STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0066

In the Matter of the Petition of:
S.G. and L.G. to Adopt P.U.K. and D.F.K.

In the Matter of the Petition of:
D.D. and L.D. to Adopt P.U.K. and D.F.K.

Filed August 6, 2012
Affirmed
Hudson, Judge

Hennepin County District Court
File Nos. 27-JV-FA-11-60, 27-JV-FA-11-87

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Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals pursuant to Minn. Const. art. VI, § 10.

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

HUDSON, Judge

In this contested adoption dispute, appellant grandparents and co-appellant county argue that (1) the district court misapplied Minn. Stat. § 259.57 (2010), and (2) the district court erred by determining that it is in the children's best interests to be adopted by foster parents. Grandparents also argue that the county failed to exercise due diligence in identifying and notifying relatives prior to the children's placement. Because we conclude that the district court did not abuse its discretion in granting foster parents' adoption petition, we affirm.

FACTS

This appeal arises from the district court's grant of an adoption petition filed by respondent foster parents L.G. and S.G. (jointly, foster parents), and its denial of an adoption petition filed by the paternal grandparents, appellants D.D. and L.D. (jointly, grandparents).

P.U.K. was born in October 2009, and D.F.K. was born in September 2010. Both P.U.K. and D.F.K. (collectively, the children) are African American and have the same biological parents, mother J.S. and father P.K. P.U.K. tested positive for cocaine at birth and shortly afterward was placed in foster care with foster parents. She was born full-term but significantly underweight. She had tremors in her hands and legs, very dry skin, and difficulty eating. She needed to be swaddled all of the time, and her eyes did not focus well. She reached developmental milestones late in the normal range. P.U.K. is currently feisty and high-spirited. She is emotionally volatile, does not handle change

well, and has difficulty sleeping, self-soothing, and problem-solving. P.U.K. is attached to foster parents and her foster siblings.

D.F.K. also was placed with foster parents after she tested positive for cocaine at birth. She was born full-term and underweight. She was quiet and calm as an infant, and currently smiles often and makes good eye contact. D.F.K. is very attached to L.G. and has anxiety about strangers. Her development is delayed by about two to three months, but she did not qualify for special services from the school district.

The district court terminated the parental rights of J.S. and P.K. to P.U.K. in June 2010. Approximately five months later, the district court terminated the parental rights of J.S. and P.K. to D.F.K. Both terminations followed involuntary proceedings. As a result of the terminations of parental rights, the Minnesota Commissioner of Human Services became the children's legal custodian.

In December 2009, the children's paternal grandmother, D.D., expressed interest to the Hennepin County Human Services and Public Health Department (the county) in adopting P.U.K., but the county did not identify her as a permanency resource for P.U.K. until March 2010. In order to further investigate and determine whether grandparents were an appropriate adoptive placement, in April, the county sent an Interstate Compact on the Placement of Children (ICPC) request to the State of Mississippi, where grandparents reside, asking Mississippi to conduct a home study. Mississippi did not respond to the ICPC request for several months. As a result, in November, the county withdrew the ICPC request due to lack of progress. The following month, the county asked foster parents if they would adopt the children, and they agreed. At about the same

time, the county notified the district court that it was supporting foster parents as the adoptive placement for the children. In January 2011, the county received a completed adoption home study from Mississippi regarding grandparents' home, and the county resumed consideration of grandparents as an adoptive placement for the children. At a hearing in June, the county notified the district court that it supported grandparents, not foster parents, as the adoptive placement for the children.

In March 2011, foster parents filed a petition to adopt the children. Grandparents also filed a petition to adopt the children. The district court consolidated the petitions and scheduled phase one of a contested adoption trial for the end of June 2011. However, at the beginning of June, the county notified the district court that the Minnesota Department of Human Services (DHS) had not consented to the adoption of the children by either foster parents or grandparents. As a result, the parties stipulated that the district court: (1) find it unreasonable that DHS had not consented to the adoption of the children by either party; (2) strike phase one of the trial; and (3) proceed immediately to phase two of the trial. *See* Minn. R. Adopt. P. 42.03, subd. 2 (requiring district court to bifurcate contested adoption trials when the child is under the guardianship of the commissioner of Human Services).

Following phase two of the contested adoption trial, the district court granted foster parents' petition and denied grandparents' petition. Grandparents moved for a new trial or amended findings. The district court denied grandparents' motion for a new trial but amended its findings in part. This appeal by grandparents and the county follows.

D E C I S I O N

"Appellate courts review a district court decision on whether to grant an adoption petition for abuse of discretion. A reviewing court will not disturb a district court's factual findings unless they are clearly erroneous." *In re Petition of K.L.B. to Adopt L.J.D.*, 759 N.W.2d 409, 412 (Minn. App. 2008) (citation omitted), *review denied* (Minn. Feb. 25, 2009). This court reviews issues of statutory interpretation de novo. *In re T.L.A.*, 677 N.W.2d 428, 431 (Minn. App. 2004).

I

Grandparents and the county argue that the district court incorrectly interpreted Minnesota adoption law by failing to apply the relative preference set forth in Minn. Stat. § 259.57, subd. 2(c), thereby rendering the preference meaningless.

In Minnesota, there are "longstanding legislative and common law preferences for placing a child in the permanent care and custody of a relative." *In re Welfare of D.L.*, 479 N.W.2d 408, 416 (Minn. App. 1991), *aff'd*, 486 N.W.2d 375 (Minn. 1992). Based on this policy, "[i]n reviewing adoptive placement and in determining appropriate adoption, the court shall consider placement, consistent with the child's best interests and in the following order, with (1) a relative or relatives of the child, or (2) an important friend with whom the child has resided or had significant contact." Minn. Stat. § 259.57, subd. 2(c). The statute further provides that the state's policy "is to ensure that the best interests of children are met by requiring an individualized determination of the needs of the child and how the adoptive placement will serve the needs of the child." *Id.*, subd. 2(a) (2010). To determine if the needs of the child are met, a district court must

consider several factors. *Id.*, subd. 2(b); *see* Minn. Stat. § 260C.193, subd. 3(b) (2010). The county must consider the following factors to determine the individual needs of the child:

> (1) the child's current functioning and behaviors;
> (2) the medical, educational, and developmental needs of the child;
> (3) the child's history and past experience;
> (4) the child's religious and cultural needs;
> (5) the child's connection with a community, school, and faith community;
> (6) the child's interests and talents;
> (7) the child's relationship to current caretakers, parents, siblings, and relatives; and
> (8) the reasonable preference of the child, if the court, or the child-placing agency in the case of a voluntary placement, deems the child to be of sufficient age to express preferences.

Minn. Stat. § 260C.212, subd. 2(b) (2010).

The plain language of Minn. Stat. § 259.57 and the other statutes that address child placement establish that there is a preference for children to be placed with their relatives. *See* Minn. Stat. § 260C.212, subd. 2(a)(1) (2010) (stating that a child shall be placed "in a family foster home selected by considering placement . . . in the following order: (1) with an individual who is related to the child by blood, marriage, or adoption; or (2) with an individual who is an important friend with whom the child has resided or had significant contact"); Minn. Stat. § 259.29, subd. 2(1) (2010) (stating that a child shall be placed "consistent with the child's best interests and in the following order, with (1) a relative or relatives of the child, or (2) an important friend with whom the child has resided or had significant contact"); Minn. Stat. § 260C.193, subd. 3(b) ("If the court finds the agency has not made efforts as required . . . and there is a relative who qualifies to be licensed to

provide family foster care . . . the court may order the child placed with the relative consistent with the child's best interests.").

However, the best interests of the child are always the most important consideration. *See T.L.A.*, 677 N.W.2d at 431–32 (concluding that "[e]ven though earlier versions of [Minn. Stat. § 259.29 (2002)] may have created a stronger preference for relatives, the resulting caselaw still required that the best interests of the child take priority over any other statutory considerations" and that the "appellants' interpretation that the statute mandates a mechanical and automatic preference for relative placement" is contrary to the statute's plain language); *see also In re Adoption of C.H.*, 554 N.W.2d 737, 742–43 (Minn. 1996) (stating that "the [relative] preference is not to be applied so as to override the overall best interests of the child" but instead it is "*a factor* to be considered along with other factors in determining the best interests of the child rather than a mandatory, overriding directive").

In support of their argument, grandparents rely primarily on two cases, *In re Welfare of D.L.*, 486 N.W.2d 375 (Minn. 1992), and *State ex rel. Waldron v. Bienek*, 155 Minn. 313, 193 N.W. 452 (1923). In *Bienek*, a grandmother petitioned for custody of her four-year-old granddaughter. 155 Minn. at 314, 193 N.W. at 452. The child had been living with her stepfather following her mother's death, and her stepfather wanted to retain custody of her. *Id.* The district court observed: "Recognizing those near of kin will be disposed to do more for [the child's] welfare and to advance its interests than those who lack the prompting of kinship, preference is given to near blood relatives, unless the situation disclosed indicates that it may be of advantage to the child to be

placed in other hands." *Id.* at 315, 193 N.W. at 452–53. The district court awarded custody of the child to her grandmother. *Id.* at 316, 193 N.W. at 453.

In *D.L.*, a two-year-old child's foster parents and maternal grandparents filed petitions to adopt the child. 486 N.W.2d at 376. The child, who was African American, was placed with foster parents, who were white, four days after her birth. *Id.* at 377. The child's grandparents, who had legal and physical custody of two of the child's sisters and lived in another state, learned about the child's birth and foster-care placement approximately two months after she was born. *Id.* at 377–78. After the parental rights of the child's parents were terminated, grandmother informed the county that she was interested in adopting the child. *Id.* at 377. At the contested adoption trial, the "key issue . . . was the severity of any trauma D.L. might experience by being moved from the foster home to her grandparents' home." *Id.* at 378. Six experts testified at trial that moving the child would cause some harm to the child, but they disagreed about the permanency of the harm. *Id.* The district court found "that the trauma of breaking the primary attachment is temporary and heals well in most cases" and "concluded that there was no good cause not to apply the statutory family preference, and that it would not be detrimental to D.L. to be adopted by her grandparents." *Id.* This court affirmed, and the Minnesota Supreme Court also affirmed, holding that "adoptive placement with a family member is presumptively in the best interests of a child, absent a showing of good cause to the contrary or detriment to the child." *Id.* at 379–80. The supreme court further noted that its holding did not require a relative's petition to be automatically granted. *Id.* Instead, the court noted that "[t]he best interests of potential adoptees will vary from case

to case, and the [district] court retains broad discretion because of its opportunity to observe the parties and hear the witnesses." *Id.*

While *Bienek* and *D.L.* are factually similar to this matter, at the time those cases were decided, different statutes governed the relative preference in the adoption of children. *See, e.g.*, Minn. Stat. § 259.28, subd. 2 (1990) (dealing specifically with relative preference in adoption of children of minority ethnic heritage). Significantly, the version of the statute applicable in *D.L.* provided:

> [i]n reviewing adoptive placement, the court shall consider preference, and in determining appropriate adoption, *the court shall give preference, in the absence of good cause to the contrary*, to (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, to (b) a family with the same racial or ethnic heritage as the child, or if that is not feasible, to (c) a family of different racial or ethnic heritage from the child that is knowledgeable and appreciative of the child's racial or ethnic heritage.

Id. (emphasis added). This version of the statute required a court to "give preference, in the absence of good cause." *Id.* Thus, the "relative preference" language was much stronger than the current statute's requirement that the district court "consider placement" with a relative. *Compare id. with* Minn. Stat. § 259.57, subd. 2(c) (2010). Further, as the district court noted, *D.L.* is distinguishable in several respects. First, the grandparents in *D.L.* also had custody of the child's siblings; here, grandparents do not have custody of any of the children's siblings, although one of the child's half-siblings lives in the same town as grandparents. Second, the children in this matter have significant special needs, which was not an issue in *D.L.* On this record, and given the current state of the law, the district court gave appropriate weight to the relative preference.

For its part, the county argues that the district court erred by considering grandparents' relative status as "only one factor" in determining the children's best interests, by not addressing grandparents' petition first, and by failing to make a finding that grandparents did not "prove by a preponderance of the evidence that it was in the children's best interests to be adopted by them."

In its order, the district court noted that Minn. Stat. § 260C.212, subd. 2 (2010), "makes it clear that placement with a relative in Minnesota is one factor to be evaluated in determining the overall best interest of the child." The district court also noted that it would consider grandparents' petition first because D.D. was a relative of the children and proceeded to discuss the factors set forth in Minn. Stat. § 260C.212. For each factor, the district court discussed the ability of both grandparents and foster parents to meet the children's needs.

Minnesota law is clear that the relative preference is more than just a best-interests factor, as the district court's characterization might suggest. *See* Minn. Stat. § 259.57, subd. 2(c). Nevertheless, the district court thoroughly analyzed the changes in the law regarding the preference for placing children with a relative and correctly determined that "the plain language of the applicable statute . . . gives relatives preference but, 'the preference is clearly lost if contrary to the best interests of the child'" (quoting *T.L.A.*, 677 N.W.2d at 432). And the record establishes that the district court carefully considered grandparents' relationship to the children and the effort that grandparents made to have the children placed in their care. In addition, the district court made detailed findings for each best-interests factor regarding both grandparents and foster

parents. While the district court did not expressly state that grandparents had not established that it was in the children's best interests to be adopted by them, it specifically found that it is in the best interests of the children to be adopted by foster parents. It followed that statement by providing two specific concerns about placing the children with grandparents. First, the district court stated that it had "real concerns about [grandparents'] ability to recognize the children's need for services and seek out additional services if necessary." The district court based this finding on grandmother's testimony about her experience raising her son, the children's father, who has difficulty reading and writing and grandmother's failure to "acknowledge that the girls *already* have special needs." Second, the district court found that "there is a real risk of future emotional and developmental damage if the children are removed from [foster parents]." Thus, the district court implicitly found that grandparents failed to prove that it was in the children's best interests to be adopted by them, and the record supports this determination.

Accordingly, a review of Minnesota law establishes that, while Minn. Stat. § 259.57, subd. 2(c), establishes a preference for children to be placed with relatives, the ultimate determination of a child's placement depends upon an examination of the child's best interests. Therefore, we conclude that the district court did not err in its application of Minnesota adoption law.

II

Grandparents argue that the district court erred by determining that it is in the children's best interests to be adopted by foster parents. "In making adoption decisions,

the overriding policy of the state of Minnesota and the purpose of the adoption statutes are to ensure that the best interests of children are met." *T.L.A.*, 677 N.W.2d at 431. Minnesota law requires courts to consider eight best-interests factors in determining the needs of the child. *See* Minn. Stat. § 260C.212, subd. 2(b). Here, the district court made very detailed findings about each best-interests factor before concluding that foster parents had proved that their adoption of the children was in the children's best interests and implicitly concluding that grandparents failed to prove that their adoption of the children was in the children's best interests. Each best-interests factor that grandparents challenge is addressed separately.

Medical, educational, and developmental needs

Grandparents argue that the district court exaggerated the children's special needs and failed to recognize that grandparents are able to meet their needs. Although the children did not qualify for services from the school district, the record supports the district court's finding that both children are developmentally delayed. At trial, an attachment expert testified extensively about the children's special needs due to their prenatal exposure to cocaine, concluding that the "children are going to be compromised." The district court's finding that it was concerned about grandparents' ability to recognize the children's needs and seek out services is also supported by the record. D.D. has expressed doubt to the county that the children have special needs. And despite having contact with the county about the children for several months, D.D. could not identify the children's special needs at trial and admitted that she did not ask foster parents about their needs. In addition, the record supports the district court's finding that

D.D. did not seek out additional services while she was raising her special-needs son. The district court's findings are supported by the record and are not clearly erroneous.

Children's history and past experience

Grandparents argue generally that the district court erred by failing to consider the benefit to the children of growing up with their biological family. However, the district court properly considered the statutory preference for placement with relatives. The district court recognized the children's paternal family's long history of living in Mississippi, and the fact that the children's relatives, including a biological half-sibling, currently live in that state. The district court also acknowledged that the children have both paternal and maternal relatives, including a biological sibling, that reside in Minnesota. The district court's findings are supported by the record and are not clearly erroneous.

Children's religious and cultural needs

Grandparents argue that the district court failed to recognize that they will be better able to meet the children's cultural needs than foster parents. Grandparents contend that the district court's finding that there are racially-diverse children living in foster parents' home and that foster parents' church has successfully expanded its diversity are insufficient to establish that foster parents will be able to meet the children's cultural needs.

The district court made specific findings about the ability of both grandparents and foster parents to meet the children's cultural needs. While the district court acknowledged that there is limited racial diversity in foster parents' community, it found

that their household was multi-cultural and that they "believe that diversity is very important." We question the substantive impact of a multi-cultural household when the multi-cultural household simply consists of two other adopted children of color. Given that they, too, are being raised in foster-parents' household, this finding says little about what culturally-specific information or values have been or will be imparted to any of these children, and by whom. And "believing that diversity is very important" will mean little to P.U.K. and D.F.K. if foster parents do not back up their words with concrete actions that ensure these children know and appreciate their rich African-American heritage. Nevertheless, while the district court's findings grossly simplify the children's cultural needs, we also recognize that the record before the district court regarding this issue was not extensive. Thus, the district court's findings are supported by the record it had before it, and therefore, the district court did not clearly err by finding that foster parents can meet the children's cultural needs.

Grandparents also challenge the district court's finding that foster parents will facilitate a relationship between the children and their biological family. The district court found that foster parents "want [the children] to have a relationship with their biological family, and the Court believes that [foster parents] will facilitate such a relationship because they have done so for their son [D.] with his biological family." In a footnote, however, the district court noted that L.G. testified at trial that she had changed her mind over the course of the proceedings about whether the children should know D.D. as their grandmother.

The record shows that L.G. testified that "the whole time, up until now, I would say [we] have wanted to maintain contact with grandma as grandma. And never been against—never been against the girls knowing grandma as grandma, and have wanted that. But, at this point, I think I have changed my mind on that." Notably, the district court later expressed its hope and belief that L.G.'s current sentiments were the temporary result of the emotional toll these proceedings have exacted on all of the parties. Thus, we conclude that the district court's finding that foster parents will facilitate a relationship between the children and grandparents is supported by the overall record and was based on its observation of foster parents at trial. This court defers to the credibility determinations of the district court. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Children's relationship to current caretakers, parents, siblings, and relatives

Grandparents argue that the district court based the majority of its decision on the potential negative impact of removing the children from the care of foster parents. The district court's finding that the children "have a healthy and secure attachment" to foster parents and their foster siblings is supported by the record. In addition, the district court's finding that the children would suffer emotional trauma if removed from foster parents' care is amply supported by the record, including detailed testimony from an attachment expert and the children's physician indicating that the children—especially P.U.K.—would likely suffer permanent emotional trauma and developmental damage if removed from foster parents' care.

Contrary to grandparents' argument, the district court carefully analyzed each of the best-interests factors. As a result of that analysis, the district court found that grandparents could meet many of the children's needs. But the district court ultimately concluded that it was in the best interests of the children to be adopted by foster parents, in part based on its concerns about grandparents' ability to recognize the children's special needs and the potential negative impact on the children if they are removed from foster parents' home. The district court did not give undue weight to its concern about the potential negative impact on the children.

Other relevant factors

Grandparents argue that the district court failed to give weight to the county's recommendation. But the district court simply viewed the county's recommendation in the context of the facts of the entire case, including what the district court viewed as the county's less-than-professional conduct throughout these proceedings. The district court's concerns about the basis for the county's decision are clearly described in its order[1] and supported by the record, including information that P.K., D.D.'s son and the children's father, has had special needs since he was a child and is currently "essentially illiterate," and that most of the county managerial employees who made the adoption recommendation in favor of grandparents had never met the children.

Grandparents also argue that the district court speculated that the children's father will be allowed to have contact with the children if they are adopted by grandparents.

[1] The district court's concerns centered primarily on what it characterized as the county's failure to make an individualized determination about the needs of P.U.K. and D.F.K. with respect to the adoptive placement of the children.

The district court should not rely on speculation about "[t]he possibility of unwanted contacts in the future." *In re Petitions to Adopt K.L.L.*, 515 N.W.2d 618, 622–23 (Minn. App. 1994). Here, the district court only briefly mentioned that P.K. "was living minutes away from [grandparents]" and that "he could have pursued contact with the children if they were placed with [grandparents]." The district court made this observation in the section of its order in which it discussed factors that the county did not consider in making its recommendation. Any error in making this observation was harmless because it was not a significant factor in the district court's decision.

Accordingly, because the district court's findings were not clearly erroneous, the district court did not abuse its discretion by granting foster parents' adoption petition and denying grandparents' adoption petition.

III

Grandparents argue that the district court erred by failing to consider whether the county exercised due diligence in identifying and notifying the children's relatives. "Among the factors the court shall consider in determining the needs of the child," are whether the county "made efforts as required under section 260C.212, subdivision 5." Minn. Stat. § 259.57, subd. 2(b); Minn. Stat. § 260C.193, subd. 3(b). The county must "exercise due diligence to identify and notify adult relatives prior to placement or within 30 days after the child's removal from the parent." Minn. Stat. § 260C.212, subd. 5(a) (2010).

Grandparents raise this issue for the first time on appeal. The issue was not raised at trial, and the district court did not make a finding regarding whether or not the county

exercised due diligence in identifying and notifying the children's relatives. In addition, grandparents did not raise this issue in their motion for a new trial. This court will generally not consider matters that were not argued and considered in the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also In re Welfare of D.D.G.*, 558 N.W.2d 481, 485 (Minn. 1997) (applying *Thiele* in a termination-of-parental-rights proceeding). Thus, we decline to consider this issue.

Finally, foster parents argue that the district court erred by denying their motion to dismiss grandparents' adoption petition for failure to state a claim and lack of subject matter jurisdiction. Because we have determined that the district court did not abuse its discretion by granting foster parents' adoption and because foster parents did not file a notice of related appeal, we will not address this issue.

Affirmed.