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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1319**

In the Matter of the Welfare of the Child of:  
A. D. and L. D., Parents.

**Filed January 13, 2014  
Affirmed  
Kirk, Judge**

Dakota County District Court  
File Nos. 19-J7-05-056338, 19HA-JV-13-730

Laura K. Valentine, Burnsville, Minnesota (for appellants A.D. and L.D.)

James C. Backstrom, Dakota County Attorney, Donald E. Bruce, Assistant County Attorney, Hastings, Minnesota (for respondent Dakota County Social Services)

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Considered and decided by Smith, Presiding Judge; Johnson, Judge; and Kirk,  
Judge.

**UNPUBLISHED OPINION**

**KIRK**, Judge

On appeal from the district court's award of permanent custody of their child to the county for placement in foster care, parents argue that: (1) they were denied due

process because they were jointly represented by one attorney during the permanency proceedings; (2) the district court did not adequately address the factors set forth in Minn. Stat. § 260C.515, subd. 5 (2012); and (3) the district court's order did not satisfy the requirements of Minn. Stat. § 260C.517 (2012). We affirm.

## FACTS

Appellant-mother A.D. and appellant-father L.D. are the parents of 17-year-old P.D., who is diagnosed with autism and possesses limited communication skills. P.D. qualifies for developmental disability services and receives special education services at his high school. As part of these services, P.D. receives “hand-to-hand” school bus transportation to and from school.

A.D. and L.D. have a long history of involvement with Dakota County Social Services (the county). From 2005 through 2011, the county filed four petitions alleging that P.D. and his older sister E.D. were children in need of protection or services (CHIPS).<sup>1</sup> Both A.D. and L.D. have long histories of abusing alcohol, and all of the previous petitions involved A.D. and L.D.'s use of alcohol. Both A.D. and L.D.'s driving privileges are cancelled as inimical to public safety, and L.D. is currently on probation.

On November 27, 2012, P.D.'s school bus attempted to drop P.D. off at his home, but the bus driver returned P.D. to the school when none of his family members met the bus. The school called the police after it was unable to contact any family members. The school eventually contacted E.D., who picked up P.D.

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<sup>1</sup> E.D. was not included in the December 2012 CHIPS petition because she is over 18 years old.

On November 29, a police detective and a social worker met with E.D. at the high school. E.D. reported that she had taken L.D. to the hospital the previous night because he was throwing up blood. Due to E.D.'s concern that she would not be home in time to meet P.D.'s school bus, the detective and the social worker accompanied her to the family's home. When they arrived, the bus driver was at the home with P.D.; they had been waiting at the home for a few minutes because no one had answered the door. E.D. allowed the detective and social worker to enter the home and told them that A.D. was upstairs in bed. They found A.D. lying in bed; she appeared to be intoxicated and the room smelled strongly of urine. A.D. refused to take a breathalyzer test, and she had difficulty standing when she attempted to get out of bed. The police transported A.D. to the hospital and later placed her in detox. The social worker arranged for E.D. and P.D.'s grandmother to stay with them for the night.

On November 30, the detective and the social worker went to the hospital to meet with L.D. after he notified them he was being released. The social worker learned from a nurse that when L.D. arrived at the hospital, he was suffering from alcohol withdrawal and received treatment for gastrointestinal bleeding. However, L.D. told the social worker that he had stopped drinking two or three days before he was admitted to the hospital. Due to L.D.'s medical condition, the detective and the social worker determined that L.D. was not able to care for P.D. and placed him in foster care. The county filed a petition alleging that P.D. was in need of protection or services.

The district court held a CHIPS trial in February 2013. At that time, P.D. had been in out-of-home placement for 684 days as a result of the current CHIPS petition and

the four previous petitions. At the beginning of the trial, L.D. and A.D.'s attorney stated on the record that she had previously represented L.D. and that both L.D. and A.D. requested that she represent them in these proceedings. She further stated:

One of the reasons that I hadn't represented both in the past is that the parties had some conflicting interests and I wanted to verify that that was not an issue for this case. It's my understanding, after talking with them, that they would waive any conflict of me representing both of them. They have agreed that they have mutual interests in denying the petition, that they have mutual interest in the disagreements with the county, and that they feel it is in their best interests to have me represent both regarding this child protection matter.

Both L.D. and A.D. stated on the record that they were comfortable with the attorney representing both of them. Following the trial, the district court filed an order determining that P.D. was in need of protection or services.

At a CHIPS review hearing in March, the district court relieved the county of making reasonable efforts to reunify P.D. with L.D. and A.D. because it determined that such efforts would be futile. The district court ordered the county to supervise visitation between L.D., A.D., and P.D. and to file a permanency petition. Shortly afterward, the county filed a petition to transfer permanent custody of P.D. to the county so he could be placed in foster care. The district court held a trial on the petition in June. A.D. did not appear on the first day of trial. As a result of A.D.'s absence, the district court noted that although a Russian interpreter had been present at the start of the trial to interpret for both parents, it had excused the interpreter with the parties' agreement because A.D. was not present and L.D. indicated he did not need an interpreter.

At trial, a case aide for the county testified that she has been supervising visits between P.D., L.D., and A.D. since December 2012. She testified that P.D. has a loving relationship with both of his parents and the visits generally go well. However, she testified that a few issues have arisen. During several visits, A.D. and L.D. raised concerns about P.D.'s appearance and L.D. spent a lot of time on his cell phone. The case aide also testified that L.D. and A.D. cancelled numerous visits because they reported that one or both of them were sick or had an appointment.

P.D.'s child protection social worker testified that P.D. has been living in a group home since March 2012 with a foster mother and three other autistic children. The social worker testified that he has observed positive changes in P.D. since he has lived in the group home, including an increased level of verbal communication. He testified that P.D. continues to attend the same high school and has advanced in his educational program. The social worker opined that it is in P.D.'s best interest to remain in his current placement.

P.D.'s guardian ad litem testified that P.D.'s current placement is an appropriate placement for him. He testified that P.D. has become more comfortable in the group home, his communication and behavior have improved, and he is being challenged in his school program. He supports the plan for P.D. to remain in the group home and believes it is in P.D.'s best interest to be placed in the county's custody.

A.D. was present during the second day of the trial. However, the district court noted on the record that a Russian interpreter was not present because the district court had not anticipated that A.D. would appear. The district court stated that it understood

A.D. was not going to testify but she was present to demonstrate that she cared about the proceedings. As a result, the district court stated that the fact that an interpreter was not present would not delay the proceedings. Both L.D. and the attorney that represented L.D. and A.D. agreed with the district court's statement. A.D. did not testify at trial.

L.D. testified that he provides UAs as part of his probation and he does not object to the county reviewing the results. He testified that his physical health is fine and A.D.'s medical condition is under control, although she has ongoing physical problems. L.D. testified that P.D.'s previous foster home placements were unacceptable, but that P.D. appears to be doing "better and better" in his current group home. He testified that he is willing to cooperate with developmental disability services for P.D. and he would be willing to have him stay in a group home.

Following the trial, the district court filed an order transferring custody of P.D. to the county for placement in foster care. A.D. and L.D. moved the district court for a new trial or amended findings, and the district court denied the motion. This appeal follows.

## **D E C I S I O N**

This court reviews a district court's permanency decision to determine whether its "findings address the statutory criteria and are supported by 'substantial evidence,' or whether they are clearly erroneous." *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261 (Minn. App. 1996). The petition's allegations must be proven by clear and convincing evidence. *Id.*

**I. L.D. and A.D. were not denied due process when they were jointly represented by one attorney during the permanency proceeding.**

The United States and Minnesota Constitutions provide that the government may not deprive an individual of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. A parent's right to make decisions about the care, custody, and control of his or her children is a fundamental right. *SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007). Whether a parent's due process rights have been violated in a permanency proceeding is a question of law, which this court reviews de novo. *See In re Welfare of Children of B.J.B.*, 747 N.W.2d 605, 608 (Minn. App. 2008).

Minnesota law guarantees a child's parent the right to effective assistance of counsel in juvenile proceedings. Minn. Stat. § 260C.163, subd. 3(a) (2012). The district court must appoint counsel for a parent if he or she is unable to afford it. *Id.*, subd. 3(b) (2012). Minnesota appellate courts "will overturn a district court's finding of a valid waiver of the right to counsel only if that finding is clearly erroneous." *In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000).

L.D. and A.D. contend that they were denied due process when they were not each separately appointed an attorney during the permanency proceeding. While A.D. and L.D. concede that they did not raise this issue to the district court during the permanency trial, the record establishes that they raised it in their motion for a new trial or amended findings. The district court rejected the argument, stating that it was not inappropriate for

them to be represented by one attorney because they “repeatedly expressed their preference to both be represented by the single attorney.”

A.D. and L.D. argue that the district court’s failure to inquire regarding their need for separate counsel resulted in a serious injustice because they had a conflict of interest and the district court failed to find that they waived their right to independent counsel. We disagree. A.D. and L.D. have not demonstrated that a conflict of interest developed between them throughout the proceeding. The record establishes that A.D. and L.D. specifically requested to be represented by the same counsel during the CHIPS proceeding. Their counsel explained on the record that after speaking with both A.D. and L.D., she determined that they did not have a conflict, and they were choosing to waive their right to separate counsel. While the district court did not address this issue during the permanency proceeding, there is nothing in the record to suggest that A.D. and L.D.’s interests ever became conflicted. A.D. and L.D. are married, live together, and are joint custodians of P.D. Throughout the proceedings, A.D. and L.D. have both uniformly opposed the county’s decisions to remove P.D. from their home, place him in foster care, and pursue a transfer of P.D.’s permanent custody to the county.

A.D. and L.D. argue that they have a conflict of interest because if A.D. had secured her own counsel during the permanency hearing, her counsel would have ensured that the trial did not move forward during her absence and that she was able to follow the proceedings in Russian. However, concerns about A.D.’s participation in the trial do not constitute a conflict of interest. There is nothing in the record to indicate that A.D. and L.D.’s joint counsel did not make an effort to ensure that A.D. participated fully in the

trial. And the decision that A.D. would not testify was a strategic decision made by her counsel. Moreover, the fact that A.D. and L.D. are represented by the same counsel in this appeal weakens their argument that they have a conflict of interest.

A.D. and L.D.'s argument that the district court erred by failing to obtain a waiver of their right to independent counsel during the permanency proceeding has merit. Because the permanency proceeding was a separate proceeding from the CHIPS proceeding, the district court should have obtained a waiver of A.D. and L.D.'s right to independent counsel in the permanency proceeding instead of relying on the waiver obtained in the CHIPS proceeding. However, we conclude that the district court's error was harmless because both A.D. and L.D. were represented by counsel throughout the permanency proceeding and their interests are not conflicting. *See In re Welfare of D.J.N.*, 568 N.W.2d 170, 176 (Minn. App. 1997) (refusing to reverse termination of parental rights for harmless error). Accordingly, L.D. and A.D. were not denied due process.

**II. The district court adequately addressed the factors set forth in Minn. Stat. § 260C.515, subd. 5.**

Under Minn. Stat. § 260C.515, subd. 5, a district court may order that permanent custody of a child be transferred to the county for continued placement of the child in foster care only “if it approves the responsible social services agency’s compelling reasons that no other permanency disposition order is in the child’s best interests.” For this statute to apply, the child must be at least 12 years old or have a significant positive relationship with a sibling who is at least 12 years old who lives in the same foster home.

Minn. Stat. § 260C.515, subd. 5(1), (2). The county must also demonstrate that it made reasonable efforts to locate and place the child with an adoptive family or relative but the efforts were not successful. *Id.*, subd. 5(3). Finally, the parent must continue to have visitation or contact with the child and remain involved in planning for the child. *Id.*, subd. 5(4).

A.D. and L.D. argue that there was insufficient evidence to support the district court's decision to order the transfer of P.D.'s custody to the county. They contend that: (1) the county failed to show that there was no other permanency option in P.D.'s best interest; (2) the county did not demonstrate that it made reasonable efforts to locate and place P.D. with a relative but the efforts were unsuccessful; and (3) the district court did not make a provision for A.D. and L.D. to continue to be involved in planning for P.D.'s needs.

In its permanency order, the district court found that the termination of A.D. and L.D.'s parental rights is inappropriate because "the parents do have a loving relationship with the child and it is in his best interests for him to continue to have a relationship with them, though not to be parented by them." The district court also found that a transfer of legal and physical custody to a relative is inappropriate because "there are no relatives who are appropriate, available and willing to provide full-time care for the child." Instead, it found that "[t]here are compelling reasons for the child to remain in the out of home placement."

The district court's findings are supported by the record. The county submitted an affidavit from P.D.'s social worker in support of its permanency petition. In the affidavit,

the social worker explained the efforts that the county engaged in to place P.D. with a relative, including exploring placement with two of his half-siblings and his great uncle. The affidavit notes that these three individuals were not able to be permanency options for P.D. because of the high level of care he requires. The affidavit also notes that P.D.'s 85-year-old grandmother was considered as an option, but she was not an appropriate choice for long-term placement of P.D. due to her age. The affidavit explains that the county explored termination of parental rights and adoption of P.D. as permanency options, but dismissed them because the county supports A.D. and L.D.'s desire to have an ongoing relationship with P.D. L.D. and A.D. never challenged the social worker's statements about the availability of P.D.'s relatives as placement options for P.D. In fact, L.D. acknowledged the difficulty of finding a foster home for P.D. due to his special needs and testified that a group home was an appropriate option for him.

Finally, the permanency order specifically provides that A.D. and L.D. will continue to have visitation with P.D. and will remain involved in planning for P.D.'s needs. The record establishes that L.D. and A.D. have had supervised visitation with P.D. throughout the permanency proceeding and supervised visitation remains in place.

**III. The district court's order transferring permanent custody of P.D. to the county satisfies the requirements of Minn. Stat. § 260C.517.**

Under Minn. Stat. § 260C.517(a), an order that permanently places a child out of a parent's home must include the following detailed findings:

- (1) how the child's best interests are served by the order;
- (2) the nature and extent of the responsible social services agency's reasonable efforts or, in the case of an

Indian child, active efforts to reunify the child with the parent or guardian where reasonable efforts are required;

(3) the parent's or parents' efforts and ability to use services to correct the conditions which led to the out-of-home placement; and

(4) that the conditions which led to the out-of-home placement have not been corrected so that the child can safely return home.

A.D. and L.D. argue that there is insufficient evidence to support a finding that P.D.'s best interests require a transfer of custody because the record establishes that they love their son. They further argue that the county did not present evidence that they failed to provide P.D. with food, clothing, shelter, love, and education. Finally, they contend that the county has not nurtured P.D.'s Russian cultural heritage.

The district court made several findings regarding P.D.'s best interests, including that both P.D.'s social worker and his guardian ad litem testified that P.D.'s best interests are served by remaining in the group home on a permanent basis. The district court further found that P.D. "has flourished in his current placement and it is in his best interests to remain there" and that it is in P.D.'s best interests to be placed in the county's permanent custody for placement in the group home. The record supports the district court's findings. Both P.D.'s social worker and his guardian ad litem testified during the permanency trial that P.D. was doing very well in his current group home and it was in his best interests to remain in the group home.

The record supports A.D. and L.D.'s assertion that they love P.D., but it also establishes that they were unable to meet P.D.'s needs when he was in their custody. As part of its permanency order, the district court adopted its findings in the CHIPS order.

In that order, the district court made numerous findings regarding the previous four CHIPS petitions that were filed regarding P.D. as well as the circumstances that led to the filing of the most recent CHIPS petition. Moreover, the district court was not required to make a finding regarding whether A.D. and L.D. provided P.D. with food, clothing, shelter, love, and education, or whether the county nurtured his cultural heritage in order to find that the order is in P.D.'s best interests.

A.D. and L.D. next argue that there is insufficient evidence to support a finding that the county made reasonable efforts to reunify P.D. with his parents. *See* Minn. Stat. § 260C.517(a)(2). But A.D. and L.D. fail to acknowledge that the district court relieved the county of making reasonable efforts to reunify P.D. with them. Thus, the district court was not required to find that the county made reasonable efforts to reunify P.D. with his parents. However, as the county argues, there is evidence in the record that the district court examined A.D. and L.D.'s efforts and ability to use services to correct the conditions that led to P.D.'s placement out of the home. The CHIPS order provides a detailed history of A.D. and L.D.'s involvement with the county and the services the county provided. That history establishes that during the previous CHIPS proceedings, A.D. and L.D. participated in services to the extent required to be reunified with their children. But each reunification was followed by another troubling incident involving A.D. and L.D.'s alcohol use that led to the filing of another CHIPS petition.

The district court also addressed A.D. and L.D.'s continued use of alcohol in its permanency order. The district court noted that both A.D. and L.D. have significant histories of alcohol abuse and that the circumstances that led to these proceedings were

directly related to those histories. The district court also found that both A.D. and L.D. were treated in the hospital for alcohol-related medical issues as recently as November 2012 for A.D. and January 2013 for L.D.

Finally, while the district court did not specifically state in the permanency order that the conditions that led to P.D.'s out-of-home placement have not been corrected where P.D. could safely return home, we conclude that the order as a whole satisfies that statutory requirement. The district court relieved the county of making reasonable efforts to reunify P.D. with his parents. In addition, the district court made numerous findings regarding A.D. and L.D.'s long history of alcohol abuse, involvement with the child-protection system, and their continued use of alcohol.

**Affirmed.**