STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0133

In re the Matter of the Welfare of the Children of:
I. I. and J. G., Parents.

Filed May 28, 2019
Affirmed
Johnson, Judge

Polk County District Court
File Nos. 60-JV-17-2374, 60-JV-17-704

Stephen D. Larson, Reynolds, Harbott, Knutson & Larson, P.L.L.P., Crookston, Minnesota (for appellant father)

Trent J. Fischer, Crookston, Minnesota (for respondent mother)

Greg Widseth, Polk County Attorney, Larry D. Orvik, Assistant County Attorney, Crookston, Minnesota (for respondent Polk County Human Services)

Suzanne M. Weber, Grand Forks, North Dakota (for respondent children)

Krista Wright, Hillsboro, North Dakota (guardian *ad litem*)

Considered and decided by Johnson, Presiding Judge; Reilly, Judge; and John P. Smith, Judge.[*]

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

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

JOHNSON, Judge

The district court terminated a man's parental rights to four children after finding him in default for his failure to appear for trial. On appeal, he argues that the district court terminated his parental rights in a manner that violated his constitutional right to due process. We conclude that the district court provided appellant with the process to which he was due. We further conclude that, even if appellant did not receive the process to which he was due, he was not prejudiced because additional procedures nonetheless would have resulted in the termination of his parental rights. Therefore, we affirm.

FACTS

J.G. is the father, and I.I. is the mother, of four minor children: A.G., F.D.G., F.G., and P.G. J.G. and I.I. were married but have been separated since approximately 2014.

The Polk County Social Services department became involved with the family in March 2017, when the children were living with I.I. The county became concerned about educational neglect and physical abuse. In early April 2017, a social worker visited I.I.'s home to perform a welfare check. I.I. displayed "erratic behavior" and tested positive for methamphetamine, amphetamine, and THC. The social worker also was concerned about the condition of I.I.'s home.

On April 7, 2017, the county filed a petition to adjudicate the children as being in need of protection or services (CHIPS), pursuant to Minn. Stat. § 260C.007, subd. 6(9) (2018). After an emergency protective-custody hearing, the children were removed from I.I.'s home and placed in foster care. The district court appointed a guardian *ad litem* for

the children. After a hearing in June 2017, the district court adjudicated the children as being in need of protection and services. After the CHIPS adjudication, I.I. failed to follow the out-of-home-placement plans. She failed approximately 32 drug tests, failed to show up for other drug tests, was repeatedly arrested on drug-related charges, and seldom visited the children.

J.G. had been living in Texas but moved to Minnesota in early 2017, after the children were removed from I.I.'s home. J.G. initially resided with I.I. in her home. Shortly thereafter, he was charged with various crimes and was detained in jail.

On October 27, 2017, a county social worker sent a letter to the county attorney's office recommending that the county seek to terminate the parental rights of both I.I. and J.G. The social worker noted that the children had been in foster care for 207 days and that I.I. had "continued to use drugs throughout our case," had failed to remain law-abiding, and had not attended scheduled visitations. The social worker stated that J.G. lived with I.I. in an uninhabitable home, which was not suitable for home visits. The social worker also expressed strong concerns about J.G.'s ability to function as a parent because he "seems to struggle to understand what is going on and when asked questions he gives several different answers for the same question." The social worker also stated that J.G. places priority on I.I.'s welfare instead of that of the children.

On November 9, 2017, the county commenced a separate action to terminate the parental rights of both I.I. and J.G. on four statutory grounds: that each had substantially, continuously, or repeatedly failed to comply with the duties imposed by the parent-child relationship; that each is palpably unfit to be a party to the parent-child relationship; that

reasonable efforts have failed to correct the conditions leading to the children's out-of-home placement; and that the children were neglected and in foster care. *See* Minn. Stat. § 260C.301, subds. 1(b)(2), (4), (5), (8) (2018).

The district court conducted nine pre-trial hearings between November 2017 and November 2018. The same district court judge presided over all hearings in both the CHIPS case and the TPR cases. On November 13, 2017, the district court held an admit-deny hearing with respect to the TPR petition jointly with a review hearing for the CHIPS case. On December 11, 2017, the district court held a pre-trial hearing in the TPR case jointly with a review hearing in the CHIPS case. A psychological evaluation was conducted by Dr. Jorgens, who noted that J.G. missed the scheduled appointment with him on multiple occasions and has "a full-scale intelligence quotient below average," and opined that J.G. "would have much difficulty running a household, managing money, or managing the schedules and social needs of children in his care." On January 8, 2018, the district court held a second pre-trial hearing in the TPR case jointly with a review hearing in the CHIPS case. The district court incorporated Dr. Jorgen's report into its findings in an order filed after the hearing.

On April 2, 2018, the district court held another joint pre-trial and review hearing. Later that month, a parental-capacity assessment was conducted by Dr. Shaleen, who concluded that J.G. "has significant cognitive limitations that would interfere with his ability to care for his children" and that "the children should not be placed" with him. On April 30, 2018, the district court held another joint hearing. The district court incorporated Dr. Shaleen's report into its findings in an order filed after the hearing.

On July 23, 2018, the district court held another joint pre-trial and review hearing. A second parental-capacity assessment was conducted by Dr. Hunter, who noted that J.G. was consistently late for appointments and that, "[d]ue to his cognitive and skills deficits, he would benefit from in home services to assist him with independent living." The district court held additional joint pre-trial and review hearings on August 20, 2018, and September 19, 2018. In its order following the September 19, 2018 hearing, the district court incorporated Dr. Hunter's report by reference, noting that it "did not differ much from the first" parental-capacity assessment.

At the September 19, 2018 hearing, the district court scheduled trial for December 3 and 4, 2018. On October 15, 2018, the district court held another joint pre-trial and review hearing at which it reiterated that trial would begin on December 3, 2018, and would conclude on December 4, 2018. J.G. did not attend the October 15, 2018 hearing. The district court conducted a final pre-trial and review hearing on November 15, 2018, and again reiterated the trial dates of December 3 and 4, 2018.

On December 3, 2018, I.I. appeared for trial and voluntarily consented to the termination of her parental rights with provisions for open adoptions. J.G. did not appear. The county moved for a "default judgment." J.G.'s attorney asked the district court to continue the trial. The district court asked the county's attorney, "[H]ow would you like to go forward with a record here today? Is it your wish to simply stand on the record in the CHIPS proceeding and the two Parental Capacity Assessments and reports that are on file with the Court?" The county's attorney answered, "Yes, Your Honor. That would be my request." J.G.'s attorney objected to a "default judgment." The district court stated that

"the Court is going to go forward under Rule 18 and its default provisions here today." The district court further stated:

> The Court does believe that the record in the CHIPS proceeding and protection matter does support a termination in relation to his rights. The Court believes that that's especially true in relation to the two Parental Capacity Assessments and reports that were filed with the Court. The Court is going to receive those items and confirm and has received those as a part of the record. Again, basically adopt the record in the protection matter as the record in this permanency matter. The Court does believe that that record does support the termination that is being advanced in the Petition by the County.
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> The Court will note, Mr. Larson [J.G.'s attorney], that if there has been a situation for [J.G.] with regard to transportation or other calamities, that the Court will keep the record open for you to appear before the Court on Monday, December 10th at 1:00. And if [J.G.] does appear and show cause and explain to the Court why a default should not be granted, then the Court will reconsider its default decision. But if he doesn't appear on Monday, December 10th at 1:00, then it would be the Court's intention to confirm the default as it relates to him.

On December 10, 2018, J.G. appeared for the hearing, with his attorney, who explained that J.G. had been confused about the date of the trial and had shown up for trial on the second day, December 4. J.G.'s attorney asked the district court to conduct a contested, adversarial trial. The county asked the district court to maintain the finding of default on the ground that J.G. did not provide a good excuse for failing to appear for trial on the date for which it was scheduled to begin. The district court took the matter under advisement.

On January 2, 2019, the district court issued a 21-page order. The district court concluded that J.G.'s "parental rights should be involuntarily terminated on both

procedural and substantive grounds." Under the heading "Procedural Grounds for Termination," the district court referred to J.G.'s default and cited supreme court opinions for the proposition that "an involuntarily termination by default is not void for lack of due process." Under the heading "Substantive Grounds for Termination," the district court concluded that "there are statutory grounds to involuntarily terminate the parental rights of the Father" for the four reasons alleged in the petition, which the district court discussed in detail in the following seven pages of the order, with frequent references to the prior proceedings and the reports of Dr. Jorgens, Dr. Shaleen, and Dr. Hunter. The district court administrator entered judgment on the same day. J.G. appeals.

D E C I S I O N

J.G. argues that the district court erred by terminating his parental rights in a manner that is inconsistent with his constitutional right to due process, for three reasons, each of which is discussed below.

The supreme court twice has considered whether a termination of parental rights after a parent's default violates the parent's constitutional right to due process. In *In re Welfare of Children of Coats*, 633 N.W.2d 505 (Minn. 2001), the supreme court held that "'a judgment will be held void for want of due process only where the circumstances surrounding the trial are such as to make it a sham and a pretense rather than a real judicial proceeding.'" *Id.* at 512 (quoting *State ex rel. Butler v. Swenson*, 66 N.W.2d 1, 4 (Minn. 1954)). The supreme court stated that "the circumstances surrounding the default judgment against Coats did not constitute a sham or a pretense such that the default judgment was void." *Id.* The supreme court explained 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." *Id.*

In *In re Welfare of L.W.*, 644 N.W.2d 796 (Minn. 2002), the supreme court noted that the district court "conducted an evidentiary hearing on the petition to terminate parental rights and heard testimony from L.F.'s social worker, the guardian ad litem, and L.F.'s mother, all of whom testified in support of termination of L.F.'s parental rights." *Id.* at 797. The supreme court stated, "The district court's decision to terminate parental rights was based on L.F.'s failure to correct the conditions leading to out-of-home placement and her neglect of L.W. while L.W. was in foster care, not on L.F.'s failure to appear." *Id.* Consequently, the supreme court concluded that "the circumstances of the default proceeding 'did not constitute a sham or a hoax' and it was 'a real judicial proceeding.'" *Id*. (quoting *Coats*, 633 N.W.2d at 512).

A.

J.G. first contends that it was "fundamentally unfair for the district court to enter a default judgment against [him] for failing to appear the first day of the December 3-4, 2018 trial under the circumstances." He notes that his attorney requested a continuance, that he appeared on the second of the two days that had been set aside for trial, and that his failure to appear was due to his cognitive limitations.

We begin by noting that the district court did not enter a "default judgment." The rules of juvenile protection procedure do not provide for a "default judgment" or for any judgment or order that is based solely on a parent's failure to appear for trial, as in other

civil cases. *Cf.* Minn. R. Civ. P. 55.01. Rather, the consequence of a parent's default in a TPR case is that "the court may receive evidence in support of the petition or reschedule the hearing." Minn. R. Juv. Prot. P. 18.01. The rule further provides, "If 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.

The district court did not misapply rule 18 by finding J.G. in default. The district court was not obligated to grant J.G.'s attorney's request for a continuance. The text of the rule allows a district court to receive evidence or to reschedule the hearing. *See* Minn. R. Juv. Prot. P. 18.01. A district court has broad discretion to grant or deny a request for a continuance of trial. *See, e.g.*, *Maranda v. Maranda*, 449 N.W.2d 158, 167 (Minn. 1989); *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 297 (Minn. App. 2007). The district court did not abuse its discretion on the ground that J.G. appeared for trial one day after the beginning of trial. Similarly, the district court did not abuse its discretion on the ground that J.G. has cognitive limitations.

The district court scheduled a follow-up hearing to determine the reason or reasons why J.G. had failed to appear for the beginning of trial, even though no such hearing is required. By doing so, the district court provided J.G. with an additional opportunity to avoid the finding of default. At that hearing, J.G.'s attorney informed the district court that J.G. had appeared for trial on the day after the beginning of trial, and the attorney specifically called attention to J.G.'s cognitive limitations, which are described in the parental-capacity assessments that the district court previously had received and reviewed.

The district court expressly considered the issue in its final order, as follows:

> [J.G.] . . . has challenges with keeping things straight and being on time. . . . [I]t was observed by the Court in relation to court hearings, lack of appearances or failures to appear. It appears clear that [J.G.'s] cognitive challenges create a situation wherein he can barely care for himself and manage his own life, let alone oversee a household with four children.

The district court's final order indicates that the district court considered the issues that J.G. believes should have precluded a finding of default, but the district court nonetheless determined that J.G. was in default. The district court did not abuse its discretion by finding J.G. in default.

B.

J.G. next contends that the district court was not an impartial decision-maker because, on its own initiative, it "summarily received into the record . . . the only evidence in support of the petition to terminate Appellant's parental rights, namely, two Parental-Capacity Assessments and the entire record in the [CHIPS] case." J.G. contends that the district court "inserted itself into the case" by "direct[ing] the presentation of [the county's] case."

As stated above, the applicable rule provides that, if a parent is in default, the district court "may receive evidence in support of the petition or reschedule the hearing." Minn. R. Juv. Prot. P. 18.01. In this case, the district court chose the first of those two options: to receive evidence in support of the petition. In transitioning from its finding of default to its receipt of evidence, the district court asked the county's attorney a leading question about how the county wished to proceed. The county was free to respond in the affirmative

or to indicate that it wished to proceed differently. We understand J.G.'s concern about the fact that the district court's question effectively communicated to the county that the evidence described by the district court would be sufficient to carry its burden of proof and that the county need not introduce additional evidence. We also understand that, because one party was absent and in default, the proceeding naturally was different from a typical adversarial proceeding. The district court should have refrained from suggesting to the county the evidence it needed to introduce and should have allowed the county, the petitioning party, to identify and offer evidence in support of the petition. *Cf. State v. Schlienz*, 774 N.W.2d 361, 367 (Minn. 2009).

C.

J.G. last contends that the district court did not give him a meaningful opportunity to be heard after finding him in default.

J.G. first asserts that his attorney was not allowed to object to the introduction of evidence, to cross-examine the county's witnesses, or to present evidence on his behalf. The district court did not expressly ask J.G.'s attorney whether he had any objection to the introduction of the evidence identified by the district court. But the district court did not prevent J.G.'s attorney from objecting. It is common for attorneys to interrupt court proceedings by interjecting an objection, and there is no reason why J.G.'s attorney could not have done so in this case.

J.G.'s attorney also did not attempt to introduce evidence on behalf of J.G. and did not object to the closure of the record without such an opportunity, perhaps because his client was not present. In any event, such a request likely would have been futile because

the natural consequence of a finding of default is that the defaulted party is not permitted to offer evidence. Rule 18 states that, after a finding of default, a district court "may receive evidence *in support of* the petition or reschedule the hearing." Minn. R. Juv. Prot. P. 18.01 (emphasis added). By expressly allowing the receipt of evidence in support of the petition, the rule implies that a district court may not receive evidence in opposition to the petition.

J.G. also contends that the district court improperly took judicial notice of the three psychologists' reports and the records of the CHIPS and TPR cases. J.G. asserts that the rules of juvenile protection procedure do not allow the district court to take judicial notice of those items. We note that the district court did not expressly state that it was taking judicial notice of anything. The county had included the three psychologists' reports on its exhibit list and had expressed its desire to offer them into evidence pursuant to the district court's suggestion. With respect to "the record" in the CHIPS and TPR cases, the district court's actions could be construed as taking judicial notice, but such an action is not necessarily inappropriate. In a TPR case, a district court is expressly permitted to take judicial notice 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. It is fair to assume that the district court was referring to its prior orders when it referred to "the record" because the district court's detailed orders following each hearing are a significant portion of the court files in both the CHIPS and TPR cases (which are two separate court files).

D.

As stated above, a termination of parental rights after a finding of default "will be held void for want of due process only where the circumstances surrounding the trial are such as to make it a sham and a pretense rather than a real judicial proceeding." *Coats*, 633 N.W.2d at 512 (quotation omitted). In *Coats*, the supreme court concluded that there was no denial of due process because the district court "took evidence and was focused on the welfare of four children," whose best interests were protected and promoted by the termination of parental rights. *See id*. In *L.W.*, the supreme court again concluded that there was no denial of due process because the district court "conducted an evidentiary hearing on the petition to terminate parental rights and heard testimony from [three witnesses], all of whom testified in support of termination of L.F.'s parental rights." 644 N.W.2d at 797. The supreme court emphasized that the "decision to terminate parental rights was based on L.F.'s failure to correct the conditions leading to out-of-home placement and her neglect of L.W. while L.W. was in foster care, not on L.F.'s failure to appear." *Id.*

In this case, the district court received evidence in the form of three written reports prepared by psychologists who had examined J.G. and assessed his ability to be a parent of the four children. There is no argument that the district court was not focused on the children's best interests. The district court's decision was based on the presence of the four statutory grounds alleged in the county's petition, not solely on J.G.'s failure to appear for trial. Because the circumstances of this case are similar to the circumstances in *Coats* and *L.W.*, we conclude that the district court proceeding that followed the default finding was

not "a sham or a hoax" but, instead, was "a real judicial proceeding." *Id.*; *Coats*, 633 N.W.2d at 512.

Furthermore, even if we were to find that J.G. did not receive all of the process to which he was due, we nonetheless would not find a violation of his constitutional right to due process. "[P]rejudice as a result of [an] alleged violation is an essential component of the due process analysis." *In re Welfare of Child of B.J.-M.*, 744 N.W.2d 669, 673 (Minn. 2008); *see also In re Welfare of Children of D.F.*, 752 N.W.2d 88, 97 (Minn. App. 2008). The record strongly suggests that J.G. is not fit to fulfill the duties of a parent. As the district court stated in its final order, J.G. had a "lack of involvement in the parental role" before moving to Minnesota, a "lack of basic knowledge or information regarding appropriate parenting methods and skills," and "overall cognitive and skills deficits." The district court also found that, after the children were adjudicated as being in need of protection and services, J.G. was "unable to engage in the process necessary to reunify with the children" due to "challenges relating to his present personal, family, mental health and behavioral health which have limited his ability to be wholly invested in the process necessary for reunification with the children." All three psychologists who evaluated J.G. concluded that he would have great difficulty running a household in light of his impairments, and both parental-capacity assessments recommended that the children not be placed with him. Thus, it is apparent that, even if the district court had conducted additional proceedings with additional procedures, the county would have prevailed, and J.G.'s parental rights would have been terminated.

In sum, the district court did not terminate J.G.'s parental rights in a manner that violated his constitutional right to due process.

Affirmed.