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July 11, 2018

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

2018AP542-NM	In re the termination of parental rights to A.N.B.: State of Wisconsin v. D.L.B., Sr. (L.C. # 2015TP253)
2018AP543-NM	In re the termination of parental rights to J.J.B.: State of Wisconsin v. D.L.B., Sr. (L.C. # 2015TP254)
2018AP544-NM	In re the termination of parental rights to A.M.B. State of Wisconsin v. D.L.B., Sr. (L.C. # 2015TP255)
2018AP545-NM	In re the termination of parental rights to H.S.A.-M. IV: State of Wisconsin v. D.L.B., Sr. (L.C. # 2016TP213)

Before Brennan J.[1]

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).

D.L.B., Sr., appeals from orders terminating his parents rights to A.N.B., born May 14, 2006, H.S.A.-M. IV, born May 2, 2007, J.J.B., born August 14, 2009, and A.M.B., born August 10, 2011. Appellate counsel, Attorney Eileen T. Evans, filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32, ***Anders v. California***, 386 U.S. 738 (1967), and ***Brown Cty. v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998). D.L.B., Sr., timely submitted a response pursuant to an extension granted by this court. We have considered the no-merit report and response, and we have independently reviewed the consolidated records. We conclude that further proceedings would lack arguable merit, and we summarily affirm the orders terminating D.L.B., Sr.'s parental rights. *See* WIS. STAT. RULE 809.21.

Background

A.N.B, H.S.A.-M. IV, J.J.B., and A.M.B. are the nonmarital children of D.L.B., Sr., and P.J.J. In early 2012, the Division of Milwaukee Child Protective Services[2] implemented a safety plan requiring that one of P.J.J.'s relatives supervise her at all times because her I.Q. of sixty-six

[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.

[2] The Division of Milwaukee Child Protective Services was formerly known as the Bureau of Milwaukee Child Welfare. We refer to the agency by its current name.

prevented her from safely caring for her children. The safety plan failed in May 2012 when P.J.J. went into hiding with the children.

The Division was unable to locate P.J.J. for nine months. During this time, the children did not go to school or receive medical attention. In late February 2013, social workers with the Division received information about P.J.J.'s location, and, on February 27, 2013, they went to her reported home, where they found her hiding in a closet. The children were nearby. They were partially dressed or naked and had not been bathed "in many days." The home had garbage piled on the floor and was heated by the four burners on the stove top. The home contained no beds, dressers, chairs, cribs, or adequate clothing for the children. The Division took the children into protective custody and placed them with D.L.B., Sr., but within a few days alternative placements were found following a determination that he was living with a woman he was not permitted to contact because she was his co-defendant in a pending criminal case.

In July 2013, the circuit court found that the children were in need of protection or services and entered an order placing them outside their parents' homes. The circuit court ordered that to meet the conditions of return, D.L.B., Sr., must comply with all criminal court matters and demonstrate that he could "set aside his needs in favor of his children by not participating in criminal acts." As additional conditions of return, the circuit court required D.L.B., Sr., to have regular, successful visits with the children, to provide a safe, suitable, and stable home for them, to ensure that their basic and special needs were met, to refrain from using illegal substances and alcohol, and to avoid friends and family members who use drugs and trigger his own use.

D.L.B., Sr., had supervised visits with the children pursuant to the court order for several months. On December 20, 2013, however, police took D.L.B., Sr., into custody in connection with charges of first-degree intentional homicide and possessing a firearm while a felon. He has remained in custody since that date. According to the criminal complaint, D.L.B., Sr., went to a restaurant with three companions on December 20, 2013. The group was intoxicated and got into an argument with the restaurant patrons and employees. The hostilities escalated, and D.L.B., Sr., shot and killed the cook.

In July 2014, a jury found D.L.B., Sr., guilty of the lesser included charge of first-degree reckless homicide while using a dangerous weapon and guilty of possessing a firearm while a felon. The following month, the circuit court imposed an aggregate sixty-year sentence bifurcated as forty-two years of initial confinement and eighteen years of extended supervision.

In August 2015, the State filed petitions to terminate D.L.B., Sr.'s parental rights to A.M.B., A.N.B., and J.J.B., and in June 2016, the State filed a petition to terminate D.L.B., Sr.'s parental rights to H.S.A.-M. IV.[3] As grounds, the State alleged in each petition that the child was in continuing need of protection or services, *see* WIS. STAT. § 48.415(2)(a), and that D.L.B., Sr., failed to assume parental responsibility, *see* § 48.415(6). The matters proceeded to a five-day bench trial in March 2017, and in May 2017, the circuit court found that the State had proved

[3] The State additionally filed petitions to terminate P.J.J.'s parental rights to the four children and to two children who are not D.L.B., Sr.'s offspring. The orders resolving those petitions are not before us, although the matters were all tried and resolved together in consolidated proceedings. Also not before us are the proceedings regarding a petition to terminate D.L.B., Sr.'s parental rights to D.L.B., Jr. The petition involving D.L.B., Jr., was initially joined with the proceedings involving the other children but was subsequently severed.

both allegations. The circuit court therefore found that D.L.B., Sr., was an unfit parent. At a subsequent dispositional hearing in August 2017, the circuit court determined that termination of his parental rights was in the best interest of the children. He appeals.

Discussion

We first consider whether D.L.B., Sr., 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. *See* 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. *See* § 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." *See* WIS. STAT. § 48.424(4).[4]

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

[4] 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.

prompt disposition of cases." *See* 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." *See* § 48.315(3).

In this case, the circuit court on multiple occasions granted continuances that extended the proceedings beyond the statutory deadlines, but D.L.B., Sr., did not object. Accordingly, he 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.***

We next consider whether D.L.B., Sr., could raise an arguably meritorious challenge to the circuit court's decision denying his pretrial motion for a change of venue. The motion was based on a claim that he could not receive a fair jury trial in the grounds phase of the proceedings because press coverage of the murder he committed tainted the potential jury pool in Milwaukee County. We conclude that pursuit of this issue would lack arguable merit. D.L.B., Sr., elected to waive a jury trial in favor of a trial to the court, and he thereby withdrew his request that an impartial jury decide his case. A deliberate choice of strategy binds the litigant and this court. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971).

We next consider whether D.L.B., Sr., can raise an arguably meritorious challenge to the jury waiver. "The right to a jury trial in a termination [of parental rights] case is statutory, not constitutional." ***Walworth Cty. DHHS v. Andrea L.O.***, 2008 WI 46, ¶29, 309 Wis. 2d 161, 749 N.W.2d 168. No statutory procedure governs a parent's withdrawal of a jury demand, *see* ***id.***, ¶30, and the circuit court is not required to engage in a personal colloquy on the record before accepting a jury waiver, *see* ***Racine Cty. Human Servs. Dep't v. Latanya D.K.***, 2013 WI App

28, ¶21, 346 Wis. 2d 75, 828 N.W.2d 251. Nonetheless, in this case the circuit court did conduct a colloquy with D.L.B., Sr., and determined that his waiver of a jury trial was knowing, intelligent, and voluntary. Further pursuit of this matter would lack arguable merit.

We consider next whether the State presented sufficient evidence to support the circuit court's finding that D.L.B., Sr., was an unfit parent. Whether grounds exist for the termination of parental rights is a question of fact. *See* WIS. STAT. § 48.415. The State must prove the existence of such grounds by clear and convincing evidence. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶3-4, 271 Wis. 2d 1, 678 N.W.2d 856. We review the sufficiency of the evidence to determine "whether there is any credible evidence to sustain the verdict." ***St. Croix Cty. DHHS v. Michael D.***, 2016 WI 35, ¶29, 368 Wis. 2d 170, 860 N.W.2d 107.

To support the claim that A.M.B., H.S.A.-M. IV, J.J.B., and A.N.B. were children in continuing need of protection or services, the State was required to prove that: (1) each child was adjudged to be in need of protection and services and placed outside of the home for a cumulative period of at least six months pursuant to a court order containing a termination of parents rights notice; (2) the Division made reasonable efforts to provide the services ordered by the court; (3) D.L.B., Sr., did not meet the conditions for the safe return of the children to the home; and (4) D.L.B., Sr., was substantially unlikely to meet the conditions for return of the children within a nine-month period after the hearing. *See* WIS. STAT. § 48.415(2)(a); *see also* WIS JI—CHILDREN 324A.

To establish the first of the foregoing elements, the State introduced certified copies of four court orders entered on July 8, 2013, reflecting determinations that the children were in need

of protection and services and placing them outside their parents' homes. Attached to each of the orders was the termination of parental rights notice required by WIS. STAT. § 48.356(2).

To establish the second and third elements, the State presented testimony from David Hagenson, the ongoing case manager assigned to the family as of August 2013. Hagenson described the referrals he made for services to D.L.B., Sr. Hagenson testified that D.L.B., Sr., was incarcerated in connection with a charge of identity theft when the circuit court entered the July 8, 2013 orders, but upon release to community supervision he became "very engaged with the children," and Hagenson recommended that D.L.B., Sr., progress to unsupervised visits. The recommendation, however, was never implemented. Megan Pena, a successor case manager, described how D.L.B., Sr., violated the conditions of return on December 20, 2013, by consuming alcohol and marijuana and committing a homicide, thereby curtailing his ability to make a home for the children and meet their basic needs. She also testified that during D.L.B., Sr.'s ongoing incarceration, he did not provide support for the children and that, by engaging in conduct leading to his placement in segregation, he impeded his ability to visit with them. Finally, to show that D.L.B., Sr., was substantially unlikely to meet the conditions for the safe return of the children to his home within the nine-month period following the hearing, the State presented certified court records showing that on August 27, 2014, D.L.B., Sr., was sentenced to forty-two years of initial confinement that he would not complete until his youngest child was more than forty years old.

D.L.B., Sr., asserts in his response to the no-merit report that the Division did not make reasonable efforts to arrange visits for him with his children while he was in segregation and that Pena testified falsely that his segregation status prohibited such visits. In support, he points us

toward the WISCONSIN ADMINISTRATIVE CODE ch. DOC 309. His complaints do not provide a basis for postdisposition proceedings. Although WIS. ADMIN. CODE § DOC 309.09(4) does permit visitation for inmates in segregation status, § DOC 309.09(6) provides that institutions may limit such visits "by issuing restrictions concerning minor visitors."

D.L.B., Sr., also asserts in his response to the no-merit report that the conditions of return were impossible for him to meet due to his incarceration, and therefore the finding of unfitness under WIS. STAT. § 48.415(2)(a) violated his constitutional rights. In support, he directs our attention to ***Kenosha Cty. DHS v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845. That case does not provide an arguably meritorious basis for further proceedings.

In ***Jodie W.***, the supreme court considered whether a court may find a parent unfit under WIS. STAT. § 48.415(2)(a) "based solely on the parent's failure to meet an impossible condition of return," and held "that a parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit." *See* ***Jodie W.***, 293 Wis. 2d 530, ¶¶19, 49. The court also stated, however, that its conclusion did "not render a parent's incarceration irrelevant" to the determination of whether a parent is unfit. *See* ***id.***, ¶50. Rather, a parent's incarceration may be considered along with other relevant factors, including, for example, the nature of the crime committed by the parent and the length of sentence imposed. *See* ***id.***

In this case, the evidence showed that D.L.B., Sr., had the opportunity to satisfy the conditions of return during the periods he was not incarcerated from July 8, 2013, through December 20, 2013, and, in fact, he made substantial progress towards reunification during that

time. While out of custody, however, he elected to violate the conditions that required him to forgo consumption of intoxicating substances, to comply with criminal court matters, and to set aside his personal needs and refrain from committing criminal acts. His decisions to disregard those conditions and instead consume intoxicants and commit a homicide—not his incarceration—kept him from supporting the children, meeting their needs, and providing them a safe and stable home.

In light of the record, we are satisfied that the circuit court properly found the evidence sufficient to support the conclusion that D.L.B., Sr., was an unfit parent because A.N.B., H.S.A.-M. IV, A.M.B., and J.J.B. were children in continuing need of protection or services. The circuit court's findings are supported by the evidence and are not clearly erroneous. An appellate challenge would lack arguable merit.

When the State alleges multiple grounds on which a parent is unfit, the circuit court must find the parent unfit upon proof of one of those grounds. *See* ***Steven V.***, 271 Wis. 2d 1, ¶25; *see also* WIS. STAT. § 48.415 ("Grounds for termination of parental rights shall be *one* of the following:") (emphasis added). Therefore, we need not review the sufficiency of the evidence to establish the alternative ground of failure to assume parental responsibility that the State also alleged. Nonetheless, we observe that the evidence was sufficient to establish that D.L.B., Sr., failed to assume parental responsibility within the meaning of WIS. STAT. § 48.415(6).

To support the allegation of failure to assume parental responsibility, the State was required to prove that D.L.B., Sr., had not had a substantial parental relationship with the children. *See* WIS. STAT. § 48.415(6). The term "'substantial parental relationship' means the

acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." *See* § 48.415(6)(b).

A finding under WIS. STAT. § 48.415(6), requires application of the "totality of the circumstances" test. *See* ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶3, 333 Wis. 2d 273, 797 N.W.2d 854. In applying the test, the circuit court "may include the reasons why a parent was not caring for or supporting [his] child[ren] and exposure of the child[ren] to a hazardous living environment." *See* ***id.*** Here, an initial assessment worker for the Division testified, and D.L.B., Sr., confirmed, that D.L.B., Sr., left Wisconsin in 2011 to live in Ohio, leaving the four children with P.J.J. Given the extent of P.J.J.'s cognitive disability, his absence exposed his young children to substantial risk, and following his return to Wisconsin, he committed a homicide that prevented him from making a home or providing necessary care for them. Accordingly, a challenge to the sufficiency of the evidence establishing D.L.B., Sr.'s failure to assume parental responsibility would lack arguable merit.

Next, we consider whether the circuit court judge properly declined to recuse herself before the dispositional hearing, when D.L.B., Sr., realized that the judge had presided over his waiver of a preliminary examination in his homicide case. WISCONSIN STAT. § 757.19(2) specifies the situations in which a judge "shall disqualify himself or herself" from proceedings. *See* ***id.*** The first six paragraphs, § 757.19(2)(a)-(f), describe objective circumstance requiring disqualification, but none of those paragraphs is applicable to the circumstance here. The last paragraph, § 757.19(2)(g), is a subjective test that requires disqualification when the judge "determines that for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." *See* ***id.*** In this case, the judge explained that she had no recollection of the

waiver hearing, which she conducted while a court commissioner, and that nothing about the hearing prevented her from presiding fairly and impartially in the instant matters.

WISCONSIN STAT. § 757.19(2)(g) '"is clearly drafted so as to place the determination of partiality solely upon the judge."' ***State v. Pinno***, 2014 WI 74, ¶93, 356 Wis. 2d 106, 850 N.W.2d 207 (citations omitted). The judge here concluded that she could be fair and impartial. Accordingly, the judge properly fulfilled her obligations under the statute, and the record does not provide a basis for asserting that the judge was nevertheless biased. *Cf.* ***id.***, ¶94 (stating that in "extreme circumstances" a judge's conduct may objectively reflect bias that violates constitutional protections). Moreover, following discussion of the judge's limited role in the criminal case, all of the parties, including D.L.B., Sr., declined to move for recusal. *See* § 757.19(3) (permitting waiver of any disqualification that may occur under § 757.19(2)). Thus, there is no arguable merit to a claim that the circuit court judge erred by presiding in this matter.

Last, we consider whether D.L.B., Sr., could mount an arguably meritorious challenge to the decision to terminate his 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. *See* WIS. STAT. § 48.426(2). In considering the best interests of the child, a trial court must consider: (1) the likelihood of adoption after termination; (2) the child's age and health; (3) "[w]hether 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." *See* § 48.426(3).

At the dispositional hearing, the State presented testimony from Q.W., the foster father for H.S.A.-M. IV and P.J.J.'s cousin; from A.J., another of P.J.J.'s cousins and the foster mother for A.N.B.; and from M.W., the foster mother for A.M.B. and J.J.B. The State also presented testimony from the on-going case manager who assumed responsibility for the matter in November 2016. D.L.B., Sr., testified on his own behalf in opposition to terminating his parental rights. The circuit court additionally heard testimony from P.J.J. and two of her sisters. At the conclusion of the testimony, the trial court considered each of the statutory factors in light of the evidence presented.

The circuit court found that each child was placed with a foster parent committed to adoption, and each child was therefore likely to be adopted. The court noted that A.N.B. was eleven years old, H.S.A.-M. IV was ten years old, J.J.B. was eight years old, and A.M.B. was six years old. The court found that the children had been living outside their parents' homes for four years and that the period of separation constituted a "very substantial" portion of each child's life. Each child was in good physical health, and each foster family was addressing the "mental health challenges" presented by each child.

The circuit court considered the bond between each child and his or her biological family members. The circuit court determined that the children had very substantial relationships with each other, but the circuit court found that each foster family recognized those relationships and would maintain them, and the court therefore concluded that severing the legal bonds would not

be harmful. *Cf.* ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, ¶29, 234 Wis. 2d 606, 610 N.W.2d 475 (court may consider adoptive parent's promise to continue relationship with child's family of origin). The circuit court went on to consider the nature and extent of the bond between D.L.B., Sr., and the children. The circuit court found that the older two children had a bond with D.L.B., Sr., and that those children were placed with family members who would continue the relationship. *See* ***id.*** As to the younger two children, the circuit court concluded that they too had a relationship with D.L.B., Sr., but the circuit court believed the testimony that each child expressed anxiety and experienced trauma at the prospect of contact with him. The circuit court therefore concluded that ending D.L.B., Sr.'s legal relationship to the four children would not be harmful to any of them.

D.L.B., Sr., asserts in his response to the no-merit report that the circuit court did not consider the wishes of the children, but the record does not support that claim. The circuit court expressly found that H.S.A.-M. IV was old enough to express his wishes, and the circuit court believed the testimony that he wanted to be placed permanently with Q.W. As to the other three children, the circuit court found that A.N.B.'s cognitive delays prevented her from understanding exactly what was at stake and that the younger two children were not old enough to express their wishes in a meaningful way.

Finally, the circuit court found that terminating D.L.B., Sr.'s parental rights would permit each child to enter into more permanent and stable relationships. The circuit court observed that D.L.B., Sr., was unable to provide daily care and supervision for the children and would likely continue under that disability for many years. Each child was bonded with a prospective adoptive parent who was engaged in meeting the child's specific needs, and each child was

secure and comfortable in his or her placement. Accordingly, the circuit court concluded that terminating D.L.B., Sr.'s parental rights was in the best interests of each of the four children.

The record shows that 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 D.L.B., Sr.'s parental rights would lack arguable merit.

Based on an independent review of the records, we conclude that no additional issues warrant discussion. Any further proceedings would be without arguable merit.

IT IS ORDERED that the orders terminating D.L.B., Sr.'s parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Eileen T. Evans is relieved of any further representation of D.L.B., Sr. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals