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DISTRICT IV

April 27, 2023

To:

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Circuit Court Judge
Electronic Notice

Gregory Bates
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Terry L.A. Reynolds
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Juneau County Justice Center
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Margaret A. Waterman
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You are hereby notified that the Court has entered the following opinion and order:

2023AP320

Juneau County Department of Human Services v. J.D.
(L.C. # 2022TP1)

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).

The Juneau County Circuit Court ordered that the parental rights of J.D. to his daughter, P.D., be terminated.² J.D. appeals that order and contends that he was not granted his statutory

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2021-22). This matter was fully briefed as of April 4, 2023, and this opinion is issued within 30 days of the submission of the briefs to this court.

All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² Pursuant to WIS. STAT. § 809.19(1)(g), I refer to the parties by initials in order to ensure confidentiality.

right to counsel. For the reasons discussed below I agree, reverse the order of the circuit court, and remand this matter for further proceedings.

In July 2022, Juneau County filed a petition for the termination of J.D.’s parental rights to his daughter, P.D. J.D. was personally served with the summons and petition. These pleadings included a notice that there would be a hearing in this matter on a particular date in August 2022 at the Juneau County Courthouse.

J.D. failed to appear at the August 2022 hearing and, based on that failure to appear, the circuit court correctly found J.D. in default regarding the allegations in the petition. However, at the request of the County, the circuit court did not take testimony at that time regarding the factual basis for the petition. Instead, the County requested to “do the prove-up for [J.D.]” at the upcoming dispositional hearing. The circuit court granted the County’s request.

A dispositional hearing was held in this matter in September 2022, and J.D. appeared in custody and pro se at that hearing. At the conclusion of the evidentiary hearing, the circuit court determined that it was in the best interests of P.D. for J.D.’s parental rights to be terminated. J.D. appeals that order.

The dispositive issue in this appeal is whether J.D. was deprived of his statutory right to counsel. That issue is reviewed de novo by this court. *State v. Shirley E.*, 2006 WI 129, ¶21, 298 Wis. 2d 1, 724 N.W.2d 623.

There are two steps in a termination of parental rights proceeding. The first step is the fact-finding phase which determines whether adequate grounds exist for the termination of parental rights. The second step, the dispositional phase, consists of an evidentiary hearing in

which the circuit court determines whether the termination of parental rights is in the child's best interests. *Shirley E.*, 298 Wis. 2d 1, ¶¶27-28.

The County does not dispute that WIS. STAT. § 48.23(2)(b)1. applies in these circumstances. That statutory subpart states in pertinent part: “In a proceeding involving ... an involuntary termination of parental rights, any parent who appears before the court shall be represented by counsel, except as follows: 1. A parent 18 years of age or over may waive counsel if the court is satisfied that the waiver is knowingly and voluntarily made.” Sec. 48.23(2)(b)1. Case law confirms the statutory language that the circuit court must either see that the parent is represented by counsel or that the parent knowingly and voluntarily waives the right to counsel. *See Shirley E.*, 298 Wis. 2d 1, ¶¶30, 57; *M.W. v. Monroe Cnty. Dep’t of Human Servs.*, 116 Wis. 2d 432, 437, 439, 342 N.W.2d 410 (1984) (modified in part on other grounds by *Steven V. v. Kelley H.*, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856). Germane here, our supreme court has held that the right to counsel attaches throughout the termination of a parental rights proceeding. *Shirley E.*, 298 Wis. 2d 1, ¶56.

I pause to note that the circuit court properly granted a finding of default against J.D. based on his non-appearance at the August 2022 hearing. *See id.*, ¶13. J.D. does not request that the default finding of the circuit court be reversed, and J.D. would have no basis to ask for that determination to be reversed. The circuit court was correct in finding that J.D. was personally served with pleadings that informed him to be at the Juneau County Courthouse on a certain date at a certain time, but J.D. did not to appear. There is no viable argument that the circuit court failed to inform J.D. of his right to counsel at that August 2022 hearing in light of the fact that J.D. decided not to appear at the hearing after receiving clear and specific notice of the hearing.

Instead, J.D. focuses on the facts that he was not represented by counsel at the September 2022 dispositional hearing and he did not knowingly and voluntarily waive his right to counsel. On the question of J.D.'s right to counsel at the September 2022 hearing, the County gives no substantive argument on appeal. Rather, the County makes reference to facts that are beside the point.

J.D. had the right to counsel at the September 2022 dispositional hearing because he did not waive that right either through his express waiver or his actions. The County does not, and can not, argue that this error is harmless. Indeed, the County does not dispute that the circuit court's order terminating J.D.'s parental rights must be reversed and this matter remanded for further proceedings once it has been determined that J.D. did not knowingly and voluntarily waive his right to counsel.³

³ The conscientious circuit judge was put in a difficult position by counsel for the County and the guardian ad litem at the September 2022 hearing at which J.D. appeared without counsel. Of course, counsel for the County and the guardian ad litem were not representing J.D.'s interests at that hearing. However, it was certainly not in the interests of the County or the minor child for the attorneys to fail to raise with the circuit court the fact that J.D. had not knowingly and voluntarily waived his statutory right to counsel. I make that observation because this matter must now be remanded for further proceedings. If the attorneys had reminded the circuit court of this situation at the September 2022 hearing, there may have been a continuance for appointment of counsel. However, it is likely that this matter would have been finally resolved without an appealable issue well before this date.

In addition, and as noted earlier, the determination of the circuit court that J.D. was in default for his non-appearance at the first hearing in this matter was correct. However, as asserted by J.D. in this appeal, there must be testimony to establish a basis to support the elements of the termination ground alleged. Usually this is done at the fact-finding stage even if there is a non-appearance by the parent. However, if that testimony is taken at the dispositional phase, the error in not taking that testimony at the fact-finding stage is harmless. See *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶¶32-35, 246 Wis. 2d 1, 629 N.W.2d 768. As a result, the remanded proceedings shall start at the point at which testimony is taken to prove the elements of the termination of parental rights ground. After that, the dispositional hearing shall take place again.

IT IS ORDERED that the order of the circuit court terminating J.D.'s parental rights is reversed. This matter is remanded to the circuit court for further proceedings consistent with this opinion.

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

Sheila T. Reiff
Clerk of Court of Appeals