STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0224

In the Matter of the Welfare of the Children of:
E.D.S. and T.L.G.,
Parents.

Filed July 22, 2013
Appeal dismissed
Ross, Judge

Hennepin County District Court
File Nos. 27-JV-12-3873
27-JV-11-7904

William Ward, Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for appellant E.D.S.)

James Brian Sheehy, Assistant Public Defender, Petra Elizabeth Dieperink, Assistant Public Defender, Minneapolis, Minnesota (for respondent T.L.G.)

Michael O. Freeman, Hennepin County Attorney, James R. Hanneman, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Mary Jo Brooks Hunter, Hamline University School of Law, St. Paul, Minnesota (guardian ad litem)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

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

ROSS, Judge

E.D.S. did not appear at the district court hearing that resulted in the termination of her parental rights to her two children. The district court denied her motion for a new trial or to reopen the judgment. E.D.S. appeals, arguing that the district court erred by refusing to reopen the judgment mainly because she has an excuse for failing to appear at the hearing. Because the facts of this case make the district court's denial of E.D.S.'s motion to reopen the judgment nonappealable, we dismiss the appeal.

FACTS

In late July 2011, E.D.S. was at a medical clinic where she screamed at her infant son, told a doctor that she "can't handle him," and said that she "need[ed] a break" from parenting. Clinic staff reported that her son seemed fearful of E.D.S. but not of others. Washington County human services staff conducted a child-protection assessment, noting that E.D.S. was receiving chemical dependency services but finding no evidence of abuse.

E.D.S. gave birth prematurely to M.S. a month later, and she tested positive for THC. Medical staff again made a child-protection report to Hennepin County based on E.D.S.'s "high risk social situation" and her demonstrated reluctance to care for the infant. The county filed a petition in September 2011 alleging that E.D.S.'s children needed protective services. After a hearing, the district court adjudicated the children to be in need of protective services, citing E.D.S.'s admission that her continuing chemical dependency problems "negatively impact her ability to properly parent her children." It

ordered E.D.S. to complete a chemical dependency assessment and follow all treatment recommendations, submit to urinalysis monitoring, and cooperate with other county services.

After the hearing, the children were allowed to remain in E.D.S.'s care. But even before the petition was adjudicated, the county discovered that E.D.S. was not actually caring for the children and had instead left them with relatives. The county placed the children in foster care in November 2011.

E.D.S. continually neglected her case plan. She missed numerous appointments and failed to complete the chemical dependency treatment, missed twenty-five required urinalysis tests knowing that each refusal would be treated as a positive result, and failed all five urinalysis tests that she did take. She left the state for two months, requiring rescheduling of her chemical dependency assessment. E.D.S. also repeatedly missed parenting-assessment appointments as well as scheduled visits with her children. When the parenting assessment was finally completed, the assessor found that E.D.S. was "at high-risk for abuse of children." And after she missed several mental-health-assessment appointments, E.D.S. "was finally brought to [a] mental health center." The mental-health evaluator could not complete his assessment, however, concluding that "the evaluation was stretched out beyond reason" by E.D.S.'s failure to keep appointments.

Based on these and other deficiencies related to her ability to parent, the county petitioned the district court in April 2012 to terminate E.D.S.'s parental rights. At a pretrial hearing, E.D.S. entered a general denial but did not address any of the specific issues raised in the termination petition. The district court scheduled a trial for October 1,

2012, and E.D.S. signed a hearing notice that acknowledged the hearing date along with the warning that her failure to appear could result in "permanent termination of [her] parental rights."

E.D.S. nevertheless did not appear at the October 1 trial. The district court delayed the proceedings thirty-five minutes awaiting her arrival. Her attorney was present and reported that E.D.S. had been reminded of the hearing at least twice in the previous week. The district court denied her attorney's motion for a continuance. It took testimony from a child-protection social worker, who recounted E.D.S.'s failures to comply with her case plan and opined that it was in the best interests of the children that they remain permanently with their foster caregivers. E.D.S.'s counsel cross-examined the social worker and argued objections to exhibits.

The district court found that the county had established by clear and convincing evidence three statutory bases to terminate E.D.S.'s parental rights. E.D.S. moved for a new trial, generally asserting errors of law, insufficiency of the evidence, and interests of justice, but making no specific assignments of error and proffering no additional evidence. The district court denied the motion, noting that E.D.S.'s counsel had "stated that the mother was present in the Juvenile Justice Center on the day of the trial, but did not realize she could enter the courtroom, since the proceedings had begun" and "that the mother had additional information that would be pertinent to the Court's decision but did not specify what that information was."

E.D.S. moved the district court to reopen its termination judgment under Minnesota Rule of Juvenile Protection Procedure 46.02, attaching an affidavit alleging

that she had arrived at the Juvenile Justice Center forty-five minutes late for the October hearing and that she had left the center because she "did not realize [she] could walk into the courtroom after the proceeding began." She argued that this was a reasonable excuse for her failure to appear. She also argued that her general denial of the permanency petition alone provided a reasonable defense on the merits because it "put the agency to its burden of proving its petition." The district court denied E.D.S.'s motion, holding that a general denial was inadequate to present a reasonable defense on the merits, that her excuse for failing to appear at the October hearing was "not . . . plausible," and that the children's interests would be prejudiced by further delaying permanency.

E.D.S. appealed all three orders. By order of this court, her appeals of the termination order and the denial of her motion for a new trial were dismissed as untimely. This appeal is limited to the district court's denial of her motion to reopen the judgment.

D E C I S I O N

The county argues that E.D.S.'s appeal of the order denying her motion to reopen the district court's default order terminating parental rights should be dismissed because the order is not appealable. On the unique facts in this case, we are persuaded by the argument. "As a general rule, an order denying a motion to vacate a final judgment is not appealable." *Carlson v. Panuska*, 555 N.W.2d 745, 746 (Minn. 1996). Rather, "[t]he proper appeal from a final judgment is from the underlying judgment itself." *Id.* And a termination-of-parental-rights order is the "final adjudication of parental rights" in a child-protection case. *In re Welfare of L.M.M.*, 372 N.W.2d 431, 433 (Minn. App. 1985) (quotation omitted), *review denied* (Minn. Oct. 18, 1985).

But default judgments often constitute an exception to the general nonappealability rule because the defaulting party may have lacked notice of the proceedings until the time to file a direct appeal had expired. *See Kottkes' Bus Co. v. Hippie*, 286 Minn. 526, 527, 176 N.W.2d 752, 753 (1970); *see also* Minn. R. Civ. App. P. 103.03(e) (allowing appeal "from an order which, in effect, determines the action and prevents a judgment from which an appeal might be taken"). Juvenile-protection rules imply somewhat broader appealability standards, *see* Minn. R. Juv. Prot. P. 47.02, subd. 1 (allowing appeal "from a final order . . . affecting a substantial right of the aggrieved person, including *but not limited to* an order adjudicating a child to be in need of protection or services" (emphasis added)), but there is no caselaw defining the parameters of appealability in juvenile-protection cases, *cf. In re Welfare of Children of M.L.A.*, 730 N.W.2d 54, 61–62 (Minn. App. 2007) (declining to decide whether standards derived from a civil-procedure rule applied to a "similar" juvenile-protection rule). Generally, where a party participated and a direct appeal was available, "appeal from an order refusing to vacate serves no useful purpose." *Kottkes' Bus Co.*, 286 Minn. at 527, 176 N.W.2d at 753. So the "critical factor" differentiating nonappealable default judgments from appealable judgments "is whether [the defaulting party] participated in the original action." *Spicer v. Carefree Vacations, Inc.*, 370 N.W.2d 424, 425 (Minn. 1985); *see also Carlson*, 555 N.W.2d at 747 (noting that while the *Spicer* court held that ex parte default orders are appealable under Minn. R. Civ. App. P. 103.03(e), this "did not alter the general rule set out in *Kottke's Bus Company* that the denial of a motion to vacate a

default judgment is not appealable when the party appealing the default judgment appeared and participated in the underlying action").

It is therefore particularly important to focus on parent participation when evaluating appealability of a denial of a motion to reopen a judgment in a termination-of-parental-rights case. A party in a termination case may be found "in default" even though she participated through counsel at the trial or in other proceedings. And the district court's findings may be based on the evidence received, not the default alone. *See* 2 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 55.4 (5th ed. 2011) (noting that "[t]he non-appearing party [in a default hearing] forfeits the right to present evidence, but the non-appearance does not constitute grounds for a default judgment"). So a default finding in a termination-of-parental-rights case does not necessarily end the proceedings. Rather, the default finding is preliminary to a default hearing where the county must still meet a statutorily defined burden to justify termination of parental rights. The defaulting parent's counsel might participate, conduct cross-examinations, and present witnesses and exhibits in that default hearing notwithstanding the parent's absence. On the other hand, a termination-of-parental-rights case might instead involve a parent's failure to appear that was not mitigated by participation of her counsel and the district court's reception of evidence in her favor. Whether the denial of a motion to reopen is appealable therefore depends substantially on the level of a party's participation, leading to a case-specific inquiry.

The facts of this case demonstrate that the order denying E.D.S.'s motion to reopen is not appealable because the termination of her rights did not result mainly from

her failure to appear. E.D.S. acknowledged in writing her notice of the October 1 termination-of-parental-rights hearing. Her attorney told the district court that she had reaffirmed her awareness of the hearing at least twice during the prior week. And although the district court denied her counsel's request for a continuance, the record reveals that E.D.S.'s counsel participated actively in the hearing, presenting evidence through cross-examination of the county's witnesses and stipulating to some exhibits while objecting to others. Her appellate counsel asserted at oral argument that the trial record was too "flimsy" to support termination of parental rights, but E.D.S. acknowledged in briefing that the district court had received evidence and exhibits supporting her defense, and counsel could not supply any examples of relevant facts that E.D.S. could add to the record. Indeed, E.D.S. has never, at any stage, suggested any material fact that the district court did not receive because she missed the default hearing. E.D.S. did participate by bringing a new-trial motion, and even then she offered no facts that the district court had not received on account of her absence. E.D.S. presented instead only the conclusory allegation that "the statutory grounds set forth in the petition are proved is not [sic] justified by evidence or contrary to law." And she failed to file a timely appeal of either the termination-of-parental-rights order or the order denying her new-trial motion. We conclude that E.D.S. participated in the case sufficiently that the denial of her motion to reopen the default judgment is not appealable.

E.D.S. argues that the existence of numerous prior opinions by this court reviewing denials of motions to reopen default judgments—including at least nine that her appellate counsel has personally litigated—indicates that such denials are appealable

orders. But these cases "are no authority upon the issue of appealability and are to be explained by the fact that the issue of appealability was never raised or called to the attention of the court." *Cf. Chapman v. Dorsey*, 230 Minn. 279, 288, 41 N.W.2d 438, 443 (1950) (addressing nonappealability of orders concerning motions for joinder).

The challenged order is also not appealable because it is a thinly veiled effort to relitigate the termination order itself. A denial of a motion to reopen a default judgment is not appealable when the motion is based on the same grounds as those available for a direct appeal. *Carlson*, 555 N.W.2d at 746. E.D.S. implicitly argues that grounds for her motion to reopen are distinct from her challenges to the termination order because the question of whether she has met the required factors to reopen a judgment is distinct from the question of whether her parental rights should be terminated. This is abstractly true, but not actually true here. Among the elements required to reopen a judgment is the requirement that the movant show "a reasonable defense on the merits." *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964) (quotation omitted). The only defense that E.D.S. proffers is the alleged insufficiency of the "sparse record" in support of the district court's statutory findings in its termination order. And her appellate counsel detailed objections to procedures and evidence at the October 1 hearing as the sole basis for E.D.S.'s appeal during oral argument. The grounds that E.D.S. asserts for review of her denied motion to reopen are therefore indistinguishable from grounds for direct appeal from the termination order and the new-trial order. And the supreme court has held that motions to reopen judgments should not be used to extend direct-appeal deadlines. *See Lyon Dev. Corp. v. Ricke's Inc.*, 296 Minn. 75, 79, 207 N.W.2d 273, 275

(1973). Because her challenge to the district court's order denying her motion to reopen the judgment rests essentially on the same grounds as her dismissed appeal, we deem this an alternative ground to hold that the presently challenged order is not appealable.

We observe in passing that E.D.S.'s lack of a reasonable defense on the merits would almost certainly defeat her appeal even if we could reach its merits. In her response to the county's petition, in her new-trial motion, in her motion to reopen, and on appeal, E.D.S. has consistently offered only a general denial of the county's allegations, stating for example that she will "put the agency to its burden of proving its petition." But an answer that "alleges no facts and simply requires respondent to prove his case is the type of answer which does not . . . establish a meritorious defense." *Wiethoff v. Williams*, 413 N.W.2d 533, 536 (Minn. App. 1987); *see also Finden*, 268 Minn. at 271, 128 N.W.2d at 750 (requiring a meritorious defense as an essential element of a motion to reopen a judgment).

Appeal dismissed.