COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2017

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. 2016AP1381
2016AP1382
2016AP1383

Cir. Ct. Nos. 2015TP16
2015TP17
2015TP18

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

NO. 2016AP1381

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

BARRON COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

C. K.,

RESPONDENT,

M. B.-T.,

RESPONDENT-APPELLANT.

NO. 2016AP1382

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

**BARRON COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,**

PETITIONER-RESPONDENT,

V.

C. K.,

RESPONDENT,

M. B.-T.,

RESPONDENT-APPELLANT.

NO. 2016AP1383

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

**BARRON COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,**

PETITIONER-RESPONDENT,

V.

C. K.,

RESPONDENT,

M. B.-T.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed.*

¶1 SEIDL, J.[1] M.B.-T. appeals termination of parental rights (TPR) orders for his three children, C.K., E.K., and K.K, and an order denying his postdispositional motion.[2] He argues the circuit court improperly granted a default judgment on the grounds for termination because: (1) he had inadequate notice and warning to appear; and (2) the court erroneously exercised its discretion when it entered the default judgment against him. He also contends the court applied the incorrect legal standard when considering whether to vacate the default judgment. Further, M.B.-T. argues his trial counsel provided ineffective assistance by failing to raise these arguments he advanced in his postdispositional motion. Finally, he requests a new trial in the interest of justice. We reject each of his arguments and affirm.

BACKGROUND

¶2 The County filed a petition to terminate M.B.-T.'s and his children's mother's parental rights on October 8, 2015. M.B.-T. was personally served with the summons and petition. The summons stated that "[y]ou are summoned and

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The children's mother has also appealed orders terminating her parental rights to the three children. *See* ***Barron Cty. D.H.H.S. v. C.K.***, Nos. 2016AP1378, 2016AP1379, 2016AP1380 (Cir. Ct. Nos. 2015TP16, 2015TP17, 2015TP18). The records for these appeals have been consolidated, but the mother's appellate issues are distinct from those raised by M.B.-T.

required to appear on: … October 30, 2015 [at] 3:00 p.m." at the Barron County Circuit Court. The summons further stated:

> **IF YOU FAIL TO APPEAR**, the court may hear testimony in support of the allegations in the attached petition and grant the request of the petitioner to terminate your parental rights.
>
> You have the right to have an attorney present. If you desire to contest the matter and cannot afford an attorney, the state public defender may appoint an attorney to represent you.
>
> If you fail to appear and the court terminates your parental rights, a notice of intent to pursue relief from the judgment must be filed in the trial court within 30 days after the judgment is entered, in order to preserve the right to preserve such relief.

¶3 M.B.-T. and the children's mother were present at the initial appearance on October 30, 2015. Neither the mother nor M.B.-T. entered a plea or indicated a position on the petition during the October 30 appearance. The court asked M.B.-T. if he would like counsel appointed for him and if he would be able to attend an adjourned appearance on November 18, to which M.B.-T. responded "yes" both times. A notice of the adjourned initial appearance was mailed to M.B.-T.'s address of record on October 30. That notice did not include the above language contained in the summons.

¶4 M.B.-T. did not appear at the November 18 adjourned initial appearance regarding the petition, either in person or by counsel. The mother appeared at the adjourned initial appearance and was represented by counsel appointed by the State Public Defender's Office. Counsel for the mother stated that M.B.-T. "did contact our office at some point" and that "[h]e didn't make contact with a person but he did call." The mother indicated she believed M.B.-T.

was "not in jail" at that time. Counsel for the mother then requested the initial appearance again be adjourned and set for November 30.

¶5 The County moved for a default judgment against M.B.-T. as to grounds to terminate M.B.-T.'s parental rights. After taking testimony and finding facts that supported grounds to terminate, the circuit court granted the County's motion. The court then asked the guardian ad litem if she "believe[d] it's in the children's best interests if the court" found M.B.-T. unfit as a result of the default, and so found after the GAL responded it was in the children's best interests to find M.B.-T. unfit. Thereupon, the court found grounds to terminate M.B.-T.'s parental rights. A notice of the next hearing, scheduled for November 30, was then mailed to M.B.-T. at the same address as listed in the summons.

¶6 M.B.-T. appeared unrepresented at the November 30 hearing. Counsel for the mother indicated she contested the petitions and requested a jury trial. M.B.-T. said nothing on the record during the hearing. A two-day jury trial on the grounds set forth in the petitions for the mother was scheduled for March 8, 2016. Notice of the jury trial was mailed on November 30 to M.B.-T.'s address as shown on the summons. Counsel for M.B.-T. was appointed that same day.

¶7 On Friday, March 4, 2016, counsel for M.B.-T. faxed a letter to the circuit court requesting the court reopen the default judgment and reschedule the jury trial for a later date. Counsel indicated he had written M.B.-T. on December 3, 2015—discussing the options regarding the default—and again on January 8, 2016—requesting immediate contact—but had received no response from M.B.-T to either letter. In his March 4 letter to the court, counsel indicated that M.B.-T. had contacted him for the first time by phone earlier that day.

Counsel stated that M.B.-T. claimed he believed counsel exhibited a "lack of effort to contact him" and had a "responsibility to see that [M.B.-T.] communicates with [counsel]." Counsel further stated that M.B.-T. denied having been served with notice of the initial appearance or having received correspondence from either the circuit court or counsel, despite M.B.-T. confirming that his mailing address was unchanged from the time the summons and petition were filed.

¶8 On Monday, March 7, 2016, the circuit court held a hearing on counsel's motion to vacate the default judgment. M.B.-T. did not attend this hearing, despite his counsel informing him when it would occur. The County argued M.B.-T. did not exhibit excusable neglect under WIS. STAT. § 806.07 and the delay by the time the motion was made was unreasonable because it was filed two business days before the jury trial.

¶9 The circuit court first noted that "paramount is the best interest of the children, and if I look at the requirements to give permanency to children, there's some urgency to having these hearings but there's also a parent's right to their children." The court then rejected M.B.-T.'s contention—through counsel—that he had not received notice of the adjourned initial appearance, noting that the record indicated M.B.-T. was orally informed and sent notice of the date on which it was held. The court concluded M.B.-T.'s neglect was not excusable because "[t]o wait three months to file a motion to reopen a default a couple days before trial is … not within a reasonable time" and M.B.-T. had not appeared to otherwise provide the court with a legitimate explanation for the delay or for his non-appearances.

¶10 M.B.-T. appeared in person for the dispositional hearing, represented by counsel, and testified on his own behalf. The circuit court subsequently entered an order terminating M.B.-T.'s parental rights.

¶11 M.B.-T. filed a notice of appeal regarding the orders, and this court granted his motion for remand to the circuit court for a hearing. M.B.-T. then filed a postdispositional motion, arguing: (1) entry of the default judgment violated due process because he lacked notice of the consequences of his failure to appear; (2) entry of the default pursuant to WIS. STAT. § 48.23(2)(b)3. violated his constitutional rights to substantive due process as applied and to equal protection on its face;[3] (3) the circuit court erroneously exercised its discretion by denying the motion to vacate the default judgment; (4) his trial counsel provided ineffective assistance; and (5) the circuit court should grant a new trial in the interests of justice. The circuit court rejected all of these arguments and denied the motion. M.B.-T. now appeals.

DISCUSSION

I. Default Judgment

¶12 M.B.-T. first argues the circuit court erroneously exercised its discretion when entering the default judgment. Termination of parental rights proceedings under WIS. STAT. ch. 48 are civil actions, *see* ***Steven V. v. Kelley H.***,

[3] M.B.-T. has abandoned his WIS. STAT. § 48.23(2)(b)3. constitutional arguments by not raising them on appeal. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994). In addition, we would not consider these arguments because, as the circuit court noted in rejecting them, M.B.-T. failed to notify the attorney general of a constitutional challenge as required by WIS. STAT. § 806.04(11).

2004 WI 47, ¶32, 271 Wis. 2d 1, 678 N.W.2d 856, and are accordingly governed by WIS. STAT. chs. 801 to 847, *see* WIS. STAT. § 801.01(2). A default judgment may be entered against a parent in a TPR case as to grounds for unfitness, though a circuit court must receive evidence showing unfitness before it may do so. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶17, 24, 246 Wis. 2d 1, 629 N.W.2d 768. Default judgments are generally disfavored, as "[t]he law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." ***Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.***, 2002 WI 66, ¶64, 253 Wis. 2d 238, 646 N.W.2d 19.

¶13 Whether to grant a default judgment is a decision that lies within the sound discretion of the circuit court. ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 130 Wis. 2d 4, 11, 386 N.W.2d 53 (1986). We review a grant of a default judgment for an erroneous exercise of discretion and will affirm the circuit court if, applying the applicable legal standard, there is a reasonable basis in the record to support the court's decision. ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997). We generally look for reasons to sustain a circuit court's discretionary determination, even if the court sets forth inadequate reasons in exercising its discretion. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493. We review de novo whether the court applied the proper legal standard. ***Keith***, 216 Wis. 2d at 69.

¶14 M.B.-T. first argues the circuit court lacked authority to grant the County's motion for default judgment at the adjourned initial appearance because M.B.-T. was present at the first initial appearance and the court could not reasonably conclude that his missing a single court appearance is either egregious conduct or in bad faith. He contends that ***Evelyn C.R.*** provides a useful guide for

when a circuit court may grant default judgment against a parent for a failure to appear in a TPR case. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶18.

¶15 In ***Evelyn C.R.***, our supreme court held that the circuit court erred by entering a default judgment on the issue of child abandonment without first taking evidence sufficient to support a finding of abandonment by clear and convincing evidence. ***Id.***, ¶¶2, 3. The issue in ***Evelyn C.R.*** was not whether more than one failed appearance is required before a default judgment may be entered. Here, at the adjourned hearing on the petition, the circuit court took evidence on the grounds to terminate M.B.T.'s parental rights as required by WIS. STAT. § 48.422(3), and therefore complied with the decision in ***Evelyn C.R.*** Thus, ***Evelyn C.R.*** does not support M.B.-T.'s argument.

¶16 M.B.-T.'s argument does not accurately address the authority under which the circuit court entered default here. Egregious conduct is simply not required. The County maintains M.B.-T.'s failure to appear either in person or by counsel at the adjourned initial appearance allowed the court to enter a default judgment under WIS. STAT. § 806.02(5)[4] because M.B.-T. never contested the petition by entering a plea and thus never "appeared" at the initial hearing on the petition.

¶17 While we agree with the County that WIS. STAT. § 806.02 governs our decision, we conclude the circuit court's authority for the default judgment in this case properly falls under subsection (1) rather than subsection (5).

[4] WISCONSIN STAT. § 806.02(5) provides as follows: "A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof."

Section 806.02(1) states that "[a] default judgment may be rendered as provided in subs. (1) to (4) if no issue of law or fact has been joined and if the time for joining issue has expired." Said differently, a defendant's failure to timely provide an answer or response to the petition may result in no joinder of issue. *See* ***Split Rock Hardwoods***, 253 Wis. 2d 238, ¶¶41-45. In TPR cases, WIS. STAT. § 48.422(3) provides that "[i]f the petition is not contested[,] the court shall hear testimony in support of the allegations in the petition[.]"

¶18 M.B.-T.'s argument assumes the mere facts that he was present at the first hearing and requested counsel means he implicitly answered the petition. However, by failing to appear at the adjourned initial appearance in any capacity, M.B.-T. provided no timely response to the petition. *See* ***Split Rock Hardwoods***, 253 Wis. 2d 238, ¶¶41, 44. M.B.-T. did not answer the petition within the thirty-day period after the summons and petition were served and the hearing was to be held, nor did he request another continuance to enter a plea. *See* WIS. STAT. § 48.422(1), (5). In fact, M.B.-T. never offered any express position on the petition until three months later—four calendar days and two business days before trial, at that—and then only indirectly through counsel's fax to the court, well after the default had been granted.

¶19 We conclude that although the circuit court did not explicitly invoke WIS. STAT. § 806.02, it properly exercised its discretion under that statute and followed the procedure under WIS. STAT. § 48.422 by hearing testimony in support

of the petition.[5] *See* ***Split Rock Hardwoods***, 253 Wis. 2d 238, ¶¶43, 63 ("The use of the word 'may' … [in § 806.02(1)] compels the circuit court to exercise sound discretion before entering a default judgment."). While the circuit court was aware via the mother's appointed counsel that M.B.-T. had contacted the Public Defender's Office, the court also noted that it personally told M.B.-T. of the date and time of the adjourned hearing and it was not aware of any basis for M.B.-T.'s non-appearance.

II. Notice

¶20 M.B.-T.'s claim of inadequate notice is tied to his argument that the circuit court erroneously exercised its discretion in granting a default judgment. He argues that even if the court could grant a default judgment against him for failure to appear, he was not provided notice or warning of that possibility. M.B.-T. does not argue on appeal that he was not personally served with the initial summons to appear. He thus has abandoned that argument. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994). M.B.-T. also does not argue that notice was defective under the statutory form contained in WIS. STAT. § 48.42(3)(c). Rather, M.B.-T. argues that the procedures here were fundamentally unfair because the summons inadequately informed him of the *consequences* of a failure to appear at any hearing other than the first appearance specifically ordered in the summons. He also claims "fundamental fairness"

[5] We also reject M.B.-T.'s cursory argument that the circuit court's statements regarding the "children's best interests" at the adjourned hearing on the petition indicates an erroneous exercise of discretion for substantially the same reason we reject his similar argument in Part III of this opinion. *See infra* ¶¶27-28.

required the court to explicitly inform him of the possibility of default or what default meant in this case once he was present at the initial appearance.

¶21 "[N]otice that apprises a party of the pendency of an action against it and affords the opportunity to present objections is regarded as '[a]n elementary and fundamental requirement of due process.'" ***Johnson v. Cintas Corp. No. 2***, 2012 WI 31, ¶24, 339 Wis. 2d 493, 811 N.W.2d 756 (quoting ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 314 (1950)). Proper notice, be it in a civil, juvenile, or criminal action, must ensure "reasonable opportunity to prepare will be afforded" to a party to respond to the "specific issues" they must meet. *See* ***In re Gault***, 387 U.S. 1, 33-34 (1967). "Whether a due process violation has occurred presents a constitutional question; the application of constitutional principles to the facts of a case is subject to independent appellate review." ***Town of East Troy v. Town & Country Waste Serv., Inc.***, 159 Wis. 2d 694, 704, 465 N.W.2d 510 (Ct. App. 1990).

¶22 We conclude actual notice of the consequences of M.B.-T.'s failure to appear was provided to M.B.-T. through the summons in this case. The summons advised M.B.-T., pursuant to WIS. STAT. § 48.42(3)(c), that his failure to appear at the initial appearance on the petition, and by extension any adjourned hearing on the petition, meant "the court may hear testimony in support of the allegations in the attached petition and grant the request of the petitioner to terminate your parental rights." Contrary to M.B.-T.'s claim, his obligation to appear for the initial hearing on the petition pursuant to the summons and offer a

plea was not eliminated when the hearing at which he was present was adjourned.[6] M.B.-T. was then given advance notice of both the October 30 proceeding, at which he was present, again for the November 18 proceeding, at which he was not, and for the November 30 hearing at which he appeared and again requested an attorney. The notices were timely, s*ee* WIS. STAT. § 48.42(4)(a), and M.B.-T. was informed of his right to an attorney and granted a continuance so he might obtain one, *see* WIS. STAT. § 48.422(5). Since M.B.-T. was afforded proper notice of the hearings and the consequences of his failure to appear, due process was provided and the circuit court properly exercised its discretion in granting the default judgment when M.B.-T. failed to appear.

¶23 M.B.-T. nevertheless argues that due process requires *every* notice of hearing in a TPR case to provide actual notice of the possibility of default for failure to appear. Essentially, he proposes that in order to satisfy the actual notice requirement and provide due process, a circuit court must explicitly advise a parent when scheduling every hearing about the possibility of a default judgment and its consequences in the event of a non-appearance. However, M.B.-T. cites no statutory authority or case law—other than an unspecific reference to "heightened legal safeguards" in TPR cases, *see* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶21—for the

[6] M.B.-T. also argues in his reply brief that the summons merely provided "constructive notice" of default and that due process required that "actual notice" be given in this case. We fail to see how notice here was "constructive," as M.B.-T. was personally informed of the date of the adjourned initial appearance and informed of the consequences of failure to appear at the appearance through the summons. More to the point, M.B.-T. has not cited any authority supporting his argument that "constructive notice" of the possibility of default through the summons and petition is inadequate in a TPR case.

proposition that in a TPR proceeding, or any civil proceeding, such a warning must be contained in every court notice.

¶24 M.B.-T. further analogizes his position to a no-contest plea in a TPR case, which requires a "knowing, voluntary, and intelligent" plea. *See* ***Oneida Cty. D.S.S. v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122 (noting that ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986), analysis applies to withdrawal of no-contest pleas in TPR cases). We reject M.B.-T's argument because his comparison of a default judgment to a no-contest plea is inapt. Failure to appear at a hearing does not indicate a "knowing, voluntary, and intelligent" position on the petition. *See* ***Bangert***, 131 Wis. 2d at 274. In fact, a failure to appear may be due to a variety of factors that may be unrelated to the parent's desire to contest the petition, such as unforeseen transportation or medical issues. This is underscored by a parent's ability to request relief from default judgment if adequate reason is given. *See* WIS. STAT. § 806.07 (mistake, inadvertence, surprise or excusable neglect as ground to vacate a default); *see also* WIS. STAT. § 48.46 (governing relief from judgment in TPR cases). That bar is far lower than the one required to withdraw a no-contest plea. *See* ***Therese S.***, 314 Wis. 2d 493, ¶6.

III. Motion to Vacate

¶25 M.B.-T. contends the circuit court's statement that "paramount is the best interests of the children" requires reversal because the court incorrectly applied that standard on his motion to vacate the default judgment. He argues that the court erred because the default judgment was entered at the grounds phase of the proceeding, and the "best interests of the child" standard does not apply until

the second, dispositional phase of the proceedings after the grounds phase has concluded. *See* ***Santosky v. Kramer***, 455 U.S. 745, 760-61 (1982). Whether to vacate a default judgment is reviewed for an erroneous exercise of discretion. *See* ***Oostburg State Bank***, 130 Wis. 2d at 11.

¶26 We conclude the circuit court properly applied WIS. STAT. § 806.07, which governs motions to vacate a default judgment, when it denied M.B.-T.'s motion. Section 806.07(1)(a) provides that, "[o]n motion and upon such terms as are just, the court … may relieve a party … from a judgment, order or stipulation for … [m]istake, inadvertence, surprise, or excusable neglect." *See* ***Charolais Breeding Ranches, Ltd. v. Wiegel***, 92 Wis. 2d 498, 512, 285 N.W.2d 720 (1979) ("'[E]xcusable neglect' is the neglect which might have been the act of a reasonably prudent person under the same circumstances."). Furthermore, such motions "shall be made within a reasonable time." WIS. STAT. § 806.07(2).

¶27 The circuit court explicitly concluded M.B.-T. exhibited "no excusable neglect" and did not move to reopen "within a reasonable time." The court found that M.B.-T. was served with written notice of the proceedings, he was orally provided with notice of the time of adjourned initial appearance during the initial hearing, and that M.B.-T.'s claim that he never received the written notices was not credible. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998) (circuit court is "ultimate arbiter of the credibility" when acting as finder of fact). Importantly, M.B.-T. failed to personally appear at the motion to vacate hearing, and thus, did not offer any evidence showing otherwise. *See* ***Charolais***, 92 Wis. 2d at 512. Additionally, the court correctly concluded M.B.-T. did not act within a reasonable time by failing to take any action to vacate the default judgment for three months and two business days

before trial. *See* ***id.*** at 512-13 (courts should "consider whether the person has acted promptly to remedy his [or her] situation" in response to default judgment).

¶28 M.B.-T. argues the circuit court's reference to the best interests of the children and there being "some urgency to having these hearings" indicated the court applied an incorrect standard of default. However, the court also stated in the same sentence that "there's also a parent's right to their children." Standing alone, those comments merely restate the general proposition that "[t]he 'best interests of the child' represents a consistent legislative objective throughout the Children's Code[,]" while recognizing that a natural parent's interest in his or her children is a "vital interest[] [that] must be accommodated" through a prior factual finding of unfitness. ***Sheboygan Cty. D.H.S.S. v. Julie A.B.***, 2002 WI 95, ¶¶21-22, 255 Wis. 2d 170, 648 N.W.2d 402. M.B.-T. has offered no explanation for why the circuit court's "application" of that standard would compel reversal or that the court failed to properly exercise its discretion under WIS. STAT. § 806.07.

¶29 M.B.-T. also relies on case law interpreting WIS. STAT. §§ 805.03 and 804.12(2)(a), arguing that a court may not impose a default judgment as a sanction unless there is bad faith or egregious conduct by the non-complying party. *See, e.g.*, ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 535 N.W.2d 65 (Ct. App. 1995). The County responds that M.B.-T. never personally objected to the termination of his parental rights at any point in the proceedings and, thus, has forfeited the right to object on appeal to the ruling on default. The County also contends the case law does not require a finding of egregiousness or bad faith when a party makes no appearance in response to a summons. The County relies on WIS. STAT. § 806.02, which governs default judgments in civil actions.

¶30 We agree with the County that WIS. STAT. § 805.03 does not address the situation in this case—where a party does not appear at the time and place designated in a notice of hearing. The supreme court in ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17, mentioned statutes in addition to § 805.03 that authorize a circuit court to order a default judgment as a sanction, but they too, are inapplicable here: They involved either the failure to follow a court order, *see* WIS. STAT. §§ 802.10(7) and 804.12, or failure to appear at trial, in person or through counsel, after having appeared in the action, *see* WIS. STAT. § 806.02(5).

¶31 However, regardless of whether WIS. STAT. § 806.02 is applicable in a TPR proceeding or what alternatives the court has when a parent does not appear in response to a properly served summons, we reject M.B.-T.'s challenge to the default here. Even if M.B.-T. is correct that the court may not find a parent in default as to the first phase without a finding of egregiousness or bad faith, we are satisfied that M.B.-T. has forfeited that argument because he failed to first ask the circuit court to vacate the default *and* personally explain his reasons for his non-appearance. The general rule is that a party must raise an issue in the circuit court in order to preserve the issue for appeal. *See* ***W.W.W. v. M.C.S.***, 185 Wis. 2d 468, 479, 518 N.W.2d 285 (Ct. App. 1994). The rationale for this rule is that the circuit court should be given the opportunity to correct its own errors, thus avoiding unnecessary delays through appeals and reversals. ***Id.*** This rule is particularly apt here. While M.B.-T.'s trial counsel filed a motion to vacate the default, M.B.-T. himself never appeared at the motion hearing to tell the circuit court why he did not appear at the adjourned initial appearance, or that he wanted the opportunity to contest the grounds alleged in the petition. He has therefore forfeited the issue on appeal.

IV. Ineffective Assistance of Counsel

¶32 M.B.-T. contends his counsel was ineffective because counsel failed to raise in the circuit court the same arguments M.B.-T. now raises on appeal. In a TPR case, parents have a statutory right to effective assistance of counsel. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). Trial counsel is ineffective when counsel's performance was deficient and resulted in prejudice. ***Id.*** at 1005. However, we have rejected all of M.B.-T.'s appellate claims. Trial counsel cannot be ineffective for failing to pursue losing arguments. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

V. New Trial in the Interests of Justice

¶33 Finally, M.B.-T. asks this court to exercise our power of discretionary reversal in the interests of justice because the issues were not tried as a result of the default judgment. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Despite his default on the grounds phase, the circuit court heard testimony at that phase, and M.B.-T. mounted a defense at the dispositional phase. M.B.-T. fails to develop any factual or legal argument as to why the real controversy was not fully tried as a basis for reversal in the interest of justice. Ordinarily, we would not consider the issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 NW.2d 633 (Ct. App. 1992).

¶34 However, we also note that counsel's ability to mount a defense on M.B.-T.'s behalf was severely diminished due to M.B.-T.'s own lack of

communication with counsel prior to March 4.[7] M.B.-T.'s counsel was left in a difficult position when M.B.-T. did not respond to his correspondence. Counsel could not simply take the liberty of assuming how M.B.-T. might have wanted to proceed without having at least a cursory discussion with M.B.-T. on the underlying issues. *See* SCR 20:1.2, ABA cmt. Furthermore, M.B.-T.'s presence and testimony at the hearing on his attorney's motion to vacate the default judgment were imperative. Only M.B.-T. could inform the court of any valid reasons why he was unable to appear at the adjourned initial appearance or more timely respond to his counsel. By ignoring his counsel's repeated attempts to contact him, doing so only when it was too late, and not appearing at the motion hearing, M.B.-T. himself, not his counsel, doomed any efforts to successfully reopen the default judgment.

By the Court.—Orders affirmed.

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

[7] M.B.-T. argued in the postdispositional motion that his trial counsel was ineffective for failing to "locate" M.B.-T. in between the time of appointment and trial. Presumably, M.B.-T's argument laid blame for the untimeliness of the motion to vacate at the feet of trial counsel. Although we briefly address this point, we also note that M.B.-T. has not advanced it on appeal. *See* ***Johnson***, 184 Wis. 2d at 344-45.