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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0405**

In the Matter of the Welfare of the Child of: M. A. B. and R. A., Parents

**Filed September 30, 2008
Affirmed
Peterson, Judge**

Redwood County District Court
File No. 64-JV-06-187

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Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

Appellant mother argues that because (1) the record lacks evidence of reasonable efforts by respondent county to reunite her with the child, (2) respondent county was not joined as a party at the beginning of the termination proceeding, and (3) the evidence is insufficient to support the court's termination order, the district court erred in terminating her parental rights. We affirm.

FACTS

I.C.B. was born to appellant-mother M.A.B.¹ on May 16, 2003. In September 2003, mother pleaded guilty to felony theft charges. Execution of her sentence was delayed so that she could wean the child and make arrangements for his care, but mother did neither. When mother was taken into custody, the police contacted respondent Redwood County Human Services (RCHS), which made arrangements for mother's sister and brother in law, respondents E.C.W. and J.A.W. (aunt and uncle), to care for the child. Mother was released from prison in May 2004.

Aunt and uncle initiated a custody action, which settled on December 22, 2004, when mother agreed to transfer legal and physical custody of the child to aunt and uncle. As part of the agreement, mother was awarded parenting time supervised by aunt and uncle every other weekend for three hours. As a result of the transfer of custody, the county never filed a child-in-need-of-protection-or-services (CHIPS) petition.

¹ I.C.B.'s father, R.A., consented to termination of his parental rights, contingent on termination of mother's rights. His rights are not at issue on appeal.

In December 2006, aunt and uncle petitioned for termination of mother's parental rights, alleging four statutory grounds. The district court terminated mother's parental rights on the basis of abandonment and its conclusion that termination is in the child's best interests. As part of its order, the district court joined RCHS as a party.

Mother made a motion for a new trial, which the district court denied. The district court amended its order to include findings that "various efforts were made to reunify the child and mother" and that "[r]easonable efforts at reunification are not required as provided under Minn. Stat. § 260.012, as the provision of further services for the purpose of reunification is futile and therefore unreasonable under the circumstances." This appeal followed.

D E C I S I O N

A district court may, upon petition, terminate all rights of a parent to a child on one or more statutory grounds and a finding that termination of parental rights is in the child's best interests. Minn. Stat. § 260C.301, subds. 1(b), 7 (2006). This court's review of the district court's decision to terminate parental rights is "limited to determining whether the findings address the statutory criteria, whether those findings are supported by substantial evidence, and whether they are clearly erroneous." *In re Welfare of D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997). "Considerable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). However, "parental rights may be terminated only for grave and weighty reasons." *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). Thus, this court

will “closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing.” *In re Welfare of J.M.*, 574 N.W.2d 717, 724 (Minn. 1998).

Upon petition, the district court may terminate the rights of a parent to a child if it finds that the parent has abandoned the child. Minn. Stat. § 260C.301, subd. 1(b)(1). “[A]bandonment requires both actual desertion of the child and an intention to forsake the duties of parenthood.” *L.A.F.*, 554 N.W.2d at 398 (quotation omitted). A presumption of abandonment is created when “the parent has had no contact with the child on a regular basis and not demonstrated consistent interest in the child’s well-being for six months and the social services agency has made reasonable efforts to facilitate contact,” or when a child under age two has been deserted under circumstances that show intent not to return to care for the child. Minn. Stat. § 260C.301, subd. 2(a) (2006). It is not necessary to prove one of the statutory presumptions to establish abandonment. *Id.*; *L.A.F.*, 554 N.W.2d at 397.

I.

In *L.A.F.*, a case that involved a petition by the child’s mother to terminate the father’s parental rights on grounds of abandonment, the Minnesota Supreme Court held that reasonable efforts by a social-service agency to facilitate contact between a parent and a child are not required before parental rights can be terminated on the basis of abandonment unless the petitioner is seeking to apply the statutory presumption of abandonment. *L.A.F.*, 554 N.W.2d at 396-98. The court reasoned:

The legislature has, in other areas, required that social service agencies become involved to help parents meet their responsibilities under the law. We decline to extend such

requirements to this case in the absence of similar policy statements by the legislature. *Compare* Minn. Stat. § 260.221, subd. 1(b)(1)(ii) (creating a presumption of abandonment when, in part, a social service agency made reasonable efforts to facilitate contact with the parent, but explaining that abandonment does not require such efforts) *with id.* § 260.012(a) (requiring court assurance that reasonable efforts are made by an agency to reunite a child with the family when a child is in need of protective services and is under the court’s jurisdiction).

Id. at 398. The supreme court later addressed termination of parental rights on the grounds of abandonment in *In re Welfare of Children of R.W.*, where the court reiterated and applied the holding of *L.A.F.* that “reasonable efforts by the county to facilitate contact between the parent and the child are not required if the county is not seeking to use the presumption of abandonment.” 678 N.W.2d 49, 55-56 (Minn. 2004). Without discussing any efforts by social services to encourage or facilitate contact, the supreme court affirmed the district court’s finding that father abandoned his children. *Id.* at 55-56.

Mother appears to concede that under *L.A.F.* and the statutes in effect at that time, no reasonable efforts would be required before her parental rights could be terminated.² But mother argues that the statutes have been amended since *L.A.F.* and focuses her argument primarily on section 260.012(a).

Section 260.012(a) currently provides:

Once a child alleged to be in need of protection or services is under the court’s jurisdiction, the court shall ensure that reasonable efforts, including culturally appropriate services, by the social services agency are made to prevent placement or to eliminate the need for removal and to reunite

² Aunt and uncle did not allege or attempt to rely on a presumption of abandonment.

the child with the child's family at the earliest possible time, and the court must ensure that the responsible social services agency makes reasonable efforts to finalize an alternative placement plan for the child as provided in paragraph (e). In determining reasonable efforts to be made with respect to a child and in making those reasonable efforts, the child's best interests, health, and safety must be of paramount concern. Reasonable efforts to prevent placement and for rehabilitation and reunification are always required except upon a determination by the court that a petition has been filed stating a prima facie case that:

- (1) the parent has subjected a child to egregious harm . . . ;
- (2) the parental rights of the parent to another child have been terminated involuntarily;
- (3) the child is an abandoned infant . . . ;
- (4) the parent's custodial rights to another child have been involuntarily transferred to a relative . . . ; or
- (5) the provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances.

Minn. Stat. § 260.012(a) (Supp. 2007). The supreme court recently stated, "Under Minn. Stat. § 260.012(a) (2006), reasonable efforts 'for rehabilitation and reunification are always required' until the district court determines that the county has filed a petition stating a prima facie case that one of five situations exists justifying cessation of such efforts." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 664 (Minn. 2008).

But section 260.012(a) does not apply to this case. Under its plain language, that section applies "[o]nce a child alleged to be in need of protection or services is under the court's jurisdiction." Section 260.012(a) did not apply in *L.A.F.* because the child was the subject of a private petition for termination of parental rights, had not been adjudicated or alleged to be in need of protective services, and the petitioner was not relying on the presumption of abandonment. *See generally L.A.F.*, 554 N.W.2d at 394-

98. The same is true here – the child is the subject of a private petition for termination of parental rights, has never been adjudicated or alleged to be in need of protection or services, and the petitioners did not rely on the presumption of abandonment. Mother’s reliance on *T.R.* is misplaced because in that case, the children were placed in foster care, the county filed a CHIPS petition, and the district court adjudicated the children to be in need of protection and services. 750 N.W.2d at 658-59. The plain language of section 260.012(a) indicates that it only applies to children who are alleged to be in need of protection or services. Because I.C.B. has never been alleged to be in need of protection or services, section 260.012(a) does not apply.

Mother also cites Minn. Stat. § 260C.001, subd. 3 (2006), which provides: “The purpose of the laws relating to permanency and termination of parental rights is to ensure that: (1) when required and appropriate, reasonable efforts have been made by the social services agency to reunite the child with the child’s parents in a home that is safe and permanent[.]” But mother cites no authority that demonstrates that reasonable efforts were required and appropriate in this case.

Mother also cites statutes and rules that require the district court to make findings regarding reasonable efforts.³ But although these provisions require the district court to make findings, they do not contain substantive requirements that reasonable efforts be made. *See L.A.F.*, 554 N.W.2d at 397 (distinguishing requirement to make findings from requirement of involvement by social services to prevent termination). The district court

³ Mother cites Minn. Stat. §§ 260.012(h) (Supp. 2007), 260C.301, subd. 8 (2006), and Minn. R. Juv. Prot. P. 34.03, subd. 3(b), 39.05, subd. 3(b)(1), which all require the district court to making specific findings regarding provision of reasonable efforts.

made findings in its amended order regarding the efforts that were made to assist mother in maintaining a relationship with the child and found that further efforts were not required.

Finally, mother argues for the first time on appeal that termination of her parental rights without providing reasonable rehabilitative efforts violates her fundamental constitutional right to raise her child. Generally, an appellate court will not address constitutional issues that were not raised before the district court. *In re Welfare of M.H.*, 595 N.W.2d 223, 229 (Minn. App. 1999). Because mother did not make this constitutional argument before the district court, we will not address it on appeal.

II.

“If the termination of parental rights petition has been filed by a party other than the responsible social services agency, that party shall join the responsible social services agency as a party pursuant to Rule 24.” Minn. R. Juv. Prot. P. 33.01, subd. 3(d). Here, RCHS was not joined as a party until the district court issued its order terminating mother’s parental rights. On appeal, mother argues that failure to join RCHS at the outset constitutes a procedural defect in the proceedings that denied her due process. Because she did not raise this constitutional argument before the district court, we will not address it on appeal. *See M.H.*, 595 N.W.2d at 229 (holding that on appeal, the court need not consider constitutional arguments not raised before the district court).

A new trial may be granted on the basis of a procedural irregularity “whereby the moving party was deprived of a fair trial” or “if required in the interests of justice.” Minn. R. Juv. Prot. P. 45.04(a), (h). The district court determined that the failure to join

RCHS at the outset was a procedural irregularity, but “did not deprive [mother] of a fair trial and a new trial is not required in the interests of justice.”

When the responsible social-services agency is not the petitioner and has not been made a party to a juvenile-protection matter, it is a participant. Minn. R. Juv. Prot. P. 22.01(c). In such cases, the responsible social-services agency has the right to intervene as a party. *Id.* 23.01, subd. 4. A person or entity can be joined as a party on the motion of the court, a party, or the county attorney. *Id.* 24.01. RCHS did not intervene as a party, and has explicitly waived “any defect in the proceedings related to its status as a party or participant.” Although there is evidence in the record that all parties and their attorneys were aware that RCHS considered itself a participant, there is no evidence of any motion to join it as a party.

While RCHS should have been joined as a party under Minn. R. Juv. Prot. P. 33.01, subd. 3(d), nothing in the record indicates that this irregularity in the proceedings in any way prejudiced mother or deprived her of a fair trial. Mother argues that if RCHS had been joined at the outset, the district court could have ordered it to provide rehabilitative services. But she cites nothing in the record that indicates that she requested that the court order RCHS to provide services or that she objected to the lack of services before she submitted her motion for a new trial.

III.

A. Abandonment

The district court found that mother failed to have any contact with the child for 20 months, despite the provision of parenting time under fair and reasonable terms; failed

to express consistent interest in the well-being of the child; and withheld parental affection. The district court also found that mother “made a conscious choice that she would not exercise visitation on those terms, and, as a result, she has virtually no relationship with the child. Mother’s refusal to see the child during that time goes right to the heart of mother’s intentions as related to abandonment.”

Mother correctly asserts that incarceration alone cannot support the conclusion that a parent has abandoned a child. *See In re Welfare of Staat*, 287 Minn. 501, 506, 178 N.W.2d 709, 713 (1970) (holding that “separation of child and parent due to misfortune and misconduct alone, such as incarceration of the parent, does not constitute intentional abandonment”). But the district court’s conclusion that mother abandoned the child is not based on the fact of her incarceration alone; it is based on her failure to maintain contact with the child or to exercise her right to supervised parenting time during the three years between her release from prison and the trial in this matter. Mother also attempts to analogize her case to *In re M.G.*, 375 N.W.2d 588, 590 (Minn. App. 1985), in which this court affirmed the district court’s conclusion that a father’s failure to exercise his right to parenting time did not constitute abandonment. That case is distinguishable because here the district court explicitly found that mother’s “abandonment was not due to misfortune and misconduct alone. There is no evidence that suggests that health or economic factors prevented visitation.” The district court also noted that “no physical, mental, or economic reason was offered to explain the lack of contact.” Thus, unlike the father in *M.G.*, who did not participate in parenting time because he was unable to comply with reasonable conditions imposed by the child’s mother, 375 N.W.2d at 589-

90, the district court found in its memorandum that mother “consciously and intentionally chose not to see her child, and not just in a moment of anger or as a short-term protest, but as a decision that stretched out for months to well over a year of consecutive time.”

Mother also argues that the district court failed to consider conditions existing at the time of trial and asserts that the conditions justifying termination will not continue for a prolonged indeterminate period because “full rehabilitation was on the horizon.” But the psychologist who performed a parenting assessment of mother opined that it would take mother 12 to 18 months to complete a treatment plan if she participated with accountability, motivation, and insight, but she is weak in all three of these areas. The court found that the psychologist’s report, testimony, and conclusions were “thorough, well-reasoned, and credible.” Mother emphasizes the efforts to re-establish regular parenting time that she undertook after the termination petition was filed, but she ignores the psychologist’s testimony that her psychological tests and history show that she often starts strong after making a commitment but is unable to follow through.

B. Best interests

Even if there is a statutory ground for termination, this step may not be taken unless it is in the child’s best interests. *In re Welfare of D.J.N.*, 568 N.W.2d 170, 177 (Minn. App. 1997). A best-interests analysis “balance[s] three factors: (1) the child’s interest in preserving the parent-child relationship; (2) the parent’s interest in preserving the parent-child relationship; and (3) any competing interest of the child.” *W.L.P.*, 678 N.W.2d at 711 (quotation omitted). A child’s need for stability, other needs, and preferences may constitute competing interests. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4

(Minn. App. 1992). In most cases, it is presumed that the child's best interests are served by being with the parent. *In re Child of P.T.*, 657 N.W.2d 577, 583 (Minn. App. 2003), *review denied* (Minn. Apr. 15, 2003).

Mother argues that the district court failed to analyze the child's best interests prospectively. But the district court specifically considered and found credible the psychologist's conclusion that "the time required for [mother's] remediation or reasonable completion of a treatment plan will pass beyond the time period required to assure the permanency needs of [the child]." In conducting the best-interests analysis, the district court expressed concern for "the danger of relapse into mother's gambling addiction, in light of [the psychologist's] assessment and mother's lack of any meaningful recovery program," and cited the child's interest "in having consistent and predictable parenting, stability and permanency in his living environment, and in avoiding emotional turmoil associated with mother's inconsistent presence in the child's life." The district court also found that, as a result of mother's lack of meaningful contact with the child, there is no parent-child relationship. Mother does not challenge this finding.

Mother also argues that the district court failed to consider the child's relationship with his half-siblings. Mother's reliance on Minn. Stat. § 260C.212, subd. 2(d) (Supp. 2007), is misplaced. That statute addresses out-of-home placement plans in child-protection cases, but this is not a child-protection case. Also, the subdivision cited expresses a preference for placing siblings together, but the child's half-siblings are not under the jurisdiction of the court. Furthermore, at the time of trial, two of the child's

half-siblings were adults. Finally, the order demonstrates that the district court considered the child's relationship with his siblings and found credible aunt's testimony that she would allow the siblings to spend time with him.

Affirmed.