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May 1, 2019

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

2019AP452-NM	In re the termination of parental rights to J.L.C., a person under the age of 18: State of Wisconsin v. L.C. (L.C. # 2016TP246)
2019AP453-NM	In re the termination of parental rights to J.C., a person under the age of 18: State of Wisconsin v. L.C. (L.C. # 2016TP247)

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).

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[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

L.C. appeals from orders terminating his parental rights to son J.L.C. and daughter J.C. Appellate counsel, Gregory Bates, has filed a consolidated 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. L.C. was advised of his right to file a response to the report, but he has not responded. Based upon our independent review of the records and the no-merit report, this court concludes that any appeal would lack arguable merit. Therefore, the orders terminating L.C.'s parental rights are summarily affirmed.

BACKGROUND

J.L.C. and J.C. were detained because of issues their parents had with domestic violence, drugs, and housing. J.L.C. was detained at approximately nine months old. He was adjudicated a child in need of protection or services (CHIPS) on March 12, 2015, when he was approximately two years and three months old, and was placed outside the home. J.C. was detained shortly after her birth. She was adjudicated a child in need of protection or services on June 23, 2015, when she was approximately nine weeks old, and was placed outside the home.

Petitions to terminate L.C.'s parental rights were filed on August 2, 2016, alleging two grounds as to each child: continuing CHIPS and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2), (6). L.C. could not be located for personal service using his last two known addresses, so he was served by publication. L.C. did not appear at the initial hearing on the petition, held on August 26, 2016, so the circuit court found him in default, subject to prove-up on the grounds.

L.C. subsequently secured appointed counsel, who attempted to have the default vacated, but the circuit court denied the attempt. At the prove-up hearing, the family case manager

testified. Following the case manager's testimony, the circuit court concluded that both grounds for termination had been adequately shown as to each child. The matter proceeded to a disposition hearing, after which the circuit court terminated L.C.'s parental rights. L.C. appeals. Additional facts will discussed herein as necessary.

DISCUSSION

1. Statutory Time Limits

Appellate counsel discusses four potential issues in the no-merit report, the first of which is whether the circuit court failed to comply with mandatory time limits, thereby losing competency to proceed. *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* ***April O.***, 233 Wis. 2d 633, ¶5, 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* § 48.315(3).

We agree with appellate counsel's analysis. The circuit court found good cause to toll the time limits on multiple occasions, and L.C. never objected to any continuance. Our review of the record further satisfies us that good cause existed for each delay, so any objections would have been meritless and overruled. The primary cause for delay was typically attorney scheduling issues, and one large period of delay was attributable to a trial reunification between J.C. and her mother, though termination proceedings resumed when the reunification was unsuccessful. There is no arguable merit to any challenge related to mandatory time limits or the circuit court's competency.

II. The Finding of Default

Appellate counsel next discusses whether the circuit court erred when it found L.C. in default for his non-appearance at the initial hearing on the petition, when it subsequently continued the default finding, and when it denied the request to vacate the default finding.

As noted, the circuit court found L.C. in default as to grounds, subject to prove-up, when L.C. failed to appear for the August 26, 2016 initial hearing on the petition. L.C. did, however, appear at a permanency plan review hearing on December 15, 2016. The circuit court explained that if L.C. wanted to try to participate even though he had already been defaulted, he should go to the public defender's office. L.C. responded that he had retained counsel. The circuit court then informed L.C. that securing counsel "needs to be priority number one" because there was about a ninety-day window for L.C. to try to convince the court that default had been inappropriate. The circuit court set January 11, 2017, as the hearing date for L.C. to return with counsel. At the January 11 hearing, however, neither L.C. nor his counsel appeared. The circuit court then continued the default finding, again subject to prove-up.

Sometime prior to the final pretrial date for the mother's cases, the State reported that it had learned L.C. had been incarcerated. The circuit court offered to write a letter to L.C. with the public defender's contact information. At a hearing on April 13, 2017, the family case manager told the court she had met with L.C. at the House of Correction and, though he had not received the circuit court's letter, he wanted to participate in proceedings. The circuit court realized it had not yet sent its letter and indicated it would make sure to do so; a copy of the letter was sent to the public defender's office.

The public defender appointed counsel for L.C. Trial counsel then moved to vacate the default judgment, asserting that default could not be imposed for "'mere nonappearance, in the absence of a showing of bad faith or egregious conduct'" and noting that L.C. had never received personal service. At a motion hearing on June 6, 2017, the State objected to reopening the default and stated that it believed the finding of default was more for failure to join issue than nonappearance. The children's guardian *ad litem* also objected to reopening the default, noting that L.C. had failed to provide correct contact information to the Division of Milwaukee Child Protective Services (the Division), which was why there was no personal service. Moreover, L.C. had been informed in person of the January date for addressing his default, but he chose not to appear.

The circuit court affirmed that the default was for failure to join issue, not because of egregious conduct. It further noted that L.C. had not made any timely, good-faith efforts to address the default, and it surmised that, but for the fact of his incarceration, which prompted the circuit court to contact him, L.C. might not have ever reappeared in these cases. Thus, the circuit court denied the request to vacate the default judgment.

Termination of parental rights (TPR) proceedings under WIS. STAT. ch. 48 are civil proceedings. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶32, 271 Wis. 2d 1, 678 N.W.2d 856. Accordingly, the proceedings are governed by the rules of civil procedure, WIS. STAT. chs. 801-847. *See* WIS. STAT. § 801.01(2). A default judgment may be entered in the grounds phase of a TPR proceeding, though a circuit court must still hear evidence in support of the petition. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶17, 24, 246 Wis. 2d 1, 629 N.W.2d 768.

Whether to grant default judgment is a matter of circuit court discretion. *See* ***id.***, ¶18. Whether to vacate a default judgment is likewise discretionary. *See* ***Ness v. Digital Dial Commc'ns, Inc.***, 227 Wis. 2d 592, 599, 596 N.W.2d 365 (1999). We affirm a discretionary decision if the circuit court applied the correct legal standard and there is a reasonable basis in the record to support the decision. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 276-77, 470 N.W.2d 859 (1991). Whether the circuit court applied the proper legal standard is a question of law that we review *de novo*. *See* ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 270, 225, 594 N.W.2d 370 (1999).

L.C.'s trial attorney tried to vacate the default judgment by arguing that "default judgment may not be imposed for mere nonappearance, in the absence of a showing of bad faith or egregious conduct." *See* ***Schneider v. Ruch***, 146 Wis. 2d 701, 706, 431 N.W.2d 756 (1988). In the no-merit report, appellate counsel notes that a party's "failure to comply with circuit court scheduling and discovery orders without clear and justified excuse is egregious conduct." *See* ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 719, 599 N.W.2d 411 (Ct. App. 1999).

We cannot agree with appellate counsel's analysis because L.C. was not defaulted for failure to comply with a scheduling order—at least, not initially. Rather, L.C. failed to respond to a summons, which is neither a scheduling nor a discovery order. However, any challenge to the default finding would still lack arguable merit because the circuit court expressly said its default finding was not based on egregious conduct but, rather, for L.C.'s failure to join issue—that is, his failure to timely appear and deny the allegations against him. *See* ***Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.***, 2002 WI 66, ¶¶41-45, 253 Wis. 2d 238, 646 N.W.2d 19. Under WIS. STAT. § 806.02(1) (2015-16), "A default judgment may be rendered … if no issue of law or fact has been joined and if the time for joining issue has expired."

These petitions were filed on August 2, 2016. A hearing must be held "within 30 days after the petition is filed. At the hearing on the petition to terminate parental rights the court shall determine whether any party wishes to contest the petition[.]" WIS. STAT. § 48.422(1) (2015-16). L.C. did not appear to contest the petition on the original hearing date. Assuming without deciding that the circuit court was able to reset the thirty-day response period after L.C. appeared at the December 15, 2016 permanency plan review hearing, L.C. then failed to appear with or by counsel at the adjourned hearing. When L.C. did finally appear with counsel, it was ten months after the petitions were filed, and he complained only about the lack of personal service at the initiation of the action. He did not explain his nonappearance in January except to say he did not recall the circuit court setting any dates, an argument the circuit court found unavailing.

We discern no erroneous exercise of discretion by the circuit court. Though it did not expressly refer to WIS. STAT. § 806.02, it properly exercised its discretion in line with that statute and later appropriately followed the procedure for hearing evidence in support of the grounds alleged in the petitions. *See* WIS. STAT. § 48.422(3) ("If the petition is not contested the court shall hear testimony in support of the allegations in the petition[.]"); ***Evelyn C.R.***, 246 Wis. 2d 1, ¶24. There is no arguably meritorious basis on which to challenge the circuit court's finding of default based on L.C.'s failure to timely appear to join issue.

III. Sufficiency of the Evidence

The third issue appellate counsel discusses is whether sufficient evidence supported the alleged grounds for termination. Both petitions alleged the same grounds: continuing CHIPS and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2), (6).

When a termination petition alleges as grounds for termination that a child is in continuing need of protection or services, the State 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.[2]

Walworth Cty. DHHS 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) and 2005 Wis. Act 293, § 20. The State has the burden to show that grounds for termination exist by clear and convincing evidence. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶22.

Appellate counsel notes that the family case manager testified that the children had been found in need of protection or services, and the juvenile court in those cases entered an order that "set goals for L.C. for the return of his children to his care."[3] The case manager also testified that L.C. had not engaged in alcohol or drug treatment, domestic violence classes, mental health treatment, regular visitation with the children, or parenting services. From this testimony, appellate counsel says, the circuit court properly found that the children had been out of the

[2] Effective April 6, 2018, there no longer needs to be proof that there is a substantial likelihood that the parent will not meet the conditions for return within a nine-month period. See 2017 Wis. Act 256, § 1. However, these petitions were filed prior to that rule change.

[3] We remind counsel that appropriate record citations are required. The citations for the prove-up/disposition hearing transcript and the circuit court's orders on termination do not match the numbering of either record on appeal, nor do the citations appear to match the circuit court's record numbering.

home for more than six months, the conditions of return were not met or likely to be met in the next nine months, and the Division had done what it could to provide services given L.C.'s lack of engagement.

This analysis is incomplete. To satisfy the first element of the continuing CHIPS ground, the State must show the children were placed outside the home for more than six months pursuant to a court order containing both the conditions for return and a termination of parental rights warning. *See* ***St. Croix Cty. DHHS v. Michael D.***, 2016 WI 35, ¶¶16-17, 368 Wis. 2d 170, 880 N.W.2d 107. The family case manager's testimony does not establish that the orders placing the children outside the home contained the termination warning, so relying solely on her testimony is inadequate. However, the State filed certified copies of documents from the CHIPS proceedings[4] and at least one order appropriately contains the conditions for return and a termination warning.

Additionally, appellate counsel does not identify any evidence offered in support of the Division's reasonable efforts to provide service to L.C.—he identifies only the ways in which L.C. failed to participate in offered services, which goes to a different element of the continuing CHIPS ground. However, upon our independent review of the record, we note that it reflects that the Division had offered alcohol or drug treatment, but L.C. declined. L.C. also did not complete psychological evaluations "that were set up for him." Further, L.C. had been banned from Children's Hospital of Wisconsin Community Services' property after threatening to choke

[4] The CHIPS documents were not originally transmitted as part of the appellate record; on our own motion, we ordered the record supplemented. We remind counsel that it is the appellant's obligation to ensure the record on appeal is complete.

a case manager, which undoubtedly constrained the Division's ability to provide services. The family case manager also testified that prior to L.C.'s incarceration, she had tried to find him, but none of the phone numbers she had for him worked and she had been unable to locate him despite checking other records and "ask[ing] anybody who may know" L.C.'s location. Thus, there is adequate evidence from which the circuit court could conclude the Division had made a reasonable effort to provide services to L.C.

Therefore, based on counsel's analysis as well as our independent review of the record, we are satisfied that adequate evidence was offered in support of the continuing CHIPS ground for termination as to each child.

Failure to assume parental responsibility is established "by proving that the parent … [has] not had a substantial parental relationship with the child." *See* WIS. STAT. § 48.415(6)(a). A 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). When the fact-finder evaluates whether a person has had such a relationship with the child, the fact-finder may consider such factors including but not limited to "whether the person has expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child[.]" *See* ***id.***

Here, appellate counsel again refers to the family case manager's testimony, noting that she "testified that L.C. had not had significant responsibility for the daily supervision, education, protection or care for his children during their lives." As evidence, this conclusory opinion is rather thin. However, the case manager's testimony was actually more substantial than that single sentence. She noted that L.C.'s visitation with the children had been suspended in

September 2015 and that he had never gotten involved in the treatment that was required for him to resume visitation. J.C. was five months old at that time and had never been placed with L.C. or lived with him on a full-time basis, and L.C. has not seen her since. J.L.C. had been placed outside the home beginning at nine months old, with visitation suspended and reinstated multiple times before the September 2015 suspension. Additionally, a contributing factor to the children's removal and suspension of visiting was L.C.'s propensity for violence, something he has failed to address at any point. There is nothing in the record to suggest that L.C. has ever accepted or exercised significant responsibility for even protection of the children, much less their daily supervision, education, or care. We therefore conclude that the record sufficiently supports the failure to assume ground for termination.

Based on the foregoing, there is no arguable merit to a challenge to the sufficiency of the evidence to support either ground for termination as to either child.

IV. The Termination Decision

Finally, appellate counsel discusses whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating L.C.'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 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.
>
> (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.

Sec. 48.426(3).

Both the family case manager and L.C. testified regarding potential dispositions for J.L.C. and J.C.[5] Ultimately, the circuit court concluded that there was "no doubt that they're adoptable children" and the foster family was ready and willing to adopt them. The circuit court found that there was nothing about the children's age or health, including J.C.'s adjustment behaviors, that would present a barrier to adoption.

The circuit court specifically found that L.C.'s relationship with the children was a "pervasively negative influence" on both the children and their mother and, if there was any chance that the children would be reunited with their mother, it had to be without L.C. having a legal relationship with the children.[6] It noted that the children were too young to express their wishes, although we note that the family case manager testified they both referred to the foster parents as "mommy" and "daddy." It noted that L.C. had not seen J.C. since she was five months old and that he had not seen J.L.C. regularly since he was nine months old. We observe

[5] We note that L.C. did not specifically ask the circuit court not to terminate his rights but, rather, urged that the children should be returned to their mother.

[6] The record suggests that, on occasion, L.C. used the children as an emotional weapon against the mother, threatening to take them away from her if she did not cooperate with him.

that this means that J.C. had been separated from L.C. for about three years, and J.C. had been separated from L.C. for nearly five years. Finally, the circuit court concluded termination of L.C.'s parental rights was "critically necessary" for the children, regardless of whether they would ultimately be reunited with their mother or achieve permanence in an adoptive home.

The circuit court's factual conclusions are adequately supported by the record. We therefore discern no arguably meritorious claim that the circuit court erroneously exercised its discretion when deciding to terminate L.C.'s parental rights as to either child.

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

Upon the foregoing, therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Gregory Bates is relieved of further representation of L.C. in these matters. *See* WIS. STAT. RULE 809.32(3).

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

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Sheila T. Reiff
Clerk of Court of Appeals