

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1551

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS OF
JOE F., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JOSE G.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Vacated and cause remanded with directions.*

FINE, J. This is an appeal by Jose G. from an order entered on default terminating his parental rights to Joe F. The dispositive issue in this case is whether the trial court had jurisdiction to enter the order against Jose G. On the basis of the record before this court, we conclude that it did not.¹

¹ We do not, therefore, address the other issues raised by Jose G. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

Accordingly, the order is vacated as to Jose G., and this matter is remanded to the trial court for further proceedings on the petition to terminate Jose G.'s parental rights to Joe F.

A petition seeking to terminate parental rights to Joe F. was filed in the trial court on December 14, 1995. It alleged that Joe F. was born on December 28, 1995, to Jacquelyn [sic] F., and that Jose G. was the boy's adjudicated father. Section 48.42(2)(a), STATS., requires that the petition for termination of parental rights and summons be served on the "parent or parents of the child, unless the child's parent has waived the right to notice under s. 48.41 (2) (d)." Section 48.42(4), STATS., requires that personal service of the summons and the petition be made, except that: "If with reasonable diligence" personal service cannot be made, service shall be made by "publication."²

² Section 48.42(4), STATS., provides:

MANNER OF SERVING SUMMONS AND PETITION. (a) *Personal service.* A copy of the summons and petition shall be served personally upon the parties specified in sub. (2), if known, at least 7 days before the date of the hearing, except that service of summons is not required if the party submits to the jurisdiction of the court. Service upon parties who are not natural persons and upon persons under a disability shall be as prescribed in s. 801.11.

(b) *Constructive notice.* 1. If with reasonable diligence a party specified in sub. (2) cannot be served under par. (a), service shall be made by publication of the notice under subd. 4.

2. If the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60 and paternity has not been adjudicated, the court may, as provided in s. 48.422 (6) (b), order publication of a notice under subd. 4.

3. At the time the petition is filed, the petitioner may move the court for an order waiving the requirement of constructive notice to a person who, although his identity is unknown, may be the father of a nonmarital child.

4. A notice published under this subsection shall be published as a class 1 notice under ch. 985. In determining which newspaper is likely to

(..continued)

give notice as required under s. 985.02 (1), the petitioner or court shall consider the residence of the party, if known, or the residence of the relatives of the party, if known, or the last-known location of the party. If the party's post-office address is known or can, with due diligence, be ascertained, a copy of the summons and petition shall be mailed to the party upon or immediately prior to the first publication. The mailing may be omitted if the petitioner shows that the post-office address cannot be obtained with due diligence. Except as provided in subd. 5., the notice shall include the date, place and circuit court branch for the hearing, the court file number, the name, address and telephone number of the petitioner's attorney and information the court determines to be necessary to give effective notice to the party or parties. Such information shall include the following, if known:

- a. The name of the party or parties to whom notice is being given;
 - b. A description of the party or parties;
 - c. The former address of the party or parties;
 - d. The approximate date and place of conception of the child; and
 - e. The date and place of birth of the child.
5. The notice shall not include the name of the mother unless the mother consents. The notice shall not include the name of the child unless the court finds that inclusion of the child's name is essential to give effective notice to the father.
- (c) The notice under par. (a) or (b) shall also inform the parties:
1. That the parental rights of a parent or alleged parent who fails to appear may be terminated;
 2. Of the party's right to have an attorney present and that if a person desires to contest termination of parental rights and believes that he or she cannot afford an attorney, the person may ask the state public defender to represent him or her; and
 3. That if the court terminates parental rights, a notice of intent to pursue relief from the judgment must be filed in the trial court within 40 days after judgment is entered for the right to pursue such relief to be preserved.

Jose G. was not served personally with the summons and petition. Rather, service was made by publication in *The Daily Reporter*, a legal newspaper that may or may not qualify under § 48.42(4)(b)4, STATS., as a “newspaper likely to give notice” to Jose G.³ The trial court found that there was “[d]ue and diligent effort” to serve Jose G. personally.

The following testimony and colloquy before the trial court on January 10, 1996, is the only matter in the record on appeal that concerns whether personal service on Jose G. was attempted with “reasonable diligence”:

Direct Examination of Marie Petropoulos, the Milwaukee County social worker to whom the case of Joe F. was assigned:

Q Miss Petropoulos, you are the worker of the Milwaukee County Department of Human Services for a file by the name of Joe F[.]?

A Yes, I am.

Q And in that capacity is it one of your responsibilities to attempt to locate the natural parents of the child?

A Yes.

Q And what efforts have you made to locate those parents, those being Jacqueline F[.] and Jose G[.]?

....

Q And regarding Mr. G[.]?

A We have never been able to locate Mr. G[.] since his release from incarceration, I believe that was in March [of 1995].

³ Jose G. does not challenge the choice of *The Daily Reporter*.

Q And he also formerly lived at 806 South 30th Street in Milwaukee; is that correct?

A Yes.

[The assistant district attorney]: Your Honor, as an officer of the court, I can inform you that I had a very long conversation with Mr. John M[.], who's the son of the grandmother, who's also the foster placement here, he's an adult son, and he informed me ... [w]ith regard to Mr. G[.], he has not been seen. He thought he knew some friends of Mr. G[.] who might know where he was, so he was going to make phone calls to attempt to locate him for me. He called me back and said none of the friends knew where Mr. G[.] was either but that his last known address was 806 South 30th Street as well.

Because they were only the last known addresses, I attempted service for both of these individuals at that address, the affidavits of which I'm giving to your clerk at this time, and I also published for both adults, and I'm handing proof of publication to your clerk. I would ask that based upon the testimony of Miss Petropoulos as well as these documents and my assertions as an officer of the court that both of these adults be defaulted at this time.

[Joe F.'s guardian ad litem]: No objection. I join in the request.

....

THE COURT: Then based on that record I will grant the motion for default as to the mother, Jacqueline Elaine F[.], and as to the father, Jose G[.]

The affidavits referred to in the colloquy between the assistant district attorney and the trial court are not in the appellate record.

“In order for a court to obtain jurisdiction over a person, a summons must be served in a manner prescribed by the statutes.” *Heaston v. Austin*, 47 Wis.2d 67, 70-71, 176 N.W.2d 309, 311 (1970). Where a statute requires that an attempt at personal service be made with “reasonable diligence,” secondary efforts at service may not be made unless there is, in fact, “reasonable diligence” to effectuate personal service. *Id.*, 47 Wis.2d at 73, 176 N.W.2d at 312. Where it is foreseeable that there may be a dispute over whether the requisite “reasonable diligence” was exercised, personal testimony by the process server is advisable. *See id.*, 47 Wis.2d at 73, 176 N.W.2d at 313 (“the court properly took testimony to determine whether reasonable diligence had been exercised by” the process server).

Whether a process server has exercised the requisite “reasonable diligence” is a question of fact for the trial court, and the trial court's finding will not be overturned on appeal unless “clearly erroneous.” *Welty v. Heggy*, 124 Wis.2d 318, 324, 369 N.W.2d 763, 767 (Ct. App. 1985). We are bound by the record as it comes to us. *See Matter of Guardianship of Eberhardy*, 102 Wis.2d 539, 571, 307 N.W.2d 881, 895 (1981), and may not consider matters not contained in the record, *Jenkins v. Sanbourin*, 104 Wis.2d 309, 313-314, 311 N.W.2d 600, 603 (1981).

The process server's affidavit in connection with the attempted service on Jose G. is not in the record, and the trial court did not take testimony as to whether the process server exercised the “reasonable diligence” required by § 48.42(4), STATS. Indeed, all we have in the record is testimony by the social worker that her office was unable to locate Jose G. after he was released from incarceration some ten months prior to the court hearing, and the statement made by the lawyer seeking to terminate Jose G.'s parental rights to Joe F. that she, the lawyer, spoke with the son of Joe F.'s maternal grandmother, who related that he could not find Jose G., and that personal service was attempted at Jose G.'s last known address.

There is nothing in the record that describes the efforts made to locate Jose G. by either the Milwaukee County Department of Human Services or by the son of Joe F.'s maternal grandmother. Further, there is nothing in the record that describes what effort, if any, the process server made to locate Jose G. Under these circumstances, the trial court had nothing upon which to base its finding that there was “[d]ue and diligent effort” to serve Jose G. personally.

Thus, that finding is “clearly erroneous.” Cf. *Merco Distributing Corp. v. Commercial Police Alarm Co., Inc.*, 84 Wis.2d 455, 459–461, 267 N.W.2d 652, 655 (1978) (findings must rest on evidence, not speculation); *Heaston*, 47 Wis.2d at 74, 176 N.W.2d at 313 (“two attempts at personal service may under certain conditions be sufficient to show reasonable diligence”). Accordingly, the order terminating Jose G.'s parental rights to Joe F. is vacated, and this matter is remanded to the trial court for either a hearing on whether personal service on Jose G. was attempted with the requisite “reasonable diligence,” or a hearing on the petition, at which Jose G. shall be permitted to participate as a party.

By the Court.—Order vacated and cause remanded with directions.⁴

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

⁴ The brief filed by the respondent State of Wisconsin does not comply with the rules of appellate procedure. RULE 809.19(1)(d), STATS., requires, in pertinent part, that each brief filed with the court contain “a statement of facts relevant to the issues presented for review, *with appropriate references to the record.*” (Emphasis added.) There are many statements of fact in the brief that do not have record references. Were this case not given expedited review as required by § 809.107, STATS., the court would have ordered that the State's brief be stricken and refiled in an amended version that complies with the rules. See RULE 809.83(2), STATS.