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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0811**

In re the Matter of the Welfare of the Child of:
B.E.M. and J.M.M., Parents.

**Filed October 21, 2019
Reversed and remanded
Slieter, Judge**

Mille Lacs County District Court
File No. 48-JV-19-610

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Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Kalitowski,
Judge.*

UNPUBLISHED OPINION

SLIETER, Judge

Appellant mother B.E.M. challenges the district court's termination of her parental rights by default following her failure to appear at an admit-deny hearing, arguing that the district court erred by not accepting her counsel's request to enter a denial to the

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

termination-of-parental-rights (TPR) petition and setting the matter for a pretrial hearing.¹ Minn. R. Juv. Prot. P. 18.01 precludes the district court from proceeding by default against an absent parent at the admit-deny hearing when counsel for the absent parent enters a denial on the absent parent's behalf. Because the district court did not accept counsel's requested denial on the parent's behalf and, additionally, did not receive sworn testimony or documentary evidence sufficiently supporting a TPR order, we conclude the court committed error that violated appellant's due-process rights. We reverse and remand.

FACTS

Appellant and respondent father J.M.M. have one child together, J.A.M. born in 2013. As described in the underlying child in need of protection or services (CHIPS) petition, J.A.M. has significant medical needs as a result of his premature birth, including several diagnosed conditions.

On September 7, 2018, Mille Lacs County Community and Veteran's Services filed a CHIPS petition related to J.A.M. Since the county filed the CHIPS petition, J.A.M. has been under the county's jurisdiction and placed in non-relative foster care. On September 21, 2018, the court entered a CHIPS adjudication and ordered the parents to comply with a case plan. The county developed an out-of-home-placement plan for appellant that included, *inter alia*, respite care, transportation services, financial support, housing search, early childhood education, WIC/public health services, and mental health referrals.

¹ Appellant raises additional challenges to the district court's termination order for erroneous factual findings and failing to make particularized best-interest findings. We do not reach these claims because the district court's decision to proceed by default violated appellant's due-process rights, which requires reversal and remand.

On March 29, 2019, the county filed a petition to terminate the parents’ parental rights. The county sought to terminate appellant’s parental rights under Minn. Stat. § 260C.301, subds. 1(b)(2), (4)-(6), (8) (2018). The district court scheduled the admit-deny hearing on the TPR petition for April 26, 2019. The district court also appointed a lawyer for each parent.

The parents failed to appear at the admit-deny hearing but, as explained by the county at the admit-deny hearing, the parents had “called the Court.”² The county requested the district court enter a default order on the TPR petition. Counsel for the parents each requested that the district court enter denials on their respective client’s behalf and schedule the matter for a pretrial hearing.³ The guardian *ad litem* indicated that she supported terminating both parents’ parental rights by default because “the parents [were] in minimal compliance with the case plan.” The district court asked the guardian *ad litem* questions about the child’s progress, eliciting statements—not under oath—that J.A.M. was doing “[e]xtremely well” in his placement.

Following statements from the guardian *ad litem*, the district court granted the county’s request to proceed by default. The district court stated:

I grant the County’s request for default in both cases. I find both of them had adequate notice, contact with the various other elements of the case — in some cases, including the counsel, but failed to respond and appear today in a timely

² The transcript of the admit-deny hearing does not explain the nature of the parents’ call to the district court. Counsel for the county at the hearing noted that the hearing began approximately 25 minutes after it was scheduled.

³ J.M.M. filed an appeal following the TPR order, but he withdrew his appeal. We therefore only address appellant’s issues raised on appeal.

fashion for a hearing necessary and important, in this case, obviously.

It's in the best interest that the child remain placed in nonrelative foster care pending adoption. The agency has applied least restrictive alternatives to these placements and this outcome, and I'll adopt the reports filed with the Court as the Court's finding in that regard. Reasonable efforts have been made to reunify the family.

I've been present through numerous hearings, much discussion about visitation.

The district court questioned the county social worker present at the hearing—not under oath—about different efforts made with the parents for parenting time and doctor appointment attendance. The county social worker noted that the parents were late to parenting time and doctor appointments; the parents provided explanations for their late appointments that the county social worker considered “not acceptable.” Based on these statements the district court stated:

All right. That's part of my findings regarding reasonable efforts. The County's extended quite extensive efforts to get the [parents] to doctor appointments and to visitation — accommodated many of those requests and adjustments over the pendency of this case, and I'm personally aware of that having presided over those prior hearings, I think, in their entirety.

And, again, I'll adopt the reports filed with the Court regarding those reasonable efforts and make that part of my findings.

At counsels' request, the district court discharged their representation at the end of the hearing.⁴

Part of the district court's TPR order included a factual finding that appellant had notice of the admit-deny hearing and was personally served with the TPR petition. This appeal follows.

DECISION

Appellant argues that the district court violated her due-process rights. First, appellant contends the district court should have granted her counsel's request to enter a denial on her behalf, as permitted by the rule, and set the matter for a pretrial hearing. Second, appellant asserts that she was deprived the opportunity to confront and cross-examine witnesses.

Appellate courts "exercise[] great caution in termination proceedings, finding such action proper only when the evidence clearly mandates such a result." *See In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996). "Whether a parent's due-process rights have been violated in a TPR proceeding is a question of law, which we review de novo." *In re Welfare of Children of D.F.*, 752 N.W.2d 88, 97 (Minn. App. 2008).

"The parent-child relationship is among the fundamental rights protected by the constitutional guarantees of due process." *Id.*; *see also SooHoo v. Johnson*, 731 N.W.2d

⁴ Appellant raises no challenge to the district court's discharge order, but we note that discharge should only occur after conclusion of the district court proceedings. *See In re Welfare of Child of M.L.A.*, 730 N.W.2d 54, 62 (Minn. App. 2007) (holding that the district court abused its discretion by discharging court-appointed counsel, without cause, before conclusion of district court proceedings); *see also* Minn. R. Juv. Prot. P. 36.05 (addressing withdrawal and discharge of counsel).

815, 820 (Minn. 2007) (“A parent’s right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right.”). A district court’s termination decision must be subject to “due process safeguards.” *In re Welfare of L.J.B.*, 356 N.W.2d 394, 397 (Minn. App. 1984). “Due process requires reasonable notice, a timely opportunity for a hearing, the right to counsel, the opportunity to present evidence, the right to an impartial decision-maker, and the right to a reasonable decision based solely on the record.” *D.F.*, 752 N.W.2d at 97; *see also In re Welfare of Children of B.J.B.*, 747 N.W.2d 605, 608 (Minn. App. 2008) (“The applicable due-process standard for juvenile proceedings is fundamental fairness.”). “It is settled that the nature of due process is flexibility. The amount of process due varies with the circumstances of the case.” *In re Welfare of Children of Coats*, 633 N.W.2d 505, 514 (Minn. 2001) (quoting *In re Welfare of H.G.B.*, 306 N.W.2d 821, 825 (Minn. 1981)). For a parent to present a valid due-process challenge that parent must show error and “prejudice as a result of the alleged violation” because that is “an essential component of the due process analysis.” *In re Welfare of B.J.-M.*, 744 N.W.2d 669, 673 (Minn. 2008) (citations omitted).

A. The district court procedurally erred by proceeding in default despite appellant’s counsel’s request to enter a denial on his absent client’s behalf.

Because appellant received notice of the potential consequences for failing to appear at the admit-deny hearing about her child,⁵ the question turns to whether the district court

⁵ We do not address appellant’s alternative argument regarding lack of service and notice of admit-deny hearing because appellant is entitled to relief because of the due-process violation as described herein. We do note however, the record does support the district court’s finding that she was properly served with notice.

properly proceeded by default in this circumstance. As noted below, the rules of juvenile protection allow for an attorney to enter a denial on an absent client’s behalf at the admit-deny hearing.

Pursuant to Minn. R. Juv. Prot. P. 18.01,⁶ a district court may proceed by default against an absent parent in a juvenile protection proceeding—with two identified exceptions.

Except as otherwise provided in Rules 47.02, subdivision 1, and 56.02, subdivision 1, if a parent, legal custodian, or Indian custodian fails to appear for an admit-deny hearing, a pretrial hearing, or a trial after being properly served with a summons pursuant to Rule 44.02 or 53.02, or a notice

⁶ The Minnesota Supreme Court promulgated amendments to the rules of juvenile protection procedure effective September 1, 2019—including rule 18—“to simplify the rules and incorporate necessary changes for consistency with updated laws and regulations.” *Order Promulgating Amendments to the Rules of Juvenile Protection Procedure and the Rules of Adoption Procedure*, Nos. ADM10-8040, 10-8041 (Minn. May 13, 2019); *see also Order Promulgating Amendments to the Rules of Juvenile Protection Procedure*, No. ADM10-8041 (Minn. Aug. 30, 2019) (amending Minn. R. Juv. Prot. P. 59 for reestablishment of the legal parent and child relationship following legislative amendments). The amendments to the rules are effective September 1, 2019 and apply to cases pending on that date. *Id.* The amendments modified rule 18.01 to “update[] the cross-references in” the rule and “are not intended to substantively change the [r]ule’s meaning.” Minn. R. Juv. Prot. P. 18.01 2019 comm. cmt. *But see Commandeur LLC v. Howard Hartry, Inc.*, 724 N.W.2d 508, 511 (Minn. 2006) (“[H]owever, as we have noted, advisory ‘committee comments are included for convenience and are not binding on the court.’”) (quoting *Vandenheuvel v. Wagner*, 690 N.W.2d 753, 756 (Minn. 2005) (citation omitted)).

The former rule 18.01, which was in effect when the district court made its decision, is substantively the same rule. Former rule 18.01 cross-referenced the former rule 35.02, subdivision 1, which permitted a denial to be made by counsel without their client’s appearance. *See* Minn. R. Juv. Prot. P. 35.02, subd. 1 (“A written denial or a denial on the record of the statutory grounds set forth in a petition may be entered by counsel without the personal appearance of the person represented by counsel.”). The former and current rule 18.02 both required the petition to be proven by the applicable standard of proof to permit relief to be granted by the district court.

pursuant to Rule 44.03, 44.04, 53.03, or 53.04, the court may receive evidence in support of the petition or reschedule the hearing.

Minn. R. Juv. Prot. P. 18.01 (emphasis added). Pursuant to rule 56.02, subdivision 1, “[a] written denial or a denial on the record of the statutory grounds set forth in a petition may be entered by counsel without the personal appearance of the person represented by counsel.”

Although appellant failed to appear at the scheduled admit-deny hearing, appellant’s counsel did appear. Appellant’s counsel requested that the district court “not enter a default judgment against [appellant] at this juncture and just allow [counsel] to enter a denial to the termination petition and have the matter set on for a pretrial.” By operation of rules 18.01 and 56.02, subdivision 1, the district court cannot proceed by default when counsel for appellant requested to enter a denial without appellant’s presence. Because the district court proceeded by default contrary to the rules, the district court erred.

B. The district court procedurally erred in the manner in which it held the default hearing.

The district court compounded its procedural error of entering default without accepting counsel’s denial on behalf of his client, inconsistent with the rules, by the manner in which the district court conducted the default hearing.

Rule 18 states that the district court proceeding by default “may receive evidence in support of the petition or reschedule the hearing,” Minn. R. Juv. Prot. P. 18.01, and that the order will be granted only if “proved by the applicable standard of proof,” Minn. R. Juv. Prot. P. 18.02. In *L.W. and Coats*, the supreme court upheld default orders granting TPR

petitions after “[t]he district court conducted an evidentiary hearing on the petition to terminate parental rights and heard testimony,” which made the proceedings “‘not constitute a sham or a hoax’ and it was ‘a real judicial proceeding.’” *In re Welfare of L.W.*, 644 N.W.2d 796, 797 (Minn. 2002) (quoting *Coats*, 633 N.W.2d at 512); *see also Coats*, 633 N.W.2d at 512 (recognizing that the record established that the district court “took evidence and was focused on the welfare of four children who were freed for adoption after waiting for over a year in the limbo of foster care while their mother repeatedly failed at the program that would have brought them home”).

Rather than receiving sworn testimony from the guardian *ad litem* and the county social worker in support of the TPR petition, the district court asked questions of witnesses, who were not placed under oath, and there was no opportunity for counsel for any party to ask questions. The district court *sua sponte* adopted the social worker’s report to court as part of its findings and received the CHIPS petition as part of the record.⁷ The record before us does not reflect an evidentiary proceeding like that in *L.W.* and *Coats* and

⁷ The district court’s order explained that it took judicial notice of these documents.

In addition to the judicial notice permitted under the Rules of Evidence, the court, upon its own motion . . . may take judicial notice *only of findings of fact and court orders* in the juvenile protection court file and in any other proceeding in any other court file involving the child or the child’s parent or legal custodian.

Minn. R. Juv. Prot. P. 3.02, subd. 3 (emphasis added); Minn. R. Evid. 201; *see also* Minn. Stat. § 260C.163, subd. 1(a) (2018) (“In all adjudicatory proceedings regarding juvenile protection matters under this chapter, the court shall admit only evidence that would be admissible in a civil trial.”). Appellant raises no objection on appeal to the district court’s receipt of these documents pursuant to judicial notice.

consistent with the requirement of rule 18.01. The district court therefore made an additional procedural error, as part of the default process, by not holding an evidentiary hearing during which the county was held to its burden to present evidence in support of the petition.

As further support of this analysis, we suggested in a recent unpublished opinion the critical distinction of default judgment under the Minnesota Rules of Juvenile Protection compared to the Minnesota Rules of Civil Procedure. *In re Welfare of Children of I.I.*, No. A19-0133, 2019 WL 2263515, at *4 (Minn. App. May 28, 2019). Rather than allowing a default judgment against a parent for merely failing to appear, the court in *I.I.* explained that a parent’s failure to appear at a TPR hearing permits the district court to receive evidence and apply the applicable standard of proof to grant a default TPR. *Id.* Although not precedential, we find the reasoning in *I.I.* to be persuasive.⁸ See Minn. Stat. § 480A.08, subd. 3(c) (2018).

C. Appellant established that the district court’s procedural errors resulted in prejudice.

For appellant to be entitled to relief on her due-process challenge, she must establish “prejudice as a result of the alleged violation” because that is “an essential component of the due process analysis.” *B.J.-M.*, 744 N.W.2d at 673 (citations omitted); *see also D.F.*, 752 N.W.2d at 97 (applying harmless error in termination cases on appeal). Because we determine that the district court could not proceed by default in this context and, moreover,

⁸ The *I.I.* court’s decision was based on the language of former rule 18, but we conclude that the rule has not substantively changed.

did not hold an evidentiary hearing when it chose to proceed by default, appellant was prejudiced by the district court's denial of her due-process right to present evidence. *See D.F.*, 752 N.W.2d at 97 (recognizing a parent's right to present evidence in a TPR action).

We reviewed the evidence considered by the district court during the admit-deny hearing in support of the TPR. Although the district court asked questions to the guardian *ad litem* and the county social worker, their responses were not under oath. The appellate record lacks sworn testimony or documentary evidence that conclusively supports the district court's termination and addresses the analysis of the child's best interests, which is the paramount consideration in juvenile protection cases. *See* Minn. Stat. § 260C.001, subd. 2(a) (2018) ("The paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the child."); Minn. R. Juv. Prot. P. 58.04(c)(2)(ii) (providing the particularized findings necessary for addressing best interests of the child in TPR cases); *see also* *S.Z.*, 547 N.W.2d at 893 (recognizing great caution taken by appellate courts in termination proceedings). Appellant establishes that the TPR order granted by the district court did not comply with her due-process rights, which caused her prejudice. *See In re Welfare of Child of A.H.*, 879 N.W.2d 1, 6 (Minn. App. 2016) ("But 'we will not reverse a correct decision simply because it is based on incorrect reasons.'") (quoting *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987)).

This court recognizes that the unfortunate result of this decision is delayed permanency for J.A.M. The Minnesota Rules of Juvenile Protection were adopted with the intention to "secure for each child under the jurisdiction of the court a home that is safe and permanent." Minn. R. Juv. Prot. P. 1.02(a). However, the rules are also established to

“provide a just, thorough, speedy, and efficient determination of each juvenile protection matter before the court and ensure due process for all persons involved in the procedures.”

Id. (b); *see also In re Welfare of Child of R.K.*, 901 N.W.2d 156, 163 n.9 (Minn. 2017) (recognizing the rules as “seek[ing] to ensure due process for all parties”). We reverse and remand for further proceedings consistent with this decision.

Reversed and remanded.