

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2003

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. 03-0079
STATE OF WISCONSIN**

Cir. Ct. No. 02TP000402

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
KIRRIA G., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

KAWANEE P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
KEVIN E. MARTENS, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Kawanee P. appeals from an order terminating her parental rights to Kirria G. Kawanee claims that the trial court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

erred when it granted the State's motion for default and entered judgment terminating her parental rights based on her failure to appear for court dates. She presents two bases for her argument: (1) the default judgment violated her due process rights because she did not receive proper notice of the motion for default and did not receive an adequate explanation of what "default" means; and (2) her failure to appear was not egregious and therefore did not warrant granting the default judgment terminating her parental rights. Because Kawanee's due process rights were not violated, and because her conduct satisfied the egregious standard, the trial court did not err in granting the State's motion for default. Accordingly, this court affirms.

I. BACKGROUND

¶2 On July 12, 1999, Kawanee gave birth to Kirria. Kirria was detained at the age of one month because she tested positive for cocaine at birth, Kawanee was abusing crack cocaine, and she did not have a stable residence. On November 15, 1999, Kirria was found to be a child in need of protection and services, and has remained outside Kawanee's home ever since.

¶3 On May 21, 2002, the State filed a petition to terminate Kawanee's parental rights on the grounds that Kawanee failed to assume parental responsibility and that Kirria continues to qualify as a child in need of protection and services. Kawanee appeared without counsel on June 24, 2002, for the initial appearance. She was informed of her right to counsel and advised that she must appear for all court dates or she would be found in default. In addition to telling Kawanee that she must appear, the court signed an Order to Appear, which warned Kawanee in writing that if she failed to appear at a court date, she may be found in default and that "[u]pon a finding of default, you will lose the right to contest this

matter, including your right to a jury trial.” The next hearing date was set for August 15, 2002. The court received a letter from the public defender’s office that Kawanee indicated she wanted to represent herself *pro se*.

¶4 On August 15, 2002, Kawanee failed to appear for her court date. She phoned the clerk to say that she was sick. The State moved for default judgment. The court took the motion under advisement, and ordered the State to provide notice of the next court date—September 5, 2002—to Kawanee. Kawanee appeared an hour late on September 5, stating that she had a flat tire and a dead cell phone. After some colloquy with the trial court, Kawanee indicated that she did want a public defender to represent her. The trial court set the next court date for September 27, 2002. The court instructed Kawanee to go to the public defender’s office immediately, and warned that her nonappearance at the next court date could result in a default judgment.

¶5 Kawanee failed to appear on September 27, 2002. A record was made by the court that the public defender had sent a letter to Kawanee indicating an attorney would be assigned to her case, but that a public defender could not appear on September 27 because of the public defender’s conference. The letter advised Kawanee that the public defender would ask the court for an adjournment, but that Kawanee must appear on September 27 or she could be found in default. Kawanee’s case manager, Lexi Groth, also testified that she had personally reminded Kawanee of the September 27 court date earlier in the week.

¶6 The State renewed its motion for default judgment. The court allowed the State to present its case for termination, which included testimony that Kawanee had failed to make sufficient progress within the prior three years towards satisfying the conditions required for the return of her child. The trial

court granted the default judgment and a written order for termination of Kawanee's parental rights to Kirria was signed by the court.

¶7 Kawanee filed a post-disposition motion to vacate the judgment and open the case. A hearing was set for November 13, 2002. Kawanee failed to appear for this hearing. The trial court denied the motion. Kawanee now appeals.

II. DISCUSSION

A. *Due Process.*

¶8 Kawanee contends that the order terminating her parental rights was entered without due process of law. She argues that she did not receive proper written notice of the default motion, and the notice she did receive was inadequate because it failed to give a good explanation of the meaning of default judgment. This court rejects her contentions.

¶9 The record reflects that Kawanee was provided with ample and repeated warnings that her failure to appear could result in default judgment. She was provided with notice via publication that if she failed to appear at the June 24, 2002 hearing, "an Order may be entered terminating your parental rights to the above named child." During that hearing, Kawanee was personally advised by the court that she must appear at all court dates. She was advised that if she did not appear, she could be found in default, which meant that the case would proceed without her. A written order was given warning her that a failure to appear could result in default, which would eliminate her right to contest the termination proceedings. Kawanee acknowledged receipt of this notice by her signature.

¶10 After August 15, 2002, Kawanee was again put on notice by publication that her failure to appear at the September 5, 2002 hearing could result

in an order terminating her parental rights. On September 5, she was orally warned by the court that failure to appear might result in her being found in default. Kawanee received written notice from the public defender's office that she must attend the September 27, 2002 hearing or the court might enter default judgment against her.

¶11 From this exposition, the record clearly demonstrates that Kawanee was given both oral and written notice that her failure to appear could result in default judgment and termination of her parental rights. Thus, her argument that due process was not complied with must be rejected. Not only was she provided sufficient due process, she was given chance after chance after chance.²

B. Egregious Conduct.

¶12 Kawanee also contends that the trial court erroneously exercised its discretion when it granted default judgment because her failure to appear did not constitute egregious conduct. This court disagrees.

¶13 This court reviews a trial court's decision regarding default judgments subject to the erroneous exercise of discretion standard. *Oostburg State Bank v. United Sav. & Loan Ass'n*, 130 Wis. 2d 4, 11-12, 386 N.W.2d 53 (1986). This court will affirm the trial court's ruling as long as the trial court considered the pertinent facts, applied the correct law, and reached a reasonable conclusion. *Id.* Here, the trial court's decision did not constitute an erroneous exercise of discretion.

² The parties also dispute the application of WIS. STAT. § 806.02(1). Based on our resolution of this case, it is not necessary to resolve the dispute. See *Gross v. Hoffman*, 227 Wis. 296, 300, 227 N.W. 663 (1938) (only dispositive issues need to be addressed).

¶14 Pursuant to WIS. STAT. §§ 805.03 and 804.12(2)(a) (2001-02)³ a trial court may grant default judgment if a party fails to obey an order of the court. The sanction of dismissal or judgment is drastic and, therefore, should only be imposed when a party's nonappearance constitutes egregious conduct or bad faith. *See Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 275-76, 470 N.W.2d 859 (1991).

¶15 The record in this case reflects that the trial court repeatedly admonished Kawanee about failing to appear or about being tardy. It entered an order instructing her that she must attend all court dates or her parental rights could be terminated. Kawanee was warned six times that her failure to appear could result in default judgment. Despite these warnings and admonishments from the court, Kawanee blatantly disregarded the court's orders. She failed to appear, feigned illness without ever providing documentation or any other explanation, and appeared extremely late. Her conduct was substantial and delayed this case beyond the time frame set for termination cases by the legislature. Her conduct was persistent and repeated. The trial court considered lesser sanctions twice by delaying a decision on default, recalling Kawanee's case when she arrived an hour late on September 5, 2002, and giving oral warnings. Kawanee's decision not to appear on September 27, 2002, in light of the history of this case, demonstrates the

³ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

egregiousness of her conduct. The trial court's decision to enter default after her repeated, blatant disrespect for the trial court was a reasonable decision.⁴

By the Court.—Order affirmed.

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

⁴ Kawanee makes a brief argument that she was denied her right to counsel. This court is not persuaded. The record reflects that Kawanee was advised of her right to counsel and initially refused the right. After speaking with the public defender's office, she decided to represent herself. At the court hearing following that decision, the court again impressed upon her the importance of allowing counsel to represent her. Kawanee then agreed to have counsel. Counsel specifically advised Kawanee that it could not appear for the September 27, 2002 court date, but that it was essential that Kawanee go to court for that hearing. Kawanee ignored counsel's advice and failed to go to court on September 27. She offered no explanation or excuse for such failure. Accordingly, Kawanee was not denied the right to counsel. She initially rejected the offer of counsel, and later refused to comply with counsel's instruction. She has no one to blame but herself. See *State v. Coleman*, 2002 WI App 100, ¶¶16-17, 253 Wis. 2d 693, 644 N.W.2d 283 (A litigant may forfeit the right to counsel by his/her conduct and may not use the right to frustrate the administration of justice.).

