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 I

April 21, 2023

To:

Hon. Joseph R. Wall
Circuit Court Judge
Electronic Notice

Tammy Kruczynski
Juvenile Clerk
Milwaukee County Courthouse
Electronic Notice

Leonard D. Kachinsky
Electronic Notice

Jenni Spies-Karas
Electronic Notice
Andrew William Boden

Legal Aid Society of Milwaukee
Electronic Notice

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

Andrea Cornwall
State Public Defenders Office Appellate Division
735 N. Water Street, Ste. 912
Milwaukee, WI 53202-4105

Joseph N. Ehmann
State Public Defenders Office Appellate Division
17 S. Fairchild St. 3rd Floor
P.O. Box 7862
Madison, WI 53707-7862

C.W.

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

2023AP98-NM In re the termination of parental rights to L.L.-W., a person under the age of 18: State of Wisconsin v. C.W. (L.C. # 2021TP278)

Before Brash, 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) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

C.W. appeals a trial court order terminating her parental rights to her child, L.L.-W. ("L.L."). C.W.'s appointed attorney, Leonard D. Kachinsky, has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32. C.W. did not respond. Following a preliminary review of the record, this court directed counsel to file a supplemental no-merit report elaborating on the applicability of the Indian Child Welfare Act ("ICWA") and the Wisconsin Indian Child Welfare Act ("WICWA").[2] *See* 25 U.S.C. §§ 1901-1963; WIS. STAT. § 48.028. Upon review of the record, the no-merit report, and the supplemental no-merit report, this court concludes that it discloses an arguably meritorious issue with regard to compliance with ICWA and WICWA. Accordingly, we reject the no-merit report, dismiss the appeal without prejudice, and set a deadline for filing a new notice of appeal.

In his no-merit report, counsel deemed any issue relating to ICWA meritless. His original analysis, reproduced in full, follows:

> There was a finding in the underlying CHIPS case that the Indian Child Welfare Act did not apply (7:7). It was not clear what the basis for that finding was as C.W. had a last name that strongly suggested she was of Native American heritage.
>
> C.W. ws [sic] an enrolled member of the Menominee Indian Tribe (the Tribe). She provided the undersigned attorney a certificate of Indian Blood and Enrollment notice from the Tribe. The document indicated that C.W. was enrolled in the Tribe on September 17, 2013 and had a Menominee Blood Degree of 45/128. The father, E.L., had a last name that suggested an Hispanic ethnic background. There was no reason to believe that E.L. was of Tribal decent [sic]. Further, he had been in a warrant status since 2018 and could not be interviewed to confirm his ethnic background.

[2] ICWA governs state-court child custody proceedings involving Indian children. *See* ***Kewaunee Cnty. DHS v. R.I.***, 2018 WI App 7, ¶12, 379 Wis. 2d 750, 907 N.W.2d 105 (2017). Wisconsin codified these minimum federal standards in WIS. STAT. § 48.028.

> Had L.L.-W. been of Tribal decent [sic] of a sufficient degree, the best interests of the child would have been determined by the Indian Child Welfare Act, 25 USC 1901 to 1963. Sec. 48.01(2), Wis. Stats. However, that applies only to an Indian child which was defined as any unmarried person who is under the age of 18 years and affiliated with an Indian tribe by being a member of a tribe or eligible for membership in an Indian tribe and was the biological child of a member of an Indian tribe. Sec. 48.02(8g), Wis. Stats. Under the Menomonee Tribal Constitution, only persons with one-quarter Tribal blood are eligible for membership.
>
> Assuming that E.L. was not of any Tribal ancestry, L.L.-W. would not have been of sufficient Tribal blood to qualify for membership. His Tribe blood quantum would have been 22.5/128, less than 25 percent. C.W. indicated to the undersigned attorney that she would apply for membership of L.L.W. but the undersigned attorney has been unable to communicate with C.W. since she made that commitment. It also appears that any application for Tribal membership would be rejected because the child's blood quantum would be below the 25 percent threshold required by the Tribal constitution.
>
> Had the Indian Child Welfare Act applied to this case, additional requirements would have existed for the termination of C.W.'s parental rights to her child. *See* Wis. JI-Children's 420. That would have affected the validity of her no contest admission to grounds for termination of C.W.'s parental rights as discussed below. However, any argument that L.L.-W. was subject to the Indian Child Welfare Act would be frivolous and without arguable merit given the facts above.

(Internet citation omitted.)

In the order requesting a supplemental no-merit report, the court noted counsel's reference to page seven of record item seven as support, which did not appear in the electronic record. This court additionally noted that the no-merit report did not include any citations to case law interpreting or applying the relevant provisions of ICWA and seemingly suggested that this court should find facts that were missing from the record. Consequently, the court asked for additional analysis.

In so doing, the court explained that a preliminary review of the record reflected that—without providing any discussion or explanation on the record—the trial court found that L.L. was not subject to ICWA. However, the certified CHIPS petition indicated C.W. told a social worker she is an enrolled member of the Menominee Indian Tribe of Wisconsin. The petition further stated:

> From the previous children['s] case [i.e., C.W.'s two other children who were the subjects of separate proceedings], [i]t has been verified through the tribe that the mother's other children … are not eligible for enrollment as they lacks [sic] sufficient blood quantum. Per IASW H. Honsa, the mother states she is an enrolled member of the Menominee Indian Tribe of Wisconsin, IA Honsa contact [sic] Carol Corn, Director of Menominee Tribal Social Services and she has confirmed that the children are first generation descendants. Menominee Tribal Social Services will decline participating in proceedings. The children are eligible for the descendants roll, which would be documentation for them to use the Gerald Ignace Health Center in Milwaukee. On 12/11/2020, OCM J. Helminger faxed notices to the tribe.

On December 14, 2020, there is an entry in the CHIPS docket that reads: "Notes Per letter from the Menomonee Indian Tribe Of Wisconsin in sibling case … Mother and siblings were NOT Eligible for Tribal Membership. Father & Alleged Father are the same person."[3]

In requesting the supplemental no-merit report, the court directed counsel to ***Sheboygan Cnty. DHS v. Neal J.G.***, 2003 WI 11, 259 Wis. 2d 563, 657 N.W.2d 363, where our supreme court urged circuit courts, as a matter of policy, "to proceed with caution and to initiate further inquiry when confronted with vague assertions of Indian heritage." ***Id.***, ¶38. The court explained that it was particularly interested in counsel's analysis of whether ICWA's notice requirement was complied with as to L.L., *see* 25 U.S.C. § 1912(a), and if not, why this does not

[3] The letter itself does not appear to be in the appellate record.

present an issue of arguable merit. In ***Neal J.G.***, the court explained that "[a] tribe cannot participate in determining tribal membership unless the tribe is aware of the proceeding." ***Id.***, 259 Wis. 2d 563, ¶15. "The notice requirement recognizes that Indian tribes have an interest in Indian child welfare proceedings apart from the parties and that the information supplied by the parties regarding the 'Indian child' status of the child may be incomplete." *See* ***id.***

In his supplemental no-merit report, counsel acknowledges that in the TPR case, the Menominee tribe was not given specific notice as it was during the CHIPS case. Counsel contends that the facts did not warrant providing the tribe with such notice.

The threshold requirement for notice is whether the court has "reason to know" that a child is an "Indian child." ***Id.***; *see also* 25 U.S.C. § 1912(a). An "Indian child" is defined as "any unmarried person who is under the age of 18 years and is affiliated with an Indian tribe in any of the following ways: (a) As a member of the Indian tribe[; or] (b) As a person who is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *See* WIS. STAT. § 48.02(8g).

There is no indication in the record that the circuit court—during the TPR proceedings—initiated further inquiry in an attempt to identify and clarify whether L.L was an Indian child so as to warrant notice to the tribe. Counsel submits that notice was not required in this case based on the following facts: (1) at the time of the CHIPS filing in December 2020, the Department knew of C.W.'s enrollment in the tribe but that its inquiry as to C.W.'s children indicated they were not eligible to enroll because of insufficient blood quantum; and (2) counsel's own review of C.W.'s Tribal ID Card, which provided a precise determination of C.W.'s blood quantum, and his research

and calculations related to "the provisions of the Tribe Constitution."[4] Counsel contends that this information "clearly established the lack of sufficient blood quantum for Tribal membership and thus the inapplicability of the Acts to L.L.…. [L.L.], by operation of genetics (since there was no available evidence that the father was of Indian descent), would clearly not be eligible."

Counsel further contends that even if blood quantum was not at issue, notice to the tribe was not required because L.L. was never part of an Indian family unit given that he was taken into custody while in the hospital, seven days after birth. Counsel relies on ***Kewaunee Cnty. DHS v. R.I.***, 2018 WI App 7, 379 Wis. 2d 750, 907 N.W.2d 105 (2017), and argues that ICWA is not applicable because a breakup of an Indian family has not occurred.[5] In that case, we concluded that specific ICWA and WICWA provisions did not apply to a non-Native American father who had never had physical or legal custody of his biological daughter who was an Indian child. *See* ***id.***, ¶¶1-2.

When counsel files a no-merit report the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See* ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the

[4] The Tribal ID Card does not appear in the appellate record.

[5] Counsel incorrectly asserted that this decision is unpublished.

lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals of Wis.***, 486 U.S. 429, 436 (1988).

In light of the limited information in the appellate record relating to L.L.'s potential status as an Indian child, we cannot conclude that ICWA and WICWA compliance issues lack arguable merit. The court, therefore, concludes that it must reject the no-merit report. Accordingly, we dismiss this appeal and extend the time for C.W. to file a new notice of appeal.[6] Our determination does not mean that this court has reached a conclusion about the ultimate merit of that or any other potential issues in this case. C.W. is not precluded from pursuing any additional issues that counsel may believe have merit.

Upon the foregoing, therefore,

IT IS ORDERED that the no-merit report is rejected and the appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for C.W. Any such appointment shall be made within thirty days of the date of this order.

[6] In a criminal no-merit appeal brought under WIS. STAT. RULE 809.32, we would dismiss the appeal and extend the time for filing a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30(2)(h). TPR appeals have a modified procedure for seeking postdisposition relief. *See* WIS. STAT. RULE 809.107(5)-(6). We therefore extend only the time for filing a notice of appeal, but C.W. is free to pursue a postdisposition motion, as appropriate, in accord with the applicable rules of appellate procedure.

IT IS FURTHER ORDERED that the public defender shall notify this court within five days after a new lawyer is appointed for C.W. or the public defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for C.W. to file a notice of appeal in this matter is extended to thirty days after the date on which the State Public Defender makes a determination on whether to appoint successor counsel.

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

Sheila T. Reiff
Clerk of Court of Appeals