COURT OF APPEALS
DECISION
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June 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-0935
02-0936

Cir. Ct. Nos. 01 TP 48
01 TP 49

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 02-0935
CIR. CT. NO. 01 TP 48

IN RE THE TERMINATION OF PARENTAL RIGHTS TO FREDERICK A.N., JR., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

FREDERICK N.,

RESPONDENT-APPELLANT.

NO. 02-0936
CIR. CT. NO. 01 TP 49

IN RE THE TERMINATION OF PARENTAL RIGHTS TO QUEEN A.M.N., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

FREDERICK N.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Reversed*.

¶1 FINE, J. Frederick N., Sr., appeals from an order terminating his parental rights to Frederick A.N., Jr., and Queen Adella Marie N., entered on the trial court's finding that he was in default.[1] We reverse.

I.

¶2 On January 30, 2001, the State of Wisconsin filed a petition to terminate the parental rights of the birth parents of five children, including Mr. N.'s children, Frederick A.N., Jr., and Queen Adella Marie N. Mr. N. appeared on the first court date, February 20, 2001. He also appeared on the second court date, the

[1] Mr. N.'s notice of appeal mistakenly refers to a "default judgment entered on October 2, 2001," which was the date the trial court found Mr. N. in default. It also references a trial court "order" of November 8, 2001, which was the date the trial court denied Mr. N.'s motion seeking relief from the trial court's finding that he was in default. There are, however, no written orders of either October 2, 2001, or of November 8, 2001, in the record. The only order material to this appeal is the trial court's order of December 14, 2001, terminating Mr. N.'s parental rights. Nevertheless, Mr. N.'s notice of intent to seek appellate relief was timely under, and complied with, WIS. STAT. § 808.04(7m) and RULE 809.107(2) & (5). Accordingly, we construe Mr. N.'s notice of appeal to be from the trial court's order of December 14, 2001, terminating his parental rights to his children.

plea hearing, on March 19, 2001, at which time he asked for a jury trial. At each of these appearances, Mr. N. appeared with his lawyer. Mr. N. also appeared with his lawyer on the next three court dates, April 17, 2001, May 16, 2001, and June 13, 2001. At the latter date, the trial court set October 2, 2001, for a final pretrial hearing, and warned the parties, including Mr. N., that they "must appear at every court case. If you fail to appear, the Court will find you in default and will move on with the case."

¶3 Mr. N. did not personally appear on October 2, 2001, but his lawyer was present. The State asked that Mr. N. be found in default. There was then the following colloquy:

> THE COURT: Unless the attorneys for the parents have any excuse to offer for their clients nonappearing today, the Court did order them to be present at all court dates, otherwise they run the risk of being found in default.
>
> [Mr. N.'s Lawyer]: Your Honor, on behalf of the father, as far as I know, he has -- he was compliant. I'd also ask how he wasn't compliant.
>
> THE COURT: I'm not concerned whether or not the parents are compliant. I have to -- I think we have to get over the hurdle of why they're not here today.
>
> [Mr. N.'s Lawyer]: He's made every court appearance on the TPR as long as the TPR was proceeding and there was a time when this case was running concurrent with the CHIPS case. He was also present for those hearings.

Mr. N.'s lawyer asked the court to stay any default finding until the next hearing date, which was to be the date set for trial. Alternatively, Mr. N.'s lawyer suggested that the trial court "stay [the default finding] to a time certain in the next ten days. I can bring him in, a walk-in or something along those lines." The trial court rejected the suggestions:

> THE COURT: I understand the dilemma you're in. That has not been my practice. My practice has been especially when I forewarn parents and advise them of the consequences of not appearing in court, I default them and we move on. I don't give a second chance to people who have failed to appear.

Mr. N. appeared before the trial court on November 5, 2001, and asked that the trial court vacate the finding of default. The trial court told Mr. N.'s lawyer that it was not inclined to vacate the finding of default unless Mr. N. agreed to voluntarily terminate his parental rights to his children:

> THE COURT: [I]f you want to present information to the Court as to why the default finding [should be vacated], and we can have a hearing as to whether or not the default, should be lifted. I think I said that I would not lift the default but I would lift it if the parents want to consider doing a voluntary understanding that a voluntary [termination of parental rights] might effect [*sic*] any children that they may have in the future.
>
> [Mr. N.'s Lawyer]: Right.
>
> THE COURT: But it's not my way of saying now this is the only way that I will remove a default. That's not what I'm saying but if they want to go through with a voluntary [termination of parental rights], as a courtesy to them, I will remove the default finding from the record or vacate the default finding, otherwise, I believe the default should stand short of any other information.

¶4 On November 8, 2001, the trial court held a hearing on whether to vacate its finding of default. Mr. N. testified, and told the trial court that although he was in court at the June 13, 2001, hearing, when the October 2, 2001, pretrial hearing was set, neither his lawyer nor his social worker had reminded him of the dates for the pretrial hearing and for the trial, which was also set that day, even though they had reminded him of the earlier dates. He explained that the date "somehow they got lost or something." He denied being given a slip of paper by the bailiff with the dates on it. He admitted that he never called his lawyer even

though not having his parental rights to his children terminated was "very important to me."

¶5 The trial court declined to vacate its finding of default:

> I didn't hear any rational reason for his nonappearance on October 2nd. And if the Court is to have any credence in what it says, it has to follow through. And unreasonable as it might seem -- and I'm not saying it's unreasonable -- but unreasonable as it might seem, if someone tells you if you don't show up to court, you very well could lose your rights to your children.... I think Mr. N[.] could have made [a] better effort at finding out when the next court date was. And, frankly, I have to even assume that if no one had told him that he missed the October 6th [*sic*] date, he wouldn't have made the trial date. He made no effort to find out about the trial date either[,] because he lost those two dates. So, he would not have been here on the trial date had not [the social worker] called him up and said, You know what or wrote to him or whatever she did, talked to him, whatever she did and said, You know what? You missed a date. So, default will stand as to Mr. [N.].

II.

¶6 The rules of civil procedure apply in termination-of-parental-rights cases. ***Door County Dep't of Health and Family Servs. v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167, 170 (Ct. App. 1999). Under WIS. STAT. RULE 805.03, and RULE 804.12(2)(a), incorporated in RULE 805.03 by reference, a trial court may grant default judgment if a party does not "obey an order" of the court. Whether to grant a default judgment against a party is a matter that is within the trial court's discretion. ***Midwest Developers v. Goma Corp.***, 121 Wis. 2d 632, 650, 360 N.W.2d 554, 563 (Ct. App. 1984). Failure to comply with the trial court's order must, however, be "egregious." ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 275–276, 470 N.W.2d 859, 864 (1991); ***Schneller v. St. Mary's Hosp.***, 162 Wis. 2d 296, 311, 470 N.W.2d 873, 878–879 (1991). Thus, we have

concluded that "the extreme sanction of dismissal or default judgment may not be imposed for mere nonappearance, in the absence of a showing of bad faith or egregious conduct." ***Schneider v. Ruch***, 146 Wis. 2d 701, 706, 431 N.W.2d 756, 758 (Ct. App. 1988) (adopting rationale of federal cases).

¶7 Termination of parental rights is an "awesome" power vested in the State, and it should not be ordered without full and just cause. ***M.W. v. Monroe County Dep't of Human Servs.***, 116 Wis. 2d 432, 436, 342 N.W.2d 410, 412 (1984). It cannot be said on this record that Mr. N.'s one-time failure to appear at a pretrial *status* conference, when his lawyer *did* appear, given that Mr. N. did attend all prior court hearings, was "egregious" conduct warranting the severe sanction of severing his legal ties to his children by *default*, especially when the lawyer was fully empowered to make all decisions that needed to be made at that pretrial conference. Simply put, on this record, Mr. N. is entitled to his day in court.

By the Court.—Order reversed.

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