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**DISTRICT II**

February 19, 2020

To:

Hon. Mark T. Slate  
Circuit Court Judge  
Green Lake County Courthouse  
571 County Road A  
Green Lake, WI 54941

Timothy A. Provis  
123 E. Beutel Rd.  
Port Washington, WI 53074

Amy Thoma  
Clerk of Circuit Court  
Green Lake County Courthouse  
571 County Road A  
Green Lake, WI 54941

Kathy Anderson-Kemnitz  
504 Mill St., #317  
Green Lake, WI 54941

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

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2019AP7

In re the marriage of: Timothy R. Anderson-Kemnitz v. Kathy  
Anderson-Kemnitz (L.C. #2017FA2)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

**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).**

The sole point of dispute throughout this divorce action between Timothy Anderson-Kemnitz and Kathy Anderson-Kemnitz has been whether their children should be “immunized.”<sup>1</sup>

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<sup>1</sup> The terms “immunization” and “vaccination” often are used interchangeably in common parlance. In the case before us, we think they should not be. “Immunization” is the process of creating immunity in an individual; “vaccination” is the inoculation with a substance to establish resistance to a specific communicable disease. *See Immunization, Vaccination*, TABER’S CYCLOPEDIA MEDICAL DICTIONARY (18th ed. 1997). In other words, vaccination is intended to *achieve* immunization. Timothy’s stated objections are to injecting foreign substances that, in his view, are of unproven efficacy in preventing disease. Vaccination—the action—can be ordered; immunization—the desired result—cannot. We thus frame the issue as whether the children can be ordered to be “vaccinated.”

Timothy appeals from the order requiring that his and Kathy's children be vaccinated over his objection.<sup>2</sup> While Timothy's Certificate of Service does not indicate that he served Kathy with a copy of his appellate brief, *see* WIS. STAT. RULE 809.19(12)(f), Comment, 2008, Kathy did not file a respondent's brief in response to the delinquency order issued by this court.<sup>3</sup> Timothy argues that requiring him to have his children vaccinated violates both his right to substantive due process and his statutory right as a parent to waive the requirement. *See* WIS. STAT. § 252.04(3). Kathy argued below that the best interests of the children should be the deciding factor. Upon reviewing Timothy's brief and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the order.

Parents have a fundamental liberty interest in the care, custody, and control of their children. *Michels v. Lyons*, 2019 WI 57, ¶15, 387 Wis. 2d 1, 927 N.W.2d 486. The determination of children's best interests is left to the discretion of the trial court. *See Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). We will affirm a trial court's discretionary determination if it examines the relevant facts, applies the proper legal standard, and uses a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). If the

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<sup>2</sup> The September 25, 2018 order, denominated as final for purposes of appeal, is appended to the December 21, 2018 judgment of divorce, the substance of which, except for the vaccination matter, is not at issue here.

<sup>3</sup> The failure to file a respondent's brief is a tacit concession that the trial court erred. *State v. R.R.R.*, 166 Wis. 2d 306, 311, 479 N.W.2d 237 (Ct. App. 1991). That failure gives this court the authority to summarily reverse or take other appropriate action. *See id.*; *see also* WIS. STAT. RULE 809.83(2) (2017-18). Whether to grant summary reversal is left to this court's discretion. *See Raz v. Brown*, 2003 WI 29, ¶14, 260 Wis. 2d 614, 660 N.W.2d 647. We conclude summary reversal is not warranted.

All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

contention is that the trial court erroneously exercised its discretion because it applied an incorrect legal standard, we review that issue de novo. See *Kerkvliet v. Kerkvliet*, 166 Wis. 2d 930, 939, 480 N.W.2d 823 (Ct. App. 1992).

The circuit court found that the parties were in agreement on all issues except for vaccination and that Timothy's objection came down to his personal and religious beliefs, while Kathy wanted the children vaccinated because she believed it was best for them. The bottom line to the court was whether Timothy, as a parent, is in the best position to decide to forgo having the children vaccinated or, as in Kathy's view, the issue is the children's best interests, such that vaccination should be ordered. Neither party produced any supportive evidence at trial.

The court observed that consideration of the children's best interests "is always paramount," see WIS. STAT. § 48.01(1); see also *Rosecky v. Schissel*, 2013 WI 66, ¶62, 349 Wis. 2d 84, 833 N.W.2d 634, and the statutes mandate that the state Department of Health Services "shall carry out a statewide immunization program" to work toward the elimination of various preventable, communicable diseases. WIS. STAT. §§ 250.01(2), 252.04(1). Further, citing a Centers for Disease Control and Prevention website, <https://www.cdc.gov/vaccinesafety/index.html>, the court took judicial notice that "all scientific evidence points to the benefits of immunization."<sup>4</sup>

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<sup>4</sup> The circuit court in its discretion may take judicial notice of facts of "verifiable certainty" upon its own motion. *Fringer v. Venema*, 26 Wis. 2d 366, 372, 132 N.W.2d 565 (1965). A fact may be judicially noticed if it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." WIS. STAT. § 902.01(2)(b). "Judicial notice is simply a process whereby one party is relieved of the burden of producing evidence to prove a certain fact." *State v. Watson*, 227 Wis. 2d 167, 208, 595 N.W.2d 403 (1999) (citation omitted).

The court concluded that: this state’s clear legislative intent is that, for the immunization program to be successful, everyone should be vaccinated; the statutory exemption *see* WIS. STAT. § 252.04(3), is not on par with the vaccination requirement; the decision not to vaccinate a child puts both the child and those who come in contact with an unvaccinated child at risk of contracting a potentially dangerous or deadly disease; and there is “solid medical and scientific evidence” that the benefits outweigh the risks. Accordingly, the court ordered that the children be vaccinated and denied Timothy any potentially applicable statutory exemption. The court’s cogent, multi-page written decision reflects a proper exercise of discretion. We affirm.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*