COURT OF APPEALS
DECISION
DATED AND RELEASED

August 16, 1996

NOTICE

No. 96-1615

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

In re the Termination of Parental Rights of Tiffany J., a Person Under the Age of 18:

State of Wisconsin,

Petitioner-Respondent,

v.

Trina J.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: ROBERT J. MIECH, Reserve Judge. *Affirmed*.

SCHUDSON, J.[1] Trina J. appeals from the trial court's written order vacating a previous order that had vacated an oral order, recorded on the judgment roll, terminating her parental rights to Tiffany J. Trina J. also appeals

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

from the reinstated order terminating her parental rights to Tiffany J. This court affirms.

I. Factual Background

This case presents a problematic procedural history rendering legal issues that are not easily resolved. The following summary is essential to the analysis of this appeal.

On July 21, 1995, the trial court held a hearing on the State's petition for termination of the parental rights of Trina J. and Richard W. to Tiffany J. At 9:40 A.M., forty minutes after the hearing was scheduled to begin, the trial court considered testimony and evidence of notice to Trina J., and found that she had received both actual and legal notice. Trina J.'s lawyer commented, "I thought she was actually going to contest this so I thought for sure she would be here today." The trial court then proceeded to take additional testimony on the merits of the TPR petition. The trial court granted the State's motion, with no objection from the attorney appearing for the guardian ad litem, to find Trina J. in default and order the termination of her parental rights to Tiffany J.[2]

On September 21, 1995, Trina J. appeared with counsel and the trial court set a date for a hearing on her motion to vacate the TPR. The State asked the trial court to "order Ms. [J] to be here personally each and every proceeding so that there's no question." The trial court responded, "I would agree. Counsel, do you understand that?" Trina J.'s counsel answered, "That's fine." The trial court then told Trina J., "Ma'am, it's very important that you show up on time here."

On October 16, 1995, the trial court held a hearing on Trina J.'s motion to vacate. Trina J. testified that she had arrived at the Children's Court Center at about 9:30 or 9:40 on July 21, had gone to the public defender's office

[2] The trial court also ordered termination of Richard W.'s parental rights to Tiffany. Richard W. does not appeal.

within the court center, and then checked in at the court where a receptionist told her her rights had been terminated. She said she returned to the public defender's office and then left the court center. Through an offer of proof, Trina J. also offered evidence from a witness who accompanied her on July 21. The trial court vacated the TPR and set a status date for November 15, 1995. The State asked the trial court "to order Ms. [J.] to personally appear at subsequent court appearances." The trial court responded, "On time, ma'am. I will hold you to strict appearance times. It will not be waived at any time."

On November 15, 1995, Trina J. appeared for the status conference with counsel who advised that the case remained in a contested posture, but further commented, "And we still may be able to resolve this short of trial. I can informally try to talk to [the assistant district attorney] at an appropriate point." The trial court scheduled the jury trial for February 27, 1996 and also scheduled one more status date for January 26, 1996.[3]

On Friday, January 26, 1996, when Trina J. did not appear for the status conference, the assistant district attorney advised the trial court:

> Your Honor, the matter was here for a status conference today. This matter had already reached full conclusion of termination and the termination was subsequently vacated in October of 1995. At that time Ms. [J] was ordered to appear personally and not by counsel at every subsequent court appearance. She's not here this morning. Her counsel has received information that Ms. [J] is on her way down here....
>
> She was ordered to appear, she was ordered to appear on a timely basis. She's not here. This is exactly the reason why this default went through because she didn't appear in court when she was

[3] The transcript reflects that the trial court specified the trial date but not the status date. The judgment roll, however, reflects that the status date was scheduled for January 26, 1996 at 9:00 A.M. Trina J. does not claim that she did not know of the January 26 status date or time.

> supposed to and I am at this time moving for the Court to further default Ms. [J] and to reinstate the previous order of termination. I also would call to the Court's attention a document which has been filed with the Court by the guard[i]an ad litem.[4] It is [the guardian ad litem's] position as it is mine that default is appropriate and I would so move the Court at this time.

Trina J.'s counsel advised the trial court:

> Your Honor, I talked to my client on Wednesday and she told me she was going to appear on Friday. She is aware of the court date. I called her this morning a little after 9 because I realized she was late and with the bad weather she has to have a bus ticket down here and she is on her way down. She has told me that it's going to take approximately an hour and a half with the weather and buses for her to make it in today. She has a sick child. This is part of the reason why she had to delay it today. She had a babysitter lined up that fell through so she is on her way down and I ask the Court therefore to pass this case later on in the morning to give her a chance to get down here.

[4] The guardian ad litem did not appear at the January 26, 1996 status conference. Another attorney appeared for him, however, and the record includes a two page document, "Guardian Ad Litem's Recommendation for Termination of Parental Rights," filed January 26, 1996, specifically stating, *inter alia*, "that in the event the mother, Trina [J], fails to appear at the scheduled status hearing set for January 26, 1996, then and in that event, the guardian ad litem moves the court for the entry of a default judgment against the mother." At the January 26 hearing, the assistant district attorney further explained that she had had "a lengthy conversation" with the guardian ad litem the previous afternoon and had requested "that he produce a written document to the Court."

The trial court expressed concern about the absence of the guardian ad litem and then, without stating any factual findings,[5] reached its conclusion and had the following exchange with defense counsel:

> THE COURT: I'm going to follow at this time the recommendation of the Assistant D.A., find her in default, vacate and reinstate the previous order. You're going to have to come in on some[]kind of an order petition then to vacate what I'm doing here today.
>
> [DEFENSE COUNSEL]: Wouldn't it be easier to pass the case?
>
> THE COURT: We've got other cases and I'm not going to be delaying this. I'm sorry.

The record does not reflect whether Trina J. ever arrived at court on January 26. Further, despite the trial court's comment that defense counsel would "have to come in on some kind of an order petition then to vacate," the record reflects no further effort of Trina J. in the trial court to vacate the order of termination.

II. Default Judgment

On appeal, Trina J. first argues that termination proceedings are governed by the rules of civil procedure[6] and, therefore, because § 806.02(5)

[5] This court notes that this proceeding was before Reserve Judge Robert J. Miech, whereas all the preceding hearings had been before Judge Ronald S. Goldberger. Nothing in the record establishes whether Judge Miech was aware of the case history beyond what he learned from the parties on January 26.

[6] For this principle, Trina J. cites ***In the Interest of F.Q.***, 162 Wis.2d 607, 470 N.W.2d 1 (Ct. App. 1991). In ***F.Q.***, this court recognized that the civil rules apply to CHIPS proceedings. ***Id.*** at

STATS.,[7] provides for default judgment only when a defendant fails to appear "at trial," and further, because a party is considered to have made an appearance when counsel appears, *see* ***Sherman v. Heiser***, 85 Wis.2d 246, 270 N.W.2d 397 (1978), the trial court had no authority to enter default judgment in the first place, or to order reinstatement of the TPR order when she failed to come to court on January 26. Trina J., however, ignores additional authority allowing trial courts to enter default judgments for violating court orders and failing to appear at non-trial hearings. As this court has explained:

> The trial court's authority to grant a default judgment is derived from secs. 802.10(3)(d), 805.03 and 804.12(2)(a), STATS. Section 802.10(3)(d) provides that "[v]iolation of a scheduling order is subject to s. 805.03." Section 805.03 provides:
>
> *[F]or failure of any party...to obey any order of court*, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a).
>
> Section 804.12(2)(a)3 provides that the court may make an order:
>
> [S]triking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, *or rendering a judgment by default against the disobedient party*.

(..continued)
611, 470 N.W.2d at 2. In ***Matter of M.A.M.***, 116 Wis.2d 432, 442, 342 N.W.2d 410, 415 (1984), the supreme court declared that "[a]lthough serious human rights are implicated in the termination-of-parental rights proceedings, the proceeding is civil in nature."

[7] Section 806.02(5) STATS., states:

> A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof.

Gaertner v. 880 Corp., 131 Wis.2d 492, 497 n.6, 389 N.W.2d 59, 61 n.6 (Ct. App. 1986) (emphasis added).

Thus, it is clear that a trial court has authority to enter default judgment for a party's violation of a court order to personally and promptly appear for a status hearing.[8] Therefore, this court next must consider whether the default judgment in this case was "just."

Trina J. argues that "[e]ntering a default judgment in response to a party's failure to appear constitutes an abuse of judicial discretion under the facts of the case." To evaluate her argument, this court must consider the applicable standard of review. In ***Gaertner v. 880 Corp.***, 131 Wis.2d 492, 389 N.W.2d 59 (Ct. App. 1986), where this court affirmed a trial court's order of default judgment against a defendant for failure to appear at a scheduling conference, the court explained:

Upon appeal, we will not set aside a discretionary order unless it is apparent that it was exercised arbitrarily or on the basis of completely irrelevant factors. Even if the evidence favoring a default judgment is slight, we will affirm unless it was impossible for the trial court to grant the judgment in the exercise of its discretion.

> The exercise of discretion requires a record of the trial court's reasoned application of the appropriate legal standard to the relevant facts in the case. Upon the failure of the trial court to record such reasoning, an appellate court may nevertheless examine the record to determine whether the facts support the trial court's decision.

[8] Trina J. does not contend that the trial court's directives to appear personally and promptly did not constitute a court order. Further, she fails to offer any authority to support her argument that a party may appear by counsel alone despite a court order requiring a personal appearance. *See* § 802.10(6), STATS. ("The court may require that a party ... be present ... to consider possible settlement of the dispute.").

Gaertner, 131 Wis.2d at 497-498, 389 N.W.2d at 61 (citations omitted). This standard guides the analysis and, in turn, reveals additional, difficult aspects of this case.

The trial court at the January 26 hearing did not make any record of a "reasoned application of the appropriate legal standard to the relevant facts in the case." ***Id***. As noted earlier, the record offers nothing to establish that the trial judge presiding on January 26 knew the case history beyond that briefly described by the assistant district attorney. Further, in the trial court's February 16, 1996 written order resulting from the January 26 hearing, one of the factual findings -- that Trina J. "failed to appear on January 26, 1996, *and failed to contact the court to account for her absence*" (emphasis added) -- is dubious considering counsel's account of her phone call with Trina J. that morning.

In the absence of any "record of the trial court's reasoned application of the appropriate legal standard to the relevant facts in the case," this court "may ... examine the record to determine whether the facts support the trial court's decision." ***Id***. Then, under ***Gaertner***, this court must not set aside the trial court order "unless ... it was exercised arbitrarily or on the basis of completely irrelevant facts" and, further, this court "will affirm unless it was impossible for the trial court to grant the judgment in the exercise of its discretion." ***Id***.

This court cannot conclude that the trial court's order reinstating the TPR was "on the basis of completely irrelevant facts." Clearly, the January 26 record reflects a brief but accurate presentation of the case history to the trial court, thus establishing Trina J's violation of a court order to appear personally and promptly. Therefore, properly applying legal standards to the undisputed facts, it was not "impossible for the trial court to grant the judgment in the exercise of its discretion."[9]

[9] In a narrow sense, this court is reviewing the trial court's January 26 decision to vacate the previous order vacating the TPR. In a broader sense, however, given that the ultimate sanction for Trina J.'s failure to appear is the default judgment of termination, it also may be appropriate to apply the standard applicable to the analogous situation where a trial court orders dismissal:

III. Termination

Trina J. also challenges the trial court's original order terminating her parental rights to Tiffany. She argues that she "was denied her constitutional right to a finding of unfitness and her statutory right to a fact finding hearing." She contends:

> At the initial hearing the court accepted testimony from Sheila Hageny-Kotz, the social worker from Department of Human Services, regarding the grounds for termination and factors pertaining to whether she was unfit as a mother to continue her parental relationship. There were no other witnesses who presented testimony and because the court

(..continued)

> [T]he sanction of dismissal is within the court's discretion once a party has failed to comply with a court order and his conduct in failing to comply with the order is egregious....[I]f the noncomplying party "shows a clear and justifiable excuse" excuse for his conduct, then dismissal is improper.

Johnson v. Allis Chalmers Corp., 162 Wis.2d 261, 276, 470 N.W.2d 859, 864 (1991).

Here, as noted, the trial court made no explicit findings. If, however, the record demonstrates noncompliance and egregiousness, this court will affirm the trial court despite the lack of explicit findings. ***Schneller v. St. Mary's Hosp.***, 162 Wis.2d 296, 311, 470 N.W.2d 873, 878-879 (1991).

In this case, Trina J.'s noncompliance with the court order for prompt and personal appearance is apparent. The trial court properly could have found Trina J.'s conduct "egregious" given: (1) this was her second failure to appear; (2) this second failure occurred despite the trial court's emphatic directives to appear promptly; and (3) both failures to appear occurred despite Trina J.'s knowledge of the gravity of termination proceedings involving her own child. Further, the trial court reasonably could have concluded that Trina J. failed to show a clear and justifiable excuse given counsel's explanation that *she* called Trina J. when *she* realized Trina J. was late again, and given that counsel then only offered a cluster of vague excuses involving weather, bus transportation, a child's illness, and babysitting. Finally, as noted, Trina J. never returned to the trial court to demonstrate that her conduct should be excused.

> struck the contest posture, no evidentiary hearing occurred. When the court approved and caused the order to be entered, it made no additional findings as to Trina's alleged unfitness. The court simply accepted without reservation the GAL's proposed order which was scant in regard to findings of fact and conclusions of law pertaining to Trina's alleged unfitness.

Trina J. offers no authority to support the view that merely because her failure to appear compromised "the contest posture, no evidentiary hearing occurred." An evidentiary hearing did occur and included not only the testimony of Ms. Hageny-Kotz, but also the introduction of documentary evidence detailing the history of Tiffany J.'s CHIPS orders, placements, progress in foster care, and the parents' abandonment of Tiffany J. and their failure to comply with the conditions for return.

The undisputed included evidence testimony that: Trina J. visited Tiffany only three times in 1993 and two times in 1994; she made two phone calls to the foster parents in 1994, and had no contact of any kind with Tiffany between October 1994 and June 1995, after the filing of the TPR petition; she failed to complete the training necessary to handle medical procedures for Tiffany who had been diagnosed with bronchial pulmonary dysplasia and who required physical therapy; she rarely attended Tiffany's medical appointments; she never contacted her social worker in response to about six letters; she failed to sign releases of information on behalf of Tiffany; and she failed to inform her social worker of her new address. The trial court concluded:

Based on the files, records and proceedings before this court, the
> sworn testimony taken, the recommendation of the guardian ad litem, this court's review of all files, records relevant to termination of parental rights as to Tiffany [J.], the court is well satisfied the State has met its burden and that there is clear and convincing evidence that grounds exist to terminate parental rights of both the adjudicated father as well as the natural mother, Trina [J.]

Although Trina J. accurately argues that the trial court "[m]ade no mention that Trina J. was unfit," the State correctly counters that, in this regard, this case is comparable to ***In the Interest of K.D.J.***, 163 Wis.2d 90, 470 N.W.2d 914 (1991), in which the supreme court stated:

> From the comments of the circuit court it is clear that the court was convinced her unfitness was sufficiently egregious to warrant termination. There would be no point in sending this case back to the circuit court for a specific, declaration to that effect.... "[A] remand directing the trial court to make an explicit finding where it has already made unmistakable but implicit findings to the same effect would be both superfluous and a waste of judicial resources."

K.D.J., 163 Wis.2d at 109, 479 N.W.2d at 922 (quoting ***Englewood Community Apartments Ltd. v. Alexander Grant & Co.***, 119 Wis.2d 34, 39 n.3, 349 N.W.2d 716, 719 n.3 (Ct. App. 1984)).

IV. Conclusion and Caution

Trina J.'s appeal presents two powerful, competing concerns. Their uncomfortable coexistence is accentuated by their equally emphatic articulation in the same supreme court decision:

> We need not reiterate this court's numerous holdings that the power of the state to terminate the parental relationship is an awesome one, which can only be exercised under proved facts and procedures which assure that the power is justly exercised. The parental right is accorded paramountcy in most circumstances and must be considered in that light until there has been an appropriate judicial

> proceeding demonstrating that the state's power may be exercised to terminate that right.
>
> It is apparent that the Wisconsin legislature has recognized the importance of parental rights by setting up a panoply of substantive rights and procedures to assure that the parental rights will not be terminated precipitously, arbitrarily, or capriciously, but only after a deliberative, well considered, fact-finding process utilizing all the protections afforded by the statutes unless there is a specific, knowledgeable, and voluntary waiver.

M.A.M., 116 Wis.2d at 436-437, 342 N.W.2d at 412-413. At the same time, however:

> While the interest of a parent is served by enforcing the rules of fair play in termination proceedings, those interests, in the case of a finalized case, must yield to the paramount interest of children. It would be contrary to the explicitly public policy declaration of the legislature ["the best interest of the child"] to reopen cases involving questions of placement, custody, and parentage of children which have been thought to be long decided.

Id. at 442, 342 N.W.2d at 415.

This court has identified problems in this case resulting from the lack of trial court findings at the final status hearing. A few more minutes and some additional patience probably would have allowed for clarification of the record. That, in turn, would have resulted either in a trial providing the kind of "deliberative, well considered, fact-finding process" the supreme court envisioned, or a stipulation, or a properly documented, explicitly supported default finding that could have eliminated any lingering uncertainty about the fairness of the trial court proceedings. Thus, while affirming the trial court orders, this court also cautions the trial court and all counsel to carefully

consider the deficiencies in this record that render uncertainty in a case where, all would agree, certainty is so very important.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.