

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 01-1145

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS
TO ALEXIS J., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KRISTIN J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARSHALL B. MURRAY, Judge. *Reversed and cause remanded with
directions.*

¶1 CURLEY, J.¹ Kristin J. appeals the trial court's order terminating her parental rights to Alexis J. following the trial court's entry of a default judgment against her. She also appeals the trial court's denial of her motion asking for relief from the judgment. She contends that her due process rights were violated when the trial court entered a default judgment after she failed to appear at a hearing. She also asserts that the trial court erroneously exercised its discretion when it refused to grant her motion seeking relief from the default judgment. Because the State confesses error, this court reverses and remands directing the trial court to set aside the termination of parental rights order.² Because the first issue is dispositive, this court declines to address the second issue raised on appeal.³

I. BACKGROUND.

¶2 A petition seeking to terminate Kristin J.'s and James J.'s parental rights to Alexis J. was filed on July 21, 2000. Previously, Alexis J. had been found to be in need of protection or services and was placed outside the home pursuant to a one-year dispositional order. An initial appearance was scheduled for August 8, 2000. Neither Kristin J. nor James J. appeared. The trial court entered a default judgment against James J. because the Department of Human Services submitted proof of publication. The trial court declined to enter a default judgment against Kristin J., but took the State's request for a default judgment

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² The guardian ad litem has notified this court that he is in agreement with the State's position.

³ *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if decision on one point disposes of appeal, appellate court need not decide other issues raised).

under advisement. The matter was adjourned until October 10, 2000, at which time Kristin J. appeared. At the hearing, Kristin J. indicated her desire to contest the termination petition, and she was directed to the Public Defender's office to obtain legal representation. The trial court adjourned the matter until November 27, 2000. The trial court did not order Kristin J. to appear at the adjourned hearing date.

¶3 On the adjourned date of November 27, 2000, an attorney appeared representing Kristin J., but Kristin J. was not present. The trial court set the matter over to January 10, 2001, and directed the defense attorney to "attempt to notify mother." On January 10, 2001, Kristin J.'s attorney appeared in court. The trial court, noting Kristin J.'s absence, made a finding that "petitioner has made due and diligent efforts to notify all parties of these proceedings" and entered a default judgment against Kristin J., terminating her parental rights to Alexis J. Post-judgment motions were filed seeking to reopen the default judgment. In an affidavit filed in support of one of the motions, Kristin J. indicated that she was unable to attend the November 27, 2000 hearing because she was in a treatment center in Minnesota. An affidavit submitted by Kristin J.'s appellate attorney indicated that his investigation revealed that Kristin J. did not appear at the February 20, 2001 hearing because she was incarcerated in Ramsey, Minnesota. The motions were either denied or dismissed.

¶4 On appeal, Kristin J. contends that her due process rights were violated because she was denied the opportunity to meaningfully participate in the proceedings terminating her parental rights to Alexis J. She argues that she was not told to appear in court, she never received notice alerting her to the fact the State was going to seek a default judgment, and she was either in a treatment center or jail on the dates set for the hearing. She notes that under the standards

for default judgment found in WIS. STAT. § 806.02(1), she is entitled to notice that the State sought a default judgment and she points out that WIS. STAT. § 806.02(5) requires “proof of any fact ... necessary for the court to enter judgment.”⁴ She submits the record does not contain proof of any warnings that a default judgment would be sought or proof that she was personally served.

¶5 The State submits that while Kristin J. was personally served with a notice and summons for the October 10, 2000 hearing, and those documents contained warnings that a default judgment would be sought by the State if she failed to appear, the State failed to file the affidavit of service with the court. Consequently, the record does not support the trial court’s findings and the State confessed error. We agree that the lack of proof that Kristin J. had been personally served in this action or warned of the possibility of a default judgment being entered if she failed to appear undermines the trial court’s findings and presents a situation where the State cannot sustain its burden. Therefore, this court reverses the trial court’s default judgment terminating Kristin J.’s parental rights to Alexis J. and remands this matter to the trial court for further proceedings.

⁴ WISCONSIN STAT. § 806.02(1) & (5) provide:

(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.

....

(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.

By the Court.—Order reversed and cause remanded with directions.

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

