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March 24, 2017

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

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2017AP95-NM In re the termination of parental rights to I.M.S.:
Kenosha County Department of Human Services v. M.L.
(L.C. # 2016TP6)

Before Dugan, J.[1]

M.L. appeals from an order of the circuit court that terminated his parental rights to his son, I.M.S. Appellate counsel, Eileen T. Evans, 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*

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

WIS. STAT. RULES 809.107(5m) and 809.32. M.L. has responded to the report. Based upon an independent review of the record, the no-merit report, and M.L.'s response, this court concludes that an appeal would lack arguable merit. Therefore, the order terminating M.L.'s parental rights is summarily affirmed.

## BACKGROUND

I.M.S. was born in January 2013. On September 20, 2013, his mother, T.S., left him with M.L., asking M.L. to "temporarily provide care" for his child. On September 21, 2013, M.L. called the Juvenile Crisis Intervention team and asked them to remove I.M.S. from his care and place him in foster care. T.S. was contacted and given the option to retrieve I.M.S. from M.L. immediately; otherwise, he would be taken to foster care. T.S. stated she would like I.M.S. to go to foster care. I.M.S. was thus taken into temporary custody and placed in a foster home.

I.M.S. was adjudicated a child in need of protection or services (CHIPS) on September 30, 2013. The disposition order was originally set to expire on I.M.S.'s eighteenth birthday. However, I.M.S. was placed back with M.L. on November 25, 2014, and the order's expiration date was changed to February 25, 2015. On February 6, 2015, an extension of the order was requested, and on February 25, 2015, a change in placement was requested. I.M.S. was returned to foster care on March 2, 2015. M.L. was subsequently incarcerated on March 24, 2015.

The Kenosha County Department of Human Services ("the County") filed a petition to terminate M.L.'s parental rights on February 10, 2016, alleging abandonment and continuing

CHIPS as grounds.[2] M.L. later admitted the CHIPS ground and the County dismissed the abandonment ground. Following a disposition hearing, the circuit court determined it was in I.M.S.'s best interests to terminate M.L.'s parental rights. M.L. now appeals.

## DISCUSSION

### *I. The Circuit Court's Competency*

Appellate counsel addresses two issues in the no-merit report: whether M.L.'s admission to the CHIPS ground was properly entered and accepted and whether the circuit court properly exercised its discretion in terminating M.L.'s parental rights. However, we first independently consider whether the circuit court lost competency to proceed for failure to comply with mandatory timelines. *See* WIS. STAT. §§ 48.422(1)-(2) & 48.424(4)(a); *see also* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927.

The statutory time limits cannot be waived, *see* ***id.***, but continuances are permitted for good cause "and only for so long as is necessary[,]" *see* 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). Our review of the record satisfies us that the time limits were followed or adjourned for good cause, or that any adjournments were not objected to. Therefore, there is no arguable merit to a challenge to the circuit court's competency.

[2] A petition was also filed against T.S., who ultimately voluntarily surrendered her parental rights.

*II. M.L.'s Admission to Grounds*

Appellate counsel first discusses whether M.L.'s admission to the continuing-CHIPS ground was entered knowingly, intelligently, and voluntarily.[3] Before accepting an admission or a no-content plea to the facts alleged in a termination petition, the circuit court must engage the parent in a colloquy. *See* ***Oneida Cty. Dep't of Soc. Servs. v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 762 N.W.2d 122; WIS. STAT. § 48.422(3), (7). The statute requires the circuit court to: (1) address the parent and determine that the admission is made voluntarily, with an understanding of the nature of the acts alleged in the petition and the potential dispositions; (2) establish whether any promises or threats were made to secure the admission; (3) establish whether a proposed adoptive resource for the child has been identified; (4) establish whether any person has coerced a parent to refrain from exercising his or her parental rights; and (5) determine whether there is a factual basis for the admission of facts alleged in the petition.[4] *See* WIS. STAT. § 48.422(7). The circuit court must also ensure that the parent understands the constitutional rights he or she is giving up with the admission, *see* ***Therese S.***, 314 Wis. 2d 493, ¶5, and that the admission will result in a finding of parental unfitness, *see* ***id.***, ¶10.

Counsel does not adequately discuss these obligations in her no-merit report. After our independent review of the record, we note that although the circuit court reviewed with M.L. the elements of the continuing-CHIPS ground and the constitutional rights that M.L. was giving up

[3] The no-merit report refers to M.L.'s admission as both an admission and a no-contest plea. While M.L.'s plea questionnaire form indicated a no-contest plea, trial counsel orally clarified at the plea hearing that M.L. was entering an admission.

[4] Appellate counsel's citation to WIS. STAT. § 48.422(7) in the no-merit report includes only the first two of the five requirements listed in that statute.

with his admission, and took care to answer several questions M.L. posed, the circuit court did not expressly review the potential dispositions with M.L., establish whether any promises or threats were made to secure the plea, determine whether M.L. was coerced to refrain from exercising his parental rights, or verify M.L.'s understanding that his admission would result in a finding of parental unfitness.[5]

Nevertheless, we have examined the entire record to determine whether the colloquy between the circuit court and M.L. was sufficient to allow M.L. to waive his right to contest the grounds for termination of his parental rights. Before a parent can challenge his plea or admission, he or she must not only "make a prima facie showing that the circuit court violated its mandatory duties" of informing the party of his or her rights, but must also allege that he or she actually "did not know or understand" the rights that he or she was waiving. *See* ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607 (citing ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986)). Here, the record does not support any such challenge to M.L.'s admission to the continuing-CHIPS ground. During the plea colloquy with M.L., the circuit court addressed the detailed plea questionnaire: counsel confirmed he had reviewed the questionnaire with M.L., and M.L. acknowledged he understood the form, signed it, and answered all of its questions truthfully. The plea questionnaire contained any necessary information that the circuit court did not expressly address with M.L. Therefore, there is no

[5] The circuit court also failed to establish during this colloquy whether a proposed adoptive resource for I.M.S. had been identified, but there is no arguable merit to a challenge to the admission based on this failure. A proposed adoptive resource—namely, the foster parent—had been identified at the prior hearing where T.S. voluntarily terminated her rights, so the circuit court would have been aware of the resource. Further, WIS. STAT. § 48.422(7) does not require the circuit court to expressly address this element with the parent in order for an admission or plea to be valid.

arguably meritorious basis for challenging M.L.'s admission. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

*III. Sufficiency of the Prove-Up*

M.L.'s admission was accepted subject to prove-up—that is, subject to the circuit court determining that a factual basis for the admission exists. *See* WIS. STAT. § 48.422(7)(c) (to accept admission, circuit court must "[m]ake such inquiries as satisfactorily establish that there is a factual basis" for admission). The no-merit report fails to discuss whether there was a sufficient factual basis for M.L.'s admission to the continuing-CHIPS ground.

When a termination petition alleges as grounds for termination that a child is in continuing need of protection and services, the petitioner 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 Cty. Dep't of Health and Human Servs. 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 petitioner has the burden to show that grounds for termination exist by clear and convincing evidence. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶22, 246 Wis. 2d 1, 629 N.W.2d 768.

The County provided testimony from M.L.'s case worker, Elizabeth Callies. Our review of the record satisfies us that with this testimony, the County satisfactorily established a factual

basis for M.L.'s admission to the continuing-CHIPS ground in the termination petition. The record contains a copy of the CHIPS order with appropriate notice; the circuit court found that the County made reasonable efforts to provide services, and this finding is not clearly erroneous; and Callies' testimony established both that M.L. had failed to meet the conditions of return and that he was unlikely to do so within the following nine months.[6]

We therefore ultimately agree with counsel's conclusion that there is no arguable merit to challenging the admission to grounds.

*IV. Disposition*

Appellate counsel also discusses whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating M.L.'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 circuit 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.

[6] The conditions of return included maintaining a suitable residence, which the County considered unfulfilled because M.L. would be incarcerated until 2020. While "a parent's incarceration is not itself a sufficient basis to terminate parental rights," *see* ***Kenosha Cty. Dep't of Human Servs. v. Jodie W.***, 2006 WI 93, ¶50, 293 Wis. 2d 530, 716 N.W.2d 845, the County also believed that M.L.'s "poor decision making" meant that he had not demonstrated any ability to maintain a safe and stable residence. Other conditions also remained unmet, including weekly letter-writing to I.M.S., monthly contact with the County case worker, and participation in available programming at M.L.'s institution.

> (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 considered each of these factors in turn, saving the "substantial relationships" element to be discussed at the end with the "stable and permanent family relationship" factor. With respect to the likelihood of I.M.S.'s adoption after termination, the circuit court noted that his current placement was pre-adoptive and the foster mother was actively working towards the necessary certification for an adoption. Even if that resource fell through, the circuit court commented that the likelihood of adoption was "fairly high" given I.M.S.'s age and lack of any barriers to adoption.

The circuit court noted that I.M.S. was removed from his parents' care at about eight months old, then again at two years and two months old, and was now three years and seven months old.[7] His health was constant, although I.M.S. may have suffered a broken leg while in his mother's care.

[7] He had been placed with M.L. when he was about twenty-two months old.

The circuit court noted that the guardian *ad litem* supported termination and adoption. The circuit court considered this opinion because it believed that I.M.S. was too young to express his wishes.

The circuit court noted that I.M.S. had been separated from his parents for two years and seven months, and that he was only three years and seven months old. This meant the total duration of the separation was about three-quarters of I.M.S.'s life.

With respect to family relationships, the circuit court started by expressing its opinion that it was impossible to sever family relationships without some harm, but stated that the overriding concern was I.M.S.'s best interests. It noted that I.M.S. had a substantial relationship with M.L., but that relationship was diminishing as M.L. spent time in custody. The circuit court was also aware that I.M.S. had some relationship with his paternal grandmother, M.L.'s mother, T.L. However, the circuit court was balancing those relationships against whether I.M.S. "will be able to enter into a more stable and permanent family relationship as a result of the termination," which the circuit court considered to outweigh the substance of I.M.S.'s relationship with M.L.

The circuit court noted that M.L. was expected to be incarcerated until 2020, and it was not in I.M.S.'s best interests to wait for that incarceration to end, as his age would nearly double while he waited for his father's release. The circuit court also noted that while T.L. expressed an interest in taking care of I.M.S., she refused to disclose the nature of her disability. This lack of information became a component of the circuit court's decision: the circuit court noted that I.M.S. would be a child for another fifteen years, so any disability that might interfere with

T.L.'s ability to care for him might result in future placements for I.M.S. and, thus, a less stable and less permanent family relationship.

Based on the foregoing, we are satisfied that the circuit court appropriately considered the necessarily factors in reaching a termination decision. There is no arguable merit to a challenge to its exercise of discretion.

*V. M.L.'s Response*

In his no-merit response, M.L. raises two issues. First, he notes that although he is incarcerated, he was "granted Boot Camp and ERP April 2016, which means I will be released before my March 2020 release date[.]" It appears that M.L. may be attempting to raise an issue with the "stable residence" condition of return and his ability to meet that condition, and with the circuit court's rationale for ordering termination.

While M.L. was deemed eligible for certain prison programs that can lead to early release, this eligibility is no guarantee of participation in or successful completion of these programs. There is no indication that M.L. would be able to secure early release in time for him to "meet the conditions of safe return of the child within the [nine]-month period following the conclusion of the termination hearing," *see* ***Andrea L.O.***, 309 Wis. 2d 161, ¶6, nor is there any indication that M.L. would be eligible for release soon enough to allay the circuit court's concerns about forcing I.M.S. to wait a significant amount of time for stability and permanence.

Second, M.L. complains that "my mother [T.L.] did not mention what her disability was to the court and made that the reason that my son couldnt go to my mothers custody. I dont

understand that part at all it doesnt make any sense." However, M.L. misapprehends the situation.

T.L. was not considered as a placement resource at earlier stages of these proceedings because she had not become appropriately licensed. The circuit court's comments regarding her disability were not made during a decision on I.M.S.'s placement. Rather, T.L. testified at the disposition hearing that her sole source of income was Social Security disability income. When asked what her disability was, she declined to disclose it, and she was not pressed further.

However, the circuit court was required to consider whether I.M.S. could enter into a more stable and permanent family relationship if M.L.'s rights were terminated. It was aware that I.M.S.'s foster mother was working towards approval for adoption, which would lead to a stable and permanent family relationship for I.M.S. T.L., on the other hand, indicated she had a disability but not its nature, which left the circuit court unable to evaluate whether T.L. could sufficiently care for a child for the next fifteen years. Thus, the circuit court could not determine whether T.L. could provide I.M.S. with a stable and permanent family relationship. Consequently, the circuit court concluded that termination of M.L.'s parental rights was most likely to result in a more stable and permanent situation and was in I.M.S.'s best interests.

There is no arguable merit to any challenge related to M.L.'s eligibility for early release programs or the circuit court's termination decision in light of M.L.'s mother's nondisclosure of her disability.

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 Eileen T. Evans is relieved of further representation of M.L. in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*