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May 7, 2019

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

2019AP475-NM	In re the termination of parental rights to M.M. and V.A.-M.: State of Wisconsin v. A.M. (L.C. # 2017TP114)
2019AP476-NM	In re the termination of parental rights to M.M. and V.A.-M. State of Wisconsin v. A.M. (L.C. # 2017TP115)

Before Dugan, J.[1]

[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.

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).

A.M. appeals from orders terminating her parental rights and from postdisposition orders denying her request to discharge appointed counsel and proceed *pro se* on appeal. Attorney Carl W. Chesshir filed a no-merit report concluding that further proceedings would lack arguable merit. *See* WIS. STAT. RULES 809.107(5m), 809.32. Upon review of the records and the no-merit report, this court concludes that A.M. could pursue an arguably meritorious challenge to the circuit court's orders denying her request to discharge counsel and to represent herself on appeal.

The circuit court terminated A.M.'s parental rights in these matters in July 2018, and the Office of the State Public Defender appointed Attorney Chesshir to represent A.M. in postdisposition and appellate proceedings. Attorney Chesshir moved to withdraw in circuit court on the ground that A.M. wished to represent herself on appeal.

The circuit court conducted a hearing to determine whether to permit A.M. to discharge appointed counsel and represent herself. At the outset of the hearing the circuit court expressed some uncertainty as to the governing law, but ultimately the circuit court said that it would proceed on the assumption that it must "determine that [A.M.] ha[s] some basic ability to understand what [her] obligations will be and ha[s] made a reasonable decision to represent [her]self." The circuit court asked A.M. several questions about her age, education, representation earlier in the proceedings, and how she intended to represent herself. A.M. told the circuit court that she was twenty-eight years old and had gone as far as the twelfth grade in high school. She said she intended to "look[] over everything and understand[] it in ... a different

way tha[n] someone explaining it to [her] in their way." The circuit court said that it would "pick out one technical aspect," and asked A.M. if she understood that she would be required to file a notice of appeal by the deadline previously established. She said that she understood. Next, the circuit court asked A.M. how she would accomplish the filing. She answered, "the public defender's office," then said that she had "no idea." The circuit court told A.M. "[that] is why you cannot represent yourself." The circuit court went on to tell A.M. that "venting" was "not really … allowed" in court, that her appointed counsel could pursue the issues that concerned her, and that, if she were permitted to represent herself, she would "blow the time limits" and lose the right to appeal.

In the no-merit report, appellate counsel suggests that the standard governing A.M.'s request to discharge counsel is found in ***State v. Thornton***, 2002 WI App 294, 259 Wis. 2d 157, 656 N.W.2d 45. While ***Thornton*** addresses the nature of proceedings required "[b]efore a court may conclude that a criminal defendant has knowingly waived his or her right to counsel on direct appeal," *see* ***id.***, ¶21, appellate counsel does not offer a case or statutory citation that describes the procedure required before a court may conclude that a parent litigating in a termination-of-parental-rights proceeding has knowingly waived his or her right to counsel. Our own research leads us to, *inter alia*, ***Dane County DHS v. Susan P.S.***, 2006 WI App 100, 293 Wis. 2d 279, 715 N.W.2d 692, which looks to criminal law and describes the standards applicable when a parent facing a petition to terminate parental rights seeks to discharge appointed counsel and proceed *pro se* in circuit court. Neither ***Thornton*** nor ***Susan P.S.***, however, squarely addresses the issue here.

We observe that in ***Susan P.S.***, we concluded that a parent facing a petition for termination of parental rights has both a statutory right and a state constitutional right to self-

representation. *See* ***id.***, 293 Wis. 2d 279, ¶¶10-13. We also concluded that in deciding whether to permit a parent to proceed *pro se* in circuit court proceedings, a circuit court may consider a wide variety of "competency considerations" to resolve the "key issue [which] is whether the record shows 'an identifiable problem or disability that may prevent' meaningful self-representation." *See* ***id.***, ¶19 (citation omitted). At the same time, we concluded that "[a] lack of technical legal knowledge does not disqualify a person from self-representation." *See* ***id.***, ¶20.

We next observe that in ***Thornton***, we examined the case law governing waiver of postconviction and appellate counsel in criminal matters. *See* ***id.***, 259 Wis. 2d 157, ¶¶14-21. Based on a synthesis of those decisions, we concluded that, before a court may determine that a criminal defendant knowingly and voluntarily elected to waive the right to counsel on appeal, the court must establish that the person is aware: (1) of the rights set forth in ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 516 N.W.2d 362 (1994), namely, "to an appeal, to the assistance of counsel for the appeal and to opt for a no-merit report; (2) of the dangers and disadvantages of proceeding *pro se*; and (3) of the possibility that if appointed counsel is permitted to withdraw, successor counsel may not be appointed to represent the defendant in the appeal." *See* ***Thornton***, 259 Wis. 2d 157, ¶21 (footnote omitted). We also stated that "'persons of average ability and intelligence' should be permitted to represent themselves and that we should only deny or delay the acceptance of an otherwise proper waiver if 'a specific problem or disability can be identified.'" ***Id.***, ¶23 (citation and some quotation marks omitted).

In light of the foregoing, we are satisfied that A.M. can pursue an arguably meritorious claim that she has a constitutional and statutory right to represent herself in postdisposition proceedings and that the circuit court did not follow a proper procedure before denying her

request to discharge counsel so that she could proceed *pro se*. We therefore conclude that we must reject the no-merit report.

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 lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals of Wis.***, 486 U.S. 429, 436 (1988). Accordingly, we reject the no-merit report, convert these no-merit proceedings to appeals on the merits, and refer these matters to the Office of the State Public Defender for the possible appointment of new counsel. The State Public Defender shall have fifteen days to appoint new counsel or determine that new counsel will not be appointed. After that determination is made, A.M. shall have thirty days to file an appellate brief and appendix.[2]

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected and these matters are converted to appeals on the merits.

[2] A.M. may of course move to extend the briefing deadline if appropriate. *See* WIS. STAT. RULE 809.82(2). We also note that our obligation to reject the no-merit report for the reasons discussed in this order does not mean we have reached a conclusion about the ultimate merit of the appeals in these matters or about the arguable merit of any other potential issue in these cases. Our order does not preclude A.M. from raising any arguably meritorious issue that the cases may present.

IT IS FURTHER ORDERED that these matters are referred to the Office of the State Public Defender for the possible appointment of new counsel, with any such appointment to be made within fifteen days.

IT IS FURTHER ORDERED that the Office of the State Public Defender shall notify this court within five days after either a new lawyer is appointed for A.M. or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for A.M. to file an appellate brief and appendix is extended until thirty days after the date on which this court receives notice from the Office of the State Public Defender advising either that it has appointed new counsel for A.M. or that new counsel will not be appointed.

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

Sheila T. Reiff
Clerk of Court of Appeals