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October 23, 2013

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

2013AP1661 In re the termination of parental rights to Will C.-R., a person under the age of 18: State of Wisconsin v. Lawanda R. (L.C. # 2012TP249)

Before Higginbotham, J.

Lawanda R. appeals an order that terminated her parental rights to her son Will R. Attorney Patrick Flanagan has filed a no-merit report seeking to withdraw as appellate counsel.

See WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 97, 403 N.W.2d 449 (1987). The no-merit report addresses the sufficiency of the evidence to support the continuing CHIPS grounds for termination, the court's exercise of its discretion in the disposition phase of the proceeding, and the assistance of counsel. Lawanda was sent a copy of the report and has filed a response alleging that she feels she was discriminated against due to having a disability; that she was not provided sufficient resources to be able to meet the conditions of return; and that, even if her rights were terminated, placement should have been with a relative.

Counsel's discussion of the potential merit of an appeal is inadequate. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 438, 440 (1988) (noting that "a defense attorney has a duty to advance all colorable claims and defenses" and that Wisconsin's no-merit rule requires citation to cases, statutes, and facts in the record supporting counsel's conclusion that the appeal is frivolous). Specifically, counsel has not addressed the primary defense that Lawanda raised at trial—namely, that the State violated her substantive due process rights by terminating her parental rights based upon her failure to satisfy conditions of return that were impossible for her to meet given her cognitive disabilities. Lawanda analogized her situation to that in the ***Jodie W.*** case, wherein the Wisconsin Supreme Court determined that it was unconstitutional to terminate the parental rights of a mother who was unable to meet an impossible condition of return due to her incarceration. *See* ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶55, 293 Wis. 2d 530, 716 N.W.2d 845.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The standard for filing a no-merit report is whether an appeal would be frivolous. WIS. STAT. RULE 809.32(1). An appeal may be found frivolous when it is "without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c)2.

Here, the circuit court relied upon the rationale of one or more unpublished court of appeals cases to distinguish ***Jodie W.*** and determine that the continuing CHIPS grounds for termination could be constitutionally applied to a parent who lacks the cognitive ability to meet the conditions of return. Unpublished decisions are not, however, precedential. Therefore, we are not persuaded that it would be frivolous for Lawanda to make a good faith argument to extend ***Jodie W.***, challenging the constitutionality of WIS. STAT. § 48.415(3) as applied to a parent whose cognitive abilities render the conditions of return impossible to achieve. Rather, this would appear to be an issue that warrants full briefing, and perhaps even publication.

Accordingly,

IT IS ORDERED that the no-merit report is rejected and this appeal shall be converted to a merits appeal. Either Attorney Patrick Flanagan, or a successor appointed by the State Public Defender if appropriate, shall file an appellant's brief addressing the constitutionality of terminating the rights of a cognitively disabled parent based upon the failure to meet conditions of return that the parent lacks the capacity to achieve. The appellant's brief shall be due thirty days from this order.

Diane M. Fremgen
Clerk of Court of Appeals