STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0474

In the Matter of the Welfare of the Children of: T. T. and T. B., Parents.

Filed September 8, 2020
Affirmed
Bryan, Judge

Mower County District Court
File Nos. 50-JV-19-604, 50-JV-18-1263

Shellie Lundgren, Minneapolis, Minnesota (for appellant mother T.T.)

Kristen Nelsen, Mower County Attorney, Aaron Jones, Assistant County Attorney, Austin, Minnesota (for respondent county)

Thomas J. Nolan, Jr., Minneapolis, Minnesota (for respondent guardian ad litem)

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

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

BRYAN, Judge

After remand for additional findings, the district court terminated appellant's parental rights. Appellant challenges the following three aspects of the district court order: (1) the district court's decision not to reopen the record; (2) the district court's factual finding that one of the minor children stated a preference against returning to live with appellant; and (3) the district court's determination that termination of appellant's parental rights is in the best interests of her two minor children. We conclude that the district court

did not abuse its discretion regarding the record after remand, the district court did not clearly err in making the challenged factual finding, and the district court did not abuse its discretion in its best interests analysis. We affirm the district court's termination of appellant's parental rights.

FACTS

In December 2017, respondent Mower County Health and Human Services filed a Child in Need of Protection or Services (CHIPS) petition on behalf of F.B., the minor child of appellant mother (T.T.). Both T.T. and F.B.'s father, T.B., initially entered denials in response to the CHIPS petition. Neither parent appeared at the pretrial hearing. The district court proceeded by default, adjudicated F.B. a child in need of protection or services, and placed F.B. in foster care. T.T.'s second child, B.T., was born in June 2018. Respondent filed a CHIPS petition on behalf of B.T. and after T.T.'s admission, the district court adjudicated B.T. a child in need of protection or services. After approximately nine months, the county filed separate termination of parental rights (TPR) petitions for the two children. T.T. attended the admit/deny hearing for the TPR petitions in April 2019, was appointed counsel, and entered denials on the TPR petitions. In May 2019, the district court found T.B. in default, terminated his parental rights, and held a TPR trial to address the petitions relating to T.T. The district court terminated T.T.'s parental rights. T.T. appealed and this court remanded for additional findings. *In re Welfare of Child of T.T.*, No. A19-1050, 2019 WL 6837959, at *7 (Minn. App. Dec. 16, 2019).

On remand, the district court scheduled a hearing for December 30, 2019, and T.T. did not personally appear. Based on the evidence from the TPR trial, the district court

made supplemental findings and terminated T.T.'s rights in March 2020. T.T. appealed that decision. We address the pertinent evidence[1] from the TPR trial in 2019, the facts relating to the December 30, 2019 hearing, and the district court's supplemental findings.

A. TPR Trial

The district court held a TPR trial on May 14, 2019. At the trial, the district court received the testimony of two mental-health practitioners, two social workers, the guardian ad litem (GAL), and T.T. Both social workers and the GAL testified that the primary concern was T.T.'s need to obtain safe and independent housing. These witnesses also testified regarding the impact that this had on the children and that F.B. was afraid of the strangers inside the home. During one visit, F.B. was locked out of his bedroom. One of the social workers testified regarding concerns that T.T. and her mother permitted a registered sex offender and drug users inside the house. The GAL also testified regarding similar concerns. In one interview with the GAL, F.B. volunteered information regarding a man who hid under the bed during the GAL's visit. In this conversation, F.B. reported that he "was really scared that that man under the bed was going to get mad at you because he was really angry when he heard you were coming in the door." When the GAL asked about the man, F.B. told him the man had driven him to school before. The GAL stated that he later had a conversation with the man, and believed he was a registered sex offender who was not permitted to have contact with minors.

[1] We previously summarized the trial testimony after the initial appeal. *T.T.*, 2019 WL 6837959, at *2-4. In this opinion, we address the contested factual finding and the supplemental findings made by the district court after remand.

The district court also received several exhibits into the trial record. Exhibits 1 to 18 consist of the district court's own previous orders after various hearings in 2018 and 2019. Paragraph 5 of Exhibit 5 includes F.B.'s stated residential placement preferences as of April 2018:

> [The GAL] stated [F.B.] is an extremely articulate kindergartner who is thriving in school; is opinionated about what he wants; and he wanted the Court to know he has never been happier or felt safer and wants to remain where he is at. [F.B.] also wants a haircut, but [T.T.] will not give permission to [Mower County Health and Human Services] to have his hair cut.

Although T.T.'s attorney noted that T.T. "has some disagreement" regarding F.B.'s preferences at a subsequent hearing, paragraph 4 of Exhibit 6 includes F.B.'s stated residential placement and visitation preferences as of June 2018:

> [The GAL] stated [F.B] is attending individual therapy; is thriving and happy in the foster home; does not want to go to supervised visits and throws a fit with the foster mother before, during, and after visits; he has had a taste of normal life, and at six years of age he is very intelligent, likes the normalcy, and has made it clear he wants to remain there.

Paragraph 4 of Exhibit 9 included a similar statement of F.B.'s preferences as of July 2018: "[F.B.] goes through trauma with visitation, does not want to return home." Other trial exhibits show that over the next several months, the situation apparently improved as T.T. began unsupervised visitation with F.B., to the point that the GAL reported more positively, stating that he observed "steady progress," and that "[F.B.] is starting to count on his mother and realizing she is going to be there for him." Beginning in November 2018 and continuing through the final order from March 2019 (admitted as

at Exhibit 18), the GAL voiced concern regarding the stability of T.T.'s residence and the number of adults visiting and sleeping overnight at T.T.'s residence. Ultimately, the GAL reported that due to these concerns and a number of other issues, including F.B. getting locked out of his bedroom and "a male party hiding under a bed," the county suspended unsupervised visitation. The GAL was not asked and did not testify as to F.B.'s stated preference regarding termination at the TPR trial.

In June 2019, the district court terminated T.T.'s parental rights to F.B. and B.T. The district court found that the county proved by clear and convincing evidence that reasonable efforts failed to correct the conditions leading to the children's out-of-home placement because T.T. had failed to obtain safe, secure, and independent housing. However, the court made no mention of the best interests factors.

B. Appeal, Remand, and Supplemental Findings

Mother appealed the district court's order, arguing that the district court abused its discretion when it terminated her parental rights. This court concluded that the district court did not abuse its discretion when the district court determined that T.T. continually failed to find and provide safe, secure, and independent housing, and when the district court determined that, therefore, T.T. failed to correct the conditions leading to the out-of-home placement. *T.T.*, 2019 WL 6837959, at *6. This court also stated that "the record in this case reflects the nature of T.T.'s relationship with her children." *Id.* at 7. However, this court determined it was not clear that the district court considered the interests of T.T. in preserving the relationship with F.B. and B.T., or vice versa, as is required by the

Minnesota Rules of Juvenile Protection Procedure.[2] *Id*. Because the district court's findings and conclusions lacked the required analysis regarding the children's best interests, this court determined it was unable to conduct a meaningful appellate review of this issue. *Id*. This court remanded for supplemental findings and stated that "the district court, at its discretion, may reopen the record to permit consideration of the children's best interests." *Id.*

A hearing was held on December 30, 2019, to address this court's decision. Notice of the hearing was filed on December 17, 2019.[3] The notice stated that if a parent failed to appear at a hearing, the district court may conduct the hearing without them and enter an order "permanently severing the parent's rights pursuant to a termination of parental rights petition." T.T.'s lawyer was present at the hearing and represented her. An attorney for the county and an attorney for the GAL were also present. The district court first requested the attorneys to address whether to reopen the record. The county attorney stated that the trial evidence already addressed the requisite findings and requested that the district court supplement the original findings based on the closed record:

> Your Honor, I think from the [respondent's] review of the Opinion and the record, we believe the facts are actually there, especially in regards to a lot of the Guardian ad Litem's testimony, the social worker's testimony, just about the effects on the child and, honestly, quite a few statements or opinions of the child that were put into the record through the Guardian ad Litem and the social worker about his desires. At least the

[2] Previously, the best interests factors were included in rule 39.05, subd. 3(b)(3), however as of September 1, 2019, they are now included in rule 58.04 (c)(2)(ii). Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(3) (2018); Minn. R. Juv. Prot. P. 58.04 (c)(2)(ii) (2019).

[3] It is not clear from the record submitted to this court whether the attorneys or the parties were served electronically, by mail, or personally.

> older child going forward. And, again, the—the Opinion does give the Court discretion that may reopen the record, but it seems like the factors are—are known for the Court to make findings on why a termination would be in the best interests of the child.

The attorney for the GAL agreed, and stated that he did not see any need to reopen the record. T.T.'s counsel also addressed the issue on her behalf. T.T.'s counsel agreed with the other two attorneys and informed the district court that he was not requesting to reopen the record. He added that he had not had any contact with T.T. in quite some time, and he had no way to contact her.

The district court agreed with the attorneys' assessments and declined to reopen the record. The district court set a deadline for the parties to submit proposed supplemental findings. A substitution of counsel for T.T. was filed the following week, and T.T.'s new counsel filed proposed findings one week later. The district court took the submissions under advisement, and in March 2020, filed its supplemental findings of fact. In the supplemental findings, the district court made 28 additional paragraphs of factual findings.

One paragraph related specifically to the first best interests factor. The district court determined the following:

> With regard to the first factor, there can be a presumption that children, generally, have an interest in preserving the parent-child relationship. [F.B.] is old enough to express a preference, but [B.T.] is not. It is unclear from the record whether [F.B.] has stated a preference regarding his mother's parental rights being terminated. However, [the GAL], whose testimony the Court finds credible in its entirety, testified and the Court finds that [F.B.] has told [the GAL] that he does not desire to return to live with his mother.

The district court also included one paragraph regarding the second factor, finding that T.T. had a desire to maintain the parent-child relationship with her children: "With regard to the second factor, evidence at trial indicated that [T.T.] has a desire to maintain the parent-child relationship with her children. [T.T.] stated that she does want to and is able to parent her children and wants them returned to her care."

The district court then devoted the bulk of its supplemental findings to the third factor. In summary, the district court found the following: T.T. stated that she was unable to control who was coming in and out of the apartment; T.T. stated she did not know whether any of these individuals were "doing drugs or was a user;" F.B. has been scared during visits with his mother because of the presence of others in the home; T.T. failed to provide a safe and stable environment by "not prevent[ing] strange and dangerous or potentially dangerous individuals from entering her home;" T.T. did not engage in any of the ongoing services provided to her to obtain safe and independent housing or change her behavior in any meaningful way; T.T. has never seriously attempted to live alone, but always maintained roommates/housemates; T.T. lacked "insight into what led to the children's removal;" T.T. is not presently able or willing to maintain safe, suitable housing for herself and her children; T.T.'s inability to provide safe, stable housing will continue for a prolonged, indefinite period of time; T.T. was not credible when she testified; and T.T. made invalid excuses and engaged in falsehoods to explain her failures.[4] Based on these findings, the district court determined that the children's interests in a safe and secure

[4] T.T. does not argue that the district court clearly erred in making any of these factual findings.

environment outweighed the children's and T.T.'s interests in maintaining the parent-child relationship, justifying termination of T.T.'s parental rights. This appeal followed.

D E C I S I O N

I. Decision Not to Reopen the Trial Record

T.T. challenges the district court's decision not to reopen the record, arguing that the district court erred by making this decision in T.T.'s absence. We are not persuaded because T.T.'s counsel appeared, did not object to proceeding in her absence, and agreed not to reopen the record. In addition, given the scope of the remand in this case, the district court acted within its discretion when it declined to reopen the record.

First, we conclude that T.T. forfeited appellate review of these issues. We note that T.T.'s counsel appeared on her behalf.[5] T.T.'s counsel did not object and did not raise any concerns regarding her absence or the adequacy of the notice provided to the parties and their attorneys. Similarly, T.T.'s counsel voluntarily acquiesced to proceeding with supplemental proposed findings instead of requesting to submit any additional evidence.

[5] T.T. argues that the district court violated the rules regarding closure of hearings and presence of litigants. T.T. does not address whether her attorney's presence satisfied these rules. We have previously held that the appearance of counsel may substitute for a litigant's absence. *See, e.g.*, *Matter of Welfare of A.Y.-J.*, 558 N.W.2d 757, 760 (Minn. App. 1997) (affirming termination of a father's parental rights despite his absence at trial), *review denied* (Minn. Apr. 15, 1997); *In re Welfare of Child of L.F.*, 638 N.W.2d 793, 797 (Minn. App. 2002) (reversing default judgment where neither mother nor her attorney appeared, but stating that "counsel may substitute for the presence of parents"), *rev'd*, 644 N.W.2d 796 (Minn. 2002) (reinstating default judgment because the notice was adequate). Given our decisions regarding forfeiture and prejudice, we need not address whether counsel's appearance satisfied the rules cited by T.T.

We do not review legal arguments raised for the first time on appeal.[6] *See In Re Welfare of D.D.G.*, 558 N.W.2d 481, 485 (Minn. 1997) (applying waiver rule in termination of parental rights case); *In re Welfare of S.G.*, 390 N.W.2d 336, 340-41 (Minn. App. 1986) (applying waiver rule in child neglect case).

Second, even assuming that appellate review was proper, T.T. identifies no actual prejudice that resulted from her absence. Without a showing of prejudice, identified errors do not result in reversal. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975) (stating that, to obtain relief on appeal, an appellant must show both error by the district court and prejudice to the appellant arising from that error); *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 171 (Minn. App. 2005) (applying *Midway* in an appeal of TPR); *In re Welfare of D.J.N.*, 568 N.W.2d 170, 175-76 (Minn. App. 1997) (stating that, although "[i]t was a mistake for the trial court . . . to take judicial notice of the entire [previous juvenile-protection] files," because appellant failed to show prejudice, there was no reversible error). In this case, the district court did not proceed by default in light of T.T.'s failure to appear, but instead permitted written supplemental proposed findings. Instead of asserting prejudice, T.T. only argues that had she appeared personally at the hearing, she *may* have decided to request reopening the record, and the district court *may* have granted that request. T.T. adds even more uncertainty by not explaining what additional evidence she might have hoped to introduce. Because T.T. does not establish

[6] T.T. does not claim ineffective assistance of counsel on appeal and does not make any constitutional due process claims.

that the identified error prejudiced her in some way or actually impacted the subsequent findings in some way, we conclude that there was no reversible error.

Finally, to the extent that T.T. challenges the basis for the district court's decision not to reopen the record, and assuming that appellate review would be proper, we conclude that the district court acted well within its discretion in this case. The remand in this case resulted from inadequate analysis and inadequate findings. *T.T.*, 2019 WL 6837959, at *7. The remand did not result from an inadequate record or erroneous admission or exclusion of evidence. *Id.* Moreover, this court's opinion explicitly stated that the decision of whether to reopen the record on remand was within the district court's discretion. On remand, the district court heard arguments by all counsel regarding the appropriateness of reopening the record and determined that it was unnecessary to do so. We conclude that the district court's refusal to reopen the record was not an abuse of discretion.

II. Factual Finding Regarding F.B.'s Preferences

T.T. argues that the district court erred in concluding that F.B. had no desire to preserve the parent-child relationship because the district court referred to testimony that did not occur. We conclude that the district court's finding is not manifestly contrary to the weight of the evidence.

Once a district court determines that the county proved at least one statutory ground for termination or parental rights, the paramount consideration is the best interests of the child. Minn. Stat. § 260C.301, subds. 1(b), 7 (2018); *In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 545 (Minn. App. 2009) ("[T]he district court must consider the child's best interests and explain why termination is in the best interests of the child."). Minnesota

Rules of Juvenile Protection Procedure, rule 58.04, explains the particularized findings that the district court must make before ordering termination of parental rights. Minn. R. Juv. Prot. P. 58.04 (c)(2)(ii). On appeal from a district court's termination of parental rights, appellate courts review whether the district court's factual findings are clearly erroneous. *D.D.G.*, 558 N.W.2d at 484; *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660-61 (Minn. 2008) (applying this standard on appeal from an involuntary TPR). A finding is clearly erroneous if it is manifestly contrary to the weight of the evidence or is not reasonably supported by the evidence as a whole. *In re Welfare of S.R.K.*, 911 N.W.2d 821, 830 (Minn. 2018).

In this case, the district court made the following finding regarding the child's interest in preserving the parent-child relationship:

> With regard to the first factor, there can be a presumption that children, generally, have an interest in preserving the parent-child relationship. [F.B.] is old enough to express a preference, but [B.T.] is not. It is unclear from the record whether [F.B.] has stated a preference regarding his mother's parental rights being terminated. However, [the GAL], whose testimony the Court finds credible in its entirety, testified and the Court finds that [F.B.] has told [the GAL] that he does not desire to return to live with his mother.

T.T. argues that this finding is contrary to the record. We disagree. First, we examine the finding made by the district court. Contrary to T.T.'s characterization, the district court did not make any findings regarding F.B.'s preferences for termination or permanency. Instead, the district court concluded the record was unclear in this regard. The district court also found that F.B. expressed to the GAL a general reluctance to "return to live with his mother." This general reluctance could relate to a temporary placement,

beginning trial home visits, or moving to protective supervision as opposed to termination of parental rights or permanency. Those concepts are not interchangeable, and we are careful to distinguish them from one another. The pertinent question for our review is whether the record supports the district court's finding that F.B. was generally reluctant to "return to live with his mother."

While the district court's finding refers to trial testimony of the GAL, the GAL did not testify at trial regarding F.B.'s stated preferences. This portion of the finding is not accurate. The record, however, is not limited to the testimony provided by the GAL, and several exhibits support the district court's finding that F.B. expressed a reluctance to live with his mother in conversations with the GAL. Specifically, exhibits 5, 6, and 9, relating to court hearings in April, June, and July of 2018, each include findings that the GAL conveyed F.B.'s stated preferences to the district court. In each exhibit, the district court finds that F.B. expressed a general reluctance to visit T.T. and a preference for continuing the foster placement. These exhibits support the district court's finding that F.B. was generally reluctant to "return to live with his mother." We conclude that the district court did not clearly err in reaching this factual conclusion.

III. Best Interests Analysis

T.T. argues that the district court erred in concluding that the best interests of the children favored termination. Because the district court did not abuse its discretion when it weighed the applicable factors, we affirm the district court's termination decision.

As noted above, district courts are required to consider the best interests of the children when deciding whether to order termination. Specifically, they must analyze the

following three factors: (1) the child's interests in preserving the parent-child relationship; (2) the parent's interests in preserving the parent-child relationship; and (3) any competing interests of the child. Minn. R. Juv. Prot. P. 58.04 (c)(2)(ii). A child's interest in permanency typically requires that a parent is not only capable of limited visitation with the child, but is also capable of providing for the child's welfare. *See In re Welfare of Children of R.W.*, 678 N.W.2d 49, 57-58 (Minn. 2004). For purposes of the third factor, competing interests "include such things as a stable environment, health considerations and the child's preferences." *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). A district court's best interests analysis is reviewed for an abuse of discretion; *In re Welfare of Child of K.L.W.*, 924 N.W.2d 649, 656 (Minn. App. 2019), *review denied* (Minn. Mar. 8, 2019); and we afford district courts great deference in this analysis; *see, e.g.*, *D.L.D.*, 771 N.W.2d at 546 (stating that "determination of a child's best interests is generally not susceptible to an appellate court's global review of a record, and . . . an appellate court's combing through the record to determine best interests is inappropriate because it involves credibility determinations." (quotation omitted)).

In this case, the district court made extensive findings regarding the competing interests considered as part of the third factor. For instance, the district court concluded that T.T. failed to provide a safe and stable environment by "not prevent[ing] strange and dangerous or potentially dangerous individuals from entering her home" and that T.T. did not engage in any of the ongoing services provided to her to obtain safe and independent housing or change her behavior in any meaningful way. The district court also concluded that T.T. is not presently able or willing to maintain safe, suitable housing for herself and

her children and that T.T.'s inability to provide safe, stable housing will continue for a prolonged, indefinite period of time. Based on these supplemental findings, the district court did not abuse its discretion in concluding that the children's interests in a safe and secure environment outweighed the other two factors.

Affirmed.