IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Dependency of S.A.P., DOB: 12/21/07, Minor Child. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent, v. REBECCA LYNNE PERKINS, Appellant.	)	No. 67079-4-I UNPUBLISHED OPINION FILED: June 11, 2012

Ellington, J. — Rebecca Perkins did not appear for trial on the petition to terminate her parental rights. The court entered an order of termination, and denied her motion to vacate. Perkins contends that the State failed to give her proper notice of a motion for default under CR 55, that her failure to appear was justified by excusable neglect under CR 60, and that she was deprived of her statutory right to counsel and her constitutional right to procedural due process. We affirm.

BACKGROUND

Perkins is the mother of S.A.P., born December 21, 2007. S.A.P. was found

dependent as to Perkins on June 10, 2010. On October 29, 2010, the Department of Social and Health Services filed a petition to terminate Perkins' parental rights. Perkins was personally served on December 14, 2010.

The notice and summons advised Perkins that a termination hearing would be held January 18, 2011 at 9:00 a.m. at the juvenile court in Everett and stated:

> YOU ARE SUMMONED AND REQUIRED TO APPEAR at this hearing on the date, time and place indicated above. *If you fail to appear at the hearing, the Court may take evidence against you, make findings of fact, and order that your parental rights be terminated without further notice to you.*[1]

The notice and summons also advised Perkins of her right to have an attorney appointed to represent her:

> If you are already represented by a court-appointed lawyer in the dependency action, that lawyer ***will not*** represent you in this [termination] matter unless you request new appointment of a lawyer. To get a court-appointed lawyer you must contact Community Service Unit-Dependency by phone at 425-388-7953 or in writing at Denney Juvenile Justice Center 2801-10th Street Everett WA 98201.[2]

Perkins did not take steps to obtain a lawyer.

A day or two before the termination hearing, Perkins phoned Monty Booth, her attorney in the prior dependency matter. As Booth later testified, he informed her he was not her attorney in the termination, and told her how to get an attorney appointed. On the day of the hearing, January 18, 2011, Perkins went to the juvenile courthouse in Everett. She spoke with Joseph Zvaleuskas, an attorney who also had represented her in the past. Zvaleuskas later told the court Perkins believed she was still represented

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[1] Clerk's Papers at 59 (emphasis added).

[2] Clerk's Papers at 60.

by Booth, and that he had "explained to her that she can go and let the judge know what's going on."[3]

That morning, Perkins also spoke with the assigned social worker in her case, DanVo'nique Reed, who asked Perkins to stay for the hearing.

When the hearing began, Perkins did not appear. The court took a recess to try to locate her and to find out whether she had requested appointment of an attorney. Once the court had verified that Perkins was not in the building and had not requested counsel, the hearing resumed. The State requested that the court "proceed with default."[4] The court heard testimony from Reed, found Perkins in default, and entered findings of fact, conclusions of law, and an order terminating Perkins' parental rights.

Perkins requested an attorney, and Booth was reappointed on February 8, 2011. On March 14, 2011, Booth filed a motion to vacate the termination. He stated Perkins should be relieved from the orders and judgments because of excusable neglect under CR 60(b)(1), and because default is disfavored under the law and parents have a fundamental constitutional liberty interest in parenting their children.

The court denied the motion, reasoning that Perkins' decision to leave the courthouse because she was frustrated was not "excusable neglect."[5]

Perkins appeals.

DISCUSSION

[3] Report of Proceedings (RP) (Jan. 18, 2011) at 6.

[4] Id. at 7.

[5] RP (Apr. 11, 2011) at 13. The court described Perkins' failure to appear as "just neglect." Id.

Under CR 60, the court may vacate an order or judgment when it results from procedural irregularity or excusable neglect.[6] We review denial of a motion to vacate for abuse of discretion.[7] A court abuses discretion if its decision is manifestly unreasonable or based on untenable grounds.[8]

"Washington courts favor resolving cases on their merits over default judgments."[9] But there is also need for efficiency and for a system that ensures that all parties will comply with judicial summons.[10] Courts will seldom relieve a party from judgment for willful disregard of, or inattention to, a properly served summons.[11]

Perkins first argues the court abused its discretion in denying her motion to vacate the default order because there was a procedural irregularity in obtaining the default, to wit, failure to provide advance notice of a motion for default. Alternatively, she argues her failure to appear at her hearing was the result of excusable neglect.

Perkins contends she was entitled to notice of the State's motion for default under CR 55(a)(3), which provides:

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[6] "On motion and upon such terms that are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." CR 60(b)(1).

[7] In re Welfare of M.G., 148 Wn. App. 781, 792, 201 P.3d 354 (2009).

[8] Id.

[9] Sacotte Const., Inc. v. National Fire & Marine Ins. Co., 143 Wn. App. 410, 414, 177 P.3d 1147 (2008).

[10] Norton v. Brown, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999).

[11] Commercial Courier Serv., Inc. v. Miller, 13 Wn. App. 98, 106, 533 P.2d 852 (1975) (quoting Bishop v. Illman, 14 Wn.2d 13, 17, 126 P.2d 582 (1942)).

> Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion. Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion.

Perkins asserts she had defended the underlying dependency proceeding, she "informally appeared" in the action because she talked briefly at the courthouse with the caseworker and with her former attorney, and the State "knew" she wanted an attorney. She concludes these events entitled her to notice of the State's motion for default under CR 55(a)(3), and that absent such notice, entry of default constituted "an irregularity in obtaining a judgment or order" under CR 60(b)(1).

Perkins did not, however, make this argument to the trial court, so the trial court had no opportunity to consider the rule. The argument is thus not properly raised here.[12] In any event, CR 55 is aimed at civil cases in which an answer must be filed, and contemplates a written motion and five days' notice.[13] The rule does not govern the procedure to be taken in open court when a party fails to appear for trial despite a summons to attend and where, as here, a party "appears" the day of the hearing but fails to attend, making it impossible to give five days' notice.

Perkins next contends her failure to appear was excusable. Under White v. Holm, a party seeking to vacate a judgment under CR 60(1)(b) must show (1) that substantial evidence supports at least a prima facie defense to the claim asserted by

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[12] Under RAP 2.5, appellate courts will generally not consider an alleged error raised for the first time on appeal. See also In re Roberts, 46 Wn. App. 748, 756, 732 P.2d 528 (1987).

[13] See, e.g., Morin v. Burris, 160 Wn.2d 745, 748-53, 757, 161 P.3d 956 (2007) (three consolidated cases where court addressed whether defendants were entitled to notice of default under CR 55 for failure to appear in lawsuit).

the opposing party; (2) that failure to appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence after notice of the default judgment; and (4) that the opposing party will not suffer substantial hardship if the default judgment is vacated.[14] The factors vary in dispositive significance.[15] Where the evidence supports a prima facie defense, the court will scrutinize more closely the reasons for failure to appear.[16] If the moving party does not produce substantial evidence to support even a prima facie defense, there is no reason for further proceedings.[17]

At no point has Perkins presented evidence or argument of a prima facie defense to the termination petition. She did not submit the affidavit required by CR 60(e)(1) setting out facts constituting a defense.[18] She now suggests the court should have excused her failure to present a defense just as it should have excused her failure to appear.

Perkins points to Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokansen[19] and Calhoun v. Merritt

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[14] 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

[15] Id.

[16] Johnson v. Cash Store, 116 Wn. App. 833, 842, 68 P.3d 1099 (2003) (citing White, 73 Wn.2d at 352-53).

[17] Pfaff v. State Farm Mutual Auto. Ins. Co., 103 Wn. App. 829, 834, 14 P.3d 837 (2000).

[18] "Application [for relief from judgment] shall be made by motion filed in the case stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding." CR 60(e)(1).

[19] 95 Wn. App. 231, 240-42, 974 P.2d 1275 (1999) (trial court has discretion to vacate the damages portion of a default judgment even where no meritorious defense

[20] for the proposition that it is inequitable and unjust to deny a motion to vacate a default based on failure to present a defense. But these cases articulate this rule only in the context of a motion to vacate the damages portion of a default judgment.

Perkins next cites Griggs v. Averback Realty, Inc., asserting that her motion to vacate should have been granted to "preserve substantial rights and do justice between the parties."[21] In Griggs, the Supreme Court affirmed vacatur of a default judgment despite the moving party's failure to submit the required affidavit because of the trial court's knowledge of the alleged defense.[22] Here, there is nothing to indicate the trial judge was aware of a possible defense.

Finally, Perkins contends she can demonstrate a prima facie defense because the evidence taken at the termination hearing was "insufficient," containing "merely . . . allegations and conclusions, not facts."[23] On review of an order denying a motion to vacate, we look only to the propriety of the denial, not the impropriety of the underlying judgment.[24] Even were we to examine the evidence supporting the judgment, Perkins did not, and still does not, point to any facts that may constitute a defense to termination of her parental rights.

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is established).

[20] 46 Wn. App. 616, 620-21, 731 P.2d 1094 (1986) (it would be inequitable and unjust to deny a motion to vacate the damages portion of the default judgment on the ground that the defendant failed to present a valid defense where the pain and suffering award warranted further discovery).

[21] 92 Wn.2d 576, 584, 599 P.2d 1289 (1979).

[22] Id. at 581-84.

[23] Appellant's Br. at 25.

[24] State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).

Perkins also does not establish the second White factor by showing that her failure to attend was excusable. "Excusable neglect" is defined as a failure to take a proper step "not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident."[25]

Perkins received clear instructions in the summons and from former counsel about how to obtain an attorney. She was advised by two former attorneys and the caseworker to appear at the hearing and request counsel. Instead, she decided to leave without requesting representation or appearing before the court.

Perkins herself filed no declaration explaining her reasons for failing to appear. In the motion to vacate, her attorney stated Perkins informed him that she "became frustrated and left because no attorney was there to represent her."[26] He argued her failure to appear was excusable due to her anxiety.

But this does not evidence an unexpected or unavoidable hindrance or accident. As the trial court observed, "Frustration is understandable. But . . . [b]ad choices aren't excusable neglect, they are just neglect."[27]

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[25] Black's Law Dictionary 1133 (9th ed. 2009); see generally Kain v. Sylvester, 62 Wash. 151, 152, 113 P. 573 (1911) (defendant mistakenly believed he had hired an attorney after meeting with that attorney); Showalter v. Wild Oats, 124 Wn. App. 506, 514, 101 P.3d 867 (2004) (defendant failed to file answer due to inadvertent misunderstanding between risk manager and paralegal); Hwang v. McMahill, 103 Wn. App. 945, 952, 15 P.3d 172 (2000) (emotional upset and impatience not a tenable basis for finding of mistake, surprise, or excusable neglect under CR 60(b)(1)); Pfaff, 103 Wn. App. at 831 (defendant failed to timely answer complaint because administrative assistant mistakenly faxed complaint to wrong number, which was a "mistake" under CR 60(1)(b)).

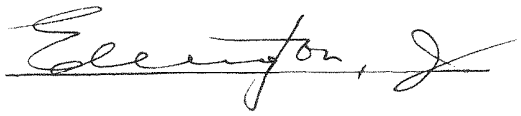
[26] Clerk's Papers at 30.

[27] RP (Apr. 11, 2011) at 13.

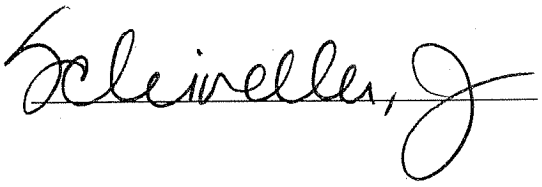
Perkins made no showing that she had any defense to the termination or that her neglect was excusable. There was no abuse of discretion in denying her motion to vacate.

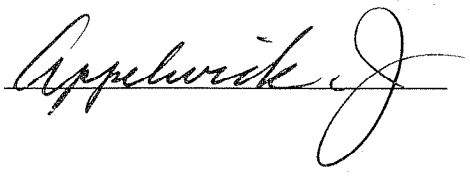
Finally, Perkins argues she was deprived of her statutory right to counsel and her constitutional right to due process.[28] She did not raise these arguments below, and they are not well taken. She never took the steps available and known to her to obtain appointment of counsel. She received notice and had an opportunity to be heard, which she did not take. And again, when reviewing the denial of a motion to vacate, we look only to the propriety of the denial, not the impropriety of the underlying judgment.[29]

Affirmed.



WE CONCUR:





[28] The statutory right to counsel in Washington is set forth in RCW 13.34.090(2) and requires that an attorney be provided to a parent when she either requests counsel or appears in the proceeding. The essential requirements of procedural due process are notice and an opportunity for a hearing appropriate to the nature of the case. In re Dependency of C.R.B., 62 Wn. App. 608, 614, 814 P.2d 1197 (1991); see also In re Dependency of A.G., 93 Wn. App. 268, 278-79, 968 P.2d 424 (1998).

[29] Gaut, 111 Wn. App. at 881.