COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0813 **Cir. Ct. No. 02-JC-000080**

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

IN THE INTEREST OF HEATHER M.A, A PERSON UNDER THE AGE OF 18:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

HEATHER M. A.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Heather M.A. appeals a default judgment declaring her to be a child in need of protection or services and the dispositional order

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

placing her outside her mother's home. Heather contends the circuit court lacked the authority to find her in default for her late appearance at her fact-finding hearing. She contends that default in a WIS. STAT. ch. 48 proceeding is only appropriate when the court has specifically ordered a child or parent to appear, but she was not so ordered. Although the court erroneously exercised its discretion by granting the County's motion for default judgment, the error was harmless. The judgment and order are therefore affirmed.

Background

¶2 Heather, who was fifteen and pregnant at the time of the petition, was alleged to be in need of protection or services because she was the victim of abuse under WIS. STAT. § 48.13(3), because she was at risk of becoming a victim of abuse under § 48.13(3m), or because her parents were unable to provide necessary care under § 48.13(10). Heather appeared at an initial hearing where the court ordered placement in her mother Bernadine's home. Heather also appeared with counsel at the plea hearing where she contested the petition. The court set the case for a fact-finding hearing.

¶3 Heather, her mother, and her brother[2] failed to appear at the hearing, although Heather's counsel appeared. Heather's father also appeared, and both he and counsel believed Heather planned to appear. Counsel stated she was prepared to proceed without Heather.

[2] Heather's brother Justin was also alleged to be in need of protection and services, and their adjudications and dispositions were apparently simultaneous. Justin's case is not, however, presently before this court.

¶4 The County moved for default judgment. Heather's counsel objected, reiterating that not only was she ready and able to proceed but also pointing out that Heather's absence might not be her fault. The court entered a default judgment finding Heather to be a child in need of protection or services under WIS. STAT. § 48.13. Heather and her mother eventually arrived after the hearing had been concluded.

¶5 At the dispositional hearing, Heather and her mother appeared, and Heather moved to vacate the default judgment. She argued that her absence was beyond her control and that she did not freely, voluntarily, or knowingly give up her right to a trial.

¶6 The court informed Heather that she had the right to a trial, but "That trial wouldn't take very long" because the County only had to prove she had been the victim of abuse. According to the law, the court informed her, someone under sixteen who has sexual intercourse is a victim of sexual abuse, but if Heather wanted to make the County prove she was under sixteen and a victim of abuse, the court would have a trial. It asked Heather directly if she wanted a trial, and she replied, "No." When the court then asked her "you want to just go ahead with this?" she replied, "Whatever."

¶7 The court denied the motion to vacate the default judgment, stating:

> I really think it was justified to find a default. … I understand that Heather has some lack of control over her ability to be here and not to be here. But that sort of is the point. There hasn't been proper supervision and attention paid.

The court proceeded with adjudication, issuing an order placing Heather with the Brown County Department of Social Services for one year, with physical placement in Marion House, a group home for teenage mothers. Heather appeals.

Discussion

¶8 The decision whether to enter a default judgment is a matter for the sound discretion of the trial court. ***In re Jayton S.***, 2001 WI 110, ¶18, 246 Wis. 2d 1, 629 N.W.2d 768. If the court has applied an incorrect legal standard in deciding whether to enter judgment, the court has erroneously exercised its discretion. ***Id.***

¶9 Heather first contends that the circuit court lacked authority to enter a default judgment. This is not true. WISCONSIN STAT. ch. 48 proceedings are civil in nature. The rules of civil procedure found in WIS. STAT. chs. 801-847 apply unless a different procedure is prescribed by statute or rule. WIS. STAT. § 801.01. Thus, WIS. STAT. § 806.02(5) grants the circuit court authority to enter a default judgment against a party who fails to appear for trial. WISCONSIN STAT. §§ 802.10(7), 804.12(2)(a), and 805.03 permit default judgments for failure to comply with court orders regarding the calendar, discovery, or prosecution of a case. *See also* ***Jayton S.***, 246 Wis. 2d 1, ¶17.

¶10 Heather's real complaint is that her behavior does not warrant a default judgment, not that the circuit court lacks authority to ever enter a default. Heather points out that she did not fail to appear because her attorney was present, so sanctions were unwarranted. We agree that Heather's appearance by counsel was sufficient. *See* ***id.*** Thus, it was error for the court to base a default judgment

on a finding that Heather had not appeared.[3] Heather asked the court to vacate its default judgment, but it declined, concluding that there was sufficient evidence to support the petition.[4]

¶11 Heather, however, argues otherwise. She contends that the court failed to take "clear and convincing evidence" sufficient to support the allegations of the CHIPS petition, that it was error for the court to say that her mother's behavior was "sort of … the point" because the conclusion was made without any evidence, and that she was deprived the right to contest whether she was "in need of protection or services which can be ordered by the court." These arguments are related and can be resolved together.

¶12 The prefatory section of WIS. STAT. § 48.13 states: "The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court …." In ***In re Courtney E.***, 184 Wis. 2d 592, 516 N.W.2d 422 (1994), the supreme court concluded, based on that statutory language, that a CHIPS petition must allege information that at least gives rise to a reasonable inference sufficient to establish probable cause that the child is in need of protection or services that the court can order. ***Id.*** at 595-96. A petition that fails to do so will be dismissed. ***Id.*** at 596.

¶13 Following this logic, we concluded in ***In re Gregory R.S.***, 2002 WI App 101, 253 Wis. 2d 563, 643 N.W.2d 890, that the petitioner must show by

[3] Appearance by counsel would not have sufficed had the court had directly ordered Heather to appear.

[4] Heather's responses to the trial court, *see* ¶6, might be considered a waiver of trial. Her counsel, however, contends her "Whatever" response reveals that any waiver was not knowing, intelligent, or voluntary. However, we need not reach this issue.

clear and convincing evidence that the child is in need of protection or services, independently of proving the substantive grounds alleged under any of the subsections of WIS. STAT. § 48.13. ***Id.***, ¶33.[5] The court must, however, determine whether the child is in need of services, even if the remainder of the petition's allegations are tried to a jury. WIS. STAT. § 48.31(4); ***Id.***, ¶35.

¶14 Heather does not dispute that there is "clear and convincing" evidence to support the part of the petition based on WIS. STAT. § 48.13(3)—that Heather was a victim of abuse.[6] This evidence, however, only supports the allegation of subsection (3), not the prefatory language. Therefore, it was error for the court to conclude that all necessary allegations in the petition had been satisfied. Nonetheless, the error is harmless because the court heard adequate evidence at the dispositional hearing.

¶15 In ***Jayton S.***, a termination of parental rights case, the supreme court concluded that the trial court erred by entering a default judgment against Jayton's mother terminating her parental rights without taking evidence sufficiently clear and convincing to support the TPR petition. ***Jayton S.***, 246 Wis. 2d 1 at ¶3. However, the court concluded that the circuit court remedied the error by hearing sufficient evidence at the dispositional hearing in support of the petition. ***Id.*** The same situation exists here.

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[5] The petitioner is not required to offer proof on specific services. For example, a psychologist need not testify regarding the possible treatments or counseling he or she might provide a child. ***In re Thomas F.***, 196 Wis. 2d 259, 268 n.6, 538 N.W.2d 568 (Ct. App. 1995).

[6] WISCONSIN STAT. § 48.13(3) regards a child who has been "the victim of abuse, as defined in s. 48.02 (1)(a), (b), (c), (d), (e) or (f) …." Abuse in § 48.02(1)(b) includes "Sexual intercourse or sexual contact under s. 940.225, 948.02 or 948.025." WISCONSIN STAT. § 948.02 defines second-degree sexual assault as sexual contact or sexual intercourse with a person who has not attained sixteen years of age.

¶16 At the dispositional hearing, Heather stipulated to use of the social worker's report in lieu of testimony by other witnesses.[7] This report contains clear and convincing evidence to support a conclusion that Heather is in need of protection and services that her mother cannot provide.[8]

¶17 The County offered Bernadine parenting and counseling services, as well as a specific list of what she could do to provide a safe environment for her children. Instead, Bernadine took her children—Heather, twelve-year-old Justin, and four-and-one-half-year-old Nakita—to Canada in a camper during the pendency of this case. When they ran out of money because improper paperwork prevented Bernadine from working, she returned to the United States with Heather and Nakita to shop with department store credit cards. Bernadine and the girls were prevented from reentering Canada, leaving Justin alone there. Bernadine admitted that she attempted to emigrate to Canada to try to avoid the court proceedings.

¶18 Heather had threatened to kill herself and her unborn child and smashed her head into a wall at Bernadine's home. Heather has a history of delinquency. Her boyfriend, in addition to being to charged with sexual assault for impregnating her, was incarcerated on charges of operating while intoxicated, resisting or obstructing an officer, reckless endangerment, and disorderly conduct.

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[7] Reports to the court are required to be filed before the dispositional hearing under WIS. STAT. § 48.33.

[8] Heather's father admitted to a basis for the petition and, in any event, admitted that he lacked the resources to adequately provide for her.

¶19 Bernadine reportedly allowed various adult males to reside in or visit the home any time of day or night, as well as allowing Heather to engage in inappropriate sexual behaviors in the home.[9] Moreover, the social worker determined the home was unsafe and extremely dirty.

¶20 Although Bernadine would have preferred Heather be placed with her, she supported Heather's placement at Marion House because she believed it would benefit Heather. She also believed she would benefit from Heather's placement because she thought Heather would learn structure, the importance of following rules, and how to help with household duties.

¶21 Given the totality of the circumstances, of Bernadine's behavior, the situations Bernadine tolerated and permitted, and the skills Bernadine evidently failed to employ or teach Heather, this court is satisfied that there is clear and convincing evidence from which the circuit court could have and would have found Heather to be in need of services that her mother was incapable of providing. Any error by entering a default judgment against Heather was therefore harmless.

By the Court.—Judgment and order affirmed.

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

[9] Heather denies that this activity took place in the home, and her denial is noted in the report.