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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1668

In the Matter of the Welfare of the Child of:
R. A. and J. D., Parents.

Filed March 25, 2013
Affirmed
Bjorkman, Judge

St. Louis County District Court
File No. 69DU-JV-12-504

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J.D., Duluth, Minnesota (pro se respondent)

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Mark S. Rubin, St. Louis County Attorney, Joseph Fischer, Assistant County Attorney, Duluth, Minnesota (for respondent county)

Doug Osell, Duluth, Minnesota (guardian ad litem)

Considered and decided by Stauber, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges the involuntary termination of her parental rights, arguing that (1) she was denied effective assistance of counsel and (2) clear and convincing evidence does not support termination. We affirm.

FACTS

Appellant R.A. (mother) and respondent J.D. (father) are the parents of S.L.A.-D. (born March 15, 2005). S.L.A.-D. has lived with respondents C.D. and R.D., her paternal grandparents, for seven years. C.D. and R.D. acquired legal custody of S.L.A.-D. on May 3, 2010, as a result of a child-in-need-of-protection-or-services (CHIPS) proceeding.

C.D. and R.D. filed a termination-of-parental-rights (TPR) petition on April 18, 2012. The district court held an admit/deny hearing on June 25. The court appointed counsel to represent mother, and mother denied the petition. During the hearing, at which mother was present, the court clerk stated that the pretrial hearing was scheduled for July 23 at 9:30 a.m. Mother did not appear on that date. Mother's counsel expressed surprise that she was not present, stating that he had spoken with her following the admit/deny hearing. Mother's counsel objected to the court proceeding in default and stated that mother opposed termination of her parental rights.

The district court proceeded in default over counsel's objection and took judicial notice of the prior CHIPS file.[1] C.D. testified that mother has not had any contact with S.L.A.-D. since 2010 and has not financially supported S.L.A.-D. or performed the normal obligations of a parent. C.D. further stated that S.L.A is doing well in school and in their custody. R.D. agreed with C.D.'s testimony. At the conclusion of the hearing, the district court found on the record that mother had abandoned S.L.A.-D., that she had not provided S.L.A.-D. financial support or performed actions in the regular course of

[1] Father consented to termination of his parental rights.

being a parent, and that termination of mother's parental rights is in S.L.A.-D.'s best interests.

On August 1, mother submitted a statement to the district court, stating that she did not receive written notice of the date and time of the pretrial hearing and that she only spoke with her counsel following that hearing. Mother requested new counsel and expressed concern that none of "the success" that she has experienced was presented to the district court.

On August 28, the district court issued an order granting the TPR petition, determining that there is clear and convincing evidence that mother abandoned S.L.A.-D., mother refused or neglected to comply with her parental duties, and termination is in S.L.A.-D.'s best interests. This appeal follows.

D E C I S I O N

Mother argues that this court should reverse the termination of her parental rights because her lawyer's ineffectiveness resulted in a default judgment and clear and convincing evidence does not support the abandonment ground for termination. We address each argument in turn.

I. Mother received effective assistance of counsel.

A parent has a right to "effective assistance of counsel in connection with a proceeding in juvenile court." Minn. Stat. § 260C.163, subd. 3(a) (2012). To establish a claim of ineffective assistance of counsel in the context of a criminal proceeding, an appellant "must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have

been different but for counsel's errors." *State v. Caldwell*, 803 N.W.2d 373, 386 (Minn. 2011); *see In re Welfare of L.B.*, 404 N.W.2d 341, 345 (Minn. App. 1987) (applying a similar standard to a juvenile-delinquency proceeding). There is a strong presumption that counsel's representation was reasonable, *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009), and matters of trial strategy are not reviewed for competence, *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

We first consider whether mother's claim of ineffective assistance of counsel is within the scope of our review. On direct appeal from a default judgment, the scope of review is limited to examining "whether the evidence on record supports the findings of fact and whether the findings support the conclusions of law set forth by the [district] court." *Nazar v. Nazar*, 505 N.W.2d 628, 633 (Minn. App. 1993), *review denied* (Minn. Oct. 28, 1993), *superseded by statute on other grounds*, Minn. Stat. § 518.551, subd. 5b(d) (1992); *see Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 493 (Minn. App. 1995) ("There are only a limited number of issues that may be raised in a direct appeal from a default judgment. These include arguing that the plaintiff's complaint did not state a cause of action or that the relief granted was not justified by the complaint."). Mother directly appealed the district court's default judgment rather than moving to vacate the judgment. Because her ineffective-assistance-of-counsel claim does not challenge the district court's findings of fact or conclusions of law, it is not within our scope of review. But because we exercise great caution in TPR proceedings and perhaps no graver matter comes before this court, *In re Welfare of A.D.*, 535 N.W.2d 643, 647 (Minn. 1995), we will review mother's ineffective-assistance-of-counsel claim in the interests of justice

under Minn. R. Civ. App. P. 103.04. *See* Minn. R. Juv. Prot. P. 47.01 (stating the Minnesota Rules of Civil Appellate Procedure apply in juvenile protection matters except as otherwise provided).

Mother argues that her counsel's performance fell below an objective standard of reasonableness because he failed to (1) inform her of the date and time of the pretrial hearing; (2) request a continuance; (3) cross-examine C.D. and R.D.; and (4) argue why the district court should not proceed in default. We disagree. First, any claimed failure by counsel to notify mother of the date and time of the pretrial hearing was harmless. At the admit/deny hearing, the court clerk announced the date and time of the pretrial hearing, providing mother with actual notice of the scheduling information. Second, we construe counsel's expressed objection to proceeding in default as a request for a continuance; counsel's objection essentially asked the district court to continue the proceeding until a later time when mother was present. Third, whether to cross-examine witnesses and which defenses to present are matters of trial strategy and are not reviewed for competency. *See State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001); *Voorhees*, 596 N.W.2d at 255. Counsel may have decided that cross-examination could have produced evidence adverse to mother's position. *See State v. Brocks*, 587 N.W.2d 37, 43 (Minn. 1998). Mother also does not identify which defenses counsel should have raised to proceeding in default. On this record, mother did not establish that her counsel's performance was unreasonable.

Moreover, mother did not demonstrate a reasonable probability exists that the outcome of the proceeding would have been different but for counsel's alleged errors. As

stated above, counsel essentially requested a continuance, which the district court functionally denied. Mother has made no showing that C.D. and R.D. would have provided testimony on cross-examination that supports mother's parental rights, and she does not identify any specific arguments counsel should have made against proceeding in default.[2] Mother's brief also does not articulate reasons why the petition would have failed following a contested trial. Counsel's statement during the admit/deny hearing that mother was sober and doing well on probation and mother's letter to the district court outlining her successes do not overcome C.D.'s clear testimony that mother has not contacted S.L.A.-D. in two years, financially supported her, or otherwise performed her parental duties. Because mother has not shown a reasonable probability exists that termination would have been avoided but for counsel's alleged errors, she is not entitled to reversal based on ineffective assistance of counsel.

II. The district court did not abuse its discretion by determining that clear and convincing evidence supports termination of mother's parental rights.

Parental rights may only be terminated "for grave and weighty reasons." *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). Termination requires clear and convincing evidence that there is at least one statutory ground for termination and that termination is in the child's best interests. *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). The district court must make findings addressing the county's reasonable efforts to reunify the child and parent or that such

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[2] If a parent fails to attend a pretrial hearing, the district court may proceed in default, receive evidence in support of the petition, and grant relief if the petition is proved by the applicable standard of proof. Minn. R. Juv. Prot. P. 18.01-.02.

efforts are not required. Minn. Stat. § 260C.301, subd. 8 (2012). On appeal, we examine whether the district court's findings address the statutory criteria and whether the findings are supported by clear and convincing evidence and not clearly erroneous. *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 663-65 (Minn. App. 2012). But the district court's determination that the statutory requirements for termination have been established by clear and convincing evidence is reviewed for an abuse of discretion. *See In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 900-01, 905 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

Statutory grounds for termination

The district court may terminate parental rights if it finds "that the parent has abandoned the child." Minn. Stat. § 260C.301, subd. 1(b)(1) (2012). "Abandonment may be established . . . if the parent has actually deserted the child and has an intention to forsake the duties of parenthood." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004) (quotation omitted).

Mother argues that clear and convincing evidence does not establish that she abandoned S.L.A.-D. We are not persuaded. The district court found that mother is unable and unwilling to have a relationship with S.L.A.-D. and that mother failed to (1) have any contact with S.L.A.-D. in two years, (2) provide S.L.A.-D. financial support, and (3) assume regular parenting responsibilities.

The record supports these findings. The district court expressly accepted the testimony of C.D. and R.D. as credible. C.D. testified that mother has not had contact with S.L.A.-D. in two years and has not provided financial support to S.L.A.-D. or

otherwise fulfilled her duties as a parent. The guardian ad litem's (GAL) report likewise states that mother has had no contact with S.L.A.-D. since she was placed in C.D. and R.D.'s legal custody.[3] And the TPR petition, which was part of the basis for the default termination, asserts that the issues that led to the out-of-home placement and CHIPS proceeding have not been corrected despite reasonable efforts by St. Louis County to reunite the family. On this record, the district court did not abuse its discretion by finding clear and convincing evidence demonstrates that mother has deserted S.L.A.-D. with the intent to forsake her parental duties. *See id. at* 55-56 (considering a parent's failure to contact the children, to inquire about the children's welfare, and to respond to a CHIPS petition when finding intent to forsake the duties of parenthood).

Mother also argues for the first time in her reply brief that clear and convincing evidence does not establish that she refused or neglected to comply with her parental duties. Arguments not raised in an appellant's principal brief that exceed the scope of respondent's brief are waived. *Wood v. Diamonds Sports Bar & Grill, Inc.*, 654 N.W.2d 704, 707 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003). Because mother's principal brief did not address this issue, this argument is waived. And because we conclude that the district court did not abuse its discretion by determining clear and convincing evidence establishes the statutory ground of abandonment, we need not consider this second basis for termination.

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[3] Mother asserts that this evidence is not clear and convincing, arguing the reference to "no contact" is vague because "contact" may refer to physical, telephonic, or written contact. We disagree. The plain meaning of "contact" includes all forms of contact.

Best interests of the child

The "paramount consideration" in all TPR proceedings is the best interests of the child. Minn. Stat. § 260C.301, subd. 7 (2012). A child's best interests may preclude termination even if a statutory ground for termination exists. *In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 545 (Minn. App. 2009). Analyzing the best interests of the child requires balancing the child's interest in preserving a parent-child relationship, the parent's interest in preserving that relationship, and any competing interest of the child. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). "Competing interests include such things as a stable environment, health considerations and the child's preferences." *Id.* "Where the interests of parent and child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301, subd. 7.

Mother asserts that there is not clear and convincing evidence that termination is in S.L.A.-D.'s best interests. We disagree. First, mother waived this argument by failing to address it in her principal brief, *see Wood*, 654 N.W.2d at 707, but because the child's best interests are the paramount consideration in TPR proceedings, we will address the issue in the interests of justice. *See In re Custody of J.J.S.*, 707 N.W.2d 706, 711 (Minn. App. 2006) (reviewing a waived issue in the interests of justice), *review denied* (Minn. Mar. 14, 2006).

Second, clear and convincing evidence supports the district court's finding that termination of mother's parental rights is in S.L.A.-D.'s best interests. The GAL report states that it is in S.L.A.-D.'s best interests to stay with C.D. and R.D. Father and C.D. testified that termination serves S.L.A.-D.'s best interests. C.D. further testified that

S.L.A.-D. is doing well in their custody and excelling in school. Mother's lack of contact with S.L.A.-D. in two years, and her failure to provide financial support or correct the issues underlying the CHIPS proceeding, undermines mother's expressed interest in having a relationship with S.L.A.-D. On this record, the district court did not abuse its discretion by concluding there is clear and convincing evidence that termination of mother's parental rights is in S.L.A.-D.'s best interests.

Finally, we note that the district court must make findings regarding the reasonableness of the county's efforts to reunite a parent and child or that such efforts are not required under Minn. Stat. § 260.012 (2012). Minn. Stat. § 260C.301, subd. 8. Reasonable efforts are not required "upon a determination by the court that a petition has been filed stating a prima facie case that" they would be futile. Minn. Stat. § 260.012(a)(7). Although the district court did not make findings addressing the county's efforts, we conclude that the lack of findings is harmless. *See In re Welfare of Children of D.F.*, 752 N.W.2d 88, 97-98 (Minn. App. 2008) (refusing to reverse the termination of parental rights for harmless error). The TPR petition establishes that mother did not correct the underlying issues that led to the CHIPS adjudication despite reasonable efforts by St. Louis County in connection with the CHIPS proceeding. Accordingly, we conclude that any error occasioned by the district court's failure to make an express finding that reasonable efforts would be futile is harmless.

Affirmed.