STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2291

In the Matter of the Welfare of the Child of:
E. D., Parent.

Filed June 3, 2013
Affirmed
Willis, Judge*

Hennepin County District Court
File No. 27-JV-12-5128

Michael O. Freeman, Hennepin County Attorney, Cory A. Carlson, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

William M. Ward, Hennepin County Chief Public Defender, Kellie M. Charles, Assistant Public Defender, Minneapolis, Minnesota (for appellant mother)

Jonathan G. Steinberg, Minneapolis, Minnesota (for guardian ad litem Patricia Timpane)

Considered and decided by Stoneburner, Presiding Judge; Johnson, Chief Judge; and Willis, Judge.

*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

WILLIS, Judge

Appellant challenges the district court's termination of her parental rights, arguing that respondent county failed to prove by clear-and-convincing evidence that any statutory ground for termination exists and that termination of her parental rights is in the best interests of the child. Appellant also argues that the district court's evidentiary ruling to admit stale evidence deprived her of the right to a fair trial. We affirm.

FACTS

Appellant E.D. is the biological mother of E.M., currently age 13. E.D. also has four adult sons. In 2006, E.M. began receiving special-education services due to concerns regarding her academic and behavioral functioning. She was later diagnosed with autism and speech and language impairments, and began attending the Minneapolis Public Schools Citywide Autism Program in 2007. At times, E.M. exhibited temper outbursts and physical aggression toward adults and peers, which led to temporary suspension from school.

History of abuse and 911 calls

In October 2009, Hennepin County Child Protection Services (the county) received a child-protection report that appellant, while intoxicated, had threatened her son's girlfriend with a knife. Appellant denied the allegations, and the matter was closed after appellant was referred to family services and support.

In January 2010, the county opened an investigation into E.M.'s claims that her brother Christopher had sexually abused her. E.M. was interviewed by school staff, the

police, and a child-protection investigator. She described sexual abuse by Christopher and also reported abuse by her brothers Weldon and Seville. But her statements were deemed inconsistent. Appellant claimed that E.M.'s teacher had invented the allegations, and Christopher refused to cooperate with the investigation. E.M. returned to appellant's care, and the county closed the case without further action.

In July 2010, E.M. underwent a psychological assessment due to academic concerns and for differential diagnosis of an autism spectrum disorder. The psychologist affirmed the diagnosis of autism and mental retardation, and found that E.M.'s "overall adaptive functioning, based on maternal report, was comparable to that of a child 6 years, 10 months of age," her cognitive functioning appeared to be similar to that of a five-year-old child, and her social and communication skills were that of a child of an age of 5 years, 8 months, to 7 years, 5 months. The psychologist encouraged close cooperation between appellant and E.M.'s school to provide E.M. with a "predictable routine, structure, and consistent limits/expectations."

In January 2011, E.M. began taking antipsychotic medications and receiving in-home services through Fraser, a service provider that specializes in working with autistic children and their families. On January 28, appellant and a county social worker took E.M. to the emergency room to seek an adjustment in her medication. The hospital record indicates that appellant had not been administering E.M.'s medication consistently. Appellant reported that since E.M. began taking her medication, she had been exhibiting "new" aggressive behavior toward appellant, such as hitting and throwing objects at her. The examining physician noted that appellant "appear[ed] to feel

overwhelmed" but that she was aware of the services of the Hennepin County Mobile Crisis unit.

On April 15, 2011, appellant called 911 because of E.M.'s increasingly aggressive behavior. E.M. was taken to the emergency room, where she was verbally and physically aggressive toward appellant and the nursing staff. Appellant "appear[ed] overwhelmed [and] unable to cope with parenting [E.M.]" and exhibited signs of a panic attack. Appellant initially refused to take E.M. home upon discharge, saying, "Send her to residential I can't take it anymore." E.M. had to be restrained, and the social worker recommended that she be admitted into the hospital for medical stabilization while an appropriate environment for her discharge was secured. Appellant left E.M. in the hospital without notifying hospital staff.

On April 25, 2011, appellant again called 911 and had E.M. sent to the emergency room. Appellant did not accompany E.M. and was not available to talk to medical staff. Staff noticed two abrasions on E.M.'s forehead, and E.M. reported that appellant had hit her with a broom. The county opened a child-protection case. Appellant claimed that E.M. had banged her head on a wall and told the social worker that she did not want E.M. to return home. E.M. remained hospitalized for the next month, and the child-protection case was closed without further action.

On April 28, 2011, appellant met with E.M.'s psychiatrist, Dr. Carrie Borchardt, for a therapy session while E.M. was in treatment at a group home. Dr. Borchardt's records indicate that appellant was a "poor historian" who was "contradictory of

information that she [had provided] at other times." Appellant "look[ed] anxious and ha[d] trouble understanding the information" regarding E.M.'s treatment and medication.

On August 2, 2011, E.M. reported that appellant had "whooped" her on the back with a belt. Appellant denied the abuse and claimed that the marks on E.M.'s back, found to be consistent with belt marks, were caused by a fall during a tantrum. A child-protection case was initiated but was later closed without further action.

In January 2012, E.M. was brought into the emergency room by her brother Seville, who reported that E.M. had been violent at home and had threatened to kill appellant. Appellant communicated by phone with E.M.'s social worker, who reported that appellant said, "I can't take it anymore," that she was "scared [E.M.] will kill [her]" in her sleep, and that "I am not in good health myself and this is too much for me to handle." Appellant did not accompany E.M. and later declined the social worker's offer for a ride to the hospital. Appellant refused to join E.M. at the hospital even after Seville had to leave for work. E.M. was kept in the hospital "due to [appellant]'s inability to provide a safe environment to [E.M.] and [E.M.]'s recent violent outbursts." But E.M. did not meet the criteria for inpatient psychiatric care because "her vital signs were stable, she had an intact appetite, [she] did not demonstrate concerning behaviors, [and] [s]he did not require chemical or physical restraint," and she was discharged from the hospital.

On February 21, 2012, E.M. reported during a CornerHouse interview that she had been sexually abused by her brother Seville. E.M. described specific sexual acts between her and Seville. E.M. also described sexual touching by her brother Christopher and said

that appellant had witnessed the incidents and had asked the boys to stop. Appellant denied E.M.'s allegations. Seville refused to be interviewed by the police. E.M.'s claims could not be substantiated, and a child-protection investigation was closed without further action.

On May 29, 2012, E.M. removed all of her clothing while at school and told her teacher that she had had sex with her brother Seville at home. On May 30, E.M.'s teacher noticed blood seeping through E.M.'s pants and discovered a two-inch abrasion on her upper right leg. E.M. told the teacher that she had been hit by appellant with a belt. Medical personnel determined that E.M. had sustained the leg injury within the preceding 24 hours but found no signs of injury related to sexual abuse. E.M. was placed on a health-and-welfare hold. When police notified appellant of E.M.'s situation, appellant criticized the officer for calling late at night, threatened that she had contacted an attorney, accused the police of traumatizing E.M., and shouted obscenities before hanging up the phone.

Another CornerHouse interview was conducted on May 31, 2012. E.M. stated that she had been "whooped" by appellant with a belt and that she had been hit on her "butt," toes, upper legs, and face. E.M. said that she felt unsafe and that appellant was "a bad person." E.M. also described having been "whooped" by her brother Weldon and struck in the face by her brother Seville, who she said was "not a good person." E.M. recounted being sexually abused by Seville in a whispered tone and demonstrated various specific sexual acts with male and female dolls. She also said that the acts had caused her pain. E.M. described having been sexually abused by her brother Weldon and said that

appellant had witnessed the act and had told Weldon to stop and leave the room. E.M. also described similar sexual abuse by her brother Christopher. E.M. initially said that she was 12 at the time of the abuse but also said that the abuse had happened every year since she was 8 years old. E.M. was placed in foster care.

A few hours after the CornerHouse interview, the police visited appellant's home. Appellant complained about the fact that the officers visited the home instead of calling her on the phone; she refused to talk to the officers and closed the door on them. When an officer contacted appellant by phone a short time later, she was polite initially but quickly became "cantankerous," refused to answer any questions, and said, "You better come correct. You ain't sh–t!" before hanging up.

Appellant voluntarily talked to the police the next day. Appellant denied that E.M. had been sexually or physically abused, but described an incident during a visit to Chicago in 2010 when an unrelated child was caught opening E.M.'s shirt. Appellant noted that E.M. began making comments of a sexual nature following the Chicago incident. Appellant denied that E.M. had any access to sexually explicit materials and attributed E.M.'s sexual behavior to her surroundings and her classmates. Appellant refused to listen to details about E.M.'s claims of abuse, stated that she had a dentist appointment, and left the interview. Appellant failed to show up to subsequent interviews and did not return several calls by the police.

On June 13, 2012, E.M.'s brother Weldon was interviewed in prison by the police. Weldon denied abusing E.M. But Weldon told police that appellant had regularly "whipped" him with a belt when he was younger and that she had occasionally

"whooped" him with hockey sticks, broom sticks, and extension cords. E.M.'s brother Christopher was also interviewed in prison, and he denied physically or sexually abusing E.M. Seville refused to be interviewed or to provide any information regarding E.M.'s claims of abuse.

The police closed the sexual-abuse investigation without filing any charges, based on a lack of "corroborative evidence, no physical evidence, and no witnesses."

Termination of appellant's parental rights

On June 4, 2012, the county filed a petition to terminate appellant's parental rights under Minn. Stat. § 260C.301 (2012). The district court relieved the county from making reasonable efforts at reunification based on the county's prima facie showing that E.M. suffered egregious harm in appellant's home. Nevertheless, Megan Berkley, a county social worker, offered appellant assistance aimed at reunification, including parenting services at Fraser Child & Family Center, a mental-health assessment, and domestic-violence services through the SAFE program. Appellant declined the services on three separate occasions.

Ms. Berkley testified at trial and opined that it was in E.M.'s best interest to terminate appellant's parental rights. She noted that E.M. "was a danger to herself as well as a danger to others" in the environment provided by appellant and that appellant was "unable to handle [E.M.] unless she called 911 and had [E.M.] taken to the hospital." Ms. Berkley expressed an ongoing concern regarding appellant's ability to protect E.M. from further sexual abuse, noting that Seville continued to live at appellant's home, that appellant had once tried to bring Seville to a supervised visit with E.M., and that

appellant had kissed E.M. on the lips, saying, "[T]hat was from Seville." Because appellant repeatedly claimed that "[E.M.'s] allegations are lies, that [E.M.] was coached to say these things, [and] that the social workers helped [E.M.] to make them up," Ms. Berkley believed that appellant "would not be looking for warning signs or notice warning signs if that [sexually abusive] behavior was going on again." Ms. Berkley also testified that appellant had not cooperated with E.M.'s school or the police in addressing the allegations of sexual and physical abuse.

Appellant also testified at trial. She stated that the allegations of physical and sexual abuse were lies and that E.M. "[doesn't] even really know how to talk like that, like what they had in the petition." Appellant denied that E.M. and Seville had ever been alone together. Appellant also denied Weldon's claims of past physical abuse.

Appellant testified that she had obtained resources to help her deal with E.M. if E.M. were to return home, but when asked how she would handle E.M.'s autism and aggression, appellant responded, "Hope she got better." Appellant justified her refusal to use the support services previously offered by the county by saying that she "had [her] hands full with [E.M.]" and that she "felt like [she] didn't need them" but that she was willing to accept them to get E.M. back.

On November 14, 2012, the district court issued an order terminating appellant's parental rights, based on her failure to meet parental duties under Minn. Stat. § 260C.301, subd. 1(b)(2), and a finding of egregious harm to E.M. under Minn. Stat. § 260C.301, subd. 1(b)(6). The district court also terminated the parental rights of E.M.'s noncustodial father, who lived in Oklahoma and declined to care for E.M. The court

found that termination is in E.M.'s best interests and that appellant "lack[ed] credibility and the capacity to understand the enormity of the situation at hand and her ability to better it." Appellant's motion for a new trial was denied, and this appeal followed.

D E C I S I O N

Appellant argues that the district court erred by terminating her parental rights. "Parental rights are terminated only for grave and weighty reasons." *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). We "must determine whether the [district] court's findings address the statutory criteria, whether those findings are supported by substantial evidence, and whether those findings are clearly erroneous." *Id.* "A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotations omitted). On appeal, we view the record in the light most favorable to the district court's findings. *Id.*

"Termination of parental rights will be affirmed 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). Clear-and-convincing proof is established if the truth of the facts asserted is "highly probable." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). "We defer to the district court's determinations of witness credibility and the weight to be given to the evidence." *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 555 (Minn. App. 2007). The deference given to underlying factual findings is greater than the deference given to the conclusions drawn from those facts. *In re Welfare of Children of J.R.B.*, 805

N.W.2d 895, 899–900 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). Thus, underlying factual findings are reviewed for clear error but ultimate findings regarding statutory bases for terminating parental rights are reviewed for abuse of discretion. *Id.* at 901.

I. The record supports the district court's finding that appellant failed to comply with her parental duties to E.M.

Appellant argues that the district court's finding that she failed to comply with the duties of the parent-child relationship is not supported by the record.

The district court may terminate parental rights if it finds that the parent

> has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed . . . by the parent and child relationship . . . and either reasonable efforts by the social services agency have failed to correct the conditions that formed the basis of the petition or reasonable efforts would be futile and therefore unreasonable.

Minn. Stat. § 260C.301, subd. 1(b)(2). Until a court determines that reasonable efforts at reunification are futile, "the statute requires the county to continue to provide services to the parent as outlined in the case plan or out-of-home placement plan." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 666 (Minn. 2008).

Here, based on the district court's finding of a prima facie showing of egregious harm to E.M., the county was relieved of the requirement to make reasonable efforts to correct the conditions that led to the petition for termination of parental rights. Nevertheless, the district court noted, Ms. Berkley offered appellant several services necessary to effect reunification which "could have provided [appellant with] a

meaningful opportunity to address the issues relevant to the child's out of home placement," but appellant refused the services.

Appellant contends that she fulfilled her parental duties by seeking special-education services for her daughter at an early age, by getting E.M. diagnosed, by consulting with E.M.'s psychiatrist and other medical professionals, by setting up Fraser in-home services, and by educating herself on autism. But the record shows that appellant was a "poor historian" of E.M.'s behavior and treatment, that she claimed she did not know of her daughter's autism for several years, that she accused E.M.'s school of hiding E.M.'s condition from her, that she caused E.M. to miss several consecutive appointments with Dr. Borchardt, and that she did not actually use the Fraser in-home services in a meaningful way. The district court found that appellant believed that she did not need to use the services recommended by the county to become a better parent. The court also noted that appellant consistently relied on 911 emergency services to address E.M.'s behavioral issues without using other—more appropriate—services because appellant was either "unwilling or unable to address [the issues] herself."

The district court also found that "[c]learly the mental needs of [E.M.] have not been met by [appellant], although [appellant] does not allege that she was without the physical or financial means to address her duties to her child." Appellant reported feeling overwhelmed by E.M.'s behavior, feeling anxious, and having a panic attack that prompted her to leave E.M. at the hospital without notifying medical staff. Although appellant was connected to many appropriate services and was aware of Hennepin County Mobile Crisis, appellant did not use those services to E.M.'s benefit. Based on

appellant's conduct, the district court expressed concern that she "will continue to not address her child's needs in the future." The court concluded that "[s]imply hoping that a child has recovered from autism does not demonstrate a parent who is fully aware of their child's needs and what they can do to meet them."

Appellant also challenges the district court's reliance on a report created by a "psychology intern" who interviewed E.M. before trial. But the parties stipulated that the report could be admitted into evidence. The district court used the report to illustrate the type of environment best suited to E.M.'s needs, such as one that provides "structured support, assisted living, and therapeutic programs to help [E.M.] process her traumatic past." The court contrasted it with the environment provided by appellant, in which E.M. had been physically and sexually abused. Moreover, the court noted, appellant had taken no measures to correct deficiencies in the environment and expected E.M. to continue to share a home with Seville. Thus, appellant's argument is without merit.

Given the extensive evidence in the record and the district court's authority to make credibility determinations, the district court did not abuse its discretion by finding that appellant failed to comply with parental duties and that the failure could not be remedied in the foreseeable future.

II. The record supports the district court's determination that E.M. experienced egregious harm while in appellant's care.

Appellant next challenges the district court's termination of appellant's parental rights based on egregious harm to E.M. while in appellant's care.

A court may terminate parental rights to a child if it finds

> that a child has experienced egregious harm in the parent's care which is of a nature, duration, or chronicity that indicates a lack of regard for the child's well-being, such that a reasonable person would believe it contrary to the best interest of the child or of any child to be in the parent's care.

Minn. Stat. § 260C.301, subd. 1(b)(6). Egregious harm is defined as "the infliction of bodily harm to a child or neglect of a child which demonstrates a grossly inadequate ability to provide minimally adequate parental care." Minn. Stat. § 260C.007, subd. 14 (2012). Examples of egregious harm include felony malicious punishment of a child and criminal sexual conduct toward a child. *Id.*, subd. 14 (3), (10). "To terminate the rights of a parent who has not personally inflicted egregious harm on a child, a court must find that the parent either knew or should have known that the child had experienced egregious harm." *In re Welfare of Child of T.P.*, 747 N.W.2d 356, 362 (Minn. 2008).

Here, the district court determined that E.M.'s statements in the May 2012 CornerHouse interview were "truthful and reliable" and found that E.M. was "sexually abused by her brothers Seville and Weldon, that [appellant] was aware of the abuse and did nothing to stop it, and that [E.M.] was also repeatedly physically abused by [appellant]."

Appellant argues that there is insufficient evidence in the record to support the district court's determination of sexual abuse. But the record shows that E.M. reported repeated acts of sexual abuse by Seville and Weldon. She also repeatedly stated that appellant was a witness to the abuse. E.M.'s reports of sexual abuse were spontaneous and did not vary with respect to the type of abuse, the way the acts were performed, and

the identity of the abusers. *See State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990) (enumerating circumstances surrounding a child's statements describing sexual abuse that are relevant to determining reliability). E.M. had no apparent motives to fabricate the claims, and the descriptions of the sexual acts were not of a type that a child of her age and intelligence level would be expected to fabricate. *Id.* Additionally, E.M.'s inappropriate sexual behavior has not been linked by her doctors to her autism, and there is no indication that she was exposed to sexual behavior or materials at school.

Appellant also argues that the district court's finding of physical abuse of E.M. by appellant is not supported by the record. The district court found that physical abuse contributed to the egregious harm suffered by E.M., although it focused its findings on sexual abuse. But the district court found that appellant's testimony at trial was "neither credible nor believable" and chose to believe Ms. Berkley and E.M.'s accounts of the physical abuse. E.M. reported being hit on the head with a broom and "whipped" with a belt several times. The record shows evidence of abrasions on E.M.'s forehead, markings on her back, and a bleeding abrasion on her leg, all of which are consistent with the acts of physical abuse that E.M. described. Thus, there is substantial evidence in the record to support the district court's determination that E.M. suffered egregious harm while in appellant's care, and the district court did not abuse its discretion in so finding.

III. The record supports the district court's finding that termination of appellant's parental rights is in E.M.'s best interests.

Appellant challenges the district court's determination that termination of appellant's parental rights is in E.M.'s best interests.

In any termination proceeding, "the best interests of the child must be the paramount consideration, provided that . . . at least one condition in subdivision 1, clause (b), [is] found by the court." Minn. Stat. § 260C.301, subd. 7. "Where the interests of parent and child conflict, the interests of the child are paramount." *Id.* "Even if a statutory ground for termination exists, the district court must still find that termination of parental rights or of the parent-child relationship is in the best interests of the child." *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 668 (Minn. App. 2012). "In considering the child's best interests, the district court must balance the preservation of the parent-child relationship against any competing interests of the child." *Id.* Such interests include "a stable environment, health considerations and the child's preferences." *Id.* "We review a district court's ultimate determination that termination is in a child's best interest for an abuse of discretion." *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 905 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

The district court found that, despite E.M.'s and appellant's desires for reunification, "the competing interests of the child's need for stability, the child's need for safety, and the necessity of addressing [E.M.'s] special needs all weigh in favor of termination."

In support of her request for reunification, appellant cites the strong bond between her and E.M. and the fact that E.M. has no other relatives to care for her and is not adoptable. A parent's bond with a child may weigh in favor of reunification. *In re Welfare of A.J.C.*, 556 N.W.2d 616, 620 (Minn. App. 1996), *review denied* (Minn. Mar. 18, 1997). But a parent's love and desire to be reunited with the child may not be

sufficient. *See In re Welfare of A.D.*, 535 N.W.2d 643, 650 (Minn. 1995) (finding that mother's failure to demonstrate requisite parenting skills prevented reunification even when mother loved and wished to be reunited with the child).

Here, the record shows that appellant is unable to provide E.M. with the care and support that she requires. Appellant seems unable or unwilling to understand E.M.'s needs, has not consistently assisted in E.M.'s treatment, and has not accepted E.M.'s claims of physical and sexual abuse.

Moreover, the evidence shows that E.M. has shown significant improvement since being removed from appellant's care and placed in foster care. E.M. has discontinued the use of one of her medications, she seems less agitated, she consistently attends medical appointments, she behaves better at school, and she has had fewer or no incidences of inappropriate behavior. Even though E.M. exhibits orally aggressive tendencies on occasion, she has not required any further hospitalizations and has not been physically aggressive. Thus, there is substantial evidence in the record to support the district court's determination that E.M.'s best interests require termination of appellant's parental rights, and the district court did not abuse its discretion in so finding.

IV. The district court did not abuse its discretion in admitting Ms. Berkley's testimony regarding appellant's past physical abuse of her son.

Appellant next argues that the district court abused its discretion by admitting into evidence Ms. Berkley's testimony regarding appellant's past physical abuse of her son. Appellant contends that the information was stale and irrelevant, but she provides no authority to support her argument.

"The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997) (quotation omitted). A new trial based on improper evidentiary rulings is available only if the complaining party demonstrates prejudicial error. *Id.* at 46. "An evidentiary error is not prejudicial if the record contains other evidence that is sufficient to support the findings." *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 93 (Minn. App. 2012).

Appellant's son Weldon told the police that he had also been physically abused by appellant when he was younger. The parties stipulated that the police report could be admitted into evidence. Over appellant's objection, the district court allowed Ms. Berkley to testify at trial about Weldon's statements to show that appellant could not provide a "safe and suitable environment" for E.M. The court found that the testimony was relevant because appellant disputed E.M.'s claims of physical abuse. We conclude that the district court did not abuse its discretion by admitting the testimony. And even if we were to determine that it was error to admit the testimony, the error would be harmless because the district court's decision to terminate appellant's parental rights was independently supported by substantial other record evidence.

Affirmed.