

Defenses to Default Judgment

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Goals For Today

⦿ Attorneys will know:

- What a default judgment is
- How to proactively prevent default judgments
 - Authorizations
 - Making well-informed arguments
- How to respond if default prior to counsel appointment.

Default Judgment

- No appearance without court order to appear
 - With counsel
 - Without counsel
- No appearance after court order to appear
 - With counsel
 - Without counsel
- Different arguments/different standards-
know what kind of default you are fighting

Authorization

- Civil action
- Authorization allowed
- Have client sign at first meeting

STATE OF WISCONSIN : CIRCUIT COURT : COUNTY

IN THE INTEREST OF:

Case number:

A CHILD UNDER EIGHTEEN YEARS OF AGE

AUTHORIZATION TO APPEAR AND ACT

The mother of the above named child, _____, hereby authorizes her attorney of record, Attorney Trisha Fritz, to appear and act on her behalf in the above-captioned case and that she be excused from attendance at any or all proceedings.

This authorization is made subject to objection to the jurisdiction of the court.

Dated: _____

Respectfully submitted,

Court Order

- Court must order client to appear
- Warn of consequences of failing to appear/cooperate with discovery
 - Standard that petitioner asks for order signed at hearing on petition
 - Be prepared to argue this isn't necessary
 - This is civil- you have authorization- your client appeared- has always appeared- etc.

ORDER FOR APPEARANCE

THE COURT ORDERS the mother, herein, [REDACTED], and the father, [REDACTED], to appear in person before the Honorable Timothy A. Hinkfuss, Circuit Court Judge, in Branch VII of the Brown County Courthouse at 100 S. Jefferson Street, Green Bay, Wisconsin, on the 30th day of September, 2019, at 8:15 a.m., to attend the jury trial scheduled in the above referenced matter. [REDACTED] and [REDACTED] are further ordered to attend all hearings, scheduled now or in the future, regarding this matter.

**YOUR FAILURE TO APPEAR AS ORDERED MAY RESULT IN YOU
WAIVING YOUR RIGHT TO AN ATTORNEY IN THE ABOVE CAPTIONED
MATTER:**

WIS. STAT. SEC. 48.23(2)(b)3.

"... 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

Case 20
Case [REDACTED]

Document 49
Document 44

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ordered, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse."

**YOUR FAILURE TO APPEAR AS ORDERED MAY RESULT IN THE COURT
ISSUING AN ORDER FOR YOUR ARREST OR GRANT JUDGMENT FOR THE
PETITIONER BASED UPON THEIR CLAIM.**

DEFAULT JUDGMENT

- Court has inherent and statutory authority to sanction parties for failing to obey court order.
 - 802.10(7) violating pretrial order
 - Fails to appear for court
 - 804.12(2)(a)(3) discovery
 - “Rendering a judgment by default against the disobedient party “
 - Conduct must be egregious or in bad faith and without justifiable excuse
- “If imposed solely for failure to obey a court order, without evidence of bad faith or no merit, sanctions imposed under sub. (2) (a) deny due process.” *Dubman v. North Shore Bank*, 75 Wis. 2d 597, 249 N.W.2d 797 (1977).

WAIVER OF COUNSEL

- Court may find parent has waived right to appear by counsel if:

 - Order to appear,
 - Party fails to appear, and
 - Failure is egregious and without clear and justifiable excuse
- 2 missed court hearings presumed to be egregious

Where the heck is my client?

- Should you:

- Freak out because your client isn't at court?
- Don't appear in court because clearly your client isn't interested in this case so why should you waste your time?
- Tell the Judge you just absolutely have no clue where the heck your client is and you can't believe they would be so disrespectful to this court?
- Ask the Judge to allow you to withdraw because you have better things to do?

- Yeah so don't do any of these things.....

Where the heck is my client?

- ◉ Stay calm- you got this, you attended this training and listened
 - Law and statutes available
- ◉ Remind the Judge you have an authorization to appear and act
- ◉ Do not disclose privileged information to the court
- ◉ Ask for an adjournment

If Court does not grant adjournment

- If court attempts to remove you as counsel:
 - Argue to stay on
 - Make sure the Court gave the proper warnings with the order
 - Make constitutional arguments
 - Argue that it isn't egregious
- If Court does not remove you as counsel:
 - Be prepared for an evidentiary hearing on the grounds "prove up" (more on next slide)
 - Ask to set out disposition: at least 2 days out
 - Juvenile Benchbook

Well prove it then!

- Petitioner must provide evidence to support one or more grounds by clear and convincing evidence. 48.422(3) (Parent unfit)
- Argue based on your last conversation with your client
 - You can: cross-examine witnesses, call your own witnesses, challenge petitioner's evidence, present your case
- Again ask for disposition to be set out- gives your client another chance to show up

Guess I can close out the file now- NO!

- Immediately after the hearing try to locate your client.
 - Court cannot conclude disposition until 2 days after you are removed from case.
- Your client is entitled to counsel to assist with vacating the default. 48.23(2)(c)
- Make sure you have client sign NOI to appeal at first meeting- file if appropriate once final order filed.

Motion to Vacate Default- Generally

- 806.07 Relief from Judgment
 - Must be brought in reasonable amount of time
- Court is required to bear three factors in mind:
 1. Statute relating to vacation of default judgments is remedial in nature and should be liberally construed;
 2. General policy of the law favors giving litigants their day in court with an opportunity to try the issues;
 3. Default judgement 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).

Motion to Vacate Default- Court Order

- Why did client miss the court hearing(s)
 - Legitimate reason?
 - Was it egregious or in bad faith and without justifiable excuse?
- File motion and affidavits
- If needed get court date immediately to ask Judge to give you more time to file motion
 - Be prepared to argue at next hearing why default should be vacated.

Motion to Vacate- No Court Order

○ Example:

- Hearing on petition and parent does not show up
- Parent does show up to the disposition hearing to find out grounds have been found at previous hearing
- Client goes to SPD and you are appointed

Now what?

- Immediately meet with your client to discuss why they didn't appear
 - Did they receive summons?
 - Did they try to contact the Court to reschedule or appear via phone?
 - Did they reach out to the Petitioner?
- Look through entire efile
 - Was service done correctly?
 - Due diligence in service
- Order transcripts of all hearings
- Serve discovery demand on Petitioner concerning service and attempts to locate parent
- File motion with support documents including affidavit, offer of proof, ask for evidentiary hearing

Standard- Excusable Neglect

- Court is taking the person's absence as a signal that he or she did not wish to contest the petition and proceed accordingly.
- Under Wis. Stats. §§ 48.46(2) and 806.07(1)(a) the applicable standard is excusable neglect.
 - Respondent must show that the default was the result of “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)
 - “A court must look beyond the cause of the neglect to the interests of justice, considering both the need to afford litigants a day in court and to ensure prompt adjudication.”
 - *Rutan v. Miller*, 213 Wis. 2d 94, 570 N.W.2d 54 (Ct. App. 1997)

1. Mr. E. has no criminal record and has not participated in any civil court matters other than the current matter.
2. Mr. E. has never hired or worked with an attorney in a legal matter before this case.
3. Mr. E. has essentially no experience with the court system.
4. Mr. E. and Ms. M. had had an informal arrangement regarding their daughter I; they had never gone to court to establish paternity or set child support.
5. The termination of Mr. E's parental rights started with an emailed request on October 28, 2017, when Ms. M asked Mr. E to give up his parental rights to Izabelle.
6. Mr. E responded via email to the request and asked for Ms. M's phone number so they would be able to talk.
7. Ms. M refused to give him her phone number, and told him that "we can continue communication through email".
8. Mr. E did not have her phone number or address.
9. Following this email exchange, Attorney L, on behalf of Ms. M, sent Mr. E documents for him to sign voluntarily giving up his parental rights.
10. Mr. E did not end up signing them; he wanted to speak with E first. He requested Ms. M contact him to discuss the voluntary termination.

18. Attorney L did not contact Mr. E again after the petition was filed making him aware that they no longer were seeking a voluntary termination and that Mr. E would have to show up to court if he did not consent.
19. According to the court file the petitioner did check the box on the petition that father would not consent.
20. Attorney E acting as guardian ad litem (GAL) for the minor child was in contact with Mr. E. Mr. E told the GAL that he was not willing to voluntarily consent to the termination.
21. Attorney E never stressed to Mr. E the important of responding to the petition and summons.
22. Mr. E was given at the most a twenty day notice of the initial hearing on the petition if he was served on September 5, 2018 and the initial hearing on the petition was September 25, 2018.
23. Mr. E could not financially afford to attend the initial hearing on the petition on such short notice nor could he miss work.
24. Mr. E did not understand that if he did not appear what the consequences would be. He assumed he could appear at the next hearing when he was able to save more money for the flight.