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DISTRICT I

November 21, 2023

To:

Hon. Joseph R. Wall
Circuit Court Judge
Electronic Notice

Tammy Kruczynski
Juvenile Clerk
Milwaukee County Courthouse
Electronic Notice

Jenni Spies-Karas
Electronic Notice

Steven Zaleski
Electronic Notice

K.L.B.

Division of Milwaukee Child Protective Services
Charmian Klyve
635 North 26th Street
Milwaukee, WI 53233-1803

Courtney L.A. Roelandts
Electronic Notice

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

2023AP1491-NM In re the termination of parental rights to A.J., a person under the age of 18: State of Wisconsin v. K.L.B. (L.C. # 2022TP92)

Before Donald, P.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).

K.L.B., by counsel, appeals the circuit court order terminating her parental rights to her child, A.J. Attorney Steven Zaleski, appointed counsel for K.L.B., has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32. K.L.B. was informed of her right to

[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.

respond to the report, but she has not done so. Upon consideration of the report, and an independent review of the record as required by ***Anders v. California***, 386 U.S. 738 (1967), this court concludes there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the circuit court's order. *See* WIS. STAT. RULE 809.21.

A.J. was born prematurely in July 2020 with many medical issues. He was in the NICU for over two months due to these issues, which included chronic lung disease, requiring him to be on oxygen. He was considered "medically fragile."

When A.J. was about to be discharged in September 2020, the hospital contacted the Division of Milwaukee Child Protective Services (DMCPS) with concerns regarding K.L.B.'s ability to care for him. K.L.B. has significant cognitive delays and untreated mental health issues, as well as physical disabilities. Hospital staff informed the case worker from DMCPS that K.L.B. "struggle[d] to provide … basic care" for A.J., and they did not believe that she would be able to provide the necessary care for all of A.J.'s medical needs.

Hospital staff was also concerned with K.L.B.'s living situation. K.L.B. lived with her mother at the time, who K.L.B. said has a drinking problem. Furthermore, K.L.B. and her mother were reported to have a "volatile" relationship, regularly getting into altercations which at times had turned physical. DMCPS discovered that the police had been contacted several times with regard to their "fighting."

DMCPS attempted to put a protective plan in place for A.J. so that he could go home with K.L.B. However, it was determined that there were no family members willing or able to

assist K.L.B. with A.J.'s care, once the extent of his medical needs were explained.[2] A.J. was therefore placed in foster care upon being discharged from the hospital.

In May 2022, the State filed the underlying petition to terminate K.L.B.'s parental rights to A.J. In the petition, the State alleged the continuing need of protection or services (CHIPS) for A.J., pursuant to WIS. STAT. § 48.415(2), and the failure to assume parental responsibility, pursuant to § 48.415(6).

During the grounds phase of the proceedings, K.L.B. chose to enter a no-contest plea to the CHIPS allegation of the petition. Prior to accepting the plea, the circuit court inquired whether K.L.B. had ever had a competency evaluation, given her cognitive difficulties. During that inquiry, K.L.B.'s defense counsel, the guardian ad litem for A.J., and a guardian ad litem who had been appointed for K.L.B. at the beginning of these proceedings, all described their interactions with her. The court also reviewed a psychological evaluation that had been done during the CHIPS proceedings, which indicated that K.L.B. had a mild intellectual disability and short-term memory issues, and was possibly bipolar.

Additionally, the court observed that K.L.B. had completed eleventh grade before dropping out of high school, and had been enrolled in special education classes, which the court stated "don't indicate incompetence at all." Therefore, the court, while recognizing K.L.B.'s cognitive and memory issues, found that she was competent to proceed.

[2] A.J.'s alleged father did not participate in any DNA testing to establish that he was the biological father, nor did he appear at the proceedings after a diligent effort was made to serve him; he was therefore found by the circuit court to be in default. His parental rights, and those of any unknown biological father, were also terminated as a result of these proceedings. The fathers' rights are not at issue in this no-merit appeal, and we do not address them further.

The circuit court then engaged in a thorough colloquy with K.L.B., carefully explaining the proceedings, the rights she would be giving up by entering a plea, and the possible dispositions in the proceedings—either terminating her parental rights, or dismissing the petition. The court ultimately accepted K.L.B.'s no-contest plea as being freely, voluntarily and knowingly made, with "an understanding of all her rights and consequences" relating to the plea.

Immediately after the circuit court accepted K.L.B.'s plea, it moved to the dispositional phase of the proceedings. After hearing and reviewing testimony from K.L.B.'s case manager, case supervisor, and A.J.'s foster parents, and considering the required statutory factors for termination in light of the evidence, the court found that it was in A.J.'s best interest for K.L.B.'s parental rights to be terminated. This no-merit appeal follows.

In the no-merit report, appellate counsel first addresses whether there would be arguable merit to a challenge regarding the competency of the circuit court relating to the adherence to statutory deadlines. Counsel states, and the record reflects, that the circuit court either acted within the statutory time periods for these proceedings as set forth in WIS. STAT. §§ 48.422(1)-(2), 48.424(4), and 48.427(1), or found good cause for granting a continuance, pursuant to WIS. STAT. § 48.315(2)-(3). We therefore agree with counsel's analysis that there would be no arguable merit to a claim relating to statutory deadlines.

Appellate counsel next addresses whether there would be any arguable merit to a claim relating to K.L.B.'s no-contest plea. In particular, counsel notes the discussion regarding K.L.B.'s competency by the circuit court prior to the plea colloquy. As stated above, a guardian ad litem had previously been appointed by the circuit court for K.LB., not because she had been

found incompetent, but rather because of her inability to "comprehend the legal process" due to her cognitive disabilities.

When the circuit court addressed K.L.B.'s cognitive issues prior to accepting her no-contest plea, it considered the information described above—K.L.B.'s interactions with counsel, her psychological evaluation, and her education. It then found that she was competent to enter her plea. *See* ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 (to determine legal competency, the court must determine whether the individual "can understand the proceedings and assist counsel 'with a reasonable degree of rational understanding'" (citation omitted)).

A competency determination is reviewed under the clearly erroneous standard. ***Id.***, ¶¶33, 45. As such, it will not be disturbed unless it is against the great weight and clear preponderance of the evidence. ***State v. Anderson***, 2019 WI 97, ¶20, 389 Wis. 2d 106, 935 N.W.2d 285. The record here, as discussed above, supports the circuit court's finding. Therefore, we agree with appellate counsel's assessment that there would be no arguable merit to a challenge of the validity of K.L.B.'s plea based on her competency.

Also with regard to K.L.B.'s plea, appellate counsel observes that the circuit court did not identify the adoptive resource for A.J. during the plea colloquy, as required under WIS. STAT. § 48.422(7)(bm). However, testimony at the dispositional hearing, which occurred immediately after K.L.B. entered her plea, established the identity of a proposed adoptive parent. Accordingly, the error in failing to address this issue during the plea colloquy is harmless. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶31-32, 246 Wis. 2d 1, 629 N.W.2d 768 (stating that in cases where the circuit court may have "procedurally erred," we review the entire record to

determine whether the error was "sufficient to justify overturning the termination order"); *see also* ***State v. Jodie A.***, Nos. 2015AP46 and 2015AP47, unpublished slip op. ¶11 (WI App July 7, 2015) (holding that the circuit court's failure to inquire about adoptive resources during the plea colloquy was harmless error). Therefore, we agree with appellate counsel that a claim regarding the validity of K.L.B.'s plea due to a colloquy deficiency would lack arguable merit.

Appellate counsel next addresses whether there would be arguable merit to challenges relating to the disposition phase of these proceedings. "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). The circuit court must consider the factors set forth in WIS. STAT. § 48.426, giving paramount consideration to the best interests of the child. *See* ***Gerald O.***, 203 Wis. 2d at 153-54. Here, the record reflects that the circuit court expressly considered the relevant factors, made a number of factual findings based on the evidence presented, and reached a reasonable decision. We therefore agree with appellate counsel's conclusion that any challenge to the circuit court's decision to terminate K.L.B.'s parental rights would lack arguable merit.

Finally, the no-merit report discusses whether K.L.B. could pursue an arguably meritorious claim that her 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). There is nothing in the no-merit report or the record to suggest that trial counsel rendered ineffective assistance of counsel in representing K.L.B. We therefore agree with appellate counsel that any such claim would lack arguable merit.

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

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven Zaleski is relieved of any further representation of K.L.B. in these matters.

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

Samuel A. Christensen
Clerk of Court of Appeals