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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

BRIEF OF THE APPELLANT FATHER, T.H.

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A. INTRODUCTION

T.H. is the father of two boys. Due to his struggles with substance use, his boys were found dependent. During the dependency, T.H. regularly visited his children and participated in services. After he was served with petitions to terminate his parental rights, he checked himself in to treatment for his substance use. While he was undergoing treatment, the State sought and successfully obtained default orders against him.

The court set a termination hearing, but T.H. was arrested before the hearing. While in jail, he made repeated attempts to contact anyone who could help him in protecting his parental rights, including the assigned case worker. His mother also called the case worker and told him that T.H. was incarcerated in the local jail.

T.H. did not appear at the termination hearing and was unrepresented by counsel. The case worker did not inform the court that T.H. was incarcerated, but testified in support of termination. The court entered default termination orders. Once T.H. was able to obtain an attorney, he promptly moved to vacate the orders, but was denied.

The termination proceedings violated T.H.'s right to due process, including his right to be heard and represented. Further, the court abused its discretion in denying his motion to vacate the default termination orders. The termination orders must be vacated.

B. ASSIGNMENTS OF ERROR

1. The juvenile court terminated T.H.'s parental rights in violation of his right to due process. U.S. Const. amend. XIV; Const. art. 1, § 3.

2. T.H. was denied his right to counsel and his right to be heard in the termination proceedings, in violation of RCW 13.34.090(1).

3. The juvenile court terminated T.H.'s parental rights without consideration of all the mandatory statutory factors required by RCW 13.34.180(1)(f).

4. The juvenile court's findings of fact 2.10, 2.11, 2.12, 2.13, and 2.15 in the termination orders were not supported by sufficient evidence. CP 35–38, 144–147.

5. The juvenile court abused its discretion in denying T.H.'s motion to vacate the default orders of termination. CP 98.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Due process requires that parents have notice, an opportunity to be heard, and the right to be represented by counsel in a termination proceeding. Additionally, the State must meet a strict burden of proof before parental rights are terminated. When a parent is completely prevented from presenting or rebutting evidence, the parent's constitutional rights are violated. Here, T.H. was incarcerated at the time of the termination hearing. Although T.H. made repeated efforts to protect

his rights prior to termination, he was ultimately unrepresented at the termination hearing. Further, the assigned case worker was aware that T.H. was incarcerated and testified in support of termination at the hearing, but did not inform the court that T.H. was not present because of his incarceration. After the State presented cursory testimony from the case worker, the juvenile court entered bare-bones termination orders, parroting the statutory requirements for termination. However, the court did not consider the mandatory factors required for incarcerated parents prior to termination. Did the termination proceedings violate T.H.'s right to due process, requiring vacation of the orders of termination?

2. Cases should be heard on their merits and courts are encouraged to liberally set aside default judgments, particularly in cases concerning a significant liberty interest like the right to parent one's children. A court's order on a motion to vacate is reviewed for abuse of discretion. It is an abuse of discretion to rule in a manner that is manifestly unreasonable or based on untenable grounds, including applying the wrong legal standard. Here, the court denied the motion to vacate the default orders of termination, but applied the wrong legal standard. Further, the court's decision to deny the motion was manifestly unreasonable in light of the fact that the case worker did not inform the court that T.H. was incarcerated and T.H. was prevented from appearing because of his

incarceration, resulting in inequitable enforcement of the termination. Did the court abuse its discretion in denying the motion to vacate the default termination orders?

D. STATEMENT OF THE CASE

T.H. is the biological father of two boys, B.H., aged 9, and G.H., aged 13. CP 2, 115. The boys previously lived with T.H. and T.H.'s mother, but were found dependent in September 2017. CP 4, 90, 117. The dependency was primarily based on the substance abuse of both parents.¹ CP 53, 60.

T.H. participated in services during the dependency. CP 54. He also remained in regular contact with the Department and visited the children. CP 54. Regardless, the Department decided to proceed with termination, providing him with notice that it was filing petitions to terminate his parental rights on February 7, 2019. CP 15, 127; *see also* CP 2–7 (termination petition for B.H.), 115–20 (termination petition for G.H.).

A hearing regarding the termination petitions was held on March 22, 2019. CP 46–50 (unofficial transcript of the hearing). At the time of the hearing, T.H. was undergoing inpatient treatment for his substance use

¹ The mother's parental rights were also terminated, but her rights are not at issue in this appeal. CP 31–34; 148–51.

disorder at a facility in Chehalis, Washington. CP 39–41 (T.H.’s declaration). Accordingly, he did not appear. CP 46. T.H.’s mother was at the hearing and informed the court that T.H. was in an inpatient treatment program. CP 47. Regardless, the State asked that default orders be entered against T.H. CP 46. The court noted that the State was not asking for termination and so only found T.H. in default. CP 48; *see also* CP 21, 136 (default orders). The court also scheduled a hearing on the termination petitions several weeks out in order to give T.H. time to “get in touch” and have an attorney appointed. CP 48.

T.H. was informed by his mother and the assigned Department case worker, Michael Wenndorf, that there was a new court date scheduled. CP 41. T.H. also learned that his insurance would not cover inpatient treatment. CP 41. He left treatment around the end of March 2019, and was arrested in Clark County on April 9, 2019. CP 39–40.

While in custody, T.H. made repeated attempts to contact Mr. Wenndorf and other Department staff as well as his dependency attorney, Courtney Baasch, who had withdrawn from representing him on April 3, 2019. CP 40, 42, 61. T.H.’s mother also called Mr. Wenndorf the day after T.H. was arrested and informed him that T.H. was at the Clark County Jail. CP 97. According to T.H.’s mother, Mr. Wenndorf informed her it was “too late” to stop the termination. CP 97.

The termination hearing was held on April 19, 2020. CP 52–56 (unofficial transcript of hearing). T.H. did not appear due to his incarceration in the Clark County Jail, nor was he represented by counsel. *See* CP 52–56. The State called Mr. Wenndorf as its only witness. CP 52. Mr. Wenndorf testified briefly about the history of the case and that his opinion was it was in the best interests of the children to have T.H.’s parental rights terminated. CP 53–56. At no point during the hearing did the attorney for the State or Mr. Wenndorf inform the court that T.H. was not present because he was incarcerated in the local jail. *See* CP 52–56.

The court entered orders terminating T.H.’s parental rights to both children. CP 35–38 (termination order for B.H.); 144–47 (termination order for G.H.). The court found that because T.H. did not appear at the hearing, all allegations in the termination petitions “have not been contested and are found to be true.” CP 37, 146 (Finding of Fact 2.14).

On April 23, 2019, T.H. finally reached Mr. Wenndorf on the phone and said he wanted to appeal the terminations. CP 43. Mr. Wenndorf responded he would get back to T.H. CP 43. On May 17, 2019, Mr. Wenndorf visited T.H. at the Clark County Jail for the first time. CP 43–44. Mr. Wenndorf informed T.H. that the Department did not want to vacate the termination orders and was not interested in pursuing an open adoption or guardianship arrangement. CP 43–44 (T.H.

declaration); CP 67–68 (Mr. Wenndorf’s progress report to the court). Mr. Wenndorf also informed T.H. that if he wanted to file an appeal he would have to “hurry.” RP 44. T.H. and Mr. Wenndorf met on a Friday; T.H.’s right to appeal the orders of termination expired the following Monday, but Mr. Wenndorf did not explain this deadline to T.H. *See* RAP 5.2(a) (permitting 30 days to file a notice of appeal).

T.H. was transferred to the Department of Corrections shortly after his conversation with Mr. Wenndorf. CP 61. There, he was able to contact a family reunification advocate. CP 61. Through this advocate, he was eventually appointed an attorney, who promptly filed a motion to vacate the default orders terminating his parental rights. CP 57–63.

At the hearing on the motion, T.H., through counsel, argued that the termination proceedings violated his right to due process. RP 6–7, 10; *see also* CP 60. T.H. noted he had made diligent efforts to try and inform his previous dependency attorney, Ms. Baasch, as well as Mr. Wenndorf that he was incarcerated at the time of the termination hearing. CP 42–43; 59. He also noted that Mr. Wenndorf was, in fact, informed of T.H.’s incarceration by T.H.’s mother on April 10, 2019, nine full days before the termination hearing. RP 5; *see also* CP 59, 97. T.H. argued he was not appointed an attorney to represent him in the termination proceedings, as was his right. RP 5–7.

In response, the State argued that termination was appropriate and that the court had already given T.H. too much time to contest the termination petitions. RP 10–13. However, at no point did the State deny it was aware of T.H.’s incarceration at the time of the termination hearing, or explain why Mr. Wenndorf did not notify the court of this information. RP 10–13.

The court denied the motion to vacate. RP 14. In doing so, it concluded that it had “left the door open for some time” and that there was no due process violation and no other basis to vacate the terminations. RP 14; CP 98. T.H. timely appealed the order denying his motion to vacate. CP 99.

E. ARGUMENT

1. T.H. was denied his right to due process of law at the termination hearing, requiring reversal of the terminations.

Parents have a fundamental liberty interest in the care and custody of their children and “in preventing the irretrievable destruction of their family life.” *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *see also In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013). Accordingly, parents’ due process rights must be strictly protected in termination proceedings. *Santosky*, 455 U.S. at 753; *In re Dependency of A.M.M.*, 182 Wn. App. 776, 790–91, 332 P.3d

500 (2014); *In re Welfare of R.H.*, 176 Wn. App. 419, 425, 309 P.3d 620 (2013); *see also In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005) (noting termination proceedings must be “fundamentally fair.”) (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 33–34, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)); U.S. Const. amend. XIV; Const. art. 1, § 3.

The court’s order denying the motion to vacate the terminations included a rejection of T.H.’s due process claims. CP 98. After the court denied T.H.’s motion to vacate, he timely appealed the denial. CP 99. Under the Rules of Appellate Procedure, T.H.’s appeal includes review of all orders and judgments that prejudicially affected the final judgment, including the underlying orders terminating T.H.’s parental rights. *See* RAP 2.4(b); *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990). Accordingly, this Court may review whether the termination proceedings comported with due process requirements. In the alternative, this Court should enlarge the time for T.H. to file a notice of appeal of the termination orders, because T.H. was prevented from appealing the termination orders themselves due to the fact that he was unrepresented and incarcerated. *See* RAP 18.8(b) (an appellate court may enlarge the time to file an appeal pursuant to “extraordinary circumstances and to prevent a gross miscarriage of justice.”)

- a. T.H. was denied his right to counsel and to be heard at the termination hearing.

“Due process requires that parents have notice, an opportunity to be heard, and the right to be represented by counsel.” *In re Key*, 119 Wn.2d 600, 611, 826 P.2d 200 (1992). The right to be heard and to be represented by counsel in a termination proceeding is also provided by statute. RCW 13.34.090(1) (“Any party has a right to be represented by an attorney in all proceedings under this chapter” and “to be heard in his or her own behalf.”). Due process also requires the State meet a “strict burden of proof” prior to termination. *In Interest of Darrow*, 32 Wn. App. 803, 806, 649 P.2d 858 (1982).

The right to be heard “ordinarily includes the right to be present.” *In re Welfare of Houts*, 7 Wn. App. 476, 481, 499 P.2d 1276 (1972). However, the right to be heard can also be afforded through the representation of counsel, particularly if the parent is incarcerated and cannot be safely and timely transported to court. *See Darrow*, 32 Wn. App. at 809. Under these circumstances, the incarcerated parent should be “afforded a full and fair opportunity to present evidence or rebut evidence presented against him.” *Id.* Where a parent is “completely prevented from presenting or rebutting evidence, due process is violated.” *Id.* at 806.

While the right to be heard is not self-executing in termination proceedings, an incarcerated parent need only demonstrate that they took reasonable and timely steps to exercise their right. *In re Welfare of L.R.*, 180 Wn. App. 717, 724, 24 P.3d 737 (2014); *see also In re Dependency of M.S.*, 98 Wn. App. 91, 96–97, 988 P.2d 488 (1999) (finding no due process violation when incarcerated parent did not alert the court that he wanted to be heard by telephone until the day of the hearing). When State actors exhibit a lack of cooperation and effort to make arrangements to permit an incarcerated parent to be heard at a termination proceeding, this can result in a violation of due process. *See L.R.*, 180 Wn. App. at 728 (noting that lack in coordination in providing an incarcerated parent transport to court or the ability to appear telephonically could amount to a due process violation).

Here, T.H. made reasonable efforts during his incarceration to enforce his right to be heard and his right to counsel. He made numerous attempts to reach out to the assigned case worker, Michael Wenndorf, as well as his dependency attorney, Courtney Baasch, and other Department staff through his criminal defense attorneys. CP 42. T.H. also sent electronic kites “to try and reach out to social workers[,] attorneys, and or anyone else who could possibly help.” CP 43. However, T.H. was unable to notify the court of his interest in protecting his rights prior to the

termination hearing. CP 43. Despite his efforts to take part in the termination hearing, he was never brought to court or given a lawyer, denying him his right to be heard and represented by counsel in direct violation of his rights to due process. *Key*, 119 Wn.2d at 611.

Significantly, Mr. Wenndorf knew T.H. was incarcerated in the local jail and wanted to participate in the termination hearing. CP 97. This fact is uncontested. Regardless, neither Mr. Wenndorf nor the attorney for the State informed the court of T.H.'s whereabouts at any point during the termination hearing. *See* CP 52–56. Instead, the State pressed the court to proceed with default terminations and presented Mr. Wenndorf's testimony in support of termination. CP 52–56. Mr. Wenndorf testified regarding T.H.'s history of incarceration, but only mentioned that T.H. had been released from custody in 2018 without informing the court that T.H. had been recently arrested and was incarcerated at the local jail. CP 54.

At best, the failure on the part of these State actors to inform the court of T.H.'s incarceration was a careless omission that cost T.H. his right to due process. *Compare L.R.*, 180 Wn. App. at 728 (lack of cooperation and effort by State actors to permit an incarcerated parent to appear can amount to a due process violation). At worst, Mr. Wenndorf engaged in purposeful concealment intended to prevent T.H. from

participating in the proceedings and facilitate a swift termination. Either way, T.H. was “completely prevented from presenting or rebutting evidence” in direct violation of his constitutional rights. *Darrow*, 32 Wn. App. at 806. This denial of due process requires vacation of the terminations, and this Court does not need to consider the additional errors discussed below. *See In re C.R.B.*, 62 Wn. App. 608, 619, 814 P.2d 1197 (1991).

- b. The termination orders violated T.H.’s right to due process because the court did not consider all mandatory factors and the State failed to meet its burden of proof.

In order to protect the parent’s liberty interests at stake in a termination proceeding, the State is held to a strict burden of proof to comport with due process. *Darrow*, 32 Wn. App. at 806; *In re Welfare of A.B.*, 168 Wn.2d 908, 918–19, 232 P.3d 1104 (2010). This burden requires the State to prove termination is appropriate by “clear, cogent, and convincing evidence,” a standard synonymous with “highly probable.” *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

During a termination proceeding, the State must prove six factors by this clear, cogent, and convincing standard to satisfy due process:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order . . .
- (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for

- a period of at least six months pursuant to a finding of dependency;
- (d) That the services ordered under RCW 13.34.136 [the statute concerning permanency planning] have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered and provided;
 - (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future . . . and
 - (f) That continuation of the parent and child relationship clearly diminishes the child’s prospects for early integration into a stable and permanent home.

RCW 13.34.180(1); RCW 13.34.190(1)(a)(i). The State must also show the parent is currently unfit. *In re Dependency of G.G., Jr.*, 185 Wn. App. 813, 828, 344 P.3d 234 (2015). Once these factors have been satisfied, the State must also demonstrate that termination is in the best interests of the child. *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995).

1. *The court failed to consider the additional mandatory factors related to T.H.’s status as an incarcerated parent.*

The legislature has recognized that “termination requirements and timelines often undermine the efforts of incarcerated parents to be reunited with their children.” *In re Parental Rights to K.J.B.*, 187 Wn.2d 592, 598, 387 P.3d 1072 (2017). Accordingly, incarcerated parents are afforded additional protections of their parental rights, including additional factors

the court is required to consider prior to terminating their parental rights. *Id.* at 599. In the context of the child’s prospects for early integration, the sixth statutory factor the State is required to prove by clear, cogent, and convincing evidence, the court is required to consider:

- (1) Whether a parent maintains a meaningful role in his or her child’s life
- (2) Whether the department or supervising agency made reasonable efforts as defined in this chapter; and
- (3) Whether particular barriers existed . . . including, but not limited to, delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.

RCW 13.34.180(1)(f). Consideration of these factors is mandatory when a parent is incarcerated. *K.J.B.*, 187 Wn.2d at 602. Further, the court must weigh these factors on the record. *Id.* at 603–604.

Here, the record demonstrates the court did not consider the required factors related to incarceration prior to termination. *See* CP 35–38, 89–93, 115–120. This was ostensibly because the court was not informed of the fact of T.H.’s incarceration at the time of the termination hearing. Regardless, “[i]n light of the significant rights at stake,” this failure alone requires vacation of the termination of T.H.’s parental rights. *See K.J.B.*, 187 Wn.2d at 606.

2. *The State failed to meet its burden of proof.*

Additionally, even had the court considered the mandatory factors related to incarceration, the State did not meet its burden of proof on other mandatory statutory factors, particularly the provision of services, the likelihood that conditions would be remedied, and the child's prospects for early integration. RCW 13.34.180(1)(d)–(f). The State also did not meet its burden in proving T.H. unfit or termination in the best interests of the children. Accordingly, the court's orders terminating T.H.'s parental rights also violated due process on this ground. *Darrow*, 32 Wn. App. at 806; *A.B.*, 168 Wn.2d at 918–19.

Even in default proceedings, courts are required to consider the sufficiency of the evidence supporting the allegations in the petition itself and hold a “*meaningful hearing on the merits.*” *In re Welfare of S.I.*, 184 Wn. App. 531, 542, 337 P.3d 1114 (2014) (emphasis added); *In re Dependency of A.G.*, 93 Wn. App. 268, 279, 968 P.2d 424 (1998). Further, the court's findings regarding termination are required to be “sufficiently specific to permit meaningful review” and “indicate the factual bases for the ultimate conclusions.” *In re Detention of LaBelle*, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). Finally, the court's conclusions of law in the order of termination must be supported by the factual findings. *See C.R.B.*, 62 Wn. App. at 619.

The evidence presented at the termination hearing and the termination order itself cannot simply “parrot” the statutory requirements without additional factual support. *See C.R.B.*, 62 Wn. App. at 618–19. Merely reciting the statutory requirements as legal conclusions does not satisfy the “clear, cogent, and convincing” burden of proof. *Id.* Further, these types of conclusory statements do not permit meaningful review on appeal. *Id.*

In *C.R.B.*, this Court held that the State had not met its burden of proof as it had only offered conclusory testimony from the assigned case worker parroting the language of the statutory requirements. *Id.* at 618. Further, the court’s “findings of fact” were not factual grounds at all, but rather “consist[ed] only of legal conclusions.” *Id.* at 619. Accordingly, this Court found that due process had not been satisfied and reversed the termination. *Id.*

Similarly here, the evidence presented to the court was insufficient to support termination. As a threshold matter, the court found that the factual allegations contained in the termination petitions had not been contested and thus were “found to be true.” CP 37, 146 (Finding of Fact 2.14). However, the petitions for termination are remarkably sparse, consisting primarily of language mirroring the statutory requirements. CP 2–6, 115–20.

The only substantive facts provided in the termination petitions include a laundry list of services allegedly offered as well as a list of alleged parental deficiencies. CP 4–6; 117–19. However, the petitions contain no specific factual allegations concerning the manner in which the services were offered or the purported failures at compliance. CP 5, 118. The petitions did not even specify which services were offered to which parent. *See id.* Further, there is no factual explanation as to why there is little likelihood of remedial action or why continuing the parent-child relationship diminishes the children’s early integration prospects. CP 5, 118. Finally, the factual allegations regarding T.H.’s alleged lack of presence in his children’s lives prior to and during the dependency was contradicted by Mr. Wenndorf’s testimony at the termination hearing. *Compare* CP 6, 119 *with* CP 90, 92 (Mr. Wenndorf testifying that the children were “under the care” of T.H. prior to dependency and that he maintained an “ongoing” relationship with them during the dependency).

Further, the only evidence presented by the State at the termination hearing was Mr. Wenndorf’s testimony, which was remarkably thin. CP 52–56. For example, Mr. Wenndorf vaguely testified to the list of services allegedly provided to T.H., including substance abuse treatment services and mental health services, but offered no other details. CP 54. Critically, Mr. Wenndorf did not testify that these services were “expressly and

understandably offered and provided” to T.H., as the State was required to prove by a “highly probable” standard. CP 54; RCW 13.34.180(1)(d). Further, with regard to whether conditions would be remedied in the near future with T.H., Mr. Wenndorf testified that it was “extremely unlikely,” vaguely referencing “choices over the last few months” that T.H. had allegedly made that “effected his ability to maintain any type of healthy relationship with the children.” CP 55. However, Mr. Wenndorf provided no details as to what these “choices” were or why these “choices” diminished T.H.’s likelihood of remedying any alleged deficiencies. CP 55. Mr. Wenndorf also testified that continuation of the parent-child relationship diminished the children’s’ prospects for early integration into a permanent, stable home, referencing the children’s “potential to suffer” and the “significant emotional consequences” of their parents’ “choices,” without providing any concrete factual details. CP 55. This was not sufficient to satisfy the State’s burden of proof by clear, cogent, and convincing evidence as to these factors. *See* RCW 13.34.180(1)(e)–(f). Further, Mr. Wenndorf summarily testified that T.H. was unfit to parent and that termination was in the children’s best interest, but provided no other details. CP 55–56.

The termination orders themselves only serve to highlight the State’s failure to satisfy its burden of proof. CP 35–38, 115–120. The

orders contain “findings” of fact that are actually conclusions of law unsupported by any evidence and that simply parrot the statutory requirements. CP 36–37, 116–17. As this Court recognized in *C.R.B.*, legal conclusions untethered to any factual evidence “do not satisfy the mandate of proof by ‘clear, cogent, and convincing’ evidence.” *C.R.B.*, 62 Wn. App. at 618. Further, these types of conclusory “findings” are not “sufficiently specific to permit meaningful review.” *Id.* (quoting *LaBelle*, 107 Wn.2d at 219). Accordingly, the termination of T.H.’s parental rights violated due process requirements, requiring vacation of the termination. *Id.*

In sum, the termination proceedings failed to comply with due process. T.H. was denied his right to be heard and represented by counsel. Further, the court failed to consider the required statutory factors regarding his incarceration—factors that were required to be weighed on the record to protect T.H.’s parental rights from undue termination. Finally, the State failed to meet its burden of proof and the court issued termination orders that merely parroted the statutory requirements. Because the proceedings violated T.H.’s right to due process, the termination orders should be vacated.

2. The court abused its discretion in denying the motion to vacate the termination orders.

Washington courts strongly favor resolving cases on their merits. *Sacotte Constr. Inc. v. Nat'l Fire & Marine Ins., Co.*, 143 Wn. App. 410, 414, 177 P.3d 1148 (2008); *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). Accordingly, courts are encouraged to liberally set aside default judgments. *Morin*, 160 Wn.2d at 754; *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979); *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960). This is particularly true in cases involving the welfare of children, which includes dependency and termination proceedings. *See In re Marriage of Pennamen*, 135 Wn. App. 790, 801, 146 P.3d 466 (2006). When presented with a motion to vacate a default judgment, courts should act to ensure “that substantial rights [are] preserved and justice between the parties [is] fairly and judiciously done.” *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968); *see also Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007) (“The fundamental principle . . . is ‘whether or not justice is being done.’”) (quoting *Griggs*, 92 Wn.2d at 581).

If a default judgment has been entered, a court may relieve a party from the final judgment on several grounds, including:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order

- (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . .
- (11) Any other reason justifying relief from the operation of judgment.

CR 60(b); *see also* CR 55(c)(1) (default judgments may be set aside under the criteria listed in CR 60(b)).

A court’s order on a motion to vacate is reviewed for abuse of discretion. *Morin*, 160 Wn.2d at 753. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Id.* A decision is based on untenable grounds or made for untenable reasons if it was reached by applying an incorrect legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). “Refusal to vacate a default judgment is more likely to amount to an abuse of discretion because default judgments are generally disfavored.” *Lamar Outdoor Adver. v. Harwood*, 162 Wn. App. 385, 391, 254 P.3d 208 (2011); *accord Griggs*, 92 Wn.2d at 582.

Here, T.H. moved to vacate pursuant CR 60(b)(1) and (b)(4),² alleging the termination orders were entered due to mistake, inadvertence, excusable neglect, and irregularity, as well as suggestions of misrepresentation or other misconduct by an adverse party. CP 72–75.

² The Motion to Vacate references CR 60(b)(3), not CR 60(b)(4). CP 72, 74–75. However, the analysis clearly references the standard to vacate under CR 60(b)(4). Under the analogous federal rule, the same language permitting vacation due to fraud is referenced under Fed. R. Civ. P. 60(b)(3), which may explain the mistake.

The trial court denied the motion, but abused its discretion in doing so on two grounds. CP 98. First, the trial court did not apply the correct legal standard, resulting in a clear abuse of discretion. Second, the default judgments occurred because the assigned case worker—at a minimum—failed to inform the court that T.H. was incarcerated. Thus, enforcement of the default judgments was inequitable and the trial court was required to permit a hearing on the merits. Reversal is required.

- a. The court applied the wrong legal standard in denying the motion to vacate, resulting in an abuse of discretion.

In deciding a motion to vacate based on the criteria listed in CR

60(b)(1), trial courts consider four specific factors:

- (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party;
- (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect;
- (3) that the moving party acted with due diligence after notice of entry of the default judgment; and
- (4) that no substantial hardship will result to the opposing party.

White, 73 Wn.2d at 352. The first two of these elements is the most critical to the court's determination. *Id.* However, these factors are "not a mechanical test; whether or not a default judgment should be set aside is a matter of equity." *Little*, 160 Wn.2d at 704.

A court abuses its discretion when it applies the incorrect legal standard. *Rohrich*, 149 Wn.2d at 654. Here, the court did not address any

of the grounds for vacation of a default judgment under CR 60(b). RP 12–14; CP 98. Nor did it consider the *White* factors for vacation under CR 60(b)(1). RP 12–14; CP 98. Instead, the court focused on the fact that it had “left the door open” after entering the default orders and before entering a final default termination “in an abundance of fairness to the father.” RP 14. Accordingly, it found that vacating termination was not “appropriate.” RP 14. The court’s written order similarly summarily denies the motion, finding “no basis” to vacate. CP 98. The court’s failure to apply CR 60(b) and the *White* factors was an abuse of discretion, requiring reversal. *Rohrich*, 149 Wn.2d at 654.

Had the court applied the correct legal factors, T.H. would have prevailed. The first *White* factor—that the defaulted party must set forth a prima facie defense—is a low bar. The defense need only be tenuous for this factor to be satisfied. *C. Rhyne & Assocs. v. Swanson*, 41 Wn. App. 323, 327–28, 704 P.2d 164 (1985). Evidence must be viewed in the light most favorable to the moving party. *Pfaff v. State Mut. Auto Ins. Co.*, 103 Wn. App. 829, 834, 14 P. 3d 837 (2000).

Here, the primary parental deficiency identified by the State was T.H.’s history of substance abuse. *See* CP 60 (motion to vacate). As the motion to vacate averred, T.H.’s “success or failure in drug treatment” was a contested and developing issue at the time of the termination hearing.

CP 61. T.H. had in fact checked himself into treatment at the time of the default hearing in March. CP 41. The State provided no evidence that T.H.'s use of illicit substances was ongoing at the time of the termination hearing in April. CP 52–56. Accordingly, T.H. had a prima facie defense to the State's termination petition. *White*, 73 Wn.2d at 352.

Concerning the second factor, T.H.'s failure to appear was occasioned upon mistake, inadvertence, surprise, or excusable neglect. *White*, 73 Wn.2d at 352; CP 60. T.H. clearly established that his failure to appear at the termination hearing was because of the barriers created by his incarceration, and was thus excusable. CP 39–44. "Excusable neglect" is defined as a failure to act "not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hinderance or accident." Black's Law Dictionary (11th ed. 2019). Here, T.H. took all reasonable steps to protect his rights in the termination proceeding, including trying to contact Mr. Wenndorf and other Department staff and reaching out to his prior dependency attorney and the courts. CP 39–44. His failure to secure an attorney and enter a notice of appearance in time for the termination proceeding was hardly due to his own carelessness, inattention, or willful disregard of the court's process.

Further, T.H. acted with diligence within the constraints of his incarceration once he learned the termination orders been entered, satisfying the third *White* factor. *White*, 92 Wn.2d at 352. He promptly made contact with a family reunification expert when he was transferred to the Department of Corrections, and was eventually appointed an attorney who moved to vacate on his behalf. CP 73. Regarding the fourth *White* factor, there is no “substantial hardship” to the State that will result in the vacation of the termination; only that the State will be finally held to its burden of proof with T.H. afforded an opportunity to be heard. *White*, 92 Wn.2d at 352.

The court failed to apply the correct analysis in denying T.H.’s motion to vacate. RP 12–14; CP 98. This fact alone is an abuse of discretion warranting vacation of the default orders of termination. *Rohrich*, 149 Wn.2d at 654.

b. The court abused its discretion in enforcing an inequitable default judgment.

Pursuant to 60(b)(4), a trial court may vacate a default judgment that was achieved through “fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.” “[A] default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment

inequitable.” *Morin*, 160 Wn.2d at 755 (citing CR 60(b)(4)). This includes intentional concealment of a fact that leads to an inequitable result, even if the party has no duty to inform. *Morin*, 160 Wn.2d at 758. Vacation is also appropriate if the opposing party misrepresents or conceals a material fact, even if the misrepresentation is innocent or careless. See *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P.2d 1056 (1989); *Matter of A.S.*, 65 Wn. App. 631, 636, 829 P.2d 791 (1992); *Morin*, 160 Wn.2d at 758.

Here, the record is uncontested that Mr. Wenndorf was aware that T.H. was incarcerated at the time of the termination hearing. CP 97. However, he did not inform the court of this fact at any point during the termination proceedings. CP 52–56. While Mr. Wenndorf testified regarding T.H.’s history of incarceration, he only mentioned T.H. had been released from custody in 2018 without informing the court that T.H. had been recently arrested and was in the custody of the local jail. CP 54. Whether Mr. Wenndorf’s omission was simply careless or intentional, the result cannot be described as anything else than an inequitable. *Morin*, 160 Wn.2d at 758; *Hickey*, 55 Wn. App. at 371; *A.S.*, 65 Wn. App. at 636. Due to the omission, T.H. was denied his right to be heard and contest termination as well as to have certain factors regarding his incarceration considered on the record.

Case managers have a “grave responsibility not only to the child, but to the parents and the court, to ensure compliance” with legal requirements regarding the permanent loss of parental rights. *A.S.*, 65 Wn. App. at 636. When a case worker’s “failure to speak undermined the integrity” of the termination proceeding, as occurred here, it is “manifestly unreasonable” to deny a motion to vacate. *See id.; Morin*, 160 Wn.2d at 753. The court’s refusal to vacate was thus an abuse of discretion warranting vacation of the termination orders. *See id.*

In sum, the court applied the incorrect legal standard and its denial of the motion to vacate was manifestly unreasonable in light of the fact that the case worker did not inform the court of the fact of T.H.’s incarceration. The court thus abused its discretion, and the termination orders must be vacated. *See Morin*, 160 Wn.2d at 753.

F. 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 20th day of April, 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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