

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 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. 03-1386
STATE OF WISCONSIN**

Cir. Ct. No. 02TP000610

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PATRICIA G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY M. WITKOWIAK, Judge. *Dismissed.*

¶1 SCHUDSON, J.¹ Patricia G. appeals from a circuit court order terminating her parental rights to Porcha B.G. She argues that, after finding her in default, the trial court erred in excusing her attorney and subsequently holding the fact-finding/dispositional hearing without counsel present to represent her. Patricia does not argue, however, that counsel's presence would have made any difference. Therefore, whether the court erred in excusing counsel is a moot issue. *See State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (“An issue is moot when its resolution will have no practical effect on the underlying controversy.”). Accordingly, this appeal is dismissed.

A. BACKGROUND

¶2 On August 12, 2002, the State petitioned for termination of Patricia's parental rights to Porcha. The petition alleged: (1) Patricia abandoned Porcha, *see* WIS. STAT. § 48.415(1)(a)(2) and (3); (2) Porcha continued to need protection or services from the court, *see* WIS. STAT. § 48.415(2); and (3) Patricia failed to meet the conditions established for Porcha's return to her home and it was substantially unlikely that she would meet them within twelve months.

¶3 The initial hearing on the State's petition to terminate Patricia's parental rights was scheduled for September 10, 2002. Without success, the State attempted to serve Patricia personally by certified and first class mail at two of her last known addresses. At the hearing, Ressie Jackson, a case manager at the Bureau of Milwaukee Child Welfare, notified the trial court that she had spoken to Patricia and told her of the hearing. Patricia, however, did not appear. The State

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

requested that the court take a default judgment under advisement and adjourn the case for forty-five days to provide enough time to accomplish service. The court did so and set the matter for October 28, 2002.

¶4 At the October 28 hearing, Patricia appeared in court and was advised of her rights, including the right to counsel, and she was referred to the State Public Defender's office. The court also notified Patricia: "[F]or each and every court appearance, you have to be here. The Court could strike your contest posture and find you in default if you don't show up for the hearings in this matter." The court then adjourned the case to November 27, 2002, for Patricia to obtain legal counsel.

¶5 At the November 27 hearing, Patricia's attorney appeared without her. He notified the court that a week earlier he had received a note at his office that Patricia had called and stated that she would not be able to appear in court on November 27 because she would be having surgery that day. He also said, however, that he had spoken to her on November 25 and that she stated she would be at the November 27 hearing. Ms. Jackson, the case manager, informed the court that she had also spoken to Patricia on November 25, that Patricia did not mention she was having surgery, and that she stated she would be in court as scheduled. Again the circuit court took a default judgment under advisement and instructed Patricia's attorney to produce some materials indicating why Patricia failed to appear. The case was rescheduled for December 13, 2002.

¶6 Patricia did not appear at the December 13 hearing and her attorney notified the court that, after the last court date, he sent a letter to her last known address stating that she must appear in court on December 13 and bring proof that she had been in the hospital on November 27. Because of her failure to appear for

two consecutive court dates and her failure to provide any explanation for her non-appearances, the State requested that the court strike Patricia's contest posture and permit it to prove the allegations in the petition. The court found Patricia in default, noting: "I did take [default] under advisement last time with the hope that [Patricia] would be here for this court appearance. The attorney hasn't received anything from [her], and she is nonresponsive." The Court subsequently excused Patricia's attorney from further participation in the proceedings and granted the State's request to prove the allegations in the petition. The Guardian ad Litem, however, requested that the hearing be set for another date as she did not have Porcha's file with her and was not prepared to proceed. The court scheduled the fact-finding/dispositional hearing for January 30, 2003.

¶7 At the January 30 hearing, the case manager testified as to the allegations in the petition. Based upon her testimony and the recommendation of the Guardian ad Litem, the trial court found grounds for termination and entered an order terminating Patricia's parental rights to Porcha.

B. DISCUSSION

¶8 Patricia admits that she violated the trial court's order to be present "for each and every court appearance," and she concedes the court had the authority to enter a default judgment against her. Patricia argues, however, that the trial court erred in excusing her attorney from further proceedings without her knowing and voluntary waiver. In her brief-in-chief, Patricia appears to be arguing that the trial court erred in entering a default judgment prior to hearing evidence to support the TPR petition. But in her reply brief, Patricia clarifies that she is not arguing that the trial court prematurely entered the default judgment; instead, she states that her sole argument is that the trial court "should not have

held the fact[-]finding/dispositional hearing without counsel being present to represent her.”

¶9 In Wisconsin, parents have a statutory right to counsel in termination of parental rights proceedings. WIS. STAT. § 48.23(2). Section 48.23(2) provides, in relevant part:

(2) RIGHT OF PARENTS TO COUNSEL ... If a proceeding involves a contested adoption or the involuntary termination of parental rights, any parent 18 years old or older who appears before the court shall be represented by counsel, *but the parent may waive counsel provided the court is satisfied such waiver is knowing and voluntarily made.*

WIS. STAT. § 48.23(2) (emphasis added). Patricia concedes that she was afforded her right to counsel. She argues, however, that her default did not terminate her right to counsel because her non-appearance did not constitute a knowing and voluntary waiver of representation. She contends, “Where the right to counsel has attached and has not been waived, requiring counsel for parents at all termination proceedings, even where the parent has been found in default, follows the dictates of the statute and serves to protect against erroneous decisions.”

¶10 Significantly, Patricia fails to contend that the absence of counsel from the final hearing made any difference. She does not argue that the trial court’s order terminating her parental rights was erroneous in any way. She does not assert, for example, that she did not appear at the fact-finding/dispositional hearing because she was unaware of the court date due to her attorney’s absence and, further, that she, together with counsel, would have presented evidence that could have altered the outcome. Instead, she simply seeks new hearings, with counsel, based on what she hopes will be this court’s rejection of the trial court’s decision to excuse counsel.

¶11 As we recently reiterated: “An issue is moot when its resolution will have no practical effect on the underlying controversy. In other words, a moot question is one which circumstances have rendered purely academic. Generally, moot issues will not be considered by an appellate court.” *Olson*, 233 Wis. App. 685, ¶3 (citations omitted). Still, “there are exceptions to the rule of dismissal for mootness.” *Id.* We explained:

We will consider a moot point if “the issue has great public importance, a statute’s constitutionality is involved, or a decision is needed to guide the trial courts.” Furthermore, we take up moot questions where the issue is “likely of repetition and yet evades review” because the situation involved is one that typically is resolved before completion of the appellate process.

Id. (citations omitted). Here, no such exception applies.

¶12 The constitutionality of the statute involved in Patricia’s argument is not at issue. *See id.* The issue is not one that would necessarily or typically evade review before completion of the appellate process. *See id.* And, given the unique nature of the underlying controversy, our determination of this issue would not necessarily address any issue of recurring great public importance or provide needed guidance to the trial courts. *See id.*

¶13 Even if Patricia is correct in contending that the trial court erred in excusing counsel (and we agree that the more prudent practice would be to decline the attorney’s request to be excused, adjourn for disposition and, to be on the safe side, have the attorney try to contact Patricia and have her appear at the next hearing or, at the very least, report back on efforts to contact her), the error was of no consequence. The fact remains that Patricia did not appear at the scheduled hearings and, as this court noted, she does not contend that her failure to appear for disposition resulted from any denial of representation or that the trial court’s

order terminating her parental rights was erroneous. Accordingly, “the rule of dismissal for mootness” requires this court to dismiss this appeal. *See id.*

¶14 This is an expedited appeal under WIS. STAT. RULE 809.17.

By the Court.—Appeal dismissed.

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

