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March 27, 2017

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

2017AP14-NM In re the termination of parental rights to C.C.S:
State of Wisconsin v. I. S. (L.C. # 2015TP101)

Before Dugan, J.[1]

I.S. appeals an order terminating her parental rights to C.C.S. Attorney Jane S. Earle, appointed appellate counsel for I.S., filed and served a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Brown Cty. v. Edward C.T.***, 218 Wis. 2d 160, 579 N.W.2d 293

[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.

(Ct. App. 1998), and WIS. STAT. RULES 809.107(5m) and 809.32 (2015-16). I.S. filed a response. We have considered counsel's no-merit report and I.S.'s response, and we have independently reviewed the record. We conclude that further proceedings would lack arguable merit, and we summarily affirm the order terminating I.S.'s parental rights to C.C.S.

BACKGROUND

C.C.S. was born on December 12, 2014. Later that day, child welfare authorities received a call regarding his birth. The caller reported concern based on I.S.'s history of schizophrenia, paranoia, and cognitive delays. Initial assessment workers determined that I.S. was delusional during her postpartum hospital stay. Child welfare workers detained C.C.S. and placed him with his maternal grandfather, I.G., but determined that C.C.S. could not safely remain in that placement because I.G. had a criminal record. When C.C.S. was four days old, he was placed in foster care with C.M. and her husband, F.M., and C.C.S. remained in that placement thereafter.

On December 22, 2014, the State filed a petition in Milwaukee County case No. 2014JC1229, asking the circuit court to find C.C.S. a child in need of protection or services (CHIPS). In support, the State alleged that I.S. had an I.Q. of 63, was mentally ill, and was exhibiting psychotic symptoms. The State further alleged that I.S.'s older son, J.S., had been found to be a child in need of protection or services and that her parental rights to J.S. had been terminated in August 2014. The circuit court entered an order on February 5, 2015, finding C.C.S. to be a child in need of protection or services pursuant to WIS. STAT. § 48.13(10).

On April 14, 2015, the State initiated the proceedings underlying the instant appeal by filing a petition seeking termination of I.S.'s parental rights to C.C.S.[2] The State alleged two grounds for termination: (1) failure to assume parental responsibility, *see* WIS. STAT. § 48.415(6); and (2) prior involuntary termination of parental rights to another child, *see* WIS. STAT. § 48.415(10). On July 7, 2015, the circuit court granted the State's motion for partial summary judgment, finding that the State had proven that grounds existed to terminate I.S.'s parental rights pursuant to § 48.415(10). In July 2015, following a dispositional hearing that I.S. did not attend, the circuit court entered an order over her trial counsel's objection terminating her parental rights.

I.S. pursued an appeal to this court and requested a remand for a postjudgment hearing. At the outset of that proceeding, the parties agreed to dismiss the appeal, vacate the order terminating I.S.'s parental rights, and hold a new dispositional hearing. On July 27, 2016, the circuit court conducted another dispositional hearing and found that termination of I.S.'s parental rights was in the best interest of C.C.S. I.S. appeals from that order.

COMPLIANCE WITH STATUTORY TIME LIMITS

We first consider whether I.S. could raise an arguably meritorious claim that the circuit 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 circuit court has thirty days to conduct an initial hearing

[2] The petition to terminate I.S.'s parental rights to C.C.S. also sought to terminate the parental rights of his unknown father. The State did not establish the identity of C.C.S.'s biological father, and the order terminating the unknown father's parental rights is not before us.

and determine whether any party wishes to contest the petition. WIS. STAT. § 48.422(1). If a party contests the petition, the circuit 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 circuit court may delay the dispositional hearing until "no later than 45 days after the fact-finding hearing." WIS. STAT. § 48.424(4).[3]

When the statutory 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).

In this case, the circuit court on several occasions granted continuances that extended the proceedings beyond the statutory deadlines, but I.S. did not object and, therefore, has waived that issue. Accordingly, I.S. cannot mount an arguably meritorious challenge to the circuit court's competency to proceed based on failure to comply with statutory time limits. *See* ***id.***

LACK OF A GUARDIAN *AD LITEM* FOR I.S.

We next consider whether the lack of a guardian *ad litem* for I.S. presents an arguably meritorious issue for appeal. The circuit court may terminate the parental rights of an incompetent person, *see* WIS. STAT. § 48.41(3), but the circuit court must appoint a guardian *ad*

[3] 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.

litem for a parent subject to a termination of his or her parental rights if any assessment or examination reveals that the parent is not competent, *see* WIS. STAT. § 48.235(1)(g). In this case, a psychological assessment was not conducted during the pendency of the proceedings. The only psychological assessment in the record was filed during the postjudgment proceedings and reflects the outcome of an examination conducted in 2013 while I.S. was imprisoned. Although the 2013 document notes her cognitive limitations and her mental illness, the document does not include an opinion that she lacks competency. There is therefore no arguable merit to a claim that the circuit court erred by not appointing a guardian *ad litem* for I.S.[4]

Assuming, however, that I.S. was incompetent at any point during the proceedings underlying this appeal, the absence of a guardian *ad litem* would not provide a basis for postjudgment relief. She had adversary trial counsel throughout the termination proceedings, and the record shows that counsel zealously opposed termination of her parental rights. As we have explained in similar circumstances:

> [t]his court has recognized that adversary counsel and a GAL may pursue independent and sometimes competing responsibilities in [WIS. STAT.] CH. 48 ... proceedings. Thus, had the [circuit] court conducted a hearing, found [the parent] incompetent and appointed a GAL, the GAL could have either acquiesced in the decision to contest the matter, in which case his or her presence would have added nothing, or alternatively, the GAL could have decided it was contrary to [the parent's] best interests to contest the matter, in which case the GAL's position would be adverse to that of [the parent] on this appeal. The trial court's inaction thus does not serve as a basis for a new trial because it did not contribute to the TPR decision that she seeks to overturn.

[4] We observe that I.S. was on probation for a 2013 criminal conviction when C.C.S. was born, and the record also reflects that she was convicted of a crime twice in 2005, and once in 2010. Thus, notwithstanding her low I.Q. and history of mental illness, she was competent to proceed with criminal litigation on multiple occasions. *See* ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 (explaining that competency is a judicial inquiry, not a medical determination, to determine whether a defendant has the capacity to understand the proceedings and assist counsel).

I.P. v. State, 157 Wis. 2d 106, 116, 458 N.W.2d 823 (Ct. App. 1990) (internal citation omitted). We are satisfied that I.S. cannot pursue an arguably meritorious challenge to the termination of her parental rights based on failure to appoint a guardian *ad litem* for her.

PARTIAL SUMMARY JUDGMENT

Under WIS. STAT. § 48.415(10), grounds exist to terminate parental rights to a child if the State proves that the child at issue has been adjudged to be in need of protection or services under WIS. STAT. § 48.13(10), and, within three years prior to the date of that judgment, a circuit court ordered the parent's parental rights terminated with respect to another child. Both of these elements may be proved by prior court order. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶37, 271 Wis. 2d 1, 678 N.W.2d 856. Here, the State proved both elements with certified court orders, namely, the February 5, 2015 CHIPS order in Milwaukee County case No. 2014JC1229 finding C.C.S. to be a child in need of protection or services pursuant to § 48.13(10), and the August 25, 2014 order in Milwaukee County case No. 2014TP8, terminating I.S.'s parental rights to J.S.[5]

Appellate counsel discusses whether I.S. could defeat the partial summary judgment by challenging the validity of the CHIPS order entered in Milwaukee County case No. 2014JC1229. Specifically, appellate counsel considers whether the evidence in the CHIPS case established the neglect necessary to prove that C.C.S. was a child in need of protection or services under WIS. STAT. § 48.13(10). We conclude that any such collateral attack on the final order in the CHIPS

[5] Appellate counsel provided this court a copy of our opinion affirming the order that terminated I.S.'s parental rights to J.S. *See* ***State v. I.S.***, No. 2015AP931-NM, unpublished op. and order (WI App July 14, 2015). "Generally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same." *See* ***Johnson v. Mielke***, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970).

proceeding would lack arguable merit. In general, a party may not pursue a collateral attack on a civil judgment unless the earlier judgment was procured by fraud.[6] *See* ***Onieda Cty. DSS v. Nicole W.***, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652 (discussing the rule in the context of a termination of parental rights proceeding). I.S. therefore could not mount a collateral attack based on an alleged insufficiency of evidence. Moreover, our independent review of the record satisfies us that it does not support a claim that the State procured the February 2015 CHIPS order by fraud. Rather, the certified court documents relating to the CHIPS order show that the State gathered information from individuals knowledgeable about I.S. and her newborn and presented that information to the circuit court for a decision under § 48.13(10). Accordingly, I.S. cannot challenge the order granting partial summary judgment by collaterally attacking the February 2015 order entered in case No. 2014JC1229. *See* ***State v. V.A.***, No. 2015AP1614, unpublished slip op. ¶¶25-29 (WI App July 19, 2016) (explaining that a challenge to a CHIPS order underlying a petition to terminate parental rights would be a meritless collateral attack on a prior civil judgment where the challenge is not based on fraud).[7]

[6] An additional exception to the rule barring collateral attack on judgments may exist for judgments obtained in violation of the right to counsel. *See* ***Oneida County DSS v. Nicole W.***, 2007 WI 30, ¶¶31-33, 299 Wis. 2d 637, 728 N.W.2d 652. A parent does not have a right to counsel in CHIPS proceedings. *See* ***Joni B. v. State***, 202 Wis. 2d 1, 5, 18-19, 549 N.W.2d 411 (1996).

[7] An unpublished opinion released on or after July 1, 2009, and authored by a single judge of this court may be cited for its persuasive value. *See* WIS. STAT. RULE 809.23(b).

DISCRETIONARY DECISION TO TERMINATE PARENTAL RIGHTS

We next consider whether I.S. could mount an arguably meritorious challenge to the decision to terminate her parental rights. The decision to terminate parental rights lies within the circuit 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 circuit court must consider: (1) the likelihood of adoption after termination; (2) the age and health of the child; (3) "whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever those 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).

At the 2016 dispositional hearing, the State presented testimony from C.M. and from Nathan Blohm, the family case manager. I.S. testified on her own behalf. At the conclusion of the testimony, the circuit court considered each of the statutory factors in light of the evidence presented.

The circuit court found that C.C.S. was not quite two years old and in good health. The circuit court found that C.M. was "extremely likely" to adopt C.C.S., but that if for some reason she could not adopt C.C.S., he would "very likely" be adopted by another family given his age and health. The circuit court found that C.C.S. had lived apart from I.S. his entire life and had received only a single visit from her when he was less than a month old. The identity of his

biological father has not been determined. The circuit court concluded that C.C.S. did not have a substantial relationship with his parents, and therefore he would not be harmed by severing such relationships.

The circuit court noted that C.C.S. was too young to express his wishes or understand the termination of parental rights proceedings, but, in light of his age, the circuit court determined he would not want to be separated from C.M and her husband because they are the only parents he knows. The circuit court also found that separating C.C.S. from his foster parents would be traumatic and that the challenges I.S. faces as a result of her mental illness and intellectual limitations are "too significant" to allow the court to believe she could meet the responsibilities of caring for a young child. The circuit court concluded that termination of I.S.'s parental rights would allow C.C.S. to enter into a more stable and permanent family relationship and that such termination was in his best interest.

The record shows the circuit court properly exercised its discretion. The circuit 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 circuit court's decision to terminate I.S.'s parental rights would lack arguable merit.

I.S.'S RESPONSE

In response to the no-merit report, I.S. filed a document in which she alleged that she has accomplished various goals, including passing a GED test and obtaining employment, and she expressed her belief that both J.S. and C.C.S. should return to her home. The response does not raise an arguably meritorious basis for further proceedings.

First, matters related to J.S. are not before this court. We affirmed the order terminating I.S.'s parental rights to J.S. in ***State v. I.S.***, No. 2015AP931-NM, unpublished op. and order (WI App July 14, 2015), and we remitted the matter on August 19, 2015. Accordingly, we have no jurisdiction to consider the matter here.[8] *See* ***State v. American TV & Appliance of Madison Inc.***, 151 Wis. 2d 175, 179, 443 N.W.2d 662 (1989).

As to matters potentially affecting the order underlying this appeal, the successes in education and employment that I.S. describes do not constitute a basis for challenging the finding that she is an unfit parent because they do not undermine proof either that C.C.S. was adjudged to be a child in need of protection and services or that, within the three years preceding that determination, a circuit court ordered I.S.'s parental rights terminated with respect to another child. *See* WIS. STAT. § 48.415(10). I.S.'s successes also do not affect the circuit court's analysis of the best interests of C.C.S. As we have seen, the circuit court concluded it should terminate I.S.'s parental rights to C.C.S. given his lack of contact with I.S. throughout his life, the trauma that would follow separating him from his foster parents, and the significant impediments that I.S. faces in meeting the needs of a small child. I.S.'s recent accomplishments are to be commended, but she does not show that they have any impact on the factors that persuaded the circuit court that termination of her parental rights was in the best interests of C.C.S.

[8] We add that, with exceptions not relevant here concerning Native American children, "in no event may any person, for any reason, collaterally attack a judgment terminating parental rights ... more than one year after the date on which all appeals from the judgment, if any were filed, have been decided." *See* WIS. STAT. § 48.43(6)(c).

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 I.S.'s parental rights to C.C.S. is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jane S. Earle is relieved of any further representation of I.S. on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals