoned Tommy C. for a period of at least three months. The State supported the allegation of abandonment. The trial court properly concluded that Lenora W. was an unfit parent. We are satisfied that further appellate proceedings regarding this issue would lack arguable merit.

DISCRETIONARY DECISION TO TERMINATE PARENTAL RIGHTS

We last consider whether Lenora W. could mount an arguably meritorious challenge to the decision to terminate her parental rights. The decision to terminate parental rights lies within the trial 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, a trial 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 these 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 trial court conducted the dispositional hearing immediately after concluding the grounds phase of the proceedings. *See* WIS. STAT. § 48.424(4). The State presented testimony at

the dispositional hearing from Jensen and from Corliss W., the foster mother and adoptive resource for Tommy C. The trial court also heard testimony from Tommy C., Sr., and from Peggy P., who is the mother of Tommy C., Sr. Lenora W., who appeared only by counsel, did not testify. *Cf. Shirley E.*, 298 Wis. 2d 1, ¶153 (parent may appear at dispositional hearing in person or by counsel). At the conclusion of the testimony, the trial court considered each of the statutory factors in light of the evidence presented.

The trial court first found that Corliss W. and her husband are committed to adopting Tommy C. The trial court noted that Corliss W. and her husband were in the midst of the process necessary to obtain approval for the adoption of Tommy C. and that they have another adopted child. The trial court concluded that Tommy C. is “highly likely” to be adopted. The trial court considered Tommy C.’s age and health, noting that he carried many medical diagnoses that had required treatment since his birth two-and-one half years earlier. The trial court found that Tommy C. was too young to verbalize his wishes, but it concluded from the evidence that he conveyed his wish to remain with his foster parents by “seek[ing] comfort and care” from them.

The trial court next found that Tommy C. had no substantial relationship with his biological family and that the time he had spent with Lenora W. could be measured in hours. The trial court credited the testimony of Tommy C., Sr., who acknowledged that Lenora W. continued to use marijuana and cocaine, and the trial court reasoned that these activities likely interfered with her ability to visit with Tommy C. The trial court also credited the testimony of Corliss W., who described some occasions on which Lenora W. expressed concern for Tommy C. and telephoned to check on his progress, but the trial court concluded that Lenora W.’s concern for Tommy C. did not create a substantial relationship with him. The trial

court therefore concluded that terminating Lenora W.'s parental rights to Tommy C. would not damage any relationships that he had with his biological family, nor would termination of her parental rights be harmful to him.

Finally, the circuit court found that termination of Lenora W.'s parental rights would permit Tommy C. to enter into a more stable and permanent family relationship. The trial court took into account the love and affection that Corliss W. expressed for Tommy C. The trial court went on to describe the extent to which his foster parents attended to his needs and managed his complicated treatment regimen. The trial court further observed that his foster parents were "the only family that Tommy [C] has ever lived with," and gave him "the only place that he's ever called home." The trial court considered several alternatives to termination, including a guardianship, but the trial court rejected those alternatives as insufficient to ensure the stability and continuity of care that Tommy C. requires. The trial court concluded that, in light of the statutory factors, the best interests of Tommy C. required terminating the parental rights of Lenora W.

The record shows that the trial court properly exercised its discretion. The trial 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 trial court's decision to terminate Lenora W.'s parental rights would lack arguable merit.

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 Lenora W.'s parental rights is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved of any further representation of Lenora W. on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals