

FILED  
Court of Appeals  
Division II  
State of Washington  
6/3/2020 1:12 PM

NO. 54304-4-II

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

In re the Welfare of: B.H. and G.H., Minor Children

STATE OF WASHINGTON  
DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES

Respondent,

v.

T.H.,

Appellant.

---

**BRIEF OF RESPONDENT**

---

ROBERT W. FERGUSON  
Attorney General

TSERING D. CORNELL  
Assistant Attorney General  
WSBA No. 44409  
1220 Main Street, Suite 510  
Vancouver, Washington 98660  
(360) 759-2100  
OID No. 91014  
Email: [vanfax@atg.wa.gov](mailto:vanfax@atg.wa.gov)

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. STATEMENT OF THE ISSUES.....2

    1. Does a trial court abuse its discretion when it denies a parent’s motion to vacate a default judgment terminating parental rights, when the parent fails to articulate a prima facie defense to a termination petition, fails to show excusable neglect, fails to exercise due diligence, and when vacating the default order would result in a significant delay in permanency for the child? .....2

    2. Does a trial court deny due process to a parent when it terminated his parental rights only after a parent fails to appear at the termination hearing claiming to be in substance abuse treatment, the court provides the parent with several weeks to provide confirmation of his or her attendance at treatment, the parent fails to do so, and the Department has met its burden of proof?.....2

III. STATEMENT OF THE CASE .....3

IV. ARGUMENT .....8

    A. The Trial Court Properly Exercised Its Discretion in Denying the Motion To Vacate.....8

        1. The father has failed to show he is entitled to relief pursuant to CR 60(b)(1).....9

            a. The father has failed to articulate a prima facie defense to the termination petition.....10

            b. The father has failed to demonstrate the existence of any of the other factors set forth in *White*.....15

(1)	The father has failed to show his failure to attend the termination hearing was due to excusable neglect.....	15
(2)	The father has failed to show he acted with due diligence after being notified of the default.....	16
(3)	Vacating the default judgment will result in substantial hardship to the children.....	17
2.	The father has failed to show he is entitled to relief pursuant to CR 60(b)(4).....	18
B.	The Father’s Procedural Due Process Rights Were Protected When He Received Notice and an Opportunity To Be Heard at the Termination Hearing .....	20
1.	The father failed to make an appearance in the case and was not entitled to counsel.....	21
2.	The Department met its burden of proof and the court considered the incarcerated parent factors .....	22
V.	CONCLUSION .....	27

## TABLE OF AUTHORITIES

### Cases

<i>Bishop v. Illman</i> 14 Wn.2d 13, 126 P.2d 582 (1942).....	9
<i>Blakely v. Housing Authority of King Co.</i> 8 Wn. App. 204, 505 P.2d 151 (1973).....	14
<i>Commercial Courier Service, Inc. v. Miller</i> 13 Wn. App. 98, 533 P.2d 852 (1975).....	9
<i>Farmers Insurance Co. v. Waxman Industries, Inc.</i> 132 Wn. App. 142, 130 P.3d 874 (2006).....	14, 15
<i>Griggs v. Averbek Realty, Inc.</i> 92 Wn.2d 576, 599 P.2d 1289 (1979).....	12
<i>In re Aschauer</i> 93 Wn.2d 689, 611 P.2d 1245 (1980).....	23
<i>In re Dependency of A.V.D.</i> 62 Wn. App. 562, 815 P.2d 277 (1991).....	23
<i>In re Dependency of C.B.</i> 61 Wn. App. 280, 810 P.2d 518 (1991).....	22
<i>In re Dependency of C.R.B.</i> 62 Wn. App. 608, 814 P.2d 1197 (1991).....	17, 24, 25
<i>In re Dependency of J.W.</i> 90 Wn. App. 417, 953 P.2d 104 (1998).....	22
<i>In re Dependency of K.S.C.</i> 137 Wn.2d 918, 976 P.2d 113 (1999).....	10
<i>In re Estate of Stevens</i> 94 Wn. App. 20, 971 P.2d 58 (1999).....	8, 16

<i>In re Parental Rights to K.M.M.</i> 186 Wn.2d 466, 379 P.3d 75 (2016).....	10, 23
<i>In re Welfare of G.E.</i> 116 Wn. App. 326, 65 P.3d 1219 (2003).....	22
<i>In re Welfare of L.R.</i> 180 Wn. App. 717, 324 P.3d 737 (2014).....	20
<i>In re Welfare of M.G.</i> 148 Wn. App. 781, 201 P.3d 354 (2009).....	8
<i>In re Welfare of S.E.</i> 63 Wn. App. 244, 820 P.2d 47 (1991).....	20
<i>In re Welfare of S.I.</i> 184 Wn. App. 531, 337 P.3d 1114 (2014).....	26, 27
<i>In re Welfare of Sego</i> 82 Wn.2d 736, 513 P.2d 831 (1973).....	11
<i>In re Welfare of Sumey</i> 94 Wn.2d 757, 621 P.2d 108 (1980).....	11
<i>Johnson v. Cash Store</i> 116 Wn. App. 833, 68 P.3d 1099 (2003).....	9, 10
<i>Krause v. Catholic Community Servs.</i> 47 Wn. App. 734, 737 P.2d 280 (1987).....	11
<i>Morin v. Burris</i> 160 Wn.2d 745, 161 P.3d 956 (2007).....	19, 21
<i>Norton v. Brown</i> 99 Wn. App. 118, 992 P.2d 1019 (1999).....	8, 16
<i>Pfaff v. State Farm Mutual Auto. Ins. Co.</i> 103 Wn. App. 829, 14 P.3d 837 (2000).....	10, 12
<i>Rosander v. Nightrunners Transport, Ltd.</i> 147 Wn. App. 392, 196 P.3d 711 (2008).....	12

<i>Sacotte Const., Inc. v. National Fire &amp; Marine Ins. Co.</i> 143 Wn. App. 410, 177 P.3d 1147 (2008).....	8
<i>Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd &amp; Hokanson</i> 95 Wn. App. 231, 974 P.2d 1275 (1999).....	14
<i>Stanley v. Cole</i> 157 Wn. App. 873, 239 P.3d 611 (2010).....	8
<i>State v. Gaut</i> 111 Wn. App. 875, 46 P.3d 832 (2002).....	14
<i>White v. Holm</i> 73 Wn.2d 348, 438 P.2d 581 (1968).....	9, 15, 16

**Statutes**

RCW 13.34.020 .....	11, 17, 22
RCW 13.34.145(1)(c) .....	11
RCW 13.34.180(1).....	11, 13
RCW 13.34.180(1)(a) through (f).....	10
RCW 13.34.190(1)(a) .....	10
RCW 43.216.906 .....	3

**Rules**

CR 60 .....	12, 14
CR 60(b).....	3, 18
CR 60(b)(1).....	9, 16
CR 60(b)(1) and (3) .....	6
CR 60(b)(3).....	6

CR 60(b)(4).....	6, 18
CR 60(e)(1).....	11, 12, 14
RAP 2.2(a)(10).....	8

**Other Authorities**

Black’s Law Dictionary (9 <sup>th</sup> ed. 2009).....	16
Laws of 2017.....	3

**Unpublished Opinions**

<i>In the Matter of L.R.C.</i> No. 32638–1–III, 2015 WL 7356451 (Wash. Ct. App. Nov. 19, 2015).....	26
---	----

## I. INTRODUCTION

B.H. and G.H. are nine and thirteen respectively. They came into the Department's care thirty-four months ago, after law enforcement removed them from the father's care and placed them into protective custody due to the father's exposing these children to dangerous home conditions, drug use, and his lack of parenting skills.

The father was timely and personally served with the termination petitions and notices and summons, but he failed to appear at the termination hearing despite receiving notice. His only offered defense for failing to appear at the termination hearing is his unverified claims that he was attending inpatient substance abuse treatment on that date, even though he had previously told his social worker he was leaving such treatment.

Despite the court giving the father several weeks after the termination hearing date to provide confirmation that he was in treatment at the time of the hearing, the father failed to do so and refused to sign a release of information so the Department social worker could verify with the provider. The father was subsequently arrested. Prior to his arrest, the father had nearly four weeks to provide confirmation he was in treatment and failed to do so. The trial court subsequently terminated his parental rights.

Several months later, the father filed a motion to vacate the terminations. Even at this late stage, the Department offered to agree to vacate the orders of default and termination if the father would provide confirmation he was in treatment at the time of the termination hearing. Again, the father failed to provide any documentation whatsoever confirming he was in treatment at the time of the termination hearing. Instead, the father requested a hearing on his motion to vacate and the trial court properly denied the father's motion. This Court should affirm.

## **II. STATEMENT OF THE ISSUES**

1. Does a trial court abuse its discretion when it denies a parent's motion to vacate a default judgment terminating parental rights, when the parent fails to articulate a prima facie defense to a termination petition, fails to show excusable neglect, fails to exercise due diligence, and when vacating the default order would result in a significant delay in permanency for the child?

2. Does a trial court deny due process to a parent when it terminated his parental rights only after a parent fails to appear at the termination hearing claiming to be in substance abuse treatment, the court provides the parent with several weeks to provide confirmation of his or her attendance at treatment, the parent fails to do so, and the Department has met its burden of proof?

### III. STATEMENT OF THE CASE

In July 2017, law enforcement placed B.H. and G.H. into protective custody and the Department of Children, Youth, and Families (Department<sup>1</sup>) filed dependency petitions.<sup>2</sup> CP at 2-7, 115-120. At the time the dependency petitions were filed, the mother's whereabouts were unknown and the primary concerns were the father's unaddressed substance abuse, untreated mental health issues, and lack of parenting skills.<sup>3</sup> CP at 2, 115. The children were found dependent on October 3, 2017 as to the father, primarily due to the same concerns. CP at 4, 117. After the parents failed to remedy their parental deficiencies for sixteen months, the Department filed termination petitions as to B.H. and G.H. on January 16, 2019. CP at 2, 115. The mother's parental rights have been terminated and are not at issue. CP at 31-34, 148-151.

The father was timely and personally served with the termination petition and notice and summons for each child, setting a termination hearing for March 22, 2019 (Termination Hearing). CP at 15, 128. The Department

---

<sup>1</sup> On July 1, 2018, the Department of Children, Youth, and Families (DCYF) assumed all powers, duties, and functions of the Department of Social and Health Services pertaining to child welfare services. RCW 43.216.906; *see also* Laws of 2017, ch. 6. To avoid confusion, this brief refers to Washington's public child welfare agency as the "Department."

<sup>2</sup> The underlying dependency cases are under Clark County Superior Court cause numbers 17-7-00248-0 and 17-7-00249-8. On January 29, 2020, the father filed unsuccessful motions to vacate the orders of dependency under CR 60(b).

<sup>3</sup> The children were found dependent as to the mother on September 26, 2017. CP at 4, 117. She is not a party to this appeal.

social worker assigned to the case personally served the father seven weeks prior to the Termination Hearing. CP at 15, 128. The notice and summons instructed the father that he was “*required* to appear at the hearing on the date, time and place set forth above.” CP at 9, 122. The notice and summons advised him of his right to an attorney and informed him the court could appoint an attorney at no cost if he qualified. CP at 9, 122. In addition, the notice and summons advised the father that an attorney could “look at the social and legal files in your case, talk to the supervising agency or other agencies, tell you about the law, help you understand your rights and help you at hearings.” CP at 9, 122. The notice and summons also informed the father that “[a] termination Petition, if granted, will result in permanent loss of your parental rights.” CP at 8, 121.

Two days prior to the Termination Hearing, the father notified the Department social worker via text message that “he was leaving treatment” and that “he was in the Olympic forest outside of Olympia.” CP at 67, 180. Neither parent appeared at the Termination Hearing. CP at 46, 159. The father had previously notified the social worker and his mother that he was seeking treatment, but refused to sign a release of information so the Department could obtain verification. CP at 66-67, 179-180. At the Termination Hearing, the Department requested that the father “be held in default and that we set a date forward date for testimony with regard to the father giving him an opportunity

to get in touch with [the social worker] and actually provide releases of information to demonstrate that he is in an inpatient facility.” CP at 47-48, 160-161. The father’s mother appeared at the Termination Hearing and subsequently submitted a declaration in support of the father’s motion to vacate. CP at 48-49, 96-97, 160-161, 209-210. At the Termination Hearing, the father’s mother said the father “has a drug addiction problem” and that “[h]e thinks the drugs are more important than the family.” CP at 49, 162. The father had only ever partially engaged in services, never rectifying his parental deficiencies, and in the month prior to the Termination Hearing, the father had “stopped complying with services altogether.” CP at 54, 204.

At the Termination Hearing, the court held the father in default due to his failure to appear and entered its order of default. CP at 21-22, 136-137. The court also, at the Department’s request, set a future hearing date for the presentation of testimony on the Department’s termination petitions (“Presentation Hearing”).<sup>4</sup> CP at 48, 161. The court confirmed that at this stage, the father had “not, uh, formally appeared in the case, appearing meaning expressing an intent to contest the case exercising his right to an attorney” and stated that the father had “three weeks to sort of get into the case if you will.” CP at 48, 161. The court also confirmed that at the Presentation

---

<sup>4</sup> The Presentation Hearing was originally set for April 12, 2019, but was later continued an additional week to April 19, 2019. CP at 71, 184.

Hearing, termination could proceed “if the State wishes and they wish to present testimony and if CASA supports it, it is for the Court to determine it.” CP at 48, 161.

The social worker notified the father of the new date. CP at 39, 152. The father did not, and to date has not – despite several Ftwoopportunities to do so – provided any documentation to demonstrate he was attending inpatient treatment on the date of the Termination Hearing. On April 9, 2019, almost four weeks after the Termination Hearing, the father was arrested. CP at 40, 153. At the Presentation Hearing, the Department presented the testimony of the social worker, the child’s guardian-ad-litem confirmed support of the termination petitions, and the court entered the termination order. CP at 35-38, 59-63, 144-147, 165-169.

Over five months later, on September 27, 2019, the father filed a motion under CR 60(b)(1) and (3)<sup>5</sup> to vacate the default termination. CP at 57, 170. The father originally noted a hearing on his motion to vacate for October 4, 2019. CP at 64, 177. Even at this late stage, the Department was willing to agree to vacate the termination orders if the father could supply documentation that he was attending inpatient treatment at the time of the Termination Hearing. CP at 68, 181. The father failed to supply any such

---

<sup>5</sup> The father cites to CR 60(b)(3) in his motion, but his argument refers to requirements of CR 60(b)(4). CP at 57, 60, 170, 173. This response will address the arguments raised by a claim under CR 60(b)(4).

documentation. CP at 68, 181. Unable or unwilling to provide such documentation, the father then re-noted his motion to vacate for December 6, 2019. CP at 65, 94, 178, 207.

In his supporting declaration, the father acknowledged, “some stuff is hard to remember due to my drug use.” CP at 44, 157. Also notably absent from the father’s declaration is any statement about his attempts, if any, to provide confirmation that he was attending inpatient treatment, as he claims, at the time of the Termination Hearing. CP at 39-44, 152-157. Despite the Department social worker’s repeated requests, the father never supplied a release of information. CP at 66-68, 179-181. The father simply claims he checked himself “into detox.” CP at 39, 152. The father’s claims about being in treatment, however, varied, as he at times reported being in treatment in Idaho and alternatively in Chehalis, Washington. CP at 67, 180.

The trial court heard argument and denied the father’s motion to vacate. RP. The father now appeals the trial court’s denial of his motion to vacate. The father also requests that this Court enlarge the time for the father to file a notice of appeal of the termination orders. The Department respectfully requests this Court affirm the trial court’s orders of default and termination and deny the father’s request for additional time to appeal the termination orders that were entered over thirteen months ago.

#### IV. ARGUMENT

##### A. The Trial Court Properly Exercised Its Discretion in Denying the Motion To Vacate

Default judgments are appealable as a matter of right. RAP 2.2(a)(10). The appellate court reviews a juvenile court's order denying a motion to vacate for an abuse of discretion. *In re Welfare of M.G.*, 148 Wn. App. 781, 792, 201 P.3d 354 (2009). A juvenile court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.* Discretion is abused only where no reasonable person would have taken the position adopted by the trial court. *Stanley v. Cole*, 157 Wn. App. 873, 879, 239 P.3d 611 (2010). If the decision to deny the motion is based upon tenable grounds and is within the bounds of reasonableness, it must be affirmed. *In re Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999).

Washington courts favor resolving cases on their merits over default judgments. *Sacotte Const., Inc. v. National Fire & Marine Ins. Co.*, 143 Wn. App. 410, 414-15, 177 P.3d 1147 (2008). However, there is also a need for efficiency and for a system that ensures that parties will comply with judicial summons. *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999). The courts will seldom relieve a party from a judgment due to willful disregard of, or inattention to, a properly served

summons, for to “countenance such an attitude [...] would seriously impair, if not destroy, the effectiveness of all judicial process.” *Commercial Courier Service, Inc. v. Miller*, 13 Wn. App. 98, 106, 533 P.2d 852 (1975) (quoting *Bishop v. Illman*, 14 Wn.2d 13, 126 P.2d 582 (1942)).

**1. The father has failed to show he is entitled to relief pursuant to CR 60(b)(1)**

In deciding a motion to vacate pursuant to CR 60(b)(1), the trial court addresses two primary and two secondary factors that must be shown by the moving party. The first factor is whether there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The second factor is whether the moving party’s failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect. *Id.* The third factor is whether the moving party acted with due diligence after notice of the default judgment. *Id.* Finally, the fourth factor is whether the opposing party will suffer substantial hardship if the default judgment is vacated. *Id.*

If a “strong or virtually conclusive defense” is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, as long as the defendant quickly moved to vacate. *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003). However, when

the moving party's evidence supports no more than a prima facie defense, the court will more closely scrutinize the defendant's reasons for their failure to appear. *Id.* Indeed, if the moving party does not produce substantial evidence to support even a prima facie defense, there is no reason for further proceedings. *Pfaff v. State Farm Mutual Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000).

**a. The father has failed to articulate a prima facie defense to the termination petition**

A trial court may terminate parental rights when the Department establishes the statutory elements of RCW 13.34.180(1)(a) through (f) by clear, cogent, and convincing evidence. RCW 13.34.190(1)(a); *In re Parental Rights to K.M.M.*, 186 Wn.2d 466, 478, 379 P.3d 75 (2016); *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). These statutory elements are:

- (a) That the child has been found to be a dependent child;
- (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
- (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 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 or 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).

When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parent are in conflict, the rights and safety of the child should prevail. RCW 13.34.020; *In re Welfare of Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973); *Krause v. Catholic Community Servs.*, 47 Wn. App. 734, 743, 737 P.2d 280 (1987). Although parents have a constitutionally protected right to the care, custody, and companionship of their child, that right is not absolute and the rights of the child are primary. *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). To this end, parents do not have unlimited time to correct their parental deficiencies. RCW 13.34.145(1)(c).

In this case, the father has failed to demonstrate he is entitled to relief from the default judgment entered against him. A motion to vacate a judgment must be supported by an affidavit of the applicant or their attorney. CR 60(e)(1). The affidavit must set forth a concise statement of

the facts or errors upon which the motion is based and, “if the moving party is the defendant, the facts constituting a defense to the action or proceeding.” CR 60(e)(1).

The moving party must establish a defense in order to avoid a useless subsequent trial. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 583, 599 P.2d 1289 (1979). The respondent satisfies his burden under CR 60(e)(1) when the averred facts, if later believed by a trier of fact, would constitute a defense to the claims presented. *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 404, 196 P.3d 711 (2008). After a party obtains a default judgment, it is presumed there is substantial evidence to support the claim that forms the basis for the judgment. *Pfaff*, 103 Wn. App. at 834. If the moving party under CR 60 cannot produce substantial evidence with which to oppose the claim, i.e., does not set forth even a prima facie defense, there is no point to setting aside the judgment and conducting further proceedings. *Id.*

Here, the father failed to present facts to show he had a prima facie defense to the termination action. He did not comply with CR 60(e)(1) as he failed to set forth sufficient facts, which if presumed to be true, would defeat the allegations set forth in the termination petition.

The father argues that that he presented a prima facie defense, but his argument is unsupported by the record. Br. Appellant at 24-25. The

father claims his primary parental deficiency was his history of substance abuse. Br. Appellant at 24. However, the father's substance abuse was only one of several primary parental deficiencies, which also include unaddressed mental health issues and lack of parenting skills. CP at 2-7, 91, 115-120, 204.

The father's argument that his success or failure at addressing his substance abuse issues is contested is entirely reliant upon his claimed participation in treatment at the time of the Termination Hearing, which the father never confirmed. If he was indeed in treatment at the time of the Termination Hearing, that fact could easily have been verified by a release of information or some other documentation from the provider, which the father either could not or would not provide. The father himself, only two days before the Termination Hearing, informed his social worker that he was leaving treatment and was in the Olympic forest outside of Olympia. CP at 67, 180. Furthermore, the father has failed to address any of his other documented and unremedied parental deficiencies.

The first three elements under RCW 13.34.180(1) are undisputed: dependency had been established, dispositional orders were entered, and the children had been out of the father's care for over six months pursuant to those orders. CP at 35-38, 144-147. Neither the father's motion to vacate nor his supporting declaration addresses the remaining elements established

by the Department. CP at 39-44, 69-93, 152-157, 182-206. Argumentative assertions may not substitute for averred facts. *See Blakely v. Housing Authority of King Co.*, 8 Wn. App. 204, 210, 505 P.2d 151 (1973). The court rules require that the father support his motion to vacate the default judgment with an affidavit that sets forth the facts constituting a defense to the termination petition. CR 60(e)(1). The unsupported arguments of the father's attorney are not evidence. The father's declaration, in which he claims he was in treatment on the date of the Termination Hearing, was insufficient for the trial court to vacate the default. The father failed to establish a prima facie defense, and failed to meet his burden under CR 60.

When considering a motion to vacate, the trial court "decides whether the affidavits set forth substantial evidence to support a defense to the claim." *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 239, 974 P.2d 1275 (1999). An appellate court reviewing an order denying a motion to vacate under CR 60 considers only the propriety of the denial, not the impropriety of the underlying judgment. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).

The requirement of CR 60 "to set forth facts constituting at least a prima facie defense is not burdensome, as it does not demand conclusive proof." *Farmers Insurance Co. v. Waxman Industries, Inc.*, 132 Wn. App. 142, 148, 130 P.3d 874 (2006). There is nothing in this

record to demonstrate that the father could “carry a decisive issue to the finder of the facts in a trial on the merits.” *Id.* (citing *White*, 72 Wn.2d at 353). The trial court did not abuse its discretion in denying the father’s motion to vacate, and the order denying the motion should be affirmed.

**b. The father has failed to demonstrate the existence of any of the other factors set forth in *White***

The father has failed to articulate a prima facie defense to the termination petition and therefore the appeal should be denied. Assuming, arguendo, that the father had made a prima facie case, the father still fails to establish that his failure to appear at the Termination Hearing was due to mistake, inadvertence, surprise, or excusable neglect, that he exercised due diligence after notice of the default against him, and that vacating the default judgment will not result in substantial hardship to the children.

**(1) The father has failed to show his failure to attend the termination hearing was due to excusable neglect.**

The father offers no argument regarding what excuses his failure to appear at the Termination Hearing. The father fails to address his failure to appear in the case, despite the court providing him with several opportunities to do so. Rather, the father argues that his failure to appear at the Presentation Hearing was excusable neglect because of the barriers

created by his being held in jail at that time. Br. Appellant at 25. His argument is without merit.

Excusable neglect is determined on a case-by-case basis. *Norton*, 99 Wn. App. at 123. Generally, it is defined as a failure to take a proper step “not because of the party’s own carelessness, inattention, or willful disregard of the court’s own process, but because of some unexpected or unavoidable hindrance or accident.” Black’s Law Dictionary 1133 (9<sup>th</sup> ed. 2009). Along with evidence of a prima facie defense, excusable neglect is one of the two primary factors the court must evaluate when considering a motion to vacate pursuant to CR 60(b)(1). *White*, 73 Wn.2d at 352-53. The only reason given for father’s failure to attend the Termination Hearing is his unverified claim that he was attending inpatient treatment at that time. This fact is easily verifiable via a release of information or other documentation from the provider. The father failed to supply any confirmation of his claims, despite several opportunities, even late in the case, to do so. This situation does not constitute excusable neglect.

**(2) The father has failed to show he acted with due diligence after being notified of the default**

“To establish good cause under CR 55, a party may demonstrate excusable neglect and due diligence.” *In re Estate of Stevens*,

94 Wn. App. 20, 30, 971 P.2d 58 (1999). The father was aware of the petitions to terminate his parental rights well before the Termination Hearing. He was personally served with the termination petitions and the notices and summons seven weeks prior to the Termination Hearing by the assigned Department social worker. CP at 15, 128. The father was also aware that the court had entered default orders against him and that he had limited time to confirm he was in treatment as he claimed. CP at 39, 152. The father never provided the Department with a release of information nor did he provide the court with any other confirmation of his claim. The father failed to exercise due diligence after being notified of his default.

**(3) Vacating the default judgment will result in substantial hardship to the children**

The children have a right to basic nurturing that includes a right to a safe, stable and permanent home and a speedy resolution to the dependency and any subsequent permanency proceeding. RCW 13.34.020. “[T]he State and the child have a strong interest not only in establishing a stable and permanent home for the child, but also in doing so as soon as possible.” *In re Dependency of C.R.B.*, 62 Wn. App. 608, 614-16, 814 P.2d 1197 (1991).

B.H. and G.H. have been legally free dependent children for over thirteen months. If the default orders were vacated as to the father, the

dependency process would resume and a new trial on the Department's petitions for termination would be required. The result is only more delay for children who have already spent three years out of the care of their parents. These children are waiting to be adopted and father's appeal is the only barrier to their achieving permanency. Such a result would be anything but a speedy and timely resolution for these children's right to stability and permanence. It is also a result that would be prejudicial to the children's interest and would result in substantial hardship to them.

The juvenile court did not abuse its discretion in determining that the father failed to meet his burden under CR 60(b). The order denying the motion to vacate the default should be affirmed, and the default order terminating his parental rights should therefore stand.

**2. The father has failed to show he is entitled to relief pursuant to CR 60(b)(4)**

As for father's argument that the trial court erred by denying his motion to vacate the default under CR 60(b)(4), this argument also fails because the father fails to identify any fraud, misrepresentation, or misconduct at the Termination Hearing. The Department denies the presence of any fraud, misrepresentation, or misconduct at any stage of these proceedings, but does specifically note that the father's attempt to distract the court with claims of fraud due to the father's subsequent jailing

are baseless. The fact that the father was being held in jail at that time the testimony was presented is immaterial. It is clear from the record that the trial court required more than the father's unverified claims that he was in treatment at the time of the Termination Hearing to excuse his failure to appear. CP at 48, 161. The father did not supply anything further.

The father cites *Morin* to support his argument that equity demands reversal of the trial court's denial of his motion to vacate, but this case is readily distinguishable. *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). *Morin* involved default judgment obtained on personal injury claims stemming from a motor vehicle accident. *Id.* There, a defendant's insurer was pursuing settlement with plaintiff's counsel. *Id.*

In *Morin*, the court found that "the record supports an inference that plaintiff's counsel actively concealed the fact that a summons and complaint had been filed" to the defendant's insurer preventing the insurance company from making an appearance. *Morin*, 160 Wn.2d at 758. The court vacated the default due to "the inequitable attempt to conceal the existence of the litigation" as the plaintiff's "failure to appear was excusable." *Morin*, 160 Wn.2d at 759.

Unlike the situation in *Morin*, neither the Department nor its counsel concealed the existence of the proceeding from the father or the father's counsel in the underlying dependency. To the contrary, the Department

social worker personally served the father with the petition and the notice and summons and was in communication with the father about the upcoming Termination Hearing. CP at 15, 66-68, 128, 179-180. The Department social worker requested a release of information from the father to confirm he was in treatment. CP at 66-67, 179-180. The father's failure to supply a release of information or any documentation to support his claim that he was in treatment at the time of the Termination Hearing does not require reversal based on equity.

**B. The Father's Procedural Due Process Rights Were Protected When He Received Notice and an Opportunity To Be Heard at the Termination Hearing**

The father argues that the trial court violated his due process rights. Br. Appellant at 8. "Due process in the termination context requires that parents have notice, an opportunity to be heard and defend, and the right to be represented by counsel." *In re Welfare of L.R.*, 180 Wn. App. 717, 723, 324 P.3d 737 (2014) (citing *In re Welfare of S.E.*, 63 Wn. App. 244, 250, 820 P.2d 47 (1991)). The record is clear, the father had both notice and an opportunity to be heard, as well as an opportunity to obtain court-appointed counsel had he chosen to appear.

**1. The father failed to make an appearance in the case and was not entitled to counsel**

The father argues the default must be vacated because the father was not represented by counsel at the Presentation Hearing. Br. Appellant at 10. The father's argument assumes that the father was entitled to counsel at the Presentation Hearing. He was not. Alternatively, the father seems to argue that his post-default jailing relieves him of the requirement to attend or provide an excuse for failing to appear at the earlier Termination Hearing. It does not.

The father failed to appear at the Termination Hearing, and the court entered orders of default. CP at 21-22, 136-137. The court was clear at the Termination Hearing that the father had "not, uh, formally appeared in the case" and generously gave him "three weeks to sort of get into the case if you will." CP at 48, 161. The father asks this Court to disregard his failure to appear, simply because he was arrested almost four weeks after the Termination Hearing. However, the requirement to appear (or provide a genuine reason for non-appearance) when properly and timely served does not evaporate if a parent is arrested subsequent to that Termination Hearing. "Those who are served with a summons must do more than show intent to defend." *Morin*, 160 Wn.2d at 749. The record demonstrates that the father

failed to make an appearance in this case, and despite several opportunities to do so, failed to provide an excuse for his failure to appear.

In these proceedings, the court's duty to provide counsel is triggered by a parent's appearance. *In re Welfare of G.E.*, 116 Wn. App. 326, 333-335, 65 P.3d 1219 (2003). Furthermore, the right to counsel in this case should only attach once the father establishes his failure to appear at the Termination Hearing is excusable – in this case, that required the father to provide confirmation that he was attending inpatient substance abuse treatment at the time of the Termination Hearing. The father, despite several weeks, and now months to do so, has not. The father failed to make an appearance at the Termination Hearing, his failure was not excused, and therefore he was never entitled to counsel. *See supra* Section IV.A.1.b.(1).

**2. The Department met its burden of proof and the court considered the incarcerated parent factors**

B.H. and G.H. have a right to basic nurture, which includes the right to a safe, stable, and permanent home and a speedy resolution of the dependency proceedings. RCW 13.34.020. The trial court has broad discretion to evaluate evidence in light of the rights and safety of the child. *In re Dependency of C.B.*, 61 Wn. App. 280, 287, 810 P.2d 518 (1991). The dominant consideration is the moral, intellectual, and material welfare of the child. *In re Dependency of J.W.*, 90 Wn. App. 417, 427,

953 P.2d 104 (1998). The decision of the trial court is entitled to great deference on review and its findings of fact must be upheld if they are supported by substantial evidence in the record. *In re Dependency of A.V.D.*, 62 Wn. App. 562, 658, 815 P.2d 277 (1991); *In re Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). If a disputed factual finding is supported by substantial evidence, the appellate court will not judge the credibility of the witnesses or reweigh the evidence. *K.M.M.*, 186 Wn.2d at 477. The deference paid to the trial judge's advantage in having the witnesses before the court is particularly important in termination proceedings. *K.M.M.*, 186 Wn.2d at 479.

The father argues that the Department failed to meet its burden of proof and that the evidence presented is insufficient to support the trial court's findings. Br. Appellant at 17-20. This argument fails because the testimony presented by the Department social worker supplied the underlying facts necessary to support termination of the father's parental rights, as discussed below. The father also argues that the trial court failed to consider the incarcerated parent factors as they relate to his post-default jailing and this requires reversal. Br. Appellant at 14-15. The father's argument fails for two reasons. First, at the Presentation Hearing, the father had already been defaulted – weeks prior to his being arrested – for having failed to appear in the case. As such, his post-default jailing is irrelevant.

The testimony taken at the Presentation Hearing could have been provided at the Termination Hearing where the father failed to appear, but for father's unsubstantiated claim that he was attending inpatient treatment. At that time, the father was not jailed. Second, despite the father's failure to appear, the trial court did consider the incarcerated parent factors, as the Department provided testimony at the Presentation Hearing about the father's history of incarceration and the nature of his relationship with the children. CP at 91-92, 204-205.

The father's reliance on *C.R.B.* to support his argument that the Department failed to meet its burden of proof is misguided. Br. Appellant at 19-20. *C.R.B.* is easily distinguishable from the current case. In *C.R.B.*, the Department social worker answered only eight leading questions about the case, giving two to four-word answers. *C.R.B.*, 62 Wn. App. at 612. Here, the Department social worker answered thirty-one questions, including several open-ended questions. CP at 52-56, 165-169. His testimony contained important details about the case, including how the children were doing, how the children came into care, the Department's efforts to identify if the children are Indian children, the nature of contact he had with the parents and the specific services offered to each parent. CP at 54, 167. The Department social worker also provided his opinion as to the likelihood that conditions could be remedied such that the children could

be returned to the father's care and gave details about the basis for his opinions, including the unstable and degrading relationship between the children and the father. CP at 92, 205.

The Department social worker provided details about the inconsistent visitation the father had with the children and negative impact it was having on the children. CP at 54-55, 167-168. He testified that the father's inconsistent visitation "effects the father's ability to maintain an appropriate, healthy, bond and positive attachment to the children it also effects his ability to further develop his parenting skills and identify the needs of the children." CP at 55, 168. Unlike in *C.R.B.*, the trial court's findings of fact in this case are well supported by the testimony from the Department social worker.

Finally, the Department social worker testified to the contact he maintained with the father while he was previously incarcerated during the dependency case. CP at 91, 204. In fact, the father's communication with the Department was more consistent while he was incarcerated. CP at 91, 204. The Department social worker testified that after his release, the "father's contact with the Department ha[d] become very inconsistent and intermittent." CP at 91, 204.

The more instructive case on point is *S.I. In re Welfare of S.I.*, 184 Wn. App. 531, 337 P.3d 1114 (2014).<sup>6</sup> In *S.I.*, the court affirmed the trial court’s denial of the mother’s motion to vacate default. *S.I.*, 184 Wn. App. at 536. Like the mother in *S.I.*, the father here was personally served with the termination petition and the notice and summons for each child by the Department social worker. *S.I.*, 184 Wn. App. at 536, CP at 15, 128. Like the mother in *S.I.*, the father here failed to appear at the Termination Hearing. *S.I.*, 184 Wn. App. at 536, CP at 21-22, 136-137. Like the mother in *S.I.*, the father had a hearing on his motion and was “allowed . . . the opportunity to vacate the default order.” *S.I.*, 184 Wn. App. at 536, RP.

For the mother in *S.I.*, “this opportunity allowed [the mother] the opportunity to establish “good cause” for failure to appear at the [termination hearing], and also the opportunity to address the factual basis of the termination of her rights.” *S.I.*, 184 Wn. App. at 536. Similarly, the father here had the opportunity to confirm he was attending inpatient treatment at the time of the Termination Hearing. CP at 47-48, 160-161. For the mother in *S.I.*, the due process afforded her “minimizes the risk of an improper termination of parental rights and contains satisfactory safeguards that properly balance the constitutional rights of all

---

<sup>6</sup> A similar analysis was employed in an unpublished opinion, *In the Matter of L.R.C.*, No. 32638–1–III, 2015 WL 7356451 (Wash. Ct. App. Nov. 19, 2015).

participants.” *S.I.*, 184 Wn. App. at 544. Like the mother in *S.I.*, the father here failed to establish any such good cause for his failure to appear, despite the court having “left the door open for some time in an abundance of fairness to the father.” *S.I.*, 184 Wn. App. at 544, RP at 14. Since the mother in *S.I.* did not “offer any evidence of a meritorious defense,” the S.I. court held that her motion to vacate was properly denied. *S.I.*, 184 Wn. App. at 544. Similarly, the father has failed to offer any evidence of a meritorious defense, and his motion should be denied.

In *S.I.*, “[t]he hearing was brief. *S.I.*, 184 Wn. App. at 539. The social worker assigned to the case answered questions under oath that mirrored the statutory requirements of termination.” *S.I.*, 184 Wn. App. at 539. The court in *S.I.* found that testimony sufficient to uphold the termination order. *S.I.*, 184 Wn. App. at 545. Here, the social worker assigned to the case also answered questions under oath, but did more than just mirror the statutory requirements for termination. CP at 89-93, 202-206. Here, the Department social worker provided ample and detailed testimony in support of the court’s order terminating the father’s parental rights, as previously discussed.

## V. CONCLUSION

These children have been legally free and waiting for permanency for thirteen months. The father failed to appear at the Termination Hearing

over a year ago and failed to provide an excuse for such failure, despite several opportunities to do so. The father's procedural due process rights were protected when he received ample notice and opportunity to be heard at the Termination Hearing. Furthermore, the trial court did not abuse its discretion in denying the father's motion to vacate. For the reasons stated herein, the Department requests that the order denying the father's motion to vacate the default judgment be affirmed, and his appeal be denied.

RESPECTFULLY SUBMITTED this 3rd day of June, 2020.

ROBERT W. FERGUSON  
Attorney General



---

TSERING D. CORNELL  
Assistant Attorney General  
WSBA No. 44409  
1220 Main Street, Suite 510  
Vancouver, Washington 98660  
(360) 759-2100  
OID No. 91014  
Email: vanfax@atg.wa.gov

## PROOF OF SERVICE

I certify that I caused to be served, through my paralegal, Mallory Maddox, a copy of this document on all parties or their counsel of record on the date below as follows:

**ELECTRONICALLY FILED WITH:**  
Washington State Court of Appeals  
Derek M. Byrne, Court Clerk  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454  
[coa2@courts.wa.gov](mailto:coa2@courts.wa.gov)

**COPY via E-mail To:**  
Jessica Wolfe  
WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
[jessica@washapp.org](mailto:jessica@washapp.org)

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3<sup>rd</sup> day of June, 2020, at Vancouver, WA.



---

TSERING D. CORNELL  
Assistant Attorney General

**ATTORNEY GENERAL'S OFFICE - RSD VANCOUVER**

**June 03, 2020 - 1:12 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54304-4  
**Appellate Court Case Title:** In re the Welfare of B.H. and G.H.  
**Superior Court Case Number:** 19-7-00023-8

**The following documents have been uploaded:**

- 543044\_Briefs\_Plus\_20200603131107D2043606\_3765.pdf  
This File Contains:  
Affidavit/Declaration - Service  
Briefs - Respondents  
*The Original File Name was 543044 Brief of Respondent.pdf*

**A copy of the uploaded files will be sent to:**

- Jessica Constance Wolfe (Undisclosed Email Address)

**Comments:**

---

Sender Name: Mallory Maddox - Email: mallory.maddox@atg.wa.gov

**Filing on Behalf of:** Tsering Dolker Cornell - Email: tsering.cornell@atg.wa.gov (Alternate Email: vanfax@atg.wa.gov)

**Address:**

Attorney General of WA, Vancouver RSD  
1220 Main Street, Suite 510  
Vancouver, WA, 98660  
Phone: (360) 759-2100

**Note: The Filing Id is 20200603131107D2043606**