STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2117
A11-2140

In the Matter of the Welfare
of the Children of:
A. C. S., B. T. S. and E. K. D., Parents.

Filed April 9, 2012
Affirmed
Toussaint, Judge[*]

Wright County District Court
File Nos. 86-JV-10-1916, 86-JV-10-7055

Jolanta M. Howard, Howard Law Firm, Minneapolis, Minnesota (for appellant/ respondent father E.K.D.)

Carol S. Weissenborn, Minneapolis, Minnesota; and

Sheridan K. Hawley, Hawley Law & Mediation, Coon Rapids, Minnesota (for respondent guardian ad litem Nicole Raske)

M.S., Andover, Minnesota (pro se respondent foster parent)

L.S., Andover, Minnesota (pro se respondent foster parent)

Anne L. Mohaupt, Amy M. Busse, Assistant County Attorneys, Wright County Courthouse, Buffalo, Minnesota (for respondent Wright County)

Considered and decided by Cleary, Presiding Judge; Stoneburner, Judge; and Toussaint, Judge.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment 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

TOUSSAINT, Judge

In this consolidated appeal following a district court decision to permanently place a three-and-a-half-year-old child in the legal and physical custody of foster parents, the biological father, appellant E.K.D. (appellant), and the child's guardian ad litem, Nicole Raske (guardian ad litem), challenge the district court's decision, claiming that the evidence was insufficient to support the decision and that the district court erroneously applied the law. Because the evidence and findings support the district court's decision and the court properly applied the relevant law, we affirm.

D E C I S I O N

"District courts have broad discretion to determine matters of custody." *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). On review of a permanent placement decision, we determine whether the district court's findings address statutory criteria and are supported by substantial evidence, or whether the findings are clearly erroneous. *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261-62 (Minn. App. 1996). "The evidence and its reasonable inferences must be viewed in the light most favorable to the prevailing party." *Id.* at 261.

When a child is placed out of the home, the district court is required to make a permanency determination within a specified time. Minn. Stat. § 260C.201, subd. 11 (2010). The permanency statute requires the district court to consider and make findings on the following grounds:

> An order permanently placing a child out of the home of the parent or guardian must include the following detailed findings:
>
> (1) how the child's best interests are served by the order;
>
> (2) the nature and extent of the responsible social service agency's reasonable efforts . . .;
>
> (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.201, subd. 11(i). A permanent placement decision must be supported by clear and convincing evidence. *A.R.G.-B.*, 551 N.W.2d at 261; Minn. R. Juv. Prot. P. 39.04, subd. 1. However, "[t]hat the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). Further, review of the district court's findings of fact must include "due regard" for the district court's opportunity "to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01.

The child, E.K.D. Jr. (E.K.D.) was placed out of the home after law enforcement discovered him in a seriously neglected state with a half-sister, C.K.K., in March 2010. At that time, E.K.D. was just over one and one-half years old, and appellant had been sent to prison on a burglary offense about six months earlier. In March 2011, the parental rights of the child's mother were terminated and appellant was released from prison. In June 2011, respondent Wright County petitioned to transfer permanent legal and physical

custody of E.K.D. to the foster parents with whom the child had resided since April 2010. In an October 18, 2011 decision following a nine-day trial, the district court made findings that analyzed each required statutory factor under Minn. Stat. § 260C.201, subd. 11, and concluded that E.K.D. should be permanently placed in the legal and physical custody of the foster parents. Appellant challenges three of the statutory bases for the permanency decision; we address each in turn.

Best Interests

Minn. Stat. § 260C.201, subd. 11(i)(1) requires the district court to consider the child's best interests in making a permanency decision. *See* Minn. Stat. § 260C.001, subd. 3 (2010) (stating that the "paramount" consideration in permanency proceedings is the best interests of the child). Here, the district court articulated the following circumstances in making its best interests determination: (1) E.K.D. "manifested a clear desire not to go with [appellant]" and to remain with the foster parents, who provided him with a nurturing, stable and secure home environment; (2) appellant continued to live with his mother,[1] who subjected appellant and his siblings to severe abuse as children; (3) appellant lacked empathy in recognizing the sibling bond between E.K.D. and C.C.K.; (4) E.K.D. and C.C.K. are bonded as siblings and the foster family would promote that bond; (5) the foster mother would support an ongoing bond between appellant and E.K.D.; by contrast, appellant attempted to undermine the foster mother by recording her

[1] The guardian ad litem argues that findings regarding appellant's residence are clearly erroneous because the district court "knew[] by the time of its amended order[] that [appellant] had moved out of his mother's home and that the social worker had deemed the apartment suitable." No evidence was submitted on the record to support this assertion.

conversations to demonstrate to the court that she "was a liar"; (6) the foster mother consistently put E.K.D.'s needs first, including facilitating E.K.D.'s relationship with his father, by offering appellant transportation to meet E.K.D.; (7) the district court expressed "grave concerns" that appellant could follow through on a sibling visitation schedule; (8) appellant did not plan ahead for or freely exchange information on visitation as required, and the foster family necessarily initiated visitation conversations; and (9) appellant was inflexible on matters of visitation.

Appellant argues that the district court's best-interests considerations may be valid, but that they are insufficient to support a permanent out-of-home placement. We disagree. Appellant has no money, no job or employment skills, no education, no safe place to live, and no driver's license. While he made great strides in turning his life around after being released from prison, the district court was not convinced, and neither were the two experts who testified, that appellant is currently or in the reasonably foreseeable future able to care for his child. In addition, appellant suffered great abuse when he was a child and, according to the experts, lacks empathy to recognize E.K.D.'s emotional needs, such as maintaining the bond with E.K.D.'s sibling and the foster family with whom E.K.D. has resided since he was an infant. Appellant also has a serious history of controlled substance abuse, although he is currently sober. The district court recognized appellant's admirable efforts to parent, but the record supports the district court's conclusion that appellant is not able to parent at this time.

Reasonable Efforts

In examining whether efforts by the county were reasonable under Minn. Stat. § 260C.201, subd. 11(i)(2), "reasonable efforts" includes the "exercise of due diligence by the agency to use appropriate and available services to meet the needs of the child and the child's family." *A.R.G.-B.*, 551 N.W.2d at 263 (quotation omitted). Reasonable efforts must be designed to address the problem presented. *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996). The district court found that the county's efforts were reasonable because they included fostering the parent-child relationship while appellant was in prison and after his release, arranging for appellant to participate in a psychological assessment while incarcerated and therapy referral during incarceration and individualized therapy after incarceration, arranging for and providing transportation to visitation, providing resources for independent housing, and budgeting. The district court concluded that respondent offered appellant services to correct the conditions that led to E.K.D.'s out-of-home placement and that those efforts were "consistent, timely, and realistic given the circumstances when [appellant] was incarcerated and when he was released."

Appellant's main contention with regard to respondent's reasonable efforts is that respondent, rather than assisting in reuniting the father and child, "was looking for any reason" for discontinuing the relationship. Specifically, appellant claims that respondent did not offer services to address E.K.D.'s attachment issues, or appellant's housing situation or employment. The record does not support this claim. Although a case worker twice gave appellant materials on job and housing information, appellant lost the

materials on one occasion and rejected the idea of employment outright in favor of furthering his education, spending time with E.K.D., and maintaining his sobriety. We agree with the district court that respondent's offers of numerous and varied services to appellant and E.K.D. throughout the course of this case were appropriate under the circumstances; the county's failure of reasonable efforts does not undermine the district court's permanency decision.

Failure to Correct Conditions

Appellant also claims that the district court erred by concluding that he failed to correct the conditions that led to E.K.D.'s out-of-home placement. Minn. Stat. § 260C.201, subd. 11(i)(3). The district court's order states that appellant's efforts "fell short" and "did not result in corrective action sufficient to warrant reunification." In deciding this factor, the district court specifically relied on appellant's failure to obtain safe housing, his inability to comprehend or support the sibling relationship between E.K.D. and C.C.K., and his inability to cooperate with visitation or to show empathy with regard to transitions for E.K.D.

Appellant claims that the reasons for E.K.D.'s out-of-home placement did not have anything to do with appellant's conduct. However, because E.K.D.'s mother's parental rights were terminated when appellant was in prison, no parent was able to care for E.K.D. at the time of E.K.D.'s placement in foster care. Thus, appellant's conduct was related to E.K.D.'s out-of-home placement. Further, the same conditions that made it against E.K.D.'s best interests to be placed in appellant's custody at the time of the permanency order also demonstrate a failure to correct conditions. Appellant was unable

to provide a safe home for E.K.D., was unable to support himself or E.K.D., was only a few months sober, and was unable to emotionally respond to some of E.K.D.'s needs, due to his own issues. Given this, we conclude that the district court did not err by concluding that the conditions that led to the out-of-home placement had not been alleviated at the time of its permanency decision. *See A.R.G.-B.*, 551 N.W.2d at 262-63 (affirming permanent placement of child outside of home when, even though conditions improved, they were insufficient to support granting parents custody).

Both appellant and the guardian ad litem argue that the district court erred by ignoring presumptions that favor the parents as custodians of their children and by elevating the preference for keeping siblings together. A parent "is presumed to be a fit and suitable person to be entrusted with care of child or children born to and belonging to [the parent]." *N.A.K.*, 649 N.W.2d at 174. A biological parent is entitled to custody of a child unless "neglect, abandonment, incapacity, moral delinquency, instability of character or inability to furnish the child with needed care [are shown] . . . or unless it has been established that such custody otherwise would not be in the best interest of the child." *Id.* at 174-75 (quotation omitted). First, we agree with respondent's contention that there is nothing in this record "to indicate that the [d]istrict [c]ourt did not consider the child's interest in residing with his parents." But we also reject this argument because Minn. Stat. § 260C.201 does not require a finding of parental unfitness before the district court makes a permanent placement determination. *Compare* Minn. Stat. § 260C.201, subd. 11(i), *with* Minn. Stat. § 260C.301, subd. 1(4) (2010) (permitting termination of parental rights upon palpable unfitness of parent).

The guardian ad litem claims that the district court's order suggests that it applied Minn. Stat. § 257C.01-.08 (2010) to decide this case, rather than Minn. Stat. § 260C.201. Chapter 257C determines child custody in cases involving third parties who are interested in obtaining custody of a non-biological child. The section applies to "de facto custodians" and "interested third parties," but specifically does not include children who are placed in a party's care by "court order or voluntary placement agreement under chapter 260C." Minn. Stat. § 257C.01, subds. 2, 3. Here, the district court specifically transferred custody of E.K.D. under Minn. Stat. § 260C.201, subd. 11. Further, the court's findings and conclusions state and address each of the statutory requirements for a custody determination under chapter 260C. Although the district court referred to the foster parents as "interested 3rd party relatives" in its order, those references, read in context, were made only to delineate the relationship of the parties in this action and not as legal designations to demonstrate application of chapter 257C.

Affirmed.