STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0512

In the Matter of the Welfare of the Child of: K.-A. M. C. and A. L. W., Parents.

Filed August 19, 2013
Affirmed; motion denied
Schellhas, Judge
Dissenting, Stauber, Judge

Anoka County District Court
File No. 02-JV-12-69

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Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Hooten, Judge.

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

SCHELLHAS, Judge

Appellant, a paternal aunt of a child to whom parental rights were terminated, appeals the juvenile court's denial of her motion for permissive intervention in post-termination proceedings. Respondent moves to dismiss the appeal as moot because the juvenile court has granted the child's adoption by his long-time foster parents. We deny

respondent's motion to dismiss, and we affirm the juvenile court's denial of appellant's motion to intervene.

FACTS

This case involves a child who was born on March 18, 2009. On July 22, 2011, the juvenile court ordered the out-of-home placement of the child in juvenile-protection proceedings that culminated in the termination of the parental rights (TPR) of the child's parents. Initially, respondent Anoka County Social Services placed the child in a non-relative foster home. The county then attempted placements of the child with his paternal great aunt and uncle and, subsequently, with his paternal grandmother. Both relative placements failed because the parents harassed the relative foster-care providers, who requested that the child be removed from their care. On August 22, 2011, respondent returned the child to his initial foster-home placement.

In early December 2011, the child's maternal grandmother expressed interest in being a placement option for the child but later changed her mind. On January 17, 2012, the county petitioned for TPR of both of the child's parents. In early February 2012, the paternal grandmother renewed her interest in being a permanency option for the child but again changed her mind. On February 2, appellant, the child's paternal aunt, informed the county that she wanted to be a permanency option for the child, withdrew her name from consideration on February 29, and, the next day, again expressed her interest in being a permanency option for the child by leaving the county a voicemail message. But, on March 6, appellant left the county another voicemail message, stating again that she would not be a permanency option for the child.

On April 17, after the child's paternal great aunt again offered and withdrew her name as a permanency option, the juvenile court granted the county's request to be relieved of the obligation to find a relative placement for the child.[1] On April 21, at appellant's request, the child's foster mother made the child available for family pictures. At about this time, the child's foster parents sought respite care because of the child's behavioral problems. Appellant was aware that the county continued to consider permanency options for the child.

The TPR trial commenced May 1, and appellant attended at least a portion of the trial during which she told a county social worker that she wanted to adopt the child. The social worker told her that her request was too late. In an order filed May 15, the juvenile court terminated the parental rights of both parents to the then three-year-old child. This court affirmed the TPR as to both parents on October 22, 2012. *In re Welfare of Child of K.-A.M.C.*, No. A12-0964, 2012 WL 5188335, at *1 (Minn. App. Oct. 22, 2012).

On December 24, appellant sent the county a letter, stating, among other things, that she wanted to rescind her decision "not to pursue legal adoption of [the child] and to begin any necessary legal process for his adoption," and that she approached the social worker with the request at court in May 2012, and that the social worker told her that it was too late. Appellant filed her letter in juvenile court in early January 2013. The record before us does not contain a response by the county to appellant's letter.

[1] That the juvenile court granted the county this request is confirmed in a written order, filed April 30, 2012.

On February 14, 2013, appellant moved for permissive intervention in the placement phase of the juvenile protection proceeding, again expressing an interest to adopt the child. The county and the guardian ad litem (GAL) opposed appellant's motion.

On February 22, the child's foster parents petitioned to adopt him, and the juvenile court opened a new court file.[2] On March 1, in the TPR case, the juvenile court denied appellant's motion to intervene. On March 15, the child's great aunt and great uncle petitioned to adopt him, resulting in the juvenile court opening a third court file.

On March 22, appellant appealed from the juvenile court's order denying her motion to intervene. Also, on that same day, appellant filed a letter with the court in the TPR case, asking the court to stay adoption proceedings regarding the child, pending appeal of the order denying her motion to intervene in the TPR case. The juvenile court declined to stay any proceedings regarding the child's adoption and consolidated the adoption cases on March 29. On April 8, appellant moved this court to stay the juvenile court proceedings, pending her appeal. This court denied appellant's motion on April 30.

The consolidated adoption cases proceeded and, in May, the juvenile court dismissed the great aunt and uncle's adoption petition and granted the foster parents' adoption petition. On June 7, great aunt and uncle appealed the order dismissing their adoption petition (A13-1005), and that appeal is pending in this court.

On June 11, the juvenile court terminated the county's legal custody of the child and the court's jurisdiction in the TPR case based on the child's adoption by his foster

[2] The only file presented to this court in this appeal is the juvenile court file for the juvenile-protection proceeding. Our references in this opinion to the contents of other, related files are based on our review of the electronic register of actions for those files.

parents, and the county moved this court to dismiss as moot both this appeal from the juvenile court's order denying appellant's motion to intervene and the great aunt and uncle's appeal from the order dismissing their petition to adopt. This court deferred the county's motion to dismiss this appeal until after oral argument on the merits of the appeal and, by separate order in the great aunt and uncle's appeal, denied the motion to dismiss that appeal as moot.

D E C I S I O N

I

The mootness doctrine requires appellate courts to "decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). If a court cannot grant effective relief, the matter is generally dismissed as moot. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). But mootness "'is a flexible discretionary doctrine, not a mechanical rule that is invoked automatically.'" *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002) (quoting *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984)). "If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98, 113 S. Ct. 1967, 1976 (1993). While the burden of showing mootness is on the party asserting mootness, the opposing party has the burden of showing that an exception to the mootness doctrine applies. *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010);

see McCaskill, 603 N.W.2d at 329 (stating that "[w]here an appellant produces evidence that collateral consequences actually resulted from a judgment, the appeal is not moot").

We reject the county's assertion that this appeal is moot on the basis that the child has been adopted by the foster parents. Because the great aunt and uncle have appealed from the juvenile court's dismissal of their adoption petition, the juvenile court's order granting the foster parents' adoption petition is not final. The appeal in this case from the juvenile court's denial of appellant's motion to intervene therefore is not moot.

II

In child-protection cases, "[a]ny person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child." Minn. R. Juv. Prot. P. 23.02. Here, the juvenile court denied appellant's motion for permissive intervention because "intervention by [appellant] would not serve the best interests of [the child]." The juvenile court stated:

> [The child] has endured multiple placements. Relative placement options were explored exhaustively. Concurrent planning was implemented. A pre-adoptive home for [the child] was located and attempted but had to be discontinued with [the child] made to endure *another* placement. A further relative placement consideration was undertaken and was unsuccessful. Finally, a second pre-adoptive home was identified. [The child] was placed there with the blessing of all in May 2012. He is flourishing, is happy and feels part of a home. The Court does not doubt [appellant's] sincerity or motivation. However, the Court feels strongly that it is not in [the child's] best interests to have his life disrupted again and to jeopardize what is by all accounts a successful pre-adoptive placement.

"Denials of requests for permissive intervention are generally not appealable." *State v. Deal*, 740 N.W.2d 755, 760 (Minn. 2007). But "[a]n appeal may be taken by the aggrieved person from a final order of the juvenile court affecting a substantial right of the aggrieved person, including but not limited to an order adjudicating a child to be in need of protection or services, neglected and in foster care." Minn. R. Juv. Pro. P. 47.02. "When reviewed, denial of a request to permissively intervene will be reversed only when a clear abuse of discretion is shown." *Deal*, 740 N.W.2d at 760 (quotation omitted). A district court abuses its discretion if its underlying findings of fact are clearly erroneous, if it misapplies the law, or if it resolves the matter in a manner that is against logic and the facts on record. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (noting that clearly erroneous findings and a misapplication of law constitute an abuse of discretion); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984) (stating that resolving matter in manner contrary to logic and facts in record constitutes abuse of discretion).

A. Time

Under Minn. Stat. § 260C.204(a)(1)–(3) (2012), no later than six months after a child's out-of-home placement, the juvenile court must conduct a permanency progress hearing to review, among other things, the agency's reasonable efforts to finalize the permanent plan for the child under Minn. Stat. § 260.012(e) (2012). Section 260.012(e) requires that the social services agency "plan for and finalize a safe and legally permanent alternative home for the child" when the child cannot be returned to the parent from whom the child was removed. Minn. Stat. § 260.012(e)(5).

Here, by the time that appellant moved to intervene, the juvenile court had terminated the parental rights to the child, this court had affirmed the TPR, and the child had been in out-of-home placement for almost 19 months. The juvenile court's expressed concern about the timing of appellant's motion to intervene and the additional delay in the child's permanent placement that would result, if the motion were granted, was a legitimate concern about the best interests of the child, who had already suffered multiple failed placements. *See, e.g.*, Minn. Stat. § 260C.617(d)(1) (2012) (allowing a juvenile court to separate siblings if further efforts to find a joint placement "would significantly delay the adoption of one or more of the siblings and [were] therefore not in the best interests of one or more of the siblings"); *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 5 (Minn. 2003) (noting the policy "reflected by the rules, that [juvenile-protection] cases in particular need to be expeditiously handled[,]" and that "delay in the termination of a parent's rights equates to a delay in a child's opportunity to have a permanent home and can seriously affect a child's chance for permanent placement"); *see also In re Welfare of A.D.*, 535 N.W.2d 643, 650 (Minn. 1995) (stating that "[w]hile judicial caution in severing the family bonds is imperative, untoward delay of the demonstrated inevitable is intolerable" (quoting *In re Welfare of J.J.B.*, 390 N.W.2d 274, 280 (Minn. 1986))).

B. Findings under Minn. Stat. § 260C.212, subd. 2(b) (2012)

Appellant notes that, in addressing the best interests of the child for purposes of ruling on her motion to intervene, the juvenile court did not analyze the factors "set forth in Minn. Stat. § 260C.212, subd. 2(b)." But appellant did not cite Minn. Stat. § 260C.212, subd. 2(b), to the juvenile court in her motion to intervene or supportive affidavit nor

does the transcript of appellant's motion hearing reflect that appellant cited the statute at the hearing. Because appellant argues that the juvenile court erred by not making findings under a statute that she did not cite to the juvenile court, we decline to address the argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only questions presented to and decided by the district court); *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 553 (Minn. App. 2007) (applying *Thiele*), *review denied* (Minn. July 17, 2007). But we note that Rule 23.02 of the Minnesota Rules of Juvenile Protection Procedure, governing permissive intervention, does not require a movant to address the best-interests factors listed in Minn. Stat. § 260C.212, subd. 2(b); section 260C.212, subdivision 2(b), does not state that it applies to Minn. R. Juv. Pro. 23.02, subd. 2; and multiple authorities identify different best-interests factors to be considered in different circumstances.[3] We also note that a person seeking permissive intervention is, when she files her motion, not a party to the case and, as a result, may lack access to the child, thereby limiting her ability to provide information on the child-centric factors in Minn. Stat. § 260C.212, subd. 2(b).

[3] *See, e.g.*, Minn. Stat. §§ 260C.212, subd. 2(b) (placement), .511 (permanency disposition) (2012); Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(3) (terminating parental rights); Minn. R. Juv. Prot. P. 41.05, subd. 1(c) (disposition order transferring legal custody to a social services agency); Minn. R. Juv. Prot. P. 41.05, subd. 2(a)(2) (disposition order transferring legal custody of a child to an agency with responsibility for placing a child in foster care).

C. Relative status

Citing Minn. Stat. §§ 260C.212, subd. 2(a), 259.57, subd. 2(c) (2012), *In re Welfare of M.M.*, 452 N.W.2d 236 (Minn. 1990), and *In re S.G.*, 828 N.W.2d 118 (Minn. 2013), appellant asserts that the juvenile court failed to acknowledge that placement with a relative, such as she, is preferred to a placement with nonrelatives (the foster parents). But none of these authorities involves a motion for permissive intervention. Section 259.57, subdivision 2(c), and *S.G.* deal with adoptions, 828 N.W.2d at 119–20, and appellant did not petition to adopt the child. Section 260C.212, subdivision 2(a), requires an otherwise appropriate potential foster placement with a person "related to the child" to be considered before an otherwise appropriate potential placement with "an important friend." Whether, under Minn. Stat. § 260C.212, subd. 2(a), appellant would be entitled to priority treatment in a placement proceeding is distinct from whether appellant should be allowed to intervene. And, at the hearing on appellant's motion to intervene, her attorney acknowledged this distinction: "You know, at the end of the day if they say, look, it's too late, [the child] has been there too long, you are not a good option, that's a different thing than saying you can't have notice. You can't be involved in this at all." Similarly, *M.M.* reviewed a decision by this court to affirm a "transfer of the guardianship and legal custody of the child to the commissioner of human services[,]" and, in doing so, acknowledged "a strong preference to award permanent care and custody of a child to a relative if either or both natural parents are unable to perform that responsibility." 452 N.W.2d at 237, 238. Yet, our review of the juvenile court's denial of appellant's motion to intervene does not involve a question of (permanent) care and

custody of a child. These authorities therefore do not show that the juvenile court abused its discretion by denying appellant's motion to intervene.

D. Prior decision not to be a placement option

"A decision by a relative not to be identified as a potential permanent placement resource or participate in planning for the child at the beginning of the case shall not affect whether the relative is considered for placement of the child with that relative later[.]" Minn. Stat. § 260C.221(a)(2) (2012). Appellant asserts that the county and the GAL ran afoul of this statutory provision by referring to her prior decisions not to be a placement for the child in their submissions opposing her motion to intervene. But, as noted above, a child's placement is distinct from whether a juvenile court should grant a motion for permissive intervention. Moreover, here, the juvenile court did not base its denial of appellant's motion for permissive intervention on appellant's prior decisions not to be a placement for the child; the juvenile court was concerned with the extent of the delay that had already occurred in this case and with disrupting the child's then pre-adoptive placement. The court's concern was consistent with the juvenile-protection statutes and the policy of prompt child placement underlying them.

E. Prior request to be a placement option

Appellant argues that the juvenile court's denial of her motion for permissive intervention ignored her assertion that, at the time of the May 2012 TPR trial, she communicated to the county her desire to adopt the child but was told by the county that she was too late to seek to do so. Appellant made this argument to the juvenile court, but the court denied her motion to intervene without specifically mentioning the argument.

Because the argument was before the juvenile court, we construe the order as implicitly rejecting the argument. *See Fraser v. Fraser*, 702 N.W.2d 283, 292 (Minn. App. 2005) (noting that a district court implicitly rejected an argument it did not address), *review denied* (Minn. Oct. 18, 2005). The juvenile court's rejection of the argument was consistent with the facts that, by the time appellant moved to intervene—to make a (third) request to be considered as a placement for the child—the juvenile court had released the county from having to find a relative placement for the child, and that prompt placement of the child had become particularly important.

Appellant also argues that the juvenile court had "no basis" on which to conclude that allowing her to intervene and be considered as a placement option "would be disruptive to the child or contrary to the child's best interests." Both the county and the GAL opposed appellant's motion, arguing that her intervention would be contrary to the child's best interests because it would delay the child's adoption and would disrupt his pre-adoptive home. Those positions were consistent with several aspects of the record and with the principle that, in cases involving children, time is of the essence.

F. Conclusion

On this record, we conclude that the juvenile court did not abuse its discretion by denying appellant's motion for permissive intervention.

Affirmed; motion denied.

STAUBER, Judge, dissenting

I respectfully dissent. In this case, several family members, including appellant, have offered to be a family placement resource. Appellant offered several times but later changed her mind; at least once in deference to another family member. Regardless, appellant has continued her involvement during the child-protection proceedings and the subsequent termination-of-parental-rights action. Appellant alleges that as far back as May, 2012, she expressed her desire to be an adoption resource but was told by the Social Worker that "it was too late for me to pursue." Following this court's affirmance of the TPR in late October, 2012, appellant secured counsel and again moved to intervene in the post-TPR placement phase. The district court summarily denied the motion, stating "L.L.C has endured multiple placements. Relative placement options were explored exhaustively. Concurrent planning was implemented." Without making a specific "best interests" analysis, or findings as I submit was required by Minn. Stat. § 260C.212 (2012) the district court essentially concluded that appellant was too late.

> The relative search required by this section shall be comprehensive in scope. After a finding that the agency has made reasonable efforts to conduct the relative search under this paragraph, the agency has the continuing responsibility to appropriately involve relatives, who have responded to the notice required under this paragraph, in planning for the child and to continue to consider relatives according to the requirements of section 260C.212, subdivision 2. At any time during the course of juvenile protection proceedings, the court may order the agency to reopen its search for relatives when it is in the child's best interest to do so.

Minn. Stat. § 260C.221

Here, appellant is only seeking intervention – the opportunity to participate in the proceedings as a statutorily preferred relative. Indeed, at the hearing on aunt's motion for permissive intervention, her attorney seems to acknowledge the distinction between a motion to intervene and a future motion to be an actual placement for the child: "You know, at the end of the day if they say, look, it's too late, [the child] has been there too long, you are not a good option, that's a different thing than saying you can't have notice. You can't be involved in this at all." "[T]hat's all we are asking for; to allow [aunt] to intervene and see if it's [a placement with aunt] possible. That's all we are asking for".

Without making "best interests" findings, appellate review becomes difficult, if not impossible. I would reverse.