

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1810

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS OF
KAYTELL S.P. AND MONTRELL D.P., PERSONS UNDER
THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

KYCHA L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

CURLEY, J.¹ Kycha L. appeals from an order terminating her parental rights to her two children, Kaytell P. and Montrell P. She claims the trial

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

court denied her due process when it entered a default judgment after she failed to appear on the second day of her termination of parental rights (TPR) trial. Because the mother repeatedly failed to obey the court's order that she be present at all the proceedings in her TPR trial, and because both § 805.03 and § 806.02(5), STATS. permit default judgment as a sanction for disobeying a court order, the trial court properly exercised its discretion in granting the default judgment.

I. BACKGROUND.

Kaytell P. and Montrell P., twins, were born to Kycha L., addicted to cocaine in October of 1992. They were released from the hospital within a month and by January of 1993, were found to be in need of protective services and were removed from the home. The children have been in foster care since that time. A number of proceedings were held between May 1996 and October 1997 that the mother attended; however, she missed some hearings despite being ordered to be present at all of the proceedings by the trial court. A motion for default judgment was made by the State in an earlier proceeding because of Kycha L.'s absences, but was deferred by the trial court several times. On October 15, 1997, a mistrial was declared when a witness revealed information that the trial court had ruled was not to be allowed in the trial. Kycha L. was present at the October trial. The trial was then rescheduled to January 5, 1998, and the mother was present that day. On the second day of trial, however, Kycha L. failed to appear and the State renewed its motion for default judgment against the mother. This motion was granted, after a long period of waiting for the arrival of Kycha L. The trial attorney objected to the court's decision to grant a default judgment.

Although the trial court stated it was granting the motion for default judgment, after dismissing the jury, the trial court continued the proceedings,

hearing additional testimony from a State's witness who supplied the factual underpinnings for a charge of abandonment. The court did not and could not hear testimony from any defense witnesses because Kycha L. was to have been the defense's only witness. After hearing from the State's witness, the court then found Kycha L. had abandoned her children pursuant to § 48.415(1)(a)2, STATS., found her unfit, and set a dispositional hearing for February 5, 1998.

Kycha L. attended the dispositional hearing on February 5, 1998. At the hearing, Kycha L. contested the State's request that a finding be made that the termination of her parental rights was in the best interest of the children but she did not raise the issue of the court proceeding in her absence or the trial court's finding that she had abandoned her children. The court found that it was in the best interests of the children to terminate Kycha L.'s parental rights after considering the factors found in § 48.426, STATS. The court found the likelihood of adoption was great and as a consequence the children would not likely continue to live in foster homes. The court further found that the children had no substantial relationship with their mother that would be harmed by the termination of her parental rights because they lived with their mother only a few months before being removed from the home after they ingested a bleach and Pine Sol mixture. The court also noted that the mother had four years to meet various conditions that would return the children to her home, and she failed to do so. Kycha L. does not contest the court's dispositional order. Instead, she claims the trial court erred in entering a default judgment and she requests a new trial.

II. DISCUSSION.

Termination of parental rights proceedings are civil in nature. *In Matter of M.A.M., S.M., minors: M.W. & I.W.*, 116 Wis.2d 432, 442, 342

N.W.2d 410, 415 (1984). Section 801.01(2), STATS., provides that “[c]hapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings ... except where different procedure is prescribed by statute or rule.” Because termination of parental rights proceedings are civil, and Chapter 48 does not prescribe a different procedure, a default judgment under § 805.03 and § 804.12(2)(a)3, is properly applied to Chapter 48.

A default judgment is one “rendered in consequence of the non-appearance of the defendant [or] [o]ne entered upon the failure of a party to appear or plead at the appointed time.”² BLACK’S LAW DICTIONARY 437 (5th ed. 1983).

The granting of a default judgment is within the trial court’s discretion. *Oostburg State Bank v. United Sav. & Loan Ass’n*, 130 Wis.2d 4, 11, 386 N.W.2d 53, 57 (1986). This court will not set aside a discretionary order “unless it is apparent that it was exercised arbitrarily or on the basis of completely irrelevant factors.” *Gaernter v. 880 Corp.*, 131 Wis.2d 492, 497-98, 389 N.W.2d 59, 61 (Ct. App 1986). Here, the default judgment was made based on highly relevant facts. Kycha L. was ordered to personally appear in all proceedings in this case and was warned several times that a default judgment ruling would be made against her if she did not follow that order. The court gave Kycha L. the benefit of the doubt many times by not entering default judgment against her.

² Ordinarily, no additional witnesses are required after the granting of a default judgment. However, the Children’s Code requires a trial judge to take certain actions in TPR proceedings regardless of whether it is contested. *See* § 48.422(3), STATS. In fact, despite the granting of the motion asking for a default judgment, the only action taken by the trial court following Kycha L.’s disappearance was to discharge the jury. However, since the parties have treated the trial court’s actions as a default judgment and have argued this case as a default judgment, this court will treat it as such.

Section 805.03, STATS., provides “for failure of any party ... to obey any order of the court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under 804.12(2)(a).” Section 804.12(2)(a)(3) STATS., authorizes the court to “stay[] further proceedings until the order is obeyed, or dismiss[] the action or proceeding or any part thereof, or render[] a judgment by default against the disobedient party.” Section 806.02, STATS., contains the direct authority for default judgment in a civil action. Section 806.02(5), STATS., reads: “A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial.” Thus, the court was specifically authorized under § 805.03, STATS., and § 806.02(5), STATS., to render a default judgment under these circumstances. The court also properly exercised its discretion in granting a default judgment.

Kycha L. was rarely on time to the proceedings in this matter and frequently failed to appear at all, as was admitted by her own attorney. She continuously delayed court proceedings due to missed appointments and court appearances. Early on, the court made it clear that all parties were to be present for court proceedings. At one point the court stated:

Trial will be set at 9:00 in the morning. The mother should be at court no later than 8:00 that morning, so we know she’s late by 9:00. I’ll proceed with any default motions. She’s been advised constantly during the course of these proceedings, and she will then have failed the opportunity to be heard.

Kycha L. argues that there is no statutory requirement that parents be present at termination of parental rights trials. In support of her argument she first cites the WIS. CONST. art. I, § 21(2), which reads: “In any court in this state, any suitor may prosecute or defend his suit either in his own proper person or by an

attorney....” This clause does not support her contention. Rather, this clause creates a constitutional right to have her attorney proceed in her absence. Here she was ordered to be present by the court, which the constitution itself does not specifically address. In *City of Sun Prairie v. Davis*, 217 Wis.2d 268, 278, 579 N.W.2d 753, 757 (1998), the Wisconsin Supreme Court addressed the issue of whether an attorney could proceed without his client being present after being ordered to appear by the municipal court. Referring to Article I, § 21(2) the court stated:

[T]his section gives Davis the right to choose whether to defend himself or to have an attorney defend him at trial; however, it does not address whether a party may, or may not, be ordered to be physically present at his trial. Davis appears to confuse the idea of being physically absent from the courtroom with the right to have an attorney defend him at trial. They are two very different notions.... Article I, §21(2) does not grant Davis the right to be absent from the courtroom. Rather, it grants him the right [to] defend himself or to have counsel present his case for him. It addresses nothing else.

Id. The supreme court’s holding applies to the instant case. Kycha L. was given an order by the court to be present at the TPR proceedings and she disobeyed that order. She, like Davis, cannot rely on Art. I, § 21(2) for the proposition that she need not be present, after she was ordered by the court to be present.

The reasons justifying an order for a party to appear personally in court are cited in *Sun Prairie*, 217 Wis.2d at 276, 579 N.W.2d at 756, and apply equally here.

[First], [i]t promotes prompt justice. If a defendant’s attorney appears without the defendant, the defendant’s attorney is more likely to be unwilling to enter into trial stipulations or meaningful settlement discussions, either because the attorney does not know certain facts known to the defendant or because the attorney cannot obtain the necessary consent from the defendant. If the defendant is

present, the defendant's attorney always has the knowledge of the facts and the defendant's authority immediately available.

[Second], [i]t enhances the search for truth. During trials, [the] court often has questions that the court puts directly to the defendant. The court can do that only if the defendant is present.

... When the defendant is in court, the [jury] is able to observe the defendant's demeanor, an important consideration for the finder of fact.

An order demanding Kycha L.'s presence promoted prompt justice. Clearly, Kycha L.'s repeated absence delayed the case. Further, had she been present, her attorney would have been able to consult with her about the case and call her as a witness. Her presence would also have enhanced the search for truth, because the court could direct questions to her and the jury could observe her demeanor.

Kycha L. distinguishes the facts in *Sun Prairie* by asserting that the *Sun Prairie* court had inherent authority to require a litigant's presence but here, "it cannot be said that Kycha L.'s 'presence at the trial was necessary for the orderly disposition of [her] case.'"

She is wrong. The reasons for the order requiring the presence of a party have even greater application in a TPR hearing than in a municipal court proceeding. Further, the trial court did not violate the limitations placed on the inherent authority by the supreme court. "First, the power must be such that it is related to the existence of the court and to the orderly and efficient exercise of its jurisdiction; second [and third], the power must not extend the jurisdiction of the court nor abridge or [sic] negate those constitutional rights reserved to individuals." *Sun Prairie*, 217 Wis.2d at 275-76, 579 N.W.2d at 756 (quoting

C.S. v. Racine County, 137 Wis.2d 217, 226, 404 N.W.2d 79, 83 (Ct. App. 1987)).

The results of a TPR hearing have significant consequences for both the children and the parents. As a parent, Kycha L.'s presence was necessary to insure prompt justice, and to insure the search for truth, two factors related to the orderly and efficient exercise of the court's jurisdiction. The court had statutory authority to enter a default judgment and Kycha L.'s constitutional rights were protected. Thus, the order for Kycha L. to appear at all court proceedings was a proper exercise of discretion.

Kycha L. also relies on case law for her contention that the trial court's order was an erroneous exercise of discretion. She cites *In re Interest of Christopher D.*, 191 Wis.2d 680, 530 N.W.2d 34 (Ct. App. 1995), for the proposition that meaningful participation does not always require the presence of a parent in a TPR case. While an accurate citation, the case goes on to say that "whether a respondent in a TPR proceeding can meaningfully participate without being physically present *depends on the circumstances of each case.*" *Id.* at 701-02, 530 N.W.2d at 42 (emphasis added). In this case, given the circumstances before it, the court felt Kycha L.'s presence was necessary. Ironically, Kycha L. now claims, despite her non-appearance at court, that the default judgment denied her the right to meaningfully participate in her trial. This court adopts the statement of the guardian ad litem who aptly stated in his brief, "[i]t was Kycha L.'s self-imposed absence from the trial that obstructed her ability to participate meaningfully in the trial."

Finally, Kycha L. asserts that a default judgment is no more appropriate in a TPR case than is summary judgment, which was found to be

impermissible in *In re Interest of Phillip W.*, 189 Wis.2d 432, 525 N.W.2d 384 (Ct. App. 1994). Summary judgment is not allowed in a TPR case because if a parent contests a TPR, there *is* a genuine issue of material fact. *Id.* at 438, 525 N.W.2d at 386. Summary judgment is a vehicle which, if granted, forecloses the right to have a trial. *Phillip W.* stands for the principle that due process entitles a defendant in a TPR case to a fact-finding hearing before rights are terminated. *Id.* at 437, 525 N.W.2d at 386. Here, the default judgment was entered as a sanction only after Kycha L. failed to appear at trial as ordered. Further, Kycha L. could have contested the default judgment at the dispositional hearing, which she attended, but failed to do so. Kycha L. had ample opportunity and participation in fact-finding hearings to satisfy due process.

III. CONCLUSION.

The trial court based its default judgment ruling on highly relevant factors: the absence of Kycha L. from her termination of parental rights trial, and her disobedience of a court order to be present.

The children at issue, Kaytell P. and Montrell P., lived with their mother only a few months out of their entire lives and are now nearly six years old. This case continued on for years with the children placed in an impermanent home. The intent of the Children's Code is that

[C]ourts and agencies responsible for child welfare should ... recognize that instability and impermanence in family relationships are contrary to the welfare of children and should therefore recognize the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their return to their family.

Section 48.01(1)(a), STATS. The children in this case have a right to be permanently placed and adopted. Section 48.01(1)(a) urges courts to recognize this right. The children have been in limbo for over five years now, while their mother has not been able to correct conditions for their return to her.

Kycha L.'s sporadic attendance and final absence on the second day of her TPR trial justified the default judgment and did not deny her due process of law.

By the Court.—Order affirmed.

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

