

FILED: July 18, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of S. W. D.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

K. M. P.,
Appellant.

Coos County Circuit Court
10JV0056

Petition Number
060211SDM

A150404

Martin E. Stone, Judge.

Argued and submitted on May 17, 2012.

Shannon Flowers, Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Appellate Division, Office of Public Defense Services.

Cecil A. Reniche-Smith, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Reversed and remanded with instructions to set aside judgment terminating mother's parental rights.

1 SCHUMAN, P. J.

2 The juvenile court terminated mother's parental rights in her 20-month-old
3 son after the state made a *prima facie* showing at a pretrial conference at which mother
4 failed to appear. Mother subsequently filed a motion to set aside the termination
5 judgment because her nonappearance was the result of excusable neglect. The court
6 summarily denied her motion. Mother appeals, contending that her nonappearance was
7 due to excusable neglect and that the juvenile court abused its discretion in denying her
8 motion to set aside the termination judgment. We agree. We therefore reverse and
9 remand.

10 In April 2010, the juvenile court took jurisdiction over mother's son. On
11 June 2, 2011, the Department of Human Services (DHS) filed a petition to terminate
12 mother's parental rights to the child. The juvenile court scheduled a pretrial conference
13 for 9:00 a.m. November 21, 2011, and a trial for December 7 through December 9, 2011.
14 The court ordered mother to appear personally and advised her that her parental rights
15 could be terminated if she failed to do so.

16 Mother did not appear at the pretrial conference scheduled for 9:00 a.m.
17 November 21, 2011. Her counsel advised the court and other parties that counsel had
18 spoken with mother by telephone several times that morning, and learned from her that
19 she had mistakenly written down the hearing's start time as 2:30 p.m. and, when she
20 discovered the mistake, attempted without success to find transportation to the
21 courthouse. DHS requested the court to allow it to move forward with a default and
22 present a *prima facie* case for termination of mother's parental rights. Mother's counsel

1 objected and stated that mother's mistake as to the time of the hearing and inability to
2 find a ride to the courthouse could constitute excusable neglect. Mother's counsel asked
3 the court to delay the proceeding to later in the day. The court denied mother's request
4 without explanation and allowed the state to present its *prima facie* case for termination
5 of mother's parental rights based on unfitness. At the conclusion of the hearing, the
6 juvenile court ruled from the bench that it would terminate mother's parental rights and
7 cancelled the trial scheduled for December 7, 2011. The court entered a termination
8 judgment on November 30, 2011.

9 On December 1, 2011, mother filed a motion to set aside the default
10 judgment with a supporting affidavit. Mother averred that she had mistakenly written
11 down the incorrect time of 2:30 p.m. for the November 21, 2011, 9:00 a.m. hearing; that
12 she had attempted to find a ride to the courthouse when she learned of her mistake on
13 November 21, 2011; and that she and another witness intended to testify on her behalf at
14 trial. The juvenile court denied mother's motion on December 5, 2010, again without
15 explanation. Mother appeals.

16 ORS 419B.819(7) authorizes a juvenile court to terminate a parent's rights
17 if that parent fails to appear "for any hearing related to the [termination] petition." Under
18 ORS 419B.923(1)(b), however, the juvenile court has the discretion to set aside a
19 termination judgment on the basis of excusable neglect:

20 "Except as otherwise provided in this section, on motion and such
21 notice and hearing as the court may direct, the court may modify or set
22 aside any order or judgment made by it. Reasons for modifying or setting
23 aside an order or judgment include, but are not limited to:

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"(b) Excusable neglect."

We addressed the issue of excusable neglect as a ground for setting aside a default judgment of termination in *State ex rel Dept. of Human Services v. G. R.*, 224 Or App 133, 135, 197 P3d 61 (2008). As we explained in that case, ORS 419B.923(1)(b) requires the court to engage in a two-step, sequential analysis in determining whether the judgment should be set aside because of excusable neglect. First, the court must determine whether the parent has established as a matter of law that the nonappearance resulted from excusable neglect. 224 Or App at 139. The concept of "excusable neglect" as used in ORS 419B.923(1)(b) encompasses "a parent's reasonable, good faith mistake as to the time or place of a dependency proceeding." *G. R.*, 224 Or App at 141-42. Second, if the parent makes the predicate showing of excusable neglect, the court "retains some range of discretion" to determine whether, in the totality of the circumstances, to allow the motion. *Id.* at 143.

As noted, the juvenile court in this case summarily denied mother's motion to set aside the judgment terminating her parental rights. On appeal, mother contends that her nonappearance constitutes excusable neglect as a matter of law, and that, in light of the totality of the circumstances, the court improperly exercised its discretion to deny mother's motion to set aside the termination judgment. This court reviews the juvenile court's determination as to whether there was excusable neglect for errors of law, and reviews the juvenile court's ruling denying a motion to set aside the termination judgment for an abuse of discretion. *Id.* at 139-40.

1 *G. R.* is sufficiently similar to the present case that it provides a good
2 template for our review of the juvenile court's order. In *G. R.*, the father had been
3 actively working with his attorney and had appeared at two pretrial hearings at 11:00 a.m.
4 *Id.* at 137. The court scheduled a subsequent trial for 11 days later, to begin at 9:00 a.m.,
5 and ordered the father to appear in person. When the father failed to do so, the court
6 allowed the state to present its *prima facie* case and ruled orally that it would terminate
7 father's parental rights. Four days later, the father moved to set aside the termination
8 judgment. In support of his motion, the father averred that he had mistakenly believed
9 that the trial had been set to begin at 11:00 a.m., rather than 9:00 a.m.; that upon learning
10 of his mistake, he immediately drove to the courthouse and arrived at 9:31 a.m.; and that
11 because the court had scheduled another termination trial for the same day, his trial
12 would have been rescheduled in any event. *Id.* at 137-38.

13 The juvenile court in *G. R.* denied the father's motion to set aside the
14 termination judgment, and the father appealed, arguing that the mistake as to the time of
15 trial constituted excusable neglect and that the juvenile court had abused its discretion in
16 denying his motion to set aside the termination judgment. We agreed, and reversed the
17 order denying the father's motion to set aside the judgment. We explained:

18 "Notwithstanding written and oral notice that the trial was to begin
19 at 9:00 a.m. on March 17, father was not present in the courtroom at that
20 time. However, counsel informed the court that both parents mistakenly
21 believed the trial was to begin at 11:00 a.m. and were 'on their way.' The
22 trial court determined, nevertheless, to proceed in their absence. Father,
23 upon learning of his mistake, immediately attempted to rectify it, arriving
24 in the courtroom, after driving from Brownsville to Albany, at 9:31 a.m., 13
25 minutes after the court had orally ordered termination upon completion of
26 the state's *prima facie* presentation. Thereafter, in support of his motion to

1 set aside, father averred that he had innocently, inadvertently confused the
2 11:00 a.m. starting time for the pretrial status conference with the 9:00 a.m.
3 starting time for the trial.

4 "In sum, father was actively engaged in preparing for the termination
5 trial, failed to appear because of a mistake as to the time of trial, acted
6 immediately upon learning of that mistake, and offered a reasonable,
7 uncontroverted explanation for his mistake. The totality of those
8 circumstances establishes, as a matter of law, 'excusable neglect' for
9 purposes of ORS 419B.923(1)(b).

10 "That does not, however, end the inquiry. Rather, as noted, given
11 the design of ORS 419B.923(1)(b), the trial court has some discretion to
12 deny a motion to set aside even if the movant establishes 'excusable
13 neglect.' We are unaware of any published discussion of the contours of
14 that discretion. We can, however, divine several considerations that should
15 reasonably guide, and restrict, the exercise of discretion in this context.
16 Those considerations include, at least, the following: (1) the nature and
17 magnitude of the interest that was adjudicated and 'forfeited' in the movant's
18 absence; (2) the movant's promptness in attempting to rectify his or her
19 nonappearance; (3) the extent to which the interests of other parties and the
20 court would be prejudiced if the motion were granted, including because of
21 intervening detrimental reliance on the judgment; and (4) whether the
22 movant can present at least a colorable defense on the merits.

23 "Here, those considerations militate decisively in father's favor.
24 First, it is difficult to imagine a more profound interest to be lost by way of
25 an irrevocable default than parental rights. Second, father here moved very
26 quickly to set aside the termination--within four days of the termination
27 hearing--and, indeed, 20 days before the entry of the termination judgment.
28 Third, the record discloses no detrimental reliance by any party on the
29 court's oral termination order in the four-day interval between that order
30 and the filing of the motion to set aside. Nor does the record disclose that
31 [the child's] interest would be meaningfully impaired if the trial were reset.
32 Further, although we are most mindful of the exigencies of dependency
33 proceedings, the uncontradicted information in father's affidavit shows that
34 another termination case was scheduled for trial the same day and would
35 have taken precedence over this case, which would have had to have been
36 rescheduled. That strongly suggests that the requested relief could have
37 been granted 'without doing violence to the regular disposition of litigation.'
38 National Mortgage Co. v. Robert C. Wyatt, Inc., 173 Or App 16, 24, 20 P3d
39 216, *rev den*, 332 Or 430 (2001). Finally, whatever the ultimate merit of

1 his position, father was, in fact, prepared to defend against the substance of
2 the termination petition.

3 "Conversely, we do not discern--and the state does not identify--any
4 discretionary consideration compelling the denial of relief under ORS
5 419B.923(1)(b). Accordingly, in the totality of the circumstances, the trial
6 court erred in denying father's motion under ORS 419B.923(1)(b)."

7 *Id.* at 142-44.

8 Here, as in *G. R.*, we discuss first the question of "excusable neglect."

9 Mother addressed the reason for her nonappearance in an affidavit in support of her
10 motion to set aside the default judgment:

11 "I tried to come to court for the pre-trial hearing. I had written down the
12 appearance for 2:30 in the afternoon. My attorney called me at 8:45 a.m. I
13 spoke with my attorney before the hearing and was unable to get a ride to
14 court for the hearing. I tried to get a ride from Pastor Matt Gass, and also
15 from another church member, Bob Meksch. I also asked Anita, the foster
16 mother, for a ride as she sometimes takes us to court. No one was able to
17 take me. Father's mother, who sometimes takes us to court, was unable to
18 drive us because she had no gas."

19 Mother contends that, as in *G. R.*, her affidavit demonstrates that her nonappearance was
20 due to a reasonable, uncontroverted, and good faith mistake as to the time of the pretrial
21 conference: Mother mistakenly wrote down a hearing time of 2:30 p.m. rather than 9:00
22 a.m. Mother also highlights other circumstances that make this case similar to *G. R.*:
23 Mother had been actively engaged in preparation for trial and she acted immediately
24 upon learning of her mistake by attempting to find a ride to the courthouse. She contends
25 that, considered together, those circumstances constitute excusable neglect.

26 In the state's view, mother's affidavit does not demonstrate excusable
27 neglect, because it does not explain *why* mother wrote down the incorrect time of 2:30

1 p.m. for the 9:00 a.m. hearing, when every other hearing in this matter had been
2 scheduled for 9:00 or 9:30 a.m. Here, the state reasons, unlike in *G. R.*, where the father
3 "offered a reasonable, uncontroverted explanation for his mistake," *Id.* at 143, mother
4 offered no plausible basis for her mistake.

5 In *G. R.*, we highlighted the legislative history of ORS 419B.923(1),
6 specifically the provision regarding "excusable neglect":

7 "[T]he legislative history of ORS 419B.923(1) discloses that the
8 legislature, in enacting the statute's 'excusable neglect' provision, was
9 especially concerned with 'horror stor[ies]' of parents having their rights
10 terminated in their absence when, because of good faith mistakes, they
11 went to the wrong courtroom or appeared at the wrong time. *See* Tape
12 Recording, Senate Committee on Judiciary, HB 2611, Apr 30, 2001, Tape
13 115, Side B (statements of Sen John Minnis and Kathie Osborn, Senior
14 Attorney, The Juvenile Rights Project)."

15 224 Or App at 141. We said that, given that history, we had "no doubt that the legislature
16 intended 'excusable neglect' in ORS 419B.923(1)(b) to encompass a parent's reasonable,
17 good faith mistake as to the time or place of a dependency proceeding." *Id.* at 141-42.

18 Mother has offered evidence that her failure to appear at the hearing was due to a
19 "reasonable, good faith mistake" as to its time, and that evidence is uncontroverted.

20 Although it is true, as the state contends, that mother did not offer an explanation for *why*
21 she wrote down the incorrect time for the hearing, that does not undermine her
22 explanation that she failed to appear because of a good faith mistake as to the time of the
23 hearing. In *G. R.*, we concluded that that is the type of mistake that will constitute
24 excusable neglect. Parental rights should not be terminated because of a good faith--if
25 careless--mistake as to the time of a hearing, and we so conclude here. Further, when

1 mother learned of her mistake as to the time, she immediately attempted to find a ride to
2 the courthouse, but was unable to do so. Mother had been actively working with her
3 attorney in preparation for trial and had never missed a court appearance with respect to
4 another child. We conclude that those circumstances constitute excusable neglect under
5 ORS 419B.923(1)(b) as a matter of law.

6 Further, as in *G. R.*, we conclude that the considerations that the court has
7 identified as relevant to the court's discretion in ruling on a motion to set aside a
8 termination judgment, 224 Or App at 143, militate decisively in mother's favor. First, as
9 in *G. R.*, the rights forfeited by virtue of the default--parental rights--are profound. *Id.*
10 Second, mother moved quickly to set aside the termination judgment--only one day after
11 the court entered the judgment. Third, there is no evidence that any party has relied to its
12 detriment on the termination judgment and no evidence that the child would be harmed
13 by a minimal delay in rescheduling. Additionally, the hearing at which mother failed to
14 appear was a pretrial hearing and not the trial itself. Had mother appeared, the court
15 would not have proceeded with an adjudication at that time, and would not have heard the
16 termination case until 16 days later, when it had been scheduled for trial. Under those
17 circumstances, the juvenile court could have granted mother's motion to set aside the
18 termination judgment "without doing violence to the regular disposition of litigation." *Id.*
19 at 144.

20 Fourth, as in *G. R.*, mother had been actively working with her attorney in
21 preparation for trial, and both she and another witness were prepared to testify on her
22 behalf. Finally, as in *G. R.*, DHS has not identified or offered any evidence regarding the

1 discretionary considerations that would support denying mother the relief requested under
2 ORS 419.923(1)(b). We conclude for all the reasons discussed that, under the totality of
3 the circumstances, the juvenile court abused its discretion in denying mother's motion to
4 set aside the judgment terminating her parental rights, and we therefore remand the case
5 with instructions for the juvenile court to set aside the judgment.¹

6 Reversed and remanded with instructions to set aside judgment terminating
7 mother's parental rights.

¹ Father also failed to appear for the hearing and the court also terminated father's parental rights on a *prima facie* showing. Father also moved to set aside the judgment, his motion was denied, and he has not appealed.