COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2218 **Cir. Ct. No. 2004TP5**

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

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JESSICA L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Jessica L. appeals the circuit court order terminating her parental rights to her child, Sicily C., born July 1, 2000. Jessica

[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.

contends the circuit court erroneously exercised its discretion because it found her in default based on her failure to appear in court for jury selection pursuant to court order without first finding that her conduct was egregious or in bad faith.[2] We conclude the record supports the circuit court's implicit determination that Jessica's conduct was egregious and without a clear and justifiable excuse and the court therefore did not erroneously exercise its discretion. We affirm.

BACKGROUND

¶2 The Rock County Human Services Department filed a petition to terminate the parental rights of both of Sicily's parents, Jessica L. and Nathan C., on March 1, 2004. A dispositional order entered in November 2002 had placed Sicily outside Jessica's home after finding that Sicily had been physically abused within the meaning of WIS. STAT. § 48.13(3) and was in need of continuing protection or services. As to both parents, the petition alleged that Sicily was in continuing need of protection or services [CHIPS] within the meaning of WIS. STAT. § 48.415(2)[3] because they failed to meet the requirements of the

[2] Jessica also adds to the heading of her argument that the court wrongly deprived her of a jury trial, but she does not suggest how a wrongful deprivation of a jury trial might exist independent from the question whether the court erroneously exercised its discretion in granting a default judgment. Therefore we do not address the deprivation of a jury trial as a separate issue.

[3] WISCONSIN STAT. § 48.415(2)(a) provides:

> 1. That the child has been adjudged to be a 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).

dispositional order for Sicily's return. At the time this initial petition was filed, Jessica had no permanent address and Nathan was incarcerated.

¶3 The first hearing was scheduled for March 29, 2004. Neither parent appeared at that time. As to Jessica, the assistant corporation counsel explained that she had recently learned Jessica was in the county jail. Counsel asked for a continuance until April 12 in order to personally serve Jessica. The court continued the hearing to April 12, 2004.

¶4 Jessica appeared pro se at the April 12th hearing. She stated that she wished to have counsel appointed, and the court referred her to the Public Defender's office to obtain counsel. The court continued the hearing to April 26, 2004, at the request of Nathan's counsel. The court told Jessica: "If you don't appear here on the 27th [sic] and you don't have a lawyer at that time and a lawyer doesn't appear for you, you could be found in default."

> 2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
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> 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.
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> 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.

¶5 At the April 26, 2004 hearing, Jessica again appeared pro se. She told the court that she had called the Public Defender's office, but that the office had not yet been able to appoint her with counsel. The court continued the hearing to May 24.

¶6 At the May 24, 2004 hearing, Jessica again appeared pro se. She told the court that she had been instructed by the Public Defender's office to request a continuance and call that office after the hearing. The court granted the continuance and set the next hearing for June 7, 2004.

¶7 At the June 7, 2004 hearing, counsel appeared on behalf of Jessica, who did not appear personally. Counsel for Jessica explained that he had not been able to meet with Jessica, and the court granted his request for a continuance and set another hearing for June 14, 2004.

¶8 At the June 14, 2005 hearing, Jessica's counsel appeared on her behalf, entered a denial and requested a jury trial. For both Nathan and Jessica, the court set jury selection for August 9, 2004, and trial for August 11 and 12.

¶9 On July 19, 2004, Rock County Human Services filed an amended petition for termination of parental rights that added, as to Nathan, a third ground: abandonment within the meaning of WIS. STAT. § 48.415(1). At a hearing on August 2, 2004, the court took up the effect of the amended petition on the scheduled trial date. Jessica appeared in person and was represented by counsel. Nathan's counsel requested that the August trial date be taken off the calendar in view of the amended petition; Jessica's counsel agreed; and the assistant corporation counsel did not object. The court rescheduled jury selection for both parents for October 25, 2004, with the trial to be held on October 27 and 28.

¶10 Jury selection did not take place on October 25, 2004. Instead, on that date counsel for all parties appeared and asked for a continuance and the court set February 7, 2005, as the new date for jury selection, with the trial to be held on February 9 and 10.

¶11 In mid-January 2005, Nathan's counsel moved to withdraw and the motion was scheduled for hearing on February 7, 2005. Jessica, Nathan, their attorneys, and the assistant corporation counsel all appeared on that date. The court granted the request to withdraw and, in order to give Nathan time to find a new lawyer, set a new jury selection date for June 13, 2005, with trial on June 15 and June 16. The court stated that it was going to provide Jessica with an order to appear on June 13, 2005, and further stated: "[I]f you fail to appear at that time, Miss L …, you may be and probably will be found in default in this case, which means you will have your rights terminated. You understand that, Miss L …." Jessica answered yes. The record reflects that the circuit court signed an order at that time and gave it to Jessica. The order states: "Jessica L … shall appear in Courtroom C, 51 S. Main Street, Janesville, Wisconsin, at 9:00 a.m. on June 13, 2005. If Ms. L … fails to appear at said date and time, she shall be found in default."

¶12 Prior to June 13, 2005, the court granted the County's motion for summary judgment against Nathan on the grounds that he had failed to attempt to obtain new counsel or to respond to Rock County's motion for summary judgment against him and that the County's affidavit established the ground of abandonment.

¶13 Jessica did not appear in person at the June 13, 2005 hearing, although her counsel did appear. At 9:15 a.m., the assistant corporation counsel

requested that the court enter a default judgment against Jessica. Counsel for Jessica objected to the default judgment. He explained that he had lost contact with Jessica since she had been released from Rock County jail on February 3, 2005, but he had been informed by her before then that she had had written and personal contact with Sicily while she was incarcerated and had been getting drug and alcohol treatment while in jail.

¶14 The court granted the default motion, concluding that Jessica had been given adequate notice of the date and of the fact that she could be found in default if she did not appear. The court then heard the testimony of Kristin Kath, a social worker with the County who had been working with Jessica, Sicily, and Nathan and who had prepared a report that she submitted to the court. Kath testified to the conditions that had been imposed on Jessica in order for Sicily to be returned to her, Jessica's failure to comply with them, the County's efforts to provide services to help Jessica meet those requirements, her opinion that there was not a substantial likelihood that Jessica would meet those requirements within a year, and matters relating to whether it would be in Sicily's best interests to terminate Jessica's parental rights. Kath testified to her recent efforts to contact Jessica as follows: she had had no face-to-face contact with Jessica since February 7; she last spoke with Jessica by phone on March 29th; she had sent several letters to Jessica; she had no idea where Jessica was living; Jessica had previously resided with her mother, but her mother had asked Kath not to send mail there any more; and Jessica had an outstanding warrant against her. Kath also testified that Jessica had not seen Sicily since November 22, 2003, last wrote to Sicily in January 2005, and last called to ask about Sicily in March 2005.

¶15 Jessica's counsel cross-examined Kath. After Kath's testimony was completed, the court stated that it was 9:27, Jessica had not yet appeared, and it

found her in default. The court found that the CHIPS ground for terminating Jessica's parental rights had been established; the abandonment ground had been established for Nathan; and both parents were unfit. After considering the statutory factors in WIS. STAT. § 48.426, the court concluded it was in the best interests of Sicily that the parental rights of both her parents be terminated.

DISCUSSION

¶16 On appeal, Jessica contends that the circuit court erroneously exercised its discretion because it found her in default based on her failure to appear in court for jury selection pursuant to court order without first finding that her conduct was egregious or in bad faith. Jessica acknowledges that the court has the authority to enter a default judgment against a parent in a TPR proceeding who violates a court order requiring him or her to appear at a particular hearing, but, she contends, the court must first determine that the parent's conduct is egregious or in bad faith, and the court here did not do that. The State responds that the circuit court may properly enter a default judgment where, as here, a party fails to appear after being ordered to appear and there is no evidence of a justifiable excuse for that failure.

¶17 The decision whether to enter a default judgment is within the discretion of the circuit court. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶18, 246 Wis. 2d 1, 629 N.W.2d 768. A reviewing court will affirm the circuit court's decision to impose such a sanction if, applying the applicable legal standard, there is a reasonable basis in the record to support the decision. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 276, 470 N.W.2d 859 (1991).

¶18 As both parties recognize, ***Evelyn C.R.*** lays important groundwork for the analysis in this case. In that case the parent in a TPR proceeding failed to

appear in person at a fact-finding hearing before a jury, although her counsel appeared. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶8. The circuit court managed to reach the parent by phone, and she insisted that the hearing be held before a jury. ***Id***. The court decided to release the jury panel and reschedule the fact-finding before a jury. ***Id***. The court issued an oral and written order to the parent to appear in person on that date and at that time and at all future proceedings or face a potential default judgment. ***Id.*** The parent failed to appear in person at the rescheduled fact-finding, although her attorney appeared. ***Id***., ¶9. In response to the petitioner's motion for a default judgment, the parent's attorney objected but waived argument. ***Id.*** The court granted the motion for default, noting that the parent had been ordered to appear at 9:00 a.m. and it was then 9:40 a.m. ***Id***. Based on the petition, the court found that the ground of abandonment had been established and the parent was therefore unfit, and it scheduled a dispositional hearing. ***Id***. The parent did not appear in person at the dispositional hearing and the court proceeded to hear testimony. ***Id***., ¶10. Midway through the hearing, the parent appeared by telephone and was given the opportunity to be heard. ***Id***., ¶12. She gave a one-sentence explanation of why she had missed an earlier proceeding and said she had nothing else to say. ***Id***.

¶19 At the close of testimony, the circuit court in ***Evelyn C.R.*** first reaffirmed its ruling on default. ***Id***., ¶13. The court then stated that the parent had "repeatedly been in default," which the supreme court noted was apparently "a reference to the fact that [the parent] violated the circuit court order to appear in person not only by failing to appear in person at the second fact-finding hearing but also by failing to appear in person at the dispositional hearing." ***Id***., ¶13 n.4. The circuit court in ***Evelyn C.R.*** also referred to its discharge of an entire jury panel so that the parent could appear in person. ***Id***., ¶13. The court reaffirmed

that there were grounds for termination based on abandonment and it concluded it was in the child's best interests to terminate parental rights. ***Id***.

¶20 The single issue on appeal in ***Evelyn C.R*** was whether the circuit court erred in entering a default judgment on the issue of abandonment without first taking evidence sufficient to support a finding of abandonment by clear and convincing evidence. ***Id***., ¶2. The supreme court concluded that this was error, but that the error was harmless because at the dispositional hearing, prior to reaffirming the default judgment and entering the order to terminate parental rights, the circuit court took evidence that was sufficient to support the finding of abandonment by clear and convincing evidence. ***Id***., ¶3.[4]

¶21 The parent in ***Evelyn C.R*** did not contest the circuit court's authority to enter a default judgment as a sanction for failure to comply with the order for personal appearance, nor did she contend that the circuit court had erroneously exercised its discretion in doing so. ***Id***., ¶16. However, in addressing the single issue she did raise, the supreme court began by discussing the circuit court's authority to enter a default judgment. The supreme court observed that WIS. STAT. § 806.02(5)[5] did not authorize the entry of a default judgment against the parent because that statute applied only if a defendant failed to appear at trial, and the parent "appeared" through her counsel. ***Id***., ¶17. But, the court continued, a

[4] Jessica does not argue that the circuit court here did not comply with the requirement for a default judgment imposed by the court in ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶16, 246 Wis. 2d 1, 629 N.W.2d 768—that the circuit court must take testimony sufficient to establish a ground for termination by clear and convincing evidence.

[5] WISCONSIN STAT. § 806.02(5) provides:

> **(5)** 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.

circuit court has inherent authority and statutory authority under WIS. STAT. §§ 802.10(7), 804.12(2)(a), and 805.03[6] to sanction a party for failure to obey court orders, and those sanctions include entering a default judgment. ***Id***. The court appeared to conclude that the conduct of the parent in this case justified the sanction of a default judgment, stating: "As [the parent] acknowledges, her violation of the order for personal appearance supplied the circuit court with adequate cause to sanction her by means of a default judgment." ***Id***., ¶26.

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[6] WISCONSIN STAT. § 802.10(7) provides:

> **(7)** SANCTIONS. Violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03.

WISCONSIN STAT. § 804.12(2)(a)1. and 2. provide:

> **(2)** FAILURE TO COMPLY WITH ORDER. (a) If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> 1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
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> 2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

WISCONSIN STAT. § 805.03 provides in part:

> **Failure to prosecute or comply with procedure statutes**. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or 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).

However the supreme court did not discuss this point in more detail because that was not the issue before it.

¶22 Like the parent in ***Evelyn C.R***, Jessica was ordered to appear for jury selection, and she did not appear but her counsel did. Thus, the statutory source for the court's authority to impose sanctions is WIS. STAT. § 805.03, and under that section the court may order such sanctions as are "just." In discussing what this means, the court in ***Johnson*** explained that the severe sanction of dismissal of a case is not "just" unless the party sanctioned has engaged in egregious conduct without a justifiable excuse or has acted in bad faith. ***Johnson***, 162 Wis. 2d at 275. The court clarified that a clear and justifiable excuse must be shown only if there is egregious conduct: a "nominal violation" would not support the severe sanction of a dismissal even if there were no showing of a clear and justifiable excuse. ***Id***. at 276. Conversely, even if the violation is egregious, it would be an erroneous exercise of discretion to dismiss the action if there were a clear and justifiable excuse. ***Id***. In making this clarification, the court referred to ***Trispel v. Haefer***, 89 Wis. 2d 725, 732, 279 N.W. 2d 242 (1979), as a proper use of the sanction of dismissal: the party there had failed to comply with a pretrial order to produce a medical report within a prescribed time and had not informed the court of any reason for that until the hearing on the motion to dismiss three months later. ***Johnson***, 162 Wis. 2d at 275-76. The court in ***Johnson*** concluded that the conduct in the case before it of repeated failures to comply with discovery orders was "substantial and egregious" and there was no justifiable excuse. ***Id***. at 277.

¶23 Both parties here appear to agree that the sanction of a default judgment is a severe sanction—like dismissal—and therefore the standard in ***Johnson*** applies. They dispute, however, how a circuit court may or must apply that standard, where, as here, the party ordered to appear does not appear and does

not provide any reason for not appearing. Jessica's position is that in these circumstances—at least in a TPR proceeding—the circuit court erroneously exercises its discretion if it enters a default judgment without permitting time for efforts to locate the parent, because the non-appearance in itself on one occasion is not egregious conduct. The State contends that the court need not defer a ruling on default and that the record in this case supports the conclusion of egregious conduct without a clear and justifiable excuse.

¶24 The cases the parties cite discuss the imposition of sanctions in the context of violations of discovery orders. The cases thus do not address whether and in what circumstances failure to appear as ordered for jury selection or other comparable proceedings is egregious conduct, nor how a court is to evaluate whether there are clear and justifiable reasons when the party does not appear and does not explain the non-appearance. For example, the language on which Jessica relies from ***Hudson Diesel, Inc. v. Kenall,*** 194 Wis. 2d 531, 543, 535 N.W.2d 65 (1995), to describe "egregious"—conduct "so extreme and persistent that it could be classified as egregious"—makes sense as a way of evaluating the violation of discovery orders, where one violation may not make dismissal "just" because of its nominal nature, but a number of them would. However, we do not agree with Jessica that when the order violated is for appearance at a jury selection that there must be repeated or persistent violations of orders to appear.

¶25 Turning to the record in this case, it is not disputed that Jessica was ordered orally and given a written order to appear on June 13 at 9:00 a.m. for the jury selection. It is also not disputed that she had not appeared by 9:27 a.m. on that date and had not contacted either the court or her attorney to explain her absence; and there is no evidence that she later provided an explanation. The facts

before the court from her attorney were that he had had no contact with her for over four months—since she had been released from jail.

¶26 Jessica suggests that the evidence from the social worker concerning Jessica's homelessness after she was released from jail might make her conduct not egregious or might provide a justifiable excuse for her failure to appear. However, while homelessness might explain losing the written order and thus forgetting the date, it does not explain forgetting that she had a jury trial—which she had requested—concerning her parental rights to her child, nor does it explain failing to call either the court or her attorney to find out the date. Even if one were to assume that Jessica did not remember her attorney's name, the record shows that she knew he was appointed by the Public Defender's office and knew how to contact that office.

¶27 We are satisfied that on this record the court could reasonably conclude that Jessica's failure to appear as ordered for the jury selection without explanation was egregious conduct. Jury selection in a case involving the parental rights to one's child is a significant proceeding and the failure to appear as ordered without contacting one's attorney or the court to explain the absence is a serious disregard of the court's authority. We are also satisfied that the court could reasonably conclude that the record does not show a clear and justifiable excuse. We recognize that the court in this case did not use the terms "egregious conduct" or "justifiable excuse," but we are persuaded from the record that the court was convinced that Jessica's conduct was egregious and without justifiable excuse. *See* ***Brandon Apparel Group, Inc. v. Pearson Props., Ltd.***, 2001 WI App 205, ¶11, 247 Wis. 2d 521, 634 N.W.2d 544 (A circuit court may find that a party acted in bad faith as long as it is clear from the record that the court was convinced of the party's bad faith, even though the court did not use the words "bad faith.").

¶28 We agree with Jessica that the fact that this is a TPR proceeding is relevant to the proper exercise of the court's discretion in deciding whether to grant a default because "'parental termination decrees are among the most severe forms of state action.'" ***Evelyn C.R.***, 246 Wis. 2d 1, ¶20 (citations omitted). However, it is also true that the legislature has decided that promptness in resolving TPR petitions is an important public policy. This is expressed in the prescribed time requirements for each stage of the proceedings. *See, e.g.*, WIS. STAT. § 48.422(1) (court must hold hearing within thirty days after the petition is filed); § 48.422(2) (court must hold a fact-finding hearing within forty-five days of the hearing if the petition is contested). The legislature's concern with promptness is also expressed in the requirement that the court must find good cause on the record in each instance that these time limits are not adhered to. *See* WIS. STAT. § 48.315(2). Jessica's argument that the court should have continued proceedings to allow efforts to find her overlooks this good cause requirement. It may be that if there were evidence before the court indicating that Jessica could be located within a short period of time, or if her attorney had provided any information indicating that he had expected her to be there and or had recent information that she intended to appear, there would be good cause for a continuance and the proper exercise of discretion would require deferring a ruling on default. However, all the information the circuit court had before it—at the time it made its initial ruling and, even more, when it reaffirmed that ruling after the social worker testified—reasonably indicated that Jessica had intentionally not been in touch with anyone connected with this proceeding for some time and would not be easy to locate. Based on this record, we cannot conclude that the court acted unreasonably in granting the default motion without providing an opportunity for someone to try to locate her.

¶29 Because we conclude that the court properly exercised its discretion in imposing the sanction of a default, we affirm.

By the Court.—Order affirmed.

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