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April 3, 2013

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

2013AP228-NM	In re the termination of parental rights to Chanel M., a person under the age of 18: State of Wisconsin v. Erastine E. (L.C. #2012TP16)
2013AP229-NM	In re the termination of parental rights to Tashari M., a person under the age of 18: State of Wisconsin v. Erastine E. (L.C. #2012TP17)

Before Kessler, J.[1]

Erastine E. appeals orders terminating her parental rights to Chanel M. and Tashari M. Attorney Carl W. Chesshir filed a no-merit report on Erastine E.'s behalf pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Brown 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) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

(Ct. App. 1998), WIS. STAT. RULES 809.107(5m) and 809.32(1). Erastine E. did not respond. We have reviewed counsel's no-merit report and we have independently reviewed the record. We agree with appellate counsel's conclusion that an appeal would lack arguable merit, and we summarily affirm the orders terminating Erastine E.'s parental rights.

BACKGROUND

Chanel, born on April 16, 2009, and Tashari, born on July 26, 2010, are the non-marital children of Erastine E. and Jonathan M. On February 4, 2011, Chanel was admitted to Children's Hospital of Wisconsin. She was dehydrated, malnourished, and developmentally delayed. She received a variety of diagnoses, including altered mental status, neglect, and failure to thrive. Throughout Chanel's hospitalization, hospital personnel observed that Erastine E. rarely interacted with Chanel during visits. Hospital personnel also observed that Erastine E. brought another child, Tashari, to the visits but did not remove her from her car seat.

The Bureau of Milwaukee Child Welfare (the Bureau) detained both Chanel and Tashari on February 18, 2011, and the State filed a petition the following week seeking a declaration that the children were in need of protection or services. On May 18, 2011, the circuit court made findings that Chanel was the victim of life-threatening neglect, that an older sibling had been detained in 2006 for a similar reason, and that Erastine E. had "failed to benefit from services and failed to maintain contact with that [older] child or [with] two other siblings under the court's jurisdiction." The circuit court further found that Erastine E. "has been diagnosed as mentally retarded" and that she "did not adequately care for Tashari during visits to Chanel at Children's Hospital.... [Erastine E.] states that she does not have relatives or people in her life

who can help her." The circuit court concluded that both Chanel and Tashari were children in need of protection or services.

The circuit court assigned the Bureau primary responsibility for providing services to Chanel, Tashari, and their family, and the circuit court imposed conditions that Erastine E. was required to satisfy before the children could return to her home. Among the conditions were requirements that Erastine E.: (1) understand and communicate the ways that her "cognitive limitations affect her ability to be a nurturing and protective parent"; (2) have "sufficient parenting skills ... to take action and provide for her daughters[']s basic needs, including their medical needs and Birth to Three treatment"; (3) attend all medical appointments for her children; (4) "understand[] the cause-effect relationship between her actions and results for her" children; (5) "maintain a relationship with [her] children by regularly participating in successful visitation with" them; and (6) "demonstrate an ability and willingness to provide a safe level of care" for the children.

On January 20, 2012, the State petitioned to terminate Erastine E.'s parental rights to Chanel and Tashari.[2] The State alleged that Chanel and Tashari continued to be children in need of protection or services. *See* WIS. STAT. § 48.415(2). The State further alleged that Erastine E. had failed to assume parental responsibility for the children. *See* WIS. STAT. § 48.415(6).

Erastine E. contested the petition with the assistance of counsel and demanded a fact-finding hearing. *See* WIS. STAT. § 48.424. After a four-day bench trial, the circuit court

[2] The petition also initiated proceedings to terminate the parental rights of Jonathan M. The orders terminating his parental rights to Chanel and Tashari are not before us.

concluded that the State had not proved Erastine E.'s failure to assume parental responsibility but that the State had proved, by clear and convincing evidence, that both Chanel and Tashari were in continuing need of protection or services. The circuit court therefore concluded that Erastine E. was an unfit parent. *See* WIS. STAT. § 48.424(4).

The matter proceeded immediately to a dispositional hearing. *See* WIS. STAT. § 48.427. After taking additional testimony, the circuit court determined that termination of Erastine E.'s parental rights was in the best interests of Chanel and Tashari. Erastine E. appeals.

STATUTORY TIME LIMITS

After a termination of parental rights petition is filed, the circuit court must conduct each stage of the proceedings within statutory time limits that may not be extended except "upon a showing of good cause in open court … and only for so long as is necessary." WIS. STAT. § 48.315(2). Failure to object to a continuance, however, waives any challenge to the circuit court's competency to act during the period of delay or continuance. *See* § 48.315(3).

In this case, the circuit court on several occasions granted continuances that extended the proceedings beyond the statutory deadlines. On each such occasion, however, the circuit court found good cause for the extension. Moreover, Erastine E. did not object to any of the continuances. Accordingly, she 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.***

APPOINTMENT OF A GUARDIAN *AD LITEM* FOR ERASTINE E.

Appellate counsel does not discuss whether a guardian *ad litem* should have been appointed for Erastine E. We conclude that the question does not present an arguably meritorious issue for appeal.

The circuit court may terminate the parental rights of an incompetent person. *See* WIS. STAT. §§ 48.41(3) and 48.415(3). The circuit court must, however, appoint a guardian *ad litem* for a parent subject to a termination of parental rights if any assessment or examination reveals that the parent is not competent. *See* WIS. STAT. § 48.235(1)(g). In this case, the record reveals that Erastine E. was competent despite her cognitive limitations. Peter Foy, a social service worker who served as an ongoing case manager for Erastine E. and her family, testified at the fact-finding hearing that Erastine E. underwent a competency evaluation in 2006 when her older children were removed from her home and that the evaluating psychologist found her competent to proceed with litigation.[3] Additionally, the record includes a report and testimony from Dr. Suzanne Lisowski, who performed a court-ordered psychological examination in this case. Dr. Lisowski did not opine that Erastine E. lacked competency to proceed. According to Dr. Lisowski, Erastine E. suffers from "mild intellectual disability, formerly [termed] mental retardation," but she has an IQ that permits her to live independently in the community. We are

[3] Certified court documents in the record reflect that, in 2006, Erastine E. brought her then fifteen-month-old daughter, Ania, to the hospital suffering from malnutrition, dehydration, and failure to thrive. Ania and her brother, Jeremiah, were taken into protective custody following Ania's hospitalization and were subsequently found to be children in need of protection or services. Based on the proceedings involving Ania and Jeremiah, Erastine E.'s third child, James, was taken into protective custody at his birth in 2007. The record reflects that Erastine E. has never regained custody of Ania, Jeremiah, and James.

satisfied that Erastine E. cannot pursue an arguably meritorious challenge to the termination of her parental rights based on failure to appoint a guardian *ad litem* for her.

WAIVER OF THE RIGHT TO A JURY TRIAL

"A parent who contests a TPR petition has a statutory right to a jury trial at the fact-finding hearing at which his or her parental unfitness is adjudicated—the so-called 'grounds' or 'unfitness' phase of a TPR proceeding." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶3, 271 Wis. 2d 1, 678 N.W.2d 856. The right to a jury trial is, however, "entirely statutory, [and] not mandated by constitutional due process." ***Id.***, ¶4. In this case, Erastine E. told the circuit court that she wanted to waive her right to a jury trial and have a trial to the court instead.

The circuit court "should ensure that the individual's rights in … a [termination of parental rights] proceeding are not waived involuntarily or without adequate understanding." ***Manitowoc Cnty. Human Servs. Dep't v. Allen J.***, 2008 WI App 137, ¶16, 314 Wis. 2d 100, 757 N.W.2d 842. Here, the circuit court questioned Erastine E. on the record about her understanding of the nature of a jury trial and whether she wanted to waive her right to such a trial.

Erastine E. confirmed her understanding that, in a jury trial, twelve people listen to the evidence and the State cannot prevail unless ten of the twelve jurors agree that the State proved all the necessary elements of at least one of the grounds alleged for terminating parental rights. She confirmed that, instead of a jury, she wanted the judge to make the decisions and that she had not been threatened or promised anything to induce her to waive a jury trial. She confirmed that she had discussed the jury waiver with her attorney and that she had adequate time to

consider the decision. Moreover, her trial counsel told the circuit court that he and Erastine E. had discussed the decision to waive a jury trial, and he was satisfied that Erastine E. chose freely and voluntarily to waive a jury trial. Accordingly, Erastine E. could not pursue an arguably meritorious argument that she waived her right to a jury trial involuntarily or without adequate understanding. *See* ***id.***

SUFFICIENCY OF EVIDENCE AS TO GROUNDS FOR TERMINATION

Grounds for termination must be proven by clear and convincing evidence. *See* ***Steven V.***, 271 Wis. 2d 1, ¶4. "When considering the sufficiency of the evidence, we apply a highly deferential standard of review. Furthermore, the fact finder's determination and judgment will not be disturbed if more than one inference can be drawn from the evidence." ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998).

Here, the State alleged two grounds for termination of Erastine E.'s parental rights, and the circuit court found that the State proved one of those grounds, namely, that Chanel and Tashari were children in need of protection or services. *See* WIS. STAT. § 48.415(2)(a). Erastine E. could not pursue an arguably meritorious claim that the evidence was insufficient to support the circuit court's conclusion as to that ground.

To establish that Chanel and Tashari were children in continuing need of protection and services, the State was required to prove that: (1) the children were 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) Erastine E. did not meet the conditions for return of the children even though the Bureau made reasonable

efforts to assist her to meet the conditions; and (3) Erastine E. 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).

Trial began on July 23, 2012. At the outset of the proceeding, the State moved into evidence certified copies of the dispositional orders entered on May 18, 2011, placing Chanel and Tashari outside the home of Erastine E. Each order included a notice concerning grounds to terminate parental rights. Erastine E. testified at trial and acknowledged that the children were removed from her care seventeen months earlier and had not been returned. She further acknowledged that she attended the dispositional hearing at which the circuit court determined that her children were in need of protection or services and that she received the termination of parental rights notice at the hearing.

Katie Sharpe testified that she served as the ongoing case manager for Erastine E. and her family from February 2011 until December 2011. Sharpe testified that she reviewed with Erastine E. on multiple occasions the conditions that she was required to fulfill before Chanel and Tashari could be returned home. Sharpe said that Erastine "often questioned a lot of what we were asking her to do," and Sharpe would explain on each occasion that she was implementing a court order. Sharpe then described the efforts she made to assist Erastine E., including helping her to enroll in therapy and assigning her a specialized parent assistant to teach parenting skills.

Despite the assistance, Erastine E. was unable to progress to unsupervised visitation with her children. Sharpe characterized the visits as consistent but unsuccessful. Erastine E. did not tend to the children properly and could not assist them to eat enough. Further, they had tantrums

and night terrors after each visit. Sharpe testified that, throughout her involvement with the case, Erastine E.'s behavior during visits remained the same and the visits were therefore reduced from twice each week to once each week.

Foy testified that he succeeded Sharpe as the ongoing case manager in December 2011. Foy acknowledged that Erastine E. regularly attended supervised visitation once each week with the two children, that she completed parenting classes, and that she attended therapy. Nonetheless, he testified that the visits were not successful. He said that each visit followed the same routine: Erastine E. changed each child's diaper "regardless of whether it needed to be changed," brought the same food for the children, prepared it the same way, and asked Foy the same questions. The children did not willingly interact with Erastine E., and she was unable to improvise in response to needs that her children displayed.

Foy further testified that Erastine E. did not attend any of Chanel's many medical appointments, she attended only one of Tashari's medical appointments, and she did not participate in Tashari's Birth to Three program. Foy testified that he provided appointment information, maps, and bus tickets for Erastine E., but she told him that she did not go to the appointments because she did not want to get lost. Foy offered Erastine E. a ride to the Individualized Education Program evaluation to discuss educational services for Chanel, but Erastine E. declined, stating that she did not feel well.

Dr. Lisowski testified that Erastine E. had an IQ of 56 and was "very limited." Additionally, Dr. Lisowski opined that paranoid and narcissistic aspects of Erastine E.'s personality rendered her "very needy" and led Erastine E. to avoid difficult problems and situations. Further, according to Dr. Lisowski, Erastine E. did not identify herself as a parent.

Dr. Lisowski concluded that Erastine E. could not have unsupervised contact with her children because she "lacked adequate problem-solving skills and adequate focus on her children to care for them for even a short time." Further, Dr. Lisowski explained that "intellectual disability/IQ is generally regarded as a fixed element of one's being" and that the prognosis for reuniting Erastine E. with her children was "poor."

The evidence amply supports the circuit court's finding that Chanel and Tashari were children in continuing need of protection or services. An appellate challenge to the sufficiency of the evidence supporting that finding would lack arguable merit.

DECISION THAT ERASTINE E. IS AN UNFIT PARENT

"If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." WIS. STAT. § 48.424(4). The circuit court in this case determined that Erastine E. was an unfit parent upon finding that Chanel and Tashari were in continuing need of protection or services. *See* ***id.***

We have considered the circuit court's conclusion that the State did not prove the second ground alleged for termination of Erastine E.'s parental rights. This conclusion does not provide an arguably meritorious basis for Erastine E. to challenge the finding that she is an unfit parent. Under WIS. STAT. § 48.415, the State is required to prove only one statutory ground for termination of parental rights to establish that a parent is unfit. *See* ***Steven V.***, 271 Wis. 2d 1, ¶25. Further appellate proceedings based on the State's failure to prove a second ground for termination of parental rights would be frivolous. *See* ***Anders***, 386 U.S. at 744.

DISCRETIONARY DECISION TO TERMINATE 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, the 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 severing those relationships would be harmful to the child; (4) the child's wishes; (5) the duration of the separation of the parent from the child; and (6) whether the child will be able to enter into a more stable and permanent family relationship as a result of terminating parental rights, 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 in this case, the State presented testimony from John R., Chanel's foster father, from Benjamin N., Tashari's foster father, and from Foy.[4] Additionally, the circuit court took judicial notice of the evidence presented at the fact-finding hearing. *See* WIS. STAT. § 48.299(4)(b) (in proceedings under WIS. STAT. ch. 48, rules of evidence do not apply at, *inter alia*, "a dispositional hearing").

[4] In the no-merit report, appellate counsel uses the full surname of each foster family. We remind appellate counsel that filings required by law to be confidential shall refer to individuals only by their first names and the first initial of their last names. *See* WIS. STAT. RULE 809.81(8). We therefore direct the clerk of this court to redact the no-merit report by crossing out the last names of the foster families to shield their identities. We expect appellate counsel to act more carefully in future proceedings.

John R. told the circuit court that he and his wife, a nurse, are licensed to provide treatment foster care and that Chanel has lived with them since she was two. He explained that Chanel suffered brain damage due to neglect and that when she began living with his family, she was unable to crawl or talk. He testified that she is enrolled in special education classes and has learned to speak a few words. He described the strong bond between his family and Chanel and his wish to adopt her. He also acknowledged her ongoing relationship with Tashari, and he testified that, if permitted to adopt Chanel, he would nurture that relationship.

Benjamin N. testified that he is a social worker, and that Tashari has lived with him and his wife since Tashari was six months old. He said that Tashari was developmentally delayed when she came to live with his family but appeared to have caught up with her age group. Benjamin N. told the circuit court that he and his wife want to adopt Tashari and that they love her. Additionally, he said that Tashari and Chanel have weekly visits in his home and that, if permitted to adopt Tashari, he and his wife would foster the ongoing relationship between Tashari and Chanel.

Foy testified that, based on his observations of Chanel and Tashari, each girl is comfortable in her placement, each girl views her foster parents as her family, and each girl addresses her foster parents as either "'momma' or 'poppa' or some derivative of that." Foy told the circuit court that each foster parent could adeptly address the challenges that his or her foster child presented, and that "all the affection is reciprocated" between each child and her foster parents.

Foy testified that Chanel and Tashari have a significant relationship with each other and that the foster families encouraged that relationship. Foy testified that he had observed only

minimal interaction between Erastine E. and her children and, in his opinion, neither child had a significant bond with Erastine E. Foy further testified that the girls' biological father had not maintained much contact with the children and that neither Chanel nor Tashari had any contact with other biological family members.

At the conclusion of the dispositional hearing, the circuit court considered the statutory factors in light of the evidence. The circuit court found a "great" likelihood that the foster parents would adopt the children and that no barriers to adoption exist. The circuit court noted that the children were not yet capable of expressing their wishes, but the circuit court noted that each child was happy in her placement and that each child's health and well-being had improved since she began living with a foster family.

The circuit court considered at length the relationship between each child and her biological family. The circuit court recognized that Erastine E. had spent time with the children throughout their lives, but the circuit court concluded that her limitations had prevented her from establishing a substantial relationship with either child. The circuit court found that Chanel and Tashari had "a good sibling relationship with each other," but the circuit court concluded that no harm would come to that relationship if Erastine E.'s parental rights were terminated because both of the prospective adoptive families recognized the importance of nurturing the bond between the two girls. The circuit court found no evidence that the girls had meaningful relationships with any other biological family members, and the circuit court concluded that the children thus would suffer no harm from severing the legal relationship between the children and their biological family. Last, the circuit court found that "each of these children [is] already in a more stable relationship" than when the children lived with Erastine E. and that adoption would

"make it [a] permanent family relationship." The circuit court therefore concluded that the best interests of the children required terminating Erastine E.'s parental rights.

The record shows that the circuit court properly exercised its discretion when it ordered Erastine E.'s parental rights terminated. The circuit court considered the relevant facts, applied the proper standard of law, and reached a reasonable conclusion. *See* ***Gerald O.***, 203 Wis. 2d at 152. An appellate challenge to that determination would lack arguable merit.

Our independent review of the record discloses no arguably meritorious basis for an appeal of the orders terminating Erastine E.'s parental rights. Any further proceedings would be wholly frivolous within the meaning of ***Anders***.

Therefore,

IT IS ORDERED that the order terminating Erastine E.'s parental rights to Chanel M. is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the amended order terminating Erastine E.'s parental rights to Tashari M. is summarily affirmed. *See* ***id.***

IT IS FURTHER ORDERED that Attorney Carl W. Chesshir is relieved of any further representation of Erastine E. on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals