COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 27, 1995

No. 95-2988

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

IN THE INTEREST OF CHRISTA P.,
A PERSON UNDER THE AGE OF 18:

COUNTY OF MARATHON,

Petitioner-Respondent,

v.

FAYE P.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Marathon county: RAYMOND F. THUMS, Judge. *Reversed and cause remanded.*

LaROCQUE, J. Faye P. appeals an order terminating her parental rights (TPR) to her daughter, Christa (d.o.b. 12/7/86). When Faye appeared at the trial only by an attorney, the court took no testimony and granted the County's motion for a default judgment. Because a person who appears by counsel in a civil action is not subject to default judgment, and because no testimony was taken as contemplated by ch. 48, STATS., the order is reversed and the matter remanded for further proceedings.

The County filed a TPR petition pursuant to § 48.415(2), STATS., in February 1995 alleging that Faye had failed to demonstrate substantial progress toward meeting the conditions for return of her daughter ordered in a prior CHIPS proceeding.[1] At the initial hearing on the petition, pursuant to § 48.422, STATS.,

Faye expressed her decision to contest it and requested a jury trial on the merits.[2]

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[1] Section 48.415, STATS., provides:

> Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
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> ....
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> (2) Continuing need of protection or services. Continuing need of protection or services may be established by a showing of all of the following:
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> (a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363 or 48.365 containing the notice required by s. 48.356 (2).
>
> (b) That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of one year or longer pursuant to such orders or, if the child had not attained the age of 3 years at the time of the initial order placing the child outside of the home, that the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

[2] Section 48.422, STATS., provides:

On the date scheduled for jury trial, June 20, 1995, a guardian ad litem appeared for Christa. He opined that the termination would be in Christa's best interests.[3] Faye also appeared by counsel but not in person. Faye's trial counsel advised the court that his client had been in the Veteran's Hospital in West Allis, Wisconsin, until discharged on May 11, 1995, and was not at her last known address. The court was advised by a social worker: "[W]e don't know where she is right now." Over defense counsel's objection, the trial

(..continued)

(1) 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 under sub. (4) and s. 48.423.

(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.

(3) If the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7)

(4) Any party who is necessary to the proceeding or whose rights may be affected by an order terminating parental rights shall be granted a jury trial upon request if the request is made before the end of the initial hearing on the petition.

....

(7) Before accepting an admission of the alleged facts in a petition, the court shall:

(a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.

(b) Establish whether any promises or threats were made to elicit an admission and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.

(c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

[3] Section 48.235(3), STATS., provides:

The guardian ad litem shall be an advocate for the best interests of the person for whom the appointment is made. The guardian ad litem shall function independently, in the sam manner as an attorney for the party to the action, and shall consider, but not be bound by, the wishes of such person ....

court concluded that Faye's failure to appear in person was grounds for a default judgment pursuant to § 806.02(5), STATS.[4] Faye appeals.

The County first summarily contends that the appeal should be dismissed because Faye's appellate counsel has not obtained Faye's authority to pursue an appeal. Apart from the lack of citation to authority for this contention, this court notes that the County entitles its contention "Standing." Faye, as an "aggrieved party," has standing to appeal. *See* ***Weina v. Atlantic Mut. Ins. Co.***, 177 Wis.2d 341, 345, 501 N.W.2d 465, 467 (Ct. App. 1993). If the County means to suggest that Faye has waived her right to appeal, or is estopped from pursuit of appeal, it has not established the basis for its claim. A person may waive the right to appeal where she has caused or induced a judgment to be entered or has consented or stipulated to entry of judgment. ***Post v. Schwall***, 157 Wis.2d 652, 657, 460 N.W.2d 794, 796 (Ct. App. 1990). Faye appeared by counsel at trial and did not waive her rights.

In appropriate cases, it is within the discretion of the court to refuse to decide an appeal if the defendant cannot be made to respond to the court's judgment. ***Smith v. United States***, 94 U.S. 97 (1876); *see also* ***State v. Bono***, 103 Wis.2d 654, 309 N.W.2d 400 (Ct. App. 1981). The statements of trial counsel and the court suggest Faye was never ordered to appear nor was she subpoenaed for the hearing. The record is inadequate upon which to estop Faye from appealing the default judgment.

The trial court applied § 806.02(5), STATS., and entered a default judgment. The interpretation of a statute presents a question of law that we review without deference to the trial court. *See* ***In re Philip W.***, 189 Wis.2d 432, 436, 525 N.W.2d 384, 385 (Ct. App. 1994).

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[4] Section 806.02(5),STATS., provides:

> A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof.

First, § 806.02(5), STATS., gives the circuit court discretion to enter a default judgment against a defendant who "fails to appear at trial." Wisconsin Supreme Court Rule 11.02 provides in part: "Every person ... may appear by attorney in every action or proceeding by or against the person in any court except felony actions ...." In ***Sherman v. Heiser***, 85 Wis.2d 246, 254, 270 N.W.2d 397, 400-01 (1978), our supreme court stated that a circuit judge should not grant default judgment under § 806.02(5) when a party appears through her attorney based on § 757.27, STATS., the statutory predecessor to SCR 11.02. A compelling policy reason for liberally construing appearance requirements is that the law disfavors default judgments because courts render them without a determination of any issue of law or fact. ***In re C.R.B.***, 814 P.2d 1197, 1203 (Wash. App. 1991). The term "appearance" has also been construed liberally in other contexts. When an appearance is made, a defendant's objection to lack of personal jurisdiction is waived. ***Artis-Wergin v. Artis-Wergin***, 151 Wis.2d 445, 452, 444 N.W.2d 750, 753 (Ct. App. 1989). In ***Artis-Wergin***, this court held that an attorney's letter to the trial court served as an "appearance" by the party, thus waiving the party's objection to personal jurisdiction. ***Id.*** at 453, 444 N.W.2d at 753-54.

Although Faye's appearance by counsel renders the issue moot, argument could be made that the default statute relating to civil proceedings is applicable to TPR cases because the juvenile code provides for testimony even where the petition is not contested. Section 801.01(2), STATS., provides "[c]hapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings ... except where different procedure is prescribed by statute or rule." Section 48.422(3), STATS., provides for testimony even where the petition is uncontested.[5]

[5] The parties do not discuss § 48.42(3), STATS., providing that the TPR summons "Advise the parties of the possible result of the hearing and the consequences of failure to appear or respond." The summons here advised Faye that "If you fail to appear as summoned, you may be held in contempt of court, or the court may proceed to hear testimony in support of the allegations in the attached petition and grant the request of the petitioner."

This advice relates to the procedure and consequences that may be followed if the parent fails to appear at the initial hearing in response to the summons. Faye did appear in person and by counsel at that hearing.

Because Faye appeared by counsel, and because § 48.422, STATS., appears to contemplate a fact finding hearing in all TPR cases, this court need not address Faye's arguments regarding an alleged violation of due process.

By the Court. – Order reversed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.