COURT OF APPEALS DECISION DATED AND FILED

January 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1403

Cir. Ct. No. 2014TP5

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE TERMINATION OF PARENTAL RIGHTS TO R. C., A PERSON UNDER THE AGE OF 18:

ADOPTIONS OF WISCONSIN, INC.,

PETITIONER-RESPONDENT,

V.

R. Z.,

RESPONDENT,

J. S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed*.

¶1 STARK, P.J.[1] J.S. appeals an order terminating his parental rights to R.C. and an order denying his postdisposition motion. J.S. argues the circuit court erroneously exercised its discretion by denying his postdisposition motion to reopen a default judgment entered based upon his failure to appear at the termination of parental rights (TPR) hearing in response to a summons. We disagree and affirm the orders.

BACKGROUND

¶2 Between January 2014 and March 2014, J.S. lived with R.Z. at her mother's house. During that time, R.Z. and J.S. engaged in sexual intercourse approximately three to four times per week; J.S. did not use a condom. On March 10, 2014, J.S. was arrested and prohibited from having contact with R.Z. as a result of a domestic violence incident. After J.S. was released from jail, he lived with one of R.Z.'s relatives for a week or two. He then left Wisconsin in violation of his bond and moved to Oklahoma to live with his mother. At some point before J.S. left Wisconsin, R.Z. told him she was pregnant.[2] J.S. eventually moved out of his mother's house to another residence also in Oklahoma. He then left that residence in late October 2014.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] At the TPR hearing, R.Z. testified that J.S. knew she was pregnant before he left Wisconsin. In his postdisposition motion, J.S. contested this testimony and argued the circuit court should vacate the termination order because of R.Z.'s misrepresentations to him about her pregnancy and to the court about when J.S. learned about the pregnancy. However, by the end of the postdisposition hearing, J.S.'s attorney conceded "very conflicting testimony" was presented regarding J.S.'s misrepresentation claim and further stated, "[W]e don't have a strong case on this anymore, I will concede that." The circuit court made the factual finding that J.S. knew R.Z. was pregnant when he left Wisconsin.

¶3 Between October 2014 and January 2015, J.S. was homeless and living out of his car. He had lost his job and was using illegal drugs, including methamphetamine. By December 2014, J.S. was using illegal drugs on a daily basis.

¶4 In the meantime, R.Z. made arrangements for R.C.'s adoption through Adoptions of Wisconsin, Inc. (AOW). On November 5, 2014, R.Z. contacted J.S.'s mother to inform her of the child's expected due date. On November 14, 2014, R.Z. gave birth to R.C., who immediately was placed with her adoptive parents. J.S.'s mother was unable to locate J.S. to tell him about R.C.'s birth until the first week of December 2014.

¶5 Shortly after R.C.'s birth, AOW filed a petition to terminate R.Z.'s and J.S.'s parental rights. The petition stated R.Z. would consent to the termination of her parental rights. The petition further stated J.S. may consent to the termination of his parental rights, and if he did not consent, grounds existed to involuntarily terminate his rights under WIS. STAT. § 48.415(6) based on his failure to assume parental responsibility. AOW attempted, without success, to personally serve J.S. AOW, however, eventually made arrangements to get the paperwork regarding the TPR proceedings, including the summons and initial pleadings, to J.S. through his mother. After receiving permission from the circuit court, AOW also published notice of the hearing in an Oklahoma newspaper.[3]

¶6 J.S.'s mother ultimately hand delivered the TPR paperwork to J.S., although the exact date on which it was delivered is uncertain. J.S. contends he

[3] J.S. concedes AOW made proper service.

received actual notice of the TPR hearing on January 6, 2015, three days before the scheduled hearing date of January 9, 2015. When he learned about the hearing, he was still in Oklahoma, homeless, and using methamphetamine.

¶7 On the day of the hearing, J.S.'s friend found the TPR paperwork in J.S.'s car. J.S. attempted to contact the attorney for AOW but was unable to reach her. He left a voicemail for the attorney's legal assistant instead, stating, "Hi, Tina, yes, this is [J.S.], and I would rea—highly, highly appreciate it if you can give me a call back at [(XXX) XXX-XXXX]." This voicemail was left approximately two hours after the TPR hearing was scheduled to begin.

¶8 At the TPR hearing, R.Z. voluntarily terminated her parental rights to R.C. The circuit court found J.S. had actual notice of the hearing and found him in default due to his nonappearance. The court further found that grounds for termination existed based on J.S.'s failure to assume parental responsibility and that it was in R.C.'s best interests to terminate J.S.'s parental rights. The court then entered an order involuntarily terminating J.S.'s parental rights.

¶9 J.S. made no further attempts to contact anyone regarding the TPR action. On January 16, 2015, J.S. was arrested in Oklahoma and ultimately convicted of burglary, possession of methamphetamine, and unauthorized use of a credit card. J.S. was sentenced to over two years in prison. While in custody, J.S. granted his mother power of attorney. His mother then filed a document asking to appeal the circuit court's TPR decision. We construed this document as a notice of intent to pursue postdisposition relief. An attorney appointed to represent J.S. subsequently filed a postdisposition motion seeking to reopen the default judgment. In the motion, J.S. alleged two grounds for reopening the judgment: misrepresentation by R.Z. and excusable neglect.

¶10 The circuit court ultimately denied J.S.'s postdisposition motion after a lengthy hearing. The court rejected J.S.'s claim of misrepresentation, finding "there was never any misrepresentation on the part of [R.Z.] towards [J.S.]." The court also concluded J.S. did not demonstrate excusable neglect under the less stringent standard for excusable neglect stated in ***Chester B. v. Larry D.***, Nos. 2011AP925, 2011AP926, unpublished slip op. (WI App Nov. 2, 2011).[4] J.S. now appeals.

DISCUSSION

¶11 A circuit court's determination whether to grant or deny a motion to vacate a default judgment is a discretionary act. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). We will not disturb the court's decision absent an erroneous exercise of discretion. *See* ***id.*** "A circuit court does not erroneously exercise its discretion if its decision is based on the facts of record and on the application of a correct legal standard." *See* **Miller v. Hanover Ins. Co.**, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493 (quoting ***Larry v. Harris***, 2008 WI 81, ¶15, 311 Wis. 2d 326, 752 N.W.2d 279).

[4] According to ***Chester B. v. Larry D.***, Nos. 2011AP925, 2011AP926, unpublished slip op. (WI App Nov. 2, 2011), in determining whether to reopen a default judgment based on a parent's failure to appear in response to a TPR summons, "the question is not whether the parent has met the high threshold of excusable neglect outlined in other types of civil cases, but whether the parent has shown that he or she *honestly wanted and diligently sought the opportunity to participate in the proceedings*." *See* **id.**, ¶¶10, 14 (emphasis added).

¶12 J.S. seeks to reopen the default judgment under WIS. STAT. § 806.07(1)(a)[5] due to excusable neglect.[6] He contends the circuit court erroneously exercised its discretion in two respects. First, he claims there was a confluence of two unfortunate circumstances that together satisfied the excusable neglect standard: (1) the short time between R.C.'s birth and the termination of his parental rights, and the even shorter time between him receiving actual notice of the hearing and the termination of his rights; and (2) his desperate situation at that time, where he was living out of his car, nearly a thousand miles from the location of the hearing, and heavily using drugs that impaired his thinking and conduct. Second, J.S. argues the circuit court erred in determining J.S. had the burden to prove, and failed to prove, that he had a meritorious defense if the TPR default judgment was reopened.

¶13 The parties appear to agree that J.S. could not meet the standard usually required in civil cases to prove excusable neglect under WIS. STAT. § 806.07(1)(a). Under that standard, J.S. would have to demonstrate both that his default was the result of excusable neglect and that he had a meritorious defense to the underlying TPR petition. *See* ***J.L. Phillips & Assocs., Inc. v. E & H Plastic Corp.***, 217 Wis. 2d 348, 351, 358, 577 N.W.2d 13 (1998). Excusable neglect is "not synonymous with neglect, carelessness or inattentiveness," but rather it is

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[5] Under WIS. STAT. § 48.46(2), "[a] parent ... who did not contest the petition initiating the proceeding in which his or her parental rights were terminated may move the court for relief from the judgment on any of the grounds specified in [WIS. STAT. §] 806.07(1)(a), (b), (c), (d), or (f)." As relevant here, under § 806.07(1)(a), a circuit court may relieve a party from a judgment or order on the basis of "[m]istake, inadvertence, surprise, or excusable neglect."

[6] Given the circuit court's factual findings at the postdisposition hearing, J.S. does not renew his claim on appeal that the default judgment should be reopened under WIS. STAT. § 806.07(1)(c) (misrepresentation).

"that neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (quoting ***Giese v. Giese***, 43 Wis. 2d 456, 461, 168 N.W.2d 832 (1969)).

¶14 J.S., however, argues default judgments are disfavored, and especially so in TPR actions for the reasons discussed in ***Larry D.*** One of those reasons is that TPR proceedings "'work a unique kind of deprivation' as they 'involve the awesome authority of the state to destroy permanently all legal recognition of the parental relationship.'" ***Larry D.***, unpublished slip op. ¶9 (quoting ***M.L.B. v. S.L.J.***, 519 U.S. 102, 118, 128 (1996)). Accordingly, J.S. argues he, like Larry D., needed only to demonstrate that he honestly wanted and diligently sought the opportunity to participate in the proceedings. *See* ***id.***, ¶14. He contends he made such a showing.

¶15 Assuming without deciding that the less restrictive ***Larry D.*** standard for excusable neglect applies, J.S. fails to show the circuit court erroneously exercised its discretion in finding J.S. did not demonstrate excusable neglect. The parties dispute the date on which J.S. had actual knowledge of the TPR action and hearing date. Regardless, the circuit court found J.S. had knowledge of the hearing at least three days before it was held. It further found that regardless of J.S.'s whereabouts, all he needed to do was contact the court or counsel at some time prior to the hearing to advise that he wished to delay the hearing and to contest the TPR petition. Had he done so, relief could have been afforded. J.S. did not contact counsel for AOW until almost two hours after the hearing began and did so by leaving a voicemail. His voicemail indicated he would "highly, highly appreciate it" if someone called him back. However, he did not respond to any of the return calls from counsel for AOW or otherwise follow

up to determine what happened at the hearing. The court reasonably determined this effort was insufficient to constitute diligence in seeking an opportunity to participate in the proceedings.

¶16 Further, the circuit court determined any impairment due to drug use was not a basis to find excusable neglect under the lesser ***Larry D.*** standard. The court found J.S. was not so impaired that he could not have contacted the court or counsel during the three days he had notice before the hearing. In making this finding, the court reasonably relied upon the testimony of J.S.'s mother and her observations of J.S. when she provided him with the paperwork three days before the hearing.[7] The court also reasonably relied upon the recording of the voicemail J.S. left on AOW's answering machine on the day of the hearing. The court indicated J.S. had "clarity of speech" and sounded like somebody who understood what he was doing in the message.

¶17 Absent a finding of excusable neglect, we need not address whether the circuit court properly considered whether J.S. had a meritorious defense should the judgment be reopened.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

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[7] J.S.'s mother testified J.S. "had lost a lot of weight, his face started sagging, [he had] rings around his eyes, [and] he was bouncing everywhere off the wall." However, when AWO's attorney asked J.S.'s mother about J.S.'s demeanor on the day she gave him the TPR paperwork, she acknowledged J.S. appeared to understand what was going on and appeared coherent as to what was going on with the TPR process because they had discussed what needed to be done.