

FILED
Court of Appeals
Division II
State of Washington
7/2/2020 4:20 PM

No. 54304-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE TERMINATION OF:

B.H. and G.H.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLERK COUNTY

REPLY BRIEF OF THE APPELLANT FATHER, T.H.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES III

A. INTRODUCTION 1

B. ADDITIONAL STATEMENT OF FACTS..... 1

 1. April 19, 2019 was the dispositive hearing at which T.H.’s
 parental rights were terminated..... 1

 2. The Department instructed T.H. to contact the Department if he
 wanted appointed counsel. T.H. did exactly that. 3

C. ARGUMENT 3

 1. T.H. was denied his due process rights to be heard and to
 counsel at the April 19 hearing due to incarceration barriers
 and the Department’s failure to inform the court T.H. was in
 jail. 3

 2. The termination proceedings did not comport with due process
 because the court failed to consider the “incarcerated parent”
 factors and the Department was not held to its burden of proof. 6

 a. The “incarcerated parent” factors. 6

 b. The evidence presented was insufficient to support
 termination. 8

 3. The court’s denial of the motion to vacate was an abuse of
 discretion..... 10

 a. Motion to vacate under CR 60(b)(1)..... 10

 b. Motion to vacate under CR 60(b)(4)..... 13

TABLE OF AUTHORITIES

Cases

C. Rhyne & Assocs. Swanson, 41 Wn. App. 323, 704 P.2d 164 (1985)... 12

In re C.R.B., 62 Wn. App. 608, 814 P.2d 1197 (1991)..... 9

In re Dependency of T.R., 108 Wn. App. 149, 29 P.3 1275 (2001)..... 4

In re Detention of LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986)..... 10

In re Parental Rights to K.J.B., 187 Wn.2d 592, 387 P.3d 1072 (2017) 7, 8

In re Welfare of A.B., 168 Wn.2d 908, 918, 232 P.3d 1104 (2010)..... 8

In re Welfare of J.M., 130 Wn. App. 912, 125 P.3d 245 (2005) 6

In re Welfare of L.R., 180 Wn. App. 717, 325 P.3d 737 (2014)..... 4

In re Welfare of S.I., 184 Wn. App. 531, 337 P.3d 1114 (2014) 4, 10

In re Welfare of Shantay C.J., 121 Wn. App. 926, 91 P.3d 909 (2004) 4

Lassiter v. Dep’t of Soc. Servs., 425 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)..... 6

Little v. King, 160 Wn.2d 696, 161 P.3d 345 (2007)..... 13

Matter of A.S., 65 Wn. App. 631, 829 P.2d 791 (1992)..... 15

Matter of Dependency of E.H., 191 Wn.2d 872, 427 P.3d 587 (2018)..... 13

Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956 (2007)..... 14, 15

Pfaff v. State Mut. Auto Ins. Co., 103 Wn. App. 829, 14 P.3d 827 (2000)12

State v. Rohrich, 149 Wn.2d 647, 71 P.3d 638 (2003) 11

White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968)..... 11, 13

Statutes

RCW 13.34.180 7, 8, 9

Rules

CR 55 2
CR 60 10, 13

A. INTRODUCTION

The termination orders in this case must be vacated because the Department did not inform the court below that T.H. was incarcerated at the time of the April 19 termination hearing. It is undisputed Department staff knew T.H. was in jail, and it is also undisputed T.H. made numerous attempts to alert the Department to his desire to contest the termination and for counsel prior to the hearing. Instead of informing the court of this information, the Department pushed for termination in T.H.'s absence. Because T.H.'s fundamental right to parent his children was terminated without due process protections, vacation of the termination orders is required.

B. ADDITIONAL STATEMENT OF FACTS

1. April 19, 2019 was the dispositive hearing at which T.H.'s parental rights were terminated.

T.H.'s parental rights were not terminated at the March 22, 2019 hearing. CP 46–50. In fact, the Department explicitly stated it was not seeking termination, but rather requesting “that [T.H] be held in default and that we set a date forward . . . for testimony with regard to the father.” CP 47–48. The juvenile court granted the request, acknowledging “[t]he State AG is not asking for termination today so I am not going to order that but I am holding him default.” CP 48. The juvenile court also

expressly reserved T.H.’s right to have an attorney appointed and “have the matter heard on the merits if he intends to contest it.” CP 48.

At the next hearing on April 19, 2020, the Department presented sparse testimony from social worker Michael Wenndorf on the merits of the termination petition. CP 52–56. It is uncontested Mr. Wenndorf knew T.H. was incarcerated in the local jail approximately one block away¹ at the time of the hearing and failed to inform the court of this fact. *See* CP 52–56, 97. The court then terminated T.H.’s parental rights, unaware T.H. had desperately tried to obtain an attorney to challenge the merits of the Department’s case. CP 35–38, 42–43, 97, 144–47.

The April 19 hearing was thus the dispositive hearing at which the default *judgments* terminating T.H.’s parental rights were entered. CP 35–38, 144–47. The March 22 hearing, on the other hand, concerned only the entry of a default *order*, with T.H.’s rights to contest the merits preserved by leave of the court. *See* CP 21–22; CR 55(c)(1) (distinguishing between an entry of default and a default judgment).

Throughout its briefing, the Department attempts to distract from the import of this procedural history by labeling the March 22 hearing the

¹ The hearings were held at the “Family Law Annex” courthouse, located approximately a block from the Clark County Jail. *See* CP 9, 122; Clark County Courts Map, *available at* https://www.clark.wa.gov/sites/default/files/fileuploads/superior-court/2015/09/superior_court_map_4.17_final.pdf (last accessed July 2, 2020).

“Termination Hearing” and the subsequent April 19 hearing as merely a “Presentation Hearing.” *See, e.g.*, Brief of Respondent at 4–5. In doing so, the Department misleadingly portrays the March 22 hearing as dispositive. This is because the Department has no explanation for its failure to inform the court T.H. was in jail at the April 19 hearing, when T.H.’s rights were actually terminated. Tellingly, the Department does not even attempt to contest it was aware T.H. was incarcerated at the time.

2. The Department instructed T.H. to contact the Department if he wanted appointed counsel. T.H. did exactly that.

The notice and summons T.H. received regarding the termination petitions instructed T.H. to contact the Department “[i]f you wish to have a lawyer appointed.” CP 9, 122. T.H. made several attempts to contact Department staff, including Mr. Wenndorf, to have an attorney appointed prior to the April 19 hearing. CP 42–43. The Department did not respond. Instead, the Department pushed for termination in T.H.’s absence.

C. ARGUMENT

1. T.H. was denied his due process rights to be heard and to counsel at the April 19 hearing due to incarceration barriers and the Department’s failure to inform the court T.H. was in jail.

“Before a default termination judgment can be entered, the court must have a meaningful hearing on the merits of the case in accordance

with statutory requirements for termination to satisfy due process.” *In re Welfare of S.I.*, 184 Wn. App. 531, 542, 337 P.3d 1114 (2014).

“Termination of parental rights can be ordered only after the statutory factors are proved by the required standard of proof at a fact-finding hearing in which the parent is *afforded the right* to be represented by counsel, to introduce evidence, to be heard, and to examine witnesses.” *In re Dependency of T.R.*, 108 Wn. App. 149, 158, 29 P.3 1275 (2001) (emphasis added); *accord In re Welfare of Shantay C.J.*, 121 Wn. App. 926, 913–14, 91 P.3d 909 (2004) (quoting *T.R.*).

Here, T.H. was denied the right to be heard, through counsel or otherwise, at the hearing where his parental rights were terminated. *See In re Welfare of L.R.*, 180 Wn. App. 717, 727, 325 P.3d 737 (2014) (due process in the termination context includes the right to be heard, which can be satisfied by representation of counsel) (citations omitted). While the right to be heard, including the right to counsel, is not self-executing, a parent need only demonstrate they have taken “reasonable and timely steps” to exercise their rights. *See id.*

T.H. was directed by the notice and summons he was served to contact the Department “[i]f you wish to have a lawyer appointed.” CP 9, 122. The notice also provided contact information for Mr. Wenndorf. CP 10, 123.

In accordance with the notice, T.H. made numerous attempts to contact Department staff, including Mr. Wenndorf, to preserve his rights to be heard and to request counsel. CP 42–43. The Department did not respond to these requests and withheld information that T.H. was incarcerated from the court at the April 19 hearing. CP 42–43, 52–56.

The Department now claims the right to counsel is only triggered by “appearance”—without acknowledging T.H. was unable to appear due to the barriers created by his incarceration and the Department’s failure to inform the court that T.H. was in jail. *See* Brief of Respondent at 22.

The Department also argues T.H. had no due process right to counsel at the April 19 hearing because he did not appear at the March 22 hearing. *See id.* at 21–22. The Department opines the right to counsel “should only attach once [T.H.] establishes his failure to appear” at the March 22 hearing is “excusable.” *See id.* The Department’s wishes, not authority, supports that view.

“Terminating parental rights is one of the severest of state actions and implicates fundamental interests.” *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005). Accordingly, the Department has an obligation to “ensure that judicial proceedings are fundamentally fair.” *See id.* (quoting *Lassiter v. Dep’t of Soc. Servs.*, 425 U.S. 18, 33–34, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)). In accordance with these due

process concerns, the court below expressly noted T.H. was entitled to counsel at the hearing on the merits of the termination petition if he so desired, and did not predicate T.H.’s right to representation on an “excused” absence. CP 48.

In sum, T.H. made reasonable and timely attempts to exercise his rights prior to the April 19 hearing. As instructed, he contacted the Department seeking appointment of counsel. At the April 19 hearing, the Department knew T.H. was incarcerated a block away, but did to bother to tell the court. These proceedings denied T.H. his right to be heard and his right to counsel and thus violated his due process rights, requiring reversal.

2. The termination proceedings did not comport with due process because the court failed to consider the “incarcerated parent” factors and the Department was not held to its burden of proof.

a. The “incarcerated parent” factors.

When a parent is incarcerated, courts are required to consider additional statutory factors in assessing parental fitness. *See* RCW 13.34.180(1)(f). These factors are mandatory and must be weighed on the record. *In re Parental Rights to K.J.B.*, 187 Wn.2d 592, 601–604, 387 P.3d 1072 (2017). Here, the juvenile court did not consider the required factors related to T.H.’s incarceration, warranting reversal. *See id.* at 606.

In order to avoid this result, the Department asserts T.H.’s parental fitness must be judged from the entry of the default order at the March 22 hearing, when T.H. was not incarcerated. Brief of Respondent at 23. However, “a parent has a due process right not to have the State terminate his or her relationship with a natural child in the absence of an express or implied finding that he or she, *at the time of trial*, is *currently* unfit to parent the child.” *In re Welfare of A.B.*, 168 Wn.2d 908, 918, 232 P.3d 1104 (2010) (emphasis added). Here, the termination trial was held on April 19, when T.H. was incarcerated. Accordingly, consideration of the “incarcerated parent” factors was required.

The Department asserts “the court did consider the incarcerated parent factors,” in light of Mr. Wenndorf’s testimony regarding T.H.’s “history of incarceration and the nature of his relationship with the children.” Brief of Respondent at 24. However, the statutory scheme requires more, including consideration of “[w]hether the department or supervising agency made reasonable efforts as defined in this chapter” and “[w]hether particular barriers existed” due to the parent’s incarceration. *See* RCW 13.34.180(1)(f). More importantly, the *court* must weigh these factors *on the record*. *K.J.B.*, 187 Wn.2d at 603–604. The juvenile court did not even mention these factors during the hearing or in the termination

orders, much less weigh them. CP 35–38, 52–56, 115–20. Vacation of the termination orders is thus required. *K.J.B.*, 187 Wn.2d at 606.

b. The evidence presented was insufficient to support termination.

As averred in the opening brief, the Department did not meet its burden of proof for termination. *See* Brief of Appellant at 16–20. Mr. Wenndorf provided the only evidence in support of termination at the trial. CP 52–56. His testimony was brief and insufficient. For example, Mr. Wenndorf did not testify services were “expressly and understandably offered” to T.H., a fact the Department was required to prove. CP 54; RCW 13.34.180(1)(d). He also provided no concrete evidence regarding other factors the Department was required to prove, including (1) T.H. would not be able to remedy his parental deficiencies and (2) permitting T.H. to maintain a relationship with his children would diminish their prospects for a permanent, stable home. CP 55; RCW 13.34.180(1)(e)–(f); Brief of Appellant at 19. His testimony largely mirrored the statutory requirements. *Compare In re C.R.B.*, 62 Wn. App. 608, 618–19, 814 P.2d 1197 (1991) (evidence presented at a termination hearing cannot simply “parrot” the statutory requirements).

The Department touts that Mr. Wenndorf answered “thirty-one questions, including several open-ended questions.” Brief of Respondent

at 24. However, it is not the quantity of questions that matters, but the quality of the testimony and whether that testimony satisfies the Department's burden of proof. Here, Mr. Wennendorf's testimony came up short in satisfying that burden. *See* Brief of Appellant at 17–20.

c. The court's factual findings did not support termination.

The Department does not even attempt to address T.H.'s argument that the juvenile court's legal conclusions are not supported by the factual findings. *See* Brief of Appellant at 19–20; *C.R.B.*, 62 Wn. App. at 618; CP 36–38, 145–47. Nor does the Department contest that the court's findings are not “sufficiently specific to permit meaningful review” as required by *In re Detention of LaBelle*, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). *See* Brief of Appellant at 20.

Instead, the Department argues the evidence presented in this case is similar to the evidence found sufficient in *In re Welfare of S.I.*, in which “[t]he hearing was brief” and the “[t]he social worker assigned to the case answered questions under oath that mirrored the statutory requirements of termination.” *S.I.*, 184 Wn. App. at 539; Brief of Respondent at 26–27. However, the *S.I.* Court explicitly declined to address the sufficiency of the evidence and the written findings, noting these issues were not raised on appeal. 184 Wn. App. at 543 n.1. Further, as the dissent in *S.I.* recognized, reversal may have been warranted on these grounds, as most

of the social worker’s testimony “consisted of legal conclusions that recited statutory requirements” and “[t]he findings of fact also lacked detail and repeated statutory language.” 184 Wn. App. at 565 (Fearing, J., dissenting).

3. The court’s denial of the motion to vacate was an abuse of discretion.

a. Motion to vacate under CR 60(b)(1).

The Department agrees the court below was required to address the four *White* factors in deciding the motion to vacate under CR 60(b)(1). *See White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968); Brief of Respondent at 9. However, the Department does not address T.H.’s argument the court abused its discretion in failing to apply the *White* factors. Brief of Appellant at 23–24. Instead of applying the proper legal framework, the court below simply determined vacation was not “appropriate.” RP 14; *see also* CP 98 (finding “no basis” to vacate). As explained in T.H.’s opening brief, this abuse of discretion alone requires reversal. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); Brief of Appellant at 23–24.

The Department instead argues T.H. failed the first *White* factor: the requirement that a movant provide a prima facie defense to the claim asserted by the opposing party. *See White*, 73 Wn.2d at 352; Brief of

Respondent at 9–15. However, the Department disregards that a prima facie defense is a low bar, and all evidence must be viewed in the light most favorable to the moving party. *C. Rhyne & Assocs. Swanson*, 41 Wn. App. 323, 327–28, 704 P.2d 164 (1985); *Pfaff v. State Mut. Auto Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 827 (2000).

Here, T.H. provided a declaration explaining he was in substance treatment the time of the March 22 hearing and thus was in the process of addressing his deficiencies. CP 39–40; Brief of Appellant at 24–25. The Department counters T.H. has not provided a release of information and thus has not proven he was in treatment at the time of default. Brief of Respondent at 13. However, the Department has presented no evidence to the contrary, and the evidence must be viewed in the light most favorable to the moving part. *Pfaff*, 103 Wn. App. at 834. That T.H. participated in treatment prior to termination is uncontested on the record before this Court.

Regarding the second and third *White* factors—whether T.H.’s failure to appear was predicated on excusable neglect and whether he took steps to act with diligence after notice of the entry of default judgment—the Department again erroneously focuses on the March 22 hearing, when default *orders* were entered, as opposed to the April 19 hearing, when the default *judgment* terminating T.H.’s parental rights were entered. Brief of

Respondent at 15–17. Again, the Department’s fixation on the March 22 hearing belies its lack of defense to the problematic April 19 hearing.

The fourth *White* factor is the “substantial hardship” that will result to the *opposing party* that will result from the vacation of a default judgment. *White*, 73 Wn.2d at 352. This factor does not concern, as the Department suggests, hardship to the subjects of the termination proceedings, *i.e.*, the children. Brief of Respondent at 17–18. Children are not recognized parties to dependency and termination proceedings. *See Matter of Dependency of E.H.*, 191 Wn.2d 872, 886 n.2, 427 P.3d 587 (2018). The Department has not provided any explanation as to why vacating the default judgment would result in its own substantial hardship.

Further, the “fundamental principle” in applying the *White* factors is “whether or not justice is being done.” *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007) (internal citations and quotation marks omitted). Accordingly, the *White* factors are “not a mechanical test; whether or not a default judgment should be set aside is a matter of equity.” *Id.* at 704. As explained further below, refusing to set aside the default judgment would be inequitable in light of the due process violations that occurred at the April 19 hearing.

b. Motion to vacate under CR 60(b)(4).

A default judgment must be set aside if the Department has engaged in conduct that “would render enforcing the judgment inequitable.” *See Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007); *see also* CR 60(b)(4) (default judgment may be set aside due to fraud, misrepresentation, or other misconduct of an adverse party). Here, it is uncontested Mr. Wenndorf knew T.H. was not present at the April 19 hearing because he was incarcerated. CP 97. It is also uncontested T.H. was directed in his notice and summons to contact the Department for the appointment of an attorney for the termination proceedings, and T.H. tried multiple times to reach Department staff and Mr. Wenndorf while incarcerated in order to protect his parental rights. CP 9, 22, 42–43. Finally, it is evident from the transcript of the April 19 hearing Mr. Wenndorf had the opportunity to inform the court T.H. was in jail, as his testimony including information about T.H.’s previous incarceration in 2018. CP 54.

The Department asserts any claims of misconduct or misrepresentation are “baseless” and T.H.’s incarceration at the time of the April 19 hearing is “immaterial.” Brief of Respondent at 18–19. As previously explained, the April 19 hearing was the dispositive hearing and thus the fact of T.H.’s incarceration was certainly material. Further,

beyond a general denial of wrongdoing, the Department makes no attempt to explain why Mr. Wenndorf did not inform the court T.H. was incarcerated or deny Mr. Wenndorf was aware of this information.

Mr. Wenndorf had a grave responsibility to the court and T.H. to ensure the termination proceedings complied with legal requirements. *Matter of A.S.*, 65 Wn. App. 631, 636, 829 P.2d 791 (1992). Mr. Wenndorf's "failure to speak undermined the integrity" of the proceedings. *See id.* Accordingly, the court's decision to deny the motion to vacate was manifestly unreasonable. *See Morin*, 160 Wn.2d at 753.

D. CONCLUSION

Due to the deprivation of due process and the court's abuse of discretion in denying the motion to vacate the termination orders, this Court should vacate the termination orders and remand for further proceedings.

DATED this 2nd day of July, 2020.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

IN RE B.H. AND G.H.,
MINOR CHILDREN.

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NO. 54304-4-II

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WASHINGTON APPELLATE PROJECT

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