COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2001

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.

Nos. 01-1184
01-1185

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

NO. 01-1184

IN RE THE TERMINATION OF PARENTAL RIGHTS TO PATIENCE R.N.S., A PERSON UNDER THE AGE OF 18:

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LUCILLE S.,

RESPONDENT-APPELLANT.

NO. 01-1185

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JAZZMINE M.C.S., A PERSON UNDER THE AGE OF 18:

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LUCILLE S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Lucille S. appeals from orders for the involuntary termination of her parental rights, arguing that the circuit court erred in granting a default hearing when she failed to appear in person at the scheduled jury trial. In addition, she insists that the court's failure to take evidence before entering the default judgment is not harmless error. Because ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, __ Wis. 2d __, 629 N.W.2d 768, controls the disposition in this appeal, we affirm.

¶2 Lucille entered denials to the allegations in two petitions for the involuntary termination of her parental rights filed by the Kenosha County Department of Human Services (County).[2] After pretrial discovery, several pretrial conferences and Lucille's waiver of the time limits, the cases were

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[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. And these proceedings have been given preference pursuant to WIS. STAT. § 809.107(6)(e).

[2] The petitions alleged three grounds for the termination of Lucille's parental rights: (1) that the children were in continuing need of protection and services pursuant to WIS. STAT. § 48.415(2); (2) that there had been a continuing denial of periods of physical placement or visitation under § 48.415(4); and (3) that Lucille failed to assume parental responsibility pursuant to § 48.415(6).

scheduled for a jury trial on January 8, 2001. Prior to the jury trial, the circuit court granted the County's motion to dismiss the first allegation of the petitions and proceed only on the second allegation—that there had been a continuing denial of periods of physical placement or visitation under WIS. STAT. § 48.415(4). The County alleged in the supporting affidavit that the reason for the motion was Lucille's admission to the elements of this allegation in response to the County's discovery request for admissions under WIS. STAT. § 804.11.

¶3 The case was scheduled to commence at 9:00 a.m. on January 8, 2001, but the circuit court did not call the case until 9:32 a.m. because Lucille was not present. In response to an inquiry regarding Lucille's absence, her attorney told the court that in the last several weeks, he had been unable to contact her. The County immediately requested default judgments and the guardian ad litem joined in that request. Lucille's attorney advised the court that Lucille did not contest the allegations that there had been a continuing denial of periods of physical placement or visitation. In granting the County's motion, the circuit court perceptively commented on the due process issues raised when there is a motion to foreclose the right of Lucille to be heard by the fact finder. The court also noted that there was a case before the Wisconsin Supreme Court addressing the issue of whether default judgment could be granted under the circumstances present in this case.[3]

¶4 On appeal, Lucille first contends that the circuit court erred in granting the County's motion for a default judgment without "taking evidence in

[3] ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, __ Wis. 2d __, 629 N.W.2d 768.

support of the ground pleaded in the petition." She correctly points out that this result is required by the supreme court's decision in ***Evelyn C.R.***:

> In the case at hand, by entering a default judgment against [the biological mother] on the issue of abandonment without first taking evidence sufficient to support such a finding, the circuit court failed to comply with the constitutional and statutory requirements for termination of parental rights. We therefore hold that the court erroneously exercised its discretion.

Evelyn C.R., 2001 WI 110 at ¶19.

¶5 We agree with Lucille that the circuit court erred in granting a default judgment. There are two reasons why there was error. First, like the facts in ***Evelyn C.R.***, while Lucille did not appear in person at the jury trial, her attorney was present and that constitutes an appearance sufficient to avoid the application of WIS. STAT. § 806.02(5). ***Evelyn C.R.***, 2001 WI 110 at ¶17; ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 759-60, 595 N.W.2d 635 (1999) (A defendant who fails to personally appear in a civil action nonetheless appears since he was entitled to and did appear by his attorney.).

¶6 Second, unlike the facts in ***Evelyn C.R.***, Lucille was not ordered to appear at the jury trial; rather, at a status conference, the circuit court notified her of the trial date. Because Lucille's failure to appear was not a violation of any order, the court did not have the authority to enter a default judgment for her failure to comply with a court order. *See* ***Evelyn C.R.***, 2001 WI 110 at ¶17.

¶7 Lucille recognizes that the circuit court's error is not enough to give her relief because in ***Evelyn C.R.***, the supreme court held that the entire record is subject to a harmless error analysis under WIS. STAT. § 805.18(2). ***Evelyn C.R.***, 2001 WI 110 at ¶¶28-29, 32. She claims, "the record does not contain sufficient

facts or evidence tending to show that visitation was suspended pursuant to a court order."

¶8 The harmless error analysis asks whether the reviewing court has confidence in the outcome of the proceeding. ***Id.*** at ¶28. For a procedural error to support a reversal, "there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Id.*** Although the circuit court in this case procedurally erred in granting a default judgment, the harmless error analysis requires us to examine the entire record to determine whether it provides a factual basis to support the court's finding of grounds for termination. ***Id.*** at ¶32. The record in the present case is strikingly similar to the record in ***Evelyn C.R.*** In the instant case, the circuit court did not enter an order terminating Lucille's parental rights until after taking testimony from the social worker, Lucille and her mother at the dispositional hearing.[4] *See* ***id.*** at ¶¶23, 33.

¶9 The record contained sufficient evidence to support the court's finding that there had been a continuing denial of periods of physical placement or visitation.[5] *See* ***id.*** at ¶33. The court had available the sworn petitions for involuntary termination of parental rights, the affidavit of the County's attorney

[4] The termination proceeding involves a two-step process. ***Evelyn C.R.***, 2001 WI 110 at ¶22. The first step is a fact-finding hearing to determine whether grounds exist for the termination of parental rights. ***Id.*** If the county meets its burden at this first step and the circuit court finds the parent "unfit," the case advances to the second step of the procedure. ***Id.*** The second step is the dispositional phase where the court decides upon the disposition of the child. ***Id.*** at ¶23. At the dispositional phase, the court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights. WIS. STAT. § 48.427(2). Thus, it can be said that at the second step, the court must reaffirm the factual findings of parental "unfitness."

[5] When the circuit court requires proof of facts necessary to support the granting of a default judgment, the court is free to accept that evidence in the form of oral testimony or affidavits. Judicial Council Notes, 1977, WIS. STAT. ANN. § 806.02 (West 1994).

recounting Lucille's admissions to the allegation, and the dispositional reports prepared by a social worker and specifically incorporated into her testimony at the dispositional hearing.

¶10 To establish the continuing denial of periods of physical placement or visitation as grounds for termination, WIS. STAT. § 48.415(4), the County must prove the following two elements:

> 1. that [the biological parent] has been denied periods of physical placement by a court order in an action affecting the family under Chapter 767 or has been denied visitation under an order pursuant to §§ 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365 containing the notice required by § 48.356(2) or 938.356(2).
>
> 2. that at least one year has elapsed since the order denying periods of physical placement or visitation to (parent) was issued and the court has not subsequently modified its order to permit periods of physical placement or visitation.

Comment, WIS JI—CHILDRENS 335.

¶11 The record contains sufficient evidence proving both elements. First, after the children were found to be in need of protection and services, dispositional orders placing them outside of Lucille's home were issued on June 23, 1997, and extended and revised every year thereafter. As a result of these dispositional orders, the children were outside of Lucille's home approximately three years. Second, court orders preventing contact between Lucille and the children were entered on November 12, 1997; the orders were revised on July 8, 1998, to permit visitation only upon recommendation of the children's therapist and the Department of Human Services and have been extended every year since then. Additionally, in answer to the County's request for admissions, Lucille acknowledges that the children had been placed outside of the home by

court orders and that she had been prohibited from periods of physical placement or visitation for more than one year by court orders.

¶12 In sum, we hold that the circuit court erred in entering a default judgment regarding the continuing denial of periods of physical placement or visitation without first taking evidence sufficient to support a finding by clear and convincing evidence that Lucille had been barred by court orders from visiting with her children for more than one year. However, we further hold that because the record—when examined in its entirety—reveals that prior to issuing the orders terminating Lucille's parental rights, the circuit court had received, taken and considered evidence sufficient to support its finding of a continuing denial of periods of physical placement or visitation, the circuit court's procedural error was harmless. Therefore, because our confidence has not been undermined by the circuit court's error, we affirm its orders terminating Lucille's parental rights.

By the Court.—Orders affirmed.

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