IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

A.B., MOTHER OF C.B. AND Z.B.P., CHILDREN,

Appellant,

v. Case No. 5D19-3331

DEPARTMENT OF CHILDREN AND FAMILIES,

Appellee.
_____/

Opinion filed February 5, 2020

Appeal from the Circuit Court
for Orange County,
A. James Craner, Judge.

Krista M. Bartholomew, of The KMB Law Firm, P.A., Orlando, for Appellant.

Kelley Schaeffer, of the Department of Children and Families, Bradenton, for Appellee.

Elise M. Ezzo, Windermere, for Guardian ad Litem.

LAMBERT, J.

A.B., the mother of two minor children, C.B. and Z.B.P., ("Mother") appeals the final judgment terminating her parental rights under section 39.801(3)(d), Florida Statutes (2018). Mother's sole argument on appeal is that the trial court erred in denying her motion to set aside the "default" resulting from her failure to personally attend the

adjudicatory hearing. Concluding that the trial court did not abuse its discretion in denying Mother's motion, we affirm.

The Department of Children and Families ("DCF") filed an expedited petition to terminate Mother's parental rights to these two children, alleging three separate statutory grounds for termination under section 39.806(1), Florida Statutes (2018). DCF also detailed in its petition why it was in the children's manifest best interests for Mother's parental rights to be terminated and further alleged that termination of Mother's parental rights was the least restrictive means of protecting the children.

Counsel was appointed to represent Mother in these proceedings. Mother did not appear in court at the scheduled time for the adjudicatory hearing. Mother's counsel was present, and the court proceeded to take testimony and receive other evidence. The hearing concluded without Mother's personal attendance. In its final judgment terminating Mother's parental rights, the court found that Mother was properly noticed as to the date, place, and time of the adjudicatory hearing; that she was ordered to personally appear at the hearing; and that under section 39.801(3)(d), Florida Statutes, her failure to personally appear at this hearing constituted her consent to the termination of her parental rights.

Mother promptly sought to vacate her statutorily-imposed consent to the termination of her parental rights by filing a "Motion to Set Aside Default and Motion for Rehearing." Following an evidentiary hearing at which Mother testified,[1] the trial court entered a written order denying the motion. This appeal ensued.

Section 39.801(3)(d), Florida Statutes (2018), provides, in pertinent part, that:

[1] Mother confirmed at this hearing that she was aware of the date, place, and time for the adjudicatory hearing.

> If a parent appears for the advisory hearing and the court orders that parent to personally appear at the adjudicatory hearing for the petition for termination of parental rights, stating the date, time, and location of said hearing, then failure of that parent to personally appear at the adjudicatory hearing shall constitute consent for termination of parental rights.

Here, Mother has not challenged the trial court's finding in the final judgment of what the Florida Supreme Court has described as a "constructive consent to termination entered pursuant to section 39.801(3)(d)." *See Fla. Dep't. of Child. & Fam. Servs. v. P.E.*, 14 So. 3d 228, 236 (Fla. 2009). Mother's argument is that the court abused its discretion in not subsequently vacating her consent. *See D.M. v. Dep't of Child. & Fams.*, 921 So. 2d 737, 739 (Fla. 5th DCA 2006) (applying abuse of discretion standard of review to final judgment terminating parental rights based on parent's consent under section 39.801(3)(d) due to non-appearance at hearing); *In re J.B.*, 990 So. 2d 520, 523 (Fla. 2d DCA 2008) (reviewing denial of motion to set aside consent based on the failure to appear at the adjudicatory hearing for an abuse of discretion).

A constructive consent to termination of parental rights entered under section 39.801(3)(d) may be set aside under the "usual three-part test" applied to vacating other defaults. *P.E.*, 14 So. 3d at 236 (citing *E.S. v. Dep't of Child. & Fam. Servs.*, 878 So. 2d 493, 496 (Fla. 3d DCA 2004)); *see also* Fla. R. Civ. P. 1.540(b)(1). Under this test, the party seeking to vacate the consent by default in termination proceedings must: (1) act with due diligence, (2) demonstrate excusable neglect, and (3) show the existence of a meritorious defense to the termination petition. *P.E.*, 14 So. 3d at 236 (quoting *E.S.*, 878 So. 2d at 496).

In the present case, at the hearing on Mother's motion to set aside her "default" or "constructive consent," Mother presented no evidence of any "meritorious defense" in

satisfaction of the third prong of this test. Mother made no mention in her motion of a meritorious defense; and her only attempt to address this third prong at the hearing consisted of a vague, underdeveloped suggestion of a potential defense to one of the three separate statutory grounds for termination of her parental rights alleged in DCF's petition. Mother failed to suggest the existence of any defense to the other two statutory grounds alleged by DCF. Under these circumstances, we conclude that the trial court did not abuse its discretion in denying Mother's "Motion to Set Aside Default" and that Mother remains "bound by [her] statutory consent." *See P.E.*, 14 So. 3d at 237.

AFFIRMED.

EDWARDS and HARRIS, JJ., concur.