[U]In re Dependency of E.M.

2002 | Cited 0 times | Court of Appeals of Washington | July 8, 2002

UNPUBLISHED OPINION

Vernal Morris appeals an order denying his motion to vacate the termination of his parental rights to E.M., his infant daughter. Although he received notice of the termination hearing, Morris, who was incarcerated at the time, did not request appointment of counsel to represent him. Morris' failure to appear was not the result of excusable neglect, and he made an insufficient showing of a meritorious defense or lack of hardship to the State. The trial court did not abuse its discretion in denying the motion to vacate. Morris also raises issues regarding the underlying termination proceeding. As he did not appeal the order on that proceeding, we do not consider those issues.

FACTS

On September 14, 1999, both parents agreed to an order of dependency for E.M., (9/14/99 RP 3) and the court placed her with the couple who had previously adopted her sister. (7/12/00 RP 17) Soon thereafter Vernal Morris was incarcerated in a state prison in Montana and then transferred to a federal holding facility in Oklahoma and to a federal prison in Oregon, arriving there on September 28, 2000. (12/5/00 RP 3; 2/21/01 RP 10) On October 12, 2000 Morris was served with a Notice and Summons for termination of his parental rights to E.M. (CP 56, 102) Morris did not contact the court to request appointment of counsel for this hearing, and neither he nor counsel appeared on his behalf. (CP 61) On December 5, 2000 the trial court entered an order terminating Morris' parental rights to E.M.

Morris was released from prison on December 26, 2000. (2/21/01 RP 12) He filed a motion to vacate the order terminating his parental rights on February 5, 2001. (CP 12-14) The trial court denied the motion on February 28, 2001, finding that Morris had not proved excusable neglect, due diligence, or a meritorious defense, and that the hardship to the State was sufficient to deny the motion.

DISCUSSION

Resolution of a motion to vacate a default judgment is addressed to the trial court's discretion.[1] In a motion to vacate a default judgment, the trial court primarily considers whether the moving party's failure to appear resulted from mistake, inadvertence, surprise, or excusable neglect, whether the party acted with due diligence after notice of the default judgment, whether the party has a meritorious defense, and whether vacating the judgment will result in a substantial hardship to the opposing party.[2]

In this case, Morris argued that his mail was delayed while he was in prison and that this constituted an excuse for his failure to request appointment of counsel. But the record shows that Morris was not transferred between prisons after September 28, 2000. He admitted that he received personal service of the Notice and Summons on October 12, 2000. The Notice contained the following advice of rights:

You have the right to have a lawyer represent you at the hearings . . . If you are already represented by a court-appointed lawyer in the dependency action, that lawyer will not represent you in this matter unless you request new appointment of a lawyer. To get a court-appointed lawyer you must contact Andrea Neupert at Snohomish County Juvenile Court, phone (425) 388-7953.

Morris never contacted the juvenile court, by letter or by telephone, to request appointment of counsel for the termination proceeding. (CP 61) Andrea Neupert, Dependency Intake Assistant for the Snohomish County Juvenile Court, stated that she routinely receives requests for appointment of counsel from incarcerated parents, and that she would have appointed counsel for Morris had he contacted the court. (CP 61). Morris said he did not telephone the court because he did not think they would have accepted a collect call; but Neupert said that if Morris had called collect she would have accepted the charges. (CP 61)

Nor did Morris present sufficient evidence to show that he had a meritorious defense. He stated that he enrolled in programs at the federal prison, but was on a waiting list and was released before starting them. (2/21/01 RP 17) He produced no evidence showing that he participated in any programs or counseling after his release from prison. And he presented no evidence to document completion of any program at any time.

The record shows that relinquishment of the mother's parental rights was scheduled at the time of the motion to vacate. E.M. had been in her current placement for a substantial amount of time and had never lived with Morris; further, the permanence of the current placement was an important concern.[3] For the foregoing reasons, the trial court did not abuse its discretion in denying the motion to vacate.

Morris argues that the State cannot terminate parental rights by default because the rights at stake are so important. But the case he relies on for this proposition, In re the Dependency of C.R.B.[4], is inapposite. In C.R.B., counsel appeared for the mother, although the mother herself did not appear. The court concluded that the trial court could not terminate her rights by default because her attorney was present at the hearing.[5]

Morris raises other issues regarding the termination proceeding itself. But he did not appeal from the termination of parental rights; in fact, his notice of appearance was not filed until March 22, 2001, substantially more than 30 days after the order terminating parental rights was entered.[6] Only the denial of the motion to vacate and not the underlying judgment is at issue in an appeal from denial of a motion to vacate.[7] The issues involving the underlying termination proceeding are not

properly before us, and we decline to entertain them. Affirmed.

1. Luckett v. Boeing Co., 98 Wn. App. 307, 309, 989 P.2d 1144 (1999).

2. White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968); Estate of Stevens, 94 Wn. App. 20, 26, 971 P.2d 58 (1999).

3. RCW 13.34.180(f).

4. 62 Wn. App. 608, 814 P.2d 1197 (1991).

5. Dependency of C.R.B., 62 Wn. App. at 616-617.

6. RAP 5.2(a).

7. Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).