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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-766

In the Matter of the Welfare of the Children of:
M. P. and G. P., Parents.

Filed October 11, 2011
Reversed and remanded
Harten, Judge*

Blue Earth County District Court
File No. 07-JV-10-1311

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Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Harten, Judge.

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

HARTEN, Judge

Appellant M.P. challenges the district court order voluntarily terminating her parental rights. Because appellant was not placed under oath at the hearing, in violation of Minn. R. Juv. Prot. P. 42.08, subd. 2(b), we reverse and remand.

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

FACTS

Appellant M.P. and respondent G.P. are the parents of two children, A., born in March 2007, and M., born in June 2008. In June 2008, G.P., an illegal alien, was arrested for violent criminal behavior; he was deported in 2010.

In August 2009, the children were removed from the home, after A. was found wandering in the streets. Respondent Blue Earth County (the county) filed CHIPS petitions on both children and, in April 2010, filed a permanency petition requesting the involuntary termination of both parents' parental rights.[1]

In November 2010, M.P. signed two documents. The first was a parental consent to termination, stating that she consented "to the entry of an order by the court terminating all [her] parental rights to the children"; that she understood that "following the entry of such an order the children may be adopted without further consent by [her] and without any further hearing or notice to [her]"; that she believed "[her] consent to terminate parental rights [was] for good cause and in [her] children's best interests"; and that she further understood that "this consent to terminate parental rights [did] not act to terminate [her] parental rights until [she] appear[ed] in Court, affirm[ed] [her] decision before the Judge, and a final order terminating parental rights [was] issued by the Court." The second document was a contact agreement, permitting M.P. four annual supervised visits until the children were adopted and stating that future visitation would be at the discretion of the adoptive parents.

[1] The children, now four and a half and three, have been in foster care for two years. We focus upon the procedural rules governing the termination and do not reach the merits of the termination.

It is undisputed that, at the hearing, M.P. was not placed under oath. Her attorney questioned her on the two documents.

> Q. And these two documents are together in that you are consenting to the termination of your [rights to] your children for good cause?
> A. Yes.
> Q. And [the termination is] based upon the Contact Agreement but we also understand that the Contact Agreement does not necessarily bind the adoptive parents?
> A. But you guys are going to make a good –
> Q. Good effort.
> A. Yes.
> Q. And it's the intention of the parties that if the visitations [are] going well, that these visitations would continue after the adoption?
> A. Yes.
> . . . .
> Q. . . . [D]o you understand that today was the date where the trial on the underlying allegations of the Petition was set for?
> A. Yes.
> Q. And we could have had the trial where the burden would have been on [respondent] to prove by clear and convincing evidence the allegations contained within the Petition before the Judge could have a basis for termination?
> A. Yeah, but then I wouldn't have been able to see [the children] after that, right?
> Q. Correct. We also talked about the consequences such as, you're right, you would not have the Contact Agreement . . . .
> A. Right.
> . . . .
> Q. And you heard the statement that I made to the Judge that the good cause is based upon . . . your mental health issues and the prescription medication that you take for your back and other pain issues?
> A. Yeah.

The district court also questioned appellant:

> Q. [T]his is a fine but it's an important point. I know it's important for you to have this Contact Agreement and that really entered into part of your decision, correct?
> A. Yeah.
> Q. And . . . the possibility of no contact would have been if the County was able to prove their case. You understand that?
> A. No. I don't get what you – I'm sorry.
> Q. All right. I'm just explaining it. If [respondent] would have proceeded with a trial today, and you would have proceeded with the trial –
> A. Yeah.
> Q. [A]nd if [respondent] would have proven by clear and convincing evidence [its] Petition to Terminate, then there would be no contact in that event. Do you understand the difference?
> A. Yeah.

The district court concluded:

> The Contact Agreement will also be attached to the file and copies of that may now be made available. . . .
>
> We will inform the future adoptive parents of the on-going visitation and hopefully that if good faith efforts have been made in the interim, the adoptive parents . . . will consider all of those factors in determining what they will choose to do after the children . . . are adopted.

On 20 December 2010, an order was entered terminating the parental rights of M.P. and G.P. M.P. filed an appeal of the order on 6 January 2011, but this court questioned its jurisdiction, because it appeared that M.P. had not presented the issues she sought to raise to the district court. M.P. voluntarily dismissed the appeal and on 2 February 2011, she

moved the district court to vacate the termination. That motion was denied, and she appeals, arguing that the termination was not voluntary.[2]

D E C I S I O N

The application of procedural rules is reviewed de novo. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 153 (Minn. 2001). At the hearing on a voluntary termination of parental rights, "the parent *shall be placed under oath* for the purpose of: (1) asking that the petition be granted; and (2) establishing that there is good cause for termination of parental rights and that it is in the best interests of the child to terminate parental rights." Minn. R. Juv. Prot. P. 42.08, subd. 2(b) (emphasis added). "'Shall' is mandatory." Minn. Stat. § 645.44, subd. 16 (2010). M.P. was not placed under oath at the hearing. She argues that this omission mandates the vacation of the order terminating her parental rights.

We agree. In addition to the mandatory "shall" preceding the directive that a parent be placed under oath, the rule also provides that the district court *shall* "inquire as to the *true voluntary nature* of the parent's consent" to the termination of parental rights. Minn. R. Juv. Prot. P. 42.08, subd. 2(c)(3) (emphasis added). Appellant did not ask under oath that her petition be granted, as required by Minn. R. Juv. Prot. P. 42.08, subd. 2(b)(1), and the transcript does not establish that her consent to the termination was truly voluntary. Rather, the transcript shows that continuing contact with her children was

[2] M.P. does not argue, and we do not imply, that there are insufficient grounds for termination.

appellant's primary objective and that both her attorney and the district court were aware of this.

The transcript reflects both appellant's understanding that she would have no further contact with the children *unless* she consented to voluntary termination and her hope that the adoptive parents would permit her to continue contact if she *did* consent to voluntary termination. The transcript also indicates that appellant's mental health and her need for pain medication were a basis for the termination. In light of appellant's mental health issues and the lack of the required oath, a fair inference from the transcript is that appellant would have said anything she perceived as likely to achieve continuing contact with the children. The transcript does not reflect "the true voluntary nature" of appellant's consent to the termination. *See id.*

Finally, the county asserts that termination of M.P.'s parental rights based on consent is justified under Minn. R. Juv. Prot. P. 42.08, subd. 2(d). But that rule prescribes the procedure to be followed when a parent is not present in court. By its own terms, the rule applies only "[i]f the parent is not present in court," a situation not presented in this case.

We reverse and remand for proceedings in accord with Minn. R. Juv. Prot. P. 42.08, subd. 2(b). Because the failure to place appellant under oath constitutes an

adequate basis for reversal, we do not address appellant's argument that her consent was invalid because obtained through fraud, duress, or undue influence.

Reversed and remanded.

Dated: _____ _____

James C. Harten, Judge