

Default



**WHAT TO DO IF YOUR CLIENT
IS MISSING**

“Terminations of parental rights affect some of parents' most fundamental human rights. *T.M.F. v. Children's Serv. Soc'y*, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983). At stake for a parent is his or her "interest in the companionship, care, custody, and management of his or her child." *Id.* Further, the permanency of termination orders "work[s] a unique kind of deprivation. In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications 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, 127-28 (1996) (citations and quotations omitted). For these reasons, "parental termination decrees are among the most severe forms of state action." *Id.*"

Evelyn C.R. v. Tykila S., 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768.

Court must order client to appear and warn your client of the consequences of failing to appear and cooperate with discovery

Default Judgment

- A circuit court has both inherent authority and statutory authority under Wis. Stat. §§ 802.10(7) [*violating a pre-trial order*], 804.12(2)(a) [*discovery*], and 805.03 [*failure to prosecute or comply with procedure statutes*] to sanction parties for failing to obey court orders.

Waiver of counsel

- Pursuant to Wis. Stat. § 48.23, a circuit court may also find that a parent has waived their right to appear by counsel if ordered to appear in person, fails to appear, and that failure egregious and without clear and justifiable excuse
- Two missed court hearings presumed to be egregious.

When default can be a sanction



- Respondent-Parent fails to appear for court proceedings
- Respondent-Parent fails to comply with discovery requests by the petition
- Respondent-Parent fails to keep in touch with his/her lawyer
- Conduct must be egregious or in bad faith and without justifiable excuse.

Statutory Authority--Wis. Stat. § 48.23(2)



- b) In a proceeding involving a contested adoption or an involuntary termination of parental rights, any parent who appears before the court shall be represented by counsel, except as follows:
1. A parent 18 years of age or over may waive counsel if the court is satisfied that the waiver is knowingly and voluntarily made.
 2. A parent under 18 years of age may not waive counsel.
 3. Notwithstanding subd. 1., a parent 18 years of age or over is presumed to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent 18 years of age or over to appear in person at consecutive hearings as ordered is presumed to be conduct that is egregious and without clear and justifiable excuse. If the court finds that a parent's conduct in failing to appear in person as ordered was egregious and without clear and justifiable excuse, the court may not hold a dispositional hearing on the contested adoption or involuntary termination of parental rights until at least 2 days have elapsed since the date of that finding.
- c) In a proceeding to vacate or reconsider a default judgment granted in an involuntary termination of parental rights proceeding, a parent who has waived counsel under par. (b) 1. or who is presumed to have waived counsel under par. (b) 3. in the involuntary termination of parental rights proceeding shall be represented by counsel, unless in the proceeding to vacate or reconsider the default judgment the parent waives counsel as provided in par. (b) 1. or is presumed to have waived counsel as provided in par. (b) 3.

File an Authorization to Appear and Act



- Have your client sign it at your first meeting
- File it with the court at the first appearance

“The respondent parent _____ hereby authorizes her attorney of record _____, to appear and act in the above-captioned case, and that she can be excused from attendance at any and all court proceedings”

Object to the order to personally appear



SCR 11.02 APPEARANCE BY ATTORNEY.

(1) AUTHORIZED. EVERY PERSON OF FULL AGE AND SOUND MIND MAY APPEAR BY ATTORNEY IN EVERY ACTION OR PROCEEDING BY OR AGAINST THE PERSON IN ANY COURT EXCEPT FELONY ACTIONS, OR MAY PROSECUTE OR DEFEND THE ACTION OR PROCEEDING IN PERSON.



What to do if your client doesn't appear

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- Do not disclose privileged information to the court if your client isn't there
- If the court does not remove you as counsel, you **MUST** fight the “prove up” that will commence. Also fight disposition.
- If the court attempts to remove you as counsel, argue to stay on.
 - Make sure that the court gave the proper warnings
 - Make constitutional arguments
 - Argue that it isn't that bad

Motion to Vacate the Default



- Wis. Stat. § 806.07—*Relief from Judgment*
 - Reasons to vacate the judgment—includes a catchall
 - Must be brought in a reasonable time.
- “In considering a motion to vacate a default judgment, the trial court is required to bear three factors in mind: (1) that the statute relating to the vacation of default judgments is remedial in nature and should be liberally construed; (2) that the general policy of the law favors giving litigants their day in court with an opportunity to try the issues; and (3) that default judgments are regarded with disfavor in the eyes of the law. *Maier Constr., Inc. v. Ryan*, 81 Wis.2d 463, 472, 260 N.W.2d 700, (1978). The prompt action of the defendant in seeking relief from the judgment is also a factor to be considered. *Id.*”

Baird Contracting Inc. v. Mid Wisconsin Bank, 189 Wis.2d 321, 325; 525 N.W.2d 376 (Ct. App. 1994)

“Prove Up”



- Even if your client fails to appear, the petitioner must nonetheless provide evidence to support one or more of the grounds pled by clear and convincing evidence.
- Wis. Stat. § 48.422 (3) requires a court to hear testimony in support of the allegations in the petition to warrant a finding that grounds exist to terminate parental rights and the resultant finding, pursuant to Wis. Stat § 48.424 (4), that the parent is unfit.
- Take direction from the last conversation you had with your client for what to do at this phase. You can (and should) cross-examine witnesses, call your own witnesses, challenge the petitioner’s evidence, and present your own.
- Also fully participate in the dispositional phase.

If the court removes you, your obligations are not over



- Look for your client immediately. The court cannot conclude disposition until 2 days after you are removed from the case.
- Continue to look for your client until you get a final order in the case. Your client is entitled to counsel to assist with vacating the default judgment. [Wis. Stat. § 48.23(2)(c)]
- Just because the court has decided that your client waiver his/her right to appear by counsel, your obligations under your SPD appointment continues.
- If you have had a discussion with your client about the right to appeal and know his/her position on appeal, consider filing a NOI.

Cases to know



Regarding counsel's obligations

- ① State of Wisconsin v. T.P., Aug. 18, 2015, 15AP857
- ② State of Wisconsin v. Shirley E., 2006 WI 129
- ③ State of Wisconsin v. Mable K., 2013 WI 28