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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1582**

In re the Matter of the Welfare of the Child of: M. R., M. P., and J. R., Parents.

**Filed May 13, 2019
Affirmed
Schellhas, Judge**

Renville County District Court
File No. 65-JV-18-74

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

David J. Torgelson, Renville County Attorney, Glen M. Jacobsen, Assistant County Attorney, Olivia, Minnesota (for respondent)

Janice Tonn, Renville, Minnesota (guardian ad litem)

Considered and decided by Schellhas, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

On appeal from the termination of her parental rights, mother argues that (1) the district court improperly terminated her parental rights by default at a pretrial hearing when she failed to appear and erred by refusing to vacate the default termination of her parental rights and (2) the county failed to make an adequate search for relatives with whom the child could be placed. We affirm.

FACTS

Appellant-mother M.R. left her children, E.R., born in 2007, J.P., born in 2009, G.P., born in 2010, and I.P., born in 2012, in the care of her mother in November 2017. Around the same time, Renville County Human Services (RCHS) became involved with M.R.'s children because of truancy reports that it received involving some of the children. The maternal grandmother told RCHS that although M.R. received regular child-support payments, she did not purchase food or clothing, or pay rent or utilities with the money. The maternal grandmother told RCHS that she was financially unable to care for all four children.

On December 11, 2017, the maternal grandmother was evicted from her home for nonpayment of rent. At the time, M.R.'s whereabouts were unknown. The maternal grandmother and the children lived with a relative until they could find new housing. On January 5, 2018, all four children went to live with M.P., the biological father of J.P., G.P., and I.P.

In January 2018, RCHS filed a child-in-need-of-protection-or-services (CHIPS) petition because of M.R.'s continued absence. The district court conducted an emergency protective-care hearing and placed the children in the care of M.P. On February 21, the court adjudicated the children CHIPS by default after M.R. failed to appear at a scheduled hearing. Over the course of the next few months, M.R. failed to comply with her court-ordered case plan.

On June 20, 2018, M.R. appeared at a permanency review hearing. The district court found that M.R. was not in compliance with her case plan or maintaining contact with her

attorney or RCHS. The court also found that a social worker had made numerous attempts to contact M.R., once while M.R. was in jail. The court noted that M.R. was unwilling to schedule a meeting with the social worker; that M.R. declined all visits with her children; that during the permanency review hearing, M.R. became angry, talked over the court, objected to her case plan, expressed that she did not want to do a chemical-use assessment or drug testing; and that M.R. objected to supervised visits. Based on M.R.'s statements in court, the court relieved RCHS from providing reasonable efforts to reunify the children with M.R. because RCHS's previous efforts were futile. The court therefore ordered that RCHS file a permanency petition.

RCHS petitioned to terminate M.R.'s parental rights to all four children and to terminate the parental rights of J.R., the father of E.R.¹ M.R. attended an admit/deny hearing on August 1, 2018. At that hearing, the district court provided M.R. a notice to appear for a pretrial hearing on September 10, 2018. The notice stated as follows:

IF YOU FAIL TO APPEAR AT THE HEARING:

- The court may conduct the hearing without you; and
- The court may find that the factual allegations and statutory grounds set forth in the Petition have been proved; and
- The court may enter an order granting the relief requested in the Petition, which may include:
 - removing the child(ren) from the home of the parent or legal custodian and placing the child(ren) in foster care,
 - permanently severing the parent's rights pursuant to a termination of parental rights petition,
 - permanently transferring the child(ren)'s legal and physical custody to a relative, or
 - an order for other permanent placement of the child(ren).

¹ The district court terminated J.R.'s parental rights to E.R., and J.R. has not appealed from that order.

M.R. failed to appear at the pretrial hearing on September 10, 2018. Her attorney was present and told the district court:

[M.R.] did call into Court Administration a little bit earlier and then I subsequently talked with her. She would like to appear by phone today. She wasn't able to get a ride, if appear by phone if that's possible. I told her given the phone system it might – might not be and I also told her that we were likely going to have to – I think we've got the first day of trial scheduled for the eighteenth and I know we're going maybe have to revise that because of something in Kandiyohi County, so that's where I'm at with her.

The court found that M.R. received notice of the hearing, was informed that an order could be entered if she failed to appear at future hearings, and found M.R. in default. The court heard a social worker's testimony that M.R. had not completed any of the services required by her case plan and that, throughout the duration of the case, she had called the children three times and had not seen them. The children's guardian ad litem (GAL) testified that the children were doing "fantastic" in the home of M.P. and his wife and were comfortable and happy. M.P. testified by phone and confirmed that he could provide for the children and that they were doing well.

At the close of the pretrial hearing, the district court found that M.R. had abandoned her children and that termination of her parental rights was in the children's best interests. M.R. appealed the default termination of parental rights (TPR) to this court and, on October 2, 5, and 9, 2018, filed motion pleadings in district court to vacate the default TPR. This court stayed M.R.'s appeal, pending a ruling by the district court on her motion to vacate.

In support of her motion, M.R. filed an affidavit in which she stated as follows:

My name is [M.R.] and I am one of the respondents in this case. John Mueller is my attorney. I found out the date of the pre-trial conference which was to be held September 10, 2018. I had a previous commitment for a sentencing in Kandiyohi County Court, Willmar, Minnesota involving a criminal sentencing, so that had priority over a civil matter in Renville County. I called Mr. Mueller and told him of the conflict, which he brought to the Court's attention. I could not attend both hearings on time. I did indicate that I could be there, but I would be late.

I asked to be heard at the pre-trial by telephone. Mr. Mueller indicated that he would call me back to see if the judge was okay with letting me appear by telephone. I received a text message from him telling me that the judge denied my request to appear by phone but that [M.P.] was permitted to appear by telephone. This was not even the date for trial. The trial date was September 18. The trial was cancelled because of the default.

On November 28, 2018, the district court conducted a hearing on M.R.'s motion to vacate the default TPR. M.R. appeared with new counsel at the hearing and did not submit an affidavit from her previous attorney, John Mueller, to corroborate the statements in her affidavit, some of which were inconsistent with the statements made by Mr. Mueller at the pretrial hearing.

The GAL informed the district court that M.R. had been scheduled for a hearing in Kandiyohi County at 10:30 a.m. on September 10, 2018, and that the TPR pretrial hearing at which M.R. failed to appear was conducted at 1:30 p.m., on that date. Relying on district court records, the court verified that M.R.'s sentencing hearing on September 10, in Kandiyohi County "concluded early enough to leave [M.R.] a substantial amount of time

to get to her pretrial hearing at 1:30 p.m. in Renville County.” The court found that M.R. did not meet the four factors necessary to vacate a default TPR and denied her motion.

This appeal follows.

DECISION

I.

Grant of default termination of M.R. ’s parental rights

M.R. argues that the district court erred by terminating her parental rights by default at a pretrial hearing because Minn. R. Juv. Prot. P. 18 “does not explicitly state that a pretrial hearing may be used as a default hearing.” We disagree.

Minn. R. Juv. Prot. P. 18.01 provides that if a parent “fails to appear for an admit-deny hearing, a pretrial hearing, or a trial after being properly served with a summons . . . or a notice . . . the court may receive evidence in support of the petition or reschedule the hearing.” Then, if the TPR petition is proved by clear and convincing evidence, “the court may enter an order granting the relief sought in the petition as to that parent.” Minn. R. Juv. Prot. P. 18.02.

While M.R., through her attorney at the pretrial hearing—not in advance of the hearing—requested permission to appear by phone, the district court had the discretion to grant or deny the request under Minn. R. Juv. Prot. P. 12.02. Rule 12.02 provides that “[b]y agreement of the parties, or exceptional circumstances upon motion of a party or the county attorney, the court *may* hold hearings and take testimony by telephone or interactive video.” Minn. R. Juv. Prot. P. 12.02 (emphasis added); see Minn. Stat. § 645.44, subds. 1, 15 (2018) (stating that, when used in a statute, “may” is permissive).

The district court here followed the proper procedure for default under Minn. R. Juv. Prot. P. 18. The court provided M.R. a notice for the pretrial hearing that explicitly cautioned her that if she did not attend the pretrial hearing, the court could permanently sever her parental rights under the TPR petition. The notice satisfied the requirements of Minn. R. Juv. Prot. P. 18.01. *See In re Welfare of the Child of L.W.*, 644 N.W.2d 796, 796 (Minn. 2002) (stating that summons that provided if party failed to appear, court “may order your parental rights . . . be terminated,” satisfied the notice requirement in Minn. R. Juv. P. 54.01, which the supreme court subsequently renumbered as Minn. R. Juv. Prot. P. 18.01). The court heard testimony at the pretrial hearing from the social worker, the children’s GAL, and the children’s caretaker. Because the circumstances of the default proceeding “did not constitute a sham or a hoax . . . and was a real judicial proceeding,” the default termination M.R.’s rights did not violate due process. *Id.* at 797. After the hearing, the court issued an order, finding that RCHS proved by clear and convincing evidence that M.R. abandoned her four children under Minn. Stat. § 260C.301, subd. 1(b)(1) (2018), and that it was in the children’s best interests to terminate her parental rights.

M.R. does not challenge the district court’s findings on appeal. Her appeal is constrained to the argument that the court could not order a default TPR at a pretrial hearing under Rule 18. Because the district court followed proper juvenile-protection procedure and RCHS proved the TPR petition by clear and convincing evidence, the court did not err by granting RCHS a default TPR at the pretrial hearing.

Denial of motion to vacate default TPR

A district court may relieve a party from a final order, including a default order, for “mistake, inadvertence, surprise, or excusable neglect.” Minn. R. Juv. Prot. P. 46.02(a). To be entitled to relief from a default order under Rule 46.02, a party must show that (1) she has a reasonable defense on the merits of the case; (2) she has a reasonable excuse for her failure to act; (3) she acted with due diligence after the notice of entry of the default order; and (4) the opposing party will not be substantially prejudiced if the motion to vacate the default order is granted. *See Finden v. Klaas*, 128 N.W.2d 748, 750 (Minn. 1964) (discussing Minn. R. Civ. P. 60.02 and factors that party must demonstrate to be relieved from consequences of attorney’s neglect); *see also In re Welfare of Children of Coats*, 633 N.W.2d 505, 510 (Minn. 2001) (applying Minn. R. Civ. P. 60.02 to default TPR and requiring parent to demonstrate factors to be relieved from default TPR). On appeal from the district court’s denial of a motion to vacate a default order, this court reviews the court’s decision for an abuse of discretion. *Id.*

M.R. did not demonstrate a reasonable defense on the merits

M.R. concedes in her brief that any “reasonable defense on the merits is relatively weak.” But she argues that although one of the *Finden* factors is weak, the district court erred by not granting her motion for relief because she made a strong showing on the remaining factors. When a district court evaluates the existence and strength of the factors, “the relative weakness of one factor should be balanced against the strong showing on the other three.” *Gelco Corp. v. Crystal Leasing, Inc.*, 396 N.W.2d 672, 674 (Minn. App. 1986).

Here, the district court found that M.R. did not demonstrate a reasonable defense on the merits because she “utterly and totally failed to comply with the case plan and has not presented for visits with her children in nearly two years.” The record supports the court’s finding. Nothing in the record reflects that M.R. made any effort to meet with the social worker; to visit her children, telephoning them only three times throughout this case; or to otherwise comply with her case plan. Indeed, in her affidavit in support of her motion to vacate the default termination of parental rights, M.R. makes no mention whatsoever of her children. She addresses neither her desire to care for them nor their welfare. Even though one weak factor should be balanced against the strength of other factors, M.R.’s lack of a reasonable defense on the merits to the TPR petition “leaves little logical reason to compel vacation of default judgment.” *See id.* at 675 (stating that “appellant’s lack of a reasonable defense on the merits to respondent’s claim leaves little logical reason to compel vacation of default judgment”). We conclude that the court did not abuse its discretion in rejecting M.R.’s claim that she had a reasonable defense on the merits.

M.R. did not demonstrate a reasonable excuse for her failure to act

M.R. argues that she sufficiently demonstrated a reasonable excuse for her failure to appear at the pretrial hearing. We disagree. M.R. had the burden to demonstrate that she had a reasonable excuse for failing to attend her pretrial hearing. *See Finden*, 128 N.W.2d at 750 (stating that party seeking relief must show that factors are met). Even if M.R.’s sentencing hearing on September 10, 2018, truly conflicted with her pretrial hearing in her TPR proceeding—a fact that M.R. has not demonstrated—the record is void of any logical explanation about why that alleged conflict was not brought to the district court’s attention

before the day of the scheduled pretrial or why M.R.'s attorney did not relay the alleged conflict to the court at the pretrial hearing. M.R.'s attorney informed the court only that M.R. was unable to get a ride to the pretrial hearing; he mentioned nothing about a hearing conflict. We conclude that the district court did not err by finding that M.R. failed to satisfy her burden to prove that she had a reasonable excuse for failing to appear at the scheduled pretrial hearing in her TPR proceeding.

M.R. demonstrated that she acted with due diligence

The district court granted RCHS default termination of parental rights on September 10, 2018. The record shows that M.R. moved for relief from the default TPR within the 90-day period mandated by Minn. R. Juv. Pro. P. 46.02. Yet the court found that M.R. did not act with due diligence in seeking relief from the default TPR. M.R. filed an appeal with this court on September 26 and a motion to vacate the default TPR with the district court on October 2. We conclude that the record shows that M.R. acted with due diligence.

The opposing party will be substantially prejudiced

The district court found that M.R.'s oldest son, E.R., would be prejudiced if the court granted M.R.'s motion to vacate the default TRP because of the delay in finalizing E.R.'s permanency. M.R. argues that the court's reasoning is erroneous because prejudice to the opposing party is confined to potential destruction of evidence, unavailability of a witness, or other related concerns.

Under the fourth *Finden* factor, M.R. bore the burden of demonstrating that the opposing party will not be substantially prejudiced if the motion to vacate the default TPR is granted. Here, although RCHS and the GAL are the opposing parties, not E.R., the

opposing parties have the legal obligation to protect the children's best interests. And the law mandates that the district court conduct a permanency review hearing when a child remains in foster care for six months. Minn. Stat. § 260C.204(a) (2018). Any unreasonable delay is prejudicial to RCHS's ability to comply with the permanency guidelines that are intended to protect the children's best interests.

Here, the children have not lived with M.R. since November 2017 and, because M.R. failed to visit with the children, they have had virtually no contact with her since then. Although E.R. has resided with his siblings and their biological father since January 10, 2018, E.R. resides in foster care. E.R.'s permanency cannot be established through adoption until the termination of M.R.'s parental rights becomes final. The supreme court has "observed the importance of emotional and psychological stability to a child's sense of security, happiness, and adaptation, as well as the degree of unanimity among child psychologists regarding the fundamental significance of permanency to a child's development." *In re Welfare of J.J.B.*, 390 N.W.2d 274, 279 (Minn. 1986).

On these facts, we conclude that the district court did not err by finding that further delay in the termination proceedings would substantially prejudice E.R.'s interests because it would continue to undermine his permanency. And the court did not err with respects to its findings on the *Finden* factors, except with respect to M.R.'s due diligence acting after the default TPR. On these particular facts, we conclude that the court did not abuse its discretion by denying M.R.'s motion to vacate the default TPR.

II.

Before ordering the termination of parental rights, a district court must make specific findings that the termination is in the best interests of the children and must analyze: “(i) the children’s interests in preserving the parent-child relationship; (ii) the parent’s interests in preserving the parent-child relationship; and (iii) any competing interests of the child.” Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(3). This court reviews a district court’s determination that termination is in the children’s best interests for an abuse of discretion. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 905 (Minn. App. 2011), review denied (Minn. Jan. 6, 2012).

Pertaining “mainly to . . . E.R.,” M.R. argues that RCHS “failed to properly determine the rights of relatives and the district court failed to take testimony in this regard.” M.R. relies on Minn. Stat. § 260C.212, subd. 2 (2018), for the proposition that RCHS failed to perform an adequate relative search. The statute provides:

The policy of the state of Minnesota is to ensure that the child’s best interests are met by requiring an individualized determination of the needs of the child and of how the selected placement will serve the needs of the child being placed. The authorized child-placing agency shall place a child . . . in a family foster home selected by considering placement with relatives and important friends in the following order:

- (1) with an individual who is related to the child by blood, marriage, or adoption; or
- (2) with an individual who is an important friend with whom the child has resided or had significant contact.

Minn. Stat. § 260C.212, subd. 2(a). This court has noted that “when considering placement options for children in the child protection system, the legislature directed child-placing agencies . . . to consider relatives first.” *In re Welfare of Children of J.L.G.*, 924 N.W.2d

9, 15 (Minn. App. 2018) (holding that “[i]n adoption-placement cases, the district court must issue a ruling expressly excluding a relative as a suitable placement option in order for that relative to be considered ‘ruled out by the court’” (quoting Minn. Stat. § 260C.07, subd. 2(5))). Section 260C.212, subdivision 2(a), requires that a child-protection agency consider blood relatives but does not mandate placement with those relatives. *In re S.G.*, 828 N.W.2d 118, 124 (Minn. 2013). The Minnesota legislature also has recognized the importance of placing siblings together. *See* Minn. Stat. § 260C.212, subd. 2(d) (stating that “siblings should be placed together for foster care and adoption at the earliest possible time”).

Here, the district court placed the children—all siblings—in the home of three of the children’s biological father, M.P., and his wife. In the default TPR order, the court did not order E.R.’s *permanent placement* with M.P., the court instead ordered that RCHS shall “make reasonable efforts to finalize the adoption for [E.R.]” M.R. cites to no legal authority that would mandate reversal of the termination of her parental rights because a child-protection agency and presiding court failed to conduct a relative search that, if successful, would culminate in the separation of siblings. And we know of no such authority. M.R.’s argument lacks merit, and we discern no reversible error by the court.

Affirmed.