IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Parentage of:	)	**No. 28593-6-III**
	)	
K.P.H.,	)	
	)	
AMY BEVERS,	)	
	)	
Appellant,	)	**Division Three**
	)	
v.	)	
	)	
RYAN LINEHAN, f/k/a RYAN HARRIS,	)	
	)	
Respondent.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Amy Bevers appeals the denial of her motion to vacate a default judgment which modified a parenting plan involving her son, K.P.H. Hampered by the record, we reverse and remand.

FACTS

On September 16, 2004, a final parenting plan was entered naming Amy Bevers as the primary residential parent for K.P.H., who was then age two. This plan severely

restricted the time K.P.H. was to spend with his father, Ryan Linehan. However, by mutual agreement outside the parenting plan, Mr. Linehan had regular visitation along with his parents Lark and Raymond Linehan (the grandparents).

In July 2008, Ms. Bevers was arrested. The grandparents immediately filed for nonparental custody of K.P.H. On August 1, 2008, the trial court entered an order denying adequate cause for the change in custody. Given Ms. Bevers' incarceration, Ms. Bevers and Mr. Linehan agreed to give temporary custody of K.P.H. to the grandparents. On October 31, 2008, due to personality conflicts with the grandparents, Ms. Bevers moved to end the temporary custody relationship. On November 10, 2008, the trial court granted her motion.

On November 17, 2008, Mr. Linehan moved to modify the parenting plan. He alleged Ms. Bevers had drug problems. His proposed plan named him as primary residential parent. It did not request any specific visitation restrictions. On January 22, 2009, the trial court denied the modification. Mr. Linehan then filed an amended petition for modification along with a proposed residential schedule on March 2, 2009. Ms. Bevers was incarcerated during this time and did not receive these documents.

The trial court entered a temporary residential schedule on March 6, 2009. An order of default was entered against Ms. Bevers on March 27, 2009. The court entered a

new residential schedule based on Mr. Linehan's amended petition. It allowed Ms. Bevers supervised visits with K.P.H. for four hours every other Saturday. The grandparents[1] or others named by Mr. Linehan were designated to supervise the visitation.

On May 4, 2009, Ms. Bevers requested a reconsideration of the visitation schedule on the grounds that she had no notice of any court hearings, that Mr. Linehan had not informed the court he lived in Idaho, and that Ms. Bevers did not have his home address.[2] On June 3, 2009, Ms. Bevers filed a new proposed parenting plan that would leave primary residence with Mr. Linehan and his wife. Ms. Bevers would have the child for one weekend a month and some vacations. Ms. Bevers' proposed supervision by her sister, the child's aunt.

During the summer of 2009, Ms. Bevers had occasional Saturday visits with K.P.H, supervised by the grandparents. Ms. Bevers claims the grandparents interfered with her visitation rather than merely supervising. Ms. Bevers also claims she had difficulty contacting Mr. Linehan and her son.

Ms. Bevers had been proceeding *pro se* up to this point. She obtained counsel and

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[1] Ms. Bevers' letters to the court document numerous controversies between her and the grandparents.

[2] There is nothing in the record indicating any action by the trial court on this or any other request made directly by Ms. Bevers.

filed an amended motion to vacate on September 11, 2009. Ms. Bevers testified at the hearing on the motion. She stated that she did not receive notice of Mr. Linehan's modified petition, and she was under the impression that the court's action in January, denying Mr. Linehan's initial attempt to modify the parenting plan, meant that she did not need to respond to the original petition. The trial court denied the motion to vacate.

Ms. Bevers then timely appealed. Mr. Linehan chose to represent himself on appeal. He did not designate any record for consideration. He filed a brief that was rejected by this court due to noncompliance with the Rules of Appellate Procedure. He did not file a corrected brief. This court considered the matter without argument.

ANALYSIS

This case turns, unfortunately, on the state of the record. The failure of Mr. Linehan to file a brief or present other portions of the record leaves this court in the difficult position of reviewing discretionary rulings without fully knowing the basis for the exercise of discretion.

When a respondent defaults in taking part in an appeal, the appellate court has discretionary authority, as it did prior to the enactment of the Rules of Appellate Procedure, to review the case under *prima facie* evidence of error standard. *Brown v. Seattle Pub. Sch.*, 71 Wn. App. 613, 616 n.2, 860 P.2d 1059 (1993), *review denied*, 123

Wn.2d 1031 (1994); *State v. Wilburn*, 51 Wn. App. 827, 755 P.2d 842 (1988). "In such cases the standard of review is limited to the determination of whether the appellant's brief, considered in light of the record, establishes a prima facie case of reversible error." *Brown*, 71 Wn. App. at 616 n.2.

CR 60 provides authority for courts to relieve parties from court orders. Decisions on motions to vacate are reviewed for abuse of discretion. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985). A trial court abuses its discretion when it exercises it on untenable grounds or for manifestly unreasonable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court also abuses its discretion when it applies the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). Default judgments are not favored since they prevent controversies from being resolved on the merits. *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 19 P.3d 1081 (2001).

Courts address four factors in deciding whether to vacate a default judgment:

> The two primary factors are (1) the existence of substantial evidence to support at least a prima facie defense to the opposing party's claim; and (2) the failure to timely appear was the result of mistake, inadvertence, surprise or excusable neglect. The secondary factors are (3) the party seeking relief acted with diligence after receiving notice of the default judgment; and (4) the effect on the opposing party would not be prejudicial if the judgment were vacated. These factors are interdependent; thus, the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors.

Newbigging, 105 Wn. App. at 186 (citations and internal quotations omitted).

This court has not been favored with the record of the March 6 or March 27 hearings, nor with the argument on the amended motion to vacate the default order.[3] Because defaults are disfavored and the record reflects that K.P.H. had been in his mother's custody for all of his life up to the time of the default order, we exercise our discretion to review this case for *prima facie* evidence of error.

On the record before this court, Ms. Bevers has demonstrated *prima facie* error involving the default order. She was not served with the amended parenting plan nor given notice of the hearing date at which she was defaulted. We do not know what information the trial court considered when it modified the parenting plan, nor do we have any information why the custody situation was so drastically altered. There is no report from a guardian *ad litem*, nor any other written explanation for the changes.

This is not to say that the modified plan is erroneous. On this record, we just do not know because Mr. Linehan has not provided appropriate argument. While stability in child-rearing is critical, and a parent's right to raise a child also is important, the critical factor in custody placement is the best interests of the child. Given the state of this record, it is unknown why the trial court acted as it did. It also appears to us that the

[3] The sole report of proceedings consists of the court's ruling on the motion to vacate the default order.

mother was not given the opportunity to be heard. This is *prima facie* error. Accordingly, the record compels us to reverse the order denying the motion to vacate the default order and amended parenting plan.

Reversed and Remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.