STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0096

In re the Matter of:

Elise Ann Anway, And On Behalf of
Minor Children, petitioner,
Respondent,

vs.

Jacob Dean Tjoland,
Appellant.

Filed September 7, 2021
Affirmed
Rodenberg, Judge[*]

Crow Wing County District Court
File No. 18-FA-20-3517

Christopher J. Macy, Legal Aid Service of Northeastern Minnesota, Brainerd, Minnesota (for respondent)

Richard Dahl, Dahl Law Firm PA, Brainerd, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Slieter, Judge; and Rodenberg, Judge.

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

NONPRECEDENTIAL OPINION

RODENBERG, Judge

Appellant Jacob Dean Tjoland appeals from the district court's issuance of an order for protection (OFP) against him, arguing that the district court erred by denying his oral motion at the OFP hearing to remove the presiding judicial referee. We affirm.

FACTS

In October 2020, respondent Elise Ann Anway petitioned for an OFP against appellant to protect herself and the parties' two children. The district court issued an ex parte OFP. The matter was then scheduled for a hearing on October 26, 2020, before a district court judge. With the consent of both parties, the district court judge continued the hearing.

The district court then issued a written notice of the continued OFP hearing to the parties, setting a remote hearing—because of the COVID-19 pandemic—for November 9, 2020, using "Zoom" technology. Appellant was personally served with the notice of hearing on October 27, 2020. The notice did not identify by name who would preside at the hearing but instead stated that the hearing would be held before a "Judicial Officer."

On November 9, 2020, the parties appeared for the remote hearing. A judicial referee was present to preside over the hearing. Following a preliminary discussion between appellant's counsel and the referee, the referee asked both parties if they were "ready to proceed." Both parties responded affirmatively. Appellant's counsel then moved to remove the referee and requested that a district court judge hear the case. The attorney stated that he had "presumed" that the district court judge who had signed the order for

continuance would be presiding at the continued hearing. He argued that he should be permitted to strike the referee because the notice of hearing "doesn't have an assignment of a judge." Respondent's counsel replied that he, in contrast, had been aware that the referee would be presiding over the hearing and was prepared to proceed. He stated that his client had received the same notice of hearing that appellant received, and that "[i]t didn't take much research" for counsel to learn that the referee would be hearing the case.

After a brief recess during which the referee considered the issue, the referee ruled that she would proceed with the hearing. At the conclusion of the hearing, the referee determined that sufficient evidence supported issuing an OFP. Accordingly, the district court entered an OFP.

This appeal followed.

DECISION

Appellant argues that the judicial referee erred by not removing herself from the OFP hearing upon his oral objection. He requests that we reverse the OFP and remand to the district court for a new OFP hearing with instructions that the district court in the future name the assigned judicial officer in its notices of hearings.

The rules concerning removal of a referee are derived from the rules for removing a judge. Minn. R. Gen. Prac. 107 1991 task force cmt.; *see* Minn. R. Civ. P. 63.03 (providing rules for removing a judge). Caselaw addressing judicial removal therefore informs our decision in this case. That caselaw explains that a properly filed notice of removal "automatically results in the judge's removal." *In re OCC, LLC*, 917 N.W.2d 86, 91 (Minn. 2018). "Failure to honor a proper removal notice is reversible error requiring a

new hearing." *Citizens State Bank of Clara City v. Wallace*, 477 N.W.2d 741, 742 (Minn. App. 1991). The requirements governing removal must "be liberally construed to safeguard both in fact and in appearance the constitutional right to a fair and impartial hearing." *Id.* Whether a removal notice complies with procedural requirements is a question of law, which this court reviews de novo. *Id.*

Minn. Stat. § 484.70, subd. 6 (2020), and Minn. R. Gen. Prac. 107 govern the removal of a referee. Section 484.70, subdivision 6, provides that a referee cannot hear any contested matter if a party timely "objects in writing to the assignment of a referee." Rule 107, in turn, provides that a party objecting to a referee's assignment "shall serve and file the objection within 14 days of notice of the assignment of a referee to hear any aspect of the case, but not later than the commencement of any hearing before a referee." The statute expressly requires that an objection be "in writing," and the rule, by requiring a party to "serve and file" an objection to the assignment, implicitly contemplates a writing.

Here, appellant objected orally to the referee's assignment to the OFP hearing; he filed no written objection and made no request for a delay to file a written objection. Therefore, even under a liberal construction of the applicable statute and rule, appellant failed to properly object to the referee's assignment.[1]

[1] We disagree with respondent that appellant's counsel's mere agreement that he was "ready to proceed" with the OFP hearing rendered untimely his objection to the referee's assignment. The rule requires an objection "within 14 days of the notice of the assignment of a referee . . . but not later than the commencement of any hearing before the referee." Minn. R. Gen. Prac. 107. Nothing in the record suggests that appellant's counsel was aware of the referee's assignment before the hearing began, and the first few lines of the transcript of the hearing seem concerned with the non-substantive, logistical concerns of whether everyone necessary had joined the Zoom session, could see and hear the other participants,

Appellant concedes that he did not comply with the written-objection requirement. But he contends that the referee should have honored his oral removal request for two reasons. First, appellant argues that the use of the phrase "assignment of a referee" in the statute and rule required the district court to include the name of the referee in the notice of hearing. But the plain language of section 484.70, subdivision 6, and rule 107 contains no such requirement. We agree with appellant that the best practice would be for the district court to include the name of the assigned presiding officer in its notices of hearings. Nonetheless, it was not reversible error for the district court to omit the referee's name from the notice, and the omission did not otherwise excuse appellant from complying with the requirements for objecting expressed in the statute and the rule.

Second, appellant contends that the judicial referee gave him "no opportunity to file a proper notice of removal" after he learned of her assignment to his case. Appellant's argument is unconvincing. Appellant had an opportunity—while he was discussing the matter with the referee during the Zoom session—to request leave of court for the purpose of filing a written objection to her assignment. Appellant did not take advantage of that opportunity.

Appellant cites three cases to support his position that the referee erred by denying his motion to remove her, but appellant's reliance on those decisions is misplaced. Unlike appellant, the aggrieved party in each of those cases filed a written objection to the judge's

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and the like. Appellant's counsel moved to strike the referee toward the beginning of the Zoom session and before any substantive discussions of the merits of the case began. The objection was timely. But even a timely objection may be ineffective if it does not otherwise comply with the applicable legal requirements, as we discuss below.

assignment. *See Peterson v. Bartels*, 170 N.W.2d 572, 573-74 (Minn. 1969) (concluding appellant was entitled to a new trial where he filed a written affidavit of prejudice 30 minutes before the hearing); *Jones v. Jones*, 64 N.W.2d 508, 510, 516 (Minn. 1954) (concluding that appellant was entitled to a new trial where he filed a written affidavit of prejudice before the trial began but after the court term at which the case had been noticed for trial convened); *Lanners v. Comm'r of Pub. Safety*, 2002 WL 109329, at *1-2 (Minn. App. Jan. 29, 2002) (concluding that appellant was entitled to a new hearing because he served and filed a notice to remove the presiding judge immediately before the license-revocation hearing).

Because appellant did not file a written objection to the referee's assignment, the referee did not err by denying appellant's oral motion to remove her. Appellant is not entitled to a new hearing.

Affirmed.