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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2161**

In the Matter of the Welfare of the Child of: N. D. C. and J. J. C., Parents

**Filed June 18, 2012
Affirmed
Peterson, Judge**

Kanabec County District Court
File No. 33-JV-11-93

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Linda Van Der Werf, Pine City, Minnesota (Guardian ad Litem)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from an order transferring custody of her child, appellant mother argues that (a) substantial evidence does not support the district court's findings and conclusions that the transfer under Minn. Stat. § 260C.201, subd. 11 (2010), was appropriate; (b) the record does not show that father, to whom custody of the child was

transferred, is a stable custodian; and (c) the standard for transferring custody of a child should be at least as high as the standard for modifying custody under Minn. Stat. § 518.18 (2010). We affirm.

FACTS

Appellant-mother N.D.C. and father J.J.C. are the parents of J.N.G.C., who was born in June 2004. In 2006, appellant and father separated, and in 2009, they were granted joint legal and joint physical custody, and a parenting-time schedule was established. Appellant provided the primary home for the child. In 2008, appellant had another child, S.A.G. S.A.G.'s father is W.A.

In May 2010, appellant married J.W.C. and resided with him, J.N.G.C., S.A.G., and J.W.C.'s two children, E.F.C. and A.C. At the time of the permanency trial in this case, physical custody of S.A.G. had been transferred to his father, and physical custody of E.F.C. and A.C. had been transferred to their mother, T.C. The custody transfers were the result of allegations made regarding the safety and well-being of the children in appellant's and J.W.C.'s home.

In October 2009, Kanabec County Social Services substantiated a finding of physical abuse regarding S.A.G. but could not identify a perpetrator. The finding was based on the fact that S.A.G. had "multiple bruises . . . highly indicative of abuse." Social services also substantiated a finding of failure to protect with regard to appellant. Several months later, A.C. disclosed that he saw J.W.C. hit S.A.G. with a belt. J.W.C. was criminally charged as a result of S.A.G.'s bruising and A.C.'s disclosure. At the time of the permanency trial, J.W.C.'s criminal case had not been resolved. J.W.C. allegedly

violated a restraining order by visiting appellant while S.A.G. was in the home. Appellant was also charged with multiple counts relating to S.A.G. and ultimately pleaded guilty to aiding and abetting J.W.C.'s violation of the restraining order.

E.F.C. visited appellant and J.W.C. at their home from December 22 until December, 24, 2010. When E.F.C. returned home, she told her mother, T.C., that appellant burned her with a cigarette. E.F.C. also told a social worker that appellant burned her with a cigarette. On December 24, E.F.C. was treated by a physician, and the physician concluded that the burn appeared intentional and appeared to have occurred within 24 to 48 hours. T.C. requested an order for protection (OFP) against appellant on behalf of E.F.C., and, following a January 3, 2011 hearing, an OFP was granted. In granting the OFP, the district court found "[appellant] intentionally burned [E.F.C.] with a cigarette as a form of punishment." Appellant was criminally charged for intentionally burning E.F.C. and, following a jury trial, she was acquitted of all charges.

On January 13, 2011, J.N.C.G. was removed from appellant's care. J.N.C.G. was initially placed with her paternal grandmother, rather than with her father, because father had a roommate and social services had difficulty obtaining background information about the roommate. Father obtained custody in March, and at the time of trial, J.N.C.G. was living with father and father's grandparents.

On January 19, 2011, a petition alleging that J.N.C.G. was a child in need of protection or services (CHIPS) was filed, and an emergency protective-care hearing was held. On February 17, 2011, appellant admitted that J.N.C.G. was a child in need of protection or services, and, the following day, the district court ordered appellant to

complete a case plan. Among other things, the case plan required appellant to: (1) actively participate in individual therapy, anger-management classes, or domestic-violence classes and schedule an appointment by February 25, 2011; (2) ensure that no child in her care is physically abused or neglected and ensure that no child in her care is a witness to abuse or neglect; (3) immediately report abuse or neglect of a child that she becomes aware of; (4) submit to a psychological evaluation or provide social services with a completed one; (5) address possible gaps or deficits in her parenting skills; and (6) visit as ordered by the court.

Appellant's case plan provided for a two-hour supervised visit once a week. Appellant missed one visit because it was on a Tuesday, and appellant erroneously believed that it had been scheduled for a Thursday.

Appellant had submitted to a psychological evaluation in December 2010. The evaluator diagnosed appellant with narcissistic personality disorder and recommended individual therapy. Appellant did not schedule an appointment for therapy, anger-management, or domestic-violence classes by February 25, 2011, as required by her case plan. On March 14, 2011, a social worker set up an appointment with a therapist for appellant. Appellant's first therapy appointment was not until May 6, 2011.¹

During May and June, appellant attended four therapy appointments. Appellant had to cancel one appointment, but she called ahead of time and re-scheduled the

¹ Mother asserts that the first appointment was canceled by the provider. The social worker's May 9, 2011 notes indicate that the first appointment was canceled by the provider. However, it appears that the note is not accurate, because the therapist testified that she met with mother on May 6, 2011, and the district court found the same.

appointment. Following the fourth appointment, the therapist concluded that appellant was not amenable to therapy and recommended that appellant participate in anger-management and parenting classes. Appellant enrolled in an anger-management class. Appellant's therapist canceled appellant's enrollment because the therapist had instructed appellant to inquire about the classes, but not to enroll, and because appellant provided "false information" when she enrolled. Appellant re-enrolled in the next available anger-management class four weeks later, and, at the time of trial, had one session of a twelve-week program left to complete.

On July 13, 2011, the district court relieved social services of reunification efforts. The order incorporated the social worker's July 8, 2011 report, in which the social worker reported:

During visits, [appellant] struggles to parent in the same manner as she does at home . . . and cannot or will not allow [the social worker] to get a true and accurate assessment of how she parents "in the real world."

....

. . . [The social worker] did have an extensive conversation with [appellant] after the visit on July 8, 2011 about . . . the looming permanency decision. . . . [Appellant] appeared to take this conversation seriously . . . [Appellant] continues to deny any involvement in maltreating the children in her care and also denies the possibility that another member of the household could have hurt the children.

. . . [W]hen talking about therapy, [appellant] continues to state she was told she did not need therapy when, in fact, the issue is not lack of need but lack of ability to benefit from it at this time.

. . . [V]irtually no progress has been made on the case plan that would indicate to [the social worker] that [appellant]

is likely to succeed in completing and internalizing the services.

During the course of working with the social workers and other service providers, appellant was often evasive and dishonest. For example, appellant told the social worker that she wanted to visit the child before appellant went away to visit family, when appellant really was going to be incarcerated in the county jail for two weeks.

At the time of trial, appellant continued to live in the same residence with the same people she lived with when the substantiated physical abuse involving S.A.G. and E.F.C occurred. Appellant denied that there was an issue with physical abuse in the home and testified that she has no concerns about the children's safety in the home.

J.N.C.G. was "shut down" and hesitant when she was removed from appellant's home but has improved since being in father's care. J.N.C.G. is doing well in school and visits with her half-brother, S.A.G.

Father tested positive for marijuana and has been convicted of driving while impaired and does not have a driver's license. After it was discovered that father's Facebook post said that he was smoking pot and partying, father submitted to a urinalysis, which was positive for marijuana. Father admitted driving without a license with J.N.C.G. in the car on three occasions.

The guardian ad litem (GAL) testified that a transfer of custody to father is in the child's best interests. The GAL indicated that the child had been having "behavioral issues" but is doing better since she has been in therapy.

The district court found that social services had made reasonable efforts to reunify appellant with the child, that appellant failed to make efforts to use the services provided to her, and that the conditions that led to the out-of-home placement had not been corrected. The district court concluded that an involuntary transfer of custody to father was in the child's best interests and, regarding parenting time with appellant, specifically concluded:

[I]t must be noted that the Court finds no basis to order that [appellant] have no relationship with [the child] hereafter. The Court is not terminating [appellant's] parental rights to [the child], nor has it been asked to. The court finds it to be in [the child's] best interests that she continue to have contact with [appellant]. The terms and conditions of such contact and parenting time shall be as ordered by the family court.

This appeal follows.

D E C I S I O N

“District courts have broad discretion to determine matters of custody.” *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). On review of a permanent-placement decision, an appellate court determines whether the district court's findings address statutory criteria and are supported by substantial evidence, or whether the findings are clearly erroneous. *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261-62 (Minn. App. 1996). “The evidence and its reasonable inferences must be viewed in the light most favorable to the prevailing party.” *Id.* at 261.

A transfer of permanent legal and physical custody requires that the district court consider: (1) the best interests of the child; (2) the nature and extent of reasonable efforts to reunite the family; (3) the parent's efforts and ability to use services to correct the

conditions that led to out-of-home placement; and (4) whether the conditions that led to the out-of-home placement have been corrected. Minn. Stat. § 260C.201, subd.11(h)(i). “Consistent with the level of proof generally required in child protection proceedings,” a permanent-placement determination must be supported by “clear and convincing evidence.” *A.R.G.-B*, 551 N.W.2d at 261.

Clear and convincing evidence is “unequivocal and uncontradicted, and intrinsically probable and credible.” *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 52 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994). However, “[t]hat the record might support findings other than those made by the [district] court does not show that the court’s findings are defective.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). We defer to the district court’s findings of fact regarding the credibility of witnesses. *In re Welfare of L.A.F.*, 554 N.W.2d 383, 396 (Minn. 1996).

Best Interests

The “paramount” consideration in permanency proceedings is the best interests of the child. Minn. Stat. § 260C.001, subd. 3(2) (2010). A child’s best interests are not served by delaying the opportunity for a permanent placement. *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996).

Father testified that the child was doing well in his care, and the district court found father to be a credible witness. The paternal grandmother, who regularly provides care for the child, testified that the child was doing well with father, her behavior had improved, and she appears happy and well-adjusted since being placed with father. The GAL testified that transfer of custody to father was in the child’s best interests, noting

that there are continuing safety concerns in appellant's home and that no improvements to the safety issues had been demonstrated. The GAL also testified that the child was doing well in father's care. Substantial evidence supports the district court's conclusion that the transfer of custody is in the child's best interests.

Reasonable Efforts

To be reasonable, the county's efforts must be designed to address "the problem presented," *S.Z.*, 547 N.W.2d at 892, and must "include real, genuine help to see that all things are done that might conceivably improve the circumstances of the parent and the relationship of the parent with the child." *In re Welfare of M.A.*, 408 N.W.2d 227, 236 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. Sept. 18, 1987). "Reasonable efforts at rehabilitation are services that go beyond mere matters of form so as to include real, genuine assistance." *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007) (quotations omitted), *review denied* (Minn. Mar. 28, 2007). "Whether efforts are reasonable requires consideration of the length of time the county has been involved with the family as well as the quality of effort given." *In re Welfare of M.G.*, 407 N.W.2d 118, 122 (Minn. App. 1987) (quotation omitted). But a county's efforts must be realistic under the circumstances of the case and "do not include efforts that would be futile." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 56 (Minn. 2004).

When determining whether reasonable efforts have been made, the court shall consider whether services to the child and family were:

(1) relevant to the safety and protection of the child;

- family;
- (2) adequate to meet the needs of the child and
 - (3) culturally appropriate;
 - (4) available and accessible;
 - (5) consistent and timely; and
 - (6) realistic under the circumstances.

In the alternative, the court may determine that provision of services or further services for the purpose of rehabilitation is futile and therefore unreasonable under the circumstances

Minn. Stat. § 260.012(h) (2010).

Social services provided individual therapy and supervised parenting time to appellant. When appellant did not schedule the first therapy session by February 25, 2001, as required by her case plan, a social worker assisted appellant with scheduling the first therapy session. Because the underlying issue was the child's safety in the home, individual therapy for appellant and supervised parenting time were appropriate and adequate services. Substantial evidence supports the district court's conclusion that social services made reasonable efforts to reunify appellant with the child.

Appellant's Efforts to Correct Conditions

Appellant did not schedule a therapy session on or before February 25, 2011, as required by her case plan. Appellant's therapist testified that appellant's participation in therapy was limited because appellant reported to the therapist that she did not have any issues. After the fourth session, the therapist concluded that appellant was "denying any issues or problems" and was unamenable to therapy. The district court found the therapist's testimony to be credible.

Appellant participated in supervised parenting time with the child. The social worker testified that “on multiple occasions” the social worker discussed with appellant that she needed to parent the child during parenting time so that the social worker could “get an accurate sense of how she parented in her own home.” Appellant “clearly was stating she wasn’t parenting during the parenting time.” As a result, the social worker was not able to assess appellant’s parenting or address other issues.

Essentially, appellant’s case plan required her to substantively participate in two services—parenting time and individual therapy. The record supports that appellant was uncooperative and did not actively engage with either service. Substantial evidence supports the district court’s conclusion that appellant did not make adequate efforts to correct the conditions leading to the child’s out-of-home placement.

Correction of Conditions

The psychological evaluation indicated that appellant has a personality disorder, and appellant’s therapist reported that appellant was unamenable to therapy. The district court concluded that “[appellant] continues to be adamant that no changes in the home environment are necessary, and none will be made.” The district court also concluded that appellant has “no understanding or acknowledgment of the need for change.” The testimony of appellant, the therapist, and the evaluator, who conducted appellant’s psychological evaluation, support these conclusions. Substantial evidence supports the district court’s conclusion that the conditions that led to the out-of-home placement have not been corrected.

Suitability of the Proposed Custodian

“[A]n order for transfer of permanent legal and physical custody to a relative shall only be made after the court has reviewed the suitability of the prospective legal and physical custodian.” Minn. Stat. § 260C.201, subd. 11 (d)(1)(i) (2010).

The district court reviewed father’s suitability and found:

[Father] admitted that he used to smoke marijuana, and that he tested positive for this a couple of months ago. He testified that he drinks some alcohol at parties and events, but not around [the child]. He acknowledges that he lost his driver’s license as a result of a DWI in December 2009. Usually his mother drives him and [the child], but he admits that he drove [the child] to the therapist, twice, and once to the YMCA, in spite of his lack of a license. These traffic violations are a concern to the court, but they do not impact [father’s] ability to parent.

. . . [father] [is] a credible witness. He was forthcoming, and made no effort to gloss over his shortcomings.

The district court reviewed father’s suitability as a proposed custodian and concluded that father’s shortcomings did not impact his ability to parent. The district court’s determination was based, at least in part, on its finding regarding father’s credibility, a finding to which this court defers.

Application of the Family-Law Statutes

Appellant argues that because this action was brought under section 260C.201, subd. 11, rather than the family-law statutes, appellant now faces a presumption of unfitness regarding her other child, S.A.G., and any future children. *See* Minn. Stat. § 260C.301, subd. 1(b)(4) (2010) (“It is presumed that a parent is palpably unfit to be a

party to the parent and child relationship upon a showing . . . that the parent’s custodial rights to another child have been involuntarily transferred to a relative. . . .”). Appellant argues that under the applicable family-law statute, section 518.18, father would have had to prove that appellant’s home “endangers the child’s physical or emotional health or impairs the child’s emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.” Minn. Stat. § 518.18(d)(iv).

“[C]hapter 518 explicitly contemplates that custody determinations may be made in CHIPS proceedings.” *In re A.R.M.*, 611 N.W.2d 43, 48 (Minn. App. 2000). Thus, the salient issue is not the application of section 518.18, but whether the requirements of the permanency statute were met. *Id.* Substantial evidence supports the district court’s findings, and the findings support its conclusions that the transfer of custody was in the child’s best interests, that social services made reasonable efforts to reunite appellant with the child, that appellant failed to make adequate efforts to correct the condition that led to the placement, that the conditions have not been corrected, and that father is a suitable custodian. Accordingly, the district court did not err in transferring custody of the child to father.

Affirmed.