COURT OF APPEALS DECISION DATED AND FILED

August 14, 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 No. 2012AP548 **Cir. Ct. No. 2010TP341**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

YVETTE A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Yvette A. appeals a trial court order denying her postjudgment motion for relief from a trial court order terminating her parental

---

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

rights to her daughter, Amya C. Yvette argues that the trial court erred in entering a default judgment at the "grounds" phase of the termination of parental rights proceeding based on her failure to appear because the failure was neither egregious nor in bad faith. Specifically, Yvette argues that at the time of the grounds hearing, she was hospitalized in a locked mental health unit of a local hospital and could not personally appear in court. We conclude that the trial court was entitled to enter a default judgment for Yvette's failure to appear, based on the trial court's findings that Yvette had a history of checking herself into hospitals without actually needing psychiatric hospitalization and had checked herself into the hospital shortly before the hearing concerning her child. We therefore affirm the trial court's order.

BACKGROUND

¶2 Amya was born to Yvette on April 30, 2004. On August 3, 2007, Amya was taken into protective custody after a series of referrals to the Bureau of Milwaukee Child Welfare for neglect, specifically medical neglect of Amya's seizure disorder. Amya was placed in a foster home immediately after being taken into protective custody. Amya continues to reside in the same foster home.

¶3 A Children in Need of Protection or Services (CHIPS) Dispositional Order was entered on November 7, 2007, outlining the conditions Yvette was to meet in order for Amya to return to Yvette's home. Yvette failed to meet the conditions for Amya's return to her care. The three primary conditions Yvette did not meet were: Alcohol and other Other Drug Abuse, mental health treatment, including individual therapy, and regular and consistent visitation with Amya.

¶4 The State filed a Petition for Termination of Parental Rights against Yvette on December 15, 2010. After being assigned an attorney, Yvette missed

two depositions due to hospitalization. Yvette also missed multiple appointments for psychological evaluation with a psychologist, Dr. Kenneth Sherry, as well as the hearing pertaining to Amya's permanency plan. At the hearings Yvette did attend, the trial court issued multiple reminders to Yvette that a failure to appear could result in a default judgment.

¶5 A jury trial for fact-finding was originally scheduled for June 13, 2011; however, at a hearing on May 18, 2011, it came to the trial court's attention that Yvette did not appear for two depositions. The trial court adjourned the jury trial and a new date was set for August 22, 2011. While in court on August 22, 2011, Yvette's attorney indicated that she received a phone call from Yvette the day before the scheduled fact-finding, in which Yvette said that she had checked herself into a mental health facility. Consequently, Yvette's attorney asked the trial court for a competency evaluation. Yvette's attorney indicated that she could not proceed with the case without Yvette present and requested a continuance.

¶6 The State requested that the trial court find Yvette in default, stating that Yvette's case manager confirmed that Yvette checked herself into a mental health facility, but that Yvette was capable of appearing by phone. The State told the trial court that Yvette admitted in her deposition to repeatedly checking herself into psychiatric hospitals by lying about being suicidal when she needed a place to stay for a few days. The State also told the trial court that Yvette admitted in her psychological evaluation, conducted by Dr. Sherry, that she had been admitted to a psychiatric hospital on eight occasions, though she never actually needed hospitalization. The Guardian ad Litem informed the court that Yvette's case manager provided Yvette with multiple bus tickets and advised Yvette of the scheduled jury trial. Yvette's case manager also told the trial court that she met

personally with Yvette three days before the scheduled fact-finding and did not notice any concerning behavior.

¶7 The trial court denied Yvette's counsel's request for a continuance, stating, "Mom has testified [that] she has lied to get into the mental health complex. Dr. Sherry says he's got real concerns about her lying, which in essence boils down to is this a circumstance of legitimacy or is this a circumstance of manipulations? It appears to be one of manipulation by the mother." The trial court denied Yvette's counsel's request for a competency exam for her client, and granted the State's request for a default judgment, stating:

> I have three very important bits of information:
>
> I have [Yvette's counsel's] statement, ["]I've represented this woman for three years. Never had a competency exam request concern until now.["]
>
> We've got the mother's own testimony at the deposition, as cited by [the State], which reflects and leads to the very reasonable inference of mom trying to manipulate the system.
>
> And then, of course, we have Dr. Sherry, who in his report, [made] the reasonable inference … mom is a manipulator.
>
> ….
>
> A default judgment can be granted, and clearly it is a civil death penalty in a TPR action. A default judgment can be granted if a party engages in egregious conduct or bad faith conduct, and there is no clear and justifiable excuse, and the party was on notice about the potential sanction.
>
> Looking at this case, [Yvette] was advised by this court on … at least on two occasions, she needed to do three things. Cooperate with her lawyer, stay in touch with her lawyer, … and make all of your court appearances. And she was told if she did not do so, she could be penalized, she could be sanctioned, and the sanction could be losing her right to a trial in the grounds phase. And if the case

> was in a posture to go forward to disposition, she could lose her right to have a say in the disposition.

¶8 The trial court stated that Yvette failed to comply with a court order, in accordance with WIS. STAT. § 805.03, and that Yvette's conduct was in bad faith and was egregious. The trial court adjourned the dispositional hearing to give Yvette another chance to appear.

¶9 At the dispositional hearing, at which Yvette did appear, Yvette testified on her own behalf. The trial court made an assessment that it had no concerns about Yvette's competency and overruled Yvette's counsel's objection to the prior default finding, stating that based upon the testimony presented, the CHIPS history, and the fact that Yvette did not provide any new information, default judgment would stand. The trial court found that it was in the best interest of Amya that Yvette's parental rights be terminated.[2]

¶10 Yvette filed a motion for postdisposition relief. We ordered the case remanded for further evidentiary proceedings to determine whether Yvette's conduct was egregious and without justifiable excuse.

¶11 At the postdisposition motion hearing, Yvette appeared and provided testimony in support of her motion as well as medical records from her hospital stay when she was found in default. The trial court also incorporated the transcripts from previous hearings. After hearing testimony from Yvette and after reflecting on its previous findings from previous hearings, the trial court found

[2] At the fact-finding hearing on August 22, 2011, Yvette's counsel indicated that she was unprepared to go forward with the dispositional hearing. The dispositional hearing was then adjourned until August 24, 2011. Because of Yvette's continued hospitalization, she did not appear in court on August 24, 2011. The trial court again adjourned the hearing until October 14, 2011. The trial court stated that it would not carry over the sanction for what it found to be Yvette's manipulative behavior; however, it notified Yvette's counsel that Yvette was to be present at the dispositional hearing, otherwise her right to participate in the hearing would be lost.

Yvette to be an incredible witness and upheld the default judgment. This appeal follows.

DISCUSSION

¶12 In termination of parental rights cases the rules of civil procedure governing default judgments apply. ***Door County Dep't of Health and Family Servs. v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999). 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) and 805.03. We uphold the trial court's exercise of discretion if the 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.

¶13 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).

¶14 Here, the trial court set forth multiple reasons explaining why it found that Yvette's failure to appear warranted a default judgment. Specifically, the trial court found that: (1) Yvette was put on notice multiple times as to her required presence at the proceedings; and (2) Yvette's failure to appear at the fact-finding trial was an intentional attempt to delay the proceedings. We conclude

that the trial court's findings that Yvette's failure to appear was egregious, in bad faith, and not justifiably excusable, are supported by the record.

¶15 First, the trial court ordered Yvette to personally appear at all proceedings, yet the day before her scheduled jury trial, Yvette called her counsel and informed her that she (Yvette) checked herself into a locked psychiatric hospital. The trial court took notice of Yvette's failure to appear at a past hearing, her failure to appear at two depositions, the result of which delayed the proceedings, as well as testimony from Yvette's case worker stating that she met with Yvette before she (Yvette) checked herself into the hospital and did not observe any unusual behavior. In fact, the trial court noted that the case worker provided Yvette with bus tickets and reminded her of the upcoming jury trial. The record indicates that Yvette was personally warned by the trial court at least twice that she was to appear at all court appearances, or face sanctioning and a default judgment. Yvette also admitted, while testifying at the postdisposition hearing, that she had telephone access while hospitalized, suggesting that she was able to appear by phone but did not.

¶16 Second, at both the fact-finding hearing and the postdisposition hearing, the trial court relied on Yvette's own deposition testimony, the medical evaluation from Dr. Sherry, and Yvette's history of failing to appear for a hearing and depositions to support its conclusion that Yvette's failure to appear at the grounds hearing was an intentional attempt to delay the proceedings. At the postdisposition hearing, the trial court stated:

> I made it very clear as to why I believed [Yvette]'s conduct in signing herself in or having herself hospitalized literally on the day of Trial, or the day before, was manipulative. And I set forth on the record the reasons why I thought it was manipulative.

Her testimony at her own deposition about conduct which this Court construed as manipulative. The Report of Dr. Sherry, which sets forth statements of [Yvette], which were further support for her manipulative conduct as found by the Court.

….

I think everyone recalls, this matter had been scheduled for a Jury Trial on June 13, 2011. It didn't go forward in June. Why? Because [Yvette] didn't show up for her deposition on multiple occasions. In fact, … the Court was advised that two depositions had been scheduled for [Yvette], but she didn't show up for them.

And [Yvette] was in court and was told by the State that they would move for Default Judgment if she didn't show up for the deposition.

….

In any event, what I'm getting at is this: Did [Yvette] have notice of the Jury Trial on August 22nd?

I made the finding that she did, because she was in court [at the previous hearing].

She had previously—as I previously found, she was advised of the necessity to stay in touch with or cooperate with the lawyer, cooperate with Discovery, make all court appearances, follow all court orders. And the potential sanction could be a default judgment if she failed to follow court orders.

….

The Court used Exhibit Number Nine, Dr. Sherry's Report, wherein Dr. Sherry reported specific things stated by [Yvette] about signing herself in multiple times under circumstances which, in essence, amounted to manipulative behavior.[[3]]

---

[3] The exhibits were actually filed on the date of Yvette's dispositional hearing in October 2011, however, the trial court was made aware of the documents and their contents by Yvette's case worker at the fact-finding hearing. The documents were a part of the record for the postdisposition hearing.

> And then the transcript of her deposition … [w]here she made statements regarding signing herself in under circumstances that one could easily infer was manipulative.

¶17 The trial court also took into account the testimony of Yvette, as provided at the postdisposition hearing. The trial court concluded that Yvette was an incredible witness. The trial court particularly relied on Yvette's statements implying that Dr. Sherry lied in his evaluation of her, and her inability to recall multiple facts clearly established on the record, to determine that her testimony did not have a "ring of truth." "We must accept the [trial] court's assessment of the credibility of a witness unless we can say that a witness was credible or incredible as a matter of law." ***Schultz v. Sykes***, 2001 WI App 255, ¶32, 248 Wis. 2d 746, 638 N.W.2d 604.

¶18 Taking into account all of the information before it, the trial court determined that Yvette exhibited a pattern of behavior that involved checking herself into psychiatric hospitals when she felt the need to delay court proceedings. The trial court, therefore, reasonably concluded that Yvette's failure to appear at the fact-finding hearing was egregious, in bad faith, and without a justifiable excuse. The trial court correctly determined that, based on Yvette's pattern of behavior, reopening the default judgment would be judicially inefficient because of the risk that she would again not appear for depositions and proceedings.[4]

[4] We commend the trial court for its thorough and meticulous consideration of analogous case law as it pertained to Yvette's case, and for going several of the proverbial "extra miles" to give Yvette the opportunity to participate in these proceedings.

CONCLUSION

¶19 For the foregoing reasons, we affirm the trial court.[5]

By the Court.—Order affirmed.

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

[5] The Guardian Ad Litem asks us to consider whether in a TPR proceeding a trial court can find that a parent has waived his or her right to participate in a jury trial based on the parent's conduct. We decline to address this issue at this time.