COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-0624, 02-0625 & 02-0626

Cir. Ct. Nos. 00 TP 330, 00 TP 331 & 00 TP 332

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

NO. 02-0624

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CAROLYN G.,

RESPONDENT-APPELLANT,

JESSE W.,

RESPONDENT-CO-APPELLANT.

NO. 02-0625

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CAROLYN G.,

RESPONDENT-APPELLANT,

JESSE W.,

RESPONDENT-CO-APPELLANT.

NO. 02-0626

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CAROLYN G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Carolyn G. and Jesse W. appeal from an order terminating their parental rights. Carolyn claims the trial court erroneously

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

exercised its discretion when it denied her motion seeking to vacate the default judgment entered when she failed to appear for the trial date. Jesse, who also failed to appear for the trial date, claims the trial court erred in granting the default judgment without "clear and convincing" evidence that he failed to assume parental responsibility. Because the trial court did not erroneously exercise its discretion when it denied the motion to vacate or when it granted default judgment, this court affirms.

I. BACKGROUND

¶2 On October 25, 2000, the State filed a petition seeking to terminate the parental rights of Carolyn to Toni W., Jestina W., and Roberta G., and the rights of Jesse to Toni and Jestina.[2] On June 21, 2001, the trial court set the trial date for November 26, 2001. Carolyn admits that she was in court on June 21, that she heard the date set for trial, and that her counsel sent her a letter indicating trial would occur on that date. The record reflects that Carolyn was previously advised that if she failed to appear for court dates, default judgment could be entered against her.

¶3 On November 26, 2001, neither Carolyn nor Jesse appeared for trial. The State moved for default judgment, which was granted by the trial court. Subsequently, Carolyn moved to vacate the default judgment, claiming that she was advised by Sheila Scharinger[3] that trial was scheduled for November 27,

[2] The alleged father of Roberta is Robert, whose current whereabouts or last known address is unknown.

[3] Sheila Scharinger was hired by the bureau of Milwaukee child welfare to provide in-home services to Carolyn, and to conduct home visits to ensure that Carolyn was properly caring for her youngest child, Alexandro.

2001, that Carolyn appeared on that date, and could not have appeared on November 26 because she had to take her son, Christopher, to the doctor. She claims her actions constituted excusable neglect. The trial court denied the motion to vacate the default, ruling that Carolyn's actions were careless and ordinary negligence. Carolyn and Jesse appeal from the order terminating their parental rights.

II. DISCUSSION

A. Carolyn.

¶4 Carolyn claims the trial court should have granted her motion to vacate the default judgment because she demonstrated that her actions in failing to appear for the trial constituted excusable neglect. She also asserts that in these types of cases, it is preferred policy to decide the case on the merits rather than disposing of the case on default judgment. This court is not persuaded.

¶5 A trial court can vacate a default judgment pursuant to WIS. STAT. § 806.07(1) (1999-2000) which provides: "On motion and upon such terms as are just, the court … may relieve a party … from a judgment, order or stipulation for the following reasons: (a) Mistake, inadvertence, surprise, or excusable neglect." Because the court "may" reopen the judgment, the decision is discretionary and reviewable for an erroneous exercise of discretion. This court will uphold a discretionary decision if the record reflects a reasoned application of the appropriate legal standard to the relevant facts. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

¶6 Carolyn claims her action constituted excusable neglect. She argues that she relied on Scharinger's confirmation that the trial was set for November 27

and points to a subpoena sent to Scharinger ordering her to appear on that date. She also argues that she could not have attended trial on November 26 because she had to take her son to the doctor. She also points out that she did appear at the courthouse on November 27.

¶7 In Wisconsin, excusable neglect is defined as "that neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Giese v. Giese***, 43 Wis. 2d 456, 461, 168 N.W.2d 832 (1969). Excusable neglect is not the same as "neglect, carelessness or inattentiveness." ***Hedtcke***, 109 Wis. 2d at 468 (citation omitted). Here, the trial court found that Carolyn's actions were not excusable neglect, but rather ordinary neglect and carelessness. The trial court reasoned:

> Having received the actual notice from the Court; having had the notice confirmed; having been fully made aware by the Court that that failure to appear on the appointed dates could result in default, I don't think [this] is excusable neglect. For [Carolyn] to rely upon what she was told by a social worker based upon a subpoena that was provided to that worker, that would require her to disregard what the Court told her and what her attorney told her. I don't think it is reasonable.

The trial court's decision is reasonable. Carolyn was specifically told by the court and her attorney that the trial date in this case was November 26. Ignoring that information because Scharinger's subpoena reflected the date of November 27, does not constitute excusable neglect. Moreover, she failed to produce any specific evidence that she was unavailable at the time the trial was scheduled to commence, or that she attempted to notify the court on November 26 of said emergency. Accordingly, this court concludes that the trial court's decision denying the motion to vacate was reasonable and did not constitute an erroneous exercise of discretion.

¶8 This court is further not persuaded by Carolyn's argument that this court should reverse the trial court because it is better policy to decide these types of cases on the merits rather than by default judgment. Although this court does not disagree with the general policy statement, the specific facts of this case determine the outcome. Here, Carolyn was afforded all required due process rights. She was provided with counsel and advised of her legal rights. She was specifically told by the court that her failure to appear for court dates could result in a default judgment. Carolyn admits that she was present when the trial date was set. She admits that her trial counsel sent her a letter with the correct trial date listed. Nevertheless, Carolyn failed to take appropriate action to be present at the trial date in this matter. The trial court's response to Carolyn's carelessness was reasonable. Therefore, this court is not in a position to overturn the trial court's proper exercise of discretion.

B. Jesse.

¶9 Jesse takes a different approach in attacking the trial court's decision. He argues that the trial court erroneously exercised its discretion in granting default judgment because there was insufficient evidence to do so. This court disagrees.

¶10 The decision whether to enter a default judgment is a matter within the sound discretion of the trial court. ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9, 242 Wis. 2d 153, 624 N.W.2d 375. The decision will not be disturbed as long as the trial court did not erroneously exercise its discretion. ***Id.***

¶11 Jesse argues that his constitutional rights were violated because the trial court failed to adduce clear and convincing evidence to terminate his parental rights. He cites ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629

N.W.2d 768 in support of his argument. In ***Evelyn C.R.***, our supreme court held that in a termination of parental rights case, the trial court may not enter a default judgment against the parent without first taking evidence sufficient to support a finding that grounds exist to terminate the parent's rights. ***Id.*** at ¶24.

¶12 Jesse's case, however, is distinguishable. Jesse does not argue that the trial court failed to take *any* evidence before entering the default, as was the case in ***Evelyn C.R.*** Rather, Jesse contends that the evidence taken was insufficient to support the finding that grounds exist to terminate his parental rights. This court cannot agree with Jesse's contention.

¶13 The record reflects that there was sufficient evidence to make a finding by clear and convincing evidence that grounds existed to terminate Jesse's parental rights. The trial court found that Jesse failed to assume parental responsibility. The termination statute provides:

> Grounds for termination of parental rights shall be one of the following:
>
> ….
>
> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern

> for or interest in the support, care or well-being of the mother during her pregnancy.

WIS. STAT. § 48.415. The record reflects that Jesse was only adjudicated the father of Toni and Jestina after the termination of parental rights action was filed. Toni was born on January 13, 1993, and Jestina was born on February 17, 1994. On April 30, 1996, both children were found to be in need of protection or services. Both children were returned to their mother's care briefly on December 12, 1996, but removed again on April 25, 1997. They have lived in foster care placements since that removal. Jesse was in jail for committing the crime of robbery from March 30, 1994, to July 31, 2001. Carolyn testified by deposition that she does not remember what Jesse did to help her while she was pregnant and that he did not live with her after the children were born. Carolyn further testified in her deposition that Jesse did not give her money for rent, for gas, for utilities or for food. She stated that on occasion, he would give her food and would watch the children if she had an appointment.

¶14 Moreover, Lynn Schlitt, the case worker assigned to this case testified that Jesse did not assume parental responsibility, he failed to establish a substantial parental relationship with the children, and that he failed to exercise any significant responsibility for their daily supervision, education, protection or care. The social worker assigned to the case, Sara Sack, also testified that Jesse failed to assume parental responsibility. She testified that she tried to locate Jesse, but could not, and that Jesse never made any contact with her.

¶15 The trial court found, based on the evidence adduced, that Jesse failed to assume parental responsibility. Although Jesse was "in and out" of the children's lives for Toni's first year of life and Jestina's first month of life, he was incarcerated the remainder of the time. There is no evidence that he attempted to

establish any type of relationship with the girls during his incarceration. He did not contact the social worker or provide any assistance. Moreover, during the time he was not incarcerated, Jesse did not provide the children with any type of monetary support and did not live with them. This is sufficient evidence to satisfy the statutory standard that he failed to assume parental responsibility and failed to establish any type of substantial relationship. Accordingly, this court rejects Jesse's argument that the trial court erroneously exercised its discretion when it entered default judgment. There was clearly sufficient evidence adduced at the hearing to satisfy the statutory standard.

By the Court.—Order affirmed.

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