

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-1538

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS
TO JOSHUA G.H.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EMMANUEL P.,

RESPONDENT-APPELLANT.

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

¶1 CURLEY, J.¹ Emmanuel P. appeals from an order terminating his parental rights (TPR) to his son, Joshua. Emmanuel P. contends that the trial court

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

erred in refusing to dismiss the TPR proceeding because he was not provided with the warnings contained in § 48.356(2), STATS., when Joshua was placed in a foster home in an earlier CHIPS proceeding. Further, he argues that the trial court erroneously exercised its discretion by entering a default judgment against him when he failed to appear at his deposition, in finding that there was sufficient evidence in the record to support the grounds alleged in the TPR action, and in finding that Emmanuel P.'s attorney was not ineffective in representing him. Finally, Emmanuel P. argues that the interests of justice require a new trial. This court finds that Emmanuel P. was not entitled to receive the warnings set forth in § 48.356(2) because he was not a party to that action, as he had not been adjudicated Joshua's father at the time of the CHIPS proceeding. Further, this court is satisfied that the trial court properly exercised its discretion in entering a default judgment against him, in finding there was sufficient evidence to support the TPR grounds, and in concluding that his attorney was effective. Also, this court concludes this is not an appropriate case for a new trial under § 752.35, STATS. Thus, this court affirms.

I. BACKGROUND.

¶2 Joshua was born to Jean H. on January 19, 1997, while Jean H. was in prison. Jean H. was not married at the time of Joshua's birth. Joshua was immediately placed in a foster home, where he has lived continuously throughout these proceedings. To effectuate Joshua's placement in a foster home, on January 27, 1997, the State brought a petition alleging that Joshua was a child in need of protection and services (CHIPS). On May 21, 1997, Jean H. stipulated to a dispositional order permitting Joshua to remain in the foster home. Jean H. was provided with a written dispositional order which contained the termination of parental rights warnings required by § 48.356(2), STATS. Emmanuel P. was also

present at the May 21, 1997, hearing, having received notification of it, but since Emmanuel P. was not married to Jean H, and he had not been adjudicated Joshua's father, the court commissioner advised Emmanuel P. that he would not be allowed to participate in the proceedings. Emmanuel P. was given a referral to paternity court and on September 19, 1997, Emmanuel P. was adjudicated as Joshua's father. On January 31, 1998, Emmanuel P. was allowed supervised visitation with Joshua. He exercised this right until August 1998 when he discontinued the visits. In May 1998, the CHIPS dispositional order placing Joshua in a foster home was extended for thirty days.

¶3 On June 3, 1998, the State filed a petition to terminate the parental rights of Jean H. and Emmanuel P. The petition alleged that both parents had failed to assume parental responsibility for their son, a ground for termination of their parental rights under § 48.415(6), STATS. After Emmanuel P. appeared in court for the initial appearance on the TPR petition he brought a motion to dismiss the TPR proceeding. He contended that the failure of the trial court to provide him with the termination of parental rights warnings required under § 48.356(2), STATS., was a fatal defect requiring dismissal of the TPR suit. After ordering briefs on the motion, the trial court denied the motion to dismiss on December 4, 1998. Prior to deciding the motion, the trial court took under advisement the State's request for a default judgment against Emmanuel P. for his failure to appear at the December 4, 1998, hearing. However, the trial court did order that Emmanuel P. appear personally at all future proceedings. After the December hearing, the State served Emmanuel P.'s attorney with a notice of disposition and a subpoena for Emmanuel P.'s attendance at a deposition scheduled for January 12, 1999. Emmanuel P. failed to attend the deposition. He also failed to attend

the final pretrial held on January 15, 1999, as well as failing to appear for the trial on February 1, 1999, and the dispositional hearing in March 1999.

¶4 On January 15, 1999, at the State's request, the trial court found Emmanuel P. in default for failing to attend the deposition scheduled by the State. On February 1, 1999, the trial date, the trial court determined that Emmanuel P.'s attorney would not be allowed to participate in the jury trial because a default judgment had previously been entered against Emmanuel P. The jury trial proceeded and the jury found that Jean H. had failed to assume her parental responsibilities. The trial court scheduled a dispositional date, pursuant to § 48.427, STATS., for March 10, 1999. On March 10, 1999, Emmanuel P. again did not appear, but his attorney was present. At this hearing, the State called several witnesses, including a social worker, who recited the history of Joshua's case including the paucity of Emmanuel P.'s interaction with his son. The trial court entered an order finding both Jean H. and Emmanuel P. unfit, and terminated their parental rights to Joshua.

¶5 Both Jean H. and Emmanuel P. appealed the trial court's findings. Emmanuel P.'s appeal was remanded for a hearing on his post-termination claim of ineffective assistance of counsel. On July 19, 1999, the trial court denied his motion. In a separate one-judge appeal filed on August 6, 1999, the court of appeals affirmed the trial court's decision to terminate Jean H.'s parental rights.

II. ANALYSIS.

¶6 Emmanuel P. first argues that the trial court's failure to give him the TPR warnings required by § 48.356, STATS., following the CHIPS proceeding placing Joshua in a foster home, violated his due process rights and the TPR suit must be dismissed.

¶7 Emmanuel P.’s argument, that he was entitled to the warnings set forth in § 48.356, STATS., raises a question of law which this court reviews *de novo*. See *In re Kody D.V.*, 200 Wis.2d 678, 682, 548 N.W.2d 837, 839 (Ct. App. 1996). This court is not persuaded by Emmanuel P.’s arguments.

¶8 This court determines that the trial court was not required to give Emmanuel P. the warnings found in § 48.356, STATS., because Emmanuel P. was not a party to the CHIPS proceeding. At the CHIPS proceeding, Emmanuel P. had not yet been adjudicated the father. Section 48.356(1) & (2), STATS., directs:

(1) Whenever the court orders a child to be placed outside his or her home, orders an expectant mother of an unborn child to be placed outside of her home or denies a parent visitation because the child or unborn child has been adjudged to be in need of protection or services under s. 48.345, 48.347 48.357, 48.363 or 48.365, the court *shall orally inform the parent or parents* who appear in court or the expectant mother who appears in court of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child or expectant mother to be returned to the home or for the parent to be granted visitation.

(2) In addition to the notice required under sub. (1), any written order which places a child or an expectant mother outside the home or denies visitation under sub. (1) *shall notify the parent or parents* or expectant mother of the information specified under sub. (1).

(emphasis added.) When Emmanuel P. appeared in court for the CHIPS proceeding, and when the trial court made its order placing Joshua in a foster home, Emmanuel P. was not a “parent.” The statute requires only that the warnings be given “to a parent or parents who appear in court.” Inasmuch as Emmanuel P. had not been legally adjudicated Joshua’s father, the trial court was not required to advise him of the conditions necessary for the child to be returned

to his home or for the grant of visitation to him. As a result, the trial court was also not obligated to give the warnings set forth in § 48.356.

¶9 Because Emmanuel P. was not entitled to the warnings contained in § 48.356(2), STATS., his due process argument also fails. Wisconsin case law indicates that terminating parental rights without these warnings is not a per se violation of due process rights. For example, in *In re Amanda A.*, 194 Wis.2d 627, 534 N.W.2d 907 (Ct. App. 1995), the court concluded that “the termination of [the father’s] parental rights pursuant to section 48.415(8), STATS., did not violate his due process rights.” *Id.* at 639, 534 N.W.2d at 911. The reviewing court determined that there was no due process violation, even though Amanda A.’s father, like Emmanuel P., never received the warnings listed in § 48.356. *See id.* Other cases have opined that procedural and substantive due process is provided by the entire statutory scheme for the termination of a parent’s rights. *See, e.g., In re K.D.J.*, 163 Wis.2d 90, 470 N.W.2d 914 (1991). A review of the record reveals that in terminating Emmanuel P.’s parental rights, the State proceeded according to the statutory scheme set forth in Chapter 48. Emmanuel P. was notified of the proceeding, given a copy of the petition, and provided with legal counsel. Consequently, this court determines Emmanuel P.’s due process rights were not violated, and this court rejects Emmanuel P.’s first argument.

¶10 Emmanuel P. next argues that the trial court erroneously exercised its discretion when it found Emmanuel P. in default for failing to appear at his deposition. This court will affirm a discretionary order if there is a reasonable basis for the trial court’s decision. *See Littman v. Littman*, 57 Wis.2d 238, 250, 203 N.W.2d 901, 907 (1973). All that is needed to affirm a discretionary order is that the trial court examined the relevant facts, applied a proper standard of law and used a demonstrated rational process to reach a conclusion that a reasonable

judge could reach. See *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

¶11 Emmanuel P. concedes that, under § 804.12(4), STATS., the trial court had the power to enter a default judgment, but he claims to do so under these circumstances was an erroneous exercise of discretion. This court disagrees.

¶12 Emmanuel P. believes that, inasmuch as his failure to appear at the deposition was the result of his indigency, his nonappearance was neither egregious nor in bad faith and did not warrant the trial court's determination to enter a default judgment.² The record reflects that after Emmanuel P. failed to appear at the December motion hearing, the trial court ordered that he appear at all future hearings. In addition, the State served on Emmanuel P.'s attorney a notice of deposition and a subpoena for Emmanuel P. Emmanuel P. does not argue that he did not receive notice of the deposition or that his failure to appear was inadvertent. He merely claims that he could not attend because he did not have the bus fare to return to Milwaukee. Thus, he argues, the trial court's decision to enter a default judgment was a harsh remedy for his absence and the trial court's decision to enter a default judgment was an erroneous exercise of discretion.

¶13 It is undisputed that after these proceedings began, Emmanuel P. decided to take a vacation to Montana and, once there, he apparently found himself without funds to return. As the State points out, when Emmanuel P.

² Emmanuel P. also argues that a default judgment should not have been granted because he was available for a telephonic deposition. The record belies this contention. In the post-termination proceeding his attorney testified he last talked to Emanuel P. about the upcoming deposition on December 10, 1998. His attorney stated that, during this telephone call, Emmanuel P. failed to give him a current telephone number and that the telephone number he had was for a bar. When the attorney called there, he was unable to locate Emmanuel P. Further, his attorney testified that he had no further contact with his client until after the deposition.

decided to leave Milwaukee, his trial date was only six weeks away. Unlike other litigation, TPR proceedings have strict time limitations. Further, given the personal nature of the suit, it was necessary for the State to obtain Emmanuel P.'s testimony prior to trial. Although in another setting granting a default judgment for failure to attend a deposition might be considered harsh, and possibly an erroneous exercise of discretion, here much was at stake when Emmanuel P. failed to attend his deposition. These proceedings placed Joshua's legal status in limbo. Thus, given the tight statutory time limitations and the urgency of a quick resolution of the suit, this court concludes that the trial court did not erroneously exercise its discretion when it entered a default judgment upon Emmanuel P.'s failure to attend his deposition. Moreover, when Emmanuel P. failed to attend the deposition, it was contrary to the trial court's express order that he personally attend all future proceedings in this matter.

¶14 Emmanuel P. next asserts that there was insufficient evidence to support the trial court's finding that he failed to assume parental responsibility for Joshua. This court will not overturn a trial court's decision to terminate the parental rights of a party unless there has been erroneous exercise of discretion. *See In re Guenther D.M.*, 198 Wis.2d 10, 21, 542 N.W.2d 162, 167 (Ct. App. 1995). Findings of fact made by the trial court will be affirmed unless they are clearly erroneous. *See* § 805.17(2), STATS. Further, on appeal, to secure a reversal of a trial court's finding requires that the finding be against the great weight and clear preponderance of the evidence. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979). Although a default judgment was entered following Emmanuel P.'s absence at his deposition, the State was, nevertheless, required to submit proof of the grounds alleged in the TPR petition.

¶15 At the dispositional hearing, the State called several witnesses, including a social worker who was the custodian of the record kept on Joshua's case. Her testimony established that Joshua had never lived with Emmanuel P. In fact, the record reflected that Joshua had been placed in his foster home when he was one day old and he considered his foster father his "daddy." Additionally, the social worker related that although Emmanuel P. began exercising his supervised visitation with Joshua in January 1998, Emmanuel P. discontinued those visits after having visited Joshua less than twelve times. Given his limited contact with his son, the record clearly supported the trial court's findings that Emmanuel P. never exercised responsibility for the daily supervision, education, protection or care of Joshua. See § 48.415(6)(b), STATS. (defining "substantial parental relationship"). The trial court's determination that the State met its burden of proof that Emmanuel P. failed to assume his parental responsibility to Joshua under § 48.415(6) is not against the great weight and clear preponderance of the evidence. Thus, this argument, too, fails.

¶16 Next, this court addresses Emmanuel P.'s claim that the trial court erroneously exercised its discretion in finding that his trial attorney was not ineffective. Emmanuel P. contends that his trial attorney was ineffective because at the dispositional hearing he was uncertain whether the trial court had previously found that Emmanuel P. had failed to assume parental responsibility for Joshua. As a result of his uncertainty, Emmanuel P. contends his attorney was unprepared to argue to the trial court that Emmanuel P. was fit. At the *Machner*³ hearing, the trial court determined that had Emmanuel P.'s trial attorney been better prepared for the dispositional hearing and attempted to introduce exhibits showing

³ *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Emmanuel P.'s concern for his son or aggressively cross-examine the witnesses, the trial court would still have made the same findings. Thus, the trial court denied the motion for a new trial. This court concurs with the trial court's determination.

¶17 The seminal case dealing with the ineffectiveness of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, Emmanuel P. must show that his counsel's performance was deficient, and Emmanuel P. must show that he was prejudiced by counsel's deficient performance. See *id.* at 687. Following a *Machner* hearing on the ineffective assistance of counsel, this court will only overturn a trial court's findings if the findings are clearly erroneous. *Id.* at 804.

¶18 As noted, Emmanuel P. failed to appear at a motion date, at his deposition, at the final pretrial, at trial and at the dispositional hearing. Due to Emmanuel P.'s conduct, the State sought and received a default judgment. As a consequence, the trial court proceeded only on Jean H.'s request for a jury trial. On the trial date, the trial court refused to allow Emmanuel P.'s attorney to participate in the trial and excused him. Thus, when his attorney appeared for the dispositional hearing, his attorney was unaware of exactly what orders the trial court made following the jury's decision that Jean H. had failed to assume parental responsibility for Joshua. Under these circumstances, it is understandable that Emmanuel P.'s attorney was unsure of the extent of the legal rulings made by the trial court. But the trial court found that, even if Emmanuel P.'s attorney had been aware of the fact that the trial court had not yet entered a finding that Emmanuel P. had failed to assume parental responsibility over Joshua, and he called witnesses and submitted documentation, it would not have resulted in a different finding. This is so because the trial court stated that the strongest evidence presented

against Emmanuel P. was his failure to attend the proceedings and no amount of persuasive trial counsel argument or documentation would have changed the result. Thus, even if Emmanuel P.'s attorney engaged in a deficient performance at the dispositional hearing, it resulted in no prejudice to Emmanuel P.

¶19 Finally, Emmanuel P. seeks a new trial under § 752.35, STATS.

It reads:

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.

Emmanuel P. claims both that the real controversy was not fully tried and that justice miscarried. As to his first contention, Emmanuel P. argues that because the trial court erroneously entered a default judgment against him, the real controversy was not tried and he is entitled to a new trial. As to the second contention, Emmanuel P. posits that, because the trial court failed to tell him what conditions he needed to meet in order to obtain custody or visitation of Joshua, and failed to warn him of the consequences of his inaction, justice has miscarried. This court is not persuaded by either argument. It was Emmanuel P.'s actions that resulted in the default judgment. Despite the fact that his termination of parental rights trial was less than six weeks away, Emmanuel P. left for a vacation in Montana without having the resources to permit his return to Milwaukee. While in Montana he was often difficult to contact and lived at several different addresses. Emmanuel P. is solely responsible for the loss of his right to have a trial.

¶20 This court is also unimpressed with Emmanuel P.'s assertion that justice has miscarried because he was unaware of the serious consequences that could occur if he continued to ignore his responsibilities to his son. Emmanuel P. voluntarily discontinued supervised visitation with his son in August 1998 when Joshua was less than two years old. Given his failure to establish any relationship with Joshua, no amount of warnings would have deterred Emmanuel P. from failing to maintain contact with his son, nor would warnings have prompted him to stay in Wisconsin and participate in his termination of parental rights, instead of vacationing in Montana. As a consequence, this court does not find this case to be an appropriate one to authorize a new trial under § 752.35, STATS. Accordingly, the order of the trial court is affirmed.

By the Court.—Order affirmed.

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

