STATE OF MINNESOTA
IN COURT OF APPEALS
A12-28

In the Matter of the Welfare of the Child of: C. P., Parent

Filed June 18, 2012
Remanded
Hudson, Judge

Koochiching County District Court
File No. 36-JV-11-595

Molly J. French, Shermoen & Jaksa, PLLP, International Falls, Minnesota (for appellant father C.P.)

Jeffrey Naglosky, Koochiching County Attorney, Shauna L. Ryan, Assistant County Attorney, International Falls, Minnesota (for respondent Koochiching County)

Daniel Griffith, Griffith Law Office, International Falls, Minnesota (for respondent child B.H.)

Gordon Dault, International Falls, Minnesota (guardian ad litem)

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

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from the district court's transfer of custody, appellant argues (1) that the district court's findings supporting its determination that the county made reasonable efforts toward reunification are clearly erroneous and (2) the district court erred by

transferring custody because the county did not conduct a proper relative search. Because the district court's findings are ambiguous, we remand for clarification.

FACTS

Appellant C.P. is the step-father of 17-year-old B.H.[1] On August 30, 2010, B.H. was removed from appellant's home and placed in emergency foster care with his maternal aunt and uncle, John and Faith Vernlund. Respondent Koochiching County Community Services (the county) filed a child-in-need-of-protection-or-services (CHIPS) petition alleging that B.H. was in need of protection under Minn. Stat. § 260C.007, subd. 6 (2)(i), (9) (2010). The petition alleged that appellant had physically abused B.H. In an amended order, the district court adjudicated B.H. as a CHIPS.

On August 8, 2011, respondent filed a petition to transfer permanent legal and physical custody to the Vernlunds, arguing that the transfer was in B.H.'s best interests and that the county had made reasonable efforts pursuant to Minn. Stat. § 260C.201, subd. 11 (2010). The petition alleged that: (1) reunification of B.H. and appellant had not occurred because B.H.'s therapist and guardian ad litem recommended no visitation; (2) appellant maintains he did not abuse B.H., although B.H.'s therapist maintained that appellant must acknowledge the abuse he inflicted on B.H. to be permitted visitation; and (3) visitation and reunification were not anticipated in the near future. The petition additionally alleged that the county had made reasonable efforts to facilitate reunification, which failed to correct the conditions that led to the out-of-home placement.

[1] In a default proceeding, C.P. was awarded custody of B.H. pursuant to a marriage dissolution decree involving the child's mother, but C.P. is not B.H.'s biological or adoptive father.

Appellant's case plan required no physical contact or visitation between appellant and B.H. until recommended by B.H.'s therapist and social services team; a domestic-violence inventory assessment, including following recommendations; scheduling individualized therapy to include a diagnostic assessment with follow-up appointments to focus on parenting and his relationship with B.H.; scheduling a psychological assessment, including a parental-capacity evaluation; and successfully completing and implementing the tasks of the plan, including signing consent forms for providers so that the county could monitor his attendance and progress.

The district court awarded permanent legal and physical custody of B.H. to John and Faith Vernlund. The district court's findings include that B.H. expressed a preference to live with the Vernlunds, where he had lived for more than a year pursuant to the out-of-home placement; B.H. stated that he would not live with appellant; B.H. had improved academically and had become involved in after-school activities since living with the Vernlunds; B.H. quit using tobacco and mood-altering substances that he used while living with appellant; Faith Vernlund had taken "a very active parenting role" with B.H.; the Vernlunds had sought appropriate help for B.H.; and the Vernlunds kept a clean and safe home to which B.H. had adapted well. Additionally, the district court found that B.H.'s therapist twice recommended that B.H. be permanently placed in the Vernlund home based on her assessment of court records, interviews with B.H., and interviews and observations of the Vernlund family. The district court found credible the testimony of B.H.'s therapist, who opined that she believed it was not in B.H.'s best interests to have contact with respondent until B.H. was psychologically ready. Specifically, the district

court observed that the therapist "advocates strenuously that it would be psychologically unhealthy for the child to be immediately returned to the care of the respondent" and believes that any communication between B.H. and appellant geared toward immediate reunification is inappropriate because appellant "never sought therapy in an effort to address the concerns expressed by the child and the findings of the court."

The district court also found that the county social worker assigned to the case recommended permanent placement in the Vernlund home. Additionally, the district court found that the social worker conducted an appropriate relative search by sending inquiries to several people appellant recommended, as well as B.H.'s biological father and maternal grandmother. The district court further found that the county worked diligently and made reasonable efforts to reunify B.H. and appellant and that those efforts were not focused on appellant admitting he abused the child, even though B.H.'s therapist opined that healthy reunification required that appellant acknowledge his abuse of B.H.

As to appellant, the district court found that he generally accomplished the requirements of the case plan but "did not follow through with the give and take of recommended therapy available for himself and the child," and that there was a lack of coordination between B.H.'s therapist and appellant. The district court also found that appellant was, in effect, bargaining for return of the child by bare compliance with the case plan, and that appellant continued to maintain that B.H. lied about material facts and that the district court's findings in the prior CHIPS proceeding were unfounded. In addition, the district court found that appellant continued to maintain that he did not abuse B.H. while rejecting the assertion that B.H. sincerely believed such abuse occurred.

The district court rejected appellant's contention that the county's reasonable efforts were a farce, that the county and guardian ad litem acted unethically, and that the county's petition and B.H.'s testimony were a subterfuge to conceal the true motive to allow B.H.'s maternal relatives to obtain a change of custody. Finally, the district court found appellant "to be incredible and [that it therefore] must largely discount much of his testimony offered as material to this case." The district court concluded that the county's efforts to reunify B.H. with appellant were reasonable and that appellant made virtually no effort to avail himself of services to correct the harm that led to the out-of-home placement.

This appeal follows.

D E C I S I O N

Allegations in a permanency petition to transfer legal and physical custody must be proved by clear and convincing evidence. *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261 (Minn. App. 1996); *see also* Minn. R. Juv. Prot. P. 39.04, subd. 1 (requiring that statutory grounds set forth in petition be proved by clear and convincing evidence). We review a permanent placement order to determine whether the district court's permanency "findings address the statutory criteria and are supported by substantial evidence, or whether they are clearly erroneous." *A.R.G.-B.*, 551 N.W.2d at 261 (quotation omitted). Findings are clearly erroneous if we are "left with the definite and firm conviction that a mistake has been committed." *In re Estate of Balafas*, 293 Minn. 94, 96, 198 N.W.2d 260, 261 (1972) (quotation omitted).

An order permanently placing a child outside the home of a guardian must address: (1) how the placement serves the child's best interests; (2) the extent and nature of the responsible social service agency's reasonable reunification efforts; (3) the ability and efforts of the parent or parents to use services to correct the conditions leading to the out-of-home placement; and (4) whether the conditions leading to the placement have been corrected so that the child can safely return home. Minn. Stat. § 260C.201, subd. 11(i) (2010). Reasonable efforts require "due diligence" by the county to use "appropriate and available services to meet the needs of the child and the child's family." Minn. Stat. § 260.012(f) (2010). In determining whether reasonable efforts have been made, the district court must consider whether the services to the child and family were "(1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances." *Id.* (h). "Whether the county has met its duty of reasonable efforts requires consideration of the length of the time the county was involved and the quality of effort given." *In re Welfare of H.K.*, 455 N.W.2d 529, 532 (Minn. App. 1990), *review denied* (Minn. July 6, 1990). The county bears the burden of proving that it put forth reasonable efforts. Minn. Stat. § 260.012(f).

The district court concluded that the county made reasonable efforts toward reunification, and appellant failed "to avail himself of services to correct the conditions that led to the out of home placement." The district court based these conclusions on multiple findings, including that appellant largely complied with the case plan but did not

follow through on recommended therapy, maintained that he did nothing improper, and rejected B.H.'s belief that the abuse had occurred.

Appellant argues that the district court's findings are clearly erroneous, asserting that he fully complied with the case plan, and that the district court based its decision on an unstated and impermissible requirement that appellant admit he abused B.H. Respondent contends that C.P. was not required to admit that he abused B.H.; rather, appellant was merely required to "acknowledge" B.H.'s feelings about the alleged abuse so that appellant's therapy sessions would be productive. After carefully reviewing the record, we conclude that the district court's findings are ambiguous regarding (1) the terms of appellant's case plan; (2) whether the terms of that case plan were adequately conveyed to appellant, and (3) whether that plan included a term that was impermissible. Therefore, we remand. *See Zerby v. Brown*, 280 Minn. 514, 516, 160 N.W.2d 255, 257 (1968) (stating that where there was "no doubt that the evidence would support one or more findings [allowing termination of parental rights]" but where the district court "made no specific finding which clearly conformed to any of these statutory conditions [for terminating parental rights]," it would "remand . . . to the district court for clarification and further findings"); *Knutson v. Zenk*, 413 N.W.2d 593, 597 (Minn. App. 1987) (remanding for clarification of ambiguous district court finding).

While not an explicit requirement of appellant's case plan, the district court record could be read to suggest that, for appellant to show that he satisfied certain aspects of his case plan, the district court required appellant to admit that he abused B.H. For example, the record includes the district court's finding that appellant was adamant that B.H. lied

about the abuse and that appellant insisted he did nothing wrong, as well as two letters from B.H.'s therapist addressed to B.H.'s social worker that state appellant must "validate what [B.H.] has experienced." The social worker's later testimony echoed this same position. Specifically, the social worker testified that, although she sought appellant's accountability for the abuse he inflicted on B.H., she did not tell appellant that "everything was contingent upon him having some accountability." She testified that, "I shouldn't have to tell parents that they need to be accountable for things that they did to their child. That's something that parents need to come to on their own terms." Later in her testimony, the social worker was asked if, during the lengthy meeting with appellant regarding the components of the case plan, it was ever "mentioned that in order for reunification to be considered, [appellant] would have to admit that the abuse occurred?" She replied no. Additionally, the social worker testified that, even after appellant completed the case plan, reunification with B.H. was not considered because appellant "was still adamant that nothing—nothing bad occurred in his home, that no abuse occurred."

Possibly as a result of whatever confusion may have existed about whether appellant was required to admit that he abused B.H., the previously quoted testimony of the social worker demonstrates that it is also unclear whether the county informed appellant that he had to admit that he abused B.H. But the county may not include as part of its reasonable efforts toward reunification a case-plan requirement that was not communicated to appellant. *See In re Welfare of M.A. & J.A.*, 408 N.W.2d 227, 236 (Minn. App. 1987) (quotation omitted) (stating that reasonable efforts 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"), *review denied* (Minn. Sept. 18, 1987); *see also* Minn. Stat. § 260C.212, subd. 1(c)(3)(i) (2010) (stating case plan must set forth "specific actions to be taken by the parent or parents of the child to eliminate or correct the problems or conditions identified . . . and the time period during which the actions are to be taken").

Moreover, it is impermissible to require parents to incriminate themselves in a permanency proceeding. *Cf. In re Welfare of J.W.*, 415 N.W.2d 879, 883 (Minn. 1987) (concluding that threat to compel parents to incriminate themselves improper in potential parental-rights termination proceeding). Therefore, if in fact the district court conditioned appellant's compliance with the case plan on a requirement that he admit to abusing B.H., it was error. *See In re Welfare of J.G.W.*, 433 N.W.2d 885, 886 (Minn. 1989) (holding that district court violated father's privilege against self-incrimination by finding no substantial compliance with case plan because father refused to explain sexual abuse of children). If, instead, the district court intended to find appellant was required to merely acknowledge B.H.'s feelings regarding the abuse, the district court must clarify its findings and ensure that they are supported by substantial evidence. *See A.R.G.-B.*, 551 N.W.2d at 261 (stating that findings in permanency order must be supported by substantial evidence).

Specifically, on remand, the district court shall clearly identify the terms of appellant's case plan, shall not include or shall remove any requirement that threatens appellant's custodial rights if he does not incriminate himself, and shall make findings

addressing whether and to what extent appellant did or did not satisfy the terms of his case plan. To clarify its findings, the district court may reopen the record.

Once the district court clarifies its findings, it may still be that appellant satisfied the case plan but transfer of custody remains appropriate because the conditions that led to the out-of-home placement have not been corrected. *Cf. In re Welfare of Maas*, 355 N.W.2d 480, 483 (Minn. App. 1984) (affirming that mother's substantial compliance with court order to take parenting classes, undergo psychological evaluation, and remain sober were insufficient to avoid termination of parental rights given past behavior and uncertainty of future improvement). But the district court must issue clear findings to support its conclusions that the county made reasonable efforts to reunify appellant and B.H. and that appellant failed to avail himself of services and correct the conditions that led to the out-of-home placement.

Because we remand for clarification of the district court's findings, we do not reach appellant's argument that the county did not conduct a proper relative search.

Remanded.