COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP334 **Cir. Ct. No. 2013TP176**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RICKEY V.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARK A. SANDERS, Judge. *Affirmed.*

¶1 FINE, J. This is a continuation of Ricky V.'s appeal of the order terminating his parental rights to his daughter Liliana V. The order terminating Ricky V.'s parental rights was entered on Ricky V.'s default as a result of his

twice not appearing for the termination-of-parental-rights evidentiary hearing under WIS. STAT. § 48.424. Retaining jurisdiction, we remanded this matter to the circuit court on Ricky V.'s request for an evidentiary hearing on whether there was "good cause" to reopen his default. The circuit court determined that there was not. We affirm.

I.

¶2 Termination of parental rights is a two-step process. *See* ***State v. Shirley E.***, 2006 WI 129, ¶26, 298 Wis. 2d 1, 18, 724 N.W.2d 623, 630. First, a fact-finder decides whether the facts justify governmental interference in whatever relationship there is between the birth-parent and his or her child. WIS. STAT. §§ 48.415, 48.424. If there are grounds to terminate a person's parental rights to a child, the trial court then determines whether those rights should be terminated, WIS. STAT. §§ 48.424(3), (4); 48.426; 48.427, and the birth parent has no special claim to the child because the trial court has to focus on the child's best interests, ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999). The parties do not dispute that the circuit court could, as a matter of its discretion, enter a default judgment against Ricky V. based on his not appearing at the two scheduled termination-of-parental-rights hearings. *See* ***Evelyn C. R. v. Tykila S.***, 2001 WI 110, ¶¶17–18, 246 Wis. 2d 1, 13–14, 629 N.W.2d 768, 774. Further, Ricky V. does not contend that the circuit court that entered the default violated the requirement that the circuit court nevertheless take evidence supporting an order terminating a person's parental rights. *See* ***id.***, 2001 WI 110, ¶24, 246 Wis. 2d at 17–18, 629 N.W.2d at 776.

¶3 A circuit court may find a parent in default if the parent's "failure to follow court orders, though unintentional is 'so extreme, substantial and persistent' that the conduct may be considered egregious." ***Dane County Department of***

Human Services v. Mable K., 2013 WI 28, ¶70, 346 Wis. 2d 396, 424–425, 828 N.W.2d 198, 212. Although a circuit court may also find a parent in default if the parent "acts in bad faith," this requires that the parent's acts be intentional. ***Id.***, 2013 WI 28, ¶70, 346 Wis. 2d at 425, 828 N.W.2d 212. As with the entry of an order on default, a circuit court's decision to vacate the default is also discretionary. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419, 422 (1985).

> An appellate court will not find an abuse of discretion if the record shows that the circuit court exercised its discretion and that there is a reasonable basis for the court's determination. The term "discretion" contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards.

Id., 122 Wis. 2d at 542, 363 N.W.2d at 422 (internal citations omitted).

II.

¶4 The fact-finding hearing under WIS. STAT. § 48.424 as to whether there were grounds to terminate Ricky V.'s parental rights to Liliana was scheduled for July 1, 2013. He did not appear. Rather, Ricky V. called and apparently told a member of the circuit court's staff that he wanted "to appear by phone." The circuit court then tried to call the number that Ricky V. left, but got no answer.[1] The circuit court adjourned the hearing as to Ricky V., and set it down for August 6, 2013.[2]

[1] The July 1, 2013, hearing was before the Honorable Pedro Colon.

[2] The August 6, 2013, hearing was before the Honorable Mark A. Sanders, as were all later matters to which this opinion refers.

¶5 Ricky V. also did not appear at the August 6, 2013, hearing, which started at "9:05 a.m." When Ricky V. did not show, the circuit court called a telephone number that Liliana's case manager had for him, and left the following voice message in response to what the Record reflects was a recorded "voice-mail message": "This message is for [the birth mother] or Ricky [V.]. This is Mark Sanders. I'm a Milwaukee County Judge. I'm calling in connection with the case involving Liliana. [The birth mother] and Mr. V[.] should get in contact with [the case manager] as soon as possible. Thank you." (Paragraphing altered.) The circuit court then took evidence supporting the petition's allegations that there were grounds to terminate Ricky V.'s parental rights to Liliana, in accordance with ***Evelyn C. R.***, 2001 WI 110, ¶24, 246 Wis. 2d at 17–18, 629 N.W.2d at 776. The circuit court noted on the Record, however, that it "would be willing to re-visit the Default finding" if Ricky V. appeared.

¶6 As we have seen, this court remanded the matter to the circuit court for an evidentiary hearing in connection with the circuit court's August 6, 2013, finding that Ricky V. had defaulted. Our remand order was in response to Ricky V.'s motion and affidavit seeking vacatur of the default. The circuit court heard testimony from both Ricky V. and Liliana's case manager.

¶7 Ricky V. first testified that he knew he had to appear on August 6, 2013, but, later in the hearing, said that he did not know. Nevertheless, he testified that he came to the Children's Court Center on August 6, 2013, at around 3 p.m. or later. He essentially blamed the mix-up on his contention that the lawyer who had, apparently, represented him in an earlier matter at Children's Court, apparently also in connection with Liliana, had not been appointed by the public-defender's office to represent him in the termination-of-parental-rights case. He claimed that he could not attend the July 1, 2013, hearing because he did not have money for

the bus, and the person who was supposed to drive him to the court had an emergency that prevented that. He also said that he did not answer the circuit court's telephone call because he did not recognize the number: "I'm saying that if I don't recognize the number and if it looks like a bill collector's number, more than likely, I won't answer it because of that."[3]

¶8 As the circuit court recognized in its thoughtful and sensitive analysis of the evidence presented at the hearing, Ricky V.'s testimony was largely confusing and contradictory. Nevertheless, although giving Ricky V. the benefit of the doubt as to whether he was lying or just had a poor memory, the circuit court opined that Ricky V.'s "inconsistent testimony" "undermines" his "credibility some."

¶9 The circuit court found that Ricky V. knew of the court dates, and, essentially, "sat on his hands." The circuit court therefore concluded that "entry of default judgment [on August 6, 2013] subject to prove-up was the appropriate remedy" because Ricky V.'s failures to appear made the case "unable to proceed forward." The circuit court did not find that "there is excusable neglect, or anything else, that would justify me lifting that default judgment."

¶10 Although the circuit court did not use the magic word "egregious" to describe Ricky V.'s failure to appear at the August 6, 2013, hearing, or even answer his telephone at the number he left with the circuit court on July 1, 2013, it is clear from the circuit court's findings of fact, which neither party says were

[3] Thus, the assertion by Ricky V.'s appellate lawyer, Gregory Bates, Esq., in his reply brief that on July 1, 2013, Judge Colon "declined [Ricky V.]'s request to appear by telephone" is not supported by the Record. We caution counsel to be more careful in the future.

"clearly erroneous," *see* WIS. STAT. RULE 805.17(2) (circuit court's findings of fact must be upheld on appeal unless "clearly erroneous"), that the circuit court determined that what Ricky V. did was, as phrased by ***Mable K.***, 2013 WI 28, ¶70, 346 Wis. 2d at 425, 828 N.W.2d at 212, "'so extreme, substantial and persistent' that the conduct may be considered egregious." (quoted source omitted.) *See* ***Monson v. Madison Family Institute***, 162 Wis. 2d 212, 215 n.3, 470 N.W.2d 853, 854 n.3 (1991) ("[I]mplicit in the circuit court's statements contained in the record is a finding that the plaintiffs' conduct in this case was egregious. Therefore, the circuit court's failure to label the plaintiffs' conduct as 'egregious conduct' is immaterial.") (quoted source omitted). The circuit court's conclusion is amply supported by its findings and the Record, and it correctly applied the law. Accordingly, we affirm.

By the Court.—Orders affirmed.

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