COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1193

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JAMES B. AND JAMEE B., PERSONS UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DEIDRA J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

SCHUDSON, J.[1] Deidra J. appeals from the circuit court order terminating her parental rights to her children, James B. and Jamee B. She raises several issues. This court affirms.

I. BACKGROUND

On November 21, 1997, the State filed a petition to terminate Deidra's parental rights to Jamee and James.[2] The petition alleged that Deidra had failed to assume parental responsibility, under § 48.415(6), STATS.; had abandoned the children, under § 48.415(1)(a)2; and had failed to demonstrate substantial progress toward meeting the conditions for return of the children, who remained in need of protection or services, under § 48.415(2).

On June 6, 1998, when Deidra failed to appear in court, the State moved for default judgment. The circuit court took the motion under advisement, adjourned the case to July 23, 1998, ordered that Deidra appear for that latter date, and indicated that notice should be sent to her last known address. When Deidra, who was on "escaped status" from a correctional facility, failed to appear on July 23, the court granted the State's motion for default judgment. The court, however, also proceeded with the scheduled hearing on Deidra's motion to dismiss the termination petition. The court denied her motion. Ultimately, the court

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), (3) STATS.

[2] The petition also requested an order terminating the parental rights of the children's alleged father and any unknown father. The circuit court subsequently granted that request; the termination of the father's parental rights is not at issue in this appeal.

terminated Deidra's parental rights on two grounds: failure to assume parental responsibility, and abandonment.[3]

II. DUE PROCESS

Deidra first argues that her "constitutional right to due process was violated by the State's untimely notice to her of the order to extend the CHIPS order which informed her of the conditions which she must meet for the return of her children." She directs this court's attention to the following chronology involving the CHIPS extension case and termination case involving Jamee and James:

> April 9, 1997: The circuit court orders extension of the CHIPS order.
>
> November 7, 1997: Deidra receives a copy of the order extending the CHIPS order.
>
> November 21, 1997: The State petitions for termination of Deidra's parental rights.
>
> January 6, 1998: The order extending the CHIPS order is filed.

Thus, Deidra contends that "[i]n essence, by its actions, the [S]tate has stripped [her] of her legal right to fully contest the Order to Extend the CHIPS Order" because her "appeal rights had not expired prior to the filing of the [termination] petition." Therefore, she maintains, "the [CHIPS extension] Order could not be presumed to be valid and to form the basis for the termination petition." Accordingly, she asks that this court "render the termination of parental rights

[3] In its brief to this court, the State asserts that "the Continuing CHIPS allegations in this case were dismissed." The record, however, does not confirm such a dismissal. Nevertheless, because Deidra does not dispute the assertion, and because the record does confirm that the termination of her parental rights was based on the other two grounds, this court will assume that the CHIPS grounds never formed the basis for termination.

proceedings as invalid." For several independent reasons, this court declines to do so.

First, even assuming Deidra was not properly informed of the conditions for return in the CHIPS extension order, that failure, at most, would invalidate the grounds for termination under § 48.415(2), STATS. Those grounds, however, did not form the basis for the circuit court's termination order.

Second, even assuming the invalidity of the final CHIPS extension order, as a basis for the termination petition, a preceding extension order would provide a sufficient basis. *See* ***Rock County Dep't of Soc. Servs. v. K.K.***, 162 Wis.2d 431, 435, 469 N.W.2d 881, 883 (Ct. App. 1991) ("[I]n termination cases for abandonment under sec. 48.415(1), Stats., only a single order need include the warnings."). In fact, Deidra, in her reply brief, concedes that "warnings in prior extension orders are sufficient." Thus, regardless of the sufficiency of the final extension order preceding the termination petition, any of the preceding orders could form the basis for the circuit court's termination of Deidra's parental rights on grounds of abandonment.

Third, Deidra offers no reply to the State's assertion that "it is not necessary for the parent to receive oral or written TPR warnings in regard to an allegation of Failure to Assume Parental Responsibility." *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted). Thus, even assuming, once again, the invalidity of the final CHIPS extension order, the "failure to assume parental responsibility" grounds for termination still would stand.

Fourth, as the State and guardian ad litem so vigorously argue, this court's decision in ***Schoenwald v. M.C.***, 146 Wis.2d 377, 432 N.W.2d 588 (Ct. App. 1988) all but precludes Deidra's challenge. We declared:

> The public interest in protecting adoptions strongly supports a ruling that parents are precluded from litigating a trial court's competency to grant a dispositional extension in a prior CHIPS proceeding except in the proceeding granting the extension or in an appeal from the order in such a proceeding….
>
> Adoptions should be free from the possibility that a CHIPS extension granted many years ago was invalid and a termination of parental rights was therefore improperly granted because a gap of a few days intervened between a dispositional order's termination and its extension. Adoptive parents and children should be protected from that risk when the defect was not timely raised in the trial court or the court of appeals and could have been….
>
> We conclude that because the parents could have litigated the trial court's competency to extend the dispositional order … and failed to do so either before the trial court at that time or by an appeal, they are precluded from raising the question in this litigation.

Id. at 396, 432 N.W.2d at 596-97. In reply, Deidra accurately distinguishes the issues of ***Schoenwald*** from those of the instant case. This court concludes, however, that ***Schoenwald***'s formidable thrust reaches to the circumstances of the instant case. It is undisputed that Deidra could have challenged the CHIPS extension before the trial court in the CHIPS case, or on appeal. She did neither and, therefore, under ***Schoenwald***, cannot raise any alleged infirmity in the CHIPS extension as a basis for challenging the termination of parental rights.

III. CONFLICT OF INTEREST

Deidra next argues that "[t]he order to extend the CHIPS order which was granted on April 9, 1997[,] is void on the basis that the guardian ad litem for the children had a conflict of interest with [her] which was not disclosed

nor [sic] waived by [her]." She contends, therefore, that the termination of parental rights was improper. Again, this court disagrees.

In the termination proceedings, two guardians ad litem disclosed their conflicts of interest and withdrew. Thus, Deidra does not dispute that, ultimately, in the termination proceedings, no attorney conflicts of interest continued. She argues, however, that because the first of those two guardians ad litem failed to disclose his conflict of interest while acting as guardian ad litem in the underlying CHIPS case, the resulting CHIPS extension was "void" and, therefore, the termination petition "must also be dismissed."

Deidra's theory crashes on some of the same rocks encountered by her due process argument. In the first place, the termination of her parental rights was based on grounds that did not depend on the existence of an underlying CHIPS order. In the second place, ***Schoenwald*** precludes her from challenging the CHIPS conflict of interest in the termination proceedings.

IV. DEFAULT JUDGMENT

Deidra next argues that the circuit court erred in granting the State's motion for default judgment when she failed to appear on June 6 and July 23, 1998,[4] and in denying her motion to vacate the judgment. For two independent reasons, this court concludes that the circuit court committed no error.

The supreme court summarized the standards governing a circuit court's default judgment decision and an appellate court's review:

[4] Although Deidra addresses this issue as if the court's grant of default judgment was based on her failure to appear on both June 6 and July 23, the court clarified that its decision granting default judgment was directly based only on her nonappearance on July 23, 1998.

> The decision to grant or vacate a default judgment is within the discretion of the trial court. However, the law views default judgments with disfavor, and "prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." An appellate court will not reverse a discretionary decision unless the trial court has [erroneously exercised] its discretion. This court will find an [erroneous exercise] of discretion if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or this court finds that the trial court applied the wrong legal standard.

Oostburg State Bank v. United Sav. & Loan Ass'n, 130 Wis.2d 4, 11-12, 386 N.W.2d 53, 57 (1986) (footnote and citations omitted). Here, Deidra has offered nothing to establish that the circuit court failed to properly exercise discretion or failed to apply proper legal standards. Further, although the circuit court granted the State's motion for default judgment, it *also* provided Deidra a hearing on the merits of her motion to dismiss the termination petition.

Deidra was in court when the June 6, 1998 date was set. Quite properly, however, the circuit court did not find her in default for her failure to appear on June 6, because she appeared by counsel. *See* ***Sherman v. Heiser***, 85 Wis.2d 246, 254, 270 N.W.2d 397, 401 (1978) (in a civil case, a party may appear by counsel). The circuit court then ordered Deidra's personal appearance for July 23, 1998. Thus, her failure to appear on that date was a direct violation of a court order, which could properly form the basis for default judgment. *See* § 805.03, STATS. ("For failure … of any party … to obey any order of court, the court … may make such orders in regard to the failure as are just ….").

At the hearing on her motion to vacate the default judgment, Deidra testified that she had failed to appear because she had escaped, was using drugs again, and did not know "the exact date [she] was coming to court." She acknowledged that she knew her lawyer's name, and that she neither contacted her lawyer nor appeared in court because she was "on the run." The circuit court

denied Deidra's motion to vacate the default judgment, reasonably concluding that her "blatant disregard" of the court order to appear provided ample basis for the default judgment. Under the circumstances, this court concludes that the circuit court properly exercised discretion.

Moreover, despite finding Deidra in default, the circuit court conducted a hearing on her motion to dismiss the termination petition. Thus, this court concludes that the record not only supports the default judgment, but also establishes that, notwithstanding the default judgment, Deidra, with counsel representing her, was granted her day in court.

V. ADOPTIVE RESOURCE

Finally, Deidra argues that "[t]he trial court erred by finding that the adoptive resource was suitable." She contends that the adoptive home described in the testimony at the dispositional hearing fails to satisfy § 48.01(1)(f), STATS., which provides that one of the legislative purposes of Chapter 48 is "[t]o assure that children pending adoptive homes will be placed in the best homes available and protected from adoption by persons unfit to have responsibility for raising children." Thus, Deidra maintains that "evidence presented in regards to the adoptive home was such [that] termination of her parental rights was not warranted."

Deidra points out that James and Jamee are African-American children with special needs, but that the proposed adoptive parents are white and their home is in a rural area where the only other African-Americans are other adopted children. She also presents other concerns including the number of children already living in the home, the fact that the children are home-schooled, the father's age, and the mother's time away from home. Deidra asserts that,

given the number of children and the household income, derived, in part, from adoption assistance, "[t]he adoptive resource appears more like a business than an adoptive home." She offers nothing, however, to counter the State's summary of the evidence establishing the appropriateness of the home:

> Mary Charrey, a Department of Human Services employee, with the adoption unit, testified at the dispositional hearing as to why she believed that termination of parental rights and adoption by the adoptive resource is in these children's best interest. [She] testified that these children are both special needs children who were cocaine affected at birth. [She] further advised the court that both of these children are African[-]American and that other African[-]American children reside in the home and in the area. When questioned about possible conflict with racial differences, Charrey testified that the family is culturally sensitive, meets the needs of the children, that the Department looked at the attitudes of the extended family, of whether or not the proposed adoptive resource has an understanding of the needs of the children as they get older, and whether or not they will be able to meet those needs. Charrey further indicated that the foster mother was raised in Africa. … Charrey state[d] that she went to observe this placement personally and saw that the foster mother is able to raise nine children because both the foster mother and foster father live and work in the home, that they enjoy doing it, and that the foster mother has a high energy level. These children do have special medical needs and Charrey testified that Jamee [] has improved in this placement and that James has been getting necessary medical treatment since being in this placement.

(record references omitted). Thus, this court concludes that the record fully supports the circuit court's determination:

> It appears to me that this adoptive resource, although they live in northwestern Wisconsin, … they have opened their arms and hearts to these children as well as to many others, and these are the kind of children that are difficult to place ….
>
> ….
>
> … [T]hese children will be able–for the first time in their lives[–to] be considered to be a part of a family. And although this family lives in a place that is

> very rural and characterized as isolated, I do not think that that in any way detracts from the support and love that they will receive.

Clearly, the testimony addressed many of the very concerns Deidra now raises, and the circuit court considered whether the proposed adoptive home was "the best home[] available." *See* § 48.01(1)(f), STATS. Unquestionably, the circuit court appropriately exercised discretion in considering the dispositional criteria directly related to potential adoption of the children. *See* § 48.426(1)-(3)(a), STATS. (In determining disposition, the court shall consider "[t]he likelihood of the child's adoption after termination."); § 48.426(1)-(2), (3)(f), STATS. (In determining disposition, the court shall consider "[w]hether the child will be able to enter into a more stable and permanent family relationship as a result of the termination.").

By the Court.—Order affirmed.

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