COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2004

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.

Appeal Nos. 04-2574
04-2575

Cir. Ct. Nos. 03TP000116
03TP000117

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

04-2574

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DORIS C.H.,

RESPONDENT-APPELLANT.

04-2575

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DORIS C.H.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed.*

¶1 DEININGER, P.J.[1] Doris C.H. appeals orders that terminated her parental rights to her sons, Cory and Jared. She claims that the trial court erred in granting the motion of the Dane County Department of Human Services to preclude her from contesting the existence of grounds for terminating her rights. Alternatively, Doris asks us to grant a new trial in the interest of justice based on her assertion that the real controversy was not fully tried. We conclude that Doris waived the right to appeal the trial court's decision to enter default findings on the grounds for terminating her parental rights because she did not object to the granting of the Department's motion and made no request of the trial court for relief from that action. We also decline to exercise our discretionary reversal authority. Accordingly, we affirm the appealed orders.

BACKGROUND

¶2 The Department petitioned the circuit court to terminate Doris's parental rights to her sons Cory and Jared, who were then eight years old and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

sixteen months old, respectively.[2] The Department alleged that grounds for termination of Doris's parental rights to these two children existed under WIS. STAT. § 48.415(2) because both had been placed or continued in placements outside Doris's home for at least six months after being adjudged to be children in need of protection and services (CHIPS). The Department further alleged that Doris had failed to meet the conditions necessary for the children to be returned to her home and that she would not likely meet those conditions within the year following the fact finding on the petition.

¶3 After several continuances to allow Doris to obtain counsel, she ultimately obtained representation from the state public defender, denied the allegations and requested a jury trial. The clerk's "court minutes" of an unreported scheduling conference indicate that the court scheduled the matter for a jury trial and set discovery deadlines and a final pretrial conference. The minutes further reflect that counsel for the Department requested the court to enter an "order for appearance" by Doris for "depositions, court hearings, pretrial," that the court granted the request and that it advised Doris that she "can be found in contempt." The court also apparently directed that the corporation counsel "may draft order," but the record contains no written order.

¶4 Just before the scheduled pretrial conference, the Department filed a motion "for default findings as to grounds." In the motion, the assistant corporation counsel asserted that Doris had arrived late or failed to appear for

[2] The Department also petitioned to terminate Doris's rights to her son Nicholas, who was then eleven years old. During the course of circuit court proceedings on the Department's petitions, the action regarding Nicholas was severed from those regarding Cory and Jared. At the time that termination orders were entered regarding the two younger children, proceedings on the termination of Doris's rights to Nicholas were still pending.

several scheduled depositions, including a continued deposition set for two days before the pretrial. On this last occasion, Doris had called to say that she had the flu, but efforts to contact her at her residence were unsuccessful. The Department requested "[p]ursuant to sec. 804.12(2), Wis. Stats.," that the court grant the Department "a judgment of default as to grounds alleged for termination of the parental rights of Doris H."

¶5 Doris failed to appear at the scheduled pretrial conference, although it was not clear that her presence was required. The Department asked the court to rule on its motion for a default as to grounds for termination, and in response, Doris's counsel informed the court, "I have no defenses or challenges to this motion." The court initially expressed skepticism that it could or should grant the Department's motion solely "for failure to cooperate with a deposition." After further discussion with counsel, the court concluded that in order to grant the sanction requested, Doris's actions "must be egregious and without clear and justifiable excuse."

¶6 The court then reviewed the record from the beginning of the case, observing, "to put it politely, she engaged in delays … [t]here's no denial of the facts regarding the many depositions scheduled." Referring to the court's summary, Doris's counsel informed the court that "I have no objection to that." The court did note that Doris had appeared on two occasions, on which, according to her attorney, "[w]e've had about six hours of testimony." After reviewing the record of early delays and continuances occasioned by Doris's lack of diligence in obtaining counsel, her missing of scheduled depositions, and her failure by the established deadline to identify any witnesses she intended to call at the fact finding hearing, the court concluded that Doris's "course of conduct is egregious

enough for me to consider a default subject to" the Department's making a prima facie showing that grounds for termination of Doris's parental rights existed.

¶7 The Department then presented testimony from a social worker who attested to the allegations of the petition for termination and provided factual details to support them. Doris's counsel cross-examined the Department's witness. Following this testimony, the court found "that 48.415(2) has been met." The court then went on to make specific findings regarding the dates of the CHIPS orders, that they contained the requisite notices and warnings, that reasonable efforts were made by the Department to provide services, that the children had been placed outside of Doris's home for six months or longer, and that Doris had failed to meet the conditions for the return of the children and was not likely to be able to do so within twelve months. Based on these findings and "on the egregious conduct I stated before," the court ordered that a "default judgment can be entered."

¶8 The Department's counsel noted for the record at the commencement of the dispositional hearing that "there's no motion for relief from [the default findings] that's been filed as of today's hearing date, and I assume there's been contact between [Doris] and her counsel and that a motion would have been brought if there was a basis under Section 806.07(1)." The court then heard testimony from Doris, an uncle with whom Cory was placed, the supervising social worker and Cory's therapist.

¶9 At the conclusion of testimony, Doris's counsel offered only two brief paragraphs of argument. Counsel indicated that this was "a real difficult case" from her point of view, and that she understood "where everybody else is coming from." She pointed out that there was no dispute that Doris loves her

children, and that her inability to meet the conditions for the return of the children was "not for a lack of love for her children." Counsel also acknowledged that the potential adoption of one of the children by Doris's brother was positive because it would permit Doris to maintain a relationship with that child. She noted that Doris would likely not have contact with the younger child if her rights were terminated, which she deemed "unfortunate." Counsel concluded with "[t]hat's all I have to say."

¶10 The court then reviewed the standard and the factors for determining the best interest of the child under WIS. STAT. §§ 48.425 and 48.426. The court concluded that it was in the best interest of both children that Doris's parental rights be terminated, and it subsequently entered orders to that effect. Doris appeals.

ANALYSIS

¶11 Doris's sole complaint on appeal is that the trial court wrongly granted the Department's motion for a default finding that statutory grounds for termination of Doris's parental rights existed. She argues that the record does not support the court's "implicit finding that [she] had violated an order of the court," and further that the court "erroneously exercised its discretion in awarding a default." Finally, she asks us to exercise our discretionary reversal authority under WIS. STAT. § 752.35 because "the real controversy was not fully tried." Doris does not specify what evidence she would have offered had she been given the opportunity. She makes only a general assertion that the court was denied "all of the material proof regarding whether Doris was an unfit parent," and further that she "was precluded from having a jury trial or offering any evidence on her own

behalf regarding her past and future ability to act as a parent for her sons Cory and Jared."

¶12 The Department responds that the trial court possessed statutory authority to enter a default against Doris for the reasons it cited, and that the court did not erroneously exercise its discretion in doing so. Following its arguments on the merits, the Department asserts that Doris waived her opportunity to appeal the granting of the default because Doris's counsel specifically informed the court that she "had no objection" to the granting of the Department's motion. The Department also notes that Doris made no request to have the court reconsider its ruling or to grant relief from it under WIS. STAT. § 806.07. We agree with the Department that Doris's failure to object to the Department's motion or to seek relief from the ruling in the trial court precludes her from claiming on appeal that it was entered in error.

¶13 We note first that Doris makes no reply whatsoever to the Department's waiver argument. We can accept as conceded propositions advanced by a party that are not refuted by the opposing party. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶14 Moreover, our own review of the record confirms that Doris made no objection of any kind to the court's entry of default findings against her based solely on the Department's testimony establishing a prima facie case. Doris made no attempt to convince the court that her conduct was not egregious, and neither did she attempt to provide any justifiable excuse for her nonappearance at scheduled depositions. She also made no argument to the trial court that it lacked statutory authority to grant the sanction that the Department requested, that the

Department had failed to make a prima facie showing that statutory grounds for termination existed or that she had important evidence that she wished the court to consider on the issue of whether grounds existed. Finally, Doris did not move for reconsideration or for relief from the default findings, although some six weeks intervened between the granting of the default and the first day of the dispositional hearing. (We add, as well, that Doris made no argument to the court at the conclusion of the dispositional hearing that there were any reasons not to terminate her rights to the two children.)

¶15 "Without an objection, even an error based upon an alleged violation of a constitutional right may be waived." *See* ***State v. Damon***, 140 Wis. 2d 297, 300, 409 N.W.2d 444 (Ct. App. 1987). This case presents a good example of why the waiver rule exists and why we will seldom elect to not apply it. By requiring a party to make a timely and appropriate objection in the trial court in order to preserve an asserted error for appeal, we foster judicial economy and diminish opportunities to purposefully build in error that might allow an unfavorable result to be overturned on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727. As we have noted, the trial court was initially skeptical of the Department's request for default findings on the grounds for termination. Had Doris presented cogent arguments as to why it would be improper or inappropriate for the court to grant the Department's motion, or had she followed up with a motion to reconsider or for relief from the default findings, the trial court may well have opted to proceed to trial.

¶16 In short, "[w]e will not … blindside trial courts with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). Moreover, given Doris's absolute silence on the matter in the trial court, the present record comes close to triggering

the doctrine of "invited error," under which an appellate court will not review an error that was "invited" or induced by the appellant in the trial court. ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992).[3]

¶17 For similar reasons, we decline the request to grant discretionary relief to Doris under WIS. STAT. § 752.35. Although she claims that the court or jury was deprived of important evidence that bore on the issue of whether grounds for termination existed, Doris's appellate argument is devoid of any hint as to what that evidence might have been. Although Doris has pointed to a potential unobjected to error, she has made no effort to demonstrate to us how or why she suffered any prejudice from the alleged error. For all we know from the record and her brief on appeal, Doris would have had little or nothing to offer in her own defense had the allegations of the petition been tried to a judge or jury. Indeed, by the deadline set for identifying witnesses (which had passed before the court granted the default), Doris had identified no witnesses that she intended to call at the fact-finding hearing. In the absence of a showing, or even an assertion, that there was specific evidence or testimony that would have been beneficial to Doris that she was prevented from providing, we decline to grant discretionary relief from the appealed orders.

CONCLUSION

¶18 For the reasons discussed above, we affirm the appealed orders.

[3] Doris makes no claim of ineffective assistance of counsel despite the fact that her trial counsel made no effort to oppose the Department's motion for default findings or to seek relief from the trial court's granting of the motion. Because Doris has not asserted ineffective assistance of counsel, and thus there was no evidentiary hearing on such a claim in the trial court, we have no basis to address the issue on appeal.

By the Court.—Orders affirmed.

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