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DISTRICT I

April 9, 2013

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Roxanne N.

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

2013AP212-NM	In re the termination of parental rights to Jasmine A., a person under the age of 18: State of Wisconsin v. Roxanne N. (L.C. #2011TP258)
2013AP213-NM	In re the termination of parental rights Brianna A.-N., a person under the age of 18: State of Wisconsin v. Roxanne N. (L.C. #2011TP259)
2013AP214-NM	In re the termination of parental rights to Sandra A.-N., a person under the age of 18: State of Wisconsin v. Roxanne N. (L.C. # 2012TP70)

Before Brennan, J.[1]

Roxanne N. appeals from orders terminating her parental rights to daughters Jasmine A., Brianna A.-N., and Sandra A.-N.[2] Appellate counsel, Kaitlin A. Lamb, has filed a no-merit report. *See* ***Brown Cnty. 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) and 809.32. Roxanne N. was advised of her right to file a response, and she has responded. Based upon on independent review of the records, the no-merit report, and the response, this court concludes that any appeal would lack arguable merit. Therefore, the orders terminating Roxanne N.'s parental rights are summarily affirmed.

Jasmine, who was born in August 2008, and Brianna, who was born in November 2009, came to the County's attention in March 2010 because of alleged medical neglect. Brianna had a history of breathing problems and had been referred in February 2010 for a chest x-ray. When Roxanne N. brought Brianna to the hospital via ambulance in March because Brianna had stopped breathing, it was revealed that Roxanne N. had not taken Brianna for the x-ray. Brianna was re-referred for the x-ray but, when Roxanne N. took her older son[3] to the doctor in April 2010, she still had not taken Brianna for the x-ray.

[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.

[2] Jasmine and Brianna's father is Sabi S.-A. Sandra's father is Jamie A. Both fathers failed to appear and had their parental rights terminated by default. Neither father's case is before us in this appeal.

[3] As best we can tell from the records, Roxanne N.'s son is presently in the care and custody of his father.

Also in March 2010, the County received a report that Roxanne N. had allowed Jasmine and Brianna's father, Sabi S.-A., and some of his friends to move in with her. This was a problem because Sabi S.-A. and his friends supposedly belonged to a gang, and there were reports of drugs and domestic violence in the house. Sabi S.-A. also allegedly attempted to smother Brianna with a pillow.

As a result of the reports to the County, Roxanne N. was originally referred for safety services in May 2010 "due to concerns regarding medical neglect, basic parenting assistance, and supervision in the home." The initial social worker determined the home was unsafe for a variety of reasons, including a lack of furniture; a puppy urinating on the floor; an unhinged door on which Roxanne N.'s son had injured himself and for which he required stitches; and broken glass, cigarette butts, small screws, and coins scattered on the floor. At one point, because of Roxanne N.'s lack of supervision, the social worker was forced to intervene to keep Jasmine from exiting the back door and falling down stairs. Jasmine and Brianna were detained on June 3, 2010. They became the subject of children-in-need-of-protection-and-services (CHIPS) orders on August 31, 2010.

On August 16, 2011, the County filed termination of parental rights petitions to terminate Roxanne N.'s rights to Jasmine and Brianna on the grounds of continuing CHIPS. The conditions of return that Roxanne N. had allegedly failed to meet included cooperation with her case manager, obtaining a stable and reliable income so that she could maintain a safe and stable residence, having regular and successful visits with the children, demonstrating an understanding of and ability to meet the children's special needs, completing programs like domestic violence counseling and individual therapy, and demonstrating an ability to recognize and identify

relationships that might put her and the children at risk so as to learn to avoid those relationships. On January 9, 2012, Roxanne N. stipulated to the grounds portion of the termination petitions for Jasmine and Brianna.

Meanwhile, Sandra was born on April 4, 2011. She was detained on April 17, 2011, and placed with Roxanne N.'s mother, with whom Roxanne N. was living. Sandra was removed from her grandmother's home on May 26, 2011, out of concern over both Roxanne N.'s and her mother's ability to care for Sandra. Both adults were smoking in the home, and it was alleged that there were frequently pills and broken glass observed on the floor, notwithstanding daily visits from a parenting aid and twice-weekly visits from a safety supervisor. It was also alleged that Roxanne N. failed to keep sufficient formula for Sandra, did not properly cleanse the child, and did not know how to properly dose medication before giving it to Sandra, which put her at risk for overdose. Sandra became the subject of a CHIPS order on August 17, 2011.

On March 23, 2012, a termination petition was filed to terminate Roxanne N.'s rights to Sandra on the grounds of continuing CHIPS and failure to assume parental responsibility. As to the CHIPS ground, it was alleged among other things that Roxanne N. had not obtained a stable or reliable income, had not demonstrated an ability to evaluate the safety of those allowed access to Sandra, had not had regular and successful visits, had not taken an active role in parenting, had not been able to demonstrate things she had learned, and was unable to recognize her own mental health needs. On the failure-to-assume ground, it was alleged that Roxanne N. had failed to exercise any significant responsibility for Sandra, as evidenced by the safety concerns leading to her detention, had failed to attend any doctor's visits since May 2011, and frequently canceled

visitation. When Roxanne N. failed to appear for the jury trial in Sandra's case on July 23, 2012, the circuit court entered default judgment against her, subject to the State's subsequent prove-up.

Jasmine and Brianna's cases had been tolled for cause to allow Sandra's case to catch up. Thus, all three cases proceeded to the disposition phase together. Following a contested disposition hearing, the circuit court ordered Roxanne N.'s parental rights to all three children terminated.

I. Time Limits/Competency

The first of five potential issues that counsel raises is whether there is any arguable merit to a claim the circuit court failed to comply with mandatory time limits, thereby losing competency to proceed. *See* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. After a petition to terminate parental rights is filed, the trial court has thirty days to hold an initial hearing and ascertain 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 fact-finding hearing to begin within forty-five days of the initial hearing. § 48.422(2). If grounds for termination are established, the circuit court is to proceed with an immediate disposition hearing, although that may be delayed up to "no later than [forty-five] days after the fact-finding hearing" if all the parties agree. *See* WIS. STAT. § 48.424(4)(a).

These statutory time limits cannot be waived. ***April O.***, 233 Wis. 2d 663, ¶5. Continuances, however, are permitted "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 waives any challenge to the circuit court's competency to act during the continuance. *See* § 48.315(3).

Here, though there were many continuances, each was granted for cause, particularly the continuation of Jasmine's and Brianna's cases so that they could proceed to disposition at the same time as Sandra's case. In addition, there were no objections to the continuances. Thus, there is no arguable merit to a claim that the circuit court failed to comply with mandatory timelines or lost competency to proceed.

II. Sufficiency of the Termination Petitions

WISCONSIN STAT. § 48.42(1) specifies what must be included in a petition to terminate parental rights. We have reviewed each petition and we agree with counsel's assessment that each petition satisfies the statutory requirements. There is no arguable merit to a challenge to the sufficiency of the termination petitions.

III. Grounds as to Jasmine and Brianna

a. The Stipulation

Roxanne N. entered a stipulation/admission to the continuing CHIPS grounds for Jasmine and Brianna. Before accepting an admission to a termination petition, the circuit court must engage the parent in a colloquy in accordance with WIS. STAT. § 48.422(7). *See* ***Oneida Cnty. DSS v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 762 N.W.2d 122. Thus, the circuit court must: (1) address the parent and determine that the admission is made voluntarily, with an understanding of the nature of the acts alleged in the petition and the potential dispositions; (2) establish whether any promises or threats were made to secure the plea; (3) establish whether a proposed adoptive resource for the children has been identified; and (4) determine whether there is a factual basis for the admission of facts alleged in the petition. *See* ***id.***; *see also* § 48.422(7).

The parent must also be aware of the constitutional rights being surrendered with the admission. *See* ***Therese S.***, 314 Wis. 2d 493, ¶5.

Our review of the record satisfies us that the requirements of WIS. STAT. § 48.422(7) were adequately covered and that Roxanne N. knowingly, intelligently, and voluntarily entered her admission. Roxanne N. acknowledged that she was surrendering constitutional rights, including the rights to contest the alleged grounds, to call and cross-examine witnesses, and to have a jury trial on grounds. She also recognized she was surrendering the right to put the State to its proof, and she acknowledged the elements the State would have to prove. She acknowledged she would be found unfit, and acknowledged that termination was not the only possible disposition. She acknowledged that she had not been threatened.[4] An adoptive resource was identified. As we will review in the next section, the ongoing case manager provided testimony sufficient to establish the factual basis for the petitions.

Additionally, though it was trial counsel and not the circuit court who primarily conducted the colloquy with Roxanne N., the record reveals that all necessary points were reviewed with her.[5] Thus, Roxanne N. would be unable to allege that she lacked the knowledge

[4] It must also be determined whether any person has coerced a parent to refrain from exercising his or her parental rights. *See* WIS. STAT. § 48.422(7)(bm)-(br). Appellate counsel notes that there was no specific testimony regarding whether Roxanne N. had been coerced but, "for reasons outside the record, counsel does not believe there are any arguable legal grounds for Ms. N. to challenge her stipulation based on these deficiencies." We accept counsel's representation.

[5] From our reading of the transcript, it appears that this is not a case where the circuit court had forgotten or refused to engage Roxanne N. in a colloquy, but rather, that trial counsel was simply forging ahead with the hearing. Further, when counsel was finished, the circuit court asked additional questions of Roxanne N. to complete the statutorily required inquiries.

of the colloquy's required topics. *See* ***Therese S.***, 314 Wis. 2d 493, ¶6. Accordingly, there is no arguable merit to a challenge to the validity of Roxanne N.'s stipulation to grounds.

b. The Factual Basis

Even though Roxanne N. entered an admission to the grounds of the petitions for Jasmine and Brianna, the circuit court still had to hear evidence in support of those petitions. *See* WIS. STAT. § 48.422(7)(c). When a termination petition alleges as grounds for termination that a child is in continuing need of protection and 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.

Walworth Cnty. 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. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶22, 246 Wis. 2d 1, 629 N.W.2d 768.

Here, the ongoing case manager testified about the children's removal from Roxanne N.'s home, the required foundational orders, the County's attempts to provide Roxanne N. with services, Roxanne N.'s failure to meet the conditions of return and the unlikelihood that Roxanne N. would be able to meet those conditions within the subsequent nine months. From

our review of the record, we are satisfied that the State offered sufficient evidence to support the petitions.

In her response, Roxanne N. challenges many of the factual allegations against her. She contends, for instance, that her home was safe, that she took her children to all of their appointments, and that she never left them supervised with inappropriate adults.[6] She also complains that her caseworker lied to her, did not timely return calls, and failed to provide her with bus passes. However, by validly stipulating to the continuing CHIPS grounds, Roxanne N. gave up the opportunity dispute the factual basis for the petitions.

Roxanne N. entered a knowing, intelligent, and voluntary stipulation to the continuing CHIPS ground for Jasmine and Brianna. There is no arguable merit to a challenge to that stipulation and the grounds phase for the girls.

IV. Grounds as to Sandra

a. Default Judgment and the Motion to Reopen

Roxanne N. had requested jury trial for the grounds portion of Sandra's case. The trial was scheduled for 9 a.m. on July 23, 2012. Because Roxanne N. was not present at that time, the matter was passed until 10:20 a.m. The State reported that Roxanne N.'s phone was evidently disconnected, and no one could reach her. Defense counsel checked to see if Roxanne N. had

[6] We observe that Roxanne N.'s response appears to more precisely focus on allegations in Sandra's case. Nevertheless, to the extent that the response was also intended to refer to Jasmine's and Brianna's cases, we discuss the response here.

left him a message, but she had not. The circuit court noted that Roxanne N. had attended everything else, so her absence was "extraordinary in a bad way" and egregious. *See* ***State v. Shirley E.***, 2006 WI 129, ¶13 n.3, 298 Wis. 2d 1, 724 N.W.2d 623. It entered a default judgment against her, subject to prove-up by the State.

There would be no arguable merit to a challenge to the circuit court's default judgment or its decision not to vacate that judgment. A circuit court has both inherent and statutory authority to enter a default judgment as a sanction for failure to obey its orders. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17. Roxanne N. was ordered and repeatedly reminded to attend each hearing or risk a default judgment being entered against her. It was therefore within the circuit court's discretion to enter the default here. ***Id.***, ¶18.

Likewise, the circuit court's decision whether to vacate its default judgment is discretionary. ***Ness v. Digital Dial Commc'ns, Inc.***, 227 Wis. 2d 592, 599, 596 N.W.2d 365 (1999). At a permanency plan review hearing on September 12, 2012, Roxanne N. asked the circuit court to reopen the default judgment because she had mixed up her court date. The circuit court declined to reopen the default. It noted that Roxanne N. had made all her other court dates and the importance of her appearance was really stressed, as was the necessity of staying in touch with her attorney. The circuit court determined that mixing up the date was not good cause, especially because the jury trial was the most important date of all. The circuit court did, however, note that it had set the disposition hearing for a later date so that Roxanne N. could appear for that. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶36 (evidence presented at dispositional hearing can be considered with regard to the grounds determination). There is no arguable merit to a

claim the circuit court erroneously exercised its discretion in refusing to open the default judgment.

b. The Factual Basis

A default judgment on the grounds decision must be accompanied by evidence sufficient to support such a finding. ***Id.***, ¶¶19, 25. While counsel concludes and we agree that there is no arguable merit to a challenge of the circuit court's inherent authority to enter a default judgment or its decision not to reopen the default, counsel does not discuss whether sufficient evidence existed to support the default judgment. Nevertheless, our independent review of the record reveals there is no arguable merit to a challenge to the sufficiency of the evidence to support the default judgment.

1. Continuing CHIPS

The required elements for continuing CHIPS as a ground were described above. *See supra*, pg. 8, ***Andrea L.O.***, 309 Wis. 2d 161, ¶6. As with Jasmine and Brianna, the case manager testified about Sandra's removal, the predicate order, the County's attempts to provide services, Roxanne N.'s failure to meet the conditions of the return, and the probability of whether Roxanne N. would meet the conditions in the subsequent nine months. The State therefore provided sufficient evidence to support the ongoing CHIPS ground.

2. Failure to Assume

Failure to assume parental responsibility "shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental

relationship with the child." 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." § 48.415(6)(b). When the circuit court evaluates whether a person has had such a relationship with the child, the circuit court 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[.]" ***Id.***

The petition had alleged that Roxanne N.'s failure to assume parental responsibility for Sandra was demonstrated in part by the unsafe home conditions, and by the fact that Roxanne N. had not attended doctor's appointments for Sandra. Further, Roxanne N. frequently cancelled visitation and had not been able to progress even to unsupervised visits. Thus, she had failed to provide for Sandra's daily supervision, education, protection, or care. When the State presented evidence for the prove-up, the case manager testified that Roxanne N. had not assumed any type of day to day responsibility for Sandra's care. She further noted that Roxanne N. had cancelled nine of the last fourteen visits. Our review of the record satisfies us that the State provided sufficient evidence to establish that Roxanne N. has not had a substantial parental relationship with Sandra.

3. Roxanne N.'s response

As noted, Roxanne N.'s response challenges the factual allegations against her. While we understand Roxanne N.'s dispute, she did present her information to the circuit court when she testified at the disposition hearing. However, her testimony did not sway the circuit court,

and we are deferential to the fact-finder. There is no arguable merit to a challenge to the sufficiency of the evidence supporting the grounds portion of the petition regarding Sandra.

V. 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 Roxanne N.'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 circuit 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.

§ 48.426(3).

Here, the circuit court noted there was a great likelihood that all three girls would be adopted upon termination of Roxanne N.'s parental rights. The children were all very young at the time of their removal. The older children's aggression had lessened within a very short time

of being removed from Roxanne N.'s care. We also observe that the record indicates that Jasmine had sleep issues, which were rapidly improving during her time with the expected adoptive family.

The circuit court noted that the children had no relationship with their fathers, so it would not be harmful to terminate those relationships. The children also had no relationship with Roxanne N.'s family beyond Roxanne N. herself and her son, so there was no harm in terminating those extended family relationships. The circuit court also determined that there was no harm to severing the legal relationship between the girls and Roxanne N. or her son: the likely adoptive family was already fostering a relationship between the girls and their half-brother, and was willing to let Roxanne N. have a relationship with the children for so long as it was in the children's best interests.

The circuit court noted that the children were too young to express their wishes, but the fact of their improved behavior suggested to the circuit court that they were happy in their current placement. The circuit court noted that the children had been separated from Roxanne N. for a long time,[7] occasioned by Roxanne N.'s failure to take advantage of multiple referrals for services. Finally, the circuit court concluded that the children would enter more stable and permanent relationships as the result of termination. It noted that the children were together and getting the appropriate attention they needed in a home likely to adopt them. In short, the record

[7] Jasmine had been detained when she was twenty-two months old. She was out of Roxanne N.'s care for at least twenty-six months, or a little more than half her life. Brianna was seven months old when she was removed from Roxanne N.'s care, a "vast majority" of her life. Sandra was detained within two weeks of her birth, then removed from Roxanne N.'s home entirely at about seven weeks old, so she was out of Roxanne N.'s care for practically her entire life.

is replete with evidence supporting the statutorily enumerated factors and indicating that terminating Roxanne N.'s rights was in the children's best interests. There would therefore be no arguable merit to a claim the circuit court inappropriately exercised its discretion by terminating Roxanne N.'s parental rights.

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

Therefore,

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

IT IS FURTHER ORDERED that Kaitlin A. Lamb is relieved of any further representation of Roxanne N. in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals