

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2006

Cornelia G. Clark
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 Nos. 2005AP2618
2005AP2619
2005AP2620**

**Cir. Ct. Nos. 2004TP52
2004TP53
2004TP54**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 2005AP2618

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
JAKOYA D.R., A PERSON UNDER THE AGE OF 18:**

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

DAPHNEA W.,

RESPONDENT-APPELLANT.

No. 2005AP2619

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

DAPHNEA W.,

RESPONDENT-APPELLANT.

NO. 2005AP2620

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
QUANDARIUS X.W., A PERSON UNDER THE AGE OF 18:**

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

DAPHNEA W.,

RESPONDENT-APPELLANT.

APPEAL from judgments of the circuit court for Rock County:
RICHARD W. WERNER, Judge. *Judgments reversed and causes remanded.*

¶1 DYKMAN, J.¹ Daphnea W. appeals from a default judgment terminating her rights to her children, Jakoya D.R., Alicia K.R. and Quandarius X.W., whom the court determined to be in continuing need of protection and services. WIS. STAT. § 48.415(2) (2003-04). The circuit court entered the default judgment against Daphnea after determining that she had failed to comply with its

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

order to appear at jury selection and disposition on the termination of parental rights (TPR) petitions.

¶2 Daphnea contends that the entry of a default judgment was an erroneous exercise of the court's discretion because she had appeared by counsel at the proceedings; appeared at previous court dates on the petitions, including two scheduled jury selection dates that were postponed; and left a phone message with her attorney the night before jury selection explaining that she had a health-related problem and asking that the case be continued. She further contends that the court erred by entering the default judgment without first making a determination that Daphnea's conduct was either egregious or in bad faith. We conclude that Daphnea's conduct was neither egregious nor in bad faith and therefore the entry of default judgment was an erroneous exercise of the court's discretion. We thus reverse the judgments and remand for further proceedings on the TPR petitions.²

Background

¶3 On July 13, 2004, the Rock County Department of Human Services filed petitions to terminate Daphnea's parental rights to her children, Jakoya D.R. (Case No. 2004TP52); Alicia K.R. (Case No. 2004TP53); and Quandarius X.W. (Case No. 2004TP54). The petitions alleged that the children remained in need of protection and services and that Daphnea had failed to meet the conditions for their return set forth in a dispositional order, constituting grounds for termination

² Daphnea also contends that the county failed to show that the allegations of the petition were supported by clear and convincing evidence. Because we reverse and remand these proceedings to the circuit court because the circuit court's entry of default judgment was an erroneous exercise of its discretion, we need not address this argument.

of parental rights under WIS. STAT. § 48.415(2). Specifically, the petitions contended that Daphnea had a history of mental health problems and hostility toward the county and her children; would disappear for weeks at a time; had not visited with her children between October 2003 and March 26, 2004; and had asserted on multiple occasions that her son, Quandarius, did not exist because she did not have a birth certificate for him.

¶4 On August 9, 2004, Daphnea made her initial appearance on the petition. Daphnea requested counsel, and the court referred her to the public defender's office. On August 23, 2004, Daphnea appeared in person and by her court-appointed attorney. Daphnea denied the allegations and requested a jury trial. She also agreed to waive the usual time limits to permit discovery in the case. The court set jury selection for November 29, 2004. On November 29, Daphnea appeared in person and by counsel. The court postponed jury selection to February 7, 2005, because both Daphnea's attorney and the social worker in the case were involved in another trial that week.

¶5 On February 7, Daphnea again appeared in person and by counsel. The court continued the case to June 27, 2005, this time to permit another case to go to trial on that day. The court then addressed Daphnea:

THE COURT: [Daphnea], I'm signing an order that is an order requiring you to appear on June 27th at 9:00 A. M., and if you don't appear I will find you in default and your rights will be terminated, you understand that. You have to answer out loud for me.

[DAPHNEA]: Daphnea: Excuse me.

THE COURT: You have to answer out loud for me. You understand that.

[DAPHNEA]: Oh, yes. Yes.

THE COURT: [Assistant Corporation Counsel] will provide you with that order before you leave, that that will be an order on each of the children.

The written “Order to Appear or be Found in Default” stated that “Daphnea W[.] shall appear ... at 9:00 a.m. on June 27, 2005. If Ms. W[.] fails to appear at said date and time, she shall be found in default.”

¶6 On June 27, 2005, Daphnea did not appear in person but appeared by counsel. The county moved for a judgment of default against Daphnea, contending that her failure to appear in person violated the court’s oral and written orders. Daphnea’s attorney advised the court:

Your honor, I met with my client either Thursday or Friday of last week. We went through the relevant information regarding the case. She insisted she was going to be here this morning, and that was the case even though I told her she did have a warrant outstanding for her failing to pay a fine. When I checked my messages this morning at the office, there was a message that was time stamped 11:30 P.M. Sunday night, and essentially the message said something along the lines she was having some kind of health problem. She proceeded to start to discuss that, and the message cut off. I tried to contact her at her sister’s number this morning and was unsuccessful. She did indicate that she wondered if there was a way that the case could be continued due to her situation.

¶7 The court found Daphnea in default:

As far as the mother, [Daphnea], she’s the mother in all three of these matters, and she was in open court when she was served with an order to appear or be found in default. She failed to appear. As I have indicated, it’s 9:15. This was scheduled at 9:00 A.M. She has failed to appear. She has left some information with [her attorney], but it’s probably insufficient to explain her failure to make that appearance here.

The court scheduled the dispositional hearing for July 25, 2005. The court took brief testimony from the cases' social worker, Emily Tofte. The court adjourned at 9:20 a.m.

¶8 On July 25, Daphnea did not appear in person but appeared by her attorney, who indicated that he had "had no recent contact with [her]." Her attorney moved to withdraw as counsel, but the court denied the motion because the attorney had not informed Daphnea that he intended to withdraw. The court found Daphnea unfit and took testimony of Tofte regarding the best interests of the children. The court again found Daphnea in default. The court determined that it was in each child's best interest to terminate Daphnea's parental rights and ordered her rights terminated. Daphnea appeals.

Discussion

¶9 Daphnea contends that the circuit court erroneously exercised its discretion when it entered the default judgment because her conduct was neither egregious nor in bad faith, and, regardless, the circuit court failed to make a determination that her conduct was egregious or in bad faith. She further asserts that the court did not order her to appear in person, and therefore her attorney's appearance on her behalf was sufficient to comply with the court's orders. The county responds that failure to appear pursuant to a court order for jury selection and disposition in a termination proceeding is a serious disregard of the court's authority. It also asserts that the written and oral orders clearly indicated that Daphnea was to appear in court personally or be found in default.

¶10 We review a trial court's entry of a default judgment under the erroneous exercise of discretion standard. *Evelyn C.R. v. Tykila S.*, 2001 WI 110,

¶18, 246 Wis. 2d 1, 629 N.W.2d 768. A circuit court exercises its discretion erroneously when it applies an incorrect legal standard. *Id.* In such a case, we may reverse the court’s discretionary decision. *Id.*

¶11 Under WIS. STAT. § 805.03, if a party fails to obey an order of a court, “the court ... may make such orders in regard to the failure as are just,” including an order of default judgment under s. 804.12(2)(a).³ Entry of default judgment “is improper, *i.e.* not ‘just,’ unless bad faith or egregious conduct can be shown on the part of the non-complying party.” *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 275, 470 N.W.2d 859 (1991) (citations omitted). Because “[d]efault judgment terminates litigation without regard to the merits of the claim ... a circuit court should impose it as a sanction only when a harsh sanction is necessary.” *Brandon Apparel Group, Inc. v. Pearson Properties, Ltd.*, 2001 WI App 205, ¶11, 247 Wis. 2d 521, 634 N.W.2d 544 (citations omitted).

³ WISCONSIN STAT. § 805.03 provides in part:

For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of 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 s. 804.12(2)(a).

WISCONSIN STAT. § 804.12(2)(a) provides in part:

If a party ... fails to obey an order ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

....

3. An order ... rendering a judgment by default against the disobedient party.

¶12 In the case of a TPR proceeding, a court may not grant a motion for default judgment without first considering the merits of the petition. *Evelyn C.R.*, 246 Wis. 2d 1, ¶19. Nonetheless, entry of default in a TPR proceeding means a determination is made on the merits without the parent presenting a defense against an action affecting his or her fundamental human rights. *See Id.*, ¶20. For this reason, courts take particular care when considering whether to impose the harsh sanction of default judgment against a parent in a TPR proceeding.

¶13 In *Evelyn C.R.*, a parent under a court order to appear for the fact-finding hearing in a termination proceeding failed to appear in person but appeared by counsel and later requested permission to appear by phone. *Evelyn C.R.*, 246 Wis. 2d 1, ¶8. The court continued the proceedings and issued an oral and written order for the parent to appear “in person” at the next court date. *Id.* When the parent failed to appear, the court entered a default judgment against her without first ascertaining whether clear and convincing evidence supported the termination of her parental rights. *Id.*, ¶9. The single issue before the *Evelyn C.R.* court was whether the circuit court erred when it found the parent in default without first determining that the evidence supported termination of her rights. *Id.*, ¶16. While this is not the issue here, *Evelyn C.R.*’s treatment of the circuit court’s default judgment is instructive to our analysis.

¶14 The *Evelyn C.R.* court determined that the parent’s failure to appear in person did not “fall within the scope of WIS. STAT. § 806.02(5),” which permits a court to enter a default judgment “against any defendant who has appeared in the action but who fails to appear at trial” because the parent appeared at the hearing by counsel. *Id.*, ¶17 and n.5. However, the *Evelyn C.R.* court concluded that the circuit court had authority to sanction the parent for failure to obey court orders

under WIS. STAT. §§ 805.03 and 804.12(2)(a). *Id.* The parent conceded that her failure to appear “in person” as ordered by the court supplied the court with adequate cause to sanction her by means of default judgment. *Id.*, ¶26.

¶15 Here, Daphnea disputes that her failure to appear in person gave the circuit court reason to find her in default. Daphnea contends her appearance by counsel complied with the court’s order because, unlike the orders in *Evelyn C.R.*, neither the court’s written nor oral orders explicitly directed her to appear “in person.” Thus, Daphnea contends, WIS. STAT. §§ 805.03 and 804.12(2)(a) do not provide a basis for entry of default judgment because she did not disobey the court’s orders.

¶16 An order specifying that Daphnea appear “in person” would have left no doubt that failure to appear personally would have defied the orders of the court. However, our conclusion does not rest entirely on the omission of these two words from the orders, though this fact is a part of our analysis. Even assuming that Daphnea was in violation of the court’s oral and written orders by her failure to appear personally, we conclude that the entry of default judgment was an erroneous exercise of the court’s discretion under the particular circumstances of this case. In *Evelyn C.R.*, the circuit court noted the parent’s failure to appear in person at an initial proceeding, but chose not to find her in default at that time. *Evelyn C.R.*, 246 Wis. 2d 1, ¶8. Thus, when the parent later failed to appear in person the second time as explicitly ordered, the court reasonably concluded that the parent’s conduct was egregious. *Id.* ¶9. Here, Daphnea did not fail to appear in person at a proceeding prior to jury selection. In fact, she appeared in person at all previous proceedings, including two jury selection dates that had been

postponed. The circuit court did not consider Daphnea's record of appearing in person prior to finding her in default.

¶17 Further, Daphnea's attorney averred that Daphnea had left a truncated message the night before jury selection stating that she could not appear in court the next day because of "some kind of health problem." As the county notes, this information was vague, and Daphnea's attorney was unable to reach her that morning to verify her illness and ascertain her level of disability. However, this message informed the court that Daphnea may have had a justifiable excuse for her failure to appear in person. "[D]efault judgment is the ultimate sanction. The law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." *Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.*, 2002 WI 66, ¶64, 253 Wis. 2d 238, 646 N.W.2d 19.

¶18 The county contends that failure to obey a trial court order is a serious disregard of the court's authority which is egregious conduct and therefore cause for entry of default judgment. It asserts that not permitting entry of default judgment in this case "completely undermines a trial court's authority and renders useless any order entered by a trial court." We decline to conclude that every failure to obey a court order is egregious conduct. When contemplating the entry of default judgment, particularly in a proceeding implicating fundamental rights, courts must consider the circumstances of each case to determine if entry of a default judgment is just.

¶19 Under appropriate circumstances in other cases, entry of default judgment would be a proper exercise of a circuit court's discretion. Here, however, Daphnea had appeared in person at prior court dates. She left a message with counsel that she would not (personally) appear at jury selection for a health-

related reason. The court's orders did not clearly state that appearance by counsel was insufficient and would result in default. Under these circumstances, entry of default judgment was outside of the court's discretion. We therefore reverse the trial court's judgment terminating Daphnea's rights to her children and remand for trial.

By the Court.—Judgments reversed and causes remanded.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

