COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1493-W **Cir. Ct. No. 03-TP-40**

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

STATE OF WISCONSIN EX REL. JOANNE M.N.,

PETITIONER,

V.

EAU CLAIRE COUNTY DEPARTMENT OF HUMAN SERVICES,

RESPONDENT.

PETITION for writ of habeas corpus. *Writ granted and cause remanded with directions.*

¶1 HOOVER, P.J.[1] By way of a petition for a writ of habeas corpus, JoAnne M.N. seeks review of an order terminating her parental rights to her son, Mitchell N.[2] She argues the court erred by entering a default judgment against her

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[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.

[2] The order was of the circuit court for Eau Claire County, William M. Gabler, J.

when she failed to appear for the hearing on the petition to terminate her rights. She contends she was present by her attorney even if she herself was not present. We agree and reverse the order and remand for a new hearing.

BACKGROUND

¶2 On August 29, 2002, Mitchell was placed in the home of his aunt and uncle, Patricia and Tony F. Mitchell was found to be a child in need of protection or services on October 29, 2002.

¶3 On October 10, 2003, the County filed a petition seeking termination of JoAnne's parental rights, alleging abandonment and continuing need for protection or services.[3] The county sheriff personally served JoAnne with a summons, copy of the petition and notice of the hearing at the Eau Claire county jail.

¶4 Although JoAnne was indigent, she never completed paperwork for a court-appointed attorney, so one was not appointed. Nevertheless, by letter dated October 20, 2003, attorney Carl Bahnson reported to the circuit court that JoAnne contacted him and he stated he would represent her if appointed. JoAnne had told Bahnson that she objected to the petition to terminate her parental rights as well as a petition to eliminate visitation. Bahnson communicated JoAnne's objections in his October 20 letter.

¶5 A hearing on the petition occurred on November 5. JoAnne did not appear but Bahnson appeared by telephone. JoAnne had failed to return to the

[3] The County also sought to terminate the parental rights of the unknown father.

Eau Claire county jail after a work release and her whereabouts were unknown. Bahnson told the court he had not been appointed to represent JoAnne. Nevertheless, the court found that Bahnson was representing her because they had an attorney-client relationship.

¶6 The County's corporate counsel moved for default judgment based on JoAnne's failure to appear in person. Bahnson objected and requested a continuance. However, the court proceeded to take testimony, after which Bahnson renewed his request for a continuance. The court denied the request, granted the default judgment, found JoAnne to be an unfit parent, and ordered her parental rights terminated. Bahnson objected to the disposition hearing taking place immediately following the finding of unfitness. The court overruled the objection.

¶7 Subsequently, attorney Margaret Maroney was appointed to represent JoAnne on appeal. Maroney filed a notice of intent to appeal, on JoAnne's behalf, on March 24, 2004. However, this notice was not timely and we issued an order concluding that Maroney was ineffective for failing to file on time and dismissed the appeal for lack of jurisdiction. We further concluded that JoAnne's remedy was a petition for a writ of habeas corpus to release Mitchell from the County's custody based on errors in the proceedings. This would allow us to review the alleged errors. *See* ***Eau Claire County DHS v. JoAnne M.N.***, No. 04-0951 (Wis. Ct. App. April 29, 2004) (citing ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 798-99, 565 N.W.2d 805 (Ct. App. 1997)). We ordered the writ to be filed in this court "because counsel's ineffective performance occurred in this court and we have the authority to review the alleged errors in the TPR proceedings." ***Id.*** The case is again before us, as JoAnne has filed a petition for a writ of habeas corpus.

DISCUSSION

¶8 The County maintains that habeas corpus is not an appropriate remedy. It lists several statutory sections that it contends govern habeas corpus relief. WISCONSIN STAT. § 782.01(1) states, "Every person restrained of personal liberty may prosecute a writ of habeas corpus to obtain relief from such restraint …." SECTION § 782.01(2) states, "Any person confined in any hospital or institution as mentally ill and committed for treatment of alcoholism … may prosecute such writ …." Finally, WIS. STAT. § 782.02 states, "No person shall be entitled to prosecute such writ who shall have been committed or detained by virtue of the final judgment or order of any competent tribunal of a civil or a criminal jurisdiction by virtue of any execution issued upon such order or judgment."

¶9 As to JoAnne, the County argues that if she is still an escapee from jail, then she is not restrained or confined in any way. Thus, WIS. STAT. §§ 782.01(1) and (2) do not entitle her to habeas corpus relief. The County further argues that even if JoAnne returned to jail, her detention was by virtue of a final judgment in another matter. Thus, WIS. STAT. § 782.02 does not entitle her to habeas corpus relief. As to Mitchell, the County maintains he was not deprived of his liberty, even though he was in custody of the State. Further, placement in alternate care was a result of a valid dispositional order. Thus, the County argues Mitchell is not entitled to habeas corpus relief either. We are not persuaded.

¶10 First, our supreme court has determined that habeas corpus relief is an appropriate remedy for a criminal defendant seeking relief due to ineffective assistance of appellate counsel. *See* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). "Habeas corpus is essentially an equitable doctrine, and a

court of equity has authority to tailor a remedy for the particular facts." ***Id.*** at 520-21 (citation omitted). Here, the County does not dispute that there was ineffective assistance of counsel by Maroney.

¶11 Second, Wisconsin courts have used habeas corpus in custody matters. For example, the supreme court in ***Bellmore v. McLeod***, 189 Wis. 431, 433, 207 N.W. 699 (1926), stated:

> Ordinarily, the basis of the issuance of the writ of habeas corpus is an illegal detention, but, in the case of the writ sued out for the detention of a child, the law is not so much concerned about the illegality of the detention as the welfare of the child, and, in proceedings in habeas corpus for the possession of a minor, the question of physical restraint is given little consideration, where a lawful right is asserted to retain possession of the child …. [T]he question of personal freedom is not involved, for an infant, from humane and obvious reasons, is presumed to be in the custody of some one until it has attained its majority.

In ***Anderson v. Anderson***, 36 Wis. 2d 455, 459, 153 N.W.2d 627 (1967), the supreme court further stated: "A habeas corpus proceeding is appropriate in Wisconsin for the adjudication of legal custody. When it is used in custody matters, however, it is not the narrow legal remedy that it is in criminal cases." Thus, we conclude that habeas corpus is also appropriate in this case because it involves custody. When habeas corpus relief is sought to release a child confined under a court order, the habeas court determines "only whether the order is void because the court issuing the order lacked jurisdiction to do so, the order was made in violation of the constitution, or there was a lack of legal authority for the order." ***J.V. v. Barron***, 112 Wis. 2d 256, 261, 332 N.W.2d 796 (1983).

¶12 JoAnne contends the circuit court lacked legal authority for the order because it erroneously granted a default judgment based on JoAnne's failure to appear at the hearing. "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. "[W]here 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.***

¶13 The County argues that default judgment was appropriate even though Bahnson appeared on JoAnne's behalf. It contends it was not clear that Bahnson was actually representing JoAnne or that JoAnne wanted him to represent her. However, the circuit court expressly resolved these issues, concluding that Bahnson and JoAnne had an attorney-client relationship and that Bahnson was indeed representing JoAnne.

¶14 Next, the County cites ***Evelyn C.R.***, where the supreme court upheld a termination of a mother's parental rights. The circuit court had granted a default judgment even though the mother's attorney was present at the hearing. ***Id.***, ¶36. The supreme court concluded that the evidence supported the circuit court's determination that there were grounds to terminate the mother's parental rights. The County maintains we should do the same here.

¶15 In ***Evelyn C.R.***, the mother failed to appear at the fact-finding hearing after the court had ordered her to appear. However, her attorney did appear on her behalf. ***Id.***, ¶¶8-9. The court granted a motion for default judgment and concluded, based on the complaint, that grounds existed to terminate the mother's parental rights. ***Id.***, ¶9. The court then scheduled a dispositional hearing for the following week. ***Id.***, ¶10. At the dispositional hearing, the court heard testimony, including that of the mother. It then reaffirmed its entry of default

judgment, concluded there were grounds for termination and terminated the mother's parental rights. ***Id.***, ¶¶10-15.

¶16 The supreme court concluded that the default judgment was appropriate as a sanction for the mother's failure to appear after being ordered to do so. ***Id.***, ¶17. However, the supreme court held that the trial court erred by entering a default judgment "without first taking evidence sufficient to support such a finding …." ***Id.***, ¶19. Thus, the "court failed to comply with the constitutional and statutory requirements for termination of parental rights." ***Id.*** However, the supreme court concluded the error was harmless because the circuit court did not enter its order terminating parental rights until after the dispositional hearing. ***Id.***, ¶33. The mother appeared by phone during the dispositional hearing and did not contest the default judgment or offer evidence to contradict testimony that her rights should be terminated. ***Id.***, ¶¶13, 33. After the hearing, the court reaffirmed its finding that there were grounds to terminate the mother's parental rights and made specific reference to testimony given at the dispositional hearing. ***Id.***, ¶34. Thus, the supreme court concluded that when the circuit court reaffirmed the default judgment, there was sufficient evidence to support that finding. Consequently, the error was harmless. ***Id.***, ¶36.

¶17 There are several differences between ***Evelyn C.R.*** and this case. First, the ***Evelyn C.R.*** court noted that, although the mother was not physically present, she did appear through her attorney. ***Id.***, ¶17. Thus, her failure to be physically present was not a sufficient basis for the default judgment. Instead, default was appropriate as a sanction for her failure to appear as ordered. ***Id.*** No similar sanction is needed here because JoAnne was not ordered to appear. The rules of civil procedure apply to termination of parental rights hearings. *See* ***Door County DHFS v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App.

1999). Thus, absent an order to the contrary, JoAnne was permitted to appear by her attorney. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17.

¶18 Second, the ***Evelyn C.R.*** court's harmless error analysis was based on the sufficiency of the testimony taken during the dispositional hearing. Importantly, the mother was present by phone and chose not to refute the evidence supporting termination of her parental rights. After this hearing, the circuit court reaffirmed its finding that there were grounds to support termination of the mother's parental rights. The supreme court concluded that the evidence elicited at the dispositional hearing supported the court's finding. ***Id.***, ¶¶33-35. Here the facts are very different. No additional testimony was taken, as the dispositional hearing was held immediately after the fact-finding hearing. The mother in ***Evelyn C.R.*** was present and given the chance to rebut the evidence taken at the dispositional hearing. No such chance was afforded here because the circuit court denied attorney Bahnson's request to hold the dispositional hearing at a later date.

¶19 WISCONSIN STAT. § 48.422(1) states, "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." Further, § 48.422(2) adds, "If the petition is contested the court shall set a date for a fact-finding hearing on the petition, unless all of the necessary parties agree to commence with the hearing on the merits immediately." Here, Bahnson noted during the hearing that JoAnne was contesting the petition, as he had stated in his October 20 letter. He also objected to the default judgment and asked for a continuance. Thus, he did not agree to commence the fact-finding hearing immediately. The court was then required to set a date for the fact-finding hearing. *See* ***id.*** Instead, it proceeded to address the merits immediately. This was not supported by the law and was therefore an erroneous exercise of discretion. We therefore reverse the

order terminating JoAnne's parental rights. We remand to the circuit court for a new hearing on the merits.

By the Court.—Writ granted and cause remanded with directions.

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