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**DISTRICT II**

May 31, 2023

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

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2023AP384-NM

Sheboygan County DH&HS v. S.J. (L.C. #2021TP40)

Before Gundrum, P.J.<sup>1</sup>

**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).**

S.J. appeals an order involuntarily terminating his parental rights (TPR) to his nonmarital child D.J. S.J.'s appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

RULES 809.107(5m) and 809.32, as well as *Anders v. California*, 386 U.S. 738 (1967). Appellate counsel provided a copy of the no-merit report, along with copies of the appellate record and transcripts, to S.J. S.J. was advised of his right to file a response but has not done so. After considering the no-merit report and following an independent review of the appellate record, we conclude there are no issues of arguable merit for review. Accordingly, we summarily affirm. *See* WIS. STAT. RULE 809.21.

D.J. was born on May 9, 2016, and was placed outside his home pursuant to an August 2019 children in need of protection or services (CHIPS) order. The Sheboygan County Department of Health & Human Services (DHHS) petitioned on November 23, 2021, for the termination of S.J.'s parental rights to D.J., citing as grounds abandonment, continuing CHIPS, and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(1)(a)2., (2)(a), and (6). DHHS attempted to serve the summons and petition on S.J. at two locations in Milwaukee where records suggested S.J. may have been residing. The process server discovered one of the addresses did not exist; at the other address, a resident answered the door and claimed that he was unfamiliar with S.J. and that S.J. did not reside there. DHHS filed an affidavit averring it had mailed the petition and summons to those same addresses, and the circuit court authorized service by publication in Milwaukee, which was accomplished.

S.J. did not appear at the December 22, 2021 hearing identified in the summons. DHHS requested that S.J. be found in default, a determination the circuit court declined to make until after it had received evidence establishing grounds for TPR. *See Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶24, 246 Wis. 2d 1, 629 N.W.2d 768 (holding that evidence must be taken to establish grounds prior to a finding of default). After taking the testimony of a social worker, the court found that grounds had been established for abandonment, CHIPS and failure to assume parental

responsibility.<sup>2</sup> It determined S.J. was in default, but it found good cause to delay the dispositional hearing until such time as grounds had been established for the other parent.

As the grounds phase proceeded as to the other parent, S.J. did not appear until a July 22, 2022 hearing, after DHHS learned he had been taken into custody. S.J. asserted he had not been aware of the initial hearing and had been repeatedly robbed and hospitalized. He requested that he be allowed to contest the default, and the circuit court advised S.J. to contact the State Public Defender (SPD) to inquire about obtaining appointed counsel.

SPD was unable to find counsel for S.J. and the circuit court appointed an attorney. S.J. then filed a motion to vacate the default judgment, citing WIS. STAT. § 806.07(1)(a) and (1)(h). S.J. argued DHHS had failed to use reasonable diligence in serving S.J. because it had not attempted personal service at his address of record in various court cases. At a hearing on the motion, DHHS pointed out that it had attempted service at that address, and S.J.'s counsel conceded the argument and requested additional time to prepare for disposition given his recent appointment.

At the scheduled time for the dispositional hearing, the circuit court addressed a letter S.J. had sent to the court requesting the discharge of his attorney. The court inquired as to the reasons S.J. wanted to discharge his attorney, and S.J. replied by raising the issues relating to the failed personal service and default. S.J. also conceded he had hung up on his attorney because “the contents of the conference was not what I wanted to hear.” The court declined to allow

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<sup>2</sup> The social worker testified that S.J. had not had any contact with D.J. since December 4, 2020, more than one year prior to the hearing date. DHHS had not had any contact with S.J. since January of 2021, and he had not responded to DHHS's efforts to contact him (which continued through July or August of 2021).

withdrawal, finding that the request was a delay tactic. It adjourned the dispositional hearing to give S.J. a further opportunity to consult with his attorney.

At the dispositional hearing, DHHS presented testimony from a social worker and D.J.'s foster parent. S.J. also testified. At the conclusion of the hearing, the circuit court determined it was in D.J.'s best interest to terminate S.J.'s parental rights, and it entered a corresponding order. This no-merit appeal follows.

The no-merit report addresses whether there would be any nonfrivolous basis to challenge the default judgment entered against S.J. in the grounds phase. We agree with the no-merit report's conclusion that, given S.J.'s nonappearance, the circuit court properly proceeded as if the TPR petition was uncontested and took testimony sufficient to establish grounds for a finding of parental unfitness.<sup>3</sup> Indeed, a court's duty to establish grounds is

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<sup>3</sup> We might quibble with whether the testimony was sufficient to support the abandonment and CHIPS grounds. The abandonment and CHIPS grounds require the petitioner to demonstrate the existence of a court order "containing the notice required by [WIS. STAT. §§] 48.356(2) or 938.356(2)." WIS. STAT. § 48.415(1)(a)2., (2)(a)1. Though there was testimony at the initial hearing that D.J. was subject to a CHIPS order imposing a lengthy out-of-home placement, there was no testimony suggesting that the order contained the required TPR notice, nor was the order introduced into evidence. The mere allegation in the petition that an order containing such notice existed was insufficient.

For two reasons, this apparent omission does not give rise to a meritorious basis for appeal. First, the testimony at the initial hearing was sufficient to establish the failure to assume parental responsibility ground as to S.J., thereby establishing unfitness. *See* WIS. STAT. § 48.415(6). Second, in any ensuing appeal, this court would have the obligation to "examine the entire record to determine whether it provides a factual basis to support the court's finding of grounds for termination." *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶32, 246 Wis. 2d 1, 629 N.W.2d 768. The CHIPS order was included in an affidavit in support of DHHS's summary judgment motion in the grounds phase as to the other parent. Though that order merely stated "TPR Warnings Attached," the affiant, an employee of the Sheboygan County Clerk of Court's office, averred that it was the Juvenile Clerk of Court's office's standard procedure to attach the TPR notice to the CHIPS dispositional order and mail it to the parent's last known address. We conclude that even if the court's abandonment and CHIPS findings in the grounds phase were made in error, the error was harmless under the circumstances here. *See id.*, ¶35.

independent of its authority to grant a default judgment. *Dane Cnty. Dep't of Human Servs. v. Mable K.*, 2013 WI 28, ¶55, 346 Wis. 2d 396, 828 N.W.2d 198.

We also agree with the no-merit report that there is no nonfrivolous basis to challenge the circuit court's denial of S.J.'s motion to vacate the default judgment. Counsel essentially conceded at the hearing that the motion was based upon counsel's mistaken belief that service had not been attempted at S.J.'s address of record. As the no-merit report sets forth, service by publication is authorized if with reasonable diligence personal service cannot be made. *See* WIS. STAT. § 48.42(4)(b)1. Based upon our review of the appellate record, no nonfrivolous argument exists that the court erred by authorizing service by publication under the circumstances.

We also agree with the no-merit report's conclusion that there is no arguably meritorious basis to challenge the circuit court's disposition decision. The court appropriately identified that its decision was guided by the "best interest of the child" standard. *See* WIS. STAT. § 48.426(2). In determining that it was in D.J.'s best interest to terminate S.J.'s parental rights, the court considered the factors enumerated in § 48.426(3) and reached a reasonable conclusion based on the facts of record.

Therefore,

IT IS ORDERED that the order terminating S.J.'s parental rights is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that attorneys Catherine R. Malchow and Susan E. Alesia are relieved of any further representation of S.J. in this matter. *See* WIS. STAT. RULE 809.32(3).

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*