

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1715

Cir. Ct. No. 2008TP9

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

KIMBERLY B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
MARY KAY WAGNER, Judge. *Affirmed.*

¶1 NEUBAUER, J.¹ Kimberly B. appeals from a trial court order denying her postdisposition motion for relief from a trial court order terminating her parental rights to her daughter, Kaylee. Kimberly argues that the trial court erred in entering a default judgment in the “grounds” phase of the termination of parental rights (TPR) proceeding without first finding that her failure to appear at that hearing was egregious or in bad faith. We conclude that the trial court was entitled to enter a default judgment based on Kimberly’s failure to appear either in person or by counsel at the initial hearing and that Kimberly subsequently failed to meet her burden of proving that she was entitled to postdisposition relief under WIS. STAT. § 806.07. We therefore affirm the trial court’s order.

BACKGROUND

¶2 On February 6, 2008, Kenosha County Department of Human Services filed a petition for the termination of Kimberly’s parental rights to her daughter Kaylee on grounds of continuing need of protection or services and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2), (6). On February 12, 2008, Kimberly was served with a summons and notice of hearing informing her of a March 7, 2008 initial hearing date on the petition for the termination of parental rights.² When Kimberly failed to appear on the March 7

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² 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, 271 Wis. 2d 1, 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
(continued)

hearing date, the County requested that Kimberly be found in default and that the court proceed to take testimony on grounds for termination.

¶3 The court then asked Kimberly’s mother if she knew of any reason why Kimberly had not appeared. Kimberly’s mother answered, “I think she’s not doing well and she knows it.” The court then stated:

Okay. Then the Court will find that [Kimberly] has been served the notice of these proceedings for the termination of her parental rights and she is not here. This was scheduled for 9:00 a.m. this morning, however, it’s now 9:16. She is not in the hallway. We’ve looked and she’s just not here. So, the Court does default her for failure to appear.

The court then proceeded to receive testimony from Kaylee’s caseworker. Following that testimony, the court found grounds for the termination of Kimberly’s parental rights based on her failure to meet the conditions of return and the lack of any likelihood that she would meet the conditions within the following nine months. The court found Kimberly to be an unfit parent and scheduled the dispositional hearing for March 18, 2008.

¶4 Kimberly failed to appear at the dispositional hearing; however, her attorney, Joseph Olson, appointed by the public defender’s office, did appear.

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.*, 271 Wis. 2d 1, ¶27.

Even if a parent is properly found in default for purposes of the first phase, the parent and the parent’s attorney retain the right to participate in the dispositional phase. *State v. Shirley E.*, 2006 WI 129, ¶¶54-55, 298 Wis. 2d 1, 724 N.W.2d 623. Thus, a failure to appear in response to a summons in a TPR action could not properly result in a default judgment terminating parental rights; the default would need to be limited, as it was in this case, to the first phase. As noted below, Kimberly’s attorney was present and participated in the second phase.

Prior to proceeding with testimony, the court observed that after Kimberly failed to appear at the initial hearing:

A day or two later I received a fax from the Public Defender's Office indicating that she had requested a public defender or had gone to the Public Defender's Office asking for an attorney and the Public Defender's Office email indicated that they instructed her to go to the hearing and say that they had not yet been able to appoint anyone. She failed to appear for that hearing.

Olson then requested the court vacate the default judgment from the initial hearing so that they could "start this process over again." Olson, who had had telephone contact with Kimberly but no face-to-face meetings, advised the court that he had spoken to Kimberly that morning and she had indicated to him that she may or may not appear at the hearing. In conjunction with the request to vacate the default judgment, the court was not provided with any factual or legal support for the request. The trial court denied Olson's motion, stating:

It would require her presence.... She didn't come on the day that we had the initial appearance. She's in default. She didn't show up at all. She didn't send counsel and she was instructed by the Public Defender to show up.

She's not here today and this isn't an optional course. This is a hearing on a termination of someone's parental rights and she once again is not here and she told you she's not coming. So here's where we are.

So, your motion to vacate the default is denied based on her failure to participate, so let's continue.

After hearing testimony and statements from the State and the guardian ad litem, the court granted the termination of parental rights and granted custody of Kaylee to the State.³

¶5 On April 18, 2008, Kimberly filed a notice of intent to appeal the termination of her parental rights. On August 12, 2008, the court of appeals remanded Kimberly's appeal to the circuit court to address her postjudgment motion based on Kimberly's request for an evidentiary hearing before the trial court. Kimberly filed her postdisposition motion to vacate the order terminating her parental rights with the trial court on August 18, 2008. As part of her motion, Kimberly noted that the court file contained a fax sent to the court from the Kenosha Job Center on March 6, 2008, at 8:44 p.m., which attached a letter from the Kenosha county office of the state public defender. According to Kimberly's motion, the letter "informed the court that [Kimberly] had applied for an attorney and was eligible for public defender representation, but that there was insufficient time to appoint counsel before the March 7, hearing." The letter requested that the court "give the client a new court date, anticipating that it will take at least three to five working days or more from the time we are notified to appoint counsel."

¶6 The trial court held a motion hearing on the request for relief from judgment on September 11, 2008. After reviewing the fax, the trial court acknowledged that it had received the fax and not, as stated at the March 18 dispositional hearing, an email. The trial court nevertheless denied the motion,

³ Kimberly's failure to appear in person, in and of itself, would not provide grounds for denying her counsel's motion to vacate the default judgment. See *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768. However, the failure to provide any evidence in support of vacating the default judgment would. Presumably, the court was expecting this evidence would come from Kimberly.

finding that “there is a requirement that you’re served and required to appear.... And I think that you stand subject to a default hearing at that point by law, by civil procedure, by the facts of it.”⁴ The trial court entered a written order on September 16, 2008, denying Kimberly’s motion for postdisposition relief. Kimberly appeals.

DISCUSSION

¶7 At the outset, we clarify the issue on appeal and the scope of our review. Kimberly contends that the trial court erred in denying her postdisposition motion for relief, which was based on her contention that the trial court should not have found her in default for failing to appear at the initial hearing without first making a finding that her failure was due to bad faith or egregious conduct. On appeal, we review the trial court’s denial of Kimberly’s postdisposition motion for relief from judgment in the context of the postdisposition motion hearing on September 11, 2008, at which the trial court addressed its denial of Kimberly’s motion to vacate at the March 18 hearing but was also prepared to hear evidence as to why she failed to appear at the initial hearing.

¶8 As the basis for her argument on appeal, Kimberly construes the trial court’s entry of a default judgment as made pursuant to WIS. STAT. § 805.03, and therefore, entered as a sanction for her failure to obey the summons to appear in court on March 7, 2008. Kimberly contends that a court may not impose a default

⁴ The court also found that Kimberly had a history of not appearing in person at hearings in the CHIPS case. *See* WIS. STAT. § 48.13 (“child in need of protection or services”). Kimberly’s attorney noted that there was no evidence in the TPR case that Kimberly had ever missed a CHIPS hearing or that the court relied on that in granting a default judgment against her at the March 7 hearing.

judgment as a sanction unless there is bad faith or egregious conduct by the noncomplying party, see *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 275, 470 N.W.2d 859 (1991), *overruled on other grounds*, *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898, and therefore the trial court erred in entering a default judgment prior to making a finding as to whether her failure to appear resulted from bad faith or egregious conduct. However, Kimberly mischaracterizes the trial court's ruling and her reliance on case law decided under § 805.03 is therefore misplaced.

¶9 While WIS. STAT. § 805.03 may be used by the court to sanction a person who fails to appear in person as directed, see *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768, in this case, Kimberly simply failed to appear—either by an attorney *or* in person. As a result of Kimberly's failure to appear, the trial court followed the specific procedures set forth in WIS. STAT. § 48.422(3) for an uncontested hearing on the petition.

¶10 WISCONSIN STAT. § 48.42 sets forth the procedure to be followed in TPR proceedings. Pursuant to § 48.42(3) and (4)(c), the summons served on Kimberly advised her to appear at the scheduled hearing and advised her that if she failed to appear, “the court may hear testimony in support of the allegations in the attached petition and grant the request of the petitioner to terminate your parental rights.”⁵ The summons also notified her that if the court terminates her

⁵ The summons additionally advised Kimberly of her right to have an attorney present at the proceedings and that if she was unable to afford one, the state public defender may appoint one for her. As evidenced by the letter from the state public defender's office and the subsequent appointment of counsel, Kimberly did avail herself of their services.

parental rights, “a notice of intent to pursue relief from judgment must be filed in the trial court within 30 days after the judgment is entered.” Sec. 48.42(3)(d).

¶11 The summons received by Kimberly is in keeping with WIS. STAT. § 48.422, which governs the initial hearing procedure. 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). If the petition is not contested, then the court shall hear testimony in support of the allegations in the petition. Sec. 48.422(3). Here, Kimberly did not appear at the hearing and no one advised the trial court that Kimberly contested the petition. As such, the trial court properly proceeded under § 48.422(3).

¶12 A parent, like Kimberly, who fails to appear at the initial hearing on the petition is not without recourse under the statutory framework for a TPR proceeding. WISCONSIN STAT. § 48.46(2) provides:

A parent who has consented to the termination of his or her parental rights under s. 48.41 *or who did not contest the petition initiating the proceeding in which his or her parental rights were terminated* may move the court for relief from the judgment on any of the grounds specified in [WIS. STAT. §] 806.07(1)(a), (b), (c), (d) or (f). Any such motion shall be filed within 30 days after the entry of the judgment or order terminating parental rights (Emphasis added.)

Therefore, a parent may request relief under WIS. STAT. § 806.07 on grounds including mistake, inadvertence, surprise, excusable neglect or misrepresentation.⁶

⁶ The relevant provisions of WIS. STAT. § 806.07 provide as follows:

(continued)

¶13 These “steps” in the statutory procedure for a TPR proceeding, including the entry of a default judgment under the circumstance presented here, are summarized in the notice requirements set forth in WIS. STAT. § 48.42(3) and (4)(c),⁷ which require the summons issued in a TPR to advise the parent of the right to counsel, “the possible result of the hearing and the consequences of failure to appear or respond,” § 48.42(3)(c), including the termination of parental rights, and the procedure for retaining relief from judgment under WIS. STAT. § 806.07. We conclude that based on the statutory procedure outlined in WIS. STAT. §§ 48.42, 48.422, and 48.46, the trial court properly proceeded in hearing evidence at the initial hearing on the petition as it was uncontested at that time due to Kimberly’s failure to appear.

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), 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;

...

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated

⁷ WISCONSIN STAT. § 48.42(4)(c) governs both personal service and constructive notice in a TPR proceeding and provides: “The notice ... shall also inform the parties: 1. That the parental rights of a parent or alleged parent who fails to appear may be terminated[.]” Consistent with the statute, the summons served on Kimberly did advise her that if she failed to appear, the court could grant the request of the petitioner to terminate her parental rights.

¶14 We further note that the entry of default under these circumstances is consistent with WIS. STAT. § 806.02(1), which permits a default judgment for a defendant’s failure to appear or answer within the statutory time period.⁸ Because a TPR proceeding is civil in nature, *see Steven V. v. Kelley H.*, 2004 WI 47, ¶32, 271 Wis. 2d 1, 678 N.W.2d 856, § 806.02 applies in WIS. STAT. ch. 48 proceedings except where a different procedure is prescribed by statute. *See* WIS. STAT. § 801.01.⁹ While we are satisfied that ch. 48 provides for the entry of a default judgment as to the first phase of a TPR when a party fails to contest a petition at the initial hearing, the trial court nevertheless would have been entitled to do so under § 806.02(1). We therefore turn to whether the trial court properly refused Kimberly’s postdisposition motion to vacate the order terminating her parental rights under WIS. STAT. § 806.07.

¶15 A circuit court determination to deny or grant a motion seeking to vacate a default judgment is also a discretionary act. *Dugenske v. Dugenske*, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). Relief from a default judgment is available if the default judgment was a product of mistake, inadvertence, surprise, or excusable neglect. *Carmain v. Affiliated Capital Corp.*, 2002 WI App 271, ¶23, 258 Wis. 2d 378, 654 N.W.2d 265. The movant has the burden to show that a requisite condition supports entitlement to relief from a default judgment. *Id.*

⁸ WISCONSIN STAT. § 806.02(1) provides: “(1) A default judgment may be rendered as provided in subs. (1) to (4) if no issue of law or fact has been joined and if the time for joining issue has expired. Any defendant appearing in an action shall be entitled to notice of motion for judgment.”

⁹ WISCONSIN STAT. § 801.01(2) provides: “Chapters 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.”

¶16 In support of her postdisposition motion, Kimberly relied almost exclusively on the fax in her court file which was apparently sent from the Kenosha Job Center, and which attached a letter from the Kenosha office of the state public defender. The fax, dated March 6, 2008, at 8:44 p.m., informed the court that Kimberly had applied for, and was eligible for, public defender representation but there was insufficient time to appoint counsel before the March 7 hearing and, therefore, requested that the client be given a new court date. Framed in terms of the standard for a WIS. STAT. § 805.03 sanction, Kimberly argued that the fax negated any inference that (1) she intentionally or deliberately sought to delay or obstruct the court proceedings by her failure to appear and (2) her failure to appear was extreme or substantial.

¶17 The circuit court held a hearing on Kimberly's postdisposition motion on September 11, 2008. Kimberly appeared at the hearing by her counsel, but did not appear in person. Kimberly's counsel again relied on the fax sent prior to the March 7 hearing, clarifying that the time stamp of 8:44 p.m. on the fax was incorrect and that she had been informed that the time stamp on the fax machine should have read 8:44 a.m. on March 7. Kimberly's hearing on March 7 was scheduled for 9:00 a.m. Neither the court nor Kimberly's counsel could explain why the letter was sent from the Kenosha County Job Center, who sent the fax, or when the fax was sent. The court did confirm with Kimberly's attorney, a court-appointed public defender, that the public defender's office "is not under the direction to tell [a client to] skip your court date and just send [the court] a fax."

¶18 In support of her contention that the trial court should reopen the judgment, Kimberly's counsel cited to the second phase of the hearings on the TPR petition during which the trial court mistakenly identified the fax as being an email to the court in which the state public defender's office informed the court

that it had instructed Kimberly to attend the hearing. However, Kimberly's reliance on the trial court's apparent confusion regarding the faxed letter overlooks that without her presence at the postdisposition hearing or any other evidence, it was impossible to know the facts surrounding the letter and her failure to appear at the March 7 hearing—i.e., when she had communicated with the state public defender, what her understanding was with respect to attending the hearing, whether she knew when or who had faxed the letter to the court, or even whether she had seen the letter.¹⁰

¶19 That certain facts surrounding the faxed letter may have been confused by the court at the March 18 hearing does not relieve Kimberly of her burden under WIS. STAT. § 806.07 to prove that conditions existed which entitle her to relief. While the trial court may have initially thought that Kimberly had been instructed by the state public defender's office to appear at the hearing, there is no evidence that she had been instructed *not* to appear, nor any other evidence as to why she failed to attend. Despite the trial court's willingness to hear Kimberly's explanation of events and provide the opportunity for a full hearing, her absence at the postdisposition hearing unfortunately resulted in a lack of evidence to support her motion.

¶20 In the end, the trial court was left with the fact that a letter was sent fifteen minutes before the hearing and was not received by the court until a day or two later. No other evidence as to Kimberly's failure to appear was presented to

¹⁰ When Kimberly's counsel noted that "[t]here's lots of different ways to look at this," the court responded, "Bring her here and have her testify," noting that "[t]here isn't a single default hearing that I wouldn't reopen if the person showed up with their attorney at the next hearing."

the trial court upon which to base a WIS. STAT. § 806.07 determination of mistake, inadvertence, surprise or excusable neglect. We therefore uphold the trial court's order denying Kimberly's request for postdisposition relief.¹¹

CONCLUSION

¶21 In reaching our decision, we are mindful that the profound consequences of the termination of parental rights warrant careful attention to procedural and substantive safeguards. See *State v. Shirley E.*, 2006 WI 129, ¶¶24-25, 298 Wis. 2d 1, 724 N.W.2d 623. However, we have reviewed the record and conclude that the trial court properly followed TPR procedure in granting the default at the initial hearing. Kimberly was given notice of the requirement that she appear and the consequences of her failure to appear; she did not appear, and she never explained to the court, either in person or through counsel, why she did not appear. We therefore affirm the trial court's order denying her request for postdisposition relief.

By the Court.—Order affirmed.

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

¹¹ We note that there is no challenge as to the sufficiency of the evidence to support the trial court's order terminating Kimberly's parental rights.