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DISTRICT IV

October 26, 2023

To:

Hon. Darcy Jo Rood
Circuit Court Judge
Electronic Notice

J. B.

J. R. W.

Kristi J Peterson
Juvenile Clerk
Vernon County Courthouse
Electronic Notice

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

2023AP798

In re the termination of parental rights to E.R.W.-B., a person under the age of 18: J.R.W. v. J.B. (L.C. # 2023TP1)

Before Nashold, 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).

J.R.W. appeals an order dismissing her termination of parental rights (TPR) petition. On this court's own motion, this appeal is disposed of summarily pursuant to WIS. STAT. RULE 809.21(1).² For the reasons below, I reverse the order dismissing J.R.W.'s petition.

¹ 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.

² WISCONSIN STAT. RULE 809.21(1) provides that, "upon its own motion or upon the motion of a party," this court "may dispose of an appeal summarily."

J.R.W. and J.B. are the mother and father of a non-marital daughter, E.R.W.-B., now three years old. In April 2023, J.R.W. filed a TPR petition seeking to terminate J.B.'s parental rights to E.R.W.-B. As grounds for termination, J.R.W.'s petition alleges "two[-]year abandonment." The petition alleges that J.B. failed to comply with a court-ordered visitation schedule, and after attending one "in-home visitation" in February 2021, "either chose not to show up for the scheduled visitations or was incarcerated." The petition alleges that J.R.W. provides a "safe and stable living environment" for E.R.W.-B., while by contrast, J.B. is frequently incarcerated and has refused to provide court-required proof of negative drug tests before scheduled visits with E.R.W.-B.

In May 2023, the circuit court held an initial hearing on J.R.W.'s TPR petition. Both J.R.W. and J.B. appeared at the hearing pro se.

Generally, the purpose of the initial hearing in a TPR action is to "determine whether any party wishes to contest the petition and inform the parties" of certain statutory rights. WIS. STAT. § 48.422(1). At the initial hearing in this case, the circuit court did not ask J.B. whether he wished to contest the petition and did not inform the parties of their rights. Instead, the court asked J.R.W., "[I]s the child being adopted?" When J.R.W. responded in the negative, the court stated, "Yeah, not happening. Petition is dismissed." The court informed the parties that "the statute requires me to take into account the adoption of a child," and that "you can't do a parentectomy, essentially ... unless you have an adoption." The court asked J.R.W. whether she had an "adoptive resource" or a husband, and J.R.W. responded that she did not. The court noted that "most children benefit from the input of ... both parents, especially when the parents are sober" and the court took "judicial notice of the fact that [J.B.] is in my Drug Court and has done exceptionally well." The court said it was "denying and dismissing [J.R.W.'s] petition"

and concluded the hearing, without giving J.R.W. an opportunity to respond. Following the hearing, the court issued a written order dismissing the petition on the basis that “[t]he evidence does not warrant . . . termination.”

J.R.W., still proceeding pro se, appeals. She argues that the circuit court lacked authority to dismiss her petition. J.B., also still proceeding pro se, did not file a respondent’s brief; however, prior to the filing of J.R.W.’s appellant’s brief, J.B. filed a letter with this court stating that he does not “choose to terminate [his] parental rights.”³ For the reasons below, the circuit court’s dismissal of J.R.W.’s petition was erroneous.

I first note the due process concerns that are raised by the circuit court’s sua sponte dismissal of J.R.W.’s petition on the merits without giving J.R.W. any notice or opportunity to be heard. The Due Process Clauses of the United States Constitution “protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). To that end, due process protections limit “the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his [or her] cause.” *Id.* The Wisconsin Constitution provides identical due process protections. *See County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999).

³ After J.B.’s deadline to file a respondent’s brief passed, this court issued an order warning J.B. that failure to file a brief may result in the sanction of summary reversal. After receiving no brief or any other response from J.B., this court issued a second order warning of possible summary reversal. To date, the court has received no response from J.B. to either order.

“The fundamental requirements of procedural due process are notice and an opportunity to be heard.” *Northbrook Wisconsin, LLC v. City of Niagara*, 2014 WI App 22, ¶21, 352 Wis. 2d 657, 843 N.W.2d 851. Subject to due process requirements, circuit courts have authority to dismiss cases sua sponte in certain circumstances. *See State ex rel. Schatz v. McCaughtry*, 2003 WI 80, ¶¶19-30, 263 Wis. 2d 83, 664 N.W.2d 596 (discussing due process rights as applied to sua sponte dismissals). Due process may be satisfied when a litigant is given notice, actual or constructive, that sua sponte dismissal may occur. *See id.*, ¶21. A litigant may have constructive notice sufficient to satisfy due process if, for example, a statute expressly grants the circuit court the power to dismiss the action without a hearing. *Cf. id.*, ¶¶30-31 (concluding that a prisoners’ litigation statute provided constructive notice satisfying due process because the statute specified that the circuit court “may dismiss the action ... without requiring the defendant to answer ... if the court determines” that the pleading fails to state a claim).

Here, the circuit court gave J.R.W. no notice and no opportunity to be heard: it dismissed J.R.W.’s petition without warning and without opportunity for argument. In addition to no actual notice, J.R.W. had no constructive notice that sua sponte dismissal without a hearing might occur. Notably, nothing in the TPR statutes grants the circuit court the authority to dismiss a TPR petition on the merits at the initial hearing under the circumstances presented here. As stated, the initial hearing in a TPR proceeding is not a hearing on the merits, but is instead a hearing to “determine whether any party wishes to contest the petition and inform the parties” of certain statutory rights. *See* WIS. STAT. § 48.422(1). In addition, no motion to dismiss (or any other motion) had been filed by J.B. and there was no reason for J.R.W. to believe that the hearing was anything other than the initial hearing under § 48.422(1). The lack of notice of possible dismissal is particularly significant here because J.R.W. was proceeding pro se and

therefore may have been less prepared than a represented litigant to respond to an unexpected sua sponte dismissal by the court.

However, even setting due process concerns aside, the circuit court's stated reasons for dismissing J.R.W.'s petition are deficient. The court's decision appears to be based primarily on the premise that a petitioner can only prevail in a TPR action if the petitioner identifies a person who will adopt the child after termination. However, the court identified no authority for this premise. Although the "likelihood of the child's adoption" is one of six statutory factors the court must consider when it determines whether termination is in the best interests of the child at the dispositional phase of a TPR proceeding, this factor is not by itself dispositive. *See* WIS. STAT. § 48.426(3); *Sheboygan Cnty. HHS v. Julie A.B.*, 2002 WI 95, ¶¶29-30, 255 Wis. 2d 170, 648 N.W.2d 402. Additionally, the court based its decision in part on its personal impressions of J.B. in a separate context, taking "judicial notice" of the fact that J.B. "is in my Drug Court and has done exceptionally well." However, the court's personal impression of J.B.'s progress in drug court is not an appropriate fact for judicial notice. *See* WIS. STAT. § 902.01(2) ("A judicially noticed fact must be one not subject to reasonable dispute"); *State v. Anson*, 2005 WI 96, ¶33, 282 Wis. 2d 629, 698 N.W.2d 776 ("[T]he circuit court may not rely on its own personal observations of events not contained in the record.").

Finally, as stated, J.B. has failed to file a brief in this matter responding to J.R.W.'s arguments on appeal, despite being informed by this court that such failure could result in summary reversal. For all of these reasons, I reverse the order dismissing J.R.W.'s petition and remand for proceedings consistent with this opinion.

Therefore,

IT IS ORDERED that the circuit court's order dismissing J.R.W.'s TPR petition is summarily reversed, and the cause is remanded for further proceedings consistent with this opinion and order.

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

Samuel A. Christensen
Clerk of Court of Appeals