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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1390**

In the Matter of the Welfare of the Children of: K. E. S., M. W. C., and T. J. S., Parents.

**Filed April 19, 2021
Affirmed
Reilly, Judge**

Winona County District Court
File No. 85-JV-19-181

Michael D. Schatz, Rochester, Minnesota (for appellant K.E.S.)

Karin L. Sonneman, Winona County Attorney, Rebecca R. Church, Assistant County Attorney, Winona, Minnesota (for respondent county)

Mark Jarstad, Wabasha, Minnesota (for T.J.S.)

A. Michael Kuehn, Winona, Minnesota (for Child 1)

Matthew Stinson, Rochester, Minnesota (for Child 2, Child 3, Child 4)

Heidi Neubauer, Holman, Wisconsin (guardian ad litem)

Considered and decided by Frisch, Presiding Judge; Reilly, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

After a termination of parental rights trial, the district court found that Winona County Health and Human Services proved by clear and convincing evidence four statutory grounds for termination of appellant-mother's parental rights. Because the district court

determined that the best interests of six of mother's seven children required termination, it terminated mother's parental rights to all but her oldest child. On appeal, mother argues the district court erred when it denied her request for a continuance and found that it was in the best interests of the children to testify informally, outside open court. We affirm.

FACTS

Appellant-mother K.E.S.'s lengthy involvement with the child protection system began over a decade and a half ago in 2004, the same year she gave birth to the oldest of her seven children. Since then, mother's children have experienced every known form of trauma while in her care. Counties in both Minnesota and Wisconsin intervened many times to provide mother services and opportunities to remedy the circumstances leading to their involvement. All, to no avail.

In October 2019, Winona County Health and Human Services (WCHHS) filed a termination of parental rights (TPR) petition alleging four statutory grounds for the termination of mother's parental rights to her seven children.¹ WCHHS alleged four statutory grounds under Minn. Stat. § 260C.301 (2018): (1) mother is palpably unfit to be a party to the parent-child relationship under subdivision 1(b)(4); (2) the children experienced egregious harm while in mother's care under subdivision 1(b)(6); (3) the children were neglected and in foster care under subdivision 1(b)(8); and (4) mother has failed to correct the conditions that led to the children's out-of-home placement under

¹ The district court involuntarily terminated the parental rights of both M.W.C. who is the father of mother's five oldest children and T.J.S. who is the father of mother's two youngest children. Neither father challenges the termination of their parental rights on appeal.

subdivision 1(b)(5).² Mother denied the allegations in the petition and the matter proceeded to trial.

Mother's four-day trial began in August 2020.³ The district court held two pretrial hearings on July 15 and July 30, 2020. The parties called 37 witnesses at trial, including mother's four oldest children: Child 1, Child 2, Child 3, and Child 4. At the end of trial, the district court found that WCHHS proved by clear and convincing evidence four statutory grounds for termination. The district court thoroughly analyzed the best interests of each individual child and found that the best interests of mother's six youngest children required the termination of mother's parental rights. But the district court considered Child 1's "strong and consistent desire to reunify with [m]other and strong opposition to being adopted" and found that the termination of mother's parental rights was not in the best interests of Child 1.

Mother appeals from the order of termination.

² Because the petition to terminate mother's parental rights was filed in 2018 and her trial held in 2020, we cite substantive statutes from 2018 and procedural statutes from 2020.

³ Mother's trial was first scheduled to begin in December 2019, but was held in August 2020, because the district court granted several continuances. During the case, five different district court judges presided over this matter. In its thorough and thoughtful TPR order the district court stated, "The Court must also address the perceived procedural missteps in this case. The Court acknowledges that having five different judges handle different parts of the case is contrary to well-established best practices."

DECISION

I. The district court did not abuse its discretion by failing to grant mother a continuance.

Mother argues that the district court abused its discretion when it denied her motion to continue her TPR trial to allow her to obtain substitute counsel. Mother failed to cite any authority for her argument. Inadequately briefed issues are not properly before this court. *See State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an issue absent adequate briefing); *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 166 (Minn. App. 2005) (citing this aspect of *Wintz* in a TPR appeal). In the interests of completeness, however, we begin by discussing the facts relevant to mother's argument.

At a hearing in February 2020, the district court learned that mother's first court-appointed attorney had represented the father of mother's five oldest children in a related child protection matter in 2009. Mother expressed her satisfaction with her first court-appointed attorney and her desire to move forward with him. But after reviewing the related matter and the rules of professional responsibility, the district court correctly determined that "it would be a conflict to move forward" with mother's first court-appointed attorney and thus disqualified him and assigned mother a second court-appointed attorney.

Five months later on Thursday, July 30, 2020, at the second pretrial hearing, mother requested to discharge her second court-appointed attorney and to continue the trial to

“possibly a week or two later.”⁴ Mother’s trial was set to begin the following Monday, August 3, 2020. Mother’s main complaints about her second court-appointed attorney were that she did not feel that he thought the matter was as serious as she did, and she was displeased with the frequency of his communication.⁵ Despite mother’s misgivings, her second court-appointed attorney testified that he has over twenty-five years of experience and has represented “a large number of parents in these kind of cases,” and that he was “ready, willing, and able to represent [mother].” Mother’s second court-appointed attorney also stated that he was “willing to do what is necessary” and would be a “zealous advocate” for mother. The district court told mother, “If you plan to represent yourself and you’re ready to go, then you can discharge your attorney at any point.” But the district court cautioned mother, “In the event, [mother], you choose to discharge your attorney, I am not going to appoint additional court appointed counsel for you.” Still, mother desired to discharge her second court-appointed attorney. The district court granted mother’s request to discharge her attorney, but denied her request for a continuance.

The morning of the first day of trial, mother immediately requested a continuance to retain new counsel. Child 1 supported mother’s motion for a continuance. WCHHS opposed mother’s request and stated that it was in the “children’s best interest that they be

⁴ Mother also requested that the presiding district court judge recuse herself because she represented mother in a child protection matter in 2009 involving two of mother’s children. The district court judge maintained her ability to be impartial but later recused herself to avoid the appearance of impropriety. A fifth district court judge was then assigned to preside over mother’s trial.

⁵ Mother testified, “this is a serious matter. I might lose my children and I don’t want to lose my children. And I would like somebody to represent me that thinks this is as important as I do.”

allowed to have permanency established sooner than later.” Child 2, Child 3, Child 4, and the guardian ad litem (GAL) agreed with WCHHS. The district court denied mother’s request and stated that it “was clear that there would be no continuance based on [mother’s] last-minute decision to discharge [her] experienced and prepared attorney.” Mother challenges the district court’s denial of her continuance request.

Generally, in juvenile protection matters, the district court “may” continue a trial “so long as the timelines for achieving permanency as set for in these rules are not delayed.” Minn. R. Juv. Prot. P. 5.01, subd. 1. Trials may not be continued for more than one week unless the district court specifically finds that the continuance “is in the best interests of the child.” *Id.*, subd. 2. Whether to grant a continuance so that a party may secure substitute counsel is a ruling within the district court’s discretion, which we will not reverse absent a showing of clear abuse of that discretion. *In re Welfare of J.A.S.*, 488 N.W.2d 332, 335 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

Our laws grant parents the right to be represented by court-appointed counsel during a TPR trial when they are financially unable to obtain counsel on their own. Minn. Stat. § 260C.163, subd. 3(a), (c) (2020); Minn. R. Juv. Prot. P. 36.02, subd. 2. But a parent may discharge their counsel in writing or on the record. Minn. R. Juv. Prot. P. 36.05(b). And a parent may voluntarily and intelligently waive their right to counsel. *In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000). “[T]he determination of whether a parent’s waiver of counsel in a TPR proceeding is voluntary and intelligent can be based on the surrounding circumstances of the case.” *Id.* at 723. “We will overturn a district court’s

finding of a valid waiver of the right to counsel only if that finding is clearly erroneous.”
Id.

Here, mother argues that her continuance request was “valid and appropriate.” We disagree. Based on the circumstances of this case, we determine that mother voluntarily and intelligently waived her right to counsel. *See G.L.H.*, 614 N.W.2d at 723 (examining the circumstances of the case to determine whether a waiver was voluntary and intelligent). Before permitting mother to discharge her second court-appointed attorney the district court told mother that she could do so if she planned to represent herself and was prepared. The district court made clear that if mother chose to discharge her second court-appointed attorney, the district court would not appoint another attorney for her and mother would need to represent herself. Yet, knowing the consequences of her decision, mother discharged her second court-appointed attorney.

And because mother discharged her second court-appointed attorney one full business day before trial was set to begin, any continuance to allow mother to secure substitute counsel would have inevitably delayed the proceedings. This case was already long past the timelines prescribed by Minnesota law for permanency proceedings. *See* Minn. Stat. § 260C.509 (2018) (stating that a TPR trial “shall be commenced within 60 days of the admit-deny hearing”). And as WCHHS, Child 2, Child 3, Child 4, and the GAL argued, it was in the children’s best interests that they have permanency established sooner rather than later. We conclude that because mother discharged her second court-appointed attorney with full knowledge that she would not be granted a continuance to seek a third attorney, the district court did not abuse its discretion in denying her continuance request.

II. The district court did not err by permitting the children to testify outside open court.

Mother argues that the district court erred when it permitted Child 1, Child 2, Child 3, and Child 4 to testify outside open court.⁶ We begin by detailing the facts relevant to mother's argument. The parties first discussed how the children would testify at trial, if at all, at a hearing in February 2020. The attorney for Child 1 and Child 2⁷ requested that when the children testify, "[m]other not be present in the courtroom." There was no objection to this request and the district court ordered that "the children will be allowed to testify without [m]other being present in the courtroom."

At the July 15 pretrial hearing, the attorney for Child 1 and Child 2 stated that the children's wishes had changed and that they now "would like to testify in front of everybody including [mother]." Before the July 15 hearing, therapists for Child 1, Child 2, Child 3, and Child 4 submitted letters to the district court stating that they did not believe it was in the children's best interests to testify in front of mother. In their letters, the therapists unanimously concluded that permitting the children to testify in open court would be detrimental to their wellbeing, and stated that the children would benefit from

⁶ Mother also argues that the district court violated the trial rights of Child 1 when it prohibited Child 1 from testifying in open court. Because mother lacks standing to challenge any purported violation of Child 1's trial rights, we decline to reach this issue on appeal. *In re D.T.R.*, 796 N.W.2d 509, 513 (Minn. 2011) (stating a party has standing when "that person had a direct interest in the litigation and *that person's* rights were injuriously affected by the adjudication" (emphasis added)). We also are perplexed as to what remedy mother seeks. The district court did not terminate mother's rights to Child 1.

⁷ At the February 2020 hearing both Child 1 and Child 2 wanted to be reunified with mother, so one attorney represented them. Because Child 3 and Child 4 did not want to be reunified with mother, another attorney represented them.

shielded testimony “without direct interaction with caregivers or other witnesses in the courtroom.” The therapists suggested that if the children *must* provide testimony, they could “be protected from undue harm by testifying to a judge privately in chambers.” WCHHS, therefore, requested that the district court continue the February 2020 order permitting the children to testify without mother present. Mother did not object. The district court ordered that mother would not be present while Child 1, Child 2, Child 3, or Child 4 testified.

At the July 30 pretrial hearing the parties again discussed the children’s preferences regarding testimony. In the time between the July 15 and the July 30 pretrial hearings, Child 2’s wishes about testifying and reunifying with mother “changed just slightly” and were closer to the wishes of Child 3 and Child 4, than those of Child 1. At the July 30 pretrial hearing, therefore, one attorney represented Child 1, who wanted to be reunified with mother, and another attorney represented Child 2, Child 3, and Child 4, who did not want to be reunified with mother. Attorney for Child 1 maintained Child 1’s request that the district court permit Child 1 to testify in person and in front of mother. Attorney for Child 2, Child 3, and Child 4, however, stated that “it would be in [his] clients’ best interest and their wishes, to not have their mother present during questioning.” WCHHS agreed and again argued that letters submitted to the district court from the children’s therapists supported the request that the district court permit the children to testify outside mother’s presence and that it is in their best interests to do so. And the GAL noted that appearing in court was traumatic for the children and that Child 2, in particular, struggled after the July 15 pretrial hearing. Mother did not object.

The district court noted that because mother had discharged her second court-appointed attorney and would be unrepresented at trial, the circumstances had changed since the February 2020 order allowing the children to testify outside mother's presence. At that time, while mother's presence would have been excused, her attorney would have been allowed to remain present while the children testified. The district court reserved issuing a decision on whether the children would be permitted to testify, but stated that if they did testify, "such testimony will be with the [district] [c]ourt and Guardian Ad Litem only."

At trial, the district court found that it was in the best interests of the children that they have a chance to testify. While it took the children's testimony, the district court permitted only the GAL to be present, but allowed the children to take breaks and speak with their attorneys at any time. Again, mother did not object. Yet, on appeal, she now challenges how the district court heard the children's testimony.

We rarely consider matters that were not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (applying *Thiele* in a TPR appeal). When the district court took the children's testimony outside open court at trial, mother did not object.⁸ Mother similarly did not object at the February 2020 hearing, July 15 pretrial hearing, or the July 30 pretrial hearing when the district court ruled that it would permit the children

⁸ We recognize that mother was self-represented at trial but this court has "repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules." *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001).

to testify without mother present. Because mother did not object to how the district court received the children's testimony, the district court did not consider any argument that excluding mother was erroneous. And we may decline to reach this issue on appeal. *Id.*

Even if mother had raised timely objections at trial, it is a well-established rule of law in Minnesota that objections to evidentiary rulings in juvenile protection proceedings, "are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error." *In re Welfare of D.N.*, 523 N.W.2d 11, 13 (Minn. App. 1994) (declining to review evidentiary issues in a juvenile protection proceeding where appellant failed to bring a motion for a new trial) (quoting *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1996)), *review denied* (Minn. Nov. 29, 1994); *see also* Minn. R. Evid. 611 (stating that the district court shall control the mode and order of interrogation and presentation of evidence); Minn. R. Juv. Prot. P. 3.02, subd. 1 (stating the rules of evidence apply in juvenile protection matters unless displaced by statute or a rule). Mother did not bring a motion for a new trial. Thus, mother's argument is not properly before us.

But even though mother's argument is not properly before us and we may decline to consider it on appeal, we may review a TPR order when "the interests of justice" require. Minn. R. Civ. App. P. 103.04. Because the best interests of children are the "paramount consideration" in termination matters, we will exercise our discretion to address mother's argument that the district court prejudicially erred by permitting the children to testify outside open court. Minn. Stat. § 260C.001, subd. 3 (2020).

Mother argues that the district court erred by offering “little to no explanation for its decision to take the testimony of the four children privately” and by denying her the opportunity to present questions or cross-examine the children. At a TPR trial, parents have the right to present evidence and witnesses, and to cross-examine witnesses called by other parties. Minn. Stat. § 260C.163, subd. 8 (2020); *see also* Minn. R. Juv. Prot. P. 49.02, subd. 2(a)(1)-(3) (2020). But, by statute, “the paramount consideration” in termination matters is the best interests of the child. Minn. Stat. § 260C.001, subd. 3. And the purposes of the laws relating to juvenile protection proceedings include “provid[ing] judicial procedures that protect the welfare of the child.” *Id.*, subd. 2(b)(2) (2020).

District courts thus may informally take the testimony of a child alleged to be in need of protection when it is in the child’s best interests to do so. Minn. Stat. § 260C.163, subd. 6 (2020). The district court may take the testimony of a child witness outside the courtroom or require counsel for any party to submit questions to the court before the child’s testimony is taken. *Id.* The district court may also “excuse the presence of the child’s parent” while the child testifies. *Id.* When it is in the best interests of the child to excuse the presence of the parent, the parent’s attorney has the right to continue to participate in the proceedings. *Id.*, subd. 7 (2020).

It is necessary for the district court to make findings explaining its exercise of discretion when it determines that it is in the best interests of a child witness to testify informally. *Rosenfeld v. Rosenfeld*, 249 N.W.2d 168, 171-72 (Minn. 1976) (holding that findings explaining a district court’s exercise of its discretion are necessary to ensure that the relevant factors have been addressed, to provide appellate courts with an adequate basis

to review the exercise of that discretion, and to assure the parties that the relevant factors have been considered); *see also In re Welfare of J.R.R.*, 943 N.W.2d 661, 669-70 (Minn. App. 2020) (citing *Rosenfeld* in a TPR appeal). When a district court's findings are inadequate, an appellate court may undertake "an independent review of the record" to effectively review the district court's ruling. *In re Welfare of M.M.*, 452 N.W.2d 236, 239 (Minn. 1990).

Mother argues that the district court made inadequate findings when it exercised its discretion to take the testimony of the children outside open court. The district court found that "[i]n weighing on the importance of the considerations, I do conclude that it is in the best interests of the children that the oldest four children, many of whom wished to tell me what they wanted me to know, should be provided that opportunity to do so." The district court made no other findings and offered no other explanation for its exercise of discretion. The district court's findings are thus, inadequate for appellate review.

But based on our independent review of the record, we conclude that the district court did not abuse its discretion by ruling that it was in the children's best interests to take their testimony informally. Therapists for Child 1, Child 2, Child 3, and Child 4, made clear that permitting the children to testify in open court would be detrimental to their wellbeing. The therapists specifically stated that if the children must testify, they would benefit from doing so without direct interaction with their caregivers and could be protected from undue harm by testifying to the district court judge privately in chambers. It is clear from the record that it was contrary to the best interests of the children to testify in open court with mother present.

Mother also argues that because she was not afforded a chance to present questions or cross-examine the child witnesses, the district court violated Minn. Stat. § 260C.163 (2020).⁹ Mother, however, does not argue that it was contrary to the best interests of the children to testify outside her presence. And when the rights of a child and a parent conflict, “the rights of the parent must yield.” *In re Booth*, 91 N.W.2d 921, 924 (Minn. 1958) (quotation omitted); *see also In re P.T.*, 657 N.W.2d 577, 583 (Minn. App. 2003) (stating that in a TPR appeal, “parental rights are not absolute and should not be unduly exalted and enforced to the detriment of the child’s welfare and happiness” (quotation omitted)). We conclude that the district court did not abuse its discretion by taking the testimony of the children outside open court in the manner that was most consistent with their best interests.

Even if we concluded that the district court erred by permitting the children to testify outside open court, mother would not prevail. Mother has not met her burden of proving that the district court erred or that she was prejudiced by such error. *See In re Child of Simon*, 662 N.W.2d 155, 162 (Minn. App. 2003) (affirming a district court’s decision to terminate parental rights when the parent did not show that an evidentiary error was prejudicial). The district court found that WCHHS proved by clear and convincing evidence four statutory grounds for termination of mother’s parental rights. To

⁹ Minnesota law grants the district court wide discretion to receive the testimony of children in the manner that is most consistent with their best interests and also grants parents the right to counsel and presumes that during a TPR trial, parents will be represented. Minn. Stat. § 260C.163, subd. 3(a); Minn. R. Juv. Prot. P. 36.02, subd. 2. Mother waived her right to representation and the consequences that flowed from that choice.

involuntarily terminate parental rights, the district court must find at least one statutory ground for termination exists. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). On appeal from a district court's TPR order, "we will review the district court's findings of the underlying or basic facts for clear error, but we review its determination of whether a particular statutory basis for involuntarily terminating parental rights is present for an abuse of discretion." *In re Welfare of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

Here, the district court found that all seven children experienced egregious harm in mother's care under Minn. Stat. § 260C.301, subd. 1(b)(6). Egregious harm is "the infliction of bodily harm to a child or neglect of a child which demonstrates a grossly inadequate ability to provide minimally adequate parental care." Minn. Stat. § 260C.007, subd. 14 (2018). The record contains overwhelming evidence, other than from the testimony of the children, which independently supports the district court's finding that the children suffered egregious harm in mother's care.

A child abuse pediatrician testified that she examined all seven of mother's children and determined that:

All of the children had a history of multiple forms of abuse and neglect especially the oldest five. Two of the children had positive hair follicle tests [for methamphetamine and THC]; the oldest and the youngest. None of the children had acute injuries at the time of my exam but . . . some had previous injuries that had left scars that were visible. Three of the children demonstrated significant emotional dysregulation during our visits, which was fairly impressive. And the two youngest girls also demonstrated indiscriminate attachment during the visit.

The child abuse pediatrician also testified:

In looking at the lives that these children have lived over the last six years that I've been acquainted with them, my concerns are that they—at least the oldest five for certain, have experienced every type of trauma that we know of multiple times. Whether it's physical abuse, sexual abuse, emotional abuse, chronic homelessness, food insecurity, witnessing their mother being beaten by their father or the other man in her life, being threatened with being harmed fatally, living with adults with substance use disorder, with mental illness. It just goes on and on.

The record also contains testimony from six therapists and one psychologist who provided care to the children. Child 1's therapist testified that Child 1 had distressing dreams and flashbacks of traumatic events, Child 1 met the "full criteria for PTSD," and Child 1 experienced a lot of the trauma while in mother's care. Child 2's therapist testified that Child 2 "met criteria for PTSD due to the significant trauma history including physical, emotional, and sexual abuse" and Child 2 suffers from "distressing memories of the trauma," "impulsivity," "self-blame," a "persistent negative emotional state of fear and anger," and "difficulty staying asleep and waking up multiple times throughout the night." Child 3's therapist testified that she diagnosed Child 3 with PTSD and he suffers from "some concerning self-harm behaviors" like "attempt[ing] to put forks in outlets, and throwing himself down the stairs, [and] hiding and balling up" Child 4's therapist testified that she diagnosed Child 4 with PTSD and Child 4 suffered from "body []base dysregulation, pressured speech, moving around a lot, [and] frequent topic switching." Child 5's psychologist testified that she diagnosed Child 5 with adjustment disorder with disruption of emotions and conduct, PTSD, and enuresis because of the significant

difficulties Child 5 had with bed wetting, and noted that Child 5 has experienced significant trauma. Child 6's therapist testified that she diagnosed Child 6 with PTSD and Child 6 suffered from nightmares. Child 7's therapist diagnosed Child 7 with PTSD and stated Child 7 "experienced direct trauma" and "appeared to be re-experiencing that trauma."

Excluding any testimony from the children, the record contains sufficient evidence that the children suffered egregious harm in mother's care. We thus conclude that the district court did not abuse its discretion by finding the statutory ground of egregious harm to support termination. Mother has not satisfied her burden on appeal of showing that the district court erred and that she was thereby prejudiced.

Affirmed.