

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1110**

In the Matter of the Welfare of the Child of:
R. H. and D. M., Parents.

**Filed February 16, 2021
Affirmed
Bjorkman, Judge**

Carlton County District Court
File No. 09-JV-19-80

Matthew Miller, Duluth, Minnesota (for appellant R.H.)

D.M., Cloquet, Minnesota (pro se respondent)

Lauri A. Ketola, Carlton County Attorney, Claire Klein, Assistant County Attorney,
Carlton, Minnesota (for respondent Carlton County Public Health and Human Services)

Tim DiPuma, Carlton, Minnesota (guardian ad litem)

Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Bryan,
Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant R.H. (mother) challenges the transfer of physical and legal custody of her child to a maternal relative following a default hearing. Mother argues that (1) she was denied due process of law because she lacked proper notice of the hearing and of the consequences of failing to appear; (2) the district court abused its discretion by transferring custody of the child; and (3) she receive ineffective assistance of counsel. We affirm.

FACTS

Mother and D.M. (father) are the parents of a child born in July 2013. The parties never married and have “an extensive history with child protection” dating back to 2015. The child was removed from the home and, following a trial, adjudicated as a child in need of protection or services (CHIPS). The problems underlying the CHIPS adjudication include both parents’ chemical-dependency issues, mother’s mental-health issues, and mother’s trouble with the law that resulted in her being in custody for a significant portion of the CHIPS proceeding. Mother ultimately completed the case plan and was reunited with the child.

In June 2019, respondent Carlton County Public Health and Human Services (the county) filed a petition to terminate mother’s parental rights after receiving reports that the child was raped on a playground, and that mother and father were using drugs in the home. Mother failed to appear at the emergency protective-care hearing, and the district court determined that transferring custody to the county was in the child’s best interests.

Mother failed to appear in court for six out of the next ten hearings. During the November 5, 2019 pretrial hearing, the county moved to proceed by default, which the district court denied.¹ Two days later, mother was personally served with a petition to transfer permanent legal and physical custody of the child to a relative. The summons specifically warned that failure to appear may result in the court “granting the relief requested in the petition,” including “permanently transferring the [child’s] legal and

¹ Father consented to transfer legal and physical custody of the child during this hearing.

physical custody to a relative.” Mother nevertheless did not appear for the admit/deny hearing, which the district court rescheduled.

Mother attended three of the next four pretrial hearings but again failed to appear on February 25, 2020. Mother’s attorney stated that she had been “texting [mother] every several days since the last hearing reminding [mother] of [the hearing] and the trial and asking [mother] to contact me, and I’ve had, unfortunately, no contact with her.” The county then moved to proceed by default over the objection of mother’s attorney; this time the district court granted the request.

A county social worker testified about mother’s prior involvement with child protection and her continued drug use and mental-health issues. The social worker also testified that since June 2019, mother has not had stable housing, has been in and out of jail, and has had “[m]inimal” contact with the child. He stated that, although he created a case plan for mother, he has not had the opportunity to review it with her. But the social worker added that he generally discussed the services the county would be asking mother to participate in during the occasions when he transported mother to and from the court. The social worker opined that it is in the child’s best interests to transfer permanent legal and physical custody to a maternal aunt.

The guardian ad litem (GAL) testified that he had no contact with mother despite multiple attempts to reach her. He explained that the child could not be returned to mother’s care because, in light of her outstanding warrants and drug use, mother is unable to provide safe and stable housing for the child. And the GAL agreed that it is in the child’s best interests to transfer custody to the maternal aunt.

The district court determined that “[c]lear and convincing evidence supports a permanent transfer of legal and physical custody of the child to the proposed custodian.” But the district court found that the “best interests of the child are served by deferring transfer of permanent legal and physical custody pending determination of the child’s eligibility for Northstar Kinship Assistance.” The district court left the record open for “two weeks so that an affidavit from the foster parent may be received.”

In April 2020, mother’s lawyer filed a letter requesting that the district court dismiss the default order. At a subsequent review hearing, the district court took no action on the letter because it was not a formal motion. Counsel then orally moved the district court to vacate the default order because mother was in treatment, had plans for aftercare, and was doing well. The district court denied the motion.

After the Kinship Benefit Agreement was filed, the district court issued its findings of fact, conclusions of law, and order transferring permanent legal and physical custody of the child. The district court determined that the “evidence is clear and convincing that the child should not be returned to the home of the mother” and that “it is in the child’s best interest that permanent legal and physical custody immediately be transferred to [the child’s] maternal aunt.” Mother appeals.

DECISION

On appeal from an order permanently transferring custody of a child, we apply a two-part standard of review. *See In re Welfare of Child of D.L.D.*, 865 N.W.2d 315, 321-22 (Minn. App. 2015), *review denied* (Minn. July 21, 2015). We review the district court’s factual findings to determine whether they are clearly erroneous. *Id.* at 321. “A finding is

clearly erroneous only if there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred.” *Id.* at 322 (quotation omitted). And we review the district court’s ultimate determination that there was a statutory basis for a permanency disposition for an abuse of discretion. *Id.* at 321. “A district court abuses its discretion if it improperly applies the law.” *Id.* at 322 (quotation omitted).

I. The district court did not err by proceeding by default.

Mother contends that proceeding in her absence was “unwarranted,” and violated her right to due process because she was “not provided with adequate notice of the consequences of failing to appear for the February [25], 2020 pretrial hearing.” She did not make this argument to the district court. We generally do not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Accordingly, mother’s argument that the district court improperly granted the county’s motion to proceed by default is not properly before us.

But even if it were, we conclude that it fails on the merits. “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.” *In re Welfare of Children of D.F.*, 752 N.W.2d 88, 97 (Minn. App. 2008); *see also In re Welfare of L.W.*, 644 N.W.2d 796, 796 (Minn. 2002) (holding that due process was satisfied where parent had adequate notice of a hearing and was warned that failure to appear could result in termination of parental rights). Whether a parent’s due-process rights have been violated is a question of law, which we review

de novo. See *In re Welfare of Children of B.J.B.*, 747 N.W.2d 605, 608 (Minn. App. 2008). But we review the district court’s related factual findings for clear error. *In re Welfare of A.D.*, 535 N.W.2d 643, 648 (Minn. 1995).

Mother argues that the district court’s finding that mother had “proper notice of [the February 25, 2020] hearing and of the consequences of failing to appear” lacks support in the record. This argument is unavailing.

In a transfer-of-custody case, a summons must be issued by the court ordering the initial appearance in court of the child’s parents. Minn. R. Juv. Prot. P. 53.02, subd. 1. The summons must contain a copy of the petition, “a statement of the time and place for the hearing,” “a statement describing the purpose of the hearing,” and a statement explaining the rights of representation. *Id.*, subd. 2(a)-(d). And the summons must contain a statement that the failure to appear may result in:

- (1) permanent out-of-home placement of the child pursuant to a permanency petition;
- (2) permanent transfer of the child’s legal and physical custody to a relative;
- (3) a finding that the statutory grounds set forth in the petition have been proved; and
- (4) an order granting the relief requested.

Id., subd. 2(e). Finally, the summons must contain “a statement pursuant to Rule 18.01 that . . . if the person summoned fails to appear, the court may conduct the hearing in the person’s absence.” *Id.*, subd. 2(g)(1).

If a parent fails to appear for an admit-deny hearing, a pretrial hearing, or a trial after being properly served with a summons under rule 53.02, the district court has discretion to “receive evidence in support of the petition,” Minn. R. Juv. Prot. P. 18.01, and

“[i]f the petition is proved by the applicable standard of proof, the court may enter an order granting the relief sought in the petition as to that parent,” Minn. R. Juv. Prot. P. 18.02.

Mother agrees that the summons she received with the transfer-of-custody petition met all of the requirements of Minn. R. Juv. Prot. P. 53.02, subd. 2. But she contends it was deficient because it did not explain the consequences of failing to appear for later hearings. And she asserts that the district court did not advise her orally or in a written order that her failure to appear at future hearings could result in the matter proceeding by default and the court granting the relief sought in the petition. We are not persuaded for two reasons.

First, mother cites no legal authority for the proposition that a parent’s right to due process is violated where orders issued after the initial summons do not contain the language required by rule 53.02. And our independent research reveals none. Second, the record satisfies us that mother had adequate notice of the February 25, 2020 hearing and the potential consequences of her failure to appear. At every hearing she attended, the district court announced the date and time of the next hearing and told the parties that the court would see them then. Mother acknowledged during the December 17, 2019 hearing that she “kn[e]w all about” the timelines in child-protection cases because she “was just here in 2015.” Mother’s understanding that she was required to attend all court hearings is further demonstrated by the fact that on the mornings of three of the hearings she missed, she contacted her attorney or social worker to advise that she was unable to attend. On this record, we see no clear error by the district court in finding that mother had proper notice

of the February 25, 2020 hearing, and the consequences of failing to appear for that hearing. Accordingly, the district court did not err by permitting the county to proceed by default.

II. The district court did not abuse its discretion by transferring legal and physical custody of the child to a maternal relative.

A district court “may order permanent legal and physical custody to a fit and willing relative in the best interests of the child.” Minn. Stat. § 260C.515, subd. 4 (2020). An order permanently transferring legal and physical custody of a child must address:

- (1) how the child’s best interests are served by the order;
- (2) the nature and extent of the responsible social services agency’s reasonable efforts . . . to reunify the child with the parent . . . where reasonable efforts are required;
- (3) the parent’s or parents’ efforts and ability to use services to correct the conditions which led to the out-of-home placement; and
- (4) that the conditions which led to the out-of-home placement have not been corrected so that the child can safely return home.

Minn. Stat. § 260C.517(a) (2020). Findings on each of the four statutory factors must be proved by “clear and convincing evidence.” See Minn. R. Juv. Prot. P. 58.03, subd. 2(a).

Mother argues that the district court clearly erred by finding that (1) the transfer of custody was in the child’s best interests and (2) the county made reasonable efforts to reunify the child with mother. We address each argument in turn.

A. Best Interests

In making a permanency disposition order, the district court “must be governed by the best interests of the child, including a review of the relationship between the child and relatives and the child and other important persons with whom the child has resided or had significant contact.” Minn. Stat. § 260C.511(b) (2020). To be sufficient, a district court’s

best-interests findings must facilitate effective appellate review, provide insight into which facts or opinions were most persuasive for the court's ultimate decision, and demonstrate the court's comprehensive consideration of the statutory criteria. *In re Tanghe*, 672 N.W.2d 623, 626 (Minn. App. 2003).

Mother argues that the testimony provided by the social worker and the GAL at the default hearing is insufficient to support the district court's findings that transfer of custody was in the child's best interests. But the best-interests findings are not based solely on that testimony. Without objection, the district court took judicial notice of the 2015 CHIPS proceeding, and made detailed findings regarding mother's extensive use of controlled substances that prompted the filing of that CHIPS petition. *See* Minn. R. Juv. Prot. P. 3.02, subd. 3 (stating that 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"); Minn. R. Evid. 201(e) (addressing a party's right to be heard regarding a court taking judicial notice). The district court also found that the current child-protection proceedings were premised, in part, on mother's continued drug use—including use in the child's presence—and her significant mental-health issues. Moreover, the district court found that mother missed several court appearances, and that at times during these proceedings, mother has been homeless, continues to use controlled substances, and has not attended visits with the child.

In addition to the extensive findings regarding mother's inability to provide adequate care for the child, the district court made findings regarding the ability of the child's maternal aunt to safely care for the child. These findings are supported by the

affidavit in which the aunt states that (1) “she wishes to have permanent legal and physical custody of [the child]”; (2) she is “mentally and physically able to provide for the needs of the child”; (3) she “has been the primary caretaker of the child since June 25, 2019 and has provided a stable and satisfactory environment for the child and has developed a close intimate family relationship with the child”; and (4) she understands that the child is able to maintain a relationship with the child’s relatives, including reasonable parenting time with mother conditioned upon mother’s sobriety.

The district court further found that “[t]he child has been in continuous, out-of-home placement in excess of 880 days over the past five years,” and that the child’s father testified that transfer of custody was in the child’s best interests. In sum, the district court found, based on all of the record evidence, that the child has “a safe, stable, and loving home in the care of the relative,” and that it is “in the child’s best interests that [the child] be placed in the permanent sole legal and physical custody of the maternal aunt.” On this record, we conclude that the district court did not clearly err by finding that the transfer of custody is in the child’s best interests.

B. Reasonable Efforts

Subject to certain exceptions not applicable here, reasonable efforts for reunification are always required. Minn. Stat. § 260.012(a) (2020). “[T]he nature of the services which constitute ‘reasonable efforts’ depends on the problem presented.” *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 664 (Minn. 2008) (quoting *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996)). In determining whether reasonable efforts have been made, the district court must consider whether the services to the child and family were:

“(1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances.” Minn. Stat. § 260.012(h) (2020).

Mother argues that the social worker’s testimony during the default hearing “includes nothing addressing the six requirements contained within [section] 260.012(h), and nothing that could be construed as genuine assistance.” She specifically contends that the county knew she struggled with homelessness, but developed a case plan that “does not include even a single resource listed to assist with this most essential of basic human needs.” Because neither the social worker nor the GAL presented evidence that mother received housing assistance, mother asserts the district court’s reasonable-efforts finding is clearly erroneous.

We are not persuaded. The social worker acknowledged that mother lacked stable housing, but noted that she has been “in out and of jail throughout these proceedings.” In addition, the record reflects that despite numerous attempts by the county to contact mother, she was often unreachable. In fact, mother’s failure to attend many of the hearings in this matter demonstrates her reluctance to cooperate with the county. The social worker testified that, during the few times he was able to meet with mother when he transported her to and from court, he “had a good opportunity to discuss the services” provided by the county. But according to the social worker, mother “just ticked ‘em off herself because she mentioned that—she mentioned, in essence, it’s gonna be the same—pretty much the same as we had the first time around.” As the county points out, it “cannot work with a parent who does not avail herself to the child protection process.”

More importantly, the social worker testified that the county focused its services on the issues that precipitated these proceedings—mother’s drug use and mental-health issues. Services included chemical-dependency and mental-health evaluations and counseling, and other programming designed to assist mother in maintaining sobriety. These services were particularly relevant to the problems presented in this case, and support the district court’s finding that the county made reasonable efforts to reunify the child with mother. *See T.R.*, 750 N.W.2d at 664 (“[T]he nature of the services which constitute ‘reasonable efforts’ depends on the problem presented.”). We see no clear error in the district court’s finding that the county made reasonable efforts to reunify the child with mother.

Because the district court did not clearly err in its best-interests and reasonable-efforts findings, the district court acted within its discretion when it granted the county’s petition to transfer legal and physical custody of the child.

III. Mother received effective assistance of counsel.

Parents have a right to effective assistance of counsel in child-protection proceedings. Minn. Stat. § 260C.163, subd. 3(a) (2020). Minnesota courts have used the test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), when considering ineffective-assistance-of-counsel claims in noncriminal matters. *See, e.g., In re Welfare of L.B.*, 404 N.W.2d 341, 345 (Minn. App. 1987) (applying *Strickland* in juvenile-delinquency context); *see also Beaulieu v. Minn. Dep’t of Human Servs.*, 798 N.W.2d 542, 550 (Minn. App. 2011) (applying *Strickland* in the civil commitment context), *aff’d on other grounds*, 825 N.W.2d 716 (Minn. 2013). Under *Strickland*, mother has the burden of establishing that her lawyer’s representation “‘fell below an objective

standard of reasonableness” and that a reasonable probability exists that, but for the lawyer’s error, the result of the proceeding would have been different. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). “We need not address both the performance and prejudice prongs if one is determinative.” *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Mother argues that she was denied the effective assistance of counsel because her lawyer failed to “effectively” move the district court to vacate the default order and present “compelling arguments in accordance with the appropriate standards for such motions.”² See Minn. R. Juv. Prot. P. 22.02 (addressing a party’s ability to obtain relief from a juvenile court ruling). We disagree. To obtain relief from a default order, 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. *In re Welfare of Children of Coats*, 633 N.W.2d 505, 510 & n.4 (Minn. 2001) (applying, before the predecessor of the current Minn. R. Juv. Prot. P. 22.02 became effective, Minn. R. Civ. P. 60.02 to default termination of parental rights).

Assuming, without deciding, that mother’s lawyer’s failure to file a formal motion to vacate under rule 22.02 was objectively unreasonable, we conclude that mother is not

² Mother forfeited this issue by failing to raise it in the district court. See *Thiele*, 425 N.W.2d at 582. But in light of the nature of the proceedings, we will review the issue in the interests of justice under Minn. R. Civ. App. P. 103.04. See Minn. R. Juv. Prot. P. 23.01 (stating that, with exceptions not applicable here, the Minnesota Rules of Civil Appellate Procedure apply in juvenile-protection matters).

entitled to relief because she is unable to establish the second *Strickland* prong—that the result of the proceeding would have been different. As discussed above, the record amply supports the district court’s findings of fact and ultimate decision to transfer legal and physical custody of the child to a maternal aunt. Accordingly, mother has not demonstrated that she had a reasonable defense on the merits. And she has not shown that she had a reasonable excuse for her failure to act. She had adequate notice of the February 25, 2020 hearing and the consequences—including transfer of custody—of her failure to attend.

In short, mother has not established that, but for her lawyer’s failure to seek relief under rule 22.02, the outcome of this proceeding would have been different. *See Gams v. Houghton*, 884 N.W.2d 611, 620 (Minn. 2016) (stating that a party must satisfy all four factors articulated in rule 60.02 in order to be granted relief). She was not denied the effective assistance of counsel.

Affirmed.