

## ARKANSAS COURT OF APPEALS

DIVISION III

No. CA09-507

KIMBERLY FREDRICK

APPELLANT

V.

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES

APPELLEE

**Opinion Delivered** October 7, 2009

APPEAL FROM THE GARLAND  
COUNTY CIRCUIT COURT,  
[NO. JV07-725]

HONORABLE VICKI SHAW COOK,  
JUDGE

MOTION TO WITHDRAW DENIED;  
REBRIEFING ORDERED

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### JOSEPHINE LINKER HART, Judge

Kimberly Fredrick's parental rights to A.F. (born October 24, 2001), C.F. (born January 15, 2004), and K.F. (born July 3, 2006), were terminated by the Garland County Circuit Court. Fredrick's appellate counsel has filed a motion to withdraw and a no-merit brief pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Ark. Sup. Ct. R. 6-9(i). The brief states that the termination hearing produced no adverse rulings other than the termination decision and explains why no meritorious ground for reversal exists. Our clerk's office mailed a copy of counsel's brief and motion to Fredrick at her last known address, informing her of her right to submit points for reversal. Fredrick has filed a hand-written letter asking for a chance to regain custody of her children. For the following reasons, we deny counsel's motion to withdraw and order

rebriefing in a merit format.

Fredrick was imprisoned in Louisiana during the majority of this case. A DHS witness testified at the termination hearing that DHS was unable to provide reunification services to Fredrick in Louisiana. However, Fredrick, without DHS assistance, arranged to take parenting classes and attend AA/NA meetings while in prison, and she tried to obtain counseling. Upon being released to a halfway house, Fredrick followed the rules of the house and participated in community service; obtained a job and provided pay stubs as proof; attended counseling twice a week; and attended additional parenting classes. The evidence also showed that Fredrick wrote frequent letters to DHS and the court during her incarceration, keeping abreast of her case, reporting on her efforts to obtain services, and enclosing letters and pictures for the children. In the termination order, the court found, among other things, that Fredrick had not demonstrated a diligent effort in working toward reunification and that, despite the offer of appropriate family services, Fredrick manifested the incapacity or indifference to rehabilitating her circumstances.

Counsel's brief does not adequately explain why there is no meritorious ground for reversal in this case. Consequently, we cannot say that an appeal would be wholly frivolous, and we order counsel to brief the case in a merit format. *See Linker-Flores v. Ark. Dep't of Human Servs.*, 364 Ark. 224, 217 S.W.3d 107 (2005). Though we are not ordering counsel to address any specific issue, in preparing the merit brief, counsel should pay particular attention to the court's reasons for termination, such as whether Fredrick manifested the

incapacity or indifference to rehabilitating her circumstances in light of her efforts both in and out of prison and her letters to her children and communications with DHS and the court; and whether DHS offered appropriate family services in light of its claim that it could not provide services to Fredrick while she was incarcerated in Louisiana. Counsel may also argue any other point of error she deems appropriate regarding other possible grounds for termination in the court's order. We note that our request for a merit brief does not foreclose appellees from arguing a procedural bar on any assignment of error, if applicable.

Motion to withdraw denied; rebriefing ordered.

VAUGHT, C.J., agrees.

GRUBER, J., concurs.

GRUBER, J., concurring. I agree with the majority that, under *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and its progeny, we must deny counsel's motion to withdraw and order her to rebrief in a merit format because I cannot say that the appeal is wholly frivolous or that there are no issues of arguable merit for appeal. See *Linker-Flores v. Ark. Dep't of Human Servs.*, 364 Ark. 224, 217 S.W.3d 107 (2005). However, I write separately to express my concern with the present state of the law. The intent of the statute authorizing the termination of parental rights is "to provide permanency in a juvenile's life in all instances in which the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence

that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective." Ark. Code Ann. § 9-27-341 (Supp. 2009). In making the determination whether to terminate a parent's rights, the court's focus is on the best interest of the juvenile. *See* Ark. Code Ann. § 9-27-341(b)(3)(A).

In my view, the rule allowing counsel to file a motion to withdraw along with a "no-merit" brief subverts the expressed intent of the legislature in these cases and does harm to the juvenile's best interest. As a general rule, counsel's preparation and our review of a no-merit brief take no less time than preparation and review of a brief in a merit format. However, when we deny counsel's motion to withdraw and require rebriefing, as in this case, it can take another six months or longer to finally resolve the case while the juvenile continues to live without permanency. I find it difficult to see how the current process is assisting the expressed intent of the legislature to provide permanency in a juvenile's life as quickly as possible.