COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1968 **Cir. Ct. No. 01TP000474**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DONALD C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

¶1 FINE, J. Donald C. appeals from the trial court's order terminating his parental rights to Shane C. The only issue presented by this appeal is whether the trial court erroneously exercised its discretion in granting default to the State on the first phase of a termination-of-parental rights proceeding, namely whether

there were grounds to go to the second phase, where the only issue is whether termination is in the best interests of the child. *See* WIS. STAT. §§ 48.415, 48.42, 48.424, 48.426; ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999) (once grounds are proven, trial court considers whether termination is in the best interests of the children without regard to the desires or interests of the parents). We affirm.

I.

¶2 Shane was born in June of 1989. On November 12, 2001, the State filed a petition to terminate Donald C.'s parental rights to Shane. The petition alleged that termination was appropriate because Donald C. failed to assume his parental responsibility in connection with Shane, and that he abandoned Shane. *See* WIS. STAT. §§ 48.415(6) (failure to assume parental responsibility); 48.415(1)(a)3 (abandonment).

¶3 After several false starts in getting Donald C. into court to respond to the petition, he appeared with a lawyer on March 8, 2002, and contested the petition and requested a jury trial. *See* WIS. STAT. §§ 48.422(1) & (2); 48.424(2) (incorporating WIS. STAT. § 48.31). The trial court told Donald C. that he would "have to appear at every other court date." Approximately one-month later, Donald C.'s lawyer filed a motion to withdraw, asserting, among other reasons, that Donald C. had missed two appointments and was late for a third, and that he was "not able to communicate with" him. The trial court granted the motion at a hearing that Donald C. did not attend, although he was given notice.

¶4 After some delay in getting a new lawyer for Donald C., both Donald C. and the lawyer appeared before the trial court on June 27, 2002, and a jury-trial was set for September 24, 2002. Between those dates, however,

someone attacked Donald C., and he needed surgery as a result. The trial court granted Donald C.'s motion to adjourn the trial date. A new date was set for February 24, 2003.

¶5 On February 11, 2003, Donald C.'s lawyer filed a motion seeking a new trial date, alleging that Donald C. was "still undergoing extensive rehabilitation and therapy" needed as a result of injuries he suffered in the attack. The motion attached a letter dated February 3, 2003, from Donald C.'s physician, who explained Donald C.'s therapy and opined that "[t]he demands of a jury trial at this time might interfere with the timing of ongoing medical treatment and if possible a delay on [*sic*] that trial might be more beneficial to" Donald C.

¶6 On February 13, 2003, the trial court held a hearing on Donald C.'s motion to adjourn the trial date. The trial court, appropriately reluctant to adjourn the case again, indicated that it would "be more than happy to work around [Donald C.'s] physical therapy appointments." Donald C.'s lawyer indicated that as a result of the assault, Donald C. had trouble breathing, had high blood pressure, had double vision, and "was really out of it." The trial court indicated that "if there is something cognitively wrong, I am prepared to adjourn the trial, assuming there is mental [*sic*] evidence to verify that." Donald C.'s lawyer and the trial court then had the following colloquy:

> [Donald C.'s lawyer]: There is nothing cognitively wrong, but he does have a good deal of physical pain and he lost a partial limb. There is a good deal of physical disability. He is at the doctor a lot.
>
> [Trial court]: We'll work around the doctor's schedule.
>
> [Donald C.'s lawyer]: I mean, I don't know.

> [Trial court]: This case goes back to 2001. The [termination-of-parental-rights petition] was filed November 12th, 2001. We adjourned the case when?
>
> [Shane's guardian *ad litem*]: In the fall.
>
> [Donald C.'s lawyer]: That was in the fall.
>
> [Trial court]: As I said, I will work around that schedule for appointments, but, you know, given the nature of his injuries, he may well be in pain for life. I mean, there are people who suffer some severe traumatic injuries who basically are stuck with lifetime headaches, pain. It is not an infrequent occurrence, and, you know, it's an -- at some point I have got to weigh the rights of this child to have a resolution of this case. And I will work around this doctor's appointments, I'll listen to a request to adjourn if there is something that is making -- that is interfering with his ability to participate, but I'm not going to adjourn it because he has a lot of doctor's appointments. He is going to have a lot of doctor's appointments. That may well last forever.
>
> So right now I'm denying the motion to adjourn. Again, if he wants -- if there are additional medical issues that you wish to be -- that can be brought up from medical personnel, I will be happy to listen to it. Right now we are going ahead.

¶7 Donald C. did not appear on the February 24, 2003, trial date. Donald C.'s lawyer explained that Donald C. said that he had medical and therapy appointments that were going to conflict with the first two days of the scheduled trial. After a brief recess, Donald C.'s lawyer indicated to the trial court that he had spoken with Donald C. and that Donald C. said that he could not make it to court in the afternoon "[b]ecause he is going to lay down to keep his blood pressure from going up. Even with the medication, he is concerned about that." The trial court responded:

> He is concerned about that[?] He isn't a doctor. I have no reason to believe that he can't be here this afternoon. I want him here this afternoon, unless a doctor says he can't be here this afternoon as a result of high blood pressure and a belief that that cannot be controlled through medication.

¶8 Donald C. and his lawyer spoke again. The lawyer related to the trial court what happened:

> I told him he had court this afternoon. He said he was -- his exact words were, I don't care what you want to do. I'm not coming. That's what he said for tomorrow, too. I said, you know you have got a trial. He said he is not coming. He is going to rest his blood pressure. He has high blood pressure. He is not going to let this kill him. And he said, you all do what you want to do. That's what he said.

The trial court indicated that if there was medical evidence that "the stress of a trial is going to exacerbate a serious medical condition," it would grant another adjournment.

¶9 After the lunch break, Donald C.'s lawyer said that he could not get much information from the physician treating Donald C. The trial court then picked a jury in Donald C.'s absence. The next day, Donald C.'s lawyer related another conversation with his client:

> I need to know, Donald, are you coming to court? Before I got the question barely out, he said, hell, no, I'm not coming to court tomorrow. I'm sick. I'm going to get an aneurism. I don't care about you guys. I don't care anymore. Do whatever you want to do. Donald [C.] is looking out for Donald [C.], started cussing me, calling me an MF. He doesn't care. I said, Don, Don, Don. I tried to calm him down so I maybe could talk to him some more. He hung up the phone. That's it. That's the last communication I had.

Both the State and Shane's guardian *ad litem* asked the trial court to strike Donald C.'s "contest posture"—seeking a default on the first phase. The guardian *ad litem* characterized Donald C.'s conduct as "egregious," and the trial court agreed. It granted the default.

¶10 On March 21, 2003, Donald C.'s lawyer filed a motion to vacate the default. In support, the lawyer submitted an undated form headed "Discharge Instructions" that characterized Donald C.'s ailments as "headaches, hypertension," and a prescription for hydrochlorothiazide, directing Donald C. to take one-half a tablet a day. Donald C. and his lawyer appeared for the dispositional hearing on April 7, 2003, and again asked the trial court to vacate the default. The trial court indicated that it would not unless there are "physicians who come in to this Courtroom and tell me about a medical condition that made [Donald C.] unable to be here and participate in this trial." Later, at the end of the dispositional hearing, the trial court said that it would revisit the default issue if Donald C. presented something, which could be "an affidavit of [a] physician," that revealed a bona fide reason why Donald C. did not appear on the dates set for the trial. No such evidence was given to the trial court, or, indeed, presented to us as an offer of proof.

II.

¶11 Whether to grant a default judgment is within the trial court's discretion. ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 130 Wis. 2d 4, 11, 386 N.W.2d 53, 57 (1986). Discretionary determinations by the trial court are thus immune from appellate-court second-guessing if what the trial court has done is a reasonable product of a demonstrated rational mental process based upon facts of record and the applicable law. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20–21 (1981).

¶12 Termination-of-parental-rights cases are civil actions. ***M.W. v. Monroe County Dep't of Human Servs.***, 116 Wis. 2d 432, 442, 342 N.W.2d 410, 415 (1984). WISCONSIN STAT. RULE 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." Thus, "a circuit court has both inherent authority and statutory authority under WIS. STAT. §§ 802.10(7), 804.12(2)(a), and 805.03 to sanction parties for failing to obey court orders." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶17, 246 Wis. 2d 1, 13–14, 629 N.W.2d 768, 774 (footnotes omitted). In this case, the trial court ordered Donald C. to be present at the fact-finding hearing, and Donald C. does not dispute this. Donald C., however, sloughed it all off, noting that the only person he was "looking out for" was himself.

¶13 As the trial court recognized, a party's conduct must be "egregious" before default is appropriate. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 276, 470 N.W.2d 859, 864 (1991); ***Schneller v. St. Mary's Hosp.***, 162 Wis. 2d 296, 311, 470 N.W.2d 873, 878–879 (1991). The trial court gave Donald C. the benefit of every doubt; all it wanted was medical proof that Donald C. could not come to court for the reasons he claimed. As noted, to this day, Donald C. has not provided any medical evidence that substantiates his claim that his medical condition prevented him from obeying the trial court's order to be in court. The trial court acted reasonably and well within its discretion in concluding that Donald C.'s disregard of his obligations to not only the court and the judicial system but also to Shane was egregious and that this warranted the default. Accordingly, we affirm.

By the Court.—Order affirmed.

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