**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 20, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**

**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* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2016AP222** **Cir. Ct. No. 2014TP48**

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

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

**WAUKESHA COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**K.R.G.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County: WILLIAM DOMINA, Judge. *Affirmed*.

¶1 REILLY, P.J.[1] Wisconsin has a two-part procedure for involuntary termination of parental rights (TPR). The focus in the "grounds" phase is on the parent, and the county must prove by clear and convincing evidence that the parent is "unfit." WIS. STAT. § 48.31(1); ***Steven V. v. Kelley H.***, 2004 WI 47, ¶3, 271 Wis. 2d 1, 678 N.W.2d 856. The focus in the "dispositional" phase is on the child, and the court must decide if it is in the child's best interests that the rights of his or her parent be terminated. WIS. STAT. § 48.426(2).

¶2 In this case, K.R.G. abandoned her child and then failed to cooperate with programming and treatment aimed at reunification. K.R.G. also repeatedly failed to attend court-ordered hearings despite being repeatedly warned that her failure to appear in court was grounds for the default of her right to challenge her "unfitness" as a parent. When K.R.G. failed to appear in court on August 12, 2015, the circuit court heard evidence as to K.R.G.'s "unfitness," found that the Waukesha County Department of Health and Human Services (County) had proven "unfitness," and defaulted K.R.G. from contesting the court's findings. K.R.G. did not attend the dispositional hearing, and the court terminated her parental rights. K.R.G. claims the court erred when it denied her motion to vacate the default finding as she had a "desire" and "determination" to participate in the TPR proceeding. We conclude the court properly exercised its discretion in all respects and affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

## BACKGROUND

¶3 Six-year-old P.K.K.G. was removed from K.R.G.'s home on May 2, 2013, after K.R.G. left him with a neighbor for three days and did not return. K.R.G.'s whereabouts were unknown as she had no memory of what had happened to her in the days after she left her son. P.K.K.G. was found to be a child in need of protection or services (CHIPS) in August 2013. This was not the first time that P.K.K.G. had been abandoned. In 2008, when P.K.K.G. was a one-year-old, the Bureau of Milwaukee Child Welfare removed him from his home because K.R.G. had disappeared. P.K.K.G. has remained in foster care during the pendency of this case. Since August 2013, the County and the guardian ad litem (GAL) encouraged K.R.G. to access services, including outpatient mental health treatment, housing and transportation assistance, AODA and medication management, domestic violence counseling, and parenting education. K.R.G. would either reject the assistance or would begin a program and then disappear.

¶4 On November 26, 2014, the County filed a TPR petition against K.R.G., alleging continuing CHIPS pursuant to WIS. STAT. § 48.415(2)(a). At the preliminary hearing on December 15, 2015, K.R.G. appeared in person. During the hearing, the circuit court instructed K.R.G. that she was ordered to appear in court for all proceedings and her failure to appear could result in the court defaulting her rights to contest the termination proceedings.

¶5 The circuit court scheduled a jury trial for April 28, 2015 through May 1, 2015. On April 9, 2015, the parties agreed to mediation, and the case was removed from the trial calendar. Mediation was not successful, and a status conference was scheduled for June 22, 2015. K.R.G. appeared by telephone for the June 22, 2015 hearing with the court's permission. The court allowed K.R.G.

to appear by telephone for the hearing but warned K.R.G. that all future appearances needed to be in person, as well as the consequences of nonappearance. The court explained to K.R.G., "I've given you the ability to appear here today by telephone, but this is a termination case where your personal appearance will be required in the future. Do you understand?" K.R.G. indicated that she understood. The court scheduled a trial for September 15, 16, and 17, 2015, with a trial status hearing on August 28, 2015.

¶6 On July 17, 2015, K.R.G. requested new counsel. The court scheduled a hearing on K.R.G.'s request for July 23, 2015. At the hearing on July 23, 2015, the court explained that "[K.R.G.] did contact the Court through the court receptionist and asked for the ability to appear by telephone today. I did grant that request. We've attempted to call her on the phone that she's given us a number of times, and I'll note for the record it goes right to voice mail. I've given instruction that if she calls in that she be joined in." The court went on to express that "this case is very troubling to me. [K.R.G.] appears to present herself when she wishes, doesn't when she doesn't want to." During a break, K.R.G. called the court, and the clerk informed her that the court would call her back when the case was back on the record. The clerk attempted to call K.R.G. three times after the break without success. During the hearing, counsel for K.R.G. was able to reach K.R.G. by text message, but neither the court nor counsel was able to reach her by telephone. Since K.R.G. was not available to request new counsel in person, the

court adjourned the review hearing to July 29, 2015, to allow K.R.G. to appear in person.[2]

¶7 On July 29, 2015, K.R.G. again failed to appear. K.R.G. was informed of the hearing by mail, telephone, e-mail, and text from her attorney; a voicemail from her social worker; and notice by mail from the circuit court. Counsel indicated that he had not had contact with K.R.G. since the July 23, 2015 hearing. Neither her social worker, the GAL, standby counsel, nor the court had heard from K.R.G. since the hearing a week before. The court again explained that it was uncomfortable releasing counsel without communicating directly with K.R.G., and adjourned the hearing to August 12, 2015.

¶8 On August 12, 2015, K.R.G. failed to appear despite being personally served with an order for appearance. None of the parties had been in contact with her. The order for appearance warned:

> IF YOU FAIL TO APPEAR:
>
> 1. At the court date above and if you fail to follow these orders, the Court will proceed without you, will find that grounds exist to terminate your parental rights, will find you unfit as a parent and will terminate your parental rights to the above listed child(ren). In addition, the Court may strike your statutory right to a jury trial.

¶9 The circuit court found that K.R.G. failed to appear in person, as ordered, on June 22, 2015, July 23, 2015, July 29, 2015, and August 12, 2015. Based on her failure to appear for two or more consecutive hearings, the court determined that her conduct was "presumed to be and found to be egregious

[2] The circuit court did not release her attorney but it did have standby counsel from the public defender's office available at the hearings on July 23, 2015, July 29, 2015, and August 12, 2015.

conduct and without clear and justifiable excuse." The court concluded that K.R.G. had waived her right to counsel, pursuant to WIS. STAT. § 48.23(2)(b)3., and both her attorney and stand-by counsel were released. During the hearing, the circuit court indicated that K.R.G. had called about ten to fifteen minutes after the hearing had started to request that she be allowed to appear by telephone. The court refused K.R.G.'s request based on the order for appearance, which required her to appear in person, and the court's previous instructions that she would need to appear in person in the future.

¶10 Based on K.R.G.'s failure to appear, the County made a motion for default under WIS. STAT. § 805.03. The court instructed the County to proceed with the grounds phase of the TPR proceeding. K.R.G.'s social worker, Susan Peck, testified that the County attempted to provide all the services ordered by the court to K.R.G., but her attendance and involvement was "very sporadic and very inconsistent." Peck stated that K.R.G. had not met any of the conditions required by the TPR petition for P.K.K.G. to return to his mother's home. After hearing testimony, the court granted the County's motion for default, finding that K.R.G.'s "conduct of failing to appear at consecutive hearings and failing to keep in contact with counsel [was] in violation of the Court's orders and as a consequence, [K.R.G.'s] right to contest the grounds phase of this termination proceeding is defaulted." Based on Peck's testimony, the court determined that the County had proven unfitness under WIS. STAT. § 48.415(2)(a). The dispositional hearing was scheduled for September 15, 2015.

¶11 K.R.G. appeared on September 15, 2015. K.R.G. indicated that she was prepared to proceed and the County put on the testimony of Kara Ecoff, P.K.K.G.'s teacher, Gary Probst, P.K.K.G.'s therapist, and Peck, K.R.G.'s social worker. After the County rested its case, K.R.G. expressed confusion regarding

the subject matter of the hearing, claiming she thought the hearing was to set the date of the trial. K.R.G. requested a lawyer. The circuit court adjourned the hearing until September 25, 2015, and provided K.R.G. with instructions on where to obtain counsel.

¶12 On September 25, 2015, K.R.G. appeared with counsel, and the court granted K.R.G.'s request for an adjournment of the dispositional hearing to October 30, 2015. On September 30, 2015, K.R.G. filed a motion to vacate the default finding from the grounds phase. On October 14, 2015, the court denied K.R.G.'s motion to vacate the default as K.R.G. presented no justifiable excuse for her failures to appear.

¶13 K.R.G. failed to appear at the October 30, 2015 dispositional hearing. After hearing testimony and considering the "best interest" factors enumerated in WIS. STAT. § 48.426, the circuit court terminated K.R.G.'s parental rights to P.K.K.G.

## DISCUSSION

¶14 K.R.G. argues that the default finding in the grounds phase should be vacated and the matter remanded to the circuit court as she demonstrated a "desire" and "determination" to participate in the TPR proceeding.[3] The question

[3] K.R.G. makes a cursory claim that the court erred in discharging her counsel. We do not address this undeveloped argument as the August 12, 2015 hearing was a result of K.R.G.'s motion to discharge her counsel. The court had stand-by counsel at the hearing and throughout the proceedings never denied counsel to K.R.G. The court properly followed WIS. STAT. § 48.23(4m) in discharging counsel. Under § 48.23(2)(b)3., a circuit court may presume that a parent has waived his right to counsel if, after being ordered to appear in court, the parent fails to do so and the court finds that failure egregious and without a justifiable excuse. ***Id.*** The statute also creates a presumption that a parent's failure to appear for two or more consecutive hearings is presumed to be egregious. ***Id.*** If a court finds that a parent has waived his right to counsel, the court may discharge counsel pursuant to § 48.23(4m).

before this court is whether the circuit court properly exercised its discretion in entering a default against K.R.G at the grounds phase and properly exercised its discretion in denying K.R.G.'s request to vacate the default finding. Whether to enter a default judgment is within the sound discretion of the circuit court. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶18, 246 Wis. 2d 1, 629 N.W.2d 768. In order to determine whether the circuit court properly exercised its discretion, we must determine whether the circuit court considered the relevant facts, applied the proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 306, 470 N.W.2d 873 (1991).

*The Circuit Court Properly Exercised its Discretion Granting Default in the Grounds Phase and Denying K.R.G.'s Motion to Vacate the Default Finding*

¶15 During the grounds phase of the TPR proceedings, "the parent's rights are paramount," and it is crucial that parents are provided "heightened legal safeguards to prevent erroneous decisions." ***Walworth Cty. HHS v. Roberta J.W.***, 2013 WI App 102, ¶1, 349 Wis. 2d 691, 836 N.W.2d 860 (citation omitted). Nevertheless, another important aspect of a TPR proceeding is the finality of the result. ***T.M.F. v. Children's Serv. Soc'y***, 112 Wis. 2d 180, 187, 332 N.W.2d 293 (1983). Our supreme court has pronounced that finality of the circuit court's decision is "critical" in such cases. ***Id.*** "The reasons are obvious: the longer the child remains in limbo, the longer it takes for him or her to shake the dislocation and trauma associated with an uncertain family situation." ***Elgin W. v. Wisconsin DHFS***, 221 Wis. 2d 36, 48, 584 N.W.2d 195 (Ct. App. 1998). K.R.G. does not dispute that the allegations in the TPR petition were demonstrated by clear and convincing evidence at the grounds hearing. Her only argument is that default should not have been granted based on her failure to appear, as she demonstrated a

"desire" and "determination" to participate in the TPR proceeding, and, therefore, the court erroneously exercised its discretion in refusing to vacate its default finding. K.R.G.'s "desire" and "determination" may have had merit if K.R.G. had offered a reasonable excuse for her repeated failures to abide by court orders to appear at the court proceedings. She did not do so.

¶16 The law is clear that a circuit court may default a parent's rights in a TPR proceeding. *See* ***State v. Shirley E.***, 2006 WI 129, ¶13 n.3, 298 Wis. 2d 1, 724 N.W.2d 623. TPR proceedings are civil in nature, ***Door Cty. DHFS v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999), and, therefore, the procedures of those proceedings are governed by WIS. STAT. chs. 801 to 847 "except where different procedure is prescribed by statute or rule," WIS. STAT. § 801.01(2). Under WIS. STAT. § 805.03, a court may "make such orders in regard to the failure as are just, including but not limited to orders authorized under [WIS. STAT. §] 804.12(2)(a)" for failure to "obey any order of court." Sec. 805.03. A default finding requires the court to make a finding of bad faith or egregious conduct. ***Dane Cty. DHS v. Mable K.***, 2013 WI 28, ¶69, 346 Wis. 2d 396, 828 N.W.2d 198. "Where a circuit court concludes that a party's failure to follow court orders, though unintentional, is 'so extreme, substantial and persistent' that the conduct may be considered egregious, the circuit court may make a finding of egregiousness." ***Id.***, ¶70.

¶17 The evidence demonstrates that from about June 2015 through August 2015, K.R.G. decided to completely ignore her counsel, while making repeated requests for new counsel between April 2015 and July 2015. When the circuit court provided her an opportunity to obtain new counsel, she either refused or did not appear. K.R.G. moved to Madison during the middle of the proceedings without informing her counsel, the County, or the GAL until after the move was

already completed. K.R.G. then attempted to use the travel distance, cost, and her "health problems" as reasons why attending court hearings was difficult for her. The circuit court rejected K.R.G.'s arguments. K.R.G. refused to provide her social worker with an address where she could be located, making it nearly impossible for her social worker to ascertain whether she was meeting the conditions of her TPR petition. K.R.G. also failed to fully participate in the programs provided by the County to help assist her with her own mental health and drug dependency issues.

¶18 Against this backdrop, the circuit court issued multiple orders, on January 15, 2015, June 24, 2015, and July 30, 2015, warning that a failure to personally appear "for all hearing dates" would have severe consequences for her case. The language in these orders clearly indicated that a failure to appear "[a]t the court dates above and all other court dates scheduled in this matter" will result in the court "proceed[ing] without you," "find[ing] that grounds exist to terminate your parental rights," "find[ing] you unfit as a parent," and "your [failure to appear at consecutive hearings as ordered] may waive your right to an attorney and your attorney may be discharged by the Court." K.R.G. never offered a reasonable explanation for her failures to appear in court as ordered.

¶19 We conclude that the circuit court properly exercised its discretion under WIS. STAT. § 805.03 in finding K.R.G. in default as a sanction for failing to abide by court orders. The circuit court found that "[K.R.G.'s] conduct of failing to appear at consecutive hearings and failing to keep in contact with counsel is in violation of the Court's orders and as a consequence, [K.R.G.'s] right to contest the grounds phase of this termination proceeding is defaulted." The court found K.R.G.'s behavior to be "egregious," in that her repeated nonappearances rose to the level "beyond carelessness or inattentiveness." The court did not default the

hearing; the court defaulted K.R.G.'s right to contest the findings of the hearing given her failure to appear. The County still had to prove that "grounds" existed to terminate K.R.G.'s parental rights. Finality is critical for all parties; K.R.G.'s repeated failures to abide by court orders without good cause operated to the detriment of P.K.K.G.

¶20 The circuit court properly exercised its discretion in granting default as well as denying K.R.G.'s motion to vacate the default finding, as K.R.G. never offered a reasonable justification for her nonappearances.

*By the Court*.—Order affirmed.

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