COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2002

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 No. 02-1811 **Cir. Ct. No. 01TP424**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

SHEILA M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 CURLEY, J.[1] Sheila M. appeals the order terminating her parental rights to her daughter, Emani, and the order denying her request to vacate the

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

termination of parental rights order. She contends the trial court's admonitions that she was required to attend all future hearings did not rise to the level of an order. Therefore, she argues, since she was never actually ordered to attend all subsequent hearings, the trial court erroneously exercised its discretion when, after she failed to attend the contested dispositional hearing, it granted the State's request for a default judgment. Because the trial court clearly ordered Sheila M. to attend all future hearings, and because she gave no clear and justifiable excuse for her failure to appear at the dispositional hearing, the trial court properly exercised its discretion when it decided to "strik[e] her contest posture" and denied her motion to vacate. Thus, this court affirms.

I. BACKGROUND.

¶2 Emani M. was born on May 11, 2000. Shortly before her birth, a CHIPS (child in need of protection or services) proceeding was started on her behalf because Sheila M. refused to follow through with her doctor's orders that she take various prescription drugs for her infectious disease, without which Emani was in danger of contracting, and because her sizable daily cocaine ingestion posed a danger to Emani. Several months after Emani's birth, she was placed in her current foster home where she has remained throughout her young life.

¶3 After Sheila M. was unable to meet the conditions for the return of Emani to her care, a petition was filed requesting that Sheila M.'s parental rights to Emani be terminated. The petition claimed that Sheila M. had failed to assume parental responsibility for Emani pursuant to WIS. STAT. § 48.415(6) (1999-2000); that she had abandoned Emani pursuant to WIS. STAT. § 48.415(1)(a)3

(1999-2000); and that Emani was a child in need of continuing protection or services under WIS. STAT. § 48.415(2) (1999-2000).[2]

¶4 Sheila M. first appeared in court on November 6, 2001, at which time she contested the petition and requested an attorney. She was given information on how to contact the public defender's office and given a new date. As the proceeding was ending, the trial court advised her to reappear.

¶5 Sheila M. next appeared in court in late November 2001 with her attorney, at which time a jury trial date was set. At the conclusion of this hearing, the trial court again told Sheila M. that she must appear in court on the adjourned date.

¶6 At a pretrial conference set in late February 2002, Sheila M. stipulated that she had abandoned Emani, as alleged in the amended petition, and waived her right to a jury trial. However, she requested a dispositional hearing, which was set for March 27, 2002, at 1:30 p.m. On that date, although the case was set in the morning, it was not called until approximately 4:00 p.m. Several witnesses testified, but the case could not be concluded and was put over until April 19, 2002, at 10:00 a.m.

¶7 On April 19, 2002, Sheila M. failed to appear. Her attorney, after advising the court Sheila M. was aware of the hearing date, indicated he had not heard from her since the last court date as her phone was disconnected, and that he could proceed in her absence. The State moved for default judgment. The trial

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. Later the State amended the petition and added a charge of abandonment under WIS. STAT. § 48.415(1)(a) & (2).

court, after waiting approximately thirty minutes, granted the State's request, stating:

> Whatever may be the explanation there is no reasonable explanation before me now for her not only [ ] having failed to appear, for not maintaining contact with her lawyer, et cetera; a lot of people have stood on their heads throughout these proceedings, including today, getting read [sic] for this, being prepared for this. I have spent sometime reviewing the file, et cetera; so I – at this point as a sanction[] for having not followed this Court – this Court's order to appear and personally participate in all of these proceedings, I'm striking her contest posture.

¶8 Several weeks later, Sheila M. brought a motion to vacate the trial court's ruling. At a hearing held on her motion, Sheila M. admitted that she knew the correct date for the hearing, but that she thought it was a Thursday rather than the actual day of Friday. When asked why she did not then appear in court on Thursday, a day early, she replied that she did not know why. The trial court determined that Sheila M.'s failure to attend was not the result of excusable neglect and refused to vacate its earlier judgment.

II. ANALYSIS.

¶9 Sheila M. contends the trial court erroneously exercised its discretion when it entered a default judgment thirty minutes after she failed to appear at the dispositional hearing. Sheila first argues that she was never ordered to appear in court, because the warnings given to her did not constitute orders of the court. Alternatively, she maintains that if they were actually orders, then she did not receive a "fair and adequate warning of the penalties to be invoked for her failure to comply with those orders." This court disagrees.

¶10 As noted, Sheila was told on two separate occasions that she must come to court for all future hearings. After the first proceeding the trial court stated:

> THE COURT: I forgot to tell you, you need to reappear at the date [the clerk] just gave you. And you need to appear in a timely fashion and for each subsequently scheduled hearings [sic], because if you do not, there is a substantial likelihood that you will lose the right to litigate this matter. Okay?
>
> RESPONDENT MOTHER M.: Yes, sir.

On the second date, the trial court elaborated on its earlier message:

> THE COURT: I'm sorry. I told Ms. M at the last hearing you need to appear on March 6th at what time at –
>
> THE CLERK: At 8:30.
>
> THE COURT: March 6th at 8:30, and if you don't or don't appear in a timely fashion, it's highly likely you would lose your right to fight this petition, Miss [M.]. So it's very important that you be here. In the interim, you need to maintain contact with Mr. Bohach. Help him prepare your defense.
>
> One of the important things that is going to happen is that he's going to be required to respond to, on your behalf, to discovery requesting questions that they are going to pose to you, provisions of documents, et cetera, and you need to cooperate with Mr. Bohach in responding to those. Because if you don't comply with the discovery requests you can also lose your right to contest this litigation in that fashion.
>
> So I urge you to do all of those things and caution you that if you don't you could lose your right to fight this petition.

The trial court's order was simple and spoken in every day language. Sheila M. was also told of the possible consequences that could occur if she failed to comply. This too, was done in such a fashion that a person unfamiliar with the

court system could understand it. Additionally, Sheila M. told the court that she understood what the court was saying to her.

¶11 Sheila M., citing ***State v. Dickson***, 53 Wis. 2d 532, 541, 193 N.W.2d 17 (1972), claims that for a pronouncement to constitute an order, it must be an unequivocal direction. The trial court's statements amounted to unequivocal directions. After reading the trial court's statements, it is difficult to improve on the wording used by the court to inform Sheila M. both of the requirement that she must return to court for all future hearings and the consequences of her not returning. Thus, Sheila M. failed to comply with the trial court's order that she return to court for all future hearings.

¶12 Having concluded that the trial court ordered Sheila M. to attend all future hearings, this court next examines whether the trial court erroneously exercised its discretion in applying the sanction it did.

¶13 WISCONSIN STAT. § 804.12(2) authorizes a trial court to sanction a party in a number of ways when the party fails to follow a court's order. Relevant to this appeal, WIS. STAT. § 804.12(2) provides, in relevant part:

> **Failure to make discovery; sanctions.**
>
> **(2)** FAILURE TO COMPLY WITH ORDER.
>
> (a) If a party … fails to obey an order … made … 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:
>
> 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;
>
> 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;
>
> 3. An order striking 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;
>
> 4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical, mental or vocational examination.
>
> (b) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Sheila M. acknowledges the existence of the statute, but claims case law has modified its application.

¶14 Sheila M. first observes that in ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 470 N.W.2d 859 (1991), the supreme court opined that in electing to apply a severe sanction, the failure to comply with a trial court's order must be egregious. *See* ***id.*** at 276-77. She also points to ***Schneider v. Ruch***, 146 Wis. 2d 701, 431 N.W.2d 756 (Ct. App. 1988), for her belief 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." ***Id.*** at 706. Sheila M. argues that the trial court erroneously exercised its discretion in its ruling because her conduct was not egregious, nor did she fail to act in bad faith. Additionally, she argues that ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768, a termination of parental rights case, supports her

position that the trial court erroneously exercised its discretion in sanctioning Sheila M. "by striking her contest posture." This court disagrees.

¶15 Although the State and Sheila M. refer to the court's action as a "default judgment," this is not entirely accurate. WISCONSIN STAT. § 806.02(1) permits a default judgment where "no issue of law or fact" has been found. Sheila M. had previously stipulated to the State's contention that she had abandoned Emani pursuant to WIS. STAT. § 48.415(1)(a)3. Thus, as pointed out by the guardian ad litem, the trial court's decision to strike Sheila M.'s contest posture at the adjourned dispositional hearing was not technically a "default judgment" under WIS. STAT. § 804.12(2)(a)3. Rather, it could be characterized, pursuant to § 804.12(2)(a)3, as the trial court's refusal "to allow the disobedient party to … oppose [the] designated claim." Here, the State's claim being opposed was Sheila M.'s contention that terminating her parental rights was not in the best interest of Emani.

¶16 Moreover, even if one treats what occurred here as a sanction as severe as default judgment, the circumstances in the ***Johnson*** and ***Schneider*** cases cited by Sheila M. are quite distinguishable from those here. ***Johnson*** was a product liability suit where the trial court dismissed the action because the plaintiff failed to comply with scheduling and discovery orders. ***Johnson***, 162 Wis. 2d at 266. After the violations occurred, the plaintiffs had been warned and given ample time to comply, but they did not. *See* ***id.*** at 267-70. The supreme court affirmed the trial court's action and stated that the Johnsons gave no "clear and justifiable excuse" for their conduct. ***Id.*** at 273. In ***Schneider***, a wrongful conversion action, the trial court was reversed after granting judgment on the defendant's counterclaim when plaintiff's attorney failed to attend the pretrial conference. ***Schneider***, 146 Wis. 2d at 703. The supreme court stated that

entering default judgment "for counsel's sin of omission is too great a burden to visit upon the plaintiff." ***Id.*** at 707. Thus, in the first case, no reasonable excuse could be offered for disobeying the court's order, and in the second case, it was the attorney, not the party, who was principally responsible for the disregard of the court's order.

¶17 Here, Sheila M. is solely responsible for the violation. She gave no reasonable explanation why she failed to attend the hearing. As noted, she stated she thought the scheduled date was a Thursday, when in fact it was a Friday. Had she actually believed that her court date was on Thursday, then she should have arrived a day early and been told it was the next day. When asked for an explanation for her failure to come on the day she thought it was set, she could not give one. Thus, she gave no clear and justifiable excuse for her absence.

¶18 Further, ***Evelyn C.R.*** offers little help to Sheila M. The case observes that a termination of parental rights suit involves constitutional issues usually not found in civil actions:

> Although termination proceedings are civil proceedings, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that "[i]n order for parental rights to be terminated, the petitioner must show by clear and convincing evidence that the termination is appropriate."

Evelyn C.R., 247 Wis. 2d at 15-16 (citations omitted). Sheila M.'s contention that ***Evelyn C.R.*** completely banned the action taken by the trial court is not correct.

¶19 In ***Evelyn C.R.***, the supreme court reversed a trial court's entry of a default judgment finding *both* that grounds existed for the termination of the parental rights and that the child's best interest would be served by the termination. ***Id.*** at 6-7. In contrast, Sheila M. stipulated that grounds existed for

the termination and evidence presented supported that stipulation. ***Evelyn C.R.*** does not obligate the trial court to take testimony in the dispositional phrase, only during the first phase, when determining if grounds exist for the termination of rights. Thus, Sheila M.'s constitutional rights were not implicated as they were in ***Evelyn C.R***. Indeed, the ***Evelyn C.R.*** court stated as much:

> As [the mother] 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. However, this cause did not relieve the circuit court of its duty under the Fourteenth Amendment and Wis. Stat. Chapter 48 to take sufficient evidence – prior to finding [the mother] to be an unfit parent – to support a finding by clear and convincing evidence that [the mother] had abandoned [the child].

Id. at 18.

¶20 Further, during the dispositional phase, unlike the first phase, the best interests of the child become paramount. ***Id.*** at 17; *see also* WIS. STAT. § 48.426. Except for a four-month period after her birth, Emani had been in foster care all her life. She had an interest in the finality of the termination action in order to permit her adoption into a secure and stable environment. Thus, this court is satisfied that the trial court properly exercised its discretion in sanctioning Sheila M. when she failed to appear at the hearing and offered no reasonable excuse for her failure.

¶21 Based upon the foregoing reasons, the trial court's sanctioning of Sheila M. is affirmed.

By the Court.—Orders affirmed.

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