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DISTRICT II

February 13, 2019

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

2018AP2360-NM	In re the termination of parental rights to Z.Z.M.-M., a person under the age of 18: Kenosha County DHS v. J.L.M., Jr. (L.C. #2018TP8)
2018AP2361-NM	In re the termination of parental rights to G.M.M., a person under the age of 18: Kenosha County DHS v. J.L.M., Jr. (L.C. #2018TP28)

Before Gundrum, 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).

J.L.M., Jr. (JLM) appeals orders granting involuntary terminations of parental rights (TPR) to his son, ZZM-M, and his daughter, GMM. 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). JLM responded to the report. Upon consideration of the no-merit report and response and our independent review of the record, we conclude there are no issues with arguable merit for appeal. We thus summarily affirm the orders. *See* WIS. STAT. RULE 809.21.

The Kenosha County Division of Children and Family Services (DCFS) filed separate TPR petitions, one alleging that GMM, the other that ZZM-M, was a child in need of protection or services (CHIPS) and that JLM failed to assume parental responsibilities for the child. *See* WIS. STAT. § 48.415(2), (6).

The children have different mothers. JLM was married to and resided with GMM's mother when GMM was born in May 2014. GMM was removed from the parental home in January 2017. After a series of foster homes, GMM was placed with her mother's cousin and his wife, now GMM's adoptive resource. GMM's mother voluntarily terminated her parental rights.

ZZM-M's mother was incarcerated when she gave birth to him in September 2016. He was removed to foster care and has resided in the same home ever since. The family wishes to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

adopt him despite his ongoing challenges from in utero drug exposure. The parental rights of his mother, who subsequently has run away, have been involuntarily terminated.

In December 2016, when GMM and ZZM-M were two years old and two months old, respectively, JLM was arrested on drug charges. A month later, genetic testing established his paternity to ZZM-M. He pled guilty to conspiracy to manufacture or deliver heroin as a repeater, for which he was sentenced and incarcerated in August 2017; he anticipates release to extended supervision in 2022.

The parties agreed to consolidate the children's cases for trial. After a colloquy, the court found that JLM agreed to have the cases consolidated and that he voluntarily, knowingly, and understandingly waived his right to a jury trial.

After the two-phase trial, the court found that, despite the efforts of DCFS, each child was outside the home for a cumulative period of at least six months; JLM failed to meet the conditions established for either child's safe return to the home; there was a substantial likelihood he would not be able to meet the conditions of return within nine months; and he did not have a substantial parental relationship with either child. The court thus found him an unfit parent and terminated his parental rights. This no-merit appeal followed.

The no-merit report considers whether (1) the evidence was sufficient to support the court's finding that grounds exist for the TPRs on the basis of both children being continuing CHIPS, *see* WIS. STAT. § 48.415(2); (2) the evidence was sufficient to support its finding that grounds exist for the TPRs on the basis of JLM's failure, beyond his incarceration, to assume parental responsibility as he did not have a "substantial parental relationship" with either child, *see* § 48.415(6); (3) the trial court erroneously exercised its discretion in terminating JLM's

parental rights; and (4) JLM knowingly, intelligently, and voluntarily waived his right to a jury trial. As our review of the record confirms counsel's conclusion that these potential issues would be frivolous and lack arguable merit, we address them no further.

JLM's response argues only that his incarceration foreclosed any possibility of his meeting the conditions of return of his children. We are persuaded that JLM's position has no arguable merit for an appellate challenge.

Incarceration alone cannot be grounds to determine a parent unfit and unable to fulfill conditions of return, but it is a relevant consideration. *Kenosha Cty. DHS v. Jodie W.*, 2006 WI 93, ¶¶49-50, 293 Wis. 2d 530, 716 N.W.2d 845. After looking to the appropriate statutes and considering the trial testimony, including JLM's, the trial court found ample grounds beyond JLM's incarceration on which to order the TPRs.

The trial court considered JLM's relationships with each child prior to and during his incarceration, the nature of his crime, his sentence, his cooperation with DCFS, and the children's best interests. *See id.*, ¶50. It also considered each child's age and health, time out of the home, substantial relationships with JLM or other family members; whether it would be harmful to the child to sever those relationships; whether a TPR would enable them to enter into more stable and permanent family relationships; and the likelihood of permanency—in each case here, a ready adoptive family. *See* WIS. STAT. § 48.426. The court observed that, even while residing with GMM, JLM made the choice that led to his incarceration, and, since learning that he is ZZM-M's father, has set eyes on the boy only once—during a court hearing and the baby was asleep. It acknowledged that JLM's incarceration has hampered his ability to parent, but that his parenting outside of that constraint did not show him to be a fit parent.

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

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

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

Sheila T. Reiff
Clerk of Court of Appeals