COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2925 **Cir. Ct. No. 03TP000017**

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

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

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

LAKISHA G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, J.[1] Lakisha G. appeals from a trial court order terminating her parental rights to her daughter, Iyanna G. The order followed the

[1] This opinion 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.

trial court's grant of a default judgment against Lakisha as to the grounds for the termination based on her failure to appear at a continued initial appearance on the termination of parental rights (TPR) petition. Lakisha argues that the trial court erred in ordering the default judgment because she appeared at the continued hearing by her counsel. As such, Lakisha contends that the court further erred by denying her motion to reopen the matter and vacate the judgment under WIS. STAT. § 806.07. We agree with Lakisha. We reverse the order terminating Lakisha's parental rights and remand for further proceedings on the TPR petition.

BACKGROUND

¶2 This case has a long and tortured history. On March 11, 2003, the Racine County Human Services Department (Department) filed a petition for the termination of the parental rights of Lakisha G. and Antonio L., to their daughter, Iyanna, on grounds of continuing need of protection and services and failure to assume parental responsibility. An original summons directed Lakisha and Antonio to appear in response to the petition on April 19, 2003. However, an amended summons advanced the hearing date to April 9, 2003. On April 3, 2003, the Department filed a court report for purposes of the April 9 hearing documenting the alleged facts underlying its TPR petition.

¶3 On April 9, 2003, both Lakisha and Antonio appeared pursuant to the amended summons. Lakisha appeared with her counsel, Attorney Nathan Opland-Dobs of the public defender's office. Antonio appeared without counsel. Opland-Dobs explained that Lakisha had first contacted the public defender's office the day before, and he requested an adjournment of the initial appearance. Antonio also indicated a desire for an adjournment in order to obtain an attorney. The trial court agreed to adjourn the case until the following week and instructed

Antonio to immediately contact the public defender's officer. The clerk then stated that the adjourned hearing date was April 16 at 8:30 a.m.[2]

¶4 Neither Lakisha nor Antonio appeared at the April 16, 2003 hearing. However, Opland-Dobs appeared on Lakisha's behalf. The following exchange took place:

> [State]: Last Wednesday, [April] 9th, [the matter] was in front of your Honor for the initial appearance TPR petition. At that time Attorney Martinez did file the affidavits. Both parents were present at that time….
>
> Neither one of the parents is here today. Both did have actual notice of the hearing today. I would ask the Court to find them both in default and would like to proceed to phase two.
>
> [Opland-Dobs]: Your Honor, I don't think that's appropriate at this point. Just speaking for Lakisha [G.], she was here last week. She had gone to the public defender's office before.
>
> [Court]: Where is she today?
>
> [Opland-Dobs]: I don't know, your Honor. She has given me every indication that she has the intention of fighting this. I'm asking for an adjournment until next week.
>
> [Court]: She has to show up to fight it, Counsel, and we're not going to sit around and wait for her.
>
> [Opland-Dobs]: I'm asking for another chance to contact [her] and bring her in. I do have a current address and phone number for her.
>
> [Court]: That's fine. I'm going to enter an order in default on both of the parents to this day and find there is sufficient

[2] On April 11, 2003, the public defender entered a formal order appointing Opland-Dobs as Lakisha's attorney. The notice said, in part, "Note to Client: Please call your attorney upon receipt of this notice;" and indicated a date for a "status" hearing of April 16, 2003, at 8:30 a.m.

> finding for phase one here.[3] We'll adjourn this until next Tuesday for the rest of it….
>
> ….
>
> [Opland-Dobs]: Default is held off until?
>
> [Court]: No, the default is today, but I'm putting it over until Tuesday so you have a chance to reopen it. See what you want to do if you can turn her up.

The trial court then scheduled a hearing for the following Tuesday, April 22, at 8:30 a.m.

¶5 At the April 22, 2003 hearing, neither Lakisha nor her attorney appeared at the 8:30 hearing. Nor did Antonio appear. The State requested that the trial court proceed to phase two of the TPR proceedings and produced Iyanna's case manager, Jean Fenelon, as a witness to testify to the grounds for the TPR petition. The court also noted a letter from Iyanna's guardian ad litem indicating that termination would be in Iyanna's best interest. The court then found:

> [T]his termination is in the best interests of the child, because there is a great likelihood that the foster parents who have been with this child for most of its life shall, in fact, wish to adopt this child. There is no substantial relationship with either of the parents. Obviously the child is bonded with these … foster parents. And it would be in the best interests of the child that the termination of parental rights be granted, and I will grant it.

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[3] Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights. In the first, or "grounds" phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, ___ Wis. 2d ___, 678 N.W.2d 856. A finding of parental unfitness is a necessary prerequisite to termination of parental rights, but a finding of unfitness does not necessitate that parental rights be terminated. Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount. ***Id***., ¶26. "At the dispositional phase, the court is called upon to decide whether it is in the best interest of the child that the parent's rights be permanently extinguished. WIS. STAT. § 48.426(2)." ***Steven V.***, 678 N.W.2d 856, ¶28.

The court transferred guardianship of Iyanna to the state. Lakisha arrived for the hearing at approximately 10:00 a.m.

¶6 On April 30, 2003, Attorney Opland-Dobs filed a motion to reopen and vacate the default judgment on grounds that (1) it was entered after Lakisha failed to appear at the April 16, 2003 status hearing, (2) Lakisha never had a proper and full due process hearing in the matter, and (3) Lakisha desired the opportunity to contest the termination. The motion indicated a hearing date of May 8, 2003, at 8:30 a.m.

¶7 Both Lakisha and Opland-Dobs appeared at the May 8, 2003 hearing. Antonio also appeared, again unrepresented. Opland-Dobs requested the trial court to reopen the default judgment entered on April 16, 2003, which Lakisha missed because "she's very young … [s]cared and confused." The State opposed the motion arguing that Lakisha could not meet the requirements of WIS. STAT. § 806.07, emphasizing the intent of WIS. STAT. ch. 48 to promote the placement of children in safe and stable environments. Turning to Antonio, the father, the court ascertained that he objected to the termination of his parental rights, that an attorney had been appointed for him, but he had not yet met with the attorney. Without further addressing Lakisha's motion to reopen, the court adjourned the hearing for a two-week period so that Antonio's appointed attorney could make an appearance. The court also requested briefs on the question of Lakisha's request for relief under § 806.07.

¶8 On May 29, 2003, the trial court conducted a further hearing on Lakisha's motion. Lakisha appeared on time for the hearing; however, Opland-Dobs was detained in the courthouse on other matters. After waiting one-half hour for Opland-Dobs, the court adjourned the matter again until June 4, 2003, and

advised Lakisha to request an attorney from the public defender's office who would "show up" at her proceedings. Opland-Dobs appeared at the adjourned hearing but Lakisha did not appear. The court denied Opland-Dobs' request to be heard on the motion to reopen despite Lakisha's absence.

¶9 On October 29, 2003, Lakisha, represented by new counsel, Attorney Thomas K. Voss, filed a notice of appeal. Later, Voss moved for summary reversal or, in the alternative, for a remand to allow Lakisha to renew her motion for relief from the default judgment and additionally to proceed on a claim of ineffective assistance of trial counsel. We denied the motion for summary reversal, but granted the alternative request for a remand to allow the trial court to address Lakisha's claim of ineffective assistance of trial counsel. In the interim, we retained jurisdiction over this appeal.

¶10 Following our remand, Lakisha filed a further motion seeking relief from the judgment and order pursuant to WIS. STAT. § 806.07 and also alleging ineffective assistance of trial counsel. The trial court held a hearing on February 20, 2004, at which both Lakisha and Opland-Dobs testified. Following the hearing, the court issued an oral decision on March 24, 2004, denying Lakisha's motion. The trial court found that Opland-Dobs' performance had not been deficient and that the outcome of the proceedings would have been the same even if his representation had been ineffective. The court said, "[w]hat led to the result that happened was [Lakisha] caused it for herself by not appearing, not cooperating, and not doing what she should." The court additionally confirmed its earlier finding that the termination of Lakisha's parental rights was in Iyanna's best interests.

¶11 Lakisha appeals.

DISCUSSION

¶12 On appeal, Lakisha renews her trial court arguments. First, she contends that the trial court erred as a matter of law in entering a default judgment as to the grounds for termination of her parental rights based on her failure to appear at the April 16, 2003 continued initial appearance hearing. Lakisha contends that she was not in default because her attorney appeared at the hearing. As such, Lakisha argues that she was denied her constitutional right to a fact-finding hearing as to the grounds for termination of her parental rights. Second, Lakisha argues that Opland-Dobs was ineffective.

¶13 Although we have set out the full procedural history of this case, our resolution of this appeal begins and ends with the proceedings relating to the initial appearance phase of the case when the trial court entered a default judgment against Lakisha as to the grounds for termination of her parental rights. As noted, the court entered the default judgment based upon Lakisha's failure to personally appear at the continued initial appearance hearing.

¶14 The decision whether to enter a default judgment is a matter within the sound discretion of the circuit court. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶18, 246 Wis. 2d 1, 629 N.W.2d 768. But where a circuit court has applied an incorrect legal standard in deciding whether to enter judgment, the court has erroneously exercised its discretion. ***Id***. In such a circumstance, this court may reverse the circuit court's discretionary decision. ***Id***.

¶15 Lakisha requested relief before the trial court under WIS. STAT. § 806.07 which provides:

> **(1)** On motion and upon such terms as are just, the court … may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

¶16 The procedure for the termination of parental rights is set forth in WIS. STAT. ch. 48. WISCONSIN STAT. § 48.422(1) governs the initial hearing on the petition. It provides, "The hearing on the petition to terminate parental rights shall be held within 30 days after the petition is filed. At the hearing on the petition to terminate parental rights *the court shall determine whether any party wishes to contest the petition* and inform the parties of their rights." Sec. 48.422(1) (emphasis added). Under subsec. (2), "If the petition is contested the court shall set a date for a fact-finding hearing to be held within 45 days of the hearing on the petition, unless all of the necessary parties agree to commence with the hearing on the merits immediately."

¶17 At the initial appearance on April 9, 2003, Lakisha appeared in person and with Opland-Dobs, her attorney. Opland-Dobs requested an

adjournment of the initial appearance because Lakisha had first consulted the public defender's office the day before. In addition, Antonio advised the court that he wished an opportunity to consult with an attorney. Therefore, the trial court properly adjourned the initial appearance for one week, at which time the court would presumably satisfy the requisites of WIS. STAT. § 48.422(1) by determining whether either parent wished to contest the petition.

¶18 At the adjourned hearing on April 16, 2003, Lakisha did not personally appear. However, Opland-Dobs did appear on her behalf. Based on Lakisha's absence, the Department requested a default judgment as to the grounds for termination alleged in the petition. Opland-Dobs responded, in part, "Your Honor, I don't think that's appropriate at this point." In addition, Opland-Dobs stated, "She has given me every indication that she has the intention of fighting this." Nonetheless, the trial court granted the State's request for a default judgment.

¶19 Pursuant to WIS. STAT. § 48.422(2), once the trial court learned that Lakisha intended to contest the petition, the court was required to set a date for a fact-finding hearing unless all of the necessary parties agreed to commence with a hearing on the merits immediately. Instead, the court proceeded to the fact-finding phase of the TPR over the objection of Lakisha's attorney and entered a default judgment without making any findings as to the grounds for termination. *See* ***Evenlyn C.R.***, 246 Wis. 2d 1, ¶24 (prior to entering a default judgment as a sanction for failing to appear in person at a fact-finding hearing, a trial court must take evidence upon which to base a finding that the grounds for termination have been satisfied by clear and convincing evidence). Thus, the court's entry of a default judgment at the continued initial appearance is not supported by the law.

¶20 The Department contends that the trial court was entitled to enter a default judgment at the continued initial appearance because Lakisha had actual notice of the hearing. However, as the Department correctly points out, the rules of civil procedure apply to TPR proceedings. *See* ***Door County DHFS v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999). As such, absent an order to the contrary, Lakisha was permitted to appear by her attorney. *See, e.g.*, ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17 (noting that although the parent was not physically present at a fact-finding hearing, she nevertheless "appeared" at the hearing via counsel).[4]

¶21 This same reasoning dooms the Department's further argument that Lakisha has not met her burden of proof under WIS. STAT. § 806.07 to obtain relief from judgment because she failed to demonstrate a good reason for missing the April 16, 2002 hearing. As noted, the trial court did not specifically order Lakisha to appear at the adjourned initial appearance, and her attorney was entitled to appear for her and to register her opposition to the TPR petition.

¶22 In summary, where a circuit court does not have the statutory authority to enter judgment, the judgment is void and the subject of the judgment is entitled to relief under WIS. STAT. § 806.07(1)(d). We therefore conclude that Lakisha was entitled to relief from the default judgment.

[4] Therefore, the trial court's entry of the default judgment cannot be considered a sanction. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768 ("[A] circuit court has both inherent authority and statutory authority under WIS. STAT. §§ 802.10(7), 804.12(2)(a), and 805.03 to sanction parties for failing to obey court orders." (Footnotes omitted.)).

¶23 In reaching this decision, we are mindful of two things. First, both Lakisha and Opland-Dobs treated the trial court with disrespect by failing to appear at various proceedings, thereby frustrating the orderly progression of this case. However, all of these failings occurred *after* the court had entered the default judgment. To the point of the default judgment, Lakisha and Opland-Dobs were in full compliance with the law. Thus, the judicial error in this case was not prompted by the later transgressions of Lakisha and Opland-Dobs.

¶24 Second, we are well aware that the intent of WIS. STAT. ch. 48 is to promote the best interests of the child and "[t]o promote the adoption of children into safe and stable families rather than allowing children to remain in the impermanence of foster or treatment foster care." *See* WIS. STAT. § 48.01(1)(gg). As such, we are loath to reverse the judgment and order. However, we are also aware that a parent has a constitutionally protected right to the care, custody and management of his or her child. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶22, ___ Wis. 2d ___, 678 N.W.2d 856. The promotion of the adoption of children must occur within the confines of the procedure for terminating those parental rights as set forth in WIS. STAT. ch. 48, subch. VIII.

¶25 This case misfired at its very inception when the trial court erroneously entered a default judgment at the initial appearance stage of the proceedings. Unfortunately, that error tainted all ensuing proceedings. We have no choice but to reverse the order and to remand for further proceedings on the TPR petition.

CONCLUSION

¶26 We conclude that the trial court erroneously exercised its discretion when it entered a default judgment at a continued initial appearance. The entry of

the default judgment was based on an incorrect legal standard and is void as a matter of law. We therefore reverse the order for the termination of Lakisha's parental rights on this limited basis.[5]

By the Court.—Order reversed and cause remanded.

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

[5] Based on our conclusion, we need not address Lakisha's further challenge to the trial court's determination that her trial counsel provided effective representation. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (court need address only dispositive issues).