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

October 13, 2022

To:

Hon. Susan M. Crawford
Circuit Court Judge
Electronic Notice

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Eve M. Dorman
Electronic Notice

Leonard D. Kachinsky
Electronic Notice

Karen Lueschow
Electronic Notice

J. B.

Eve E. Dennison Pollock
Electronic Notice

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

2022AP354-NM	Dane County DHS v. J.B. (L.C. # 2021TP1)
2022AP355-NM	Dane County DHS v. J.B. (L.C. # 2021TP2)
2022AP356-NM	Dane County DHS v. J.B. (L.C. # 2021TP3)

Before Fitzpatrick, J.[1]

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).

Attorney Len Kachinsky, as appointed counsel for J.B., filed a no-merit report pursuant to WIS. STAT. RULE 809.107(5m). Counsel provided J.B. with a copy of the report, and both counsel and this court advised him of his right to file a response. J.B. did not respond. In addition, I ordered counsel to further review one issue, and counsel filed a supplemental no-merit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

report. I then provided time for J.B. to respond to the supplemental no-merit report, and he has not responded. I conclude that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After an independent review of the records, I conclude that there is no arguable merit to any issue that could be raised on appeal.

At the grounds phase of the proceeding, the circuit court found J.B. in default because he did not appear at a hearing held on July 22, 2021. At that hearing, the court also heard testimony from a social worker that the court found established the ground for termination that was alleged, specifically, failure to assume parental responsibility. J.B. did not later move to vacate the default finding.

In my order of July 11, 2022, I directed counsel to review the potential issue of whether J.B.'s trial counsel was ineffective by not moving to vacate the default finding before the case proceeded to the disposition phase. The ground for such a motion would have been that there may have been a legal basis to vacate that finding due to inadequate notice to J.B.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694.

Counsel has filed a supplemental no-merit report concluding that this issue would lack arguable merit. Although I ultimately agree with that conclusion, I first clarify that there are certain parts of the supplemental no-merit report that I am *not* relying on.

The supplemental no-merit report concludes that there would not have been a basis to move to vacate the default finding. Counsel agrees that if the only basis for the default was failure to appear at the July 22 hearing that was noticed by publication, that would have been insufficient to support a default finding. However, counsel then goes on to say that J.B. also failed to appear on three other occasions after being ordered by the court to appear at all further hearings, and that these failures were an additional basis for a default finding.

This analysis is based on an erroneous view of the record. The record before me does not contain any order, either oral or written, directing J.B. to appear at "all" hearings. At the first hearing, on February 1, 2021, the court ordered J.B. to appear at the next hearing, which he did on March 3, 2021. However, no similar order was given at that hearing and, after those appearances, J.B. did not personally appear at future hearings where such an order could have been given. This was presumably why the State considered it necessary to take the unusual step of publishing such an order for the July 22 hearing.

The supplemental no-merit report also appears to assert that J.B.'s failure to maintain communication with his attorney would have been a further basis for a default finding, even while acknowledging that no information to that effect was in the record at the time of that finding. It is not clear that a period of non-communication with counsel would, by itself, justify a default finding, without there also being a failure to appear in response to a proper order to appear.

For these reasons, I do not rely on the supplemental no-merit report's conclusion that it would be frivolous to allege that trial counsel's performance was deficient by not moving to vacate the default finding.

The supplemental no-merit report also concludes that it would be frivolous to argue that J.B. was prejudiced by the lack of a motion to vacate the default finding. As I stated in my July 11 order, for J.B. to show prejudice from counsel's failure to vacate the default judgment, it would be necessary for him to establish that, if the default judgment had been vacated, there is a reasonable probability that he would have prevailed at the fully contested grounds hearing that would have followed the vacating of the default judgment.

In the supplemental no-merit report, counsel informs us that he is not aware of any information that J.B. could have used to rebut the testimony provided by the social worker. In my July 11 order, I provided J.B. with a period of time to respond to the supplemental no-merit report, but he has not responded to dispute that assertion or to provide information about a possible defense. Therefore, I conclude that it would be frivolous to allege that J.B. was prejudiced by his counsel's failure to move to vacate the default finding.

Turning to the next issue, the no-merit report correctly observes that J.B. was not informed of his rights on the record, contrary to WIS. STAT. § 48.30(2). The report suggests that J.B. may have been informed of his rights by his attorney. J.B. did not respond to the no-merit report to dispute that he was informed of his rights, or to assert that he did not understand his rights. Accordingly, there is no arguable merit to this issue.

The no-merit report addresses whether the testimony of the social worker satisfied the elements of failure to assume parental responsibility. Without attempting to recite that evidence here, I agree that it would be frivolous to argue that this ground was not sufficiently proven.

The no-merit report addresses whether the court erroneously exercised its discretion by ordering termination of J.B.'s parental rights at the disposition hearing. The court considered appropriate factors under WIS. STAT. § 48.426(3), did not consider inappropriate factors, and reached a reasonable decision. There is no arguable merit to this issue.

My review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the orders terminating parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kachinsky is relieved of further representation of J.B. in these matters. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals