COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal Nos. 2005AP1602
2005AP1603

Cir. Ct. Nos. 2004TP2
2004TP3

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

NO. 2005AP1602

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CALEB W. C., A PERSON UNDER THE AGE OF 18:

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DENA D. C.,

RESPONDENT-APPELLANT,

SHANNON W.,

RESPONDENT.

NO. 2005AP1603

IN RE THE TERMINATION OF PARENTAL RIGHTS TO KELSEY A. C., A PERSON UNDER THE AGE OF 18:

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DENA D. C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Reversed and cause remanded with directions*.

¶1 ANDERSON, J.[1] Dena D.C. seeks review of orders terminating her parental rights to her two children. She argues the circuit court erred by entering a default judgment against her when she failed to appear for the trial on the petition to terminate her rights. She contends that she was present by her attorney even if she herself was not present. We agree and reverse the orders and remand for a new hearing.

FACTS

¶2 On January 20, 2004, the County filed petitions to terminate Dena's parental rights to her two children, Caleb W.C. and Kelsey A.C. The petition alleged that Dena's children had been out of the home for fifteen of the previous twenty-two months, Dena had not completed the conditions for return of the children and that she was not likely to meet the conditions within the next twelve

[1] This appeal is decided by one judge, pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

months.[2] The petitions alleged that Dena had failed to stay free from alcohol, had recently been arrested for operating a motor vehicle while intoxicated, and failed to demonstrate parenting skills she had learned from parenting class.

¶3 At a hearing on the petition on March 23, 2004, Dena stated that she would not agree to a voluntary termination of her parental rights and requested a jury trial. On May 7, the County moved for partial summary judgment, claiming that there were no genuine issues of material fact relating to the unfitness phase of

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[2] WISCONSIN STAT. § 48.415 provides in pertinent part:

> Grounds for termination of parental rights shall be one of the following:
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> ….
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> **(2)** CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> ….
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

the termination proceedings. Dena responded that there was a genuine issue of material fact as to whether, within the next twelve months, there was a substantial likelihood that she would be able to meet the conditions for return of the children. The circuit court agreed with Dena and denied the County's motion for summary judgment at the May 24 hearing on the issue.

¶4 On June 7, the parties appeared in court to place a stipulation on the record. The parties stipulated that the only issue left to try in the unfitness phase was whether there was a substantial likelihood that Dena would not meet the conditions for return of the children within one year of the conclusion of the fact-finding hearing.[3] The parties also agreed that this issue could be tried to the court, and the dispositional hearing could occur, after she earned Huber privileges in a separate criminal matter. The court approved the stipulation and ordered that the dispositional hearing be moved up if Dena should fail to comply with Huber rules, probation conditions or other conditions relating to the termination proceedings. The court set the trial date for January 25, 2005.

¶5 At the next status hearing, September 14, 2004, Dena did not personally appear but her attorney was present. Her attorney informed the court that she had lost her Huber privileges and had not been brought over from the law enforcement center for the hearing. The court responded that it would make sure that her appearance was "not up for question next time. We'll make sure that she

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[3] Dena stipulated that the children had been adjudged to be in the need of protection and services and placed outside the home for a period of longer than six months, that the Walworth County Department of Health and Human Services had made a reasonable effort to provide the services ordered by the court, and that she had failed to meet the conditions established for the safe return of the child to the home. *See* WIS JI—CHILDREN 324.

gets transported here; and if not, we'll have somebody present to tell us that she refused." The County requested that that court move up the trial date and find Dena in default if she failed to appear at that hearing. The court set a status date so as to give Dena a chance to appear personally.

¶6 Both Dena and her attorney were present for the September 21 status hearing. The County informed the court that Dena had violated her Huber rules on two occasions and requested that the court move up the trial date as a result. Dena's attorney indicated that she would be getting her Huber privileges back on October 4 and requested that the trial stay set for January 25, 2005, to give her a chance to work on the conditions for return of the children. The court granted Dena's request, but informed her that it was her "last chance."

¶7 On January 25, Dena again failed to appear personally, but her attorney was present. Her attorney indicated that Dena had notice of the hearings, but that there was also an apprehension request from the Department of Corrections. The County requested a default judgment and asked the court to go directly to the dispositional phase of the proceedings. Dena's attorney responded, "Obviously, my client would ask me to resist a default." The court granted the default judgment, found that Dena had demonstrated over the previous several months that she was unable to meet the conditions for return of the children and that Dena was therefore an unfit parent. The court then proceeded immediately to the dispositional phase of the proceedings. Dena's attorney objected to the disposition hearing taking place immediately following the court's finding of unfitness because of Dena's absence. The court overruled the objection.

¶8 Following testimony from two employees from the Walworth County Department of Health and Human Services, the court determined that

termination of Dena's parental rights was in the best interests of both her children. Dena appeals from the subsequent orders terminating her parental rights.

¶9 On appeal, Dena argues that the court lacked the legal authority to issue the orders terminating her parental rights because it erroneously granted a default judgment based on Dena's failure to appear at the January 25, 2005 hearing. As Dena points out, even though she was not personally present at the hearing, her attorney did appear on her behalf.

¶10 The decision whether to enter a default judgment is a matter within the sound discretion of the circuit court. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶18, 246 Wis. 2d 1, 629 N.W.2d 768. When the circuit court has applied an incorrect legal standard in deciding whether to enter judgment, the court has erroneously exercised its discretion. ***Id.*** In such a circumstance, this court may reverse the circuit court's discretionary decision. ***Id.***

¶11 The rules of civil procedure apply to termination of parental rights hearings. *See* ***Door County DHFS v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999). Thus, absent a court order to the contrary, Dena was permitted to appear by her attorney. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17; SCR 11.02(1) (2005) ("Every person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court …."). The County complains that Dena waived the right to challenge the default judgment by failing to properly object to it at the January 25, 2005 hearing. However, after reviewing Dena's attorney's comments to the court following the County's request for a default judgment, we conclude that Dena preserved the issue for appeal. *See* ***State v. Agnello***, 226 Wis. 2d 164, 174, 593 N.W.2d 427

(1999) ("All that we have required of a party is to object in such a way that the objection's words or context alert the court of its basis.").

¶12 Furthermore, the circuit court had a duty under the Fourteenth Amendment and WIS. STAT. ch. 48 to take sufficient evidence—prior to holding Dena to be an unfit parent—to support a finding by clear and convincing evidence that there was a substantial likelihood that Dena would not be able to meet the conditions for return of the children within the next year. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶26. However, the circuit court entered a default judgment against Dena without first taking this constitutionally and statutorily required evidence; it made its finding based on the minimal evidence of Dena's behavior already in the record. The circuit court therefore erroneously exercised its discretion. *See* ***id.***

¶13 The County cites ***Evelyn C.R.***, where our supreme court upheld a termination of a mother's parental rights. The circuit court had granted a default judgment even though the mother's attorney was present at the hearing. ***Id.***, ¶36. The supreme court concluded that the evidence supported the circuit court's determination that there were grounds to terminate the mother's parental rights. The County maintains we should do the same here.

¶14 In ***Evelyn C.R.***, the mother failed to appear at the fact-finding hearing after the court had ordered her to appear. However, her attorney did appear on her behalf. ***Id.***, ¶¶8-9. The court granted a motion for default judgment and concluded, based on the complaint, that grounds existed to terminate the mother's parental rights. ***Id.***, ¶9. The court then scheduled a dispositional hearing for the following week. ***Id.***, ¶10. At the dispositional hearing, the court heard testimony, including that of the mother. ***Id.***, ¶12. It then reaffirmed its entry of

default judgment, concluded there were grounds for termination and terminated the mother's parental rights. ***Id.***, ¶¶10-15.

¶15 The supreme court concluded that the default judgment was appropriate as a sanction for the mother's failure to appear after being ordered to do so. ***Id.***, ¶17. However, the supreme court held that the circuit court erred by entering a default judgment "without first taking evidence sufficient to support such a finding...." ***Id.***, ¶19. Thus, the "court failed to comply with the constitutional and statutory requirements for termination of parental rights." ***Id.*** However, the supreme court concluded the error was harmless because the circuit court did not enter its order terminating parental rights until after the dispositional hearing. ***Id.***, ¶33. The mother appeared by phone during the dispositional hearing and did not contest the default judgment or offer evidence to contradict testimony that her rights should be terminated. ***Id.***, ¶¶13, 33. After the hearing, the court reaffirmed its finding that there were grounds to terminate the mother's parental rights and made specific reference to testimony given at the dispositional hearing. ***Id.***, ¶34. Thus, the supreme court concluded that when the circuit court reaffirmed the default judgment, there was sufficient evidence to support that finding. Consequently, the error was harmless. ***Id.***, ¶36.

¶16 There are several differences between ***Evelyn C.R.*** and this case. First, the ***Evelyn C.R.*** court noted that, although the mother was not physically present, she did appear through her attorney. ***Id.***, ¶17. Thus, her failure to be physically present was not a sufficient basis for the default judgment. Instead, default was appropriate as a sanction for her failure to appear as ordered. ***Id.*** No similar sanction is needed here because Dena was not ordered to appear. Thus, as

we have explained, absent an order to the contrary, Dena was permitted to appear by her attorney.

¶17 Second, the ***Evelyn C.R.*** court's harmless error analysis was based on the sufficiency of the testimony taken during the dispositional hearing. Importantly, the mother was present by phone and chose not to refute the evidence supporting termination of her parental rights. ***Id.***, ¶¶10-12. After this hearing, the circuit court reaffirmed its finding that there were grounds to support termination of the mother's parental rights. ***Id.***, ¶13. The supreme court concluded that the evidence elicited at the dispositional hearing supported the court's finding. ***Id.***, ¶¶33-35.

¶18 Here the facts are very different. Unlike ***Evelyn C.R.***, no additional testimony was taken concerning the grounds for termination, as the dispositional hearing was held immediately after the finding of unfitness. Furthermore, the mother in ***Evelyn C.R.*** was present and given the chance to rebut the evidence taken at the dispositional hearing. No such chance was afforded here because the circuit court denied Dena's attorney's request to hold the dispositional hearing at a later date. Thus, unlike ***Evelyn C.R.***, we hold that our confidence in the outcome is undermined and the circuit court's error was not harmless.

¶19 We therefore reverse the order terminating Dena's parental rights. We remand to the circuit court for a new hearing on the merits.

By the Court.—Orders reversed and cause remanded with directions.

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