COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 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. 2017AP1150
2017AP1151

Cir. Ct. Nos. 2016TP21
2016TP22

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

CASE NO. 2017AP1150

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

V. J. G.,

RESPONDENT-APPELLANT.

CASE NO. 2017AP1151

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

V. J. G.,

RESPONDENT-APPELLANT

APPEALS from orders of the circuit court for Kenosha County: JODI L. MEIER, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] V.J.G. appeals from orders terminating his parental rights based on his failure to personally appear at multiple hearings despite court orders to do so. V.J.G. raises a number of arguments.[2] His first set of arguments is premised on, as he sees it, the circuit court's lack of authority to order him to personally appear at hearings, especially in view of SCR 11.02. Second, he claims his due process rights were violated because he was not notified of the dispositional hearing. Finally, he raises an equal protection challenge against WIS. STAT. § 48.23(2)(b)3., which the circuit court used here to remove his attorney and find him in default. We reject these arguments and affirm the circuit court's orders.

BACKGROUND

¶2 These consolidated termination of parental rights (TPR) cases began when the Kenosha County Department of Human Services filed petitions to

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

[2] Several additional undeveloped arguments are noted below.

terminate V.J.G.'s parental rights to V.E.G. and N.V.G. V.J.G. was served with a separate summons and petition in each case. V.J.G. was ordered to appear on May 6, 2016, and warned that if he failed 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."

¶3 At the initial appearance on May 6, the court attempted to contact V.J.G. on "two different phone numbers" but did not receive an answer. V.J.G. eventually called later in the hearing, and the court informed him that it had almost defaulted him for failing to appear. The court warned V.J.G. about his failure to appear in future hearings:

> I'm glad you called back. I need to give you a warning, and that warning is … if you fail to appear or be available for any hearing or after you have an attorney stop having contact with that attorney you could be defaulted; and what default means is that your ability to contest or object to the termination of the parental rights could be taken away from you.

V.J.G. affirmed that he understood this warning.

¶4 Due to difficulty in locating the mother of V.E.G. and N.V.G.—against whom the County was also seeking termination of parental rights to the children—the court continued the initial appearance to June 13, 2016. V.J.G. confirmed that the court could contact him at the same number. V.J.G. was represented by counsel at the June 13 hearing and appeared by phone as well. The initial appearance was continued again to July 5, 2016. V.J.G. did not appear, but the notice of the hearing had been sent to his attorney, and his attorney averred that she had not told V.J.G. about the July 5 hearing. The court adjourned the hearing to August 5, 2016, and ordered that V.J.G. "appear at that hearing" and "[f]ailure to appear at that hearing may result in a finding of default." V.J.G.

appeared by telephone at the August 5 hearing, and the mother of V.E.G. and N.V.G. filed her own request for substitution of judge. The initial appearance hearing was continued yet again to August 22, but V.J.G. did not appear at this hearing. The court determined that notice of the August 22 hearing had again been sent to V.J.G.'s attorney and not him. The hearing was adjourned to September 8, 2016. The court confirmed that it had a current address for V.J.G. and ordered that V.J.G. be given written notice of the next hearing. Written notice was sent to V.J.G. informing him that he must appear by phone or in person at the September 8 hearing and again warned that "FAILURE TO APPEAR MAY RESULT IN THE ENTRY OF DEFAULT JUDGMENT."

¶5 The court conducted a continued initial appearance hearing on September 8, 2016. V.J.G. appeared at this hearing by phone. The court scheduled a pretrial hearing to occur on October 17, 2016, and a trial to occur on November 29, 2016. Because the children's mother and another party were incarcerated—a circumstance already difficult to accommodate—the County requested that V.J.G. be required to appear in person for the trial. The court granted the request and ordered V.J.G. to appear personally for the trial, but allowed him to appear telephonically for the pretrial hearing.[3]

¶6 As scheduled, the court conducted the pretrial hearing on October 17, 2016. V.J.G. failed to appear. His attorney explained that she had "not had contact with [V.J.G.] since our last court date" and relayed that she had "attempted calling him and [had] not received a response at this point." Based on V.J.G.'s failure to appear, the County moved for default. The court granted the default but

[3] V.J.G. did not object to the County's request that he appear in person.

informed V.J.G.'s attorney that it would be amenable to hearing a motion to vacate the default if the attorney could locate V.J.G.

¶7 On November 29—the day scheduled for trial—V.J.G. again failed to appear despite being ordered to personally appear for trial. V.J.G.'s attorney attempted to contact him immediately prior to the hearing to no avail. The clerk also attempted to contact V.J.G. by telephone, but the attempt "went to voicemail." The County then requested that the court discharge V.J.G.'s attorney pursuant to WIS. STAT. § 48.23(2)(b)3. due to V.J.G.'s failure to appear in person as ordered by the court. V.J.G.'s attorney objected. The court found that V.J.G. had notice of both the October 17 and November 29 hearings and failed to appear at either hearing. The court found this conduct "egregious" and without "clear and justifiable excuse" and granted the motion to discharge V.J.G.'s counsel. Because § 48.23(2)(b)3. prohibits the court from conducting a dispositional hearing "until at least 2 days have elapsed" from the date the court discharged counsel, the court scheduled a dispositional hearing for December 1.

¶8 The evidentiary and dispositional hearing occurred on December 1 as scheduled. The County's attorney averred that she had spoken to V.J.G.'s former attorney "about an hour" prior to the hearing, and V.J.G.'s former attorney stated that she still had not heard from V.J.G. The court proceeded with the hearing, found V.J.G. unfit, and terminated his parental rights to V.E.G. and N.V.G.

¶9 V.J.G.—through his discharged counsel—subsequently filed a notice of intent to pursue postdisposition relief and additionally requested that another attorney be appointed to represent him. The public defender's office appointed a new attorney to represent V.J.G., and the new attorney filed a notice of appeal in

both cases. Counsel subsequently filed a motion with this court to remand these cases to the circuit court to address a postdisposition motion (yet to be filed) alleging that V.J.G.'s attorney was ineffective. We remanded the matters, and V.J.G. filed a postdisposition motion in the circuit court.

¶10 The circuit court held a hearing on this motion on September 6, 2017. Despite being ordered to appear at this postdisposition hearing in person, V.J.G. again failed to appear either in person or by telephone. When asked why V.J.G. was not present, V.J.G.'s new attorney explained that V.J.G. had "not responded to my most recent attempts to contact him."

¶11 V.J.G.'s original attorney testified at the hearing that V.J.G. had received notice of the November 29 trial date, which was "also given for disposition." She confirmed that V.J.G. "was, in fact, on the phone and given the pretrial and trial date … of October 17, 2016 and the trial date of November 29, 2016," during the September 8, 2016 hearing. She also averred that she had no contact with V.J.G. between the September 8 hearing and October 17 hearing. She had attempted to contact V.J.G. by phone "multiple times" and left multiple messages reminding him of the hearing, but V.J.G. did not get in touch. Nor was she able to contact V.J.G. between the October 17 pretrial hearing and the November 29 hearing. She called V.J.G. immediately after the October 17 hearing and left a message informing him that he had been defaulted and needed to contact her to "take care of that." She also called V.J.G. the Sunday prior to the November 29 hearing and left another message, this time informing him "that if he did not appear for that hearing, that they were going to terminate his parental rights without him there." As before, V.J.G. did not get in touch. She also attempted to call him "moments before our hearing was called" and left a message providing a phone number for the court clerk. She testified that she attempted to

contact V.J.G. after the November 29 hearing. She left V.J.G. another message informing him that "you really need to get ahold of me so you don't lose your parental rights." V.J.G. never contacted his attorney.

¶12 At the conclusion of the postdisposition hearing, the court delayed making a decision and scheduled the matter to be taken up again on September 8, 2017. At the subsequent hearing, V.J.G.'s counsel still had not been able to get in touch with him. On the merits, the court rejected V.J.G.'s arguments and denied his motion.

DISCUSSION

¶13 V.J.G. takes issue with multiple basic aspects of the TPR proceedings. He first argues that the court lacked the authority to order him to appear. Next, he claims that the order terminating his parental rights violated due process because he lacked notice of the dispositional hearing. Finally, he claims that WIS. STAT. § 48.23 violates equal protection. We address and reject each argument below.

A. Personal Appearance

¶14 V.J.G. first takes issue with the court's directive that he appear—either by phone or in person—at the hearings in this case. He argues that such a directive is unlawful. Because he believes the court's order that he appear at the hearings in these cases was illegal, V.J.G. maintains that (1) the court's decision to default him for failing to follow the order must be reversed, (2) the default violates due process, and (3) his attorney was ineffective for failing to object to the court's order that he appear. These issues turn on the interpretation of statutes and

Supreme Court Rules, questions of law we review de novo. ***Radloff v. General Cas. Co.***, 147 Wis. 2d 14, 17-18, 432 N.W.2d 597 (Ct. App. 1988).

¶15 WISCONSIN STAT. § 48.23(2)(b) provides that parents in TPR proceedings "shall be represented by counsel" when appearing before the court except if the parent waives his or her right to counsel.[4] In addition to a knowing, intelligent, and voluntary waiver of counsel, a parent may also waive his or her right under the following circumstances:

> [A] parent … is presumed to have waived his or her right to counsel and to appear by counsel *if the court has ordered the parent to appear in person at any or all subsequent hearings* in the proceeding, the parent fails *to appear in person as ordered*, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent … *to appear in person at consecutive hearings as ordered* is presumed to be conduct that is egregious and without clear and justifiable excuse. If the court finds that a parent's conduct in failing *to appear in person as ordered* was egregious and without clear and justifiable excuse, the court may not hold a dispositional hearing on the contested adoption or involuntary termination of parental rights until at least 2 days have elapsed since the date of that finding.

Sec. 48.23(2)(b)3. (emphasis added). Thus, the statute conditions retaining the right to counsel on compliance with a court order to appear at hearings.

¶16 The court here found that V.J.G. had failed to appear in person at the November 29 hearing and that failure was egregious and without clear and justifiable excuse. Accordingly, the court found that V.J.G. had waived his right to counsel. V.J.G. makes no argument that the court did not follow this statute.

[4] A parent under the age of eighteen may not waive counsel. WIS. STAT. § 48.23(2)(b)2.

¶17 When interpreting statutes, our aim is to say what the law is, reading the words the legislature chose reasonably and as a whole. V.J.G. asserts that no statute explicitly authorizes requiring personal appearance at hearings as the court ordered here. But in our view, the only reasonable reading of WIS. STAT. § 48.23(2)(b)3. is that the statute blesses and therefore empowers a circuit court to order a parent to appear personally. To read it otherwise makes no sense. V.J.G.'s reading would mean the legislature wrote this new law just a few years ago[5] giving a circuit court authority to remove a parent's statutorily authorized attorney only upon the violation of an order the circuit court has no authority to issue in the first place. Of course, this statute was passed in view of already clear authority from the Wisconsin Supreme Court, which approved default as a sanction for a parent's failure to personally appear as ordered—a holding necessarily premised upon the court's authority to enter such an order in the first place. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶1, 17, 246 Wis. 2d 1, 629 N.W.2d 768. In short, we conclude § 48.23 grants circuit courts the authority to order the personal appearance of parents in TPR actions and to impose appropriate consequences for failure to obey court orders.

¶18 The only potentially meritorious challenge V.J.G. raises is one not explicitly addressed in our published case law—namely, that notwithstanding ***Evelyn C.R.*** and WIS. STAT. § 48.23(2)(b)3., a court's authority to order a party to appear personally at all hearings is circumscribed by SCR 11.02. The rule provides:

> **SCR 11.02 Appearance by attorney.** (1) AUTHORIZED. Every person of full age and sound mind may appear by

[5] *See* 2013 Wis. Act 337, § 4.

> attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defend the action or proceeding in person.

¶19 A plain, commonsense reading of SCR 11.02 is that appearance by an attorney is "[a]uthorized." The rule—one governing attorneys—does not appear to limit a court's separately authorized power (here, under WIS. STAT. § 48.23(2)(b)3. and as recognized in ***Evelyn C.R.***). There is nothing inconsistent about a rule allowing parties to appear by attorneys and a statute allowing a court to order a party's personal appearance in certain proceedings as well. Simply put, SCR 11.02 does not, under its plain terms, prevent a court from entering an order requiring a party to personally appear. Or said another way, V.J.G. is authorized to appear by an attorney unless a court enters a valid order otherwise. Accordingly, all of V.J.G.'s arguments that depend on that faulty premise must fail as well.[6]

B. Due Process

¶20 V.J.G. next argues that the court's order terminating his parental rights violated due process because he was not notified of the December 1

[6] V.J.G. argues that the court lacked the competency or jurisdiction (he uses the terms without distinction) to order him to appear, that "[e]ntering default based on an unauthorized order violates due process," that his counsel was constitutionally deficient for failing to object to the court's unlawful order, and finally claims that WIS. STAT. § 48.23(2)(b)3.—to the extent it authorizes the court to order a party to appear—violates the separation of powers doctrine by contradicting SCR 11.02. All of these arguments depend on the crucial premise that SCR 11.02 prevents the court from ordering a party to appear. As that premise is false, we reject these arguments.

dispositional hearing.[7] He makes much of the distinction between a fact-finding hearing and a dispositional hearing. Conceding that he had notice of the November 29 trial date, V.J.G. maintains that this was merely a fact-finding hearing to determine whether grounds for termination existed. The notice provided to him did not, he insists, inform him that the court could also proceed to disposition and terminate his rights at the same hearing. V.J.G. does not identify any statutory deficiency in the various notices he received, and we are not aware of any such deficiency.[8] Thus, we interpret his argument as being solely on constitutional grounds.

¶21 The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child." ***Santosky v. Kramer***, 455 U.S. 745, 753 (1982); *see also* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶21. Due process requires "that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" ***Cleveland Bd. of Educ. v. Loudermill***, 470 U.S. 532, 542 (1985) (citation omitted). Whether the notice a person receives satisfies due process is a question of law we review de

[7] The heading to V.J.G.'s argument proclaims that WIS. STAT. § 48.23 violates "procedural due process of law because it does not require notice to the parent that failure to appear at a fact-finding hearing will deprive them of the right to counsel at the subsequent dispositional hearing." However, the substance of V.J.G.'s argument merely addresses whether he was given sufficient notice of the dispositional hearing itself. We will address the argument he substantively raised. To the extent V.J.G. intended to raise both claims, he fails to develop an argument that he should have been given notice that his counsel could be discharged. We will not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[8] V.J.G. initially cited to several statutes claiming that these required the court to provide notice of all hearings, but concedes in his reply brief that these statutes are inapplicable to TPR cases.

novo. ***Zimbrick v. LIRC***, 2000 WI App 106, ¶9, 235 Wis. 2d 132, 613 N.W.2d 198.

¶22 The TPR process is a two-step proceeding. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶22. First, the court conducts a fact-finding hearing to determine whether grounds exist under WIS. STAT. § 48.415 to terminate parental rights. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶22. At this phase, "the parent's rights are paramount" and the petitioner must prove the grounds for termination by clear and convincing evidence. ***Id.*** Once grounds are proven, the circuit court "shall find the parent unfit" and "shall then proceed immediately to" the second step—the dispositional phase. *See* WIS. STAT. § 48.424(4); ***Evelyn C.R.***, 246 Wis. 2d 1, ¶22. During the dispositional phase, the circuit court determines whether parental rights should in fact be terminated. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶23. In contrast to the first step, the paramount consideration is now whether, in the court's discretion, termination is in the best interests of the child. ***Id.***; *see also* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996) (ultimate decision whether to terminate parental rights is discretionary). The parent, however, still has the right to present evidence and be heard. *See* WIS. STAT. § 48.427(1)-(1m).

¶23 Ordinarily a court may proceed immediately to disposition after grounds have been found. Although the notice V.J.G. received (both written and in court) did not use the magic words "dispositional," he was informed of the basic nature of the proceeding. And V.J.G. was clearly informed that if he failed to appear for hearings, his parental rights may be terminated in his absence. Termination involves both the fact-finding and dispositional steps. V.J.G.'s attorney additionally confirmed that V.J.G. had received notice of the November 29 hearing, which was "also set for disposition." Thus, had V.J.G. merely failed to appear at the November 29 hearing and the court terminated parental rights then

and there, there would be no argument; V.J.G. clearly received notice of this hearing. However, WIS. STAT. § 48.23(2)(b)3. requires the court to wait at least two days before conducting a dispositional hearing if it determines that a parent has waived his or her right to counsel—a last-minute grace period where the court and counsel can make a last-ditch attempt to contact an absentee parent.

¶24 V.J.G. certainly had a right to appear and be heard at the dispositional phase on December 1, *see* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶23, but his due process argument falls flat because any notice deficiency was due to his own conduct of failing to contact his counsel. Counsel attempted to contact him immediately after the November 29 hearing and left yet another phone message informing him that his parental rights would be terminated unless he decided to participate, but V.J.G. still failed to get in touch with counsel. V.J.G. makes no argument that counsel had been using the wrong number, the number was disconnected, or V.J.G. otherwise failed to receive counsel's numerous messages. His failure to respond was simply a continuation of his absenteeism that stretched all the way back to the September 8 hearing. Counsel was unable to elicit any response in the nearly three-month period between the September 8 hearing and the November 29 hearing. The court could have taken additional steps to attempt to notify V.J.G. that his counsel had been discharged and a dispositional hearing would be held, but V.J.G. has not persuaded us that the court was required to do so as a matter of due process.

¶25 In short, V.J.G.'s attorney attempted to give him notice just as she had for prior proceedings. V.J.G. has not shown us that due process requires more than this. A party who fails to respond to efforts to give notice has not had his constitutional rights violated. Plugging one's ears does not absolve a litigant of

the responsibility to listen. V.J.G. is, in effect, asserting a right to know in spite of his refusal to hear. The constitution is no refuge for such duplicity.

C. Equal Protection

¶26 In the alternative, V.J.G. argues that even if WIS. STAT. § 48.23(2)(b)3. allows the court to order a party to appear personally, the statute violates equal protection because "it singles out parents facing termination of their parental rights." The constitutionality of a statute is a question of law we review de novo. ***Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund***, 2000 WI 98, ¶18, 237 Wis. 2d 99, 613 N.W.2d 849.

¶27 V.J.G. argues for strict scrutiny based on alleged impairment of parental rights, a fundamental liberty interest. *See* ***State v. Allen M.***, 214 Wis. 2d 302, 314, 571 N.W.2d 872 (Ct. App. 1997) (strict scrutiny applies to a statutory classification that significantly interferes with exercise of parental rights). However, the statute here merely allows the court to require a party to personally appear, and it allows the court to dispense with the statutory requirement that a parent always be represented if that parent fails to appear as required. *See* WIS. STAT. § 48.23(2)(b). As § 48.23 does not involve a suspect classification or interfere with a fundamental right, *see* ***Lassiter v. Department of Soc. Servs.***, 452 U.S. 18, 26-27 (1981) (no presumed right to counsel in TPR proceedings), ***Dane Cty. Dep't of Human Servs. v. Susan P.S.***, 2006 WI App 100, ¶10 n.2, 293 Wis. 2d 279, 715 N.W.2d 692 (observing that the right to counsel in TPR proceedings for indigent parents is a statutory right), we review its constitutionality under rational basis analysis. ***Blake v. Jossart***, 2016 WI 57, ¶34, 370 Wis. 2d 1, 884 N.W.2d 484.

¶28 "Under rational basis scrutiny, we will uphold a challenged law unless it is patently arbitrary and bears no rational relationship to a legitimate government interest." ***Porter v. State***, 2017 WI App 65, ¶15, 378 Wis. 2d 117, 902 N.W.2d 566. It is V.J.G.'s burden to demonstrate the statute is unconstitutional. ***Aicher***, 237 Wis. 2d 99, ¶¶18-19. He has not met this burden.

¶29 The legislature reasonably determined that requiring parents in TPR proceedings to be represented by counsel, at public expense if necessary, was merited to protect the parents' interests. If a parent declines to participate in the case as required, the court may reasonably dispense with the statutory requirement that he or she be represented by counsel. This statutory condition supports the efficient administration of cases, it better protects the parents and children involved, and it ensures that taxpayer dollars are limited to those willing to comply with court orders and engage in the defense of their own parental rights. While the legislature could choose a different policy, V.J.G. makes little effort to show why this classification is not reasonable. We conclude V.J.G. has not met his burden to show that the statute deprives him of equal protection of the laws.

CONCLUSION

¶30 Despite V.J.G.'s assertion to the contrary, the court's decision to default him and terminate his parental rights was proper. The court entered a valid order that V.J.G. appear, and V.J.G. declined to obey that order. Therefore, the court was well within its authority to terminate his parental rights. Nor are we persuaded that V.J.G.'s due process rights were violated. He received ample notice that his parental rights could be terminated in his absence, declined to return counsel's calls, and has offered no excuse for failing to participate in these proceedings in a meaningful manner. We finally see no merit to V.J.G.'s equal

protection claim; it is perfectly reasonable for the State to condition the provision of counsel upon a party obeying valid court orders. Accordingly, we affirm the circuit court's orders.

By the Court.—Orders affirmed.

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