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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0689

In the Matter of the Welfare of the Child of: B. H. and C. W., Parents

Filed October 15, 2012
Affirmed
Stoneburner, Judge

St. Louis County District Court
File No. 69VI-JV-11-220

Bill L. Thompson, Duluth, Minnesota (for appellant C.W.)

Mark S. Rubin, St. Louis County Attorney, Sharon Chadwick, Assistant County Attorney, Virginia, Minnesota (for respondent county)

Karen Olson, Hibbing, Minnesota (guardian ad litem)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant father challenges the default judgment terminating his parental rights to his minor child, arguing that his rights to procedural due process were violated and that the evidence is insufficient to show that termination of parental rights is in the child's best interest. We affirm.

FACTS

Appellant C.W. (father) is the father of B.W., born to B.H. (mother) on January 9, 2007. Father and mother were never married. Father executed a recognition of parentage establishing paternity, but he never brought any court action to establish his custodial rights. Mother was the sole legal and physical custodian of B.W.

B.W. was removed from his parents' care in November 2010 for many reasons, including his parents' chemical-dependency issues and intentionally engaging in sexual behavior in B.W.'s presence, as well as C.W.'s excessive physical discipline of B.W. and the inability of either parent to provide an appropriate environment or safe home for him. B.W. was adjudicated a child in need of protection or services (CHIPS) in mid-December 2010, and a reunification case plan was developed for each parent. The services provided to father under the case plan by respondent St. Louis County Public Health and Human Services Department (the county) included case management, facilitating visits and other forms of contact with the child, random urinalyses, and referrals for chemical-dependency services and parenting classes. The services were designed to address father's underlying issues of engaging in sexual behavior in front of the child, excessive physical discipline reported by the child, and chemical abuse.

In July 2011, father was incarcerated. The county then developed a case plan that conformed to the services available at father's place of incarceration. He is scheduled to be released from prison in 2014.

In October 2011, the county petitioned the district court for termination of the parental rights of mother and father to B.W. Father was served with the petition and a

summons to an admit/deny hearing scheduled for December 8, 2011. As required by Minn. R. Juv. Prot. P. 32.02, subd. 4(c), the summons notified father that if he failed to appear, the court may conduct the hearing in his absence and the hearing may result in termination of parental rights (TPR).

Father was not present and was not represented by counsel at the December 8, 2011 hearing.[1] By interim order, the admit/deny hearing was continued for a pretrial hearing, scheduled for December 29, 2011.[2] Copies of the order and notice of filing of the order were mailed to father.

Father did not appear at the December 29, 2011 pretrial hearing. The district court ordered the pretrial hearing continued to January 19, 2012. The district court appointed counsel to represent father. Copies of the order and notice of filing of the order were mailed to father. For reasons not explained in the record, the pretrial hearing did not resume until February 23, 2012. The county's report to the district court filed on February 21, 2012, reflects that the county had provided father's wife with B.W.'s address so that father could begin correspondence, but the child did not receive any letters, phone calls, or pictures from father or his wife.

[1] While this appeal was pending, the St. Louis county attorney discovered two notes in the district court file relating to a request by father to appear by telephone at this admit/deny hearing. This request is not addressed in the district court record.

[2] The record does not reflect that a formal admit/deny hearing ever took place or that either party ever entered an admission or a denial to the petition or that a denial was entered by the court based on the parents' silence. *See* Minn. R. Juv. Prot. P. 35.01, subd. 1(a) (providing that if a parent remains silent and does not admit or deny the statutory grounds set forth in a TPR petition, "the court shall enter a denial of the petition on the record").

Father did not appear at the February 23, 2012 pretrial hearing, but father's attorney appeared. At that hearing, father's counsel was "formally appointed" to represent father in the TPR proceeding.[3] The district court ordered the pretrial hearing continued to March 8, 2012, "to allow [father's counsel] to confer with [father]" about the TPR action.

Neither father nor mother appeared at the March 8, 2012 pretrial hearing. Father's counsel appeared by telephone and advised the district court that father had been advised of representation but made no request to appear by telephone or to be transported to the hearing, and father failed to respond to counsel's letter and multiple messages counsel left for father with father's caseworker asking to speak with father. The social worker told the district court that father had also failed to respond to correspondence she sent to father on three occasions after his incarceration. The district court found mother and father in default and proceeded with an evidentiary hearing that resulted in TPR of both parents.

Based on the evidence presented at the hearing, the district court found that, before his incarceration, father refused court-ordered random urinalyses and declined to consider other services. And after incarceration, father did not participate in parenting classes required by the case plan and did not initiate any contact with B.W. or the social worker. The district court found that TPR is in the best interests of the child and terminated father's parental rights under Minn. Stat. § 260C.301, subd. 1(b)(2) (substantial,

[3]The county's brief on appeal suggests that there may have been some confusion regarding whether the appointment of father's counsel related to the CHIPS or the TPR actions.

continuous, or repeated refusal or neglect to comply with the duties imposed by the parent-child relationship), (4) (palpably unfit to be a party to the parent-child relationship), (5) (failure of reasonable efforts to correct the conditions that led to out-of-home placement), (8) (child neglected and in foster care) (2010).

In a letter to the district court dated March 30, 2012, father requested an appeal and appointment of counsel to represent him on appeal. The district court appointed appellate counsel, and this appeal followed.

D E C I S I O N

On appeal, father does not challenge any of the district court's findings regarding the statutory bases for terminating his parental rights other than the sufficiency of the evidence to support the finding that TPR is in the child's best interest. Instead, father asserts that his due-process rights were violated in the process that led to default judgment being entered at the March 8, 2012 pretrial hearing. Father candidly acknowledges on appeal that none of the issues he raises on appeal were raised in the district court and that this court generally declines to address issues raised for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Father nonetheless urges this court to consider the issues raised in this appeal in the interests of justice under Minn. R. Civ. App. P. 103.04 (authorizing review of any matter as the interest of justice may require).

Father argues that, due to the timing of the appointment, appellate counsel did not have time to bring any type of motion for postjudgment relief before the district court. He argues that the court's failure to consider his arguments will "create the injustice

contemplated by Rule 103.04" and that "his due process rights would have been violated, and Father will have lost any opportunity he may have had to challenge the termination of his parental rights." The county opposes review of the issues raised for the first time on appeal because father, in addition to failing to establish or preserve a record in support of issues raised on appeal, has failed to assert any defense to TPR on the merits or to identify any specific instances of prejudice flowing from the claimed violations of his due-process interests. The county's arguments against extending review are persuasive. Father failed to comply with the case plans developed for him before and after his incarceration. After incarceration, he failed to communicate with the child, the social worker, the district court, and appointed counsel despite being given notice of all TPR proceedings and despite attempts of the social worker and counsel to communicate with him. Father does not argue that the evidence in the record is insufficient to support the district court's conclusion that there is a statutory basis for TPR. Nor does he argue that the due-process violations he now alleges had any effect on the outcome of the proceedings. We conclude that father has failed to establish that the interests of justice require review of due-process issues he failed to bring before the district court. We decline to address those issues on appeal other than to note that "[a]n appellant cannot assert a procedural due-process claim without first establishing that he has suffered a 'direct and personal harm' resulting from the alleged denial of his constitutional rights." *Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869, 877 (Minn. App. 2008) (quoting *Davis v. Comm'r of Pub. Safety*, 509 N.W.2d 380, 391 (Minn. App. 1993), *aff'd*, 517

N.W.2d 901 (Minn. 1994)), *review denied* (Minn. May 20, 2008). Error is never presumed on appeal:

> It must be made to appear affirmatively before there can be reversal. . . . [T]he burden of showing error rests upon the one who relies upon it. And we do not reverse unless there is error causing harm to the appealing party. In other words, error without prejudice is not ground for reversal.

Loth v. Loth, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (quotation omitted). Because father claims no harm resulting from the alleged violation, any potential error by the district court is not grounds for reversal.

Finally, even if we were to address the merits of father's arguments, it is clear that the best interests of B.W. outweigh father's alleged procedural violations. *See In re Welfare of S.R.A.*, 527 N.W.2d 835, 839-40 (Minn. App. 1995) (holding that the cognizance of a child's right to be raised in a secure home requires a balancing of the child's interest and any procedural defects raised by the parent and concluding that "the best interests of the child may be held paramount to a parent's 'liberty' interest in filiation"), *review denied* (Minn. Mar. 29, 1995).

Affirmed.