STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0478

In the Matter of the Welfare of the Child of: J. L. C., Parent

Filed October 15, 2018
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-JV-17-370

Daniel W. Homstad, Dan Homstad Defense LLC, Bloomington, Minnesota (for appellant)

Michael O. Freeman, Hennepin County Attorney, Michelle A. Hatcher, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Shirley A. Reider, St. Paul, Minnesota (for guardian ad litem Carolina Amini)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant-father argues that the district court abused its discretion in denying his motion to vacate the default judgment terminating his parental rights. Because there was no abuse of discretion in the denial of appellant's motion, we affirm.

FACTS

Appellant J.L.C. and D.E., who have a history of domestic violence, are respectively the father and mother of J.R.C., born in 2017. Shortly after the birth, J.R.C. was ordered into out-of-home placement and placed with her paternal aunt, appellant's sister, where she has remained. D.E. was notified that, if she failed to appear at a hearing on June 6, 2017, her parental rights could be terminated; she did not appear, and her parental rights to J.R.C. were terminated.[1]

Appellant was notified that, if he failed to appear at a hearing on September 18, 2017, at 9:00 a.m., his parental rights to J.R.C. could be terminated. He did not appear for the hearing, nor did he respond to phone calls from his case manager. The district court continued the hearing to 10:00 a.m., but, when appellant had not appeared or been heard from by that time, the district court proceeded with a default hearing. The testimony and evidence presented at the hearing indicated that termination of appellant's parental rights would be in J.R.C.'s best interests. Appellant arrived at court after the default hearing had concluded. He was asked why he had not returned the case manager's phone call and replied that he did not think of it.

Six days later, appellant reported that he did not appear for his trial because D.E. had slashed his tires that morning. He filed a motion to vacate the default judgment and for a new trial. Following two hearings, appellant's motions were denied and his parental

[1] D.E. is the mother of five other children to whom her parental rights have been voluntarily or involuntarily terminated.

rights were terminated. He argues that the district court abused its discretion in denying his motions to vacate the default judgment and for a new trial.

D E C I S I O N

"[An appellate court] will not overturn a ruling on a motion to vacate a default judgment unless the district court abused its discretion." *Roehrdanz v. Brill*, 682 N.W.2d 626, 631 (Minn. 2004). A party seeking to vacate a default judgment must show (1) a reasonable defense on the merits; (2) a reasonable excuse for the failure to act; (3) due diligence in responding to the entry of judgment; and (4) the absence of substantial prejudice to the opposing party if the motion to vacate is granted. *In re Welfare of Children of Coats*, 633 N.W.2d 505, 510 (Minn. 2001). The parties agree that appellant showed due diligence in responding to the entry of judgment.

1. Defense on the Merits

Appellant argues that he has a reasonable defense on the merits because he: (1) substantially complied with his case plan, (2) purchased some baby supplies, (3) has been sober for one year, (4) worked with the mental-health court and probation officer, (5) participated in parenting classes, (6) completed a 30-day inpatient treatment program in June 2017, and (7) attended eight sessions of a domestic violence/anger management program.

But testimony from appellant's case manager, who has been on the case since J.R.C.'s birth, indicated that appellant did not substantially comply with his case plan. When asked if she could explain appellant's compliance, she answered:

> [H]is case plan included getting a Rule 25 [assessment], getting some therapy for his chemical addiction. He's admitted to using K2, cocaine, alcohol, and marijuana. He . . . completed an outpatient program, and he's now involved in a once a week ongoing aftercare program. He was also asked to get involved in an anger-management domestic violence program . . . . He's been attending the meetings, I believe he's missed three of them. There [have] been some issues . . . [After his] last meeting . . . the facilitators sent me an update because they were concerned about the aggression he was demonstrating toward the facilitator. . . . He admitted that anger management is something he needs to continue working on.
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> . . . [H]e's in mental health court right now. . . . [H]e's supposed to have ongoing therapy and follow the recommendations of a psychiatrist. He's self-reported that he was diagnosed with bipolar disorder, anxiety, and depression. Since the case has opened, he has not attended any therapy or seen a psychiatrist, so he hasn't been med[ication] compliant the whole time. . . . I believe there's three different therapists that he's told me he's seen, but he's never been willing to sign releases so I can get follow-up information. And . . . on the 30th of August, he admitted to me that he has not seen a therapist since the case opened.
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> . . . [M]ental health is a really big concern . . . . [H]is probation officer, . . . his inpatient . . . or outpatient therapist . . . and . . . the anger management [services] . . . all feel he needs additional emotional support and therapy regarding . . . [the] huge amount of trauma in his background.
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> Another part of the case plan was to maintain gainful employment. He's been . . . on leave from work since the case opened. He was in a car accident and got a head injury. And then his former partner, [D.E., J.R.C.'s mother] attacked him with a hammer and hit him on the head. . . . [H]e has not been working . . . .

When asked if she was concerned about appellant's emotional and mental health, the case manager testified:

> [W]hen I visit him at home, . . . he gets like super anxious and then he'll just crumble and start sobbing. He talks about how he can't handle all the pressure in his life and . . . he's really on edge. And that's my primary concern about him being able to

> manage the stresses of a newborn child[:] he seems not able to cope with his own everyday stressors.

When asked about appellant's housing, the case manager testified, "He currently lives in apartment building where . . . registered sex offenders also live . . . and a lot of addicts . . . . It would definitely not be a safe place to have [J.R.C.]. And in [his] visitation, he's specifically prohibited from bringing her [there.]" When asked if she thought J.R.C. would be safe in appellant's care, she replied, "At this time, I do not think she would be safe in his care."

Appellant's relationship with D.E. was the subject of testimony from his case manager, his probation officer, and two police officers. The case manager testified,

> [H]e currently has an order for protection and . . . there's also a DANCO against D.E. She's physically attacked him on numerous occasions. . . . [P]robation has been working with [appellant] to call [the probation officer] when [D.E.] comes. At first he wouldn't even do that, even with the OFP and the DANCO. Now sometimes he'll call 911 but he'll refuse to follow up and press charges against her, so that's a significant safety issue, too . . . [a]nd . . . an ongoing concern [is] that [D.E.] may come around when [appellant is] with [J.R.C.].

The probation officer wrote on December 4, 2017:

> While [appellant] does have an OFP against [D.E., people] "have continually seen him within the neighborhood with [her]. . . . [Appellant] could be a good father to [J.R.C., but] . . . he would have to have a close watch by child protection to maintain safety for the child. [D.E.] is a [problem] for him, a HUGE DEBILITATING problem for him. I think sometimes he just can't say no to her. . . . [D.E.] NEEDS TO BE OUT OF THE PICTURE . . . TOTALLY. . . [I]f that doesn't happen, then I fear for the child's safety.

(Emphasis in original, quotation omitted.)

A police officer reported that, on December 11, 2017, he was called to appellant's apartment where domestic abuse was in progress. He met D.E., who said that appellant had attacked her when she came to retrieve her property, "swung on her two times hitting her in the lip and nose" and told her "he was going to kill her as he hit her." D.E. refused to fill out domestic-violence supplement forms against appellant.

Another police officer reported that, on February 5, 2018, he responded to a domestic assault call at a dance club and met with D.E. She said she noticed that appellant was in the club and left because he had an OFP against her. Appellant was upset because he wanted her to stay and followed her. When they reached an intersection he "grabbed her, punched her on the right side of her face, and bit her in the right side of the face, . . . took her jacket and also forcibly took her cell phone and purse." D.E. gave oral answers to questions on the domestic assault supplement form to the officer, saying that "she is not sure if [appellant] will seriously injure or kill her or their child [JRC] and that he threatens to assault her all the time"; she also said that appellant "obtained an OFP against her because she was a crack cocaine user and [appellant] was trying to get custody of their child."

The district court's findings reflect the testimony of the case manager, the probation officer, and the police officers, as well as the exhibits. Appellant does not dispute any of the testimony or the contents of the exhibits. The district court did not abuse its discretion in concluding that appellant's "[r]easonable [d]efense on the [m]erits is [d]eficient" because appellant has not shown that his parental rights are not likely to be terminated.

2. Reasonable Excuse for the Failure to Act

Appellant submitted an affidavit dated October 16, 2017, stating that: (1) he received text messages reminding him of his termination-of-parental-rights hearing scheduled on September 18 at 9:00 a.m. and his mental-health-court hearing scheduled on September 19 at 10:00 a.m.; (2) he confused the times and thought the termination-of-parental-rights hearing was at 10:00 a.m.; (3) he realized this when he received messages from his sister (J.R.C.'s foster parent) and his case manager asking where he was; (4) when he left his building to go to court, he saw D.E., who had slashed his tires; (5) he called both a cab and 911; (6) it was close to 10:00 a.m. when the cab arrived; (7) the hearing was over but the judge was still on the bench and the parties were still in the courtroom when he arrived at the court; (8) he was told it was too late and his parental rights had been terminated; and (9) his request to have the case heard immediately was denied.

The district court did not find appellant's account credible. "In his affidavit, [appellant] states that he arrived at the hearing, while the Judge was still on the bench. This is not true. [Appellant] apparently arrived after the Judge was already in chambers. Thus, the court finds that [appellant's] affidavit lacks credibility." The district court also found that:

> Attempts to contact [appellant] prior to the court date were made by the [case manager], Guardian ad Litem, and [appellant's] counsel. [Appellant] did not answer his phone or return any of the phone calls. On the day of the trial, the [case manager] called [appellant] twice, but he did not answer her phone calls. The [case manager] also called [appellant's] sister, the foster parent, in an attempt to communicate with [him], but was unsuccessful. The trial was scheduled to start at 9:00 a.m.; however, the court continued the trial to 10:00

> a.m. to give [appellant] more time to either appear [or] communicate his whereabouts. At 10:00 a.m. the court proceeded by default. [Appellant] did make an appearance after the default hearing had concluded. When asked why he did not return the [case manager's] phone call, he stated that he didn't think about it. [Appellant] did not mention the altercation with [D.E., i.e., her slashing of his tires] until six days later when police were dispatched to [appellant's] residence due to a reported domestic-violence-with-weapons incident.

Appellant does not refute any of these findings. The district court's determination that appellant's "[r]easonable [e]xcuse for [f]ailing to [a]ppear [l]acks [m]erit" is not an abuse of discretion.

3. Prejudice to the Opposing Party

J.R.C., now 20 months old, has been in out-of-home placement with her paternal aunt for her entire life. Reasonable efforts to correct the conditions leading to out-of-home placement of children under eight years old are presumed to have failed when the children have been in out-of-home placement for six months, and parental rights to such children may be terminated. Minn. Stat. § 260C.301, subd. 1(b)(5) (2016). Thus, reasonable efforts to correct the conditions leading to J.R.C.'s out-of-home placement were presumed to have failed more than a year ago, on July 27, 2017; she still lacks permanent status; and vacating the default termination of appellant's parental rights would prejudice her by prolonging her nonpermanent status.

Appellant offers no legal support for his argument that vacating the default termination of his parental rights would be in J.R.C.'s best interest, and J.R.C.'s best

interest is the primary consideration in this TPR dispute.[2] *See* Minn. Stat. § 260C.301, subd. 7 (2016) ("In any proceeding under this section, the best interests of the child must be the paramount consideration" and "[w]here the interests of parent and child conflict, the best interests of the child are paramount.").

Appellant cites five cases to support his argument that "prejudice to the opposing party [i.e., J.R.C.] is not established by a showing of the delay which is suffered by any litigant when a case is continued, at least where no evidence has become unavailable or witnesses lost," but the cases are all distinguishable: they deal with adult litigants and their ability to prevail in litigation.[3] J.R.C. is not an adult litigant concerned about prevailing; she is a 20-month-old who needs and is entitled to placement in a permanent home, and delay will prejudice her and the guardian ad litem representing her interests.

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[2] Appellant also offered no support for the view stated at oral argument that J.R.C. will not be prejudiced because she will remain where she is regardless of the delay. But "[t]the purpose of the laws relating to . . . termination of parental rights . . . is[,]. . . if placement with the parents is not reasonably foreseeable, to secure for the child a safe and permanent placement . . . preferably with adoptive parents or . . . a fit and willing relative through transfer of permanent legal and physical custody to that relative." Minn. Stat. § 260C.001, subd. 3(2) (2016). J.R.C. will be deprived of *permanent* placement unless and until appellant's parental rights are terminated.

[3] *See Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988) (no prejudice other than that resulting from delay, which does not establish prejudice); *Riemer v. Zahn*, 420 N.W.2d 659, 662 (Minn. App. 1988) (no prejudice when delay does not cause evidence to be affected or witnesses to be unavailable); *Petrich v. Dyke*, 419 N.W.2d 833, 835 (Minn. App. 1988) (finding "no prejudice to [the opposing party] other than his costs and the minimal prejudice inherent in every delay"); *Hill v. Tischer*, 385 N.W.2d 329, 332 (Minn. App. 1986) (no prejudice where witnesses can be located); *Guillaume & Assocs., Inc. v. Don-John Co.*, 371 N.W.2d 15, 18 (Minn. App. 1985) (concluding that opposing party's litigation techniques as well as defaulting party's neglect caused delay).

There is no basis to vacate the default judgment terminating appellant's parental rights.

Affirmed.