STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1186

In the Matter of the Welfare of the Children of: J. M. P., N. T. B., and C. P. H., Parents.

Filed December 24, 2018
Affirmed and remanded
Larkin, Judge

Faribault County District Court
File No. 22-JV-18-7

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Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

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

LARKIN, Judge

Appellant-mother challenges the district court's order transferring permanent legal and physical custody of two of her children to their biological father. We affirm, but we remand for the district court to amend its order consistent with this opinion.

FACTS

Appellant J.M.P. is the mother of S.B. (born in 2007), E.B. (born in 2009), K.H. (born in 2013), and L.H. (born in 2014). Respondent N.T.B. is the biological father of S.B. and E.B. C.P.H. is the biological father of K.H. and L.H. Mother had custody of the children prior to the events underlying this appeal.

On March 20, 2017, respondent Human Services of Faribault and Martin Counties (the county) placed the children in protective custody based on mother's methamphetamine use. S.B. and E.B. were placed with N.T.B. and remained with him during the pendency of the underlying proceedings. On March 22, 2017, the district court held an emergency protective care hearing regarding the children. At the hearing, mother admitted that she had used methamphetamine while caring for the children and that her methamphetamine use created a dangerous environment for the children. The district court adjudicated the children to be in need of protection or services.

On January 12, 2018, the children remained in out-of-home placement, and the county filed a permanency petition seeking termination of mother's parental rights on four statutory grounds.[1] Mother denied the petition at a hearing on February 7.

On May 17 and June 1, the district court held a trial on the termination of parental rights (TPR) petition. In its opening statement, the county requested that "[mother's] parental rights be terminated for the two younger children and that custody of [S.B.] and [E.B.] be involuntarily transferred to their father, [N.T.B.]." However, in its written closing argument, the county did not argue for a transfer of legal custody. Instead, the county argued that termination of J.M.P.'s parental rights to all four children was in the children's best interests.

During trial, the district court interviewed S.B. and E.B. in chambers, outside of the presence of the attorneys and parties, regarding their experiences in mother's care. S.B. revealed that the children had witnessed violent conduct between mother and C.P.H., and that mother had attempted to communicate with S.B. at times when she was not supposed to do so. S.B. did not like mother's attempts at unauthorized communication and wanted to continue living with his father. E.B. told the district court that mother kept drugs in the basement of her house and that mother had asked E.B. to lie to her therapist about mother's drug use. E.B. also told the district court that she considered mother's house to be "home" but did not want to live there unless mother was healthy.

[1] The county also sought termination of C.P.H.'s parental rights to K.H. and L.H. For reasons not relevant to this appeal, C.P.H.'s rights were not terminated, and he is not a party to this appeal.

After trial, the district court made findings indicating that the relevant facts are as follows. After the children were removed from mother's care in March 2017, mother tested positive for methamphetamine twice that month. Mother completed a chemical-dependency assessment in April 2017, which recommended that she abstain from mood-altering chemicals. After mother tested positive for methamphetamine in July 2017 and again on November 5 and 16, she completed an updated chemical-dependency assessment. Mother successfully completed the recommended chemical-dependency treatment, and at the time of trial, she had not had any positive tests since November 2017.

In addition to chemical-dependency treatment, mother also received mental-health therapy. She completed parenting classes, maintained employment with two different employers, and maintained housing. The district court found that overall, mother "substantially completed the requirements of her case plan."

All four of the children received therapy as a result of the child-protection intervention. The therapy addressed domestic violence that the children had witnessed while mother was in a relationship with C.P.H. from 2012 until August 2016. The district court found that C.P.H. "punched holes in the walls, struck [mother], choked her, and threatened to kill her." K.H. and L.H. were diagnosed with post-traumatic stress disorder "due to exposure to violence in the home." S.B. was diagnosed with post-traumatic stress disorder and reactive attachment disorder. E.B. was diagnosed with post-traumatic stress disorder and depressive disorder.

From March 2017, when the children were removed from the home, through December 2017, mother had supervised visitation with all four children twice a week for

two hours. In December, L.H.'s therapist recommended that visits between mother and L.H. be discontinued because L.H. exhibited several "behavioral struggles" following visits with mother. The therapist testified that mother was the "direct cause" of these behaviors and was a "trauma trigger" for L.H.'s post-traumatic stress disorder. Visits between K.H. and mother were discontinued at some point in February or March 2018. On May 9, 2018, visits between K.H., L.H., and mother resumed.

In February 2018, S.B.'s therapist recommended that visits between S.B. and mother be discontinued. The therapist saw improvements in S.B.'s behavior and emotional state after a few weeks of having no contact with mother. The district court ordered visits between S.B. and mother to resume in April 2018, but S.B. did not want to see mother. Soon after the district court ordered visits to resume, S.B.'s "mental health became unstable and he was hospitalized for a week." It is not clear from the district court's findings whether visits between E.B. and mother were ever discontinued, but E.B. told the district court that at the time of trial, it had been a "long time" since her last visit with mother. Mother was not involved in the therapeutic process with any of the children.

The children's therapists believed that mother was responsible for the children's behavioral issues that occurred or worsened after visits, including K.H.'s difficulty concentrating and violent play with toys, L.H.'s clinginess and bedwetting, S.B.'s flashbacks and anxiety, and E.B.'s nightmares and academic struggles. The district court was not persuaded by the therapists' opinions, finding that "there appeared to be little effort on the part of [the children's therapists and the county] in finding ways to address the children's trauma while facilitating reunification of the family." The district court also

found that "[n]o efforts were made to include [mother] in therapy with the children or help her in understanding any trauma the children may be suffering and what she could do." The court noted that in L.H.'s case, the determination that mother was the source of L.H.'s behavioral issues was made "[w]ithout having considered or ruled out other possible causes."

The district court noted that although "the case plan was reasonable in design, it failed to provide for any services between [mother] and the children as she progressed on the plan." The district court expressed concern that no efforts were made to address the children's behavioral issues with mother. The court noted that "her visits were terminated without any consideration or plan for how to work on reunification efforts." The court found that mother had "accomplished the stated goals in her case plan and [had] shown a period of stability . . . , yet no effort was made to consider visits" between mother and the children until April 2018, about one month before the TPR trial began.

The district court concluded that the county did not prove any of the alleged statutory grounds for TPR by clear and convincing evidence, that the county did not make reasonable efforts to reunify mother and the children, and that TPR was not in the children's best interests. The district court continued K.H. and L.H. under the court's child-protection jurisdiction, but transferred legal custody of S.B. and E.B. to their father, N.T.B.

Mother appeals, challenging that part of the district court's order transferring legal custody of S.B. and E.B. to N.T.B.

D E C I S I O N

Mother contends that "[t]he evidence is insufficient to support the [district] court's order transferring permanent custody [of S.B. and E.B.] to [N.T.B.]." We review the district court's permanency decision for abuse of discretion. *In re Welfare of Child of D.L.D.*, 865 N.W.2d 315, 321 (Minn. App. 2015), *review denied* (Minn. July 20, 2015).

When a child has been placed in foster care or in the care of a noncustodial or nonresident parent, "the court shall commence proceedings to determine the permanent status of [the] child by holding the admit-deny hearing . . . not later than 12 months after the child was placed" out of home. Minn. Stat. § 260C.503, subd. 1 (2018). At the conclusion of the permanency proceedings, the district court must either "order the child returned to the care of the parent or guardian from whom the child was removed" or "order a permanency disposition . . . or termination of parental rights . . . if a permanency disposition order or termination of parental rights is in the child's best interests." Minn. Stat. § 260C.509 (2018). In any termination proceeding, the district court shall find "that reasonable efforts to finalize the permanency plan to reunify the child and the parent were made," unless the district court makes a finding "that reasonable efforts for reunification are not required as provided under section 260.012." Minn. Stat. § 260C.301, subd. 8 (2018).

In making a permanency disposition order or terminating parental rights, the district 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.511(b) (2018).

The "best interests of the child" means "all relevant factors to be considered and evaluated." Minn. Stat. § 260C.511(a) (2018).

"If the court finds that termination of parental rights and guardianship to the commissioner is not in the child's best interests, the court may transfer permanent legal and physical custody of the child to a relative when that order is in the child's best interests." Minn. Stat. § 260C.513(a) (2018). "[A]n order for transfer of permanent legal and physical custody to a relative shall only be made after the court has reviewed the suitability of the prospective legal and physical custodian," and "in transferring permanent legal and physical custody to a relative, the [district] court shall follow the standards applicable under [chapter 260C] and chapter 260, and the procedures in the Minnesota Rules of Juvenile Protection Procedure." Minn. Stat. § 260C.515, subd. 4(1)-(2) (2018).

Except for an order terminating parental rights, an order permanently placing a child out of the home of the parent or guardian must include the following findings:

> (1) how the child's best interests are served by the order;
> (2) the nature and extent of the responsible social services agency's reasonable efforts or, in the case of an Indian child, active efforts to reunify the child with the parent or guardian where reasonable efforts are required;
> (3) the parent's or parents' efforts and ability to use services to correct the conditions which led to the out-of-home placement; and
> (4) that the conditions which led to the out-of-home placement have not been corrected so that the child can safely return home.

Minn. Stat. § 260C.517(a) (2018); *see also* Minn. R. Juv. Prot. P. 42.05, subd. 1 (requiring the same findings).

Mother bases her challenge to the sufficiency of the evidence on the four factors set forth in Minn. Stat. § 260C.517(a). We address the district court's consideration of each factor in turn.

Children's Best Interests

Mother argues that the "district court failed to make adequate best-interest findings regarding transferring the custody of [her] older children, S.B. and E.B., to their father." She further argues that "[t]he court did not address how the best interests were better served by transferring permanent legal and physical custody to [S.B. and E.B.'s] father. In fact, the record is void of any factors pertaining to the children's father."

The record does not support mother's argument. The district court made several findings regarding N.T.B.'s suitability as a custodian. The district court found that S.B. and E.B. "both have a healthy relationship with [N.T.B.]" and that S.B. "wanted to continue living with his father." The district court also noted that both S.B. and E.B. "have resided with their father since their removal from [mother's] home," and "have spoken positively about residing with him." S.B. "explicitly stat[ed] that he would prefer to live with [N.T.B.] permanently." Moreover, the district court noted that the county, the guardian ad litem, and the children's therapist all "opined that [N.T.B.] provides a stable and safe home" for S.B. and E.B. The court concluded that because N.T.B. "represents a fit and willing relative to serve as [S.B.] and [E.B.'s] custodian . . . it would be in their best interest for him to have permanent legal and physical custody" of S.B. and E.B.

In sum, the district court adequately explained why a transfer of legal custody to N.T.B. was in the children's best interests.

Reasonable Efforts

> Once a child alleged to be in need of protection or services is under the court's jurisdiction, the court shall ensure that reasonable efforts, including culturally appropriate services, by the social services agency are made to prevent placement or to eliminate the need for removal and to reunite the child with the child's family at the earliest possible time, and the court must ensure that the responsible social services agency makes reasonable efforts to finalize an alternative permanent plan for the child . . . .

Minn. Stat. § 260.012(a) (2018).

Mother argues that the "very fact that social services failed to make reasonable efforts towards reunification is the very reason [she] should be allowed more time to work on an amended case plan before a court permanently transfers custody." She further argues that the "district court prematurely transferred custody in this case; despite recognizing that [she] was not given the resources to properly work towards reunification." But mother does not cite, and we are not aware of, authority establishing that the responsible social services agency's failure to provide reasonable efforts, by itself, precludes a transfer of legal custody to a relative as a permanent-placement option.

We note that, in a proceeding to terminate parental rights, the district court shall find "that reasonable efforts to finalize the permanency plan to reunify the child and the parent *were made*." Minn. Stat. § 260C.301, subd. 8(1) (emphasis added). However, the district court is not required to make a similar finding when transferring legal custody. Instead, the district court need only make a finding regarding "the nature and extent of the responsible social services agency's reasonable efforts or, in the case of an Indian child, active efforts to reunify the child with the parent or guardian where reasonable efforts are

required." Minn. Stat. § 260C.517(a)(2). Thus, unlike an order terminating parental rights, an order transferring legal custody does not require a finding that reasonable efforts were in fact made, and a lack of reasonable efforts is not dispositive. Instead, it is one of four factors that the district court must consider in making a legal-custody-transfer determination.

In sum, we are not persuaded that the district court's finding that the county failed to provide reasonable efforts, by itself, precludes the transfer of legal custody in this case. Although the finding is relevant, it is not dispositive.[2]

Mother's Efforts to Use Services and Whether the Conditions that Led to Out-of-Home Placement Were Corrected

As mother notes, the district court's findings regarding these factors generally favor mother. Mother argues that the conditions that led to the out-of-home placement are "almost entirely corrected." She also argues that the children were placed out of home

[2] The county "respectfully disagrees with the Court's determination that [it] did not provide reasonable services," but it "supports the ultimate outcome of permanency for the two children who are the subject of this appeal, S.B. and E.B., as it is in their best interest to live with their father." The county states that "[w]hile [it] recognizes and embraces its obligation to reunify families, child protection workers are not necessarily trained mental health professionals. It is reasonable for [them] to rely on the professional opinions of those who are." Although the county disagrees with the district court's reasonable-efforts determination, it did not file a notice of related appeal seeking review of that determination. "After one party timely files a notice of appeal, any other party may seek review of a judgment or order in the same action by serving and filing a notice of related appeal." Minn. R. Civ. App. P. 103.02, subd. 2. Respondents who do not file a notice of related appeal are "not entitled to affirmative relief from this court." *In re Guardianship of Pates*, 823 N.W.2d 881, 884-85 (Minn. App. 2012). Because the county did not file a notice of related appeal, we do not review the district court's reasonable-efforts determination.

because of her methamphetamine use and that she "has demonstrated her sobriety and can now properly care for her children."

There is no presumption that completion of a case plan equates with correction of the conditions that led to an out-of-home placement. *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 89 (Minn. App. 2012). "The critical issue is not whether the parent formally complied with the case plan, but rather whether the parent is presently able to assume the responsibilities of caring for the child." *Id.* Moreover, a district court "may find that a child cannot safely return home even though the factual bases for the conditions preventing the child's return home are not identical to the factual bases for the conditions that led to the child's out-of-home placement." *D.L.D.*, 865 N.W.2d at 316. Those are the circumstances here: mother has substantially completed the requirements of her case plan and corrected the conditions that led to out-of-home-placement of her children—the dangerous environment created by her methamphetamine use—but the children cannot safely return to mother's care because of their mental-health issues and emotional needs.

In sum, mother's completion of her case-plan services and her correction of the original conditions that led to the out-of-home placement do not preclude the district court's permanency disposition in this case.

Conclusion

In transferring permanent legal custody of S.B. and E.B. to N.T.B., the district court reasoned that "the children are not ready to return home due to such an extended period of having no contact with their mother and no family therapy" and that "[mother], at present and in the near future, will be unable to properly care for the children." The district court

therefore concluded that it was necessary to make a determination regarding the permanent placement of S.B. and E.B. Mother argues that "[i]t is premature to permanently transfer physical and legal custody of her two older children while still allowing her a chance with her younger children" and that "[t]he court should have allowed for continued [child-protection] services [for] all four children." For the reasons that follow, we are not persuaded.

The district court's decision to continue child-protection jurisdiction over K.H. and L.H. was based on its determination that "no permanent placement options exist" for those children. Thus, the district court ordered K.H. and L.H. to remain in out-of-home placement indefinitely and ordered the county to "renew efforts to identify permanent placement options in the event that custody of [K.H.] and [L.H.] cannot be returned to [mother]." Essentially, the district court ordered continued child-protection jurisdiction over K.H. and L.H. because it had no other permanency option for those children. *See* Minn. Stat. § 260C.312(a) (2018) (stating that "[i]f, after a hearing, the court does not terminate parental rights but determines that the child is in need of protection or services, . . . the court may find the child is in need of protection or services"). But the district court had a viable permanency option for S.B. and E.B.: transfer of legal custody to their biological father, N.T.B. Because the circumstances of the two sibling groups were different, the district court did not abuse its discretion by proceeding to a permanency disposition for only one of the sibling groups.

Moreover, the district court appropriately considered the relevant circumstances when determining whether to order a permanent placement for S.B. and E.B., including

that they had been placed out of mother's care for approximately 15 months, that they were with N.T.B. the entire time, that they have a healthy relationship with N.T.B., and that mother was not able to meet their mental-health and emotional needs. The supreme court has recognized "the importance of emotional and psychological stability to a child's sense of security, happiness and adaptation, as well as . . . the fundamental significance of permanency to a child's development." *In re Welfare of J.J.B.*, 390 N.W.2d 274, 279 (Minn. 1986).

It may seem unfair that mother lost custody of S.B. and E.B. to their father even though she completed her case-plan services and the county did not make reasonable efforts to address the visitation and contact issues. But the record establishes that S.B. and E.B. needed permanency. And although the record does not support termination of mother's parental rights, it supports the less severe permanency option of a transfer of legal custody of S.B. and E.B. to N.T.B.[3] The district court did not abuse its discretion in ordering that option.

However, we have concerns regarding the district court's order. A permanency order transferring legal custody "shall state whether the transfer was voluntary or involuntary" and "shall state whether a child support order exists or if the issue is reserved for future determination." Minn. R. Juv. Prot. P. 42.07, subd. 6.; *see* Minn. Stat. § 260C.515, subd. 4(2) ("in transferring permanent legal and physical custody to a relative,

[3] Although the district court's denial of the county's request for termination of mother's parental rights is not at issue in this appeal, we nonetheless observe that the district court correctly determined that the record does not support termination.

the [district] court shall follow . . . the procedures in the Minnesota Rules of Juvenile Protection Procedure"). The record does not indicate that the district court addressed these issues.

We also note that the district court may retain jurisdiction after a transfer of legal custody.

> When the court orders transfer of permanent legal and physical custody to a relative under [rule 42.07], the court may retain jurisdiction over the responsible social services agency, the parents or guardian of the child, the child, and the permanent legal and physical custodian. The court may conduct reviews at such frequency as the court determines will serve the child's best interests for the purpose of ensuring:
>
> (a) appropriate services are delivered to the child and the permanent legal and physical custodian; or
>
> (b) conditions ordered by the court relating to the care and custody of the child are met.

Minn. R. Juv. Prot. P. 42.07, subd. 7. If jurisdiction continues, the court order "shall address parental and sibling visitation and ongoing services" for the child while the district court has jurisdiction. *Id.*, subd. 6.

We recognize that "[i]f the court transfers permanent legal and physical custody to a relative, [district] court jurisdiction is terminated unless specifically retained by the court." *Id.*, subd. 2. But in this case, because the district court retained child-protection jurisdiction over K.H. and L.H., clarification regarding whether the district court's jurisdiction over S.B. and E.B. is also to continue, and if so whether visitation and services will be ordered for those children, would be useful.

In sum, although the district court did not abuse its discretion by transferring legal custody of S.B. and E.B. to N.T.B., the district court's order does not fully comply with

the requirements of Minn. R. Juv. Prot. P. 42.07, subd. 6, and could address other issues stemming from the custody transfer. We therefore affirm the district court's order, but we remand for the district court to amend its order consistent with this opinion.

Affirmed and remanded.