COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2011

A. John Voelker
Acting 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. 2011AP925
2011AP926

Cir. Ct. Nos. 2010TP34
2010TP35

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

NO. 2011AP925

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JORDAN P. B., A PERSON UNDER THE AGE OF 18:

CHESTER B. AND LUANN B.,

PETITIONERS-RESPONDENTS,

V.

LARRY D.,

RESPONDENT-APPELLANT.

NO. 2011AP926

IN RE THE TERMINATION OF PARENTAL RIGHTS TO KIANNA M. B., A PERSON UNDER THE AGE OF 18:

CHESTER B. AND LUANN B.,

PETITIONERS-RESPONDENTS,

V.

LARRY D.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Reversed and causes remanded with directions*.

¶1 BROWN, C.J.[1] Larry D., who was incarcerated in a Minnesota correctional facility at the time of this action, did not appear at the initial appearance in the termination of parental rights proceedings for his two children. The trial court held a hearing and ordered termination in his absence. Posttermination counsel attempted to have the matter reopened on the grounds that Larry wanted to contest the matter, sought out counsel and told opposing counsel that he did not want to proceed without counsel, but was not savvy enough to know that he had to initially appear even if he was not yet represented. The trial court denied the motion. The trial court said it all when it characterized the events leading up to Larry's failure to appear as "an instance of the perfect storm." Defaults[2] in civil cases are viewed with disfavor. This should be more so when it concerns the termination of parental rights. The facts specific to this case lead this court to hold that Larry is entitled to his day in court because he did not "blow" the matter off. He made an effort, but in the trial court's words, just "did not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Although the trial court did not explicitly find Larry in default, by noting Larry's unexplained absence and proceeding without him, that is essentially what the trial court did, and we will address it in that context.

follow through" as he should have. For similar reasons, we also conclude that WIS. STAT. § 808.04(7m), which would normally bar our jurisdiction over this case because Larry filed his notice of intent to pursue postdisposition relief nine days late, is unconstitutional as applied to Larry. We reverse and remand with directions.

FACTS

¶2 The underlying facts drive the result in this case. Larry was imprisoned in a Minnesota correctional facility when, on December 13, 2010, he received a summons and petition for the termination of his parental rights to his two children. The petitions were filed by the maternal grandparents. The summons directed Larry to appear at a hearing scheduled for January 7, 2011.

¶3 The very next day, Larry filled out a prison form stating his wish to talk to his case worker. In the meantime, he tried to find the address or phone number of the person he needed to speak to in regard to getting legal representation. Larry met with his case worker, who tried to help him find the address and phone number of the SPD in Sheboygan county since that information did not appear on any of the served papers. Larry did notice the number for the petitioners' attorney, Douglas Leppanen. With the case worker's help, he placed a call to Leppanen's office. Leppanen was out of the office, but Larry was able to speak to his secretary who gave Larry the number of the SPD. Leppanen subsequently returned Larry's call and Larry told Leppenan that he wanted an attorney to represent him. Leppanen said he would contact the state public defender's office on his behalf. Leppanen made good on his promise and wrote a letter to the SPD on December 23, 2010. The SPD became aware of the letter on either December 27 or 28.

¶4 The SPD did not contact Larry. Rather, it waited for Larry to contact the office. Larry, for his part, thought that the SPD was going to contact him. Consequently, no one contacted anybody. Larry could not write the court because he had no money to purchase a stamp or envelope. He tried to place a collect call to the SPD but it was not accepted. Larry did not try to make a call to the SPD with the help of his case worker. He thought that the matter was going to be continued until he got some representation. He thought wrong.

¶5 January 7 came and there was no Larry at the court proceeding. Because of his nonappearance, the court held a hearing and terminated his parental rights without him. When Larry received the order terminating his parental rights by mail, he found the SPD's address and mailed the office a letter, again requesting counsel.[3] The SPD received the letter on February 7, the day after the notice of intent would have been due. It contacted Larry by phone and filed the notice of intent and motion to extend the deadline on February 15, 2011. An appeal was filed pursuant to WIS. STAT. RULE 809.107 and we granted a remand to the trial court to hold a posttermination hearing. The trial court heard testimony on whether the termination proceedings should be reopened and denied Larry's motion. This appeal ensued.

DISCUSSION

¶6 This is a case where everyone dropped the ball through no one's fault—since no one realized the ball was being dropped. Larry thought that the SPD was going to contact him and nothing would happen until it did. The SPD,

[3] Larry testified that by then, he did have money in his account to buy an envelope and a stamp.

meanwhile, was waiting for Larry to contact it. Leppanen, in the trial court's words, went "above and beyond his role here" and contacted the SPD's office for Larry. He did not inform the court at the hearing either that Larry wanted an attorney or that Larry had said he did not want to proceed without one. But then again, he had no duty to do that. The court, therefore, had no inkling that Larry wanted to contest the case. All the court knew was that Larry had an opportunity to contest the matter, but had not appeared. The court reasoned that this was Larry's choice. The situation then became even more serious because Larry did not know what happened until he received a copy of the order terminating his parental rights, at which point he was unable to recontact the SPD until it was too late for them to timely file a notice of intent to pursue postdisposition relief.

¶7 We first address whether the trial court properly denied Larry's posttermination motion to reopen the case based on the circumstances surrounding his failure to appear. A trial court determination to deny or grant a motion seeking to vacate a default judgment is a discretionary act, so it will not be overturned absent erroneous exercise of discretion. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). At the posttermination hearing, once the court knew that Larry did actually want to contest the matter and had tried to get a public defender, the court nonetheless determined that Larry could have sought the help of the case worker to call the SPD, but did not. The court said that this was Larry's fault and that he should not have, but did, let the matter pass up through January 7.

¶8 We understand the court's reasoning. And were this an ordinary civil case involving an incarcerated plaintiff and, say, a business entity defendant,

a court could readily find no excusable neglect because the prisoner did not fully avail himself of help from the case worker.

¶9 But this is not an ordinary civil action. This is a TPR. Termination of parental rights proceedings "work a unique kind of deprivation" as they "involve the awesome authority of the state to destroy permanently all legal recognition of the parental relationship." ***M.L.B. v. S.L.J.***, 519 U.S. 102, 118, 128 (1996) (internal quotations omitted). Therefore, "heightened legal safeguards" are provided both by statute and by due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, §§ 1 and 8 of the Wisconsin Constitution. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶21, 246 Wis. 2d 1, 629 N.W.2d 768.

¶10 So, given that this is a termination proceeding, how is a trial court to decide whether a default judgment should be reopened? Larry argues that, unless his conduct resulting in nonappearance is egregious or in bad faith, the matter must be reopened. He cites ***State v. Shirley E.***, 2006 WI 129, ¶13 n.3, 298 Wis. 2d 1, 724 N.W.2d 623 (citing ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17). We agree with the trial court, however, that there is a distinct difference between a failure to appear (either in person or by an attorney) in response to a summons as opposed to a failure to appear in person in contravention of a specific court order once the proceedings have begun. The latter default is a sanction, used when there is a specific order of the court to a litigant, telling the litigant to do a specific act and the litigant does not do it. In such a case, the court has the power to punish the litigant. But when the court decides to use its power to punish this way in termination of parental rights proceedings, the law requires that the litigant's conduct be egregious or in bad faith. *See* ***Shirley E.***, 298 Wis. 2d 1, ¶13 n.3.

Failure to appear, on the other hand, has more to do with a litigant who decides, for whatever reason, not to show up to contest a cause of action. In such cases, the court is simply taking the person's absence as a signal that he or she did not wish to contest the petition and proceeding accordingly. *See* WIS. STAT. § 48.422(3). Because of that difference, we reject Larry's argument that the trial court had to find his conduct egregious or in bad faith.

¶11 So, what is left? We conclude that under WIS. STAT. § 48.46(2), the standard is excusable neglect for this case.[4] So, Larry has the burden to show that the default was the result of "neglect which might have been the act of a reasonably prudent person under the same circumstances." *See* ***Giese v. Giese***, 43 Wis. 2d 456, 461, 168 N.W.2d 832 (1969) (citation omitted). Despite the oft-stated maxim that default judgments are met with disfavor in Wisconsin's courts,[5] case law really suggests that excusable neglect is a very high hurdle for the defaulting party to overcome. As we stated at the outset of this discussion, if this were an ordinary civil action, Larry might well lose. But since TPR proceedings are far from ordinary civil cases, our analysis does not end there.

¶12 Here is where the trial court's "perfect storm" analogy comes into play. Larry, sitting in a prison in Minnesota, assumed that because he had talked to the petitioner's lawyer and because that lawyer told him he would contact the SPD in Sheboygan county, the case would not go forward until the SPD had

[4] WISCONSIN STAT. § 48.46(2) lists several WIS. STAT. § 806.07(1) grounds for relief from termination of parental rights when parents do not contest the petition initiating the proceeding. Excusable neglect, under § 806.07(1)(a), is the only one applicable to this case.

[5] *See, e.g.*, ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶31, 326 Wis. 2d 640, 785 N.W.2d 493 (citing ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977)).

undertaken to represent him. He assumed the wrong thing, as we have said. And had he taken the proper steps, according to the testimony of his case worker, he likely could have made an appearance. But that does not end the matter.

¶13 This court is convinced that the key to the case is found in a concurring opinion by Justice David Prosser in ***Shirley E.*** There, Justice Prosser wrote that the record in that case was "devoid of evidence that the mother made any real effort to preserve the companionship, care, custody, or management of her child and the most compelling proof of this is her consistent failure to show up for the hearings." ***Shirley E.***, 298 Wis. 2d 1, ¶69 (Prosser, J., concurring). Justice Prosser lamented the absence of any sensible explanation or excuse for the mother's repeated nonappearance. ***Id.***, ¶¶69-70 (Prosser, J., concurring).

¶14 This court recognizes that the concurring opinion, joined by two other justices, is not the law in this state. But if the supreme court majority in that case can protect a parent who did not care enough to appear and defend herself on repeated occasions, without explanation, this court certainly must protect a parent who, the evidence shows, did care enough to want to contest the proceeding and obtain representation. In this court's view, therefore, the question is not whether the parent has met the high threshold of excusable neglect outlined in other types of civil cases, but whether the parent has shown that he or she honestly wanted and diligently sought the opportunity to participate in the proceedings. If so, then we must "protect the parent's right to participate meaningfully in a termination of parental rights proceeding." *See* ***Shirley E.***, 298 Wis. 2d 1, ¶49. In this case, Larry's desire to participate has been shown, as acknowledged by the trial court's very own comments that the result in this case is due to a "perfect storm" of facts.

So, bottom line, we should give Larry his day in court. He may not be successful, but that is not the question now.

¶15 This court well recognizes the need for permanency in a child's life. As Justice Prosser's concurrence in ***Shirley E.*** suggests, many would argue that our case law too often has given heed to technicality over the best interests of the child, especially when bonding with a new family unit has already occurred. *See* ***Shirley E.***, 298 Wis. 2d 1, ¶¶67-70 (Prosser, J., concurring); *see also*, *e.g.*, ***Brandt v. Witzling***, 98 Wis. 2d 613, 617-18, 624, 297 N.W.2d 833 (1980) (upholding biological mother's withdrawal of consent to adopt); ***Sheboygan Cnty. Dep't of Soc. Servs. v. Matthew S.***, 2005 WI 84, ¶37, 282 Wis. 2d 150, 698 N.W.2d 631 (holding that failure to comply with a statutory time limit in a termination of parental rights proceeding deprived the trial court of competency to proceed). But this is a case where it appears that Larry really wants to contest the termination of his parental rights. He is not one of those parents who waves blandly at the proceedings and then, only after termination has been adjudged, suddenly wants to avail himself of the statutory "rights" found in our TPR law. Larry should get his chance.

¶16 Indeed, it is many of the same facts that drive our conclusion on the second issue—whether WIS. STAT. § 808.04(7m) is unconstitutional as applied to Larry. We review the constitutionality of statutes de novo, but they are presumed constitutional. ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶¶19-20, 293 Wis. 2d 530, 716 N.W.2d 845. Section 808.04(7m) requires parents to file a notice of intent to pursue postdisposition relief within thirty days after the final judgment or order is entered in a termination of parental rights proceeding. Through the SPD, Larry filed a notice of intent after thirty-nine days, accompanied

by a motion to extend the deadline, which this court granted.[6] However, § 808.04(7m) additionally states that the time limit "may not be enlarged unless the judgment or order was entered as a result of a petition under [WIS. STAT.] § 48.415 that was filed by a representative of the public under § 48.09." In other words, because this TPR was initiated by a private party, we conclude that the deadline could not be extended in accordance with § 808.04(7m).

¶17 We have previously recognized that the filing of a notice of intent to pursue postdisposition relief confers jurisdiction on this court. *See* ***Carla B. v. Timothy N***., 228 Wis. 2d 695, 699, 598 N.W.2d 924 (Ct. App. 1999) ("While in other civil cases it is the timely filing of a notice of appeal that confers jurisdiction on this court, in a termination of parental rights case it is the filing of the notice of intent."). And although the petitioners did not object to the motion to extend or the motion to remand to the trial court on those grounds (or any others), jurisdiction cannot be conferred by waiver or consent of the parties, ***State ex rel. Skinkis v. Treffert***, 90 Wis. 2d 528, 535, 280 N.W.2d 316 (Ct. App. 1979), and it is the duty of this court to inquire into whether it has jurisdiction to proceed. ***Carla B.***, 228 Wis. 2d at 698.

¶18 Larry argues that despite the limitations in WIS. STAT. § 808.04(7m), we retain jurisdiction to extend his deadline because § 808.04(7m) is

[6] We note that Larry's motion to extend the deadline did not specify that the TPR was initiated by a private party, (rather than the public), or raise the constitutionality of the WIS. STAT. § 808.04(7m). So this court was not aware of the potential jurisdictional issue when it granted that motion.

unconstitutional as applied to him. We agree.[7] Larry has a constitutional right to procedural due process because "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *See* ***Santosky v. Kramer***, 455 U.S. 745, 753-54 (1982). When analyzing procedural due process claims in the context of termination of parental rights, we balance three factors: the private interest affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting the use of the challenged procedure. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶40, 271 Wis. 2d 1, 678 N.W.2d 856.

¶19 Obviously, the private interest in all TPR cases is great. *See*, *e.g.*, ***M.L.B.***, 519 U.S. at 127-28. The risk of error created by the procedure used in this case was also great—although the trial court took testimony before finding Larry unfit and terminating his parental rights, it did so without Larry or counsel for Larry being present to present any possible evidence to the contrary. While this would not be problematic if Larry had shown no interest in presence or representation at the hearing, that was not the case here, as we already discussed. Finally, although the governmental interest in permanency for children is tremendous, in this case there was only a nine-day extension of the statutory time limit, which is hardly overwhelming given Larry's out-of-state incarceration and resulting difficulties obtaining counsel. So, based on the unique facts of this case and the gravity of TPR cases in general, we find that WIS. STAT. § 808.04(7m) is

[7] We acknowledge that the thirty-day time limit in WIS. STAT. § 808.04(7m) is almost certainly not unconstitutional on its face, *see* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 696-97, 530 N.W.2d 34 (Ct. App. 1995) (holding that a fifteen-day time limit to file a notice of appeal after the last transcript is received does not violate due process).

unconstitutional as applied to this case, and we retain jurisdiction to decide the merits of this case.[8]

By the Court.—Orders reversed and causes remanded with directions.

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

[8] The petitioners and the guardian ad litem both additionally contend that the appeal should be dismissed because Larry should have proceeded under WIS. STAT. § 48.46(2) rather than WIS. STAT. § 809.107. This argument is a nonstarter for two reasons. First, WIS. STAT. § 49.46(2), the statute detailing the procedure by which a person who did not contest a termination may move the trial court within thirty days for relief on WIS. STAT. § 806.07 grounds, only applies *if* the person has not filed a timely notice of intent to pursue relief under WIS. STAT. § 808.04(7m). That is exactly what Larry did here based on his lawfully granted extension. Therefore, the thirty-day time limit under § 48.46(2) does not apply. Second, the proceedings in the trial court were ordered to take place by an order of *this court*. In doing so, this court recognized that Larry had filed a timely appeal as the avenue by which to seek relief and that order is the law of this case.