OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/IV

February 25, 2014

To:

Hon. John Zakowski
Circuit Court Judge
Brown County Courthouse
P O Box 23600
Green Bay, WI 54305-3600

Jason B. Beck
Juvenile Clerk
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54301-3600

Leonard D. Kachinsky
Sisson & Kachinsky Law Offices
103 W. College Ave. #1010
Appleton, WI 54911-5782

Ryan Anthony Reid
Assistant Corporation Counsel
P.O. Box 23600
Green Bay, WI 54305-3600

Luis F.
734 Schoen St., #A
Green Bay, WI 54302

David J. Matyas
366 Main Avenue
De Pere, WI 54115

Jessie W.
Brown County Jail
3030 Curry Lane
Green Bay, WI 54301

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

2014AP48-NM In re the termination of parental rights to Javier F., a person under the age of 18: Brown County Department of Human Services v. Jessie W. (L.C. # 2013TP12)

Before Blanchard, P.J.[1]

Jessie W. appeals an order terminating her parental rights to Javier F. Attorney Len Kachinsky has filed a no-merit report seeking to withdraw as appellate counsel. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967), and WIS. STAT. RULE 809.32. The no-merit report

[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.

addresses potential claims of procedural errors; the sufficiency of the evidence to support the jury verdicts; and the court's exercise of discretion in terminating Jessie's parental rights. Jessie was sent a copy of the report, but has not filed a response. Upon our independent review of the entire record, as well as the no merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

On March 11, 2013, Brown County Human Services Department petitioned to terminate Jessie's parental rights to Javier,[2] who is a member of the Menominee Indian Tribe and thus subject to the Indian Child Welfare Act (ICWA). Brown County alleged abandonment and failure to assume parental responsibility as grounds to terminate Jessie's parental rights. *See* WIS. STAT. § 48.415(1) and (6).

Jessie contested the petition. Following a jury trial, the jury returned special verdicts finding both grounds alleged by Brown County. The jury also returned a special verdict finding that the requirements of ICWA had been met. The circuit court found Jessie unfit and held a dispositional hearing. The court then determined that termination of Jessie's parental rights was in Javier's best interest.

The no-merit report addresses whether there would be arguable merit to any claim of procedural error. Our review of the record indicates that Jessie was advised of her rights and afforded counsel, and that the circuit court complied with statutory time requirements or found

[2] Brown County also petitioned to terminate the parental rights of Javier's father, which are not at issue in this appeal.

good cause for extensions on the record. *See* WIS. STAT. §§ 48.42; 48.422; and 48.424. We agree with counsel's assessment that any claim of procedural error would lack arguable merit.

The no-merit report also addresses the sufficiency of the evidence to support the jury verdicts as to grounds and compliance with ICWA. "'Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, [appellate courts] will not overturn that finding.'" ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752 (citation omitted). We agree with counsel's assessment that an argument that the evidence was insufficient to support the jury's findings would lack arguable merit.

Brown County had the burden at trial of establishing grounds for termination by clear and convincing evidence. *See* WIS. STAT. §§ 48.424 and 48.31(1). Because there was credible evidence presented at trial to support the jury's findings of grounds based on abandonment and failure to assume, a claim that the evidence was insufficient to support the verdicts would lack arguable merit.

Abandonment is established when: (1) the parent left the child with another person; (2) the parent knew or could have discovered the whereabouts of the child; and (3) the parent failed to visit or communicate with the child for six months. WIS. STAT. § 48.415(1)(a)3. As a defense to abandonment, the parent has the burden to prove, by a preponderance of the evidence, that the parent had good cause for failing to visit or communicate with the child. Section 48.415(1)(c). Here, Brown County offered evidence that Jessie failed to visit or communicate with Javier for an eight-month period, despite Jessie's knowledge of Javier's

whereabouts and the willingness of Brown County and the foster home to continue contact between Jessie and Javier. Jessie did not present any evidence to establish good cause for her failure to visit or communicate with Javier, but counsel argued in closing that evidence of Jessie's financial problems and the foster mother's apparent animosity toward Jessie supported a finding of good cause. This evidence was sufficient to support the jury verdict as to abandonment.

The no-merit report notes that the verdict submitted to the jury incorrectly stated that the burden to show good cause was by clear and convincing evidence, rather than by a preponderance of the evidence. Here, however, defense counsel did not object to the proposed jury verdict form. The question, then, is whether there would be arguable merit to a claim that Jessie was denied the effective assistance of counsel by her counsel's failure object to the verdict form. We determine that there would be no arguable merit to a claim of ineffective assistance of counsel on this basis.

A claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984). To show prejudice, a party must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. Our review of the record indicates that it would be frivolous to contend that counsel's failure to object to the verdict form deprived Jessie of a fair trial. The court instructed the jury on the proper standard of review in its jury instructions. Additionally, while Jessie's counsel suggested that Jessie may have lacked funds necessary for visiting or communicating with Javier, and that the foster parents had animosity toward Jessie, there was no evidence that Jessie was actually unable to visit or communicate with Javier based on financial limitations or the feelings of the

foster parents. A claim that counsel's failure to object to the jury form deprived Jessie of a fair trial with a reliable result would be wholly frivolous.

Failure to assume parental responsibility is established when the parent has not had a substantial parental relationship with the child, meaning the parent has not accepted and exercised significant responsibility for the daily supervision, education, protection and care of the child. WIS. STAT. § 48.415(6). "[A] fact-finder must look to the totality-of-the-circumstances to determine if a parent has assumed parental responsibility." ***Tammy W–G. v. Jacob T.***, 2011 WI 30, ¶22, 333 Wis. 2d 273, 797 N.W.2d 854. That is, "a fact-finder should consider a parent's actions throughout the entirety of the child's life when determining whether [s]he has assumed parental responsibility." ***Id.***, ¶23. Here, Brown County presented evidence that, for at least a year and a half leading up to trial, Jessie did not have a strong relationship with Javier; that Jessie's contacts with Javier had been minimal; and that Jessie had not exercised any significant responsibility regarding Javier. By the time of trial, Javier was nine years old and had been outside of Jessie's care for almost three years. This evidence was sufficient to support the jury's verdict as to failure to assume.

Additionally, under ICWA, Brown County had the burden to establish beyond a reasonable doubt that returning Javier to Jessie's custody was likely to result in serious emotional or physical damage to Javier, including by use of expert testimony. *See* 25 U.S.C. § 1912(f); WIS. STAT. § 48.028(4)(e)1. Brown County was also required to establish by clear and convincing evidence that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of Javier's family and that those efforts had proved unsuccessful. *See* 25 U.S.C. § 1912(d); WIS. STAT. § 48.028(4)(e)2. Here, Brown County presented testimony by the case worker assigned to Jessie and Javier as to the efforts

Brown County made to provide services to Jessie, including its efforts involving the Menominee Tribe, and that those efforts were unsuccessful. Brown County also presented expert testimony by a Menominee Indian Tribe social worker that returning Javier to Jessie would be harmful to Javier because Jessie was not ready to take care of a child, based on unaddressed mental health issues. The social worker also testified as to the efforts the Menominee Tribe's Social Services Department and the Brown County Human Services Department had made to provide services to Jessie and Javier to prevent the breakup of their family, and that those services had proved unsuccessful. The evidence was sufficient to support the jury verdicts as to the requirements of ICWA.

Finally, the no-merit report addresses whether the circuit court properly exercised its discretion in determining that termination of Jessie's parental rights was in Javier's best interest. The evidence at the dispositional hearing established that Javier had been in the same foster family for nearly the entire time he was placed outside of Jessie's care, and that he was likely to be adopted by that family following termination of Jessie's parental rights. Additionally, Brown County presented testimony that Javier did not have a substantial relationship with Jessie, that Javier's only contact with other members of Jessie's family was limited contact with Jessie's mother, and that Javier wished to be adopted by his current foster family. The Brown County ongoing case manager for Jesse and Javier opined that termination was in Javier's best interest because it would provide Javier the permanence and stability he needed. The circuit court explained its reliance on that testimony and the relevant statutory factors in reaching its determination. We agree with counsel's assessment that a claim that the circuit court erroneously exercised its discretion would lack arguable merit.

The no-merit report notes that the circuit court, in explaining its determination that termination was in Javier's best interest, stated: "And I do believe the Lord works through people, and God does move people to do certain things. There are callings. And I think there is a real calling in this situation. God is looking out for Javier." We agree with counsel's assessment that the court's statements would not support an arguably meritorious claim that the court relied on an impermissible religious factor in reaching its determination. The circuit court was referencing the foster mother's testimony that she felt a religious calling to adopt Javier, and did not indicate the court reached its determination based on the court's religious beliefs. *See generally* ***State v. Betters***, 2013 WI App 85, 349 Wis. 2d 428, 835 N.W.2d 249. Our review of the transcript of the court's decision indicates that the court relied on the proper statutory factors in reaching its determination, and did not rely on impermissible religious grounds. *See* ***id.*** Any argument to the contrary would lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the order terminating Jessie's parental rights. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Upon the foregoing,

IT IS ORDERED that the order terminating Jessie's parental rights is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Len Kachinsky is relieved of any further representation of Jessie W. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals