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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2174**

In the Matter of the Welfare of the Child of: L. F., Parent.

**Filed April 30, 2012
Reversed
Schellhas, Judge**

Hennepin County District Court
File No. 27-JV-11-8302

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Michael O. Freeman, Hennepin County Attorney, Cory A. Carlson, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Sally Thomas, Minneapolis, Minnesota (guardian ad litem)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's adjudication of her child as a child in need of protection or services (CHIPS) under Minn. Stat. § 260C.007, subd. 6(3), (8) (2010), arguing that (1) the evidence is insufficient to support the district court's conclusion that the child was without the necessities required by subdivision 6(3) or the parental care required by subdivision 6(8); (2) the district court's best-interest findings are erroneous

and insufficient; and (3) this court should review the district court's alleged procedural and evidentiary errors even though appellant did not preserve her objections in a post-trial motion. Because the record evidence does not sustain the district court's findings of fact and the findings do not sustain the conclusions of law that the child was without the necessities required by subdivision 6(3) or the parental care required by subdivision 6(8), we reverse.

FACTS

On March 23, 2011, at age 19, L.F. gave birth to J.F. When J.F. was conceived and born, L.F. was unmarried. J.F. suffers from severe eczema and must be administered daily medication. C.J.H. is an alleged father of J.F.¹ Shortly after J.F.'s birth, L.F. and J.F. began residing in the home of P.H., C.J.H.'s mother, with P.H. and C.J.H. On March 30, L.F. signed a delegation-of-powers-by-parent form (DOPA) under Minn. Stat. § 524.5-211 (2010), delegating to P.H. her "parental powers and authority regarding the care, custody, and property of [J.F.]." P.H. also signed the form, acknowledging her acceptance of the delegation of parental authority over J.F.

L.F. has bipolar disorder and is prescribed medication to treat it. When L.F. fails to take her medication, she becomes frustrated and mean. On such occasions in 2011, L.F. sometimes left P.H.'s home. The first occasion occurred in May, when L.F. was

¹ Although the CHIPS petition alleges, and the CHIPS order states, that N.T. is the alleged father of J.F., without mentioning C.J.H., at the CHIPS trial, the Hennepin County Attorney asked C.J.H., "You are also the alleged father of [J.F.]," to which he responded yes. At that time, no paternity of J.F. had been adjudicated. N.T. did not appear at the trial.

gone three days, and C.J.H. filled out a missing-person's report with the police. L.F.'s second absence occurred around June or July, when L.F. was gone two or three days.

On September 9, while L.F. and C.J.H. were at school, a Minneapolis police officer removed J.F. from P.H.'s home and transported him to a shelter. On September 14, Hennepin County filed a CHIPS petition. On November 2, 2011, the district court conducted a CHIPS trial and issued a written order on November 14. The court found that L.F. "has issues with mental health and parenting which negatively impact her ability to properly parent [J.F.]" and that the disposition of "foster care placement is in the best interests and safety of [J.F.] until [L.F.] can provide a safe environment for [J.F.]" The court adjudicated J.F. CHIPS under Minn. Stat. § 260C.007, subd. 6(3), (8), transferred J.F.'s legal custody to the Hennepin County Human Services and Public Health Department for placement in foster care, adopted the county's case plan, and ordered L.F. to comply with the case plan.

This appeal follows.

D E C I S I O N

This court is bound by a "very deferential standard of review" of factual findings in CHIPS determinations, *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 734 (Minn. App. 2009), and will not reverse such findings unless they are "clearly erroneous or unsupported by substantial evidence," *In re Welfare of B.A.B.*, 572 N.W.2d 776, 778 (Minn. App. 1998). "A finding is clearly erroneous if it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660–61 (Minn. 2008) (quotation omitted).

“[W]hen no motion for a new trial has been made—as is the case here—the questions for review include whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment.” *S.S.W.*, 767 N.W.2d at 733 (quotation omitted).

“A close review inquires into the sufficiency of the evidence to determine whether the evidence is clear and convincing.” *Id.* at 730, 733 (“The CHIPS petitioner must prove [at trial] that the child meets the statutory definition of a ‘[c]hild in need of protection or services’ by clear and convincing evidence.” (quoting Minn. R. Juv. Prot. P. 39.04, subd. 1)). “‘Clear and convincing evidence’ is evidence that is ‘more than a preponderance of the evidence but less than proof beyond a reasonable doubt.’ Such proof is shown when ‘the truth of the facts asserted is ‘highly probable.’” *State v. Jones*, 753 N.W.2d 677, 696 (Minn. 2008) (quoting *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978) (citation omitted)).

L.F. argues that the record evidence is insufficient to support the district court’s adjudication that J.F. is CHIPS under Minn. Stat. §§ 260C.007, subd. 6(3), (8). We agree. An adjudication that a child is CHIPS “requires proof of the existence of one of the enumerated child-protection grounds *and* that the child needs protection or services as a result.” *S.S.W.*, 767 N.W.2d at 735 (emphasis added). Under subdivision 6(3), a child is CHIPS if the child needs protection or services because the child “is without necessary food, clothing, shelter, education, or other required care for the child’s physical or mental health or morals because the child’s parent, guardian, or custodian is unable or unwilling to provide that care.” Minn. Stat. § 260C.007, subd. 6(3). Under subdivision 6(8), a child

is CHIPS if the child needs protection or services because the child “is without proper parental care because of the emotional, mental, or physical disability, or state of immaturity of the child’s parent, guardian, or other custodian.” Minn. Stat. § 260C.007, subd. 6(8).

Here, the only two witnesses to testify at the CHIPS trial were C.J.H.,² age 19, and L.F. C.J.H. testified that he had not yet signed a recognition-of-parentage form because he was awaiting the outcome of “DNA testing.” From March until L.F. moved out sometime in September, C.J.H. observed L.F.’s ability to parent J.F. in his mother’s home, both when L.F. took her medication for bipolar disorder and when she did not. C.J.H. observed that when L.F. took her medication, she had no difficulties caring for J.F.; she catered to him. He testified that when L.F. did not take her medication,

she would still do what she needed to do, but she will get frustrated easily, more easier, than her being on them. But when she is off of them she is—I mean, she still does everything for him, and whatever he needed done, she will do it, but . . . she will get irritated in the process, but she will still get it done.

C.J.H. testified that he was aware that L.F. “had signed temporary custody over to [P.H.]” C.J.H. explained that

[L.F.] did that so if me and [L.F.] were at school and my mom was the only one with [J.F.] at the time, if [J.F.] got sick or anything, or needed to go to the doctor, my mom would have the rights to go and do that while me and [L.F.] are at school.

² Before trial commenced, the county attorney informed the district court that it “originally intended to have [P.H.] testify” and that she had confirmed by telephone the previous day that “she would be willing to come in and testify,” but she was not present because of illness. Although C.J.H. was not on the county’s witness list, the court allowed the county to call him to testify over L.F.’s objection.

That way we wouldn't have to take time off of school and miss credits to take [J.F.] to the doctor.

So she signed that so my mom could actually deal with him while we are at school doing what we needed to do.

C.J.H. testified that, when L.F. was off her medication, she was never “physical towards [J.F.]” or verbally abusive toward him, although she was physically and verbally abusive towards him when she was not on her medication. L.F. admitted that when she left J.F. in P.H.’s home it was “necessary for [her] to stay away from [J.F.] [for] three days for [her] to deal with [her] frustrations.” She explained, “Either I stay away, or I take it out on my son. I didn’t want to take it out on my son because he doesn’t deserve it.”

The district court found that “[i]n early September, 2011, [L.F.] left [P.H.’s] home, and on Sept. 9, the child was removed from that home and taken to St. Joseph’s shelter by police.” This finding is not supported by the record evidence. The only evidence in the record that pertains to early September, before J.F.’s removal from P.H.’s home, is C.J.H.’s direct testimony, as follows:

COUNTY ATTORNEY: Wasn't there a situation then in September, early September of this year, where there was a concern that [L.F.] had left [J.F.] because she was off her medications and frustrated?

C.J.H.: Not that I recall.

COUNTY ATTORNEY: Wasn't there a situation where Child Protection got involved and the child was taken into custody?

C.J.H.: Actually, she never left him. When Child Protection got called and they took him[,] me and her were actually in school the day Child Protection took him.

And they told my mom that they got a call saying that she abandoned him and she was abusing him and everything else, which was not true because when I called my mom,

when I was at school on lunch, I used her phone and I called my mom, and my mom told me that they took [J.F.]

No record evidence supports a finding that L.F. left P.H.'s home in early September 2011, that L.F. abandoned J.F. in September, that L.F. was not providing J.F. proper care, or that L.F. was not leaving him with suitable caretakers when she was not able to provide his care. No record evidence supports a finding that, on September 9, 2011, J.F. was without the necessities required by subdivision 6(3) or "proper parental care" required by subdivision 6(8). L.F. testified that she provided J.F.'s baby formula, woke up at night to feed him, provided him "clothes and diapers and everything else that he needed," and took him to medical appointments. J.F. had his own room and crib in P.H.'s home, and L.F. had delegated parental powers to P.H. by signing a DOPA, as authorized by Minn. Stat. § 524.5-211.³ The district court found that during L.F.'s absences from P.H.'s home, she left J.F. in the care of P.H., and nothing in the record suggests that the care provided to J.F. by P.H. and C.J.H. was unsatisfactory or deficient in any way.

In its order, the district court found that L.F. "testified that when she went off her medication, she would leave [J.F.] with other people because she did not want to take her frustrations out on [J.F.]; she could not care for [J.F.] at these times because of her mental illness." Although L.F. essentially admitted that *during her absences* from J.F., she was unable or unwilling to care for J.F., no record evidence or findings support the conclusion

³ Pursuant to the DOPA, L.F. delegated to P.H. her "parental powers and authority regarding the care, custody, and property of [J.F.], including, but not limited to the authority to: a. authorize medical treatment; b. enroll [J.F.] in school; and c. provide a home, care, and supervision of [J.F.] at the home of [P.H.]."

that J.F. was ever “without necessary food, clothing, shelter, education, or other required care for [J.F.’s] physical or mental health or morals” under Minn. Stat. § 260C.007, subd. 6(3). Similarly, although L.F.’s testimony supports the court’s finding that L.F. has “issues with mental health and parenting which negatively impact her ability to properly parent [J.F.],” no record evidence or findings support the conclusion that J.F. was ever without proper parental care “because of” L.F.’s mental illness or otherwise under Minn. Stat. § 260C.007, subd. 6(8).

We conclude that the record evidence and findings are insufficient to sustain the district court’s conclusions that J.F. is CHIPS under Minn. Stat. § 260C.007, subds. 6(3) and 6(8), because the findings are unsupported by clear and convincing evidence. *See S.S.W.*, 767 N.W.2d at 726, 735 (affirming district court’s determination that mother’s child is not CHIPS because, even though mother had “a history of mental-health issues that impact her judgment and required treatment[,] . . . the assigned caseworker and [guardian ad litem] observed nothing to suggest that [mother] was not providing for her child’s needs”).

We further conclude that, even if the record evidence and findings were sufficient to support a finding that one of the grounds under subdivisions 6(3) or 6(8) existed, the record evidence does not clearly and convincingly support a finding that J.F. needed protection or services as a result. *See id.* at 735 (noting that even though mother had “past and current behavioral concerns, the department failed to prove that [child] is a child in need of protection and services” (quotation omitted)). L.F.’s two absences from P.H.’s home occurred in May 2011 and June or July 2011, but the county did not file its CHIPS

petition until September 14, 2011. Although the district court found that after J.F.’s removal from P.H.’s home on September 9, L.F. “did not attempt to find [J.F.] until notified of the emergency protective care hearing on Sept. 14, 2011,” this finding alone is not sufficient to sustain the conclusion that J.F. needs protection or services.

The record before us does not show it to be highly probable that the statutory grounds identified in the CHIPS petition are satisfied, nor does it show it to be highly probable that J.F. needs protection or services as a result. The record may show that L.F. is not an ideal parent, but ideal parenting is not the standard. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 379 (Minn. 1990) (noting, in a termination of parental right appeal, that “few children would be reared by natural parents if model parents were the standard” (citing *In re Welfare of D.C.*, 415 N.W.2d 915, 919 (Minn. App. 1987) (Huspeni, J., dissenting))). If the circumstance of L.H. not personally providing *all* of J.F.’s care, instead allowing the DOPA delegate and alleged father, C.J.H., to share in the caretaking, prompted the county to file the CHIPS petition, we are concerned that such action might discourage other similarly situated parents from signing DOPAs. That discouragement will not advance the best interests of similarly situated children.

Because we are reversing J.F.’s CHIPS adjudication, we do not reach L.F.’s challenge to the district court’s best-interest findings or alleged procedural and evidentiary errors.

Reversed.