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 IV

November 1, 2016

To:

Hon. Juan B. Colas
Circuit Court Judge
215 South Hamilton, Br.10, Rm. 7103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Clare Altschuler
Asst. Corporation Counsel
Room 365
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3342

F.D.J.
206 Whispering Pines Way
Fitchburg, WI 53713-4318

Jackson Correctional Institution
P.O. Box 232
Black River Falls, WI 54615-0232

B.M.M. 566354
Jackson Corr. Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

Special Litigation & Appeals Unit
P.O. Box 7857
Madison, WI 53707-7857

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

2015AP1918 In re the Paternity of T.M.J.: F.D.J. and State of Wisconsin v. B.M.M. (L.C. # 1993PA127)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

B.M.M. appeals a circuit court order that denied his motion to vacate a default child support order entered in 1993. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] For the reasons discussed below, we reverse and remand with directions.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

On November 30, 1993, the circuit court held a hearing to determine B.M.M.'s child support obligations. An order was entered the next day requiring B.M.M. to pay child support. It is undisputed that B.M.M. was in jail at the time and did not attend the hearing.

In April 2015, B.M.M. filed the motion to vacate the child support order. A hearing on the motion was held on June 8, 2015. The circuit court heard argument on B.M.M.'s motion, but did not take evidence. The court denied B.M.M.'s motion.

B.M.M.'s motion sought relief under WIS. STAT. § 806.07(1)(d), alleging that the child support order was void. The motion alleged some facts that seem to put the blame on jail staff for B.M.M.'s non-appearance at the November 1993 child support hearing. B.M.M.'s motion and his argument before the circuit court advanced two legal theories as to why the 1993 child support order should be declared void: first, that B.M.M.'s absence from the 1993 hearing meant that, under WIS. STAT. § 767.235(2), the circuit court lacked jurisdiction to proceed because the court did not first make a "good cause" finding about the reason for B.M.M.'s absence; and second, that the jail staff's actions or failures prevented B.M.M. from attending the hearing and, thereby, denied B.M.M. a meaningful opportunity to be heard in violation of his due process rights.

As we explain below, B.M.M.'s first voidness argument is patently meritless, and we dispose of it accordingly. However, the circuit court erred when it relied on the passage of time to reject B.M.M.'s second voidness argument.

As noted, B.M.M. argues that the child support order was void because the circuit court lacked jurisdiction under WIS. STAT. § 767.235(2) to proceed to a default judgment in his absence without making a finding of "good cause" (or lack of "good cause") for that absence.

B.M.M.'s argument is based on a misunderstanding of the statute. Section 767.235(2) requires both parties in an action affecting the family to appear at the final hearing unless a party lives out of state, service was accomplished by publication, or the court, for "good cause," orders otherwise. The statute imposes on parties the obligation to attend, and provides circuit courts with authority to excuse a litigant from attending if the court finds good cause to do so. Contrary to B.M.M.'s apparent argument, nothing in the statute requires a court to determine the reasons for a litigant's non-excused absence, much less to make a finding of good cause for that absence, in order to retain jurisdiction.

Turning to B.M.M.'s second voidness argument, our review of the hearing transcript reveals that the circuit court mistakenly believed that B.M.M.'s delay in raising this voidness argument was a proper basis for rejecting the argument.

A void judgment is legally ineffective and can be challenged at any time and, therefore, no amount of time can be deemed unreasonable for bringing a motion under WIS. STAT. § 806.07(1)(d). *See* ***Neylan v. Vorwald***, 124 Wis. 2d 85, 99-100, 368 N.W.2d 648 (1985) (the "reasonable time" requirement does not apply to void judgments). Indeed, B.M.M. cited ***Neylan*** in his motion and, during the hearing, argued that "there is no time limit when it comes to a void judgment." Thus, the circuit court erred when it relied on the passage of time to reject this voidness argument. For example, the circuit court told B.M.M.: "I think if there was a defect in the entry of that judgment back in 1993 it had to be raised sooner than that; it had to be raised at some reasonable time." Similarly, the circuit court stated: "[W]e don't even get to that question of whether it's a void judgment because you waited too long to assert that claim." The circuit court seems to have mistakenly applied the reasonable time standard, applicable to motions brought under § 806.07(1)(h), to B.M.M.'s § 806.07(1)(d) argument.

The error we describe above derailed consideration of B.M.M.'s assertion that the child support order should be declared void because B.M.M. was improperly prevented from attending the child support hearing. We therefore remand for further proceedings on that topic, but also provide some additional observations.

First, we do not weigh in on the merits of B.M.M.'s remaining voidness argument. The State does not provide us with an alternative argument that might support the circuit court's denial of the motion. For example, the State does not argue that the factual allegations in B.M.M.'s motion are insufficient to warrant a hearing, much less support such an argument with case law. The State concedes that an order obtained without due process is void, but does not suggest that there is no due process problem if B.M.M. missed the hearing through no fault of his own.

Second, assuming a sufficient motion and a viable underlying legal theory, it would appear that the merits of B.M.M.'s theory depend primarily on unresolved factual questions that require an evidentiary hearing, such as what steps needed to be taken in 1993 to have B.M.M. transferred to court and whose responsibility it was to take those steps. B.M.M.'s motion alleges that he informed jail staff that he needed to be in court and that he also sent a "jail communication form" to the court prior to the hearing informing the court that he was still in jail and that he wished to appear at the hearing if it was still scheduled. An evidentiary hearing might include determining whether these allegations are true and, if so, whether they show that B.M.M. satisfied any obligation on his part to assure his own attendance.

Third, we acknowledge that B.M.M. played a role in diverting attention from his could-not-get-to-court voidness theory. B.M.M. complained in his motion and complained at the

hearing that he was never served with the support order and that this lack of service was the reason he did not promptly challenge the support order. However, as we have explained, B.M.M. correctly and simultaneously argued that his delay did not matter; therefore, it is irrelevant whether or not B.M.M. was promptly served.

Fourth, we do not address whether the record supports relief from the judgment under WIS. STAT. § 806.07(1)(h) because B.M.M. never made that argument before the circuit court and does not do so on appeal. In particular, B.M.M. has never argued that lack of service, along with other factors, entitled him to relief from the judgment under § 806.07(1)(h).

Fifth, although it does not appear to matter for purposes of our decision or further proceedings on remand, it appears that the circuit court erred in making the factual finding that B.M.M. was served with the support order in 1993. The basis for the circuit court's conclusion that B.M.M. waited too long to make his voidness argument was the court's finding that B.M.M. was served in 1993. We could say more on this topic, but it is sufficient to say here that, although the circuit court was permitted to take judicial notice of the service affidavit in the record, which constitutes self-authenticating evidence of service without the need for the deputy's testimony or a signature from B.M.M. acknowledging receipt of the order, it appears to us that, if it had mattered whether B.M.M. was served, B.M.M. should have been afforded an opportunity in an evidentiary proceeding to dispute service.

To summarize, the circuit court's erroneous reliance on the proposition that B.M.M. waited too long to raise his could-not-get-to-court voidness argument derailed proper consideration of that argument. Essentially, we return the matter to the stage at which B.M.M. had pending, before the circuit court, his motion to void the child support order. We have

concluded that the motion presents a single potentially viable legal theory. Thus, we remand for further proceedings with respect to that argument.

IT IS ORDERED that the circuit court order denying B.M.M.'s motion for relief from a 1993 child support order is summarily reversed pursuant to WIS. STAT. RULE 809.21(1). The matter is remanded to the circuit court to conduct additional proceedings consistent with this opinion.

Diane M. Fremgen
Clerk of Court of Appeals