STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4
Appeal No. 2022AP000030

In re the Termination of Parental
Rights to B.J.L.
A Person Under the Age of 18:

Portage County Department of
Health and Human Services,
Petitioner-Respondent,

v.

A.K.,
Respondent-Appellant.

Appeal from the Circuit Court of
Portage County
The Honorable Patricia Baker Presiding
Branch 3
Circuit Court Case 2021TP000002

BRIEF OF THE RESPONDENT-APPELLANT

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BRIEF OF RESPONDENT-APPELLANT

QUESTIONS PRESENTED

1. If a person is not served in accord with the Rules of Civil Procedure, but, nonetheless believes that she is, has she waived the objection to personal jurisdiction by subsequently participating in the proceedings?

ANSWER: The Trial Court answered in the affirmative.

2. Was there an agency relationship between Attorney Arendt and A.K. so tha he was authorized to accept personal service of the TPR Petition on her behalf?

ANSWER: The Trial Court answered in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary but publication may be beneficial because this decision might clarify existing rules on personal service.

STATEMENT OF THE CASE

This is an appeal of the August 10, 2021, Order terminating A.K.'s parental rights, rendered by the Honorable Patricia Baker in Portage County Circuit Court Branch 3.

On January 4, 2022, A.K., by her attorney, Jill C. Vento, filed a No-Merit Notice of Appeal.

On January 19, 2022, A.K., by her attorney, Jill C. Vento, filed a Motion to Withdraw No-Merit Notice of Appeal and Motion for Remand to Circuit Court.

On January 21, 2022, the Court of Appeals changed this appeal to a regular appeal, denied the Motion for Remand because it did not include an Affidavit and extended the time to re-file the Motion for Remand. Therefore, on January 24, 2022, A.K., by her attorney, Jill C. Vento, re-filed the Motion for Remand along with Affidavit.

On January 25, 2022, the Court of Appeals granted the Motion for Remand, thereby remanding the record to the circuit court.

The Circuit Court heard the Motion for Remand on March 31st and April 8th, 2022.

On April 28, 2022, the Circuit Court entered its Order denying the Motion.

A.K. appeals the Order denying the Motion for Remand and ultimately, the Order terminating her parental rights.

STATEMENT OF THE FACTS

A.K. is the mother of B.J.L.

On 02-12-2021 Portage County filed a Petition to terminate A.K.'s parental rights to B.J.L.

On 02-18-2021, A.K.'s attorney, Patrick Arendt, personally accepted service of the summons and petition on her behalf. In doing so, he filed an Admission of Service stating that he accepted service for A.K. as her attorney.

On 07-19-2021, A.K. appeared before the Honorable Patrice A. Baker and voluntarily consented to the termination of her parental rights. The Court found that she freely and voluntarily entered her plea to a voluntary termination of parental rights and freely and voluntarily gave up her right to contest.

On 08-10-2021, the Court held the dispositional hearing. After taking testimony, the Court ordered that A.K.'s parental rights to B.J.L. be terminated.

A.K. filed a Motion for Remand which was heard by the Trial Court on March 31st and April 8th, 2022.

Judge Baker rendered her written decision on April 28, 2022, denying the motion.

ARGUMENT

It is without dispute that Atty Arendt represented A.K. in several different legal proceedings.[1]

It is without dispute that he did not represent A.K. in these TPR proceedings.[2]

It is without dispute that he filed an Admission of Service on February 18, 2021, wherein he twice said that he was the attorney for A.K. and referred to her as his client.[3]

It is without dispute that A.K. did not raise a jurisdictional issue, participated in the proceedings, and eventually voluntarily terminated her parental rights.

The problem is that when Atty Arendt held himself out as A.K.'s attorney and accepted service "on her behalf," he created a dichotomy between two legal principles: one, that if he was A.K.'s attorney, he was precluded by statute from accepting service of the summons so that it was inappropriate for him to do so, and two, since he did not actually represent A.K. in these proceedings, it was inappropriate that he held himself out as her attorney.

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[1] *R.11. Affidavit of Patrick Arendt. "I represented [A.K.] in two Portage County CHIPS cases regarding two of her children that were placed out of her home, a Portage County criminal case relating to abuse of her children and related child support cases."*

[2] *Atty Arendt swore under oath that he did not represent A[redacted] in the TPR proceedings. See note 1.*

[3] *R.11.*

I. SINCE A.K. WAS NOT PERSONALLY SERVED WITH THE TPR SUMMONS IN ACCORD WITH THE RULES OF CIVIL PROCEDURE THE COURT DID NOT HAVE PERSONAL JURISDICTION FROM THE FIRST INSTANCE.

Under the rules of civil procedure, a court obtains personal jurisdiction over a person when that person is personally served with the summons and petition. § 801.11, Wis. Stats.[4]

When a person is represented by an attorney, the general rule is that service is made upon the attorney, with one very distinct exception - the summons, which must be personally served. §801.14(2), Wis. Stats.

The first sentence of §801.14(2) states:

> *Whenever under these statutes, service of pleadings and other papers is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party in person is ordered by the court.*

However, the last sentence of §801.14(2) clarifies the first sentence. The last sentence states:

> *The first sentence of this subsection shall not apply to service of a summons or of any process of court or of any paper to bring a party into contempt of court.*

Therefore, a plain reading of §§ 801.11 and 801.14(2),

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[4] **Personal jurisdiction, manner of serving summons for.** *A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows: (1) Natural Person. Except as provided in sub. (2) upon a natural person: (a) By personally serving the summons upon the defendant either within or without this state.*

Wis. Stats., together concludes that service of the summons must be personally made on the respondent; service on the attorney is not permissible.

This has been the cardinal rule in not just Wisconsin but the federal courts for over 100 years. *"An attorney cannot, under his general authority, accept service for his client of the original process by which the action is begun."* Starr v. Hall, 87 N.C. 381, 383 (1882), adopted by the United States Supreme Court in Stone v Bank of Commerce, 174 U.S. 412, 19 S.Ct. 747, 43 L.Ed. 1028 (1899).

> *The principles upon which these authorities rest, is, that it is no part of the duty of an attorney, nor within the scope of his authority, to admit of service for his client, of the original process by which the jurisdiction of the court over the person of the client is first established, for until that be done, the relation of client and attorney cannot begin; nor can it be created by the act of the attorney alone.*

Starr at 2.

These rules of civil procedure also apply to Chapter 48. See e.g. Waukesha County Dept. Of Social Services v. C.E.W., 124 Wis.2d 47, 368 N.W.2d 47 (1985) ("*Sec. 801.01(2) provides that chapters 801 to 847 govern procedure and practice in the circuit courts in all civil actions and special proceedings except where different procedure is prescribed by statute or rule.*")

In particular, the rules apply to termination of

parental rights proceedings. State ex rel. JoAnne v. Eau Claire Co. Dept. Of Human Services, No.04-1493-W, citing Door County DHFS v. Scott S., 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999). "*The Wisconsin Rules of Civil Procedure apply to TPR proceedings under Wis. Stats. Ch. 48 unless a different procedure is prescribed by chapter 48.*" Barron Co. Dept. Of Health & Human Services v. S.R.T. (In re Termination of Parental Rights to A.A.T., 388 Wis.2d 145,¶27, 930 N.W.2d 288 (Table), 2019 WI App 33(Ct. App. 2019), referencing Steven V. v. Kelley H., 2004 WI 47, 271 Wis.2d 1, 678 N.W.2d 856.

While the Supreme Court has determined that §48.42(2), Wis. Stats., is the exclusive statute for determining who must be summoned, ("*it is clear from the statutes that the legislature intended §48.42(2) prescribing who must be summoned in a termination of parental rights proceeding to be the exclusive statute on that subject,*" In Interest of Brandon S.S., 179 Wis.2d 114, 105, 507 N.W.2d 94(1993), how service must be made in a termination of parental rights proceeding is governed by §48.42(4), Wis. Stats.

That subsection provides that the summons and petition "*shall be personally served*" upon the parties. Thus, §48.42(4) is consistent with §§ 801.11 and 801.14(2), Wis. Stats., by requiring that the summons and petition must be

personally served on a parent in termination of parental rights proceedings.

However, §48.42(4), does not include the provision that service cannot be made on the attorney, as does §801.14(2). Thus, § 801.14(2), Wis. Stats., is more specific than §48.42(4), Wis. Stats.

It is a cardinal rule of statutory construction that when a general and a specific statute relate to the same subject matter, the specific statute controls. State v. Denter, 121 Wis.2d 118, 357 N.W.2d 555 (1984). Therefore, since §801.14(2) and §48.42(4) both establish the rules for personal service, and since §801.14(2) is more specific than §48.42(4), then §801.14(2) controls here. Consequently, A.K. was to have been personally served with the summons.

However, that did not happen here. Instead of allowing the State to serve A.K. with the summons and petition, or, serving her himself, Atty Arendt personally accepted service of the summons and petition on her behalf.

However, the fact that Attorney Arendt improperly accepted service as A.K.'s "attorney" is compounded by the fact that he did not actually represent A.K. in the TPR proceedings.

A. Attorney Arendt did not Represent A.K. In the TPR Proceedings.

Attorney Arendt did not file a Notice of Retainer with the Court.[5] A.K. did not retain him to represent her in this matter.[6] A.K. did not pay Attorney Arendt to represent her in this matter, nor did she sign a Legal Representation Agreement for that purpose.[7] Attorney Arendt did not appear in this case, nor was he appointed by either the Court or the Public Defender's office.[8] Therefore, since "*[t]he authority of an attorney commences with his retainer,*" Stone, at 421, and no retainer was effectuated here, Attorney Arendt did not represent A.K. in these TPR proceedings. However, that did not prevent him from saying that he did,[9] causing the "train-wreck" that ensued.

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[5] *R.128. The Notice of Retainer at Exhibit 1 is for Case No. 17-JC-52, not this case.*

[6] *R.118:17. Affidavit of A.K.*

[7] *See note 6.*

[8] *The only attorney appearing for A.K. in the TPR proceedings was Attorney Leuschow who was appointed by the Public Defender's Office on March 1, 2021.*

[9] *R.11. "I, Patrick Arendt, attorney for [A.K.]...." Admission of Service.*

The Rules of Professional Responsibility provide inter alia:

SCR 20:4.1 Truthfulness in statements to others

(a) In the course of representing a client a lawyer shall not knowingly: (1) make a false statement of a material fact or law to a 3rd person;

SCR 20:3.3 Candor toward the tribunal

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

B. Attorney Arendt Held Himself Out as A.K.'s Attorney And on that Basis Improperly Accepted Service of the TPR Summons.

The TPR petition was filed on February 12, 2021.

On February 15, 2021, Jennifer Williams, a paralegal in the Portage County Corporation Counsel's office sent an email to Atty Arendt asking him if he was representing A.K. in these proceedings, and if so, would he assist in serving her with the TPR summons and petition.[10]

Atty Arendt responded a few minutes later:

> *I am representing [A.K.] in the TPR case and will accept service on her behalf.*

It is commonly understood that asking an attorney if he represents someone in a legal proceeding means just that; are you the attorney for this person in this legal proceeding. These are not words used casually or without intent. That is because the attorney/client relationship carries with it significant and important legal ramifications. The Preamble to the RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS describes an attorney's role as follows:

> *A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains*

[10] *R.129.*

> *their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.*

Thus, for an attorney to represent a person in legal proceedings carries with it specific responsibilities and ethical considerations. As a result, the relationship is not taken lightly. Therefore, as an attorney since 2004,[11] Atty Arendt had to know the import this statement would have to a paralegal asking him about accepting service, especially when she included a second paragraph detailing the efforts the County would take to serve A.K. if he would/could not do so.

However, that Atty Arendt said that he was A.K.'s attorney and would accept service set in motion a chain of events:

1) Ms. Williams delivered the TPR petition to Atty Arendt.[12]

2) Atty Arendt filed an Admission of Service on February 18, 2021. In the Admission of Service, Atty Arendt unequivocally stated that he is the attorney for A.K.:

> *I, Patrick Arendt, attorney for [A.K.]ranski, hereby accept personal service of the following*

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[11] *R.137:15-16.*

[12] *R.129.*

documents on behalf of my client, [A.K.] and at my request...."

At the end of the Admission of Service, he signed:

Patrick Arendt, Attorney for Mother, [A.K.]

Thus, Atty Arendt twice declared himself as the attorney for A.K. and once referred to her as his client. Again, these are not terms that an attorney uses casually because they carry the full weight of the Rules for Professional Conduct. Thus, it is impossible to read this document without believing that Atty Arendt and A.K. had an attorney/client relationship, with all that entails.

3) Atty Arendt sent an email to A.K. with the TPR petition attached.[13]

4) A.K. relied on Atty Arendt's filing of the Admission of Service as being valid, *infra*. Critically, Atty Arendt's authority to file the Admission of Service as A.K.'s attorney was also not questioned by the Court, the County or the Guardian ad Litem, even though Atty Arendt had not filed a Notice of Retainer with the Court nor had he been appointed as her attorney by either the Court or the Public Defender's

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[13] *R.131. Even though Atty Arendt emailed A.K. the TPR petition, neither the Wisconsin Legislature nor the Wisconsin Supreme Court recognizes an email as constituting personal service. Section §801.11(1)(a) states: "by personally serving the summons upon the defendant...." Likewise, the Supreme Court states in Punke v. Brody, 17 Wis.2d 9, 115 N.W.2d 601 (1962) that "[p]ersonal service means actual delivery to the defendant in person." Thus, emailing A.K. the Summons does not comply with Wisconsin service requirements. Accordingly, Attorney Arendt did not personally serve A.K. when he emailed her the summons.*

Office. Put another way, there appears to have been an unspoken consensus that Atty Arendt represented A.K. and as a result, had authority to act on her behalf.[14] In other words, those involved believed Atty Arendt had "implied authority" to accept service based upon his representation of her in other legal matters, intimately related to these proceedings.

Consequently, A.K. cannot be faulted for doing the same thing. Her belief was bolstered by the fact that Atty Arndt told her, during a three-way telephone conversation with her life coach, Derek Bootle, in December of 2020, that he could accept service for her, *infra*.

As further support of Atty Arendt's good standing and trustworthiness, Judge Baker sang his praises in her decision, stating that A.K.

> *had the benefit of advice from an attorney skilled in this area of the law. Attorney Arendt had been representing parents and children in TPR proceedings for over 15 years. It was nearly one-third of his practice. He testified that he represented [A.K.] on multiple cases, two different CHIPS cases as well as a coinciding criminal matter and family court matters. He spoke with her "life coach" and expressed concern for her mental health and well-being. He further allowed her to use his*

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[14] *The Guardian ad Litem stated that it was her belief that Atty Arendt represented A.K.*

VENTO: [to Atty Arendt] But the reality is, you never represented A.K. in the TPR proceedings; is that correct?

KESSLER: Your Honor, I'm going to object. I believe that there's sufficient testimony in the record that he did. R.137:118:17-22.

office address for her mail, again out of concern for her safety and well-being. R.135:107.

Truly then, if A.K. could not trust and rely upon an attorney like Atty Arendt, who told her that he could and then did accept service "for her," then who else could she possibly rely on or trust.

Consequently, Atty Arendt had to appreciate that by both telling A.K., a person with no legal knowledge or experience, a person whom he had represented in other proceedings over several years, that he could and did accept service, that she would rely upon that without question. It cannot now be held against her that she did.

5) Consequently, with no reason to believe that there was an issue with service:

- A.K.'s actual attorney in these proceedings, did not raise a jurisdictional issue; and
- A.K. participated in the proceedings, eventually voluntarily giving up her parental rights.

Therefore, by his own admission, Atty Arendt accepted service as her attorney, even though he is precluded by statute from doing so.

Further, Atty Arendt did not actually represent A.K. and therefore, should not have held himself out as her attorney.

Further, that Atty Arendt sent A.K. an email with the

Summons attached does not constitute personal service.[15]

Further, while Atty Arendt may have given A.K. a copy of the Summons, he did not file an Affidavit of Service with the Court as required by statute.[16]

Lastly, as addressed below, actual notice does not constitute personal service.

The Supreme Court makes it clear that when service is fundamentally defective, the court is deprived of personal jurisdiction from the first instance.

> *[O]ur courts have recognized a distinction between service that is fundamentally defective, such that the court lacks personal jurisdiction over the defendant in the first instance, and service that is merely technically defective. (Citations omitted). If the defect is fundamental, then the Court lacks personal jurisdiction over the defendant, regardless of whether or not the defect prejudiced the defendant. (Citation omitted). If the defect is technical, however, then the court has personal jurisdiction over the defendant only if the complainant can show that the defect did not prejudice the defendant. The burden rests on the complainant to show that service was not defective or, if service was defective, that the defect was merely technical and did not prejudice the defendant.*

Johnson v. Cintas Corp. No.2, 339 Wis.2d 493, 811 N.W.2d 756, 2012 WI 31 (2012).

Therefore, since A.K. was not personally served with the summons and petition as required by statute, and since service of the summons on her attorney does not comport with

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[15] *See note 14.*

[16] *See note 17.*

Wisconsin law, service was not just fundamentally defective, service never occurred. It follows then, that if a fundamental defect in service results in a lack of personal jurisdiction, then surely no service at all would as well. Thus, the Court lacked jurisdiction over A.K. from the first instance. Consequently, the TPR Order is void.

II. SINCE A.K. DID NOT GIVE ATTY ARENDT ACTUAL EXPRESS AUTHORITY TO ACCEPT SERVICE OF THE TPR SUMMONS AS HER AGENT SHE WAS NOT SERVED THEREBY DEPRIVING THE COURT OF PERSONAL JURISDICTION.

Since Atty Arendt cannot accept service of the summons as A.K.'s attorney, which he admitted to doing, the only way to salvage the TPR Order is to find some other theory upon which to find effective service.

The Trial Court did that by wholly adopting the County's position that Atty Arendt accepted service as A.K.'s agent under §801.11(1)(d), Wis. Stats., even though this position is in direct contrast to Attorney Arendt's Admission of Service where he unequivocally stated that he was accepting service as A.K.'s attorney.

Without doubt, an attorney can accept service for a client in an agency capacity. It is a common practice. However, unlike what Atty Arendt did here, that relationship would be identified in the Admission of Service to avoid this very situation.

Accordingly, instead of writing

> *I, Patrick Arendt, attorney for [A.K.] hereby accept personal service...on behalf of my client, A.K., and at my request...*

as Atty Arendt did here, the Admission of Service would instead read

> *I, Patrick Arendt, am authorized by A.K. to accept service for her at her request..."*

or words to that effect.

However, the Trial Court has apparently chosen to ignore the plain wording of Atty Arendt's Admission of Service that he filed with the Court, where again, he unequivocally writes, with full cognizance of the Rules of Professional Conduct and as an officer of the Court, that he accepted personal service as the attorney for A.K. and did so knowing that he did not represent her, even though it might have been his intent to do so.[17]

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[17] *Atty Arendt testified that he believed an attorney can accept service of the summons. This belief undermines the Trial Court's conclusion that he accepted service as A.K.'s agent.*

VENTO: Would you agree, Atty Arendt, that under the Wisconsin Statutes, an attorney cannot accept service of a summons of petition - summons and petition?

ARENDT: No.

VENTO: Okay. Under §801.14(2), it says that the summons must be personally served. Do you understand that even if you were representing [A.K.] in the TPR proceedings, which it's established now that you were not her attorney, even if you were her attorney, you do not have statutory authority to accept service for her?

ARENDT: No, I do not understand that.

VENTO: Do you understand that, under Wisconsin law, providing somebody with an email with an attached summons does not constitute personal service?

ARENDT: Yes.

VENTO: Did you file an - did you file an affidavit of service with the Court stating that you personally served [A.K.] with a copy-with the copy-authenticated copy of the summons?

ARENDT: I did not.

VENTO: Would you agree that a process server is required by statute to file an affidavit of service indicating that service of a summons was properly

While an attorney can accept service in an agent capacity, the mere fact that Patrick Arendt is an attorney by profession does not equate to him being A.K.'s agent for purposes of service. *"An attorney, however, is not authorized by general principles of agency to accept, on behalf of a client, service of process commencing an action."* Gimenez, M.C. v. State of Wisconsin Medical Examining Board, 229 Wis.2d 312, 317, 600 N.W.2d 28 (Ct. App. 1999).

Even when an attorney represented a person in a legal proceeding and had a broad Power of Attorney, the Court held that did not authorize him to accept service in a different proceeding. Schultz v. Schultz, 436 F.2d 635 (1971).

So...does it really matter whether Atty Arendt accepted service as A.K.'s attorney or as her agent? After all, as the Trial Court points out, A.K. ultimately received the Summons and Petition, she participated in the proceedings - what difference does it make how she received the Summons?

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effectuated?
ARENDT: No.
VENTO: Okay. Now, you stated that it was your intent to represent [A.K.] in the TPR proceedings, correct?
ARENDT: It was.
R.137:117:8-25; 118:1-16.

VENTO: Atty Arendt, at least three times you've said in these exhibits that you represented [A.K.] in the TPR proceedings. First in your email correspondence with Jennifer Williams and then twice in the admission of service, correct?
ARENDT: Correct.
R.137:112:18-25.

Judge Baker concludes:

> *[A.K.] appeared at numerous hearings and requested relief from the court in several of those hearings. This case was set to go to trial the day after she entered her plea on July 19, 2022. Had she not entered her plea voluntarily, this case would have gone to trial....However, to allow this defendant to successfully argue that this Order is null and void after specifically authorizing Attorney Patrick Arndt [sic] to receive on her behalf of the Summons and Complaint, then appear in seven hearings without once objecting to personal service would be a waste of judicial and taxpayer resources. It would further defy the plain language of Wis. Stat.§48.42(4) and §801.08 and the guidance provided in Artis-Wergin. It would also be a true disservice to this child, who is entitled by law to a prompt disposition of this matter (see Wis. Stats. §48.01(1)(gr)).* R.135:109.

That notwithstanding, the answer is yes - it matters how and if A.K. was served because Wisconsin requires strict compliance with the rules of statutory service - even though the result may be harsh, because proper service is a condition precedent to personal jurisdiction.

> *Given that a defendant's constitutional right to due process is at stake, `Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh.' (Citation omitted). In particular, `[t]he service of a summons in a manner prescribed by statute is a condition precedent to a valid exercise of personal jurisdiction,' (citation omitted), as any action taken by a court over a defendant not properly served is a deprivation of that defendant's constitutional protection (Citation omitted).*

In Johnson v. Cintas Corp. No.2, 339 Wis.2d 493, 811 N.W.2d 756, 2012 WI 31 (2012).

Here, A.K. has two constitutional rights at stake.

First, like the defendant in Cintas Corp. No. 2, is A.K.'s constitutional right to due process. However, even more significant, is her constitutional right to the care and custody of her child as guaranteed by the 14th Amendment of the United States Constitution. Thus, given A.K.'s constitutional rights at stake, the rules of statutory service were to have been strictly complied with. That they were not, renders the TPR Order a nullity, which may seem a harsh result, given that the dispositional phase of the TPR proceedings is designed to protect the best interest of the child by promoting stability.

> *We are well aware that the intent of Wis. Stats. Ch. 48 is to promote the best interests of the child and 'to promote the adoption of children into safe and stable families rather than allowing children to remain in the impermanence of foster or treatment foster care.' See Wis. Stats. §48.01(1)(gg). As such, we are loathe to reverse the judgment and order. However, we are also aware that a parent has a constitutionally protected right to the care, custody and management of his or her child. See Steven V. v. Kelley H., 2004 WI 47, ¶22, Wis. 2d , 678 N.W.2d 856. The promotion of the adoption of children must occur within the confines of the procedure for terminating those parental rights as set forth in Wis. Stat. Ch. 48* subch. VIII.

Racine Co. Human Services Dept. V. Lakisha, 2004 WI App 149, 275 Wis.2d 879, 685 N.W.2d 173 (Ct. App.).[18]

Thus, failure to properly serve A.K. resulted not only in a deprivation of her constitutional rights, but ultimately

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[18] *Not relied upon here for the holding.*

led to the extinguishment of her constitutional right held most dear, the care and custody of her son.

Therefore, it matters that A.K. was not personally served with the TPR Summons.

III. THE TRIAL COURT ERRONEOUSLY CONCLUDES THAT A.K. GAVE ACTUAL AUTHORITY TO ACCEPT SERVICE UNDER §801.11(1)(d), WIS. STATS.

The Trial Court determined that A.K. provided "actual authority" to Atty Arendt to accept service under §801.11(1)(d), Wis. Stats.[19] In doing so, the Court relied on 1) the comments of Atty Arendt; 2) the testimony of Derek Bootle; and 3) A.K.'s "own words in Exhibit 5."[20]

In response, A.K. asserts that the Court's reliance on these items is misplaced based upon the holding in Mared Industries, Inc. V. Mansfield, 2005 WI 5, 690 N.W. 835, 277 Wis. 2d 350 (2005), which establishes the standard that an agent's authority to accept service must be "actual express authority." Apparent authority is not enough.

In Mared, even though the layperson employee told the process server that he had authority to accept service, the Court determined that this was insufficient to establish express authority in light of the defendant's denials that he gave the employee express authority to accept service. Thus,

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[19] *R.135:7*

[20] *R.135:7*

as here, Atty Arendt's statements that he had authority to accept service are insufficient to establish actual express authority in light of A.K.'s denial of same.

A. The Comments of Atty Arendt do not Establish Actual Authority to Accept Service for A.K.

In reaching its decision, the Trial Court relied upon the language of §801.11(1)(d), Wis. Stats., which states *inter alia*, *"upon an agent authorized by appointment or by law to accept service of the summons for the defendant."*

The Mared Court explained that this language required the principal to "*designate the agent to perform the function, job, or duty of accepting service...In other words, the agent must have actual express authority.*" The Court further explained that while actual express authority does not need to be in writing, "*it must be set forth in clear and unambiguous terms.*" Mared at ¶33.

Atty Arendt's testimony does not establish that A.K. gave him "authority to accept service" in "clear and unambiguous" terms. This was acknowledged by Judge Baker:

> [w]hen pressed by Ms. [A.K.]'s attorney he added that they had discussed this as early as September 2020, however he was unable to give a specific date or time of the discussion stating that the conversations had 'blended together.'" R.135:2

On cross-examination, Atty Vento asked Atty Arendt when A.K. asked him to accept service. He was unable to provide a specific date.

VENTO: All right [sic]. Can you tell me again why you think you had authority to - to accept service as [A.K.]'s agent?[21]

ARENDT: She told me I could accept service.

HON. BAKER: Ms. Vento?

Vento: I'm waiting for him to answer.

HON. BAKER: He did answer.

Vento: Oh, I'm sorry. Then I didn't hear what he said.[22]

[The question was read back.]

VENTO: And I asked him, when did she tell you that.

ARENDT: *She told me on repeated occasions commencing in September, in - November, and December, and there were other conversa—I recall those two events particularly, but we were in regular communication throughout the course of this, and the subject matter came up. I can only identify those two particular dates, though.*

VENTO: *I didn't hear any dates. I heard September and November.*

HON. BAKER: Is that a question, Ms. Vento?

VENTO: Well, I don't know if he answered my — I asked him specifically when, what day, did she authorize you to accept service as her agent?

KESSLER: Your Honor, I believe this has been asked and answered...in a number of ways.

HON. BAKER: I believe-I believe Mr. Arendt answered that question. Go ahead and ask your next question, please.[23]

Thus, Atty Arendt never provided a specific date that A.K. authorized him to accept service.

Likewise, Atty Arendt was unable to say exactly what A.K. said to him that authorized him to accept service for her. During direct examination, he testified as follows:

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[21] *R.137:114:14-16.*

[22] *Atty Vento appeared via Zoom; everyone else was in the courtroom.*

[23] *R.137:115:6-25; 116: 1-5.*

WUNDERLIN: What led you to believe that Ms. [A.K.] was agreeing to give you authorization to accept service?

ARENDT: She said yes. R.137:86: 14-17.

However, on cross-examination, he could not remember what A.K. actually said to him.

VENTO: And she - what did she specifically say to you?

ARENDT: That we explained how process would be achieved, that the pet - once the petition would be filed, that a process server would come to the door.

VENTO: I asked - I'm going to move to strike this answer. I asked, what did she say to you?

HON. BAKER: I'll - I'll sustain that. If you are able to say exactly what she said, I think that's what the question is, Mr. Arendt.

ARENDT: She said I could accept service. I cannot tell you the specific words she spoke to me in that context - outside of that contextual answer. R.137:116:9-25;117:1-3.

Additionally, Atty Arendt could not remember whose idea it was that he accept service.

WUNDERLIN: Okay. And in your conversation with A.K. and Derek Bootle, who first brought up the concept of potentially giving you authority to accept service of the summons and petition?

ARENDT: I don't recall. R.137:83:25 to 84: 1-4.

In cross-examination by the Guardian ad Litem, Atty Arendt testified that his accepting service was a "mutual decision" between him and A.K.

KESSLER: And did you, as a represent-and did you, in your representation of [A.K.], make the suggestion, or did she ask if you would be able to rep-accept service for her? (Emphasis added).

ARENDT: I think it was a mutual decision that we came to at - at - at the time. I - or that - that the conversation came mutually based on a similar conversation to the prior question you had. R.137:122:12-15.

Further, that the "agency relationship" was not spelled out in clear and unambiguous terms, is also evidenced by

the fact that it was not reduced to writing.

WUNDERLIN: Did you memorialize this agreement, that you would accept service of the summons and petition for her in any case notes or correspondence?

AREDNT: No. R.137:86:22-25.

These colloquies show that there were not clear and unambiguous terms establishing that A.K. gave Attorney Arendt actual express authority to accept service of the TPR Summons because no one contemplated an agency relationship.

Rather, Atty Arendt accepted service on the implied understanding that because he represented A.K. in other legal proceedings, he could act here.

This is borne out by the phrasing used by the Guardian ad Litem in her questions, for even in the midst of the hearing to establish that Atty Arendt and A.K. had an agency relationship, the GAL referred to their attorney/client relationship.

GAL: Okay. And you continued to represent Ms. [A.K.] in the termination of parental rights-rights case for some time as evidenced by your reviewing records with her?

ARENDT: That's correct.

GAL: And preparing for a defense of this matter?

ARENDT: That is correct.

GAL: And you represented her for a period of time on this TPR case until she obtained different counsel?

ARENDT: That's correct. R.137:124:12-23.

This demonstrates that when the actors were not "focusing" on trying to show an agency relationship, they

naturally referenced the actual relationship that existed, that of attorney/client. When the GAL asked: "*in your representation of A.K.*", she was referring, of course, to the attorney/client relationship, not an "agency" relationship, when presumably the two of them understand the difference.

Critically, Atty Arendt did not correct her. He did not say, no, we discussed my accepting service as her agent, not as her attorney. He did not do so because not only did the agency relationship not exist, it was not contemplated by anyone, least of all Atty Arendt, until, of course, this appeal was initiated.

Consequently, when Atty Arendt admitted that he accepted service as A.K.'s attorney, he meant it. That is what he told the paralegal, that is what he filed as an officer of the Court, that is what he testified to. He believed that because he represented A.K. in the CHIPS case, that he also represented her in the TPR proceedings and accepted service as her attorney.

Therefore, the "so-called" agency agreement between Atty Arendt and A.K. was not established at all, let alone by clear and unambiguous terms. First, it was not reduced to writing. Next, Atty Arendt could not remember either the date or month it was supposedly established. Next, Atty Arendt could not remember whose idea it was to "create" the

agency relationship, at times saying it was mutual, at other times saying it was A.K.'s idea, and on top of that, he could not remember what was actually said to create the agency relationship.

i. A.K.'s Testimony Refutes an Agency Relationship Between Her and Atty Arendt.

In contrast, A.K. offered clear and unambiguous testimony, that she never created an agency relationship with Atty Arendt and never authorized him to accept service for her as her agent.

VENTO: Ms. [A.K.], you were present in the courtroom last week on Thursday, March 31st, during Atty Arendt's testimony, weren't you?

A.K.: Yes, I was.

VENTO: And did you hear his testimony?

A.K. Yes, I did.

VENTO: Did you hear him say that sometime during the months of September, October, November or December of 2020, you authorized him to accept service of the TPR summons?

A.K. Yes, I did.

VENTO: Do you agree with that statement?

A.K.: No, I do not agree.

VENTO: And why not?

A.K.: Because I never asked him to accept service for me. R.137:6:19-25; 7:1-9.

After testifying that she had only one conversation with Atty Arendt about service, A.K. then testified:

VENTO: So during this one conversation, did you ask Atty Arendt to accept service of the summons and petition on your behalf?

A.K.: No.

VENTO: Did you tell Atty Arendt to accept service of the summons and petition on your behalf?

A.K.: No.

VENTO: Did you direct Atty Arendt to accept service of the summons and petition on your behalf?

A. No, I did not.

VENTO: Did you authorize him to accept service on your behalf?

A.K.: No, I did not.

VENTO: Did anyone else ask him to accept service on your behalf? R.137:51:7-25.

A.K.: Derek Bootle.

VENTO: Okay. Did you join in Derek Bootle's request?

A.K.: No, I didn't because I didn't believe they would file it. [referencing the TPR petition].

VENTO: Did you enter into a separate agreement, either verbal or written, with Attorney Arendt giving him authority to accept service of the TPR summons and petition on your behalf?

A.K.: No.

VENTO: At any time and under any circumstances, did you ever authorize Attorney Arendt to accept service of the TPR summons and petition for you or on your behalf?

A.K.: No, I did not.

VENTO: At any time either before or after the TPR petition was filed, did you have a conversation alone with Attorney Arendt about him accepting service of the TPR summons and petition for you?

A.K.: No. R.138:52:10-25.

VENTO: Did you ever enter into an agency relationship with Attorney Arendt?

A.K.: No.

VENTO: That notwithstanding, did you ever authorize Attorney Arendt to act as your agent to accept service of the TPR summons and petition on your behalf?

A.K.: No I did not.

VENTO: During his representation of you in other legal matters, did you tell him he had authority to accept service of the TPR summons and petition?

A.K.: No.

Thus, for the Trial Court to find that Atty Arendt accepted service as A.K.'s agent simply does not comport with the facts.[24]

ii. Attorney Arendt's statements to Third Persons do Not Establish Agency.

Agency also cannot be established by describing the relationship to third persons. "*[A]n agent's authority may not be shown by testimony describing his declarations to third persons.*" Punke v. Brody, 17 Wis.2d 9, 115 N.W. 601(1962). In Punke, Brody, the purported party, had an agency relationship with Altman, wherein Altman had authority to accept service for Altman in other matters. The Trial Court found, over defendant's objections, that the process server was entitled to believe the "agent" that he could accept service. However, the Supreme Court disagreed. "*The objection should have been sustained. An agent's authority may not be shown by testimony describing his declarations to third persons.*" Punke at 605.

This same rule was adopted in Schwarz v. Thomas, 222 F.2d 305 (1955). In Schwarz, Thomas' attorney, Busby, accepted service on her behalf. Eventually, a default judgment was entered against her. Nearly a year later, after

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[24] *While Attorney Arendt admits to accepting service on A.K.'s behalf as her attorney, he says nothing in his Admission that he was A.K.'s agent.*

garnishment proceedings had been commenced, Thomas filed a motion to set aside the judgment on the grounds that she was never summoned, never authorized Busby to accept service for her, even though he was representing her in other litigation, and never ratified his acceptance of service. The trial court set aside the judgment. The United States Court of Appeals affirmed. The Court held:

> *The rule is clear that it must appear that any agent who accepts service must be shown to have been authorized to bind his principal by the acceptance of process, and further, that the authority to accept such service cannot be shown by the extra-judicial statements of an attorney. This is an elementary law of agency.*

Id. at 308.

Therefore, that Atty Arendt told the paralegal that he would accept service did not create an agency relationship between him and A.K., especially since he prefaced it by saying that he "represented her." He affirmed this during his testimony.

VENTO: Now, you're also no doubt aware of Supreme Court Rule 20:3.3, Candor Toward the Tribunal, which states, "A lawyer shall not knowingly make a false statement of fact or law to a tribunal," correct?

ARENDT: Correct.

VENTO: And you are no doubt also aware of Supreme Court Rule 20:4.1, which is Truthfulness in Statements to Others, which states, "In the course of representing a client, a lawyer shall not knowingly make a false statement of a material fact or law to a third person," is that correct?

ARENDT: Correct.

VENTO: Yet in spite of knowing those things, in your admission of service that you filed with the court on February 18, 2021, you identified yourself as the attorney for [A.K.], didn't you?

ARENDT: Yes. I said that I was representing [A.K.] in the TPR case. R.137: 106:24-25; 107:1-17.

Likewise, that Atty Arendt intended to represent A.K. in the TPR proceedings is also not enough to establish actual express authority.

VENTO: Now, you stated that it was your intent to represent A.K. in the TPR proceedings, correct?

ARENDT: It was. R.137:118:13-16.

Therefore, Atty Arendt's statements to others do not establish actual express authority to accept service. Accordingly, since Wisconsin requires "strict compliance with statutory service requirements." Mech v. Borowski, 116 Wis.2d 683, 686, 342 N.W.2d 759, 760 (Ct. App. 1983), A.K. was not personally served with the Summons.

Accordingly, the TPR Order is void.

iii. Attorney Arendt did not Have Implied Authority To Accept Service on A[redacted]'s Behalf.

Contrary to the position taken by the Guardian ad Litem above, the fact that Atty Arendt represented A[redacted] in other legal proceedings did not give him "implied authority" to accept service on her behalf in this case.

The notion of "implied authority" was debunked by the 7th Circuit Court of Appeals in Schultz v. Schultz, 436 F.2d 635 (1971). In Schultz, husband gave his divorce attorney Power of Attorney over other matters. When wife began a

proceeding in federal district court, she served the attorney instead of husband, arguing that "he had authority by implication to accept service" because he was the attorney in the divorce and had a broad Power of Attorney.

The Court responded that it was a "dubious assumption" to imply such authority, focusing instead on the language of the statute. The Court explained that

> *[t]he phrase 'an agent authorized by appointment to receive service of process' is intended to cover the situation where an individual actually appoints an agent for that purpose."*(Emphasis in original).

Id. at 640.[25]

The Court held:

> *"...such implied authority cannot be enlarged into a power to accept service of process before the action is commenced and the defendant served."*

Id.

Here, even when testifying that he accepted service as A.K.'s agent, he couched it in terms of their attorney/client relationship. This is the very definition of "implied authority."

VENTO: You understand the difference between acting as an agent for someone and representing them as their attorney?

ARENDT: I do.

VENTO: So as an officer of the court and being mindful of the Supreme Court rules regarding truthfulness, when you said those three times that you were the attorney for A.K., you were not holding yourself out as A.K.'s agent, were you?

ARENDT: I was holding myself out as A.K.'s agent at that time.

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[25] *This is the language used in §801.11(1)(d) relied upon by the State.*

VENTO: Really?

ARENDT: I was.

VENTO: And on what authority did you - and what authority did you have to act as A.K.'s agent?

ARENDT: I had a client - attorney/client relationship with A.K. The petition was being filed at that time. We had not formalized the retainer. I was accepting service on the front end. The reason - it was odd that I would because that is not a typical practice for me. But the circumstances that had existed in the prior cases, Ms. K.'s extreme aversion to going and meeting with other people, even entering into this courthouse, allowed - made me feel that that exception was warranted based upon the attorney-client relationship I had so that we could get an orderly process so the petition could be delivered and processed and reviewed with her in a reasonable manner that accommodated her disability. (Emphasis added).

VENTO: So your testimony then is that you believed that, because you represented A.K. in other legal proceedings, that that authorized you to accept service in this TPR case?

ARENDT: That is a misstatement of my characterization.
R.137:113: 2-25; 114: 1-13.

The unspoken consensus was that because Atty Arendt represented A.K. in other proceedings, that "morphed" into an ability to accept service for A.K. in these proceedings. Again, this is exactly what is meant by "implied authoritty." His ability to accept service was "implied" by his representation of her in other matters. Notably, this "implied authority" was also held by other officers of the Court, such as the Guardian ad Litem, and even the Court itself, because again, no one questioned Atty Arendt's authority to accept service in these proceedings. This is borne out by the GAL's questioning of Atty Arendt.

KESSLER: Atty Arendt, there's been a lot of questions about when you started representing [A.K.] on various matters. As an attorney who represents people in a number of actions pertaining to the - to children and the government, such as children in need of protection and services, isn't it true that a natural progression in some of those cases go to a

termination of parental rights?

ARENDT: That is correct.

KESSLER: Isn't it true that it is your obligation to discuss that potential with your clients?

ARENDT: That's true.

KESSLER: And if that potential becomes something that is close or near or imminent, is it your obligation to discuss that with your client?

ARENDT: It is.

KESSLER: And when you make the discussion -

VENTO: Objection. Immaterial.

HON. BAKER: Overruled. Please continue.

KESSLER: Okay. Progressing where I was, if that becomes imminent and you receive information that this is - this is an imminent decision by the governmental agency that a TPR petition is going to be filed against the chi- with the child of one of your clients, do you feel it's your obligation to discuss that with your client?

ARENDT: I do.

KESSLER: And do you feel it's your obligation to explain to your client at that time what is likely to occur?

ARENDT: I do.

KESSLER: And is it - at that particular time, would you discuss the potential of your representing - or that you would represent the client at that time?

ARENDT: I did.

KESSLER: And there is preparation and representation of that client in the TPR matter during that period of time that you know is coming; is that correct?

ARENDT: That's correct.

KESSLER: And in this case, were you - you discussed with [A.K.] your representation of her in the TPR case?

ARENDT: That's correct.

KESSLER: Okay. And at the time you accepted the service on her behalf in the TPR, it was based on a multiple of factors; is that correct?

ARENDT: That is correct.

KESSLER: One of the factors was [A.K.]'s mental health and

fragility at that time; correct?

ARENDT: That is correct.

KESSLER: And at that time, it was [A.K.]'s inablity or extreme reluctance to engage in any communications with governmental officials and law enforcement; correct?

ARENDT: Correct.

KESSLER: And was it [A.K.]'s desire to avoid those kinds of contacts?

ARENDT: It was.

KESSLER: And did you, as a represent - and did you, in your representation of [A.K.], made the suggestion, or did she ask if you would be able to rep - accept service for her? (Emphasis added).

ARENDT: I think it was a mutual decision that we came to at - at - at the time. I - or that - the conversation came mutually based on a similar conversation to the prior question you had.
R.137:119:21-25 to 122:to 15.

Critically, not one of the factors recited by Atty Arendt had anything to do with establishing a separate and independent agency relationship between them in clear and unambiguous terms. Rather, Atty Arendt testified that he accepted service here based on his representation of A.K. in other legal proceedings. Put another way, based on his understanding of an "implied relationship."

While there can be overlap in certain legal proceedings, especially when a CHIPS case becomes a TPR case, once the TPR petition is filed, that becomes its own independent proceeding. Petitioner must effectuate service. A GAL is appointed. Defense counsel is appointed. These things are not simply continued from the CHIPS case as if two proceedings are instead one and the same.

Consequently, that Atty Arendt represented A.K. in the CHIPS case, did not give him "implied authority" to accept service here. This is consistent with Wisconsin law. See e.g. Gimenez v. Medical Examining Board, 229 Wis.2d 312, 600 N.W. 28 (Ct. App. 1999), where the Court found that the attorney general's "continuing representation of the [Medical Examining] Board did not authorize it to accept service for the Board."

B. Derek Bootle's Testimony Does Not Support an Agency Relationship Between A.K. and Atty Arendt.

In reaching its decision, the Trial Court surprisingly relied upon the "corroborating comments of Derek Bootle," even though his testimony does not support the Trial Court's conclusion. Rather, Derek Bootle's testimony was that he asked Atty Arendt if he could accept service for A.K., not A.K. herself.

VENTO: Okay. So you had one call about service of the TPR petition, and your recollection is that was in about December of 2020; correct?

BOOTLE: Correct.

VENTO: And who was on this call?

BOOTLE: [A.K.], Atty Arendt, Patrick Arendt, and myself.

VENTO: All right [sic]. Were you all - after you guys established the - what do you call it? - the merging of the three of you together, were you all on the call at the same time?

BOOTLE: Yes.

VENTO: And for the same amount of time?

BOOTLE: Yes.

VENTO: Were you able to hear everything that A.K. and Atty Arendt said?

BOOTLE: Yes.

VENTO: During this call, did you hear A.K. ask Atty Arendt to accept service of the TPR summons and petition?

[OBJECTION OVERRULED BY JUDGE]

BOOTLE: No.

VENTO: Did you hear A.K. authorize Atty Arendt to accept service of the summons and petition?

BOOTLE: No.

[OBJECTION OVERRULED BY JUDGE]

VENTO: And one more. Did you hear A.K. direct Atty Arendt to accept service of the summons and petition?

BOOTLE: No.

VENTO: Did you ask Atty Arendt whether he could accept service?

BOOTLE: Yes.

VENTO: What specifically did you say?

BOOTLE: I asked if he was - if he was going to accept the - the TPR summons, and he said yes.

[OBJECTION OVERRULED BY JUDGE]

VENTO: What happened next?

BOOTLE: It was my understanding that he was going to accept the TPR summons. We ended the call. Later on...

VENTO: Stop. Stop. I'm not asking you about that. Before the call ended, did you hear A.K. say anything in response to Atty Arendt's answer?

BOOTLE: No.
R.137:*20:12-25 to 28 ending at 10.*

Therefore, Derek Bootle's testimony establishes two things: 1) he asked Atty Arendt if he could accept service, not A.K.; and 2) Derek Bootle cannot create an agency relationship between A.K. and Atty Arendt - that is a

personal relationship between them. Thus, Derek Bootle's testimony does not in any way, shape or form prove that A.K. and Atty Arendt had an agency relationship in clear and unambiguous terms. Accordingly, the Trial Court's reliance on Derek Bootle's testimony for this conclusion is misplaced.

C. The County's Exhibit 5 Does Not Show an Agency Relationship Between A.K. and Atty Arendt.

Lastly, the Court relied upon Exhibit 5,[26] an email that A.K. wrote to Atty Arendt after he had accepted service, in which A.K. asked when they were going to start working on the petition.[27] The Trial Court admitted this exhibit over Atty Vento's objection, stating that it was "spot-on." R.138:12:14. However, on re-direct, A.K. testified that this email was written after Atty Arendt had accepted service and after his admission of service was on file with the Court; that the email did not reference service of process and that the requested meeting never took place.

VENTO: What box are you referring to?

A.K.: He had given me my CHIPS case file.

VENTO: Okay. Now, this was - this was dated February 24th, correct?

A.K.: Yes, that's correct.

VENTO: And the TPR petition was filed on February 12th, correct?

A.K.: Yes. I believe that's true.

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[26] *R.132.*

[27] *R.132.*

VENTO: And Atty Arendt accepted service for you on February 18th, correct?

A.K.: Yes.

VENTO: So do you see anything in this email to you - were you at all retroactively affirming his ability to accept service on your behalf?

A.K. No. There's nothing in there about that.

VENTO: So when you said, "I want to make sure I have it ready for when it's needed," what are you talking about?

[THE COURT HANDS A.K. THE ORIGINAL EXHIBIT AND QUESTION IS READ BACK]

A.K.: Because Mr. Arendt made it seem like he was going to be my attorney for the TPR.

VENTO: So you thought you were - so just to clarify, the petition had already been filed. He said he had already accepted service. His admission of service was already on file with the Court.

A.K.: Yes.

VENTO: And then how many days later - a week later, you asked him about the TPR petition because you thought it was a done deal, that service had been finalized?

A.K.: Yes, that's correct.

VENTO: So you were intending to talk to him about service of process when you wrote him this email?

A.K.: No.

VENTO: Did you, in fact, retain him to represent you in the TPR petition - excuse me, proceedings of February 24th?

A.K.: No, because he didn't meet with me.

VENTO: So after you sent him this email, what happened?

A.K.: We never met. And I had to contact the public defender's office.

VENTO: And - actually, a week later, Atty Leuschow was appointed for you - correct? On March 1st?

A.K.: I believe that's the date. Or right around there, the beginning of March, yes.

VENTO: So he had already accepted service for you even though he didn't represent you as an attorney. You were trying to do what you thought you needed to do to proceed with the case, and then you never heard from him again?

A.K.: Correct.

VENTO: And then after that, did he withdraw from representing you in these other cases?

A.K.: Yes. In all my other cases.
R.138:13:18 to 16 at 10.

IV. SINCE A.K.'S PARTICIPATION IN THE PROCEEDINGS WAS TAINTED BY IMPROPER SERVICE SHE DID NOT SUBMIT HERSELF TO THE JURISDICTION OF THE COURT.

The Trial Court determined that A.K. submitted herself to the jurisdiction of the Court and therefore, she waived personal service. In doing so, the Court relies on § 801.08, Wis. Stats., the holding in Artis-wergin v. Artis-Wergin, 151 Wis.2d 445, 444 N.W.2d 750 (Ct. App. 1989) and a comment by the GAL that a criminal defense attorney recites the "magic mantra" of "'preserving all jurisdictional objections'" at the Initial Appearance of every criminal case so as to preserve all jurisdictional objections for a later review." R.39:8.

While it is true that A.K. did participate in the proceedings, that participation was based on the mistaken belief that Atty Arendt's acceptance of service of the summons comported with the statutes. This was made all the worse though, because it was Atty Arendt who accepted service, the one person she believed was charged with protecting her interests.

Consequently, his actions gave "color of law" to the improper service. In other words, A.K. was entitled to rely

on the fact that her very own attorney correctly ensured that service was proper and comported with the statutes. It follows then that she would have had no reason to *sua sponte* raise lack of jurisdiction as a defense.

A.K. testified that she trusted Atty Arendt, believed him and relied upon his legal advice. R.138:8:2-8.

Vento: So when you heard him say that you - that, during, excuse me, when you heard him say that during the telephone conversation with you and Derek Bootle, that he could accept service for you as your attorney, did you have any reason to not believe him?

A.K.: No. R.138:8: 9-15.

Vento: So when Attorney Arendt actually did accept service for you as your attorney, did you have any reason to think there was a problem with that?

A.K.: No, I did not. R.138:8:24-25; 9:1-2.

Vento: And as a result of him accepting service for you, what did you do?

A.K.: I attended hearings and proceedings as I thought I was supposed to. TR at 9:3-6.

Therefore, A.K.'s participation in the proceedings was based on the mistaken belief that she was properly served. Thus, as under the Fruit of the Poisonous Tree Doctrine borrowed from criminal law, her participation cannot be construed as having submitted herself to the jurisdiction of the Court because of the original taint of defective service.

Thus, in light of the Court's depiction of Atty Arendt's character, coupled with the lengthy relationship between Atty

Arendt and A.K. which included him representing her in several cases over several years, she had no reason in the world to doubt him when he said that he could accept service on "her behalf" in these proceedings. Thus, that he actually did accept service on her behalf, only cemented its legitimacy. Accordingly, A.K. had no reason to not participate in the proceedings, or, to say the "magic mantra" about preserving jurisdictional issues.

V. NEITHER ACTUAL NOTICE OF THE PROCEEDINGS OR BEING NAMED IN THE PLEADINGS WAS SUFFICIENT TO CONFER PERSONAL JURISDICTION OVER A.K.

The Trial Court notes that A.K. received a copy of the Summons and Complaint [sic]. In other words, she had actual notice. Consequently, the Court concluded that because A.K. had actual notice of the proceedings it was enough to confer personal jurisdiction. However, the Cintas Court has made clear that "*actual notice alone is not enough to confer jurisdiction upon the court. Service must be made in accordance with the manner prescribed by statute.*" Cintas Corp. No. 2, at ¶43.

Likewise, that A.K. was named in the summons and petition does not make her a party because only service of the summons and petition does that.

> *[A] person does not become a party to an action by the mere naming of him or her in the title of the action. [Citation omitted.] It is widely accepted*

> *that an individual named as a co-defendant is not a party unless he [or she] has been served.*

Bartels v. Rural Mutual Insurance Co., 2004 WI APP 166, 275 Wis.2d 730, 687 N.W.2d 84 (Ct. App. 2004).

Thus, that A.K. was named in the summons and petition, appeared at the hearings and had actual notice of them is not sufficient to confer personal jurisdiction upon the court.

While it is understandable that the Trial Court is concerned for the child's disposition, so that nullifying the TPR order "*would be a true disservice to this child, who is entitled by law to a prompt disposition of this matter,*" R.135:9; that cannot be done at the expense of A.K.'s constitutional rights.

The bottom line is that the State acted at its own peril when it failed to personally serve A.K., relying instead on Attorney Arendt's representations, because a fundamental defect in service cannot be cured.

> *Failure to properly serve a defendant is a fundamental defect fatal to the action, regardless of prejudice. (Citations omitted). Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh. We have previously stated that, if the service statutes 'are to be meaningful, they must be unbending.*

Bergstrom v. Polk County, 2011 WI App. 20, 331 Wis.2d 678, 795 N.W.2d 482 (Ct. App. 2011).

Therefore, "*a judgment issued by a court lacking personal jurisdiction is a nullity under Wis.Stat. §806.07(1)(d).*" Wengerd v. Rinehart, 114 Wis.2d 575, 578-79,

338 N.W.2d 861 (Ct. App. 1983).

Thus, the fact that A.K. was not personally served with the Summons deprived the Court of personal jurisdiction. Consequently, the TPR Order is void.

CONCLUSION

According to his Admission of Service, Atty Arendt accepted service for A.K. as her attorney, not as her agent.

Therefore, since A.K. was not personally served in accord with the Rules of Civil Procedure, the circuit court did not have personal jurisdiction in the first instance.

In turn, because fundamental defects in personal service cannot be cured, it follows that the Order terminating A.K.'s parental rights is void.

Respectfully submitted this 14th day of June, 2022.

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CERTIFICATION

I certify that this Brief conforms to the rules contained in §809.19(8)(b), (bm) and (c, Wis. Stats., for a Brief. The length of the Brief is 43 pages.

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