COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2008

David R. Schanker
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. 2008AP237
2008AP238

Cir. Ct. Nos. 2007TP29
2007TP30

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

2008AP237

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ARMOND L., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANGELA M.L.,

RESPONDENT-APPELLANT.

2008AP238

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANGELA M.L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Angela M.L. appeals the circuit court order terminating her parental rights to her children, Armond and Aubrianna.[2] She contends the circuit court erroneously exercised its discretion in finding her in default for failing to appear at the initial hearing. For the reasons we explain below, we affirm.

BACKGROUND

¶2 An affidavit of service shows that Angela was personally served on April 16, 2007, with the summons and petition for termination of parental rights (TPR) with respect to each child. Each summons stated that she was required to appear on May 9, 2007, at 10:30 a.m. at a specified room in the Dane County Courthouse and stated: "**IF YOU FAIL TO APPEAR**, the court may hear testimony in support of the allegations in the attached petition and grant the request of the petitioner to terminate you parental rights." Each summons also explained the nature of the proceedings to terminate parental rights and the rights Angela had with respect to the proceedings, including the right to have an attorney

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] We have consolidated the two cases for purposes of this appeal.

to represent her and how to obtain one if she could not afford one. Attached to each summons was a "Notice of Motion for Default Judgment," which stated:

> **If you fail to appear at this hearing, or any subsequent hearing, the court may proceed to hear testimony and enter an order terminating your parental rights.** Petitioner will move for such judgment if you fail to appeal in court as required.

¶3 Angela did not appear on May 9. Armond and Aubrianna had different fathers; each father appeared by telephone and in person by counsel. After the court completed matters relating to the fathers, the State moved for a finding of default regarding Angela. The court found Angela in default and proceeded to hear evidence in support of the petitions. At the conclusion of the evidence, the court found, as to both children, grounds for termination of Angela's parental rights under WIS. STAT. § 48.415(2)(a), which relates to children in need of protection or services.

¶4 Several pretrial conferences subsequently occurred regarding the fathers. Aubrianna's father consented to the voluntary termination of his parental rights. The record shows no contact by Angela with the court until a proceeding that took place on October 15, 2007. Angela appeared by telephone. At the beginning of this proceeding counsel for the State advised the court that Armond's father intended to enter a plea of voluntary consent to the termination of his parental rights and then they would be ready to proceed to the disposition.

¶5 After the court accepted Armond's father's plea, the court considered the reports filed in support of termination of parental rights as to each child, made findings of fact, and ordered termination of the parental rights of Angela and both fathers. In ordering this disposition, the court stated that it had already found Angela in default. After explaining the disposition order it was

entering, the court asked "Have I missed anything?" Angela, who had said nothing during the proceeding up to this point, did not say anything in response to this question. At this point the court addressed Angela and the two fathers and advised them of their appeal rights. The following interchange then took place:

> Court: … Let me also indicate to both fathers and [Angela] that I know this was a terribly difficult decision—
>
> [Angela]: I didn't make a decision.
>
> Court: All right. You were defaulted. I understand that.

The court then addressed the guardian ad litem on other matters. Angela did not say anything else.

DISCUSSION

¶6 On appeal Angela argues that the circuit court erroneously exercised its discretion in finding her in default because it did not first find either egregious conduct or bad faith. Angela's argument is based on WIS. STAT. § 805.03, which permits the court to impose sanctions "as are just" for a failure to obey a court order.[3] The sanctions include:

[3] WISCONSIN STAT. § 805.03 provides:

> **Failure to prosecute or comply with procedure statutes**. 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). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A

(continued)

> ….
>
> 1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> 2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

WIS. STAT. § 804.12(2)(a)1. and 2. Angela relies on case law decided under § 805.03 and § 804.12(2)(a)[4] holding that a court may not impose a default

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> dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

[4] WISCONSIN STAT. § 804.12(2) provides:

> **(2)** FAILURE TO COMPLY WITH ORDER. (a) If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05(2)(e) or 804.06(1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, 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:
>
> 1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> 2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;
>
> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> 4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical, mental or vocational examination.

judgment as a sanction unless there is bad faith or egregious conduct by the noncomplying party. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 275, 470 N.W.2d 859 (1991).

¶7 The State responds, first, that Angela never objected to the termination of her parental rights at any point in the proceedings before the circuit court and thus has waived the right to object on appeal to the ruling on default. Second, the State contends, the case law does not require a finding of egregiousness or bad faith when a party makes no appearance in response to a summons. The State relies on WIS. STAT. § 806.02, which governs default judgment in civil actions.[5]

[5] WISCONSIN STAT. § 806.02 provides:

> **Default judgment. (1)** A default judgment may be rendered as provided in subs. (1) to (4) if no issue of law or fact has been joined and if the time for joining issue has expired. Any defendant appearing in an action shall be entitled to notice of motion for judgment.
>
> **(2)** After filing the complaint and proof of service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue, the plaintiff may move for judgment according to the demand of the complaint. If the amount of money sought was excluded from the demand for judgment, as required under s. 802.02(1m), the court shall require the plaintiff to specify the amount of money claimed and provide that information to the court and to the other parties prior to the court rendering judgment. If proof of any fact is necessary for the court to give judgment, the court shall receive the proof.
>
> **(3)** If a defendant fails to appear in an action within the time fixed in s. 801.09 the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by s. 801.10 and, in addition, shall require further proof as follows:

(continued)

¶8 The decision whether to enter a default judgment is a matter within the circuit court's discretion. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶18, 246 Wis. 2d 1, 629 N.W.2d 768. We affirm discretionary decisions if the court applied the correct legal standard and there is a reasonable basis in the record to support the decision. *See* ***Johnson***, 162 Wis. 2d at 276-77. The issue whether the court applied the correct legal standard is a question of law, which we review de novo. *See* ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 225, 594 N.W.2d 370 (1999).

¶9 We agree with the State that WIS. STAT. § 805.03 does not address the situation in this case—where a party does not appear at the time and place

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> (a) Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by the complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require.
>
> (b) Where no personal claim is made against the defendant, the court shall require such proofs, by affidavit or otherwise, as are necessary to show the court's jurisdiction has been invoked over the status, property or thing which is the subject of the action. The court may require such additional proof as the interests of justice require.
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> **(4)** In an action on express contract for recovery of a liquidated amount of money only, the plaintiff may file with the clerk proof of personal service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue. The clerk shall render and enter judgment against the defendants who are in default for the amount demanded in the complaint. Leaving the summons at the abode of a defendant is not personal service within the meaning of this subsection.
>
> **(5)** A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof.

designated in a summons. The court in ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17, a TPR case, mentioned statutes in addition to § 805.03 that authorize a court to order a default judgment as a sanction, but they too, are inapplicable here: They involved either the failure to follow a court order, *see* WIS. STAT. § 802.10(7) and WIS. STAT. § 804.12, or failure to appear at trial, in person or through counsel, after having appeared in the action.[6] *See* WIS. STAT. § 806.02(5).

¶10 Angela argues that there is no reason to treat violating an order to appear at an initial hearing any differently than violating an order to appear at a later hearing, and bad faith or egregious conduct should be required for both. However, this overlooks the fact that a summons is not a court order to appear: quite simply, a summons is not signed by a court. WISCONSIN STAT. § 806.02, which permits a default judgment for a defendant's failure to appear or answer within the statutory time period, fits, to a certain extent, the failure to appear in response to the service of a summons in a TPR proceeding. We say "to a certain extent" because a TPR proceeding has two distinct phases that lead to the final order terminating parental rights: a fact-finding hearing before the court or jury in order to determine if there is a statutory ground for termination; and, if there is, a disposition hearing at which the court determines whether it is in the child's best interests to terminate parental rights. *See* WIS. STAT. §§ 48.424, 48.426, 48.427.

[6] In ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶1, 246 Wis. 2d 1, 629 N.W.2d 768, the parent, who had previously appeared in the TPR proceeding, failed to appear in person at a fact-finding hearing although ordered to do so by the court. The issue on appeal was not whether the circuit court properly found the parent in default. ***Id.***, ¶2. The sole issue was whether the court erred in entering a default judgment on a statutory ground for termination of parental rights without first taking evidence sufficient to support a finding of that ground by clear and convincing evidence. ***Id.*** The court concluded that this was error, but that it was harmless because of the evidence taken at the dispositional hearing. ***Id.***, ¶3. In this case, after finding Angela in default, the circuit court did take evidence that, it determined, established a ground for termination. Angela does not challenge that determination.

See also ***State v. Shirley E.***, 2006 WI 129, ¶¶27-28, 298 Wis. 2d 1, 724 N.W.2d 623. Even if a parent is properly found in default for purposes of the first phase, the parent and the parent's attorney retain the right to participate in the dispositional phase. ***Id.***, ¶¶54-55. Thus, a failure to appear in response to a summons in a TPR action could not properly result in a default judgment terminating parental rights; the default would need to be limited, as it was in this case, to the first phase.

¶11 However, we need not decide whether WIS. STAT. § 806.02 is applicable in a TPR proceeding or, if not, what alternatives the court has when a parent does not appear in response to a properly served summons. Even if Angela is correct that the court may not find a parent in default as to the first phase without a finding of egregiousness or bad faith, we are satisfied that a parent may not challenge the finding of default on appeal unless she has first asked the court to vacate the default and explained her reasons for the non-appearance. The general rule is that a party must raise an issue in the circuit court in order to preserve the issue for appeal. *See* ***In re Paternity of C.A.S.***, 185 Wis. 2d 468, 479, 518 N.W.2d 285 (Ct. App. 1994). The rationale for this rule is that the circuit court should be given the opportunity to correct its own errors, thus avoiding unnecessary delays through appeals and reversals. ***Id.*** This rule is particularly apt here. Angela never told the circuit court why she did not appear on May 9, 2007, or that she wanted the opportunity to contest the grounds alleged in the petition.

¶12 In support of her argument that we should not apply waiver, Angela points to her statement to the court at the close of the disposition hearing that she "didn't make a decision," the court's response, and the fact that she was unrepresented. Apparently Angela is contending that she attempted to voice her disagreement with the default finding and the court either ignored it or did not

understand. We recognize that Angela was unrepresented and likely did not understand the procedure for setting aside the finding of default. However, we see no reason, and Angela provides none, why she could not have written to the court before the disposition hearing or told the court at the beginning of the disposition hearing that she wanted the opportunity to contest the petition. We do not agree with Angela's suggestion that her single comment to the court should have informed the court that she wanted to contest the petition. Taking a very flexible view of what is required to preserve an issue, we conclude Angela's single comment did not "reasonably advise the court" that she objected to the default finding and why. *See* ***State v. Corey J.G.***, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998).

¶13 We also observe that, even after the entry of the order terminating her parental rights, Angela had the opportunity under WIS. STAT. § 48.46(2), as a parent who did not contest the petition, to move during specified time periods to have the judgment set aside on any of the grounds specified in WIS. STAT. § 806.07(1)(a), (b), (c), (d), or (f). However, she did not do this, even though apparently she had counsel in time to take advantage of this procedure.

¶14 We agree with Angela that the profound consequences of the termination of parental rights warrant careful attention to procedural and substantive safeguards. *See* ***Shirley E.***, 298 Wis. 2d 1, ¶¶24-25. However, we do not agree that the procedure in the circuit court was unfair to Angela. She was given notice of the requirement that she appear and the consequences of her failure to appear, she did not appear, she never explained to the court why she did not

appear,[7] she did not tell the court she wanted to contest the petition although she had the opportunity to do so, and she did not make use of the post-judgment procedure for setting aside the judgment.

CONCLUSION

¶15 In summary, we decline to reverse and remand on an issue that Angela did not raise in the circuit court. Accordingly, we affirm.

By the Court.—Order affirmed.

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

[7] We note that on appeal Angela does not tell us why she did not appear on May 9, 2007. Thus, even if she is correct that the court was required to find egregiousness and bad faith before finding her in default, we have no way of knowing whether she would likely prevail under this theory.