OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II/I

September 16, 2015

To:

Hon. William Domina
Circuit Court Judge
521 W. Riverview, Room JC 103
Waukesha, WI 53188-3636

Kelly K. Haag
Juvenile Clerk
521 W. Riverview, Room JC 103
Waukesha, WI 53188-3636

Elizabeth A. Neary
Grady, Hayes & Neary, LLC
N14W23777 Stone Ridge Dr., Ste. 200
Waukesha, WI 53188

Christine M. Quinn
P.O. Box 70055
Milwaukee, WI 53207

David L. Coon
Wimmer & Coon
1220 S. Grand Ave.
Waukesha, WI 53186-6686

P. A. R.

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

2015AP1461-NM In re the termination of parental rights to P. A. R., Jr., a person under the age of 18: A. M. L. v. P. A. R. (L.C. #2014TP28)

Before Brennan, J.[1]

P.A.R. appeals from an order terminating his parental rights to son P.A.R., Jr. Appellate counsel, Christine M. Quinn, has filed a no-merit report. *See* ***Brown Cty. 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) & 809.32. P.A.R. was advised of his right to file a response, but he has not responded. Based upon this court's independent review of the record and the no-merit report, we

[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.

conclude that an appeal would lack arguable merit. Therefore, the order terminating P.A.R.'s parental rights is summarily affirmed.

BACKGROUND

P.A.R., Jr., was born on January 8, 2011. P.A.R. lived with P.A.R., Jr.'s mother A.M.L., in the home of A.M.L.'s mother and stepfather. Six weeks after the child's birth, P.A.R. moved out. The last time P.A.R. saw his son was December 25, 2012; the last time he contacted A.M.L. about the child was some time in December 2013.

A.M.L. was married in March 2014. On July 23, 2014, A.M.L. filed the underlying involuntary termination petition, seeking to terminate P.A.R.'s parental rights so that her husband could adopt P.A.R., Jr. P.A.R. was served on August 4, 2014. As grounds for termination, A.M.L. alleged abandonment and failure to assume parental responsibility.

Both parties appeared with counsel at the initial hearing on August 15, 2014. P.A.R. contested the petition, and his attorney asked to have the matter adjourned because she was only recently appointed and she had not yet had a chance to fully discuss the case with P.A.R. At the next hearing, on September 25, 2014, the parties agreed that a pretrial conference might allow them to come to a resolution, so the matter was set out to October 22, 2014.

On October 22, 2014, both parties appeared, and A.M.L. asked for sanctions because P.A.R. had not attended his deposition. After ascertaining that A.M.L. hoped the deposition would yield information that would allow her to file a dispositive motion, the circuit court, rather than imposing sanctions, set a discovery deadline for P.A.R. to be deposed and a briefing

schedule for A.M.L.'s anticipated motion. A.M.L. subsequently moved for summary judgment on the abandonment ground.

The summary judgment motion hearing was held on schedule on January 20, 2015. P.A.R., who declined to stipulate to grounds for termination, nevertheless did not contest the summary judgment motion. Thus, the circuit court granted partial summary judgment to A.M.L. on the abandonment allegation and dismissed the failure-to-assume allegation. After an attempt at mediation failed, the disposition hearing was held on February 26, 2015. Following that hearing, the circuit court issued a written order terminating P.A.R.'s parental rights.

DISCUSSION

Counsel raises two potential issues for appeal: whether it was appropriate for the circuit court to grant summary judgment on the abandonment ground and whether the circuit court erroneously exercised its discretion in terminating P.A.R.'s parental rights. Counsel does not discuss the circuit court's competency, but we first consider whether there is any arguable merit to a claim the court failed to follow mandatory time limits, thus losing competency to proceed. *See* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927.

A. Competency

After a petition to terminate parental rights is filed, the circuit court has thirty days to hold an initial hearing and ascertain whether any party wishes to contest the petition. WIS. STAT. § 48.422(1). If a party contests the petition, the court must set a fact-finding hearing to begin within forty-five days of the initial hearing. *See* § 48.422(2). If grounds for termination are established, the court is to proceed with an immediate disposition hearing, although that may be

delayed up to "no later than [forty-five] days after the fact-finding hearing" if all the parties agree. *See* WIS. STAT. § 48.424(4)(a). These statutory time limits cannot be waived. ***April O.***, 233 Wis. 2d 663, ¶5. 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* § 48.315(3).

Here, though the initial hearing and the disposition hearing were timely, the "fact-finding" hearing was not held until six months after the initial hearing, and there were no tolled deadlines or explicit continuances granted by the circuit court—at the end of each hearing, the case was simply scheduled for its next hearing date. However, P.A.R.'s attorney raised no objections on his behalf, so we consider whether there is any arguable merit to a claim of ineffective assistance of counsel for failing to make objections to the continuation of the fact-finding hearing. *See* ***Oneida Cty. Dept. of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652 (right to effective assistance of counsel in termination proceedings). To demonstrate ineffective assistance of counsel, a person must show that counsel was both deficient and prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

As noted, the initial appearance and the disposition hearing were both held within the applicable statutory time limits. With respect to the repeated adjournment of the fact-finding hearing, it is evident that any continuances were granted for cause. The first adjournment was granted so P.A.R.'s attorney could meet with him. The second adjournment was granted on the parties' agreement so they could try to resolve the matter themselves. The third adjournment was granted because P.A.R. had not attended his deposition and because A.M.L. expected to be able to bring a dispositive motion once P.A.R. was deposed. The fact-finding hearing—which,

in this case, was a summary judgment motion hearing—was finally held according to the briefing schedule set when the third adjournment was granted.

Based on the foregoing, it is evident that any objections to the continuances would have been overruled, and an attorney is not ineffective for failing to make meritless objections. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). Accordingly, there is no arguable merit to a claim that trial counsel was ineffective for failing to object to continuances or otherwise challenge the circuit court's competency to proceed.

B. Summary Judgment on Grounds

There are two parts to termination-of-parental-rights proceedings. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. The first part involves grounds for the termination, and the petitioner must prove by clear and convincing evidence that one of the statutory grounds for termination exists. *See* ***id.*** If grounds are proven, the circuit court finds the respondent parent unfit, *see* WIS. STAT. § 48.424(4), and the matter proceeds to disposition, *see* ***Steven V.***, 271 Wis. 2d 1, ¶25. Thus, we next consider the first issue raised by counsel—whether the circuit court erred in granting summary judgment to A.M.L. in the grounds phase.

Partial summary judgment is available in termination-of-parental-rights proceedings. *See* ***id.***, ¶¶5-6. Summary judgment may be employed "when there is no genuine factual dispute that would preclude finding one or more of the statutory grounds by clear and convincing evidence." *See* ***Nicole W.***, 299 Wis. 2d 637, ¶14.

A.M.L.'s petition alleged abandonment under WIS. STAT. § 48.415(1)(a)3., which required her to prove that "[t]he child has been left by the parent with any person, the parent

knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer." A.M.L.'s affidavit in support of her petition alleged that P.A.R. had last seen his son on December 25, 2012, and that P.A.R. had last communicated with her about the child on December 2, 2013. In her summary judgment brief, A.M.L. focused on a period from December 25, 2013, through August 15, 2014, and asserted the following facts.

On December 25, 2013, P.A.R. had attempted to drop off Christmas gifts for P.A.R., Jr., at the home A.M.L. still shared with her mother and stepfather. However, according to a decree in the action in which P.A.R. was adjudicated P.A.R., Jr.'s father, visitation was to be with reasonable notice, and P.A.R. had shown up with no notice at all. A.M.L.'s mother gave P.A.R. the option of having her deliver the gifts, or of taking the gifts with him and calling to schedule a visit. P.A.R. chose to take the gifts with him, but never called to arrange for visitation.

At all times during the December-to-August period, A.M.L. lived with her mother and stepfather in the home at which P.A.R. had temporarily resided after his son's birth. A.M.L.'s cell phone records showed no incoming calls from P.A.R., who admitted at least knowing how to contact A.M.L. In his deposition, pages of which were submitted with the motion, P.A.R. admitted having A.M.L.'s mother's and stepfather's cell phone numbers, though he said there was "no telling if they changed their number," and he claimed to have lost the phones with their home phone number in it. P.A.R. admitted that A.M.L.'s stepfather was a lawyer with whom he had consulted on some business issues, the implication being that P.A.R. could readily find the stepfather's phone number with a small amount of effort.

In his deposition, P.A.R. acknowledged that he had made no attempts to communicate with A.M.L. or P.A.R., Jr., in the December 2013 to August 2014 period. Further, he tendered no defense to the summary judgment motion. Thus, there is no genuine factual dispute that P.A.R., Jr., had "been left by [P.A.R.] with any person," that P.A.R. knew or could have discovered his son's whereabouts, and that P.A.R. had failed to visit or communicate with P.A.R., Jr., for six months or longer. Accordingly, there is no arguable merit to a claim that the circuit court erred in granting partial summary judgment on the abandonment ground.[2]

C. Termination

The other issue appellate counsel discusses is whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating P.A.R.'s parental rights during the disposition phase of the termination proceedings. *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.

[2] As a result of the summary judgment, the circuit court, as required, found P.A.R. unfit.

> (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, issuing a written decision, explained that A.M.L. and her husband would be pursuing a stepparent adoption if P.A.R.'s rights were terminated. It also noted that P.A.R., Jr., was healthy, with no apparent developmental delays.

The circuit court observed that after P.A.R., Jr., was six weeks old, P.A.R. had limited contact with him. There had been no actual contact with P.A.R., Jr., since December 2012, notwithstanding P.A.R.'s sporadic attempts to see his son in 2013. There had also been limited contact between P.A.R., Jr., and his paternal relatives. Thus, the circuit court concluded that P.A.R., Jr., had no substantial relationship with P.A.R. or any paternal relatives, so it would not be harmful to sever whatever relationships there were.

The circuit court noted that the duration of the child's separation from P.A.R.—nearly two years—was significant, observing that the quantity and quality of the contact between the two amounted to no substantive involvement in P.A.R., Jr.'s life and development. The circuit court further commented that with termination, the void of a father-figure would presumably be filled.

The circuit court concluded that each of the statutory factors weighed in favor of termination.[3] It then went on to comment on some additional factors that it thought were relevant. *See* WIS. STAT. § 48.426(3) (when considering best interests of child, circuit court "shall consider but not be limited to" enumerated factors).

The circuit court did not consider P.A.R.'s age and maturity to be a factor, in that it did not believe that twenty-six-year-old P.A.R. was at a stage, like a much younger person, where significant changes could be expected with further aging. The circuit court noted that though P.A.R. tried to demonstrate, during the disposition hearing, his attempts to visit his son, those efforts were at best "fits and starts." While P.A.R. complained, for instance, about lack of transportation from Milwaukee County to Waukesha County, the circuit court noted that he did not seem to have difficulty finding transportation for things he wanted to do, suggesting that visitation with P.A.R., Jr., was not a priority. Despite the likely stepparent adoption, the circuit court did not give weight to A.M.L.'s marriage, simply because it was too new. The circuit court also noted—because P.A.R. attempted to make an issue out of it—that there was no reason to believe that A.M.L. and her husband, both Caucasians, would prevent P.A.R., Jr., from knowing or learning about his and P.A.R.'s African-American heritage.

Based on the foregoing, there is no arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating P.A.R.'s parental rights. The circuit court's

[3] It noted that P.A.R., Jr., was only four years old, so it did not give any consideration to what his wishes might be. We note, however, that A.M.L. testified that she did not think P.A.R., Jr., would recognize his father. A.M.L.'s husband testified that the child had taken to calling him "daddy" based on observations of what classmates called the men picking them up at school.

decision demonstrates a careful consideration of required factors, and no additional improper facts.

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

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Christine M. Quinn is relieved of further representation of P.A.R. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals