COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1964 **Cir. Ct. No. 2007TP122**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JENNIFER M.,

RESPONDENT,

LUIS G.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JANE V. CARROLL, Judge. *Affirmed.*

¶1 BRENNAN, J.[1] Luis G., the father of Jenalyn G., appeals both the trial court's judgment, terminating his parental rights to Jenalyn (born 6/20/05), and the trial court's order on Luis's motion for post-judgment relief, determining that Luis had forfeited[2] his right to a jury trial on the abandonment ground.[3] Luis argues that the trial court erred under WIS. STAT. § 48.422 in determining that he forfeited his right to a jury trial on the original abandonment count and in not re-advising him of his right to a jury trial upon the filing of the amended petition. Because Luis failed to appear at the initial hearing, despite proper service, and remained absent from court for ten more months, I conclude that he forfeited his right to a jury trial on the abandonment ground in both petitions and affirm the judgment and order.

BACKGROUND

¶2 Jenalyn was born June 20, 2005. She was taken into protective custody in January 2006 because of abuse allegations and has lived with her maternal aunt and three siblings ever since. The State filed a Termination of Parental Rights ("TPR") Petition on May 1, 2007 against Jennifer M. (the mother

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] While the trial court, parties and relevant case law use the word "waiver," we use the word "forfeiture" consistent with the terminology adopted by ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.") (internal quotation marks and quoted source omitted).

[3] This case was originally assigned to the Honorable William S. Pocan, but was reassigned to the Honorable Jane V. Carroll following a motion for judicial substitution. Judge Carroll entered both the judgment and order at issue on appeal.

of Jenalyn) and Luis.[4] The State alleged abandonment under WIS. STAT. § 48.415(1)(a)(3) as grounds for terminating Luis's parental rights. The summons and petition set May 22, 2007, as the initial hearing date.

¶3 The State attempted personal service on Luis, certified mail service and finally published notice to him of the May 22, 2007 initial hearing date. On May 22, 2007, Luis failed to appear in court. The State requested that the court find Luis in default and filed the Proof of Publication and the Affidavit of Attempted Service, which contained the notes of the process server who wrote: Luis "does not live here per [H]ispanic female." (Capitalization omitted.) But the State did not have proof of mail service at that time. Consequently, the court stated that it would take the State's default request under advisement for prove-up on the next court date, set for July 5, 2007.

¶4 On July 5, 2007, Luis still did not appear, and because Jennifer's counsel filed a request for judicial substitution, nothing occurred on the State's default request at that time. The State did, however, file proof of attempted certified mail service, noting that the notice was returned and stamped "unclaimed." The court set July 13, 2007, as the next court date for the first appearance before the newly assigned judge.

¶5 On July 13, 2007, Luis still did not appear, and the court took the State's request for a default order under advisement for prove-up at the next hearing on September 4, 2007. On September 4, 2007, Luis again did not appear. The State advised the court that it sent several letters to Luis's addresses at South

[4] The State also petitioned for termination of Jennifer's parental rights to her three other children as well as their two fathers, none of whom are the subject of this appeal.

22nd Street and South 15th Street, placed several phone calls and checked with the Bureau of Milwaukee Child Welfare but was informed that no one at the Bureau had heard from Luis in the last nine months. This time the court made a finding of default, but again adjourned the prove-up to the next court date, on October 5, 2007. Luis did not appear at the October 5, 2007 hearing nor did he appear for the next five hearings on November 13, 2007, January 16, 2008, January 23, 2008, January 29, 2008 and February 19, 2008.

¶6 On February 19, 2008, Jennifer voluntarily stipulated to grounds for terminating her parental rights to Jenalyn, and the court set the dispositional hearing for March 25, 2008.

¶7 Finally, on March 25, 2008, ten months after the initial hearing and after Jennifer had dropped her contest posture, Luis appeared in court for the first time. The court adjourned so that Luis could get an interpreter and a public defender. On the next court date, April 24, 2008, Luis complained of problems with his attorney, so the case was adjourned again to enable him to get a new attorney. The next court date was June 6, 2008, when Luis appeared with his trial counsel who informed the court of his intention to file a motion to rescind the court's default order. The court set-up a briefing schedule on the motion and set August 7, 2008, for a hearing.

¶8 The hearing on the motion to rescind the default order took place on August 7 and September 10, 2008. At the conclusion of the hearing on September 10, the court found that Luis had been properly served with the summons and petition, and had failed to appear for the May 22, 2007 initial hearing and for the next ten months of court appearances without any excusable reason. The court found that it had never really completed the default because it

had never finished the prove-up, which the court believed was required by ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768. Nonetheless, the court found that Luis had forfeited his statutory right to a jury trial due to his failure to request a jury trial before the end of his May 22, 2007 initial hearing.

¶9 After the court's ruling on the motion to vacate the default order, the State advised that it was going to file an amended petition adding a second grounds count of failure to assume parental responsibility. The court then asked Luis's counsel how he would like to schedule the case. He answered, "I'd ask … the Court to set the matter for a *court trial* at this point on the fact-finding issues as expeditiously as possible." (Emphasis added.)

¶10 On November 10, 2008, at the pretrial conference on the amended petition, the State served Luis with the amended TPR petition re-alleging the original abandonment ground against Luis, but adding a new ground of failure to assume responsibility. The court asked Luis's counsel if he had any objection to the filing of the amended petition. He said "no." The court trial was set for November 24, 2008.

¶11 When the court trial commenced on November 24, 2008, Luis's counsel made no objection to proceeding as a court trial. The trial concluded on November 26, 2008, when the court found that both grounds were proven and that Luis was unfit as a parent. A dispositional hearing followed, at the conclusion of which the court terminated Luis's parental rights to Jenalyn.

¶12 Luis filed a post-judgment motion arguing that: (1) the court should have had a plea hearing on the amended petition; and (2) the court should have granted Luis's request for a jury trial on the amended petition. At the conclusion of the hearing, the court found that it should have advised Luis of his right to a

jury trial on the amended petition, but its failure to do so was harmless error given that Luis had already forfeited his right to a jury trial on the original abandonment count. Luis appeals.

STANDARD OF REVIEW

¶13 Luis contends that the trial court erred both in interpreting WIS. STAT. ch. 48 to find that he had forfeited his right to a jury trial and in exercising its discretion not to grant his request for a jury trial.

¶14 Whether the trial court correctly read WIS. STAT. ch. 48 raises a question of statutory interpretation. We interpret statutes independently of the trial court, but benefiting from its analysis. ***State v. Bobby G.***, 2007 WI 77, ¶42, 301 Wis. 2d 531, 734 N.W.2d 81. "Statutory language is given its common, ordinary, and accepted meaning." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutes are interpreted in context of the whole and in a manner to avoid absurd results. ***Id.***, ¶46.

¶15 When determining whether the trial court properly exercised its discretion, we look to determine whether the trial court "examine[d] the relevant facts, applie[d] a proper standard of law, and, using a demonstrated rational process, reache[d] a conclusion that a reasonable court could reach." ***Flottmeyer v. Circuit Court for Monroe County***, 2007 WI App 36, ¶17, 300 Wis. 2d 447, 730 N.W.2d 421. Stated another way, "[w]e will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶16 The trial court's factual findings and credibility determinations are entitled to deference on review and are reviewed under the clearly erroneous standard. *See* WIS. STAT. § 805.17(2). Under this standard, even if the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

DISCUSSION

A. Original Abandonment Petition

¶17 Luis argues that when the trial court decided not to grant the State's request to enter a default judgment against him: (1) the trial court, in effect, granted him a new initial hearing, which in turn entitled him to request a jury trial under WIS. STAT. § 48.422; or, in the alternative, (2) the trial court should have exercised its discretion and granted his request for a jury trial.

¶18 The State counters that: (1) Luis failed to request a jury trial on the original abandonment charge by the end of the initial hearing, as required by WIS. STAT. § 48.422(4); (2) the court's decision not to enter a default judgment against Luis ten months into the case did not re-invest him with the right to a jury trial; and (3) the court properly decided not to grant Luis's late request for a jury trial. The guardian *ad litem* ("GAL") supports Luis's position on appeal but states that termination of Luis's parental rights is in the child's best interests and asks for an appellate court resolution "with all possible dispatch" because the child has lived with her aunt and three siblings from January 2006 to the present and needs a final end to these proceedings.

¶19 I conclude that Luis forfeited his right to a jury trial on the original abandonment petition under WIS. STAT. § 48.422 because he failed to appear at the initial hearing to make a timely request. The trial court was correct that, under both the Wisconsin Constitution and § 48.422, a party can forfeit his right to a jury trial by not timely requesting one, and Luis did so here. The trial court's decision not to complete its earlier default finding against Luis did not return the case to the initial hearing stage or reinstate Luis's right to a jury trial. Additionally, the record discloses a reasonable basis for the trial court's exercise of its discretion not to grant a late request for a jury trial both due to concerns for prompt permanency for the child and judicial economy. *See* ***Prahl***, 142 Wis. 2d at 667 ("We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision.").

¶20 WISCONSIN STAT. ch. 48 sets forth the procedures for TPR petitions. Where it is silent on a procedure, the civil code controls. *See* WIS. STAT. § 801.01(2). Luis concedes that a parent's right to a jury trial is statutory. *See* ***Walworth County DHHS v. Andrea L.O.***, 2008 WI 46, ¶29, 309 Wis. 2d 161, 749 N.W.2d 168. Under WIS. STAT. § 48.31(1) and (2), a TPR trial (otherwise known as a fact-finding hearing) "*shall be to the court* unless the child [or] the child's parent … exercises the right to a jury trial by demanding a jury trial at any time before or during the plea hearing." WISCONSIN STAT. § 48.422(1) and (4) specifically state that an initial hearing (plea hearing) on a TPR petition shall be held within thirty days after the petition is filed, and at the hearing, the court shall determine whether any party wishes to contest the petition, and any necessary party who requests a jury trial before the end of the initial hearing shall be granted a jury trial.

¶21 Luis failed to attend his initial hearing and therefore failed to timely request a jury trial. The summons commanded Luis to appear at the initial hearing on May 22, 2007; he did not do so. Accordingly, the State requested that the court find Luis in default. The court took the request for default "under advisement" because of time restraints on the court and the fact that proof of certified mail service had not yet come back from the post office. The State filed the Proof of Publication and the Affidavit of Attempted Service regarding attempts to serve Luis notice of the May 22 initial hearing.

¶22 Luis failed to appear at the next two court dates, on July 5 and 13, 2007, but again, the court took the State's request for default "under advisement." Finally, on September 4, 2007, the court made the actual finding that Luis was in default, but again adjourned for prove-up. Five more court appearances followed with no appearances by Luis. Subsequently, on March 25, 2008, on the eleventh court date and ten months after the petition was filed, Luis appeared for the first time and moved to vacate the September 4, 2007 default order.

¶23 At the September 10, 2008 hearing on Luis's motion to vacate the court's default order, the court found that Luis had forfeited his statutory right to a jury trial on the abandonment count. The court found that Luis was properly served with the summons and petition and notice of initial hearing, but failed to appear for no excusable reason and failed to timely request a jury trial. None of the court's factual findings are disputed on appeal.

¶24 The law is well-settled that a party can forfeit his or her statutory constitutional right to a jury trial by failing to make a timely request. *See* WIS. CONST. art. I, § 5 ("The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury

trial may be waived by the parties in all cases in the manner prescribed by law."); *see also* ***Rao v. WMA Sec., Inc.***, 2008 WI 73, ¶¶18-19, 310 Wis. 2d 623, 752 N.W.2d 220 ("[A] defendant 'has no vested right under [WIS. CONST. art. I, § 5], to the manner or time in which [the right of trial by jury] may be exercised or waived, since these are merely procedural matters to be determined by law.'") (footnote and citation omitted; third alteration in ***Rao***).

> [A] party's 'waiver' of the Article I, Section 5 right of trial by jury need not be a 'waiver' in the strictest sense of that word, that is, an 'intentional relinquishment of a known right.' Instead, a party may 'waive' the Article I, Section 5 right of trial by jury by *failing to assert the right timely* (*as when a party fails to demand a jury trial timely in accordance with* [*WIS. STAT. §*] *805.01*).

Rao, 310 Wis. 2d 623, ¶22 (emphasis added; footnote omitted). Because Luis failed to timely request a jury trial at the initial hearing, as required by WIS. STAT. § 48.422, the trial court properly found he had forfeited his right to request a jury trial.

¶25 Despite Luis's argument to the contrary, the trial court's decision not to grant the State's motion for default judgment did not return the case to the initial hearing stage and did not reinstate Luis's right to request a jury trial. Neither WIS. STAT. § 48.422 nor WIS. STAT. § 806.02 compel this result, nor does Luis present any authority for his argument.

¶26 A default is a type of judgment. WIS. STAT. § 806.02. Whether to grant a default judgment is a matter for the trial court's discretion and may be rendered at any stage of the proceedings. § 806.02(1)–(5); ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 130 Wis. 2d 4, 11, 386 N.W.2d 53 (1986). Not granting a default judgment simply means the court is permitting a party some

opportunity to resist judgment. The exact form of that opportunity is not dictated by either the default statutes or WIS. STAT. § 48.422.

¶27 If the court considers a decision on a default motion at a late stage in the proceedings, the party may have already missed many deadlines, as is the case here. After deciding *not* to enter a default judgment, the trial court must use its inherent authority to control its cases, long-recognized by Wisconsin law, to determine whether to reinstate any of the party's rights and whether to re-do any of the procedural hearings the party missed. *See* ***State v. Tody***, 2009 WI 31, ¶62, 316 Wis. 2d 689, 764 N.W.2d 737 (citing ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999)) ("A [trial] court judge possesses broad inherent powers that provide him or her with the tools to fairly, efficiently, and effectively administer justice."). For example, the court may need to decide whether to: (1) permit a trial to the court or a jury trial; (2) reopen closed discovery deadlines or closed expert witness filing deadlines; or (3) permit late pleadings.

¶28 Here, the court concluded that it never entered a default judgment because it had failed to do the prove-up, which the court believed ***Evelyn C.R.*** required.[5] When specifically questioned by the parties as to whether the court's decision meant that it was regarding the September 2008 hearing date as a new initial hearing, the court said "no." The court chose to refuse Luis's late request for a jury trial, finding he had already forfeited it and that the record showed no

[5] Although both the State and the GAL argued before the trial court and on appeal that the trial court misinterpreted ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768, neither party appealed the trial court's decision in that regard. We do not address that issue because it is not necessary for resolution of the issues on appeal.

reason to grant him a new opportunity to exercise the right at this late stage in the proceedings. The record discloses that the court's decision was a reasonable exercise of its discretion. *See* ***Flottmeyer***, 300 Wis. 2d 447, ¶17. The child's interests in permanency and the court's interest in judicial economy are proper reasons for the court's decision.

B. Amended Abandonment Petition

¶29 Luis next argues that the trial court erred in not holding an initial hearing on the amended petition and not re-advising him of his right to a jury trial, pursuant to WIS. STAT. § 48.422(1) and (4). The State counters that: (1) the trial court was not required to re-advise Luis of his right to a jury trial on the abandonment count in the amended petition because the count was identical to that in the original petition and Luis had already forfeited his right to a jury trial on that count; (2) Luis forfeited his right to a jury trial on both counts of the amended petition because he failed to object to the court trial and failed to request a jury trial; and (3) even if the court erred in not re-advising Luis of his right to a jury trial upon the filing of the amended petition, the error was harmless because Luis already forfeited his right to request a jury trial on the abandonment count and only one ground need be proven for a TPR judgment. The State is correct.

¶30 WISCONSIN STAT. § 48.422 refers to the *petition* and is silent on an *amended* petition. There is no reference in WIS. STAT. ch. 48 to an *amended* petition. Here, the abandonment count in the amended petition is identical to the abandonment count in the original petition. Luis already had an initial hearing on the abandonment count and forfeited his right to request a jury trial by not appearing and requesting one. To read § 48.422 to require re-advising of rights on the abandonment count in the amended petition, especially where, as here, the

count is identical to that in the original petition, would be illogical, even absurd. We are to avoid absurd results. ***Kalal***, 271 Wis. 2d 633, ¶46. Also, to require the court to re-advise Luis of his right to jury trial on an identical charge would be a poor use of judicial resources and would needlessly prolong a case that, in the best interests of the child, should be resolved expeditiously.

¶31 Further, "an objection not made to the trial court is waived." ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds by* WIS. STAT. § 940.225(7), *as recognized in* ***State v. Grunke***, 2007 WI App 198, 305 Wis. 2d 312, 738 N.W.2d 137. Luis not only failed to object to a trial to the court on his two count amended petition, he *asked* for the case to be tried before the court. At the September 10, 2008 pretrial conference, Luis's attorney asked the court to set the matter for a *court trial* as expeditiously as possible. And at the start of the trial on November 24, 2008, Luis's attorney, again, did *not* request a jury trial, and in fact, stated that he was glad that they were proceeding to a court trial. After the GAL noted on the record that "one of the advantages of trying this case to the Court is that I know that the Court will not become distracted by things that are not relevant," Luis's attorney stated, "I trust the jury system, *but I'm also grateful to have a court trial*." (Emphasis added.)

¶32 Luis had ample opportunity to request a jury trial or to object to a court trial but did not do so. The State told the court on September 10, 2008, that it was going to file the amended petition, filed it on October 30, 2008, and then on November 10, 2008, served Luis in court with the amended petition. On November 24, 2008, the court commenced the court trial on the amended petition. At no point did Luis object to a trial to the court or ask for a jury trial.

¶33 Luis concedes that he did not object to a trial to the court or request a jury trial. Nonetheless, he argues he cannot be found to have forfeited a right of which he was not properly advised. That argument fails as to the abandonment count because his failure to be advised of his right to a jury trial was due to his choice not to appear at his initial hearing and timely request it.

¶34 Even if Luis had not forfeited his right to be advised of a jury trial on the amended petition, any error by the trial court in not advising him was harmless as to the abandonment count. WISCONSIN STAT. § 805.18(1) states that "[t]he court shall, in every stage of an action, disregard any error or defect in the … proceedings which shall not affect the substantial rights of the adverse party." An error affects a party's substantial rights when there is "a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Evelyn C.R.***, 246 Wis. 2d 1, ¶28. If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless. ***Id.***

¶35 There is no reasonable possibility that the failure of the trial court to advise Luis of his right to a jury trial on the abandonment count in the amended petition contributed to the outcome of the grounds' portion of his TPR trial. The evidence supporting the abandonment was substantial and the court's extensive factual findings and conclusions of law are not challenged by Luis. A jury trial would not have led to a different outcome.

¶36 Finally, only one ground need be proven for a judgment terminating parental rights under WIS. STAT. §§ 48.415 and 48.424. So the trial court's failure to advise of the right to a jury trial on the second count of the amended petition has no practical effect on the underlying controversy and is therefore moot. *See*

State ex rel. Olson v. Litscher, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. Accordingly, I affirm the trial court's order and judgment terminating his paternal rights on the abandonment ground.

By the Court.—Judgment and order affirmed.

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