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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2304**

In the Matter of the Welfare of the
Children of: M. R., Parent.

**Filed July 22, 2008
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-JV-06-16014

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Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant M.R. challenges the district court's denial of her motion to vacate the default judgment terminating her parental rights. Appellant argues that the district court erred in (1) the procedures it used during the default proceeding, (2) refusing to vacate

the default judgment, and (3) denying her motions to transfer legal custody. In addition, appellant asserts that the district court made incorrect findings of fact that, in combination with other errors, warrant reversal of the default judgment. Because the district court properly exercised its discretion in this matter, we affirm.

FACTS

Hennepin County Human Services and Public Health Department (department) filed a child-in-need-of-protective-services (CHIPS) petition on May 31, 2006, regarding appellant's four children: S.W., H.W., M.H., and D.H. The department's petition detailed appellant's long history of chemical-dependency problems and involvement in drug court. The initial reason for the CHIPS petition was appellant's physical abuse of her daughter, H.W., which resulted in criminal charges against her in Scott County.

Appellant was represented at the pretrial conference on October 30, 2006, but was not personally present. Because there had been seven prior hearings regarding this matter, because appellant had signed a hearing notice advising her that she had to be present at the hearing, and because appellant's attendance was not likely given that there were outstanding warrants for her arrest, the department had moved to proceed by default to obtain an adjudication that appellant's children were in need of protection or services. According to the department and the guardian ad litem (GAL) appointed by the district court, appellant was not present because there was an outstanding warrant for her arrest. The GAL also told the district court that appellant had "done nothing on the case plan" and that appellant had failed to appear at a scheduled hearing in drug court, where a no-bail warrant was issued. The GAL supported the department's motion. Appellant's

counsel opposed the department's motion and requested a continuance until the trial date of November 13, 2006. The attorney representing S.W. and the GAL both expressed their desire to have permanency for the children.

After hearing the arguments of the parties on the issue of default, the district court concluded that "given [appellant's] lack of appearance and the warrant status situation . . . default is [the] appropriate way to proceed." The district court informed the attorneys that if appellant had an explanation as to why she was not present at the hearing, she could make a timely request to reopen the default, but stated that "absent some reasonable explanation for her failure to appear I doubt that the default would be reopened."

Sandra Dorn, a department child-protection social worker, then testified about appellant's failure to follow her voluntary case plan. Dorn stated that appellant had previously lost custody of some of her children due to prior child-protection involvement. The department designed a voluntary case plan for appellant to address her mental-health problems, complete a chemical-health evaluation, and be subjected to ongoing sobriety checks. According to Dorn, appellant's case plan was appropriate to address her issues, and reasonable efforts were made to engage her in the case plan. But appellant was not in compliance with the plan; she failed to complete anger-management classes, domestic-abuse counseling, a parenting evaluation, an updated psychological evaluation, and failed to maintain a safe and suitable home or hold a job to provide support for her children. Because of appellant's continued failure to meet the case-plan requirements, her visitation with her children was suspended, and the department concluded that it was in

the best interests of appellant's children to adjudicate them in need of protection and services.

Based on Dorn's testimony, the district court found that the "underlying needs as well as the other allegations in the petition that were testified to do provide a basis for" a determination that appellant's children are in need of protection or services. Appellant's counsel did not object to the specifics of the case plan, and the district court ordered that the voluntary case plan, as outlined on the record, become the court-ordered case plan. The GAL advised the district court that two of appellant's children, D.H. and H.W., were in non-relative foster placement, that M.H. had been placed in foster care with relatives, and that S.W. was currently at St. Joe's in Coon Rapids. Both the GAL and S.W.'s counsel stated that S.W. preferred to stay with her aunt, R.R., which was appellant's preference. But the district court determined that S.W. could not be placed with R.R. because of R.R.'s failure to complete the licensing process required to provide foster care and because of R.R.'s prior arrest for possession of cocaine.

On November 13, 2006, appellant appeared in court for an admit/deny hearing on the permanency petition filed by the department. The department stated that appellant had "not made any progress on her case plan." The district court was informed that S.W. refused to go to the foster home assigned to her on October 30 and was currently staying in a shelter. Appellant renewed her request to allow S.W. to stay with R.R., but the district court again denied the request because R.R. had not followed up with appointments and the county did not want to issue her a foster-care license. But the district court agreed to allow S.W. to have passes to visit another relative, A.H., and all

parties agreed that getting A.H. licensed was an immediate goal so that S.W. could be placed in a home. The district court also agreed that R.R. could have visitation with S.W.

The district court scheduled another pretrial conference for January 18, 2007, and appellant signed a written acknowledgement of that hearing. The hearing notice informed appellant that if she failed to appear, the department could proceed with a default judgment that could terminate her parental rights. Despite this warning, appellant failed to appear on January 18, and the department requested to proceed by default.

S.W.'s attorney and the GAL agreed with the request to proceed with a default hearing, although they reiterated their request that S.W. be placed with R.R., despite the department's objections. Due to an emergency, appellant's counsel could not attend the hearing. But a replacement attorney was present, who advised the district court that he had not had a chance to speak with appellant at all about the case.¹ The district court granted the request to proceed with a default hearing.

Dorn testified that appellant refused to provide urine samples to the department as required by her case plan, but did provide urine samples to her probation officer. The samples that appellant did provide showed positive results for opiates and "benzos." Dorn also testified that appellant failed to: (1) complete a parenting assessment on more than one occasion; (2) participate in the ordered domestic-abuse counseling or verify that she was participating in an alternative abuse program; (3) complete a psychological evaluation; (4) obtain safe and suitable housing capable of being verified; (5) meet on a

¹ Although appellant argues that the replacement counsel left at this point, it is unclear from the record whether replacement counsel remained or left.

regular basis with the department, including an inability to be available for home visits; and (6) complete anger-management counseling. It was Dorn's opinion that it was in the best interests of appellant's children for the district court to grant the petition to terminate appellant's parental rights. Dorn did not foresee that appellant would be able in the foreseeable future to complete her case plan to the point that the department would recommend reunification.

After Dorn finished testifying, appellant's original counsel arrived at the hearing and requested that the district court stay any order following the proceedings so that counsel could "determine [her] client's position and offer any objection." The district court agreed to stay the termination-of-parental-rights order until the hearing scheduled for February 8, 2007, but did transfer legal and physical custody of S.W. to R.R.

When appellant failed to attend the February 8 hearing, the department asked the district court to lift the stay on its order terminating appellant's parental rights. According to appellant's attorney, appellant had called her at approximately 9:15 a.m. that morning and told her that appellant's arranged ride had not picked her up, therefore, she could not arrive at court until 11:00 a.m. The district court was informed of this phone call at 10:40 a.m.; appellant's counsel objected to proceeding before 11:00 a.m. The district court disagreed, stating that the

trial was set for 9 o'clock, which [appellant] knew, signed a notice for and that's why I gave her until today was to be here at 9. It is now 18 minutes to 11, actually 16 minutes to 11 and she still is not here, which this Court generally gives people at least 20 minutes but that would have been 9:20. We'll proceed.

Appellant's counsel argued that if the district court chose to proceed, it should transfer legal custody of H.W., M.H., and D.H. to family members who were present that day rather than terminate appellant's parental rights. The GAL argued against the transfer of legal custody because she considered adoption by family members a preferable option. At 11:04 a.m., after hearing the parties' arguments and testimony, the district court stated appellant "is not present. She did not come through with her statement to her attorney . . . and under those circumstances I accept the testimony from Ms. Dorn that I received on January 18, 2007." The district court then ordered termination of appellant's parental rights to H.W., M.H., and D.H.

Appellant moved for a new trial, requesting a reopening of the default judgment and amended findings. The district court denied appellant's motion. This appeal follows.

D E C I S I O N

I.

Appellant first argues that the district court abused its discretion in the manner in which it conducted the default hearing. A party appealing from a default judgment may raise procedural arguments on appeal, assuming that the party has raised those same issues by motion before the district court. *Cf. Thorp Loan & Thrift Co. v. Morse*, 451 N.W.2d 361, 363 (Minn. App. 1990) (stating that "a party in default may not raise procedural irregularities on appeal which were not raised below, provided that adequate and expeditious relief is available by motion in the [district] court"), *review denied* (Minn. Apr. 13, 1990); *see also Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986) (holding that "evidentiary rulings . . . are subject to appellate review only if there has

been a motion for a new trial in which such matters have been assigned as error”). This general rule “applies equally to juvenile cases.” *In re Welfare of D.N.*, 523 N.W.2d 11, 13 (Minn. App. 1994), *review denied* (Minn. Nov. 29, 1994); *see also In re Welfare of S.G.*, 390 N.W.2d 336, 340-41 (Minn. App. 1986) (applying this waiver rule in the context of an appeal of a child-neglect case). Here, appellant made a timely motion for a new trial, amended findings of fact, and an opening of the default judgment. Therefore, appellant’s arguments regarding the procedures used by the district court in the default-judgment hearing are properly before this court. *Cf. S.G.*, 390 N.W.2d at 340-41 (failure to make a motion for a new trial precluded review of various alleged evidentiary errors).

Appellant asserts a series of evidentiary errors, including arguing that her inability to cross-examine the witnesses who presented testimony at the default hearing amounts to a deprivation of her right to due process. “It is well settled that where the [district] court has jurisdiction of the offense and of the defendant a judgment will be held void for want of due process only where the circumstances surrounding the trial are such as to make it a sham and a pretense rather than a real judicial proceeding.” *In re Welfare of Children of Coats*, 633 N.W.2d 505, 512 (Minn. 2001) (quotation omitted). Here, as in *Coats*, there is no dispute that the district court had personal and subject-matter jurisdiction and that appellant was personally served with the TPR petition and signed a hearing notice warning her of the ramifications of failure to appear. *See Coats*, 633 N.W.2d at 509, 512. The district court took evidence at both the CHIPS hearing on October 30, 2006, and the pretrial hearing on January 18, 2007.

As appellant notes, her original counsel was not present at the January 18, 2007 hearing. Appellant's substitute counsel requested a stay, in part, because the January 18 proceeding was scheduled as a pretrial conference and, as he informed the district court, "I have no clue what's going on. I don't know what [appellant's] position would be. . . . I haven't had a chance to talk with [appellant's counsel]." The department's attorney asked the district court to proceed with a default hearing, noting that appellant

signed a hearing notice indicating we would be set today for a pretrial. The hearing notice also clearly indicates that if she failed to appear that she essentially risks the department moving forward with a default and that by doing so she could lose her parental rights [B]ecause she is not here today . . . and does have proper notice the department is asking the [district] court for permission to proceed by default.

The district court took testimony "in support of a default . . . [and] stay[ed] the order until February 8." Recognizing appellant's due-process rights, the district court stated, "[I]f [appellant] chooses to come in because this wasn't set as a trial, that's the one thing that concerns me in terms of due process." The district court also expressed its willingness to reopen the hearing if appellant provided a reasonable explanation at the February 8 hearing. But appellant also failed to appear at the February 8 hearing. Despite appellant's failure to appear, the district court's decision to terminate her parental rights was not based on her absences but, instead, on her failure to correct the conditions that led to the removal of the children from her care.

Dorn's testimony regarding appellant's inability to meet the requirements of her case plan was based on her work with appellant starting in September 2006, and although appellant argues that Dorn's testimony was prompted by improper questioning by

counsel for the department, the record supports the district court's finding that appellant "has failed to cooperate with her Court-ordered case plan and correct the conditions leading to out-of-home placement." In addition, the district court stated that "reasonable efforts" were made to "offer [appellant] services to assist in correcting the conditions that led to the out-of-home placement" but these efforts were unsuccessful. Although the district court proceeded in default, appellant's parental rights were terminated because she has "substantially, continuously [and] repeatedly refused or neglected to comply with the duties imposed upon her by the parent and child relationship." The district court's termination of appellant's parental rights on this record was not a violation of her right to due process.

II.

Appellant argues that the district court erred in refusing to vacate the default judgment terminating her parental rights. On appeal from the district court's denial of a motion to vacate a default judgment, the district court's decision will be upheld "absent clear abuse of discretion." *In re Welfare of B.J.J.*, 476 N.W.2d 525, 526-27 (Minn. App. 1991). A district court may relieve a party from a default judgment for "'mistake, inadvertence, surprise, or excusable neglect.'" *In re Welfare of Children of M.L.A.*, 730 N.W.2d 54, 60 (Minn. App. 2007) (quoting Minn. R. Juv. Prot. P. 46.02). When a party moves to vacate a default judgment, that party has the burden of showing that (1) it has a reasonable defense on the merits; (2) it has a reasonable excuse for its failure to act; (3) it proceeded with due diligence after notice of entry of the default judgment; and (4) no substantial prejudice to the opposing party will result from vacating the judgment. *Coats*,

633 N.W.2d at 510²; *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 456 (1952). All four parts of the test must be met to justify relief under Minn. R. Juv. Prot. P. 46.02. *See Coats*, 633 N.W.2d at 510 (stating the same in the context of rule 60.02).³

First, appellant must show that she has a reasonable defense on the merits. *Coats*, 633 N.W.2d at 510. Appellant asserts that because she appeared at the admit/deny hearing on November 13, 2006, this put the department to the burden of proving its petition by clear and convincing evidence. In addition, appellant suggests that because she supported transfers of legal custody of her children, she essentially “counterclaim[ed]” to the agency’s TPR petition. But appellant’s parental rights were terminated because of her failure to adhere to her court-ordered case plan. The fact that the district court could have ordered a transfer of legal custody does not demonstrate that appellant had a reasonable defense to the termination petition. Appellant failed to present

² In discussing these four requirements, *Coats* applies Minn. R. Civ. P. 60.02 because at the time the district court considered the motion to vacate, the rules of juvenile procedure did not include a rule comparable to rule 60.02. 633 N.W.2d at 510 n.4. But the supreme court noted that Minn. R. Juv. P. 81.02, which has since been renumbered as Minn. R. Juv. Prot. P. 46.02, is basically a counterpart to rule 60.02 and involves the same analysis. *See id.*; *see also Juvenile Protection Rules Committee*, No. C1-01-927 (Minn. Nov. 12, 2003) (order) (amending rules 37 to 82 of the Minnesota Rules of Juvenile Procedure and renumbering them as rules 1 to 47 of the Minnesota Rules of Juvenile Protection Procedure).

³ Appellant suggests that *M.L.A.* supports her contention that when a motion to reopen a default judgment is brought under Minn. R. Juv. Prot. P. 46.02, the four-part test does not have to be met. But *M.L.A.* only holds that where an admission supporting a TPR is coerced, there is no need to evaluate the motion to reopen the judgment under the four-part test. 703 N.W.2d at 61-62. Because that is not the case here, the four-part test is required.

an argument beyond mere “conclusory statements” that she was not in violation of her case plan, and, without more, she cannot prevail on this factor. *Coats*, 633 N.W.2d at 511.

Although appellant does not satisfy the first factor of the test to reopen the default judgment and thus cannot be granted relief, we will briefly discuss the other three factors. In addressing the second factor, appellant argues that she was not given an opportunity to demonstrate why she was not present at the hearings. But the record shows that it is likely she failed to attend in an effort to avoid arrest warrants in both October 2006 and January 2007. According to her attorney, appellant’s failure to attend the February 2007 hearing was caused by a transportation problem. But the district court gave appellant approximately two hours before proceeding, and when the hearing concluded at 11:19 a.m., beyond the scheduled hearing time, appellant still had not arrived. On this record, there is no reasonable excuse for her failure to attend.

On the third factor, respondent concedes that appellant moved with diligence to reopen the default judgment. But as noted, in failing to meet either of the previous two factors of the test, appellant cannot be granted the relief she seeks. In addressing the fourth factor, appellant argues that the department would not be prejudiced by reopening the default judgment. But she ignores the fact that her children and the GAL are also parties to this matter. *See* Minn. R. Juv. Prot. P. 21.01 (stating GAL is a party to a juvenile-protection matter). Because permanent placement is in the best interests of children, any effort to reopen the judgment will result in prejudice to the GAL and the

interests of the children. *See In re Welfare of J.J.B.*, 390 N.W.2d 274, 279 (Minn. 1986) (discussing the significance of permanency to a child's development).

Because appellant cannot meet three of the four factors of the test required to reopen her default judgment, the district court properly exercised its discretion in denying appellant's requested relief.

III.

Appellant challenges the district court's denial of her motion to transfer legal custody of her three youngest children, H.W., M.H., and D.H. Appellant asserts that because Minn. Stat. § 260C.201, subd. 11(d)(1), (i) (2006), requires the district court to make specific findings before a motion to transfer custody out of the home of the parent or guardian can be granted, the same requirement applies to denial of such a motion. Appellant's argument misapplies the language of the relevant statutes. Minn. Stat. § 260C.201 (2006) applies only to situations when parental rights have not yet been terminated. Because appellant's parental rights were terminated, section 260C.201 does not apply to her request. *See* Minn. Stat. § 260C.312 (2006) (stating that a district court may apply Minn. Stat. § 206C.201 when it does not terminate parental rights).

IV.

Finally, appellant challenges three findings of fact made by the district court, arguing that although the individual findings are not reversible error, taken as a whole and combined with the district court's refusal to vacate the default judgment, they warrant reversal. We disagree. In all three instances, appellant mischaracterizes the statements of the district court. First, appellant claims that it was error to find that

February 8, 2007, was “the second scheduled day of trial” because there was no hearing on February 7. While the trial days were not consecutive, the district court’s statement was correct. November 13, 2006, was the first hearing date; February 8, 2007, was the second.

Next, appellant claims that it was error to find that she defaulted on the transfer of legal custody of S.W. to R.R. But appellant did not attend the transfer-of-legal-custody hearing. Merely agreeing to the transfer of legal custody, as appellant asserts she did, is not equivalent to attendance at the hearing. Appellant had notice and signed the petition that explained the potential default consequences of her failure to appear. Appellant’s final claimed error concerns the date provided by the district court for the termination of her parental rights. The date given by the district court is eight months earlier than the date the order was filed, but the statement made by the district court refers to the day that the hearing occurred that resulted in the parental-rights termination. There is no error in the district court’s reference to the hearing.

Affirmed.