

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00881-CV

In re The State of Texas, ex rel. Jennifer A. Tharp

ORIGINAL PROCEEDING FROM COMAL COUNTY

MEMORANDUM OPINION

Relator The State of Texas, through Jennifer A. Tharp, the Criminal District Attorney of Comal County, filed its petition for writ of mandamus, asking the Court to direct the trial court to vacate its October 25, 2016 order granting the parents' bills of review in a parental-termination case. *See* Tex. R. App. P. 52.1. Having reviewed the petition, the record, and the responses, we will deny the petition for writ of mandamus. *See id.* R. 52.8(a).

The record reflects that (1) the State failed to serve the parents with the final order being presented to the referring district court for signing after a trial before an associate judge, and (2) the parents had no notice of the district court's signing of the order within an adequate time to pursue a direct appeal or a restricted appeal through no fault or negligence of their own. *See* Tex. R. Civ. P. 21(b) (mandating that "[a]n application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, must be served upon all other parties not less than three days before the time specified for the hearing"), R. 305 ("Each party who submits a proposed judgment for signature shall serve the proposed judgment on all other parties to the suit"); *see also Mabon Ltd. v. Afri-Carib Enters., Inc.*, 369 S.W.3d 809, 812-13 (Tex. 2012) (explaining

that bill-of-review plaintiff claiming due-process violation for no service or notice need only prove element of lack of negligence). “Entry of a post-answer default judgment against a defendant who did not receive notice of the trial setting or *dispositive hearing* constitutes a denial of due process under the Fourteenth Amendment of the United States Constitution.”¹ *Id.* at 813 (emphasis added); *see also In re K.M.L.*, 443 S.W.3d 101, 119 (Tex. 2014) (holding in parental-termination case in which father had appeared but received no notice of trial setting that “[f]ailure to give a parent notice of pending proceedings ‘violates the most rudimentary demands of due process of law’” (quoting *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86-87 (1988))). “A complete failure of service deprives a litigant of due process . . . ; *the resulting judgment is void* and may be challenged at any time.” *In re E.R.*, 385 S.W.3d 552, 566 (Tex. 2012) (emphasis added) (holding in parental-termination case that Family Code’s six-month time limit on direct and collateral attacks cannot foreclose challenge to void judgment by parent who was deprived of constitutionally adequate notice); *see also In re K.M.L.*, 443 S.W.3d at 120 (holding that lack of notice to father, who had appeared in suit and at trial, of permanency hearings and trial rendered judgment unenforceable and void). Accordingly, the district court did not abuse its discretion by allowing the parents to proceed with a collateral attack of the August 3, 2015 judgment adopting the associate judge’s report. *See Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (per curiam) (holding that collateral

¹ The district court’s signing of the order was the dispositive hearing in this case. *See Attorney Gen. of Tex. v. Orr*, 989 S.W.2d 464, 468 (Tex. App.—Austin 1999, no pet.) (holding that when a “referring court renders judgment without holding a de novo hearing, the ‘hearing’ that leads to the judgment occurs when the referring court considers the matter”; therefore, the party seeking restricted appeal had not participated in the hearing resulting in the judgment when the district court had adopted the associate judge’s report without holding a timely requested de novo hearing).

attack on judgment of court of general jurisdiction in another court of equal jurisdiction is permissible if underlying judgment is void). We deny the petition for writ of mandamus. *See* Tex. R. App. P. 52.8(a).

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Filed: February 9, 2017