No. 95-3088

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

In the Interest of Joshua G., Hannah G., Spencer C., and Jacob C., Persons Under the Age of Eighteen Years:

MANITOWOC COUNTY,

Petitioner-Respondent,

v.

ERRATA SHEET

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Respondent-Appellant.

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PLEASE TAKE NOTICE that the attached opinion is to be substituted for the opinion which was released on January 17, 1996.

Dated this 24th day of December, 2006.

COURT OF APPEALS
DECISION
DATED AND RELEASED

January 17, 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.

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DENISE G.,

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APPEAL from an order of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Appeal dismissed*.

SNYDER, J. Denise G. appeals from an order issued in response to her motion for posttermination relief following the termination of her parental rights (TPR) to four of her children. Because we conclude that posttermination relief is precluded by statute, the trial court was without

authority to consider the motion. Consequently, we affirm our previous holding that this court is without jurisdiction to hear the appeal and the appeal is dismissed.

Prior to the posttermination motion, Denise had sought appellate review of four TPR orders. We denied review because the filing of the notice of intent to appeal was untimely.[1] *See* § 808.04(7m), STATS. Subsequently, Denise filed a "Request to Reinstate Appeal Rights," pursuant to § 809.14, STATS. We concluded that this court has no authority to extend the time to file a notice of intent to appeal in a TPR.[2] *See* § 808.04(7m).

On July 31, 1995, Denise filed a motion in circuit court for posttermination relief based on a claim of ineffective assistance of counsel, citing counsel's failure to file a timely notice of intent to appeal. The claim originated with a defective summons, which stated:

> [A] notice of intent to pursue relief from the judgment must be filed in the trial court within 40 days after the judgment is entered, in order to preserve the right to pursue such relief.

Both Denise and trial counsel testified at the hearing for posttermination relief that they relied on the information contained in the summons.

The summons did not reflect the change in the law which shortened the appeal time to fifteen days, *see* 1993 Wis. Act 395, § 45, nor did it

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[1] Court of Appeals order dated February 8, 1995.

[2] Court of Appeals order dated June 29, 1995.

satisfy the requirement of § 48.42(3)(d), STATS., which mandates that a summons must "[a]dvise the parties 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 15 days ...." *See* ***id.***

The trial court found that while counsel's failure to file a timely notice of intent to appeal constituted ineffective assistance of counsel, the defective summons had not deprived the trial court of jurisdiction in the TPR proceedings. The trial court then declined to address the impact of counsel's ineffectiveness, deferring any remedy to this court. Denise now appeals the order requesting posttermination relief.

Denise's actions in seeking posttermination relief fall under § 809.30, STATS. It states in relevant part:

Rule (Appeals in felony cases). (1) DEFINITIONS. In this section:

> (a) "Postconviction relief" means, in a felony or misdemeanor case, an appeal or a motion for postconviction relief other than a motion under s. 973.19 or 974.06. In a ch. 48, 51 or 55 case, *other than a termination of parental rights case under s. 48.43,* it means an appeal or a motion for reconsideration by the trial court of its final judgment or order .... [Emphasis added.]

This statute clearly addresses motions for postconviction relief in ch. 48, STATS., cases, "other than a termination of parental rights case." The reason for the particular reference to cases which involve the termination of parental rights is explained in the comments. The notes indicate that this "[c]reates [an] exception to appellate procedure under s. 809.30, stats., for TPR cases to reflect

creation by this bill of s. 809.107, which governs TPR appellate procedure." NOTE, 1993 Wis. Act 395, § 47.

> We turn to § 809.107, STATS., which states in pertinent part:
>
> **(1)** APPLICABILITY. This section applies to the appeal of an order or judgment under s. 48.43 and supersedes all inconsistent provisions of this chapter.
>
> **(2)** INITIATING THE APPEAL. A person shall initiate an appeal under this section by filing, within the time specified in s. 808.04(7m), a notice of intent to appeal ....

As noted in the two previous orders, that time limit is fifteen days. Section 809.107 makes no allowance for posttermination relief, other than through a timely appeal. This comports with the legislature's decision to expeditiously resolve termination cases.

Denise argues that this analysis conflicts with our holding in ***A.S. v. State***, 168 Wis.2d 995, 485 N.W.2d 52 (1992), and ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). She claims that ***A.S.*** and ***Machner*** both "clearly require an evidentiary hearing to occur before the trial court in order to establish a record ...."

Both of these cases, however, predate the changes the legislature made to the procedure in termination of parental rights cases. While ***Machner*** outlines the necessity of a hearing preserving the testimony of trial counsel as a prerequisite to a claim of ineffective representation, ***Machner***, 92 Wis.2d at 804, 285 N.W.2d at 908, this holding does not address the timeliness of filing a notice of intent to appeal. The procedures followed at the time of ***A.S.*** included the

filing of a motion for posttermination relief. *See* ***A.S.***, 168 Wis.2d at 1000, 485 N.W.2d at 53. These procedures have been superseded by the filing requirements of § 809.107, STATS.[3]

We concede that we are troubled by the fact that the information contained in the defective summons which was relied upon by both Denise and trial counsel in determining Denise's appellate rights resulted in a denial of her right of review. However, a remedy is beyond the power of this court.

We conclude that the trial court was without authority to hear Denise's motion for posttermination relief. The trial court's order is not appealable. It is the duty of this court to take note of the jurisdictional basis of an appeal and to dismiss an appeal if it is not taken from an appealable document. *See* ***Yaeger v. Fenske,*** 15 Wis.2d 572, 573, 113 N.W.2d 411, 412 (1962). Under the statutory mandates governing these appeals, we lack jurisdiction.

By the Court.—Appeal dismissed.

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

[3] We also distinguish this case from ***Rhonda R.D. v. Franklin R.D.***, 191 Wis.2d 680, 530 N.W.2d 34 (Ct. App. 1995), in which an ineffective assistance of counsel claim was remanded for a hearing in the trial court while we retained jurisdiction. ***Id.*** at 692, 530 N.W.2d at 38-39. However, that remand followed the timely filing of a notice of intent to appeal. *See* ***id.*** at 692, 530 N.W.2d at 38.