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DISTRICT I

March 28, 2023

To:

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Circuit Court Judge
Electronic Notice

Andrew William Boden
Legal Aid Society of Milwaukee
Electronic Notice

Tammy Kruczynski
Juvenile Clerk
Milwaukee County Courthouse
Electronic Notice

Division of Milwaukee Child Protective
Services
Charmian Klyve
635 North 26th Street
Milwaukee, WI 53233-1803

Danielle E. Chojnacki
Electronic Notice

A.D.

Leonard D. Kachinsky
Electronic Notice

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

2023AP128-NM	In re the termination of parental rights to Z.J., a person under the age of 18: State of Wisconsin v. A.D. (L.C. # 2021TP169)
2023AP129-NM	In re the termination of parental rights to A.J., a person under the age of 18: State of Wisconsin v. A.D. (L.C. # 2021TP170)

Before Brash, C.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).

A.D. appeals from orders terminating her parental rights to her children Z.J. and A.J. Appellate counsel, Leonard D. Kachinsky, has filed a no-merit report. *See* WIS. STAT. RULES

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

809.107(5m), 809.32; *see also Anders v. California*, 386 U.S. 738 (1967). A.D. was advised of her right to file a response, but she has not responded. Based upon an independent review of the records and the no-merit report, this court concludes that an appeal would lack arguable merit. Therefore, the orders terminating A.D.'s parental rights are summarily affirmed.

The children were removed from A.D.'s custody in July 2019 after then-nine-year-old Z.J. and then-seven-year-old A.J. were reported to be unsupervised in a park. The children were dirty with a strong odor and said that they had not eaten since the day before. Attempts were made to contact A.D. at her apartment, but the door was locked and she did not answer, and the children did not have a key. The children were adjudicated to be in need of protection or services (CHIPS) and were placed outside A.D.'s home by dispositional orders entered in October 2019.²

On July 23, 2021, the State filed petitions to terminate A.D.'s parental rights to Z.J. and A.J., alleging abandonment, continuing need of protection or services, and failure to assume parental responsibility. A.D. was found in default after failing to appear for a final pretrial conference. The cases proceeded to a combined hearing at which the State first presented evidence in support of the grounds for termination. The circuit court found the State had satisfactorily demonstrated a basis for all three grounds as to each child. The hearing then shifted focus to disposition. The State provided evidence to support its argument for termination of A.D.'s parental rights; A.D. also testified on her own behalf. The circuit court concluded that

² A.D. and the children's father were not married. The children were reunited with their father around January or February 2020, but had to be removed from his care in July 2020. His parental rights were also terminated in these cases.

termination of A.D.'s parental rights was in the children's best interests and subsequently entered orders to that effect for each child. A.D. appeals.

The no-merit report first addresses whether there were any "procedural defects" in the proceedings. Upon our review of the record, we agree with appellate counsel's conclusion that there is "no basis for claiming that A.D. was not advised of her procedural rights as required or that delays in the proceedings in excess of the statutory time limits³ were for any reason that did not constitute good cause."

The no-merit report next discusses whether the circuit court "properly found A.D. in default in the grounds phase of the proceeding." At the first hearing on the petitions, the circuit court told A.D., "I am ordering that you make all your court appearances. If you don't show up, then I would potentially find you in default, which means I'd be making decisions without your input[.]" The circuit court also told A.D. that she must continue to comply with the CHIPS dispositional orders for the children; those orders included visitation requirements. The initial hearing on the termination petitions was then adjourned so that A.D. could obtain counsel.

At the next hearing date, A.D. did not appear, and the circuit court found her in default. However, appointed counsel subsequently moved to vacate the default, noting that counsel had not yet been appointed for A.D. at the time of the hearing and that A.D.'s father had suffered a heart attack and stroke the morning of the hearing. The circuit court vacated the default after a

³ Failure to comply with statutory time limits may deprive a circuit court of competency to proceed. *See State v. April O.*, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. The time limits cannot be waived, *see id.*, but continuances are permitted for good cause "and only for so long as is necessary[.]" *see* WIS. STAT. § 48.315(2). Failure to object to a continuance waives any challenge to the court's competency to act during the continuance. *See* § 48.315(3). Our review of the record satisfies us that the time limits were either followed or adjourned for sufficient cause, and no objections were made.

hearing and set a final pretrial date. A.D. then failed to appear for the final pretrial. Counsel had no explanation for her non-appearance. The circuit court, noting that A.D. was also apparently failing to comply with the visitation required by the CHIPS orders, deemed her conduct to be “egregious and in bad faith” and found her in default. Although A.D. appeared at later hearings, she never offered an explanation for her non-appearance at the final pretrial conference, nor did she ever seek to vacate this second default.

A circuit court has both inherent and statutory authority to enter a default judgment as a sanction for failure to obey its orders. *See Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768. A.D. was ordered to attend each hearing or risk a default judgment being entered against her and, in fact, she had already experienced a default once in these cases. There is no arguable merit to challenging the circuit court’s discretionary decision to find A.D. in default here. *See id.*, ¶18.

Notwithstanding a finding of default, the State still has the burden to show that grounds for termination exist by clear and convincing evidence. *See id.*, ¶¶22, 25. Thus, the circuit court held a prove-up hearing before proceeding to disposition.

To prove abandonment, the State needed to show “[t]hat the child has been placed, or continued in a placement, outside the parent’s home by a court order containing the notice required by [law] and the parent has failed to visit or communicate with the child for a period of 3 months or longer.” *See WIS. STAT. § 48.415(1)(a)2.*

To prove that a child is in continuing need of protection or services, the State must show that the child has 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; the applicable

county department has made a reasonable effort to provide services ordered by the court; and the parent has failed to meet the conditions established in the order for the safe return of the child to the parent's home. *See* WIS. STAT. § 48.415(2)(a).

To prove failure to assume parental responsibility, the State must demonstrate “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).

The no-merit report advises that the case manager's sworn testimony “and the documents offered into evidence in support of the petition established factual grounds for the finding that grounds existed for TPR.” Based upon our review of the records, we agree. Accordingly, there is no arguable merit to claiming there is insufficient evidence to support the grounds alleged for termination.⁴

Finally, the no-merit report discusses whether the circuit court erroneously exercised its discretion when it terminated A.D.'s parental rights. “The ultimate decision whether to terminate parental rights is discretionary.” *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The circuit court must consider the factors set forth in WIS. STAT. § 48.426, giving paramount consideration to the best interest of the child. *See Gerald O.*, 203 Wis. 2d at 153-54. Here, the records reflect that the circuit court expressly considered the relevant factors

⁴ We also note that only one ground for termination need be established. *See* WIS. STAT. § 48.415 (“Grounds for termination of parental rights shall be *one* of the following[.]”) (emphasis added).

in light of the evidence as to each child, made a number of factual findings based on the evidence presented, and reached a reasonable decision. We therefore agree with appellate counsel's conclusion that there is no arguable merit to a claim that the circuit court erroneously exercised its discretion in deciding to terminate A.D.'s parental rights to Z.J. and A.J.

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

Upon the foregoing, therefore,

IT IS ORDERED that the orders are summarily affirmed

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved of further representation of A.D. in these matters.

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

Sheila T. Reiff
Clerk of Court of Appeals