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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2023AP000533

In the matter of the mental commitment of M.A.C.:
WAUKESHA COUNTY,

Petitioner-Respondent,

v.

M.A.C.,

Respondent-Appellant-Petitioner.

AMICUS CURIAE BRIEF OF
WISCONSIN STATE PUBLIC DEFENDER
IN SUPPORT OF PETITION FOR REVIEW

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ARGUMENT

- I. This Court should grant review in this case to revisit *Waukesha County v. S.L.L.* to address how it shifted the burden of providing notice from the county to the State Public Defender when the county seeks to extend a person’s commitment order.**

In *Waukesha County v. S.L.L.*, this Court concluded the county was not required to personally serve or provide notice of its extension petition to S.L.L. because “service on a party represented by an attorney may be accomplished by serving the attorney.” 2019 WI 66, ¶ 27, 387 Wis. 2d 333, 929 N.W.2d 140. The problem with that conclusion from *S.L.L.*—which the court of appeals relied upon in this case—is that it misunderstands the appointment process at the SPD and shifts the burden from the petitioner (the county) to the local SPD office to provide notice to the person who is the subject of the extension proceedings.

SPD-appointed attorneys do not continue to represent their clients after a chapter 51 commitment order is entered. Once the commitment order is entered, and after the attorney discusses the client’s appeal rights, the attorney closes the case and a notice of completion is filed with the circuit court. Therefore, the person subjected to the commitment order is no longer “represented by an attorney” unless

the person has retained counsel—which is rarely, if ever, the case. If the county seeks to extend the commitment, it provides the local SPD office with a copy of the petition pursuant to Wis. Stat. § 51.20(3). This is to effectuate prompt appointment of counsel. However, at the time the petition is filed, the committed person is *not* represented by an appointed attorney.

This misunderstanding is evident in *S.L.L.* where the Court states, “The County mailed a copy of the Extension Petition and the Extension Hearing notice to both Ms. L at her last known address **and her counsel.**” *S.L.L.*, 387 Wis. 2d 333, ¶28 (emphasis added). Unless *S.L.L.* had privately retained counsel, she would not have had counsel at the time the petition was filed. This misunderstanding likewise occurred in this case, where the court explained the county “instead sent the notice to her appointed lawyer.” *Waukesha County v. M.A.C.*, No. 2023AP533, unpublished slip op. (WI App. July 28, 2023), ¶ 12; App. 8-9. And, then concluded “service of the notice on her appointed attorney satisfies the statutes.” *Id.* at ¶ 13.

The Court in *S.L.L.* relied upon the rules of civil procedure, specifically Wis. Stat. § 801.14(2), in reaching its conclusion.

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. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing it to the last-known address, or, if no address is known, by leaving it with the clerk of the court.

S.L.L., 387 Wis. 2d 333, ¶ 27 (quoting Wis. Stat. § 801.14(2), emphasis in *S.L.L.*).

One of the fundamental problems with relying on § 801.14(2), is that “when service of the pleadings or other papers is required”—*i.e.*, the extension petition—the individual is not represented by an attorney. It is only *after* the SPD receives notice of the extension petition that it will appoint counsel. Pursuant to Wis. Stat. § 51.20(3), “[a]t the time of the filing of the petition the court shall assure that the subject individual is represented by adversary counsel by referring the individual to the state public defender, who shall appoint counsel for the individual without a determination of indigency, as provided in s. 51.60.” Thus, based upon its plain language, § 801.14(2) does not apply because the individual is not represented by an attorney when service is required.

In addition, as explained in the petition for review filed by M.A.C., Wis. Stat. §§ 51.20(2), (10)(a), and due process require the county to provide notice to the person whose liberty is at stake. Those points will not be repeated here.

The practical implication of *S.L.L.* is that it shifts the obligation to provide notice from the county (petitioner) to the SPD (the entity that subsequently appoints counsel). It requires the local SPD office to appoint counsel *and* try to find the person to provide notice of the proceedings. This is unworkable and puts appointed counsel in an untenable position. It is the county who has an ongoing relationship with the person during the (6-month or 12-month) commitment period, as the county is providing treatment. And, it is the county who is the petitioner seeking to extend a person's commitment. Conversely, the SPD-appointed attorney's involvement terminates after the commitment order is entered,¹ and as such, the SPD should not be required to locate and notify a *prospective* client of the proceedings. That obligation is soundly with the petitioner.

Finally, the problems created by *S.L.L.* are highlighted and compounded by the other issue raised by M.A.C., which is likewise in need of review: whether a default judgment is permissible when appointed counsel is present for the hearing. The court of appeals concluded the default judgment should be upheld because the scenario was the same as *S.L.L.*, where appointed counsel could not find the client, and thus, had no direction on how to proceed. App. 10, ¶16.

¹ If the person appealed the prior order, they may have an attorney appointed by the Appellate Division. However, that attorney will not handle the extension hearing.

The problem is that *S.L.L.* allows service on the SPD to qualify as adequate notice yet when the SPD subsequently appoints counsel, that attorney's representation is not sufficient to prevent default judgment. "With such an important liberty interest at stake, the accompanying protections should mirror the serious nature of the preceding." *Langlade County v. D.J.W.*, 2020 WI 41, ¶ 43, 397 Wis. 2d 231, 942 N.W.2d 277. Allowing a person's liberty to be significantly restricted without adequate notice and then entering a default judgment against them does not "mirror the serious nature of the proceeding."

CONCLUSION

This Court should accept review to address the issues raised in the petition filed on behalf of M.A.C.

Dated this 7th day of September, 2023.

Respectfully submitted,

Electronically signed by

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,041 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of September, 2023.

Signed:

Electronically signed by

Katie R. York

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