

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 4, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-2263
96-2264

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

No. 96-2263

In the Interest of Jennnifer L.R.,
A Child Under the Age of 18:

PATRICIA H.S.,

Petitioner-Respondent,

v.

RICHARD LEE R.,

Respondent-Appellant.

No. 96-2264

In the Interest of Nicole S.R.,
A Child Under the Age of 18:

PATRICIA H.S.,

Petitioner-Respondent,

v.

RICHARD LEE R.,

Respondent-Appellant.

APPEALS from orders of the circuit court for Kenosha County:
MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

NETTESHEIM, J. Richard Lee R. appeals from trial court orders terminating his parental rights to his two minor children. Richard argues that the juvenile court improperly utilized summary judgment procedure against him at the factfinding portion of the proceedings. We agree with Richard that the law bars the use of summary judgment in contested TPR proceedings. However, we nonetheless affirm the termination orders because the court's ruling was also based on Richard's default for repeatedly failing to appear at various proceedings, especially the factfinding hearing.

On October 30, 1995, Patricia H.S., Richard's former wife, filed petitions seeking to terminate Richard's parental rights to two children born of their marriage. The petitions alleged that Richard had abandoned the children pursuant to § 48.415(1), STATS., and had failed to assume his parental responsibilities pursuant to § 48.415(6). Patricia filed the petitions so that her present husband might adopt the children.

Richard personally appeared at the initial hearing. The juvenile court explained the TPR procedure in detail to Richard, who indicated that he

wished to contest the petitions. He requested time to contact an attorney. The court granted this request and continued the initial appearance to January 26, 1996. Since Richard was living in Michigan, the court indicated that Richard could appear by telephone at this continued hearing. The court instructed Richard to provide a telephone number to court personnel.

Richard did not personally appear at the adjourned hearing. The juvenile court attempted to reach him at the telephone number which Richard provided, but the attempt was unsuccessful. Nonetheless, the court appointed counsel for Richard and continued the initial hearing to February 9. At the February 9 hearing, Richard appeared by telephone while his appointed attorney personally appeared. However, Richard and his counsel had not previously consulted. Therefore, the court again continued the initial appearance to February 16, when Richard again appeared by telephone and his attorney again personally appeared. At this hearing, Richard's attorney filed certain jurisdictional motions, and the court adjourned the matter to February 28 for a hearing on the motions.

Richard did not appear personally or by telephone at the February 28 motion hearing. However, the juvenile court heard arguments on the jurisdictional motions from Richard's counsel. These arguments prompted a request by Patricia for leave to file amended petitions. The court granted this request. The amended petitions realleged that Richard had abandoned the children and newly alleged that Richard's physical placement privileges had been denied for over one year by virtue of an order entered in an action in

Michigan. See § 48.415(4), STATS. The court scheduled a further initial appearance on the amended petitions for March 22.

Richard failed to appear personally or by telephone at this hearing. His attorney did appear and entered a denial to the petitions on Richard's behalf. Richard's attorney also notified the court that certain mailings by her to Richard had been returned with the notation that Richard was no longer living at the stated address. Richard's attorney also stated that Richard had not notified her of his current address. The juvenile court scheduled the factfinding trial for April 15, 1996.

The day before the scheduled trial, Patricia filed a motion for summary judgment and default judgment.

Richard did not personally appear at the factfinding trial. However, the juvenile court was able to reach him by telephone at a rehabilitation facility in Michigan where Richard was staying by court order. The juvenile court first addressed the motions filed by Patricia. Richard's attorney objected to Patricia's summary judgment request, arguing that such procedure was not recognized by ch. 48, STATS. The court rejected this argument and addressed the motion on the merits. After hearing arguments on the motion and Richard's statements, the court granted summary judgment to Patricia. The court determined that there were no material issues of fact as to the grounds asserted by Patricia under § 48.415(4), STATS., *amended by 1995-96*

Wis. Act 275, § 80, effective July 1, 1996. The court did not address Patricia's motion for default judgment.

The juvenile court then scheduled a dispositional hearing for May 31, 1996. The court explained to Richard that if he did not appear at that hearing, he would be found in default.

Richard did not appear at the May 31 hearing. At this hearing, Richard's counsel renewed her argument that the court had improperly utilized summary judgment procedure at the factfinding hearing. The court again rejected this argument. However, the court also broadened its prior ruling. The court noted that it had not addressed Patricia's companion request for a default judgment at the factfinding hearing. The court ruled that judgment on this additional basis was also warranted.

The juvenile court then moved to the merits of the termination question. The court took certain evidence on the matter. However, the court did not rule with finality since the court had not yet received certain required written reports. The court continued the matter to June 5.

Richard again failed to appear personally or by telephone at the June 5 hearing. After receiving additional evidence and reviewing the written reports, the juvenile court concluded that it was in the best interests of the children to terminate Richard's parental rights.

Richard appeals.

DISCUSSION

We agree with Richard that the juvenile court's use of summary judgment was error. *Walworth County Dep't of Human Servs. v. Elizabeth W.*, 189 Wis.2d 432, 436, 525 N.W.2d 384, 385 (Ct. App. 1994), clearly bars such procedure in a TPR case.

Elizabeth W. is based on due process considerations. *Id.* at 436-37, 525 N.W.2d at 385-86. The court held that where a parent contests the termination, the fundamental liberty interest in the matters of family life preclude the use of summary judgment. *See id.*

Here, however, the additional procedure employed by the juvenile court was a sanction-based default judgment. TPR proceedings are civil in nature. *M.W. v. Monroe County Dep't of Human Servs.*, 116 Wis.2d 432, 442, 342 N.W.2d 410, 415 (1984). Section 801.01(2), STATS., provides that chs. 801 to 847, STATS., govern procedure in all civil actions and special proceedings except where a different procedure is prescribed by statute or rule. Section 806.02, STATS., permits a court to grant default judgment against a party who fails to appear at trial. Chapter 48, STATS., does not prescribe a different procedure for a party who fails to appear at trial. We therefore conclude that a sanction-based default judgment pursuant to § 806.02 is permitted in the proper exercise of judicial discretion.

In addition, this case does not raise the constitutional implications of *Elizabeth W.* There, the party suffering summary judgment was actively

contesting the proceedings, had not engaged in any conduct which impeded the proceedings and had not slept on her rights. In contrast, a sanction-based default judgment is premised squarely on the fault of the party suffering the sanction.

Here, Richard made only a few token appearances, failed at times to keep his attorney advised of his whereabouts and, most importantly, failed to appear at the factfinding hearing, a most critical stage of the proceedings. Moreover, the juvenile court exhibited patience with Richard's conduct and proceeded with caution. The court repeatedly adjourned the proceedings. Although Richard never asked for the appointment of counsel, the court appointed counsel for him at the first adjourned initial appearance—a proceeding which Richard did not attend.

At some point, however, the interests of Patricia and, especially, the children had to enter into this equation. Whether to enter a default judgment is addressed to the trial court's discretion. *Midwest Developers v. Goma Corp.*, 121 Wis.2d 632, 650, 360 N.W.2d 554, 563 (Ct. App. 1984). We will not reverse a trial court's discretionary ruling unless that discretion has been misused. We conclude that the court properly balanced the interests of all the parties in choosing to ultimately grant a sanction-based default judgment against Richard as to the factfinding portion of these proceedings.

By the Court.—Orders affirmed.

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