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August 7, 2017

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

2017AP1025-NM	In re the termination of parental rights to J.C.R.S.: Kenosha County Department of Human Services v. A.R.S. (L.C. # 2015TP32)
2017AP1026-NM	In re the termination of parental rights to J.M.S.: Kenosha County Department of Human Services v. A.R.S. (L.C. # 2015TP33)
2017AP1027-NM	In re the termination of parental rights to J.A.S. Kenosha County Department of Human Services v. A.R.S. (L.C. # 2015TP34)

Before Dugan, J.[1]

[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.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

A.R.S. appeals orders terminating her parental rights to J.C.R.S., a son born July 22, 2006, J.M.S., a daughter born September 15, 2008, and J.A.S., a daughter born February 17, 2010. Attorneys Megan Sanders-Drazen and Colleen Marion, appointed appellate counsel for A.R.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 (Ct. App. 1998), and WIS. STAT. RULES 809.107(5m) and 809.32. A.R.S. did not file a response. We have considered counsels' no-merit report, and we have independently reviewed the records. We conclude that further proceedings would lack arguable merit, and we summarily affirm the orders terminating A.R.S.'s parental rights.

Background

J.C.R.S, J.M.S., and J.A.S., are the marital children of A.R.S. and J.C.S. In June 2011, the children's half-sister alleged that she had been sexually assaulted by her stepfather, J.C.S. Kenosha County Juvenile Intake Services detained J.C.R.S., J.M.S., and J.A.S. on June 24, 2011, based on concerns about the risks they faced if they remained in the family home.

On May 20, 2015, the Kenosha County Department of Human Services (the County) filed petitions to terminate A.R.S.'s parental rights to J.C.R.S., J.M.S., and J.A.S. on the ground that the children were in continuing need of protection or services.[2] *See* WIS. STAT. § 48.415(2).

[2] The petitions also sought to terminate the parental rights of J.C.S. The orders terminating his parental rights are not before us, and we therefore do not consider those orders here.

According to the petitions, a circuit court previously found that the children were in need of protection or services and, on March 27, 2012, placed the children outside A.R.S.'s home pursuant to dispositional orders that included warnings in conformity with WIS. STAT. § 48.356(2), concerning grounds for termination of parental rights. The petitions further alleged that the County had made reasonable efforts to assist A.R.S. in meeting the conditions for return of the children, but she failed to meet those conditions and the children remained in a placement outside her home.

A.R.S. disputed the allegations in the petitions for some time, but in April 2016 she decided to enter a no-contest plea to the allegations that the children were in continuing need of protection or services. The circuit court found that she was an unfit parent and, following a dispositional hearing in January 2017, terminated her parental rights in the best interests of the children.

Compliance With Statutory Time Limits

We first consider whether A.R.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 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 multiple occasions granted continuances that extended the proceedings beyond the statutory deadlines, but A.R.S. did not object and therefore has waived that issue. Accordingly, she cannot mount an arguably meritorious challenge to the circuit court's competency to proceed based on failure to comply with time limits. *See* ***id.***

No-Contest Plea to Grounds For Termination

Before accepting a no-contest plea in the grounds phase of a termination of parental rights proceeding, the circuit court must conduct a colloquy with the parent in accordance with WIS. STAT. § 48.422(7), to ensure that the plea is knowing, intelligent, and voluntary. *See* ***Brown Cty. DHS v. Brenda B.***, 2011 WI 6, ¶¶34-35, 331 Wis. 2d 310, 795 N.W.2d 730. The statute requires the circuit court to: (1) address the parent and determine that the plea is made voluntarily and knowingly; (2) establish whether any promises or threats were made to elicit the

[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.

plea; (3) establish whether a proposed adoptive parent for the children 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 plea. *See* § 48.422(7).

Additionally, when accepting a parent's plea in the grounds phase of a termination of parental rights proceeding, the circuit court must ensure the parent's understanding that acceptance of the plea will result in a finding of parental unfitness. *See* ***Brenda B.***, 331 Wis. 2d 310, ¶43. The parent further must be informed that at the later dispositional phase, the circuit court may dismiss the petition or terminate parental rights. *See* ***id.***, ¶66. "Finally, the parent must be informed that ... [o]nce the parent is found to be unfit, it is the court's determination about what is best for the child rather than any concern about protecting the parent's right that drives the outcome" of the dispositional hearing. *See* ***id.***, ¶44. In conducting the colloquy, the circuit court is not required to follow a specific checklist. *See* ***id.***, ¶57. Rather, "[t]he questions to be asked depend upon the circumstances of the case." ***Id.***

The record establishes that the circuit court conducted a proper colloquy with A.R.S. before accepting her no-contest plea to the allegation that her children were in continuing need of protection and services. A.R.S. submitted a signed plea questionnaire and waiver of rights form. *Cf.* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (stating that a plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The circuit court established that she had reviewed the form with her attorney, that she understood it, and that she had no questions about it. The form reflected that A.R.S. understood the rights she waived by entering a plea and the elements the County must prove at trial before a jury could find that her children were in continuing need of protection or services. The form

further reflected A.R.S.'s understanding that if the circuit court accepted her no-contest plea, the circuit court would find her to be an unfit parent and would then conduct a dispositional hearing at which the court would grant or dismiss the termination of parental rights petitions based on the best interests of her children.

The circuit court explained the two-part procedure in a termination of parental rights case and described the components of the grounds phase and dispositional phase of the case. A.R.S. said she understood the procedure. The circuit court explained to A.R.S. that by entering a no-contest plea she was giving up her right to a jury trial on the question of whether grounds existed to terminate her parental rights. A.R.S. said she understood. The court explained that to prevail at a jury trial, the County must prove that: (1) J.C.R.S., J.M.S., and J.A.S. were adjudged to be in need of protection and services and placed outside of A.R.S.'s home for a period of six months or longer pursuant to one or more court orders that contained warnings about the grounds for termination of parental rights; (2) the County made a reasonable effort to assist A.R.S. in meeting the conditions; (3) she did not meet the conditions for return of the children; and (4) there is a substantial likelihood that she would be unable to meet the conditions for return of the children within a nine-month period after the hearing. *See* WIS. STAT. § 48.415(2). A.R.S. said she understood. She said she had not been forced to give up her right to a jury trial, and she had not been threatened or promised anything in order to induce her no-contest plea.

When a petition to terminate parental rights is uncontested, the circuit court shall hear testimony in support of the allegations in the petition. *See* ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶¶53, 56, 233 Wis. 2d 344, 607 N.W.2d 607. The testimony may be presented during proceedings other than the plea hearing. *See* ***id.***, ¶58. In this case, on the County's motion and

without objection from A.R.S., the circuit court adjourned the proceedings after the plea colloquy and agreed to hear testimony establishing the factual basis for her plea at the time of the dispositional hearing.

At the dispositional hearing, the circuit court took judicial notice of certified records showing that the children were removed from A.R.S.'s home pursuant to court orders that contained a warning about the grounds for termination of A.R.S.'s parental rights. The County also presented testimony that J.C.R.S., J.M.S., and J.A.S. were children in continuing need of protection or services within the meaning of WIS. STAT. § 48.415(2).

Kristi Peterson testified that she was employed by the Kenosha County Division of Children and Family Services as the case worker for the three children. Peterson said that the children had been placed outside of A.R.S.'s home for more than five years, and that, despite the County's efforts, A.R.S., had failed to satisfy numerous conditions that the circuit court ordered her to fulfill before the children could be returned.

Peterson said that A.R.S. was required to maintain regular contact with the children, but she had moved to Kentucky soon after the children were detained in 2011 and continued to reside there. Peterson said that A.R.S. did not meet the goal of seeing the children twice a month. During the year immediately preceding the hearing, A.R.S. had visited with the children only five times, even though the County paid for A.R.S.'s hotel room in Wisconsin when she came for purposes of visitation. Peterson also testified that A.R.S. was required to sign therapeutic releases and school authorizations for the children, but, although the County repeatedly sent such releases and authorizations to A.R.S., she refused to sign some of the documents and significantly delayed signing others. Additionally, A.R.S. failed to provide for

the financial needs of the children; at the time of the hearing, A.R.S. had not paid any child support for more than a year and owed $16,373.48 that had accrued over the course of the litigation. The foregoing were not the only conditions of return that Peterson said A.R.S. failed to satisfy. Peterson opined that, based on her knowledge of the case and in light of the significant amount of time that A.R.S. had unsuccessfully worked towards reunification, A.R.S. was not likely to meet the conditions of return within the nine months following the hearing.

The County went on to offer testimony establishing a proposed adoptive resource, as required by WIS. STAT. § 48.422(7)(bm). Specifically, Peterson testified that the foster parents who had cared for the children since shortly after they were detained wanted to adopt them and were approved to adopt them.

The record establishes that A.R.S. knowingly, intelligently, and voluntarily entered a no-contest plea to the allegation that J.C.R.S., J.M.S., and J.A.S. were children in continuing need of protection and services. A factual basis exists for the plea. The circuit court properly concluded that A.R.S. was an unfit parent. We are satisfied that further appellate proceedings regarding this issue would lack arguable merit.

Expert Opinion Testimony

In anticipation of a jury trial, A.R.S. moved to bar Peterson from offering an expert opinion about the likelihood of A.R.S. satisfying the conditions for return of the children within nine months after the fact-finding hearing. *Cf.* WIS. STAT. § 907.02 and ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 582-95 (1993) (establishing the Wisconsin standard that the proponent of expert testimony must satisfy before such testimony is admitted into evidence).

The circuit court granted the motion without objection from the County. We have therefore considered whether A.R.S. could mount an arguably meritorious challenge to Peterson's testimony, offered as a part of the factual basis for the no-contest plea, that A.R.S. was unlikely to meet the conditions of return during the applicable nine-month period. We conclude she could not do so.

The County showed that A.R.S. failed to meet the conditions of return during the five years preceding the plea hearing. As is well settled, a parent's long history of failing to meet the conditions of return is evidence tending to show that the parent is unlikely to meet those conditions in the future. *See* ***La Crosse Cty. DHS v. Tara P.***, 2002 WI App 84, ¶14, 252 Wis. 2d 179, 643 N.W.2d 194. Evidence other than Peterson's opinion therefore established a factual basis for concluding that A.R.S. was unlikely to meet the conditions of return within the time allowed. Because Peterson's opinion testimony had no practical effect on the outcome of the proceedings, a challenge to that testimony would be frivolous within the meaning of ***Anders***.

Severance

During pretrial proceedings, A.R.S. moved to sever her jury trial from that of her husband, J.C.S. The circuit court denied the motion. In the no-merit report, appellate counsel examines whether the circuit court erred. Because A.R.S. ultimately entered a valid no-contest plea instead of proceeding to jury trial, she appears to have forfeited the severance issue. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (explaining that a person who enters a valid no-contest plea in a criminal case forfeits nonjurisdictional defects in the proceedings leading up to the plea); *see also* ***County of Racine v. Smith***, 122 Wis. 2d 431, 436, 362 N.W.2d 439 (Ct. App. 1984) (holding that the forfeiture rule applies to prosecutions for

civil violations). No published case, however, has resolved whether the forfeiture rule applies in termination of parental rights matters. *See* ***Sheboygan Cty. DHHS v. Vincent E.K.***, Nos. 2009AP1034/1035, unpublished slip op., ¶3 n.3 (WI App July 14, 2010). Accordingly, we assume that A.R.S. could challenge the order denying severance, and we consider whether such a challenge would be arguably meritorious. We conclude it would not.

"[P]roceedings to terminate parental rights against both the father and the mother may be brought in a single action in the interest of judicial economy and in the absence of prejudice." ***I.P. v. State***, 157 Wis. 2d 106, 121, 458 N.W.2d 823 (Ct. App. 1990), *aff'd*, 166 Wis. 2d 464, 480 N.W.2d 234 (1992). Whether to grant severance rests in the circuit court's discretion, *see* ***id.***, and we review a circuit court's discretionary decisions with deference, *see* ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶12, 324 Wis. 2d 180, 781 N.W.2d 503. The circuit court here determined that severance would be "extremely inconvenient" and would squander judicial resources unnecessarily because the evidence as to A.R.S. and J.C.S. substantially overlapped. The circuit court further rejected A.R.S.'s argument that the jury would be improperly influenced by testimony about J.C.S.'s incarceration and his financial, employment, and mental health problems; the circuit court explained that it would instruct the jury to consider the evidence as to each parent independently. Any danger of prejudice arising from joinder '"can be overcome by the giving of a proper cautionary instruction.'" *See* ***State v. Linton***, 2010 WI App 129, ¶22, 329 Wis. 2d 687, 791 N.W.2d 222 (citation and one set of quotation marks omitted). Accordingly, A.R.S. cannot pursue an arguably meritorious challenge to the decision denying her motion for severance.

Discretionary Decision To Terminate Parental Rights

We next consider whether A.R.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 dispositional hearing, the County presented testimony from Peterson and from Lora Schroeder, the treatment foster care worker for J.C.R.S., J.M.S., and J.A.S. Additionally, A.R.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 J.C.R.S., J.M.S., and J.A.S. were, respectively, ten, eight, and six years old, and that while J.C.R.S. carried a diagnosis of A.D.H.D., none of the children had health concerns that would affect resolution of the case. The circuit court found that J.C.R.S. had lived apart from A.R.S. for more than half of his life, and the other two children had not spent a meaningful portion of their lives with her. Conversely, the circuit court found that the

children had lived with their foster parents for more than five years and that the foster parents wanted to adopt the children and were approved to do so.

The circuit court acknowledged that each child had some bond with A.R.S. and that the bonds would be severed if her parental rights were terminated. The circuit court concluded, however, that any hardship arising from severing those bonds was outweighed by the benefits of permanence and consistency that would follow from termination and subsequent adoption by the foster family. The circuit court indicated that this consideration was particularly significant in light of Schroeder's testimony that the children's strongest preference was for permanence. Finally, the circuit court found that in light of the long period of time the children had lived with the foster family, termination of A.R.S.'s parental rights would permit the children to formalize their places in a long-established family unit and to enter into more stable and permanent family relationships.

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 A.R.S.'s parental rights would lack arguable merit.

Refusal to Adjourn the Dispositional Hearing

Last, we consider whether A.R.S. could raise an arguably meritorious claim that the circuit court erroneously refused to adjourn the dispositional hearing. At the outset of the hearing, counsel for A.R.S. explained that she was unable to appear in person because the arrangements she had made to permit her to attend "fell through" and, in addition, "finances

made it prohibitive" for her to travel to Wisconsin. The circuit court responded that it had ordered A.R.S. to appear in person and would not adjourn the hearing. The circuit court instead permitted A.R.S. to appear by telephone. A.R.S., by counsel, objected without argument to the court's order denying a continuance. We are satisfied that the order does not provide grounds for further appellate proceedings.

As we have seen, continuances in termination of parental rights matters may be granted only upon a showing of good cause and only when necessary. *See* WIS. STAT. § 48.315(2). Here, A.R.S. did not show either good cause or a need for a continuance. A parent has a right to meaningful participation in a termination of parental rights proceeding, but meaningful participation does not always require physical presence, and whether the parent was able to meaningfully participate by telephone depends upon the facts of each case. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 701-02, 530 N.W.2d 34 (Ct. App. 1995).

In this case, the record reflects that appearance by telephone permitted A.R.S. to consult with counsel and to hear and understand the courtroom proceedings. *See* ***id.*** Moreover, the record shows that as to almost all of the hearings that preceded the disposition, including the plea hearing, A.R.S. appeared by telephone at her request and with the circuit court's permission. A.R.S. thus had ample opportunity to assess the quality of telephone appearances and could have advanced any complaints she had about such appearances as a basis for seeking an adjournment of the dispositional hearing. She offered no complaints at all. Accordingly, we are satisfied that A.R.S. could not pursue an arguably meritorious challenge to the circuit court's decision to hold the dispositional hearing as scheduled when A.R.S. was able to attend telephonically.

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 orders terminating A.R.S.'s parental rights to J.C.R.S., J.M.S. and J.A.S. are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorneys Megan Sanders-Drazen and Colleen Marion are relieved of any further representation of A.R.S. on appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals