COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0344

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF MARZELL S., SHANAE R., JOSHUA J., OCTAVIUS J. AND DOMINIQUE J., PERSONS UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DIANE R.,

RESPONDENT-APPELLANT.

APPEAL from an order and amended order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed.*

FINE, J. Diane R. appeals from the trial court's order, on her default, terminating her parental rights to Marzell S., Shanae R., Joshua J.,

Dominique J. and Octavius J.[1] The children were born in January of 1986, December of 1987, May of 1989, August of 1990, and September of 1991.[2] Diane R. claims that the trial court erred in not appointing a lawyer for her, that it erred in granting the default, and that reversal is required under § 752.35, STATS., because, she contends, the "real controversy" was not tried and "justice has been miscarried."[3] We affirm.

A petition seeking to terminate Diane R.'s parental rights was filed on July 2, 1997. It alleged, among other things, that the children were found to be in need of protection or services in May of 1993, and that they had not lived with Diane R. since that time. The petition also alleged that Diane R. had no "contact" with any of the children since early April of 1995. The summons and petition were served personally on Diane R. on July 3, 1997, and directed her to appear before the Children's Division of the Milwaukee County circuit court on July 31, 1997. The summons further advised:

> In the case of your failure to appear as summoned herein, you may be proceeded against by default, and the court may proceed to hear testimony in support of the allegations in the petition and grant the relief requested by the petitioner.
>
> You may appear alone or with an attorney of your choice. If you are the mother or legally adjudicated or marital

[1] The order was entered on October 29, 1997. An amended order was entered on November 4, 1997. Diane R.'s notice of intention to pursue post-dispositional relief was dated and filed November 11, 1997. Both it and the notice of appeal, which was filed with the trial court on February 3, 1998, refer to the October 29 order only. We construe the notice of appeal as seeking relief from both the order and amended order. None of the three fathers, whose parental rights were also terminated, appeals.

[2] The petition erroneously gives the birth date of Dominique and Octavius as September 21, 1991.

[3] The guardian *ad litem* has filed a brief urging affirmance.

> father, and cannot afford an attorney, you are to contact the State Public Defender's Office at (414) 266-1210 immediately. The Court has the power to see that an attorney is appointed as counsel for the parents.

We discuss Diane R.'s arguments in turn.

1. *Appointment of an attorney.* Diane R. went to court on July 31, 1997. The guardian *ad litem*, however, had filed a substitution-of-judge request against the judge to whom the case was assigned, and the matter was adjourned until August 28, 1997. *See* § 48.29(1m), STATS. (judge against whom a proper and timely request for substitution has been filed "has no further jurisdiction"). Diane R. did not appear on August 28.

As noted, Diane R.'s first claim of trial-court error is that the court did not appoint a lawyer for her. The applicable statute is § 48.23(2), STATS., which provides, as material here, that if a "proceeding involves ... the involuntary termination of parental rights, any parent 18 years old or older who appears before the court shall be represented by counsel; but the parent may waive counsel provided the court is satisfied such waiver is knowingly and voluntarily made."

As pertinent to this appeal, the key phrase in the statute is: "who appears before the court." An "appearance" requires an "overt act" before a court with jurisdiction. *See* ***McLaughlin v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.***, 23 Wis.2d 592, 594, 127 N.W.2d 813, 815 (1964) ("The term 'appearance' is generally used to signify the overt act by which one against whom a suit has been commenced submits himself to the court's jurisdiction and constitutes the first act of a defendant in court."). Although Diane R. was in court on July 31, 1997, the judge to whom the case had been assigned did not have jurisdiction over the matter. *See* § 48.29(1m), STATS. (judge against whom a proper and timely request for substitution has been filed "has no further

jurisdiction"). Diane R. did not appear on the adjourned date, even though she—and the others present on July 31—were told that the judge against whom the substitution-of-judge request had been filed could do nothing in connection with the case except adjourn it. Diane R.'s brief on this appeal points to nothing in the appellate record (other than an undeveloped reference to a 1993 psychological report that indicates that she is limited emotionally and intellectually) that excuses her failure to appear on August 28, 1997.[4] Section 48.23(2), STATS., does not require counsel for a parent who does not show up. *Cf.* ***M.W. v. Monroe County Dept. of Human Services***, 116 Wis.2d 432, 434, 438, 342 N.W.2d 410, 411, 413 (1984) (parent who appears must have counsel unless right to counsel is waived).

2. *Default*. Section 801.01(2), STATS., provides that "Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil

[4] Diane R. could have attempted to fashion an argument on her alleged mental deficiencies by seeking relief and developing a factual record under § 48.46(2), STATS., which provides:

> A parent who has consented to the termination of his or her parental rights under s. 48.41 or who did not contest the petition initiating the proceeding in which his or her parental rights were terminated may move the court for relief from the judgment on any of the grounds specified in s. 806.07 (1) (a), (b), (c), (d) or (f). Any such motion shall be filed within 30 days after the entry of the judgment or order terminating parental rights, unless the parent files a timely notice of intent to pursue relief from the judgment under s. 808.04 (7m), in which case the motion shall be filed within the time permitted by s. 809.107 (5). A motion under this subsection does not affect the finality or suspend the operation of the judgment or order terminating parental rights. Motions under this subsection and appeals to the court of appeals shall be the exclusive remedies for such a parent to obtain a new hearing in a termination of parental rights proceeding.

We may not determine factual issues, *see* ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107, 293 N.W.2d 155, 159 (1980), and will not consider arguments that are undeveloped, *see* ***Barakat v. Department of Health & Soc. Services***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995).

actions and special proceedings ... except where different procedure is prescribed by statute or rule." Termination-of-parental-rights proceedings are "civil actions." ***M.W.***, 116 Wis.2d at 442, 342 N.W.2d at 415. Thus, § 806.02, STATS., authorizing that judicial relief may be entered on default, applies to proceedings under Chapter 48; there is nothing in Chapter 48 that excepts matters thereunder from the common-sense rule that parties against whom judicial relief is sought must take reasonable steps to protect their interests. Diane R. does not contend otherwise. Indeed, § 48.46(2), STATS., which is reprinted in footnote 3, provides a mechanism for a parent "who did not contest the petition initiating the proceeding in which his or her parental rights were terminated" to seek post-termination relief on any of the grounds set out in § 806.07(1)(a), (b), (c), (d) or (f), STATS. Diane R. has not sought relief under § 48.62(2).

Whether to grant a default judgment is within the trial court's discretion. ***Oostburg State Bank v. United Savings & Loan Ass'n***, 130 Wis.2d 4, 11, 386 N.W.2d 53, 57 (1986). As revealed by the evidence presented in support of the petition to terminate her parental rights, Diane R.'s failure to appear on August 28 was but one more sign of her lack of concern for her children. The evidence in support of termination that was presented to the trial court at the default hearing was overwhelming. The trial court did not erroneously exercise its discretion in terminating Diane R.'s parental rights on her default, and she does not point to anything in the record that supports an opposite conclusion. Rather, she argues, that § 806.02(1), STATS., requires that she receive separate notice of the State's motion for default judgment.[5] We disagree. Although she showed up on

[5] Section 806.02(1), STATS., provides:

> 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

(continued)

July 31, 1997, she never appeared before a judge who had jurisdiction over the petition, *see* § 48.29(1m), STATS. (judge against whom a proper and timely request for substitution has been filed "has no further jurisdiction"), and she never filed a written response to the petition. Thus, she did not "appear" as that word is used in § 806.02. She was, however, on notice that if she did not appear, which she did not, that her parental rights could be terminated on default. As we have seen, the summons, which she received, advised her that:

> In the case of your failure to appear as summoned herein, you may be proceeded against by default, and the court may proceed to hear testimony in support of the allegations in the petition and grant the relief requested by the petitioner.

That is what was done here. She has no cause to complain.

3. *Section 752.35, STATS.* Diane R.'s final argument is that we should exercise our discretion under § 752.35, STATS.[6] We decline to do so. The evidence presented in support of the State's petition to terminate Diane R.'s parental rights reveals a sorry and sordid history of neglect and abandonment. Diane R. has squandered many, many chances to bond with her children, and the social service workers went extra miles in trying to help her. The trial court's

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> joining issue has expired. Any defendant appearing in an action shall be entitled to notice of motion for judgment.

[6] Section 752.35, STATS., provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

findings of abandonment, neglect, and parental unfitness are not only amply supported by the record, any finding to the contrary would have been, in this court's view, clearly erroneous. As the guardian *ad litem* points out in her brief on this appeal, the focus of the legal system's care and concern must now be on the children, who are entitled to "finality" and "judicial protection." *See also* §§ 48.01(1)(a), STATS. (emphasizing legislative concern that children not be forced to wait "unreasonable periods of time for their parents to correct the conditions that prevent their return to the family"); 48.01(1)(gr), STATS. ("This chapter may be cited as 'The Children's Code'. In construing this chapter, the best interests of the child shall always be of paramount consideration. This chapter shall be liberally construed to effectuate the following express legislative purposes: … (gr) To allow for the termination of parental rights at the earliest possible time after rehabilitation and reunification efforts are discontinued in accordance with this chapter and termination of parental rights is in the best interest of the child."). Diane R. has had every protection that the law requires. The baton of opportunity has now been passed to her children; we will not wrench it from their grasp.

By the Court.—Order and amended order affirmed.

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