COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1739

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

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

EVELYN C. R.,

PETITIONER-RESPONDENT,

V.

TYKILA S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Tykila S. appeals from an order terminating her parental rights to Jayton S. She asserts that the trial court erred by finding her an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98).

unfit parent in the absence of evidence establishing unfitness. She bases her argument on the due process clauses of the federal and Wisconsin constitutions and WIS. STAT. § 48.422(2) (1997-98),[2] which requires that a fact-finding hearing be held in a contested proceeding to terminate parental rights. We conclude that by failing to appear for the scheduled fact-finding hearing, Tykila S. has waived her constitutional rights, and that a fact-finding hearing is subject to WIS. STAT. § 806.02(5), which permits a default judgment to be rendered against a defendant who fails to appear at trial.

¶2 Evelyn C.R., the paternal grandmother of Jayton S., filed a pro se petition to terminate Tykila S.'s parental rights to her son, Jayton S., on the ground of abandonment.[3] Tykila S. appeared at a plea hearing on November 2, 1999, and was told to obtain an attorney through the public defender's office. Apparently she did so, for at a pretrial conference on February 17, 2000, she appeared by an attorney, though not in person. Evelyn C.R. was also represented by counsel. The case was set for jury selection on February 28, and for trial on March 1 or 2, 2000. On February 28, Tykila S. was not present, though she appeared by telephone and by her attorney. The trial court adjourned the trial until April 3, 2000. Tykila S. acknowledged that date, and that she should be in court by 9:00 a.m., and in the meantime keep in contact with her attorney.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] At a plea hearing, Tykila S. asserted that Evelyn C.R.'s son was not Jayton S.'s biological father, and that Jayton S.'s biological father was dead. This information was apparently unknown to Evelyn C.R. It also appears that Evelyn C.R. was previously appointed Jayton S.'s guardian, and that a paternity action to establish the identity of Jayton S.'s father had previously been brought. This information played no part in further proceedings in this case, and we therefore do not discuss it further.

¶3 On April 3, 2000, Tykila S. did not appear in person, though her attorney appeared. The trial court found her in default for failure to appear and found that she had abandoned Jayton S. The court then found that Tykila S. was an unfit parent, and scheduled a disposition hearing, which was held on April 11. At that hearing, Tykila S. was represented by counsel, but did not appear until the middle of the hearing, when she telephoned the court. She was present by telephone for the remainder of the hearing, and was asked if she wished to be heard. She testified briefly, and the court then ordered that Tykila S.'s parental rights to Jayton S. were terminated.

DECISION

¶4 Tykila S. asserts that the trial court was required to hold an evidentiary hearing before it found her to be an unfit parent. It is undisputed that the trial court did not do so. She first argues that she cannot be found unfit in the absence of clear and convincing evidence that she is an unfit parent, a requirement of the due process clauses of the federal and state constitutions. *See* ***Santosky v. Kramer***, 455 U.S. 745, 769 (1982). We agree with Tykila S.'s view of her constitutional right. But we disagree that even in her absence, the trial court must take testimony from which it can draw its finding that she is an unfit parent. Even constitutional rights may be waived. *See* ***Perlick v. Country Mut. Cas. Co.***, 274 Wis. 558, 566, 80 N.W.2d 921 (1957). We conclude that Tykila S. waived her Due Process Clause right to require clear and convincing evidence that she is an unfit parent by failing to appear at the hearing where this issue was to be determined. Though the right to parent a child is fundamental, a parent whose actions demonstrate no interest in asserting this right has effectively told the court that he or she has no interest in protecting that right. Courts should always be alert to avoid injustice, but the facts supporting Evelyn C.R.'s assertion that Tykila S.

had abandoned Jayton S. were brought out at the disposition hearing. We need not consider the constitutional implications had the trial court based both its finding of unfitness and its disposition order solely on Tykila S.'s default. That did not happen.

¶5 Tykila S. also asserts a statutory right to an evidentiary hearing before a finding of unfitness is made. She relies on WIS. STAT. § 48.422(2), which provides: "If the petition is contested the court shall set a date for a fact-finding hearing to be held within 45 days of the hearing on the petition, unless all of the necessary parties agree to commence with the hearing on the merits immediately."

¶6 We agree with Tykila S. that she contested Evelyn C.R.'s petition, and we agree that at a fact-finding hearing, the petitioner must prove the allegations of the petition by clear and convincing evidence. *See* WIS. STAT. §§ 48.31(1) and 48.424(2). But, WIS. STAT § 806.02(5) provides for default procedure where a defendant does not appear at trial: "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."

¶7 The question is whether "proof of any fact is necessary." We considered this question in ***Midwest Developers v. Goma Corp.***, 121 Wis. 2d 632, 652-53, 360 N.W.2d 554 (Ct. App. 1984). In ***Midwest Developers***, the court granted default judgment as a sanction for the defendants' non-cooperation. ***Id.*** at 650. The plaintiff made no proof of damages. *See* ***id.*** at 651. We concluded that no proof was necessary because the defendants had been made aware of the plaintiff's claim earlier in the action, and the defendants had not questioned the amount of damages. *See* ***id.*** at 652-53. In ***United States v. DeFrantz***, 708 F.2d

310, 311-12 (7th Cir. 1983), the court granted default judgment under a federal rule analogous to WIS. STAT. § 806.02(5). The court reasoned that the plaintiff was not required to prove any facts because the defendant "knew the exact amount the plaintiffs were claiming" and defendant's counsel never questioned the amount. ***DeFrantz***, 708 F.2d at 312.

¶8 There are differences, of course, between ***Midwest Developers*** and ***DeFrantz*** and a termination of parental rights case. But, the issue in all cases is whether proof of any fact is necessary. Both ***Midwest Developers*** and ***DeFrantz*** focus on the notice the defendants had of the relief sought by the plaintiffs and whether there was a real dispute as to the relief sought. Here, Tykila S. had adequate notice that Evelyn C.R. wanted to terminate Tykila S.'s rights to Jayton S.

¶9 There is no answer required to a petition to terminate parental rights. Instead, there is a hearing on the petition where the court determines whether any party wishes to contest the petition. Tykila S. was pro se at the hearing on the petition, but at a pretrial conference, her attorney's conversations with opposing counsel and the court evidenced an intent to contest the termination by claiming that Tykila S. did not know where Jayton S. resided, and therefore did not abandon him.

¶10 We cannot see the significance of an evidentiary hearing under these circumstances. On the date of the default judgment, Tykila S. was not present. Tykila S. could not have testified that she did not know of Jayton S.'s whereabouts. And, Tykila S.'s failure to appear spoke more loudly than words about her interest in either Jayton S. or her parental rights.

¶11 Courts must have some method of dealing with litigants who choose not to appear for trials. The trial court could have required that Evelyn C.R.'s attorneys examine her to prove up the facts supporting her petition. But she most likely would have testified as she did at the initial hearing, that she had not heard from Tykila S. for over five years, and that her name and address were in the telephone book during that time. A parent who was really intent on finding a "lost" child would have had adequate time to check with social services agencies for assistance in finding the child. We conclude that under these circumstances, proof of facts supporting a finding that Tykila S. had abandoned Jayton S. was not necessary for the court to render judgment. We therefore conclude that Tykila S.'s assertion of a statutory requirement for an evidentiary hearing is unavailing.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.