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September 27, 2017

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

2017AP1328-NM In re the termination of parental rights to L.J., a person under the age of 18: State v. L.J. (L.C. #2015TP228)

Before Neubauer, 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).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

L.J. appeals an order granting an involuntary termination of her parental rights (TPR) to her biological child, "James."[2] M.W.'s appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32, ***Anders v. California***, 386 U.S. 738 (1967), and ***Brown Cty. v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (per curiam), and a supplemental report pursuant to this court's August 17, 2017 order. L.J. responded to each report outlining her efforts to regain custody. Based on the no-merit reports, L.J.'s responses, and our independent review of the record, we conclude there are no issues with arguable merit for appeal. We summarily affirm the order. *See* WIS. STAT. RULE 809.21.

L.J. has documented cognitive deficits and mental health issues. She was found walking the streets in the early morning hours in November 2013 with two-month-old James. Saying she had no safe place to go, she asked that James be placed in foster care; she herself required inpatient mental health treatment. The State later filed a TPR petition alleging that, although the Bureau of Milwaukee Child Welfare (the Bureau) made reasonable efforts to provide appropriate services to L.J., she failed to assume parental responsibility for James and he remained a child in continuing need of protection or services (CHIPS).

At the three-day jury trial, L.J.'s case managers, her social worker, an Easter Seals program supervisor, and a psychologist who evaluated her three times over the past two and one-half years testified that, despite both her diligent efforts to cooperate with programming and the attachment between her and James, L.J.'s intellectual deficits and her mental health challenges made her unable to care for James without supervision. The ongoing case manager

[2] "James" is a pseudonym.

recommended a TPR. The court agreed. James, nearly three, still resided in the foster home where he initially had been placed and which was identified as an adoptive resource. The court found that, while a substantial relationship existed between mom and son, a TPR was in James' best interest. This no-merit appeal followed.

The no-merit reports consider whether all mandatory time limits set forth in WIS. STAT. ch. 48, subch. VIII, were adhered to. Any continuances or delays were for good cause stated on the record and without objection. *See* WIS. STAT. § 48.315(1)(b), (2). No issue of arguable merit could arise from either point.

Appellate counsel also considered whether a guardian ad litem should have been appointed for L.J. herself in the TPR proceeding, as a guardian ad litem (GAL) had been appointed in the underlying CHIPS case after she was found incompetent in March 2014. A court "may appoint" a GAL in any appropriate matter under WIS. STAT. ch. 48, and "shall appoint" a GAL for a parent who is the subject of a TPR proceeding, if an assessment or examination of the parent ordered under WIS. STAT. § 48.295 (1) shows that the parent is not competent to participate in the proceeding or to assist his or her counsel or the court in protecting the parent's rights in the proceeding. WIS. STAT. § 48.235(1)(a), (g). Before exploring competence, "there must be some evidence raising doubt as to his [or her] competence or a motion for a determination on the question setting forth the grounds for belief that such competency is lacking." ***State v. McKnight***, 65 Wis. 2d 582, 595, 223 N.W.2d 550 (1974). A person who is incompetent "lacks the ability to reasonably understand pertinent information, rationally evaluate litigation choices based upon that information, or rationally communicate with, assist and direct counsel." ***Kainz v. Ingles***, 2007 WI App 118, ¶3, 300 Wis. 2d 670, 731 N.W.2d 313.

The TPR jury trial was in September 2016, two and one-half years after L.J. had been found incompetent. Trial counsel told the court that neither she nor predecessor TPR counsel had qualms about L.J.'s competence. Others involved with L.J. agreed. The court found that L.J. cooperated and consulted with counsel about the facts of the case and its progress and appeared engaged in and to understand the proceedings. Based on L.J.'s courtroom behavior and demeanor, the court said it did not "see any reason at all to question [L.J.'s] competency." No issue of arguable merit could arise from the court's decision not to order a competency examination or to appoint a GAL.

The no-merit report also correctly determined that no meritorious challenge could be made to the sufficiency of the evidence to support the court's conclusion that grounds existed for the TPR. "Grounds for termination must be prove[d] by clear and convincing evidence." ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993). This court gives significant deference to the jury's verdict and may not overturn it if any credible evidence supports what the jury has found. ***Deannia D. v. Lamont D.***, 2005 WI App 264, ¶9, 288 Wis. 2d 485, 709 N.W.2d 879. There was no dispute that James had been adjudged CHIPS and placed outside the home for six months or longer pursuant to a court order containing the TPR notice required by law. *See* WIS. STAT. § 48.415(2)(a)3. The jury was entitled to believe the witnesses who testified to the effect that L.J. had not met the conditions necessary for James' return despite the Bureau's many reasonable efforts to assist her. The jury also could have found from the evidence that, despite her efforts, L.J. made only limited progress and that it was unlikely that she would satisfy the court-ordered conditions in another nine months. *See* ***id.*** An argument that there was no credible evidence to support the jury verdict would lack arguable merit.

Another potential issue is whether the trial court erred when it permitted evidence of a pending criminal case against L.J. and denied her request to give WIS JI—CRIMINAL 317 regarding the effect of invoking her Fifth Amendment right to remain silent regarding that matter. The criminal case stemmed from L.J.'s assault of her then case manager after a hearing that had left L.J. particularly frustrated. The court allowed the State to introduce evidence of the assault to demonstrate L.J.'s continuing emotional volatility, which was highly relevant to the TPR proceeding.

"Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom." WIS. STAT. § 905.13(3). Subsection (3) does not apply in a civil case, however. Sec. 905.13(4). "TPR proceedings are civil in nature, not criminal." ***Walworth Cty. DHHS v. Andrea L.O.***, 2008 WI 46, ¶47, 309 Wis. 2d 161, 749 N.W.2d 168. Thus, the court instead gave WIS JI—CIVIL 425, which instructs that jurors may find from a witness' refusal to answer that the answer would have been against his or her interest. There would be no merit to a claim that the trial court erred in regard to admitting the evidence or denying the request for the criminal instruction.

The no-merit report also addresses whether the trial court properly exercised its discretion in terminating L.J.'s parental rights. Whether the evidence warrants a TPR is within the trial court's discretion. *See* ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶28, 255 Wis. 2d 170, 648 N.W.2d 402. The court thoroughly considered the WIS. STAT. § 48.426(3) factors from the perspective of James' best interests, his adoptability into the home he had lived virtually his whole life, his strong bond with L.J., his bonded relationship with the foster mother, and the possibility and benefit of nurturing an ongoing post-TPR relationship between L.J., James, and the adoptive mom. Acknowledging its frustration that an out-of-state biological aunt first

surfaced as a potential adoptive resource at the disposition hearing, the court found that, at this stage of the proceedings, the aunt, who had never met James, was not a reasonable placement option. We agree that no issue of arguable merit could arise in regard to disposition.

Our independent review satisfies us that there are no other potential issues of arguable merit. Therefore,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved from further representing L.J. in this matter.

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

Diane M. Fremgen
Clerk of Court of Appeals