COURT OF APPEALS DECISION DATED AND FILED

March 27, 2012

Diane M. Fremgen
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.

Appeal Nos. 2011AP2825
2011AP2826
2011AP2827
2011AP2828

Cir. Ct. Nos. 2008TP246
2008TP247
2008TP248
2008TP249

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

Appeal No. 2011AP2825

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CHARLES P., JR.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LAURA M.,

RESPONDENT-APPELLANT.

Appeal No. 2011AP2826

IN RE THE TERMINATION OF PARENTAL RIGHTS TO AH-JAH K.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LAURA M.,

RESPONDENT-APPELLANT.

Appeal No. 2011AP2827

IN RE THE TERMINATION OF PARENTAL RIGHTS TO PADREIN K. II, A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LAURA M.,

RESPONDENT-APPELLANT.

Appeal No. 2011AP2828

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LAURA M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Laura M. appeals from the trial court's orders terminating her parental rights to Charles P., Jr. (born August 26, 1999), Ah-Jah K. (born July 18, 2002), Laura K. (born July 12, 2003), and Padrein K., II (born July 12, 2003).[2] She asserts that the trial court erred when it: (1) found her in default for failing to appear at the grounds trial, and (2) prohibited her attorney from presenting evidence at the factfinding hearing following the entry of default. Because we conclude that the trial court properly exercised it discretion when it entered the default and because her attorney was not prohibited from presenting evidence, we affirm.

BACKGROUND

¶2 In 2006, Laura M. was offered Safety Services by the Bureau of Milwaukee Child Welfare (BMCW) to address concerns with housing and her failure to follow through with medical appointments for Padrein K., II, who had been diagnosed with failure to thrive. In August 2006, the children were removed from Laura M.'s care after it was reported that Laura K. had been brought to the hospital with third and fourth degree burns to her feet and ankles and that Laura

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Per this court's December 19, 2011 order, all four cases were consolidated on appeal.

M. had delayed seeking medical treatment. BMCW subsequently learned that Laura M. had left Charles P., Jr., and Padrein K., II, home alone while she sought medical care for Laura K. In October 2006, all four were found to be children in need of protection or services (CHIPS) and have remained out of Laura M.'s home and care since that time. A dispositional order was entered setting forth conditions for Laura M. to meet before the children could be returned to her home. Laura M. failed to meet those conditions.

¶3 Consequently, on July 23, 2008, the State filed petitions to terminate Laura M.'s parental rights to the children (TPR petitions). The petitions alleged that all four children were in continuing need of protection or services. The petitions also sought to terminate the rights of the children's respective fathers: Charles P., Jr.'s father—Charles P.—and Ah-Jah K., Laura K., and Padrein K., II's father—Padrein K.[3]

¶4 The initial appearance on the petitions was held on August 18, 2008. Laura M. appeared at the hearing with counsel. Laura M. told the trial court that she contested the petitions, preserved her right to a jury trial, and waived her right to substitution of judge. The matter was set for a status conference and for a hearing on visitation on September 30, 2008. Time limits were tolled for good cause.

[3] Only Laura M.'s rights are raised on appeal.

¶5 On September 30, 2008, the parties appeared and told the trial court that they did not need a hearing addressing visitation. A final pretrial conference was scheduled for December 2, 2008, and a jury trial on grounds was scheduled for December 8, 2008. Time limits were tolled for good cause until trial.

¶6 On December 2, 2008, the parties appeared for the final pretrial conference. There were nine TPR cases set for trial on December 8, 2008, and the trial court agreed to adjourn Laura M.'s trial. A new final pretrial date was scheduled for February 4, 2009, and a jury trial on grounds was scheduled for February 9, 2009. Time limits were tolled for good cause until the new trial date.

¶7 On February 4, 2009, the parties appeared for a final pretrial, but Laura M.'s attorney was not available, so the trial court decided that the pretrial issues would be discussed the morning of trial.

¶8 On February 9, 2009, the parties appeared and told the trial court that they were seeking an adjournment so that they could address the services BMCW was providing to Laura M. and to give Laura M. an opportunity to demonstrate that she could safely parent the children. A new final pretrial was scheduled for May 19, 2009, and a jury trial on grounds was scheduled for June 22, 2009. Time limits were tolled for good cause.

¶9 On March 3, 2009, all parties appeared and the guardian ad litem (GAL) requested a new trial date because of a conflict she had during the week the trial had been set. A new final pretrial was scheduled for June 11, 2009, and a jury trial on grounds was scheduled for July 13, 2009. Time limits were tolled for good cause.

¶10 On June 11, 2009, the final pretrial date, the parties appeared and advised the trial court that Laura M. had been doing very well, and they were hopeful that trial would be unnecessary. The July 13, 2009 trial date was changed to a status hearing.

¶11 On July 13, 2009, the parties appeared and advised the trial court that Laura M. was still doing very well and that the parties hoped to dismiss the TPR petitions and extend the CHIPS orders. The matter was scheduled for a status hearing on September 1, 2009. Time limits were tolled for good cause.

¶12 On September 1, 2009, the parties appeared and advised the trial court that Laura M. was continuing to make progress and BMCW was planning to return Padrein K., II, and Laura K. to Laura M.'s home on September 18, 2009. Charles P., Jr., and Ah-Jah K. were scheduled to be returned approximately two weeks later. Another hearing was scheduled for November 3, 2009, and time limits were tolled for good cause.

¶13 On November 3, 2009, the parties advised the trial court that the reunification plan had encountered problems because Laura M. had allegedly allowed the children to have unauthorized and unsupervised contact with Padrein K., the father of the three youngest children. As a result, BMCW withdrew the Notices of Change of Placement it had filed to return the children to Laura M. A jury trial on grounds was scheduled for December 7, 2009.

¶14 On December 7, 2009, the parties appeared for the scheduled jury trial. The parties advised the trial court that Laura M. had given birth to a new baby, Evella, on November 5, 2009. The assistant district attorney explained that

he now believed that he needed to call Laura M.'s attorney as a witness, which would necessitate her removal from representing Laura M. The matter was continued to December 9, 2009, to resolve the issue.

¶15 On December 9, 2009, the trial court issued a ruling on attorney-client privilege regarding Laura M.'s attorney, and as a result, removed her attorney from the case. The trial court directed the appointment of new counsel for Laura M.; a status conference was set for January 27, 2010, and a jury trial on grounds was scheduled for March 22, 2010. Time limits were tolled for good cause.

¶16 On January 27, 2010, the parties appeared, and Laura M. was represented by new counsel. Laura M.'s new counsel requested an adjournment of the March 22, 2010 trial date because he was new to the case and needed to review the extensive discovery. A final pretrial was scheduled for April 19, 2010, and a jury trial on grounds was scheduled for April 26, 2010. Time limits were tolled for good cause.

¶17 On April 19, 2010, all parties appeared, although Laura M. appeared late. The parties were advised that trial would proceed on April 26, 2010, as scheduled.

¶18 On April 26, 2010, the case was set to be called at 8:30 a.m., but was not called until 10:30 a.m. Laura M. failed to appear at 10:30 a.m. despite having two additional hours to get to court. Laura M.'s counsel informed the trial court that he had received a phone call from Padrein K., at 7:45 a.m., stating that he had been stabbed a few days earlier and that Laura M. would be accompanying him to

the doctor for a follow-up appointment rather than appearing in court. Padrein K. also informed Laura M.'s counsel that a suspect in the stabbing had been apprehended and that both Padrein K. and Laura M. were told to report to the district attorney's office in downtown Milwaukee at 1:30 p.m. that afternoon.[4]

¶19 In light of this information, the trial court passed the case to allow Laura M.'s attorney thirty minutes to locate her. When the case was recalled, Laura M. was still not present. Laura M. had not contacted her attorney or the trial court. The trial court found Laura M. in default, setting forth its reasons for doing so on the record.

¶20 The trial court then proceeded to receive evidence in support of the TPR petitions. Jennifer Winkler, the ongoing case manager assigned to Laura M. and her family since July 2007 was the State's sole witness. Winkler testified that BMCW had set four separate dates for Laura to be reunited with her children from the time the children were removed from Laura M.'s home in August 2006 until the April 2010 trial. However, on each occasion reunification failed.

¶21 Winkler testified that the first reunification failed in January 2007 after BMCW received a report that Laura M. had whipped Charles P., Jr. After investigating the report, another reunification plan was implemented but that plan

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[4] The docket notes from April 26, 2010, state that Laura M. personally contacted her counsel and relayed the information set forth above. However, the transcript from the April 26, 2010 court date shows that Laura M.'s counsel told the trial court that Padrein K. contacted him, not Laura M. The parties, in their respective appellate briefs, also state that Padrein K. and not Laura M. contacted Laura M.'s attorney.

failed in July 2007 when Laura M. lost her housing and asked to have the return put on hold. A third reunification plan failed in December 2007, after the children reported that Padrein K., who was not permitted to have contact with his children, was at an unsupervised Christmas visit the children had with Laura M. The children reported that Padrein K. hit Laura M. during the visit. A fourth reunification plan failed in September 2009 when BMCW received another report that Padrein K. was at a visit Laura M. had with her children, and that there were on-going episodes of domestic violence, alcohol abuse, and possible physical abuse to Charles P., Jr.

¶22 Winkler further testified that there were periods of time when Laura M. had been participating in all of the programs required by the CHIPS orders. However, even though Laura M. was cooperating in the programs, there were concerns about Laura M.'s honesty. Winkler noted that she learned after the fact that Laura M. had given birth to a baby in November 2009, and that Laura M. had named Padrein K. as the father, despite Laura M.'s claim that she had no contact with him and was unaware of his whereabouts.

¶23 Winkler also testified about ongoing concerns BMCW had with Laura M.'s involvement with Padrein K. including episodes of domestic violence, and concerns about Padrein K.'s serious untreated mental health issues and drug and alcohol issues. Winkler noted that Padrein K. had been hospitalized at the Mental Health Center where he threatened to kill Winkler. He had also failed to participate in any services to address his substance abuse or mental health issues, and his visits with his children were suspended in July 2007 when he came to a

supervised visit intoxicated and was belligerent to the staff. In spite of this, Laura M. had recently allowed Padrein K. to see the children.

¶24 Winkler testified that she talked to Laura M. about BMCW's concerns about her relationship with Padrein K. and how her involvement with him was an impediment to her getting her children back because he was not actively engaged in services to address his mental health and substance abuse issues. Winkler testified that Laura M. acknowledged that her relationship with Padrein K. is unhealthy and that they are not good together. She also acknowledged the violence in their relationship, but she continues to go back to him.

¶25 Winkler testified that Laura M. and Padrein K. had been offered services if they chose to be a couple and other services if they chose to separate. At the time of her testimony, Winkler's concern was that the children had been in and out of home care for an extensive period of time and that Padrein K. was still very unstable and had not improved his parenting capabilities.

¶26 During the hearing, Laura M.'s attorney was permitted to cross-examine Winkler, was permitted to call witnesses, and was permitted to make a closing argument. The trial court found the children in continuing need of protection or services and found Laura M. unfit. A dispositional hearing was scheduled for May 25, 2010.

¶27 Following another adjournment on May 25, 2010, the trial court held an evidentiary hearing regarding disposition on July 14, 2010. The hearing continued on August 5, 2010, September 13, 2010, November 2, 2010, and

December 14, 2010. On December 14, 2010, the trial court entered orders terminating Laura M.'s parental rights to all four children.[5] Laura M. appeals.

¶28 Additional facts are included in the discussion section as necessary.

DISCUSSION

I. The trial court reasonably exercised its discretion when it found Laura M. in default for failing to appear in court for the grounds trial on April 26, 2010.

¶29 Laura M. first argues that the trial court erroneously exercised its discretion when it entered default for her failure to appear at the April 26, 2010 grounds trial. Laura M. admits that the trial court ordered her to appear and that the trial court has the authority to issue sanctions—including default—for failure to obey a court order. However, she contends that because she had appeared at numerous prior hearings, her failure to appear was not egregious, and that therefore the default was improper. We disagree.

¶30 A trial court has discretion to sanction a party for disobeying a court order by entering a default judgment. *See* ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶¶39-41, 299 Wis. 2d 81, 726 N.W.2d 898; WIS. STAT. §§ 804.12(2)(a) & 805.03. We uphold the trial court's exercise of discretion if the

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[5] The Honorable Christopher R. Foley originally presided over this case and handled all matters up to and including the April 19, 2010 pretrial. The Honorable Marshall B. Murray presided over the April 26, 2010 trial for Judge Foley, and the case was eventually transferred to Judge Murray. Judge Murray presided over the dispositional hearing and entered the orders terminating Laura M.'s parental rights.

court relied on the facts of record and applied the proper standard of law to reach a reasonable decision. ***Industrial Roofing Servs.***, 299 Wis. 2d 81, ¶41.

¶31 Because entry of default is a particularly harsh sanction, the supreme court has limited use of the sanction to those acts that are "egregious[] or in bad faith." ***Id.***, ¶43. An act is egregious if it is "'extraordinary in some bad way; glaring, flagrant.'" ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶21 n.8, 247 Wis. 2d 501, 634 N.W.2d 553 (citation omitted). A party's "failure to comply with circuit court scheduling and discovery orders without clear and justifiable excuse is egregious conduct." ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 719, 599 N.W.2d 411 (Ct. App. 1999).

¶32 Here, the trial court properly set forth at least four reasons explaining why it found Laura M.'s failure to appear egregious and supporting its decision to enter default: (1) Laura M. had been ordered to appear and warned that failure to do so could result in default and yet she failed to heed the court's warning; (2) Laura M. did not call to explain her absence to the court and the explanation given to her attorney by Padrein K. did not justify her failure to appear; (3) Laura M.'s children had been in foster care for several years due to Laura M.'s failure to comply with the CHIPS orders and further delaying trial would harm the children; and (4) judicial efficiency. We conclude that each of these reasons is adequately set forth by the record and supports the trial court's conclusion that Laura M.'s failure to appear was egregious.

¶33 First, the trial court had ordered Laura M. to appear for the trial and she had been warned on several occasions that failure to do so could result in entry

of default. Yet, despite this knowledge, she still failed to appear the morning of trial. The docket notes that the trial court warned Laura M. at a hearing in March 2010,[6] just prior to the April 25, 2010 trial date, that "failure to personally appear at the next scheduled court date and all subsequent scheduled court dates … may result in a default finding." The scheduling order issued by the trial court also ordered that "[t]he parents must appear [at trial] and their failure to appear will result in a default finding under Wis. Stat. §§ 805.03 & 804.12(2)(a)3." Moreover, at the May 25, 2010 hearing immediately following her missed trial date, Laura M. admitted to knowing that entry of default was a possibility. At the beginning of the hearing, the trial court asked Laura M., "[W]ere you told by Judge Foley that if you failed to come to court, that you will be defaulted? Were you told that by Judge Foley on at least one, if not more than one occasion?" Laura M. responded, "Yes, sir."

¶34 Second, Laura M. failed to call either her attorney or the trial court to explain her absence and the explanation provided to Laura M.'s attorney by Padrein K. was inadequate. As the trial court explained:

> [Laura M.] is not here. Any rational[] reason to her not being able to be here other than she wanted to go with [Padrein K.] to a doctor's appointment or that [maybe] she was ordered to be downtown at 1:30 by the DA's office.

[6] Laura M. was not required to appear at the March 11, 2010 hearing; however, Laura M. chose to appear anyway. The purpose of the hearing was to address whether Padrein K. had been found in default at an earlier hearing.

> As to 1:30, it's now 10:30. This case was ordered to be in court at 8:30 this morning. It's now two hours. Court has not heard from [Laura M.]. Now, I don't think that is reasonable for her -- unreasonable for her to say: [Padrein K.], I'm going to go to court. I'll let them know what is going on, but I'm going to be there. I'm going to hold out a spot. We're going to fight this case. She had made a decision what is most important for her.
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> ….
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> … I find that [Laura M.'s] choice of not attending court today, the day of trial, could be egregious, and that there is no rational[] reason for her not being here despite the fact that [Padrein K.] might have suffered an injury and needed to go and see a doctor today, at least that's the information that was provide[d] to [Laura M.'s attorney]. And it appears that in the conversation, whatever information has been provided to [Laura M.'s attorney], that [Padrein K. is] able to transport himself. … So they placed some -- both [Padrein K. and Laura M.] placed priority on somewhere else other than this Court.
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> And even if they called the Court [and] said: ["]Judge, I've got to be at the doctor's appointment. As soon as I can get to court[."] I would have said: ["]Fine. We can select the jury or we can begin in the process but I need you here.["] And they have not communicated with the Court. So I'm finding the mother … in default.

¶35 In so ruling, the trial court reasonably concluded, based on the information before it, that it was unnecessary for Laura M. to accompany Padrein K. to a follow-up doctor's appointment and that her decision to do so demonstrated that she did not prioritize her children. The trial court noted that Padrein K.'s injuries did not appear to be life threatening and that even if Laura M. was required to appear at the district attorney's office downtown at 1:30 in the afternoon, that appearance should not have interfered with her ability to appear for trial at 8:30 in the morning. Moreover, Laura M. never contacted either her attorney or the trial court to attempt to justify her failure to appear, and she had

ample time to do so, given that Padrein K. reported that he had been stabbed a few days earlier.

¶36 Third, the trial court reasonably considered the effect that Laura M.'s failure to appear had on her children, noting that Laura M.'s failure to appear put her children at risk because the children "need to know what their destiny is, what is happening in their lives, you know, what is going to be the permanency. Are they going to be going home? Are they going to be released from separation? Be released for adoption? What is happening with them?" The trial court's consideration of the children was rational and reasonable under the circumstances.

¶37 Finally, the trial court reasonably considered the effect of Laura M.'s actions on judicial efficiency. The court noted that it had been prepared to go forth with a jury trial that morning and that a panel had been waiting while Laura M. failed to appear.

¶38 The trial court's considerations were reasonable and based upon the facts in the record. As such, we affirm the trial court's conclusion that Laura M.'s failure to appear was egregious. *See* ***Industrial Roofing Servs.***, 299 Wis. 2d 81, ¶41.

¶39 We also reject Laura M.'s argument that the trial court's use of the phrase "*could* be egregious" renders uncertain its conclusion that Laura M.'s failure to appear *was* egregious. (Emphasis added.) The trial court's offhanded use of the word "could" does not change the tone and tenor of its oral decision, in

which it clearly concluded that Laura M.'s failure to appear *was* egregious. Consequently, we affirm.

II. The trial court did not prevent Laura M., through her attorney, from presenting evidence at the factfinding hearing.

¶40 Next, Laura M. argues that the factfinding hearing that the trial court held immediately following its entry of default[7] denied her of her statutory right to counsel because, although her attorney was permitted to cross-examine the State's witness and to give a closing argument, the trial court allegedly did not permit Laura M.'s attorney to present evidence. *See* WIS. STAT. § 48.23. We disagree.

¶41 WISCONSIN STAT. § 48.23 provides a parent subject to a TPR petition the right to competent and zealous counsel. ***State v. Shirley E.***, 2006 WI 129, ¶¶31, 37, 298 Wis. 2d 1, 724 N.W.2d 623. The trial court has a duty to provide counsel an opportunity to effectively advocate for the parent by, among other things, "challenging the State's evidence and presenting … evidence at the fact-finding phase." ***Id.***, ¶¶36-39, 51. Whether a trial court has afforded a parent his or her statutory right to counsel is a question of law that we review *de novo*. ***Id.***, ¶21.

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[7] In ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768, our supreme court held that the trial court erred in not holding a factfinding hearing prior to the entry of default. ***Id.***, ¶19. Here, entry of default and the factfinding hearing occurred almost simultaneously, and Laura M. concedes that there was no error. Consequently, we do not address the issue.

¶42 Laura M. does not contest that her counsel, in her absence, was permitted to cross-examine the State's only witness and to give a closing argument. Rather, she argues that the trial court "did not allow Laura M. through her counsel to present [her] evidence." The record belies her assertion. Following the presentation of the State's evidence, the trial court and Laura M.'s counsel engaged in the following exchange:

> THE COURT: ….
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> [Laura M.'s counsel], do you wish to call any witnesses?
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> [LAURA M.'S COUNSEL]: I don't, your Honor. My witnesses were subpoenaed for Wednesday of this week which is when I thought we would be presenting our case in chief. So I don't have any here … two days earlier.

In other words, the trial court provided counsel an opportunity to present witnesses on Laura M.'s behalf. However, because of Laura M.'s failure to appear, which was her choice, the witnesses were required sooner than counsel anticipated. Because her counsel was otherwise permitted to cross-examine the State's witness and to make a closing argument, we conclude that she was not denied her statutory right to counsel.

By the Court.—Orders affirmed.

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