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DISTRICT II

February 12, 2025

To:

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Circuit Court Judge
Electronic Notice

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Register in Probate
Kenosha County Courthouse
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D.J.W.

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

2024AP2537-NM

Kenosha County Department of Human Services v. D.J.W.
(L.C. #2024TP4)

Before Grogan, 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.J.W. appeals from an order terminating his parental rights (TPR) to T.W.² Attorney Steven Zaleski has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report sets

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.

² Pursuant to WIS. STAT. RULE 809.81(8), we use initials instead of the parties' names in this confidential matter.

forth the procedural history of the case and addresses multiple potential issues, including the sufficiency of the evidence to support grounds for termination and the circuit court's exercise of discretion at the dispositional hearing. D.J.W. was advised of the right to respond to the report, but he has not done so. Upon independently reviewing the entire Record, as well as the no-merit report, this court concludes that counsel will be allowed to withdraw and the TPR order will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

T.W. was taken into protective custody shortly after her premature birth in January 2022. Testing of the placenta blood revealed the presence of both methamphetamines and amphetamines. Suffering from severe respiratory distress and an inability to properly feed, T.W. was hospitalized in the neonatal intensive care unit (NICU) for approximately two weeks after her birth. T.W.'s mother left the hospital two days after giving birth and never returned. D.J.W. visited T.W. once during her entire stay in the NICU. T.W. was subsequently found to be a child in need of protection or services.³

In January 2024, the State petitioned to terminate D.J.W.'s parental rights, alleging that he had failed to assume parental responsibility and that T.W. was a child in continuing need of protection or services. At the time of the petition, T.W. had been in the care of her foster mother without interruption since T.W. was approximately eight weeks old. At the close of a two-day

³ The Honorable Chad G. Kerkman presided over the initial dispositional hearing shortly after T.W.'s birth, determined that T.W. was a child in continuing need of protection or services, and ordered that T.W. be placed outside the home with a foster family. The Honorable Jodi L. Meier presided over the jury trial on grounds and the disposition hearing at which D.J.W.'s parental rights were terminated.

trial, a jury determined that grounds were established on both allegations. After a dispositional hearing, the circuit court terminated D.J.W.'s parental rights.⁴ This no-merit appeal follows.

The no-merit report addresses whether there is any arguable merit to a claim that: (1) the circuit court failed to comply with mandatory time limits, thereby losing competency to proceed; (2) there was insufficient evidence to support grounds for termination; (3) the court erroneously admitted evidence at the trial; (4) the court erroneously exercised its discretion at disposition in determining that termination of D.J.W.'s parental rights was in T.W.'s best interest; and (5) trial counsel was ineffective. The lengthy no-merit report thoroughly discusses these issues, including references to trial testimony, relevant caselaw, and statutory authority. This court agrees with appellate counsel that there would be no arguable merit to pursuing a postdisposition motion or a merit appeal based on those issues. We will briefly elaborate on the issues below.

The no-merit report first addresses whether there is any arguable merit to a claim that the circuit court failed to comply with mandatory time limits, thereby losing competency to proceed. *See* WIS. STAT. §§ 48.422(1)-(2) and 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 663, ¶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). Both counsel’s report and our review of the Record satisfy us that the time limits were either followed or adjourned for sufficient cause. There is no arguable merit to a challenge to the court’s competency.

⁴ The circuit court additionally terminated the parental rights of the mother, but the mother is not a party to this appeal.

The no-merit report next discusses whether there was sufficient evidence supporting grounds for termination. 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. When a termination petition alleges as grounds that a child is in continuing need of protection or services, the State must prove that the child has been placed out of the home for a cumulative total of more than six months pursuant to circuit 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).⁵

The second ground, failure to assume parental responsibility, is established “by proving that the parent ... [has] 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.” Sec. 48.415(6)(b). When the factfinder evaluates whether a person has had such a relationship with the child, the factfinder “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.* Here, the circuit court found that this ground was satisfied in a number of ways, including that

⁵ If the child has been placed outside the home for less than fifteen of the most recent twenty-two months, then the State must also prove “that there is a substantial likelihood that the parent will not meet [the return] conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months[.]” WIS. STAT. § 48.415(2)(a)3. Testimony at the jury trial established that T.W. had been placed out of the home for over two years pursuant to the dispositional order, and that such order contained the requisite termination of parental rights warnings.

“after the birth of [T.W.] who was born drug positive, [D.J.W.] never came once to visit her after he left the hospital for approximately [fifteen] days when she was in horrendous health.” The court noted that this was at a time when T.W. “[o]bviously needed comfort.” T.W. “[n]eeded a parent and [D.J.W.] never came.”

Our review of the Record satisfies us that the jury appropriately concluded the State had presented sufficient evidence to support termination, and that this issue has been correctly analyzed by appellate counsel as lacking arguable merit. We therefore do not address the sufficiency of the evidence at the jury trial further.

The no-merit report also includes a discussion of whether there were any procedural defects in the proceedings and whether the circuit court correctly exercised its discretion when ruling on evidentiary disputes. Our review of the report satisfies us that these issues have been correctly analyzed by counsel as lacking arguable merit. We therefore do not address these issues further.

Additionally, although the no-merit report does not explicitly address whether the jury was properly selected, whether the jury instructions were proper, and whether there were potential defects in counsels’ opening statements and closing arguments to the jury, our independent review of the Record satisfies us that that no issues of arguable merit arise from the jury selection, jury instructions, or arguments of counsel. Further discussion of these matters is not warranted.

The no-merit report next discusses whether there would be any arguable merit to challenging the circuit court’s decision to terminate D.J.W.’s parental rights at the conclusion of the dispositional phase of the proceedings. This court agrees with counsel that there is no

arguable merit to this issue. “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). At the dispositional hearing, the court heard testimony from the case supervisor and from D.J.W. The court had previously heard testimony from T.W.’s foster mother during the trial on the grounds phase. In rendering its decision, the court considered the statutory factors set forth in WIS. STAT. § 48.426(3), and concluded that termination of D.J.W.’s parental rights to T.W. was in the child’s best interest. This court agrees with counsel that a challenge to the circuit court’s exercise of discretion as to disposition would be wholly frivolous.

Finally, the no-merit report includes a discussion of whether D.J.W. could pursue an arguably meritorious claim that his trial counsel was ineffective. To prevail on such a claim, a litigant must show that counsel’s performance was deficient and that the deficiency prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). For the reasons stated in the no-merit report, we agree with appellate counsel’s assessment that a claim of ineffective assistance of trial counsel would lack arguable merit here.

This court’s independent review of the Record discloses no other potential issues for appeal and therefore concludes that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

Upon the foregoing reasons,

IT IS ORDERED that order of the circuit court terminating parental rights is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven Zaleski is relieved of any further representation of the appellant in this matter pursuant to WIS. STAT. Rule 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals