STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1380
A12-1407

In the Matter of the Welfare of the Child of: A. M. S. and M. A. C., Parents.

Filed January 22, 2013
Affirmed
Schellhas, Judge

Olmsted County District Court
File Nos. 55-JV-12-2169, 55-JV-12-3200

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Considered and decided by Kirk, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

In this consolidated appeal, appellant-mother and appellant-father argue that the district court erred by not transferring legal and physical custody of their child to her paternal grandmother and that termination of parental rights is not in their child's best interest. We affirm.

FACTS

Respondent Olmsted County Community Services first became involved with appellant-mother, A.M.S., and appellant-father, M.A.C., in May 2010, when it received a report that A.M.S., who was pregnant with A.L.S., was using marijuana every day and alcohol every other day. The county contacted A.M.S. and offered her voluntary services through the Parent Support Outreach Program. A.M.S. gave birth to A.L.S. on December 5, 2010. In March 2011, the county received a report that M.A.C. had held A.M.S. hostage, refusing to allow her to leave the residence with A.L.S., and that A.L.S. had bumped her head during the incident. In response to the report, the county referred the family to its domestic-violence unit and assigned a social worker as the family's case manager. In May 2011, the county received a report that A.M.S. was using cocaine and ecstasy while caring for A.L.S. and that she had assaulted M.A.C. in the presence of A.L.S., which resulted in A.M.S.'s arrest and charges of fifth-degree domestic assault, disorderly conduct, and reckless driving. While in custody, A.M.S. tested positive for methamphetamines and marijuana. A.M.S. also admitted to using ecstasy.

In June 2011, A.M.S. signed a voluntary placement agreement, allowing the county to place A.L.S. in foster care. The county placed A.L.S. with S.S., her maternal aunt, who lived with F.S., A.M.S.'s maternal grandmother. In late June, the county filed a petition, alleging that A.L.S. was a child in need of protection or services (CHIPS), and the district court ultimately adjudicated A.L.S. as CHIPS. In July, the district court appointed a guardian ad litem (GAL) for A.L.S. Also in July, A.M.S. and M.A.C. agreed to an out-of-home placement plan, and the district court approved the plan. The placement plan required that A.M.S. and M.A.C.: not provide independent care of A.L.S. "while under the influence," complete UA drug testing, address their chemical dependency through treatment, regularly visit with A.L.S., seek stable and secure housing, and seek employment. The placement plan also required M.A.C. to participate in a domestic-violence treatment program and A.M.S. to develop a safety plan with the social worker.

In February 2012, due to appellants' lack of progress on their placement plan, the district court ordered the county to file a permanency petition. The county petitioned to transfer permanent legal and physical custody of A.L.S. to M.C., A.L.S.'s paternal grandmother in Chicago, although the county had not yet received a home study on M.C. The petition set forth the county's concerns about the physical and emotional safety and welfare of A.L.S. in appellants' care because of appellants' chemical use and domestic violence. The petition noted that M.C. was appellants' agreed-upon choice as a permanent legal and physical custodian of A.L.S. The GAL did not support the county's permanency petition and filed a petition to terminate the parental rights of A.M.S. and

M.A.C. Among other things, the GAL's concerns stemmed from comments by M.C. that A.M.S. and M.A.C. would get back together and could then raise A.L.S. and the fact that three out of four of M.C.'s adult children had extensive involvement with law enforcement or social services.

In June 2012, the district court conducted a three-day trial on the competing permanency petitions and issued a lengthy, detailed permanency order in July, granting the GAL's petition to terminate appellants' parental rights.

This appeal follows.

D E C I S I O N

Based on its determination that M.C. is not a suitable person to serve as a permanent legal and physical custodian of A.L.S. and that A.L.S.'s best interests are served by terminating appellants' parental rights, the district court denied the county's petition to transfer the permanent legal and physical custody of A.L.S. to M.C. and granted the GAL's petition to terminate appellants' parental rights. Appellants challenge the termination of their parental rights, arguing that M.C. is a suitable person to be the legal and physical custodian of A.L.S. and that the child's best interests will be served if her legal and physical custody are transferred to M.C.

When a child is in foster care and is not returned to the home, the district court must order permanent placement according to several possible dispositions set forth in Minn. Stat. § 260C.201, subd. 11(d) (2010).[1] These dispositions include a permanent

[1] Minn. Stat. § 260C.201, subd. 11, was repealed effective August 1, 2012. 2012 Minn. Laws ch. 216, art. 6, §§ 14–15 at 502–03. But the "rule of statutory interpretation

transfer of legal and physical custody to a relative, termination of parental rights, long-term foster care, and foster care for a specified period of time. *Id.* In determining a child's permanent placement, "the court must be governed by the best interests of the child, including a review of the relationship between the child and relatives and the child and other important persons with whom the child has resided or had significant contact." Minn. Stat. § 260C.201, subd. 11(e) (2010).

Denial of Petition to Transfer of Legal and Physical Custody to M.C.

The district court found that M.C. "is not a suitable prospective legal and physical custodian for [A.L.S.]" and determined that it is not in the best interests of A.L.S. to have her permanent legal and physical custody transferred to M.C.

A transfer of permanent legal and physical custody must be in the best interests of the child and is subject to statutory conditions, including a requirement that the court review the suitability of the prospective custodian. Minn. Stat. § 260C.201, subd. 11(d)(1)(i). When transferring legal custody, the district court must consider "the appropriateness of the particular placement" under factors listed in Minn. Stat. § 260C.212, subd. 2(b) (2010). Minn. Stat. § 260C.201, subd. 2(a)(3) (2010). Section 260C.212, subdivision 2(b), lists factors that include among others: the medical, educational, and developmental needs of the child; the child's relationship to current caretakers, parents, siblings, and relatives; and the reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

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concerning the repeal of a statute during the pendency of an action allows the court to apply either old law or the newly enacted law." *Cnty. of Hennepin v. Brinkman*, 378 N.W.2d 790, 792–93 (Minn. 1985) (citing Minn. Stat. § 645.35 (1984)).

"Transfer of permanent physical and legal custody is not necessarily preferred over termination of rights, and is expressly governed by the children's best interests." *In re Welfare of Children of A.I.*, 779 N.W.2d 886, 895 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010). "The 'best interests of the child' means all relevant factors to be considered and evaluated." Minn. Stat. § 260C.201, subd. 11(c)(2) (2010).

At trial, the court received evidence that M.C. was married to a convicted felon, R.S., who has convictions of armed robbery and attempted murder from 1980, possession of under 100 grams of cocaine from 1996, and possession of a small amount of marijuana from 2000. The county did not discover R.S.'s criminal record until trial because M.C. did not list him as a resident of her home in her application for a home study. M.C. testified that she and R.S. separated in August 2011 and that, after their separation, R.S. lived in a Chicago suburb and M.C. saw him only every two to three months. R.S. was at M.C.'s home in Chicago when a social worker and the GAL visited, and R.S. drove the group to dinner in M.C.'s car. M.C. testified that she had not invited R.S. to her home but that he knew "by word of mouth" where she lived and that A.L.S. was coming. M.C. also surmised that M.A.C. possibly told R.S. to visit M.C.'s home that weekend for the purpose of seeing A.L.S. and that R.S. left shortly after arriving.

The district court found that "the presence of [R.S.]—a convicted felon—makes [M.C.'s] home an unsuitable option for [A.L.S]." Appellants argue that the district court's finding of R.S.'s presence is clearly erroneous because it was clear from the testimony at trial that R.S. did not live in the home. Appellants' argument is not persuasive. The district court did not determine that M.C. was not a suitable custodian

because R.S. lived in her home; rather, the district court found that R.S. had a "continued involvement" with M.C. and determined that R.S.'s "presence" in M.C.'s home contributed to making M.C. an unsuitable custodian of A.L.S. The court's finding that R.S. had a continued involvement with M.C. is not clearly erroneous. F.S. and M.C. testified about R.S.'s presence in M.C.'s house, and the court made an explicit credibility finding that M.C. was "evasive regarding her ongoing relationship with [R.S.] and she lacked credibility regarding such a significant part of the potential environment for [A.L.S.] if placed in her home."

We defer to the district court's credibility determinations. *See In re Matter of Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996) (stating that appellate courts must give "considerable deference . . . to the district court's decision because a district court is in a superior position . . . to assess the credibility of witnesses"). Here, because the court's finding about R.S.'s involvement and presence in M.C.'s life is not contrary to the weight of evidence in the record, the finding is not clearly erroneous.

Appellants' alternative argument that R.S.'s presence in M.C.'s house does not make M.C. an unsuitable custodian because "the felony convictions on [his] record are 32 and 16 years old" is without merit. The district court must consider "all relevant factors" when considering whether to transfer legal custody. Minn. Stat. § 260C.201, subd. 11(c)(2). These relevant factors include the criminal history of potential physical and legal custodians. *See* Minn. Stat. § 260C.212, subd. 2(e) (2010) (providing that a potential foster parent must undergo a "completed background . . . study under section 245C.08 before the approval of a foster placement in a related or unrelated home");

Minn. Stat. § 245C.08 subd. 2(a)(3) (2010) (requiring that the background study include "information from the Bureau of Criminal Apprehensions"). Moreover, the district court has discretion to consider a party's criminal history when determining whether it is in the best interests of a child to be cared for by that party. *See In re Welfare of Children of J.B.*, 698 N.W.2d 160, 172–73 (Minn. App. 2005) (concluding in termination-of-parental-rights case that district court did not err by admitting evidence of father's "criminal convictions dating back to 1983" because, "coupled with his recent convictions," the evidence was probative to show that father "has a long-standing problem remaining law-abiding").

Contrary to the record evidence, M.A.C. argues that the county "was aware of [R.S.] and his relationship—or lack thereof" with M.C. when it recommended M.C. as a permanent-placement choice and that therefore the district court erred by determining that the relationship M.C. had with R.S. made her an unsuitable custodian for A.L.S. The record reveals that the county did not find out about R.S.'s convictions of attempted homicide and armed robbery until the time of trial. Moreover, while the social worker testified that she did not think that R.S. was "a threat" to A.L.S., she also testified that his "identification" "raise[d] a concern just like it raise[d] a concern for everybody here."

In addition to evidence about R.S. that pertained to M.C.'s suitability as a custodian for A.L.S., the district court considered evidence about an incident that occurred the night before the last day of trial. During trial, M.C. was staying in a hotel because she had traveled from Chicago. The social worker testified that while she arranged for A.L.S. to spend the night with M.C. at M.C.'s hotel room, she told M.C. that

she did not want M.A.C. and A.M.S. visiting together. M.C. testified that at approximately 9:30 p.m., M.A.C. and A.M.S. visited her hotel room and told her that they wanted to come in to give A.L.S. a kiss goodnight. When M.C. opened the door, both of them walked in. M.C. told them that they "weren't supposed to be there," but she let them come in because she "thought they was just going to turn around and leave." M.C. testified that "[p]robably about five minutes" after M.A.C. and A.M.S. entered the hotel room, they began arguing about photos on A.M.S.'s phone and started "wrestling over the phone." During the argument, appellants were shouting and awakened A.L.S., who started crying. According to M.C., appellants did not notice that A.L.S. was crying because they were "too busy . . . arguing over their phone."

Regarding the above incident, the district court found that "[i]t was clear the rules were that [appellants] would not be together, yet [M.C.] allowed them to enter the hotel room." To the court, the incident "cast doubt" on whether M.C. could keep A.L.S. safe from her parents. Appellants argue that the district court's finding is clearly erroneous because M.C. followed the safety plan that she and the social worker had established and that M.C. therefore ensured the safety of A.L.S. Appellants' argument is not persuasive. M.C. allowed M.A.C. and A.M.S. to enter her hotel room together against the explicit instructions of the social worker, and M.C. did not call the police when an altercation ensued between M.A.C. and A.M.S. The district court's finding that M.C. allowed appellants to enter the room despite instructions to the contrary is not clearly erroneous.

The district court also considered M.C.'s expression of "intent to take custody of [A.L.S.] only to later return her to [appellants]." The district court heard testimony from

the GAL about numerous comments made by M.C. that led the GAL to believe that M.C. wanted to return A.L.S. to appellants. Based primarily on the testimony of the GAL, the district court determined that M.C.'s intentions were contrary to providing stability for A.L.S., implicitly finding M.C.'s contradictory testimony not credible. Because the district court's finding is based on its determination of M.C.'s credibility, we defer to it. *L.A.F.*, 554 N.W.2d at 396. M.A.C.'s argument that the district court clearly erred by finding that M.C. had intentions to return A.L.S. to appellants is unpersuasive.

M.A.C. also argues that the district court clearly erred by finding that A.L.S.'s best interests would not be served by transferring custody to M.C. M.A.C. argues that M.C. has a stable home and job, lives close to a police station, and is the same culture as A.L.S. But "[e]ven if the record might support findings different from those made by the court, this does not show that the court's findings are defective." *In re Welfare of Child of J.L.L.*, 801 N.W.2d 405, 414 (Minn. App. 2011), *review denied* (Minn. July 28, 2011).

We conclude that the district court's finding that a transfer of legal and physical custody of A.L.S. to M.C. is not in A.L.S.'s best interest is supported by clear-and-convincing evidence in the record.

Termination of Parental Rights

> [O]n appeal from a district court's decision to terminate parental rights, we will review the district court's findings of the underlying or basic facts for clear error, but we review its determination of whether a particular statutory basis for involuntarily terminating parental rights is present for an abuse of discretion.
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> . . . .

> [P]arental rights are not absolute, and they should not be unduly exalted and enforced to the detriment of the child's welfare and happiness. The right of parentage is in the nature of a trust and is subject to parents' correlative duty to protect and care for the child. Moreover, in terminating parental rights, the best interests of the child are the paramount consideration, and conflicts between the rights of the child and rights of the parents are resolved in favor of the child.

In re Welfare of Children of J.R.B., 805 N.W.2d 895, 901−02 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. Jan. 6, 2012). We will affirm a termination of parental rights (TPR) "as long as at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the child's best interests." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004); *see In re Welfare of Children of K.S.F.*, ___ N.W.2d ___, ___ 2012 WL 4856209, at *6 (Minn. App. 2012) (citing Minn. Stat. § 260C.317, subd. 1 (2010), clarifying that the standard of proof in a termination-of-parental-rights proceeding is clear-and-convincing evidence). But "'we closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing.'" *J.R.B.*, 805 N.W.2d at 899 (quoting *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008)). "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." *L.A.F.*, 554 N.W.2d at 396. The paramount consideration is the best interests of the child. Minn. Stat. § 260C.001, subd. 3 (2010).

Appellants do not dispute that clear-and-convincing evidence exists to satisfy the necessary statutory grounds under Minnesota Statutes section 260C.301 to terminate their

parental rights.[2] Instead, appellants argue that a termination of their parental rights is not in the best interests of A.L.S.

"Even when statutory grounds for termination are met, the district court must separately find that termination is in the child's best interests." *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 92 (Minn. App. 2012), *review denied* (Minn. July 17, 2012). "Considering a child's best interests is particularly important in a termination proceeding because a child's best interests may preclude terminating parental rights even when a statutory basis for termination exists." *In re Termination of the Parental Rights of Tanghe*, 672 N.W.2d 623, 625–26 (Minn. App. 2003) (quotation omitted). "[T]he best interests of the child must be the paramount consideration." Minn. Stat. § 260C.301, subd. 7 (2010).

> [T]he best interests of the child must be the paramount consideration in deciding whether to actually terminate parental rights, and, if there is a conflict between the interests of a parent and a child, the interests of the child are paramount. In analyzing a child's best interests, the court must balance 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. Competing interests

[2] The district court concluded that clear-and-convincing evidence supported the petition to terminate appellants' parental rights on more than one statutory ground: appellants "failed to adhere to the duties imposed on them by the parent-child relationship" under Minn. Stat. § 260C.301, subd. 1(b)(2) (2010); appellants were "palpably unfit to parent" A.L.S. under Minn. Stat. § 260C.301, subd. 1(b)(4) (2010); A.L.S. had been placed out of home and "[r]easonable efforts have failed to correct the conditions leading to [A.L.S.'s out-of-home] placement" under Minn. Stat. § 260C.301, subd. 1(b)(5)(i)–(iv) (2010); and A.M.S. was chemically dependent and has either failed two or more times to successfully complete a treatment program or has refused at two or more separate meetings with a caseworker to participate in a treatment program and continues to abuse chemicals" under Minn. Stat. § 260C.301, subd. 1(b)(5)(A)–(E) (2010).

> include such things as a stable environment, health considerations and the child's preferences.

J.R.B., 805 N.W.2d at 905 (quotations omitted).

The district court applied this standard and made a finding that it is in the best interests of A.L.S. to terminate the parental rights of each parent. We review a district court's ultimate determination that termination is in a child's best interest for an abuse of discretion. *Id.*

A.M.S. argues that the district court erred because it "failed to apply the balancing test." But the district court explicitly stated that it weighed A.L.S.'s interests in "emotional and physical stability" and a "safe environment" against appellants' interests of maintaining "the parent-child relationship," and it found that A.L.S.'s interest in emotional and physical stability, and her interest in a stable, safe environment, outweighed appellants' interests in maintaining the parent-child relationship. At an approximate age of 18 months, A.L.S. was far too young to express a preference. A.M.S.'s argument that the district court failed to apply the balancing test is unfounded.

M.A.C. argues that clear-and-convincing evidence does not support the district court's determination that A.L.S.'s best interests are served by terminating appellants' parental rights. But the district court made numerous, undisputed findings, which are supported by the record, that support its decision to terminate appellants' parental rights. Among other findings, the district court found that: A.M.S. failed to stay in contact with A.L.S. for weeks at a time; A.M.S. lacked "stable and consistent housing"; numerous incidents of domestic violence occurred between A.M.S. and M.A.C. in the presence of

A.L.S.—including the incident the night before the last day of trial; A.M.S. repeatedly used drugs, including on or about March 1, 2012; M.A.C. had been in and out of incarceration for long periods of time; and M.A.C. had been unemployed since 2008. Further, appellants testified on the first day of trial that they were unfit to parent A.L.S.

M.A.C. emphasizes the GAL's testimony that A.L.S. is "healthy[,] . . . does not display any attachment issues[,] . . . [and is] a beautiful sweet little girl." He argues that because A.L.S. is healthy and emotionally stable, appellants' parental rights should not be terminated. But A.L.S.'s emotional health and stability cannot be attributed to appellants. The district court found that at the time of trial in June 2012, A.L.S. had been in foster care for almost a year—for most of her life, a finding supported by the record that appellants do not dispute.

M.A.C. also focuses on the GAL's testimony that it would be "fine for [A.L.S.] to know her parents" and that appellants "do have some parenting skills," arguing that the testimony shows that A.L.S.'s best interests are not served by termination of appellants' parental rights. But M.A.C. focuses on the GAL's testimony out of context. The GAL testified that she recommended termination of appellants' parental rights based on A.M.S.'s drug-dependency issues, both parents' lack of a job, the repeated incidents of domestic violence between A.M.S. and M.A.C., and the fact that M.A.C. and A.M.S. had often been absent and had not emotionally supported A.L.S. The GAL also testified that it was in A.L.S.'s best interests to be a permanent member of a family where she can "bond with parent figures . . . where she doesn't have to ever worry about being taken out of that home and going back with her parents or anywhere else."

The district court's determination that A.L.S.'s best interests are served by terminating appellants' parental rights is supported by clear-and-convincing evidence. The district court did not abuse its discretion.

Affirmed.