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March 10, 2015

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Anita J.

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

2015AP10-NM	In re the termination of parental rights to Aniyla P., a person under the age of 18: State of Wisconsin v. Anita J. (L.C. #2014TP61)
2015AP11-NM	In re the termination of parental rights to Shaniyla P., a person under the age of 18: State of Wisconsin v. Anita J. (L.C. # 2014TP62)

Before Curley, P.J.[1]

Anita J. appeals from orders terminating her parental rights to twin daughters Aniyla P. and Shaniyla P. Appellate counsel, Karen Lueschow, has filed a no-merit report. *See* ***Brown Cnty. v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (*per curiam*); *see*

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[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.

also WIS. STAT. RULES 809.107(5) & 809.32. Anita J. has not responded. Based upon an independent review of the records and the no-merit report, this court concludes that an appeal would lack arguable merit. Therefore, the orders terminating Anita J.'s parental rights are summarily affirmed.

Termination petitions were filed for both children on March 17, 2014. The petitions alleged that the girls continued to be children in need of protection and services (CHIPS), and that Anita J. had failed to assume parental responsibility. On August 5, 2014, the State moved for a finding of default against Anita J. for her failure to attend two deposition dates. On August 13, 2014, Anita J. failed to appear at a final pretrial conference. After hearing arguments on the default motion, the circuit court deemed Anita J.'s conduct to be "egregious and without explanation," finding her in default.[2] The August 25, 2014 trial date was converted to a prove-up and contested disposition hearing.

Anita J. moved to vacate the default finding, explaining why she had missed the deposition dates. The State objected to vacating the finding. After argument, the circuit court declined to vacate the default determination, noting that Anita J. had been told to cooperate with discovery, including depositions, and had been warned of the consequences for not doing so. It rejected her explanations for missing dates as inadequate.

Having rejected the request to vacate the default, the circuit court then took testimony in support of the termination petitions and found them adequately supported. It deemed Anita J.

[2] These cases were assigned to the Honorable Mark A. Sanders, but the August 13, 2014, final pretrial conference was held in front of the Honorable Rebecca G. Bradley; Judge Sanders was unavailable.

unfit as a result. After hearing testimony relating to disposition, the circuit court concluded that termination was in the children's best interests, and it terminated Anita J.'s parental rights. Additional facts will be discussed herein as necessary.

Competency

Counsel raises three issues, each of which she concludes lacks arguable merit. Counsel does not address whether there is any arguable merit to a claim that 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, 607 N.W.2d 927; WIS. STAT. § 48.422(1) (thirty days to hold initial hearing after filing of termination petition); WIS. STAT. § 48.422(2) (forty-five days to hold fact-finding hearing after initial hearing); and WIS. STAT. § 48.424(4)(a) (if grounds for termination found, disposition hearing to be held immediately but may be delayed up to forty-five days).

The statutory time limits cannot be waived, ***April O.***, 233 Wis. 2d 663, ¶5, but continuances 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).

To the extent that any of Anita J.'s hearings were held outside the statutory timelines, we note that there were no objections and, thus, no arguable merit that the circuit court lost competency. There is also no arguable merit to any claim of ineffective assistance of trial counsel for failure to object because the record reflects that any continuances were granted for good cause in open court. *See* WIS. STAT. § 48.315(2).

Sanctions

Counsel addresses whether there would be any arguable merit to a challenge to the circuit court's default judgment or its decision not to vacate that judgment. A circuit court has both inherent and statutory authority to enter a default judgment as a sanction for failure to obey its orders. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768. Anita J. was ordered to cooperate with discovery, including depositions, and to appear for each and every hearing. The circuit court further explained to Anita J. why it was important for her to follow those orders, and the orders were given at least twice. Anita J. was also warned that if she failed to follow those orders, the State would ask for a default, and Anita J. would lose the right to a jury trial. Nevertheless, Anita J. missed the first scheduled deposition, the make-up deposition scheduled by her counsel with her input, and the final pre-trial conference. It was, therefore, within the circuit court's discretion to enter a default here. *See* ***id.***, ¶18.

Likewise, the court's decision whether to vacate a default judgment is discretionary. *See* ***Ness v. Digital Dial Commc'ns, Inc.***, 227 Wis. 2d 592, 599, 596 N.W.2d 365 (1999). The circuit court here declined to vacate the default because it determined Anita J.'s behavior was egregious and unjustified. Anita J. claimed she missed the first deposition because she lost her phone with her appointments listed in it. The circuit court rejected this reasoning, suggesting that Anita J. should have had other reminders of the date. Anita J. said she missed the second, rescheduled deposition date because the Bureau of Milwaukee Child Welfare had not provided her with bus tickets. The State told the circuit court that Anita J. had been given bus tickets to attend scheduled visitations but, because Anita J. skipped several visitations, she should have had extra tickets to use. The circuit court agreed that Anita J. probably should have had extra tickets and, in any event, it was not the Bureau's job to help Anita J. with her litigation. To explain her

failure to appear for the final pretrial conference, Anita J. explained that she had left her home at 9:45 a.m. on the day of the hearing, but she had to take two buses and she arrived at the courthouse well after the 11 a.m. hearing time. The circuit court observed that when one has to come to court, a person should "do it in a way that you get here on time."

The circuit court was well within its discretion to reject Anita J.'s excuses and ratify the default determination. There would be no arguable merit to a claim the circuit court erred by imposing and refusing to vacate the default judgment.

Sufficiency of the Evidence

Counsel declares that "the court properly exercised its discretion to terminate Anita J.'s parental rights where the unfitness finding and best interest determination were supported by substantial evidence." This actually presents two issues: whether there is any arguable merit to a claim that insufficient evidence supported the State's alleged grounds for termination and whether there is any arguable merit to a claim that the circuit court improperly exercised its discretion in terminating Anita J.'s parental rights. Thus, we next consider whether there is any arguable merit to a claim that insufficient evidence was presented in support of the grounds alleged in the termination petition. Even when a parent is in default, the State must present this evidence before entering a default judgment. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶24.

When a termination petition alleges as grounds for termination that a child is in continuing need of protection and services, the State must prove the following:

> First, the child must have been placed out of the home for a cumulative total of more than six months pursuant to court orders containing the termination of parental rights notice. Second, the [applicable county department] must have made a reasonable effort

> to provide services ordered by the court. Third, the parent must fail to meet the conditions established in the order for the safe return of the child to the parent's home. Fourth, there must be a substantial likelihood that the parent will not meet the conditions of safe return of the child within the [nine]-month period following the conclusion of the termination hearing.

Walworth Cnty. DHHS v. Andrea L.O., 2008 WI 46, ¶6, 309 Wis. 2d 161, 749 N.W.2d 168; *see also* WIS. STAT. § 48.415(2)(a). The State has the burden to show that grounds for termination exist by clear and convincing evidence. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶22.

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[.]" ***Id.***

The circuit court here made adequate factual findings from the evidence presented by the State to support both alleged grounds as to both children. As to the continuing-CHIPS basis, the court found that both children had been placed outside the home pursuant to a court order containing the required notices on August 9, 2012. By the August 25, 2014 hearing, the children had been outside the home for well over six months. The circuit court noted that the Bureau had made a number of referrals to service providers to try to help Anita J., including various family support programs, and that effort was reasonable. The circuit court noted several of the conditions of return and that Anita J. had not yet met them. And, while it noted that Anita J. had

made some progress on some of her conditions, the circuit court did not believe it was substantially likely that Anita J. would be able to satisfy the conditions within the subsequent nine months.

With respect to the failure-to-assume ground, the case worker noted that Anita J. had never been the children's primary caretaker and had not exercised any responsibility for the children. There had been a referral to the Bureau when the children were born, based on their pre-term birth at twenty-nine weeks' gestation and on the fact that Anita J. was fifteen years old at the time. The case manager noted there had been minimal cooperation with Safety Services to try to make a safe home for the children following that referral.

The children were originally detained after Shaniyla was hospitalized due to seizures. A relative had called 911 after Anita J. reported the seizure activity to her and Anita J. refused to call an ambulance herself. Shaniyla's seizures were determined to be caused by her having low sodium and too much water. Upon investigation, it was determined that this malnutrition was caused by Anita J. feeding the children diluted juice, diluted formula, or plain water, resulting in the children receiving only about sixty percent of their nutritional needs. The CHIPS petition, a copy of which was introduced at the prove-up hearing, alleged that Anita J. would sell her formula or state assistance checks meant to purchase that formula. The petition also stated that after Shaniyla was admitted to the hospital, Anita J. was asked to bring Aniyla in so her electrolyte levels could be evaluated, but Anita J. was evasive about Aniyla's location. A relative later brought Aniyla to the hospital to be checked out. Anita J. also did not appear to understand the seriousness of Shaniyla's condition, responding with inappropriate laughter and sucking her thumb.

Anita J. had never paid any child support for the children. Anita J. skipped many visits. When offered a chance to extend future visits to make up for lost time, she indicated that anything longer than three hours would be too tiring, even though she spent much of the visits preoccupied with her phone. When asked by case workers, Anita J. had no plan for how to manage the children on a full-time basis. Anita J. also failed to attend any medical appointments to learn about the children's health concerns. This set of facts indicates that Anita J. has not exercised significant responsibility for the daily supervision, protection and care of the children, so there is no arguable merit to a claim of insufficient evidence presented in support of grounds.

Termination of Parental Rights

Finally, we consider whether there is any arguable merit a to a claim that the circuit court erroneously exercised its discretion in terminating Anita J.'s parental rights. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (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 noted that the children were highly adoptable and the likelihood of their adoption was high. The foster parents seemed enthusiastic and were already approved as an adoptive resource.

The children were just shy of three years old at the time of the disposition hearing. They had some issues, like eczema, sleep issues, and a blood disorder called Hemoglobin C, but those were being appropriately treated by the foster parents. The children's asthma issues had improved. While the children were removed from Anita J.'s care due to malnutrition, there were no such concerns with the foster parents. Though the children had lagged behind their peers for age-appropriate milestones at the time of their detention, they had caught up to those milestones under the care of the foster parents and, in fact, had advanced beyond their age level.

The circuit court noted that the children had no substantial relationship with their father, but their relationship with Anita J. was a "much closer" question. She had been present for more of the visitation and, although she did not always fully engage, the children seemed to occasionally enjoy the visits. Nevertheless, the circuit court opined that even if there were a substantial relationship between Anita J. and the children, "I don't think there would be any harm to severing that relationship," in part because the foster parents were willing to allow future contact between Anita J. and the children. The circuit court noted that the children had some relationships with other relatives, but either those relationships were no longer continuing or they were not substantial, so there would be no harm to severing those, either.

The circuit court noted that the children were too young to have express wishes. However, they conveyed their wishes by actively seeking out comfort from the foster parents.

At the time of the disposition hearing, the children had been separated from Anita J. for at least two and one-half years, having been detained when they were four or five months old. The circuit court noted that two and one-half years is a long time for an adult, and "a remarkably long time when you're only three years old."

Finally, the circuit court noted that Anita J. was making some steps towards increasing her stability, but it was still more likely that the children would achieve stability and permanence with the foster parents. The circuit court explained why alternatives to termination would not work: there were no realistic alternatives for a guardianship, and continuing the CHIPS orders was not in the children's best interests because visitations caused them stress. The circuit court also noted that the foster parents were "grown ups," unlike eighteen-year-old Anita J., and adults tend to have a different level of stability to their lives that teenagers simply lack.

The circuit court's factual findings underlying its termination decision were not clearly erroneous. Thus, there is no arguable merit to a claim it erroneously exercised its discretion in terminating Anita J.'s parental rights.

Our independent review of the records reveals no other potential issues of arguable merit.[3]

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[3] Appellate counsel also addresses trial counsel's performance. *See* ***Oneida Cnty. DSS v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652 (parent in termination of parental rights matters has right to counsel, so that means a right to effective counsel). Based on our review of the records, we conclude there is no arguable merit to any claim that trial counsel was ineffective.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Karen Lueschow is relieved of further representation of Anita J. in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals