STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0983

In the Matter of the Welfare of the Children of: A. W., Parent

Filed December 30, 2008
Affirmed
Toussaint, Chief Judge
Concurring specially, Crippen, Judge[*]

Hennepin County District Court
File No. 27-JV-07-7858

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Crippen, Judge.

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

TOUSSAINT, Chief Judge

Appellant Phillip Steen, guardian ad litem for A.H., 14, and M.W., 12, challenges the district court orders granting termination of the parental rights of mother, A.W., and denying A.H. and M.W.'s new-trial motion. Appellant claims that long-term foster care, as opposed to termination of parental rights, is in A.H. and M.W.'s best interests. Because respondent Hennepin County Human Services and Public Health Department (the department) made "reasonable efforts" to finalize a placement plan for A.H. and M.W., and substantial, clear-and-convincing evidence supports the district court's conclusion that termination of parental rights is in A.H. and M.W.'s best interest, we affirm.

D E C I S I O N

A.W. has ten children, but only A.H. and M.W. are at issue in this case.[1] A.H. suffers from epilepsy and asthma. After child-protection proceedings failed to correct A.W.'s educational and medical neglect of her children, A.H. and M.W. were placed in foster care with M.W.'s godfather, M.L., and the department filed a petition seeking the termination of A.W.'s parental rights to all of her children. A.W. did not attend the trial on the termination of her parental rights, and the district court proceeded by default. As

[1] The purported fathers of A.H. and M.W. have not appeared in these proceedings and their whereabouts are unknown. Mother was the sole custodian of A.H. and M.W.

to A.H. and M.W., the only issue before the district court was the request that the court place them in long-term foster care with M.L. instead of terminating A.W.'s parental rights.[2] The district court ordered termination of A.W.'s parental rights to A.H., M.W., and seven of her other children.[3] Counsel for A.H. and M.W. moved for a new trial and/or amended findings, but the district court denied the motion.

On appeal, decisions to terminate parental rights are reviewed to determine whether the district court's findings address the statutory criteria, whether its findings are supported by substantial evidence, and whether its conclusions are clearly erroneous. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). This court must "closely inquire[] into the sufficiency of the evidence to determine whether the evidence is clear and convincing." *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996). "Considerable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." *L.A.F.*, 554 N.W.2d at 396. Questions of statutory interpretation are reviewed de novo. *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 209 (Minn. 2001).

I.

Appellant claims that the district court erred in concluding that the department made "reasonable efforts" to finalize a placement plan for A.H. and M.W. because the permanency social worker did not consider long-term foster care as a permanency option.

[2] It is undisputed that M.L. is an appropriate placement and source of excellent support for A.H. and M.W. The record indicates that he is clearly meeting their educational, medical, safety, and stable-housing needs.

[3] Mother's oldest son, R.W. was to remain in long-term foster care.

As a threshold matter, this issue was not raised before the district court and therefore appellant has waived it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate court will not consider matters not argued to and considered by district court). Although we are not required to decide this issue, we note that it is without merit.

In child-protection cases, the district court "must ensure that the responsible social services agency makes reasonable efforts to finalize an alternative placement plan for the child." Minn. Stat. § 260.012(a) (Supp. 2007). Reasonable efforts to finalize a permanent plan for the children, as relevant here, are due diligence by the department to conduct a "relative search," and "when the child cannot return to the parent . . . to plan for and finalize a safe and legally permanent alternative home for the child . . . preferably through adoption or transfer of permanent legal and physical custody of the child." *Id.*, (e)(3), (4) (Supp. 2007).

Here, the permanency social worker testified that he was not authorized to consider long-term foster care because the department had already determined that it was not an option for A.H. and M.W. due to their ages and potential for adoption. Nothing in the record suggests that the department failed to consider long-term foster care as an option.

We conclude that the department made reasonable efforts to finalize a permanent plan for A.H. and M.W. The department conducted a relative search, but no potential related adoptive resources were identified. By seeking termination of parental rights and

temporarily placing the boys in foster care with M.L., the department planned for a safe-alternative home.

II.

Appellant does not challenge the statutory grounds for termination of parental rights. Instead, he claims that the district court erred by determining that termination of parental rights, as opposed to long-term foster care, is in A.H. and M.W.'s best interests. Long-term foster care is a disfavored disposition for all children, even if the statutory criteria are met. *In re Welfare of J.M.*, 574 N.W.2d 717, 721 (Minn. 1998). If another permanent placement option is available, courts are not required to consider long-term foster care or balance it against other available options. *In re Welfare of Children of R.W.*, 678 N.W.2d. 49, 58 (Minn. 2004) (holding that district court is not required to consider long-term foster care as alternative to adoption as part of best-interests analysis).

When a child over the age of 12 cannot be returned home, "the court may order [the] child into long-term foster care only if it approves the responsible social service agency's compelling reasons that neither an award of permanent legal and physical custody to a relative, nor termination of parental rights is in the child's best interests." Minn. Stat. § 260C.201(d)(3)(i) (Supp. 2007). Long-term foster care is appropriate only when the social services agency "has made reasonable efforts to locate and place the child with an adoptive family or with a fit and willing relative who will agree to a transfer of permanent legal and physical custody of the child, but such efforts have not proven successful." *Id.*, (d)(3)(i), (ii)(A) (Supp. 2007).

Long-term foster care was not an appropriate permanency option in this case for two reasons. First, the county did not request long-term foster care for A.H. and M.W. and therefore did not provide the district court with compelling reasons for long-term foster care. Second, the county's efforts to place A.H. and M.W. with an adoptive family have not proven unsuccessful; M.L. continues to be recognized as an adoptive resource.

In a termination of parental rights proceeding, "the best interests of the child must be the paramount consideration." Minn. Stat. § 260C.301, subd. 7 (2006). But contrary to appellant's argument, the best-interests standard does not supersede the statutory requirement that the department must first give compelling reasons for long-term foster care before a district court can order it. *See J.M.*, 574 N.W.2d at 722 (holding that "best interests standard guides a court's determination in a termination proceeding, but it does not permit a court to order a statutorily-prohibited placement"). Here, long-term foster care for A.H. and M.W. is prohibited by section 260C.201(d)(3).[4]

Evaluating a child's best interests in a termination of parental rights proceeding requires the district court to balance the child's interest in preserving a parent-child relationship, the parent's interest in preserving a parent-child relationship, and any competing interests of the child. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). A child's "competing interests" can include "a stable environment, health considerations and the child's preferences." *Id.*

A.H. and M.W.'s interest in preserving their relationship with A.W. is limited; the record indicates that they wish to remain with M.L. permanently. Similarly, A.W.'s

[4] The question of the district court's inherent authority is not at issue in this appeal.

conduct demonstrates that she lacks an interest in preserving the parent-child relationship; she has not challenged the termination of parental rights petition or findings and has been missing since September 2007.

As the district court found, A.H. and M.W.'s preference to remain with M.L. does not weigh in favor of long-term foster care because it is "a less permanent placement and could be disrupted, resulting in the children being placed with someone other than [M.L.]." Appellant claims that long-term foster care is in the best interests of A.H. and M.W. because, as a long-term foster parent, M.L. receives a $2,200 monthly subsidy and, if he adopted them, his income of only $1,700 per month (consisting of monthly income of $600 plus an adoption subsidy of $1,100) would not "provide for the food, clothing, shelter, therapy and educational tutoring" that the boys need.

The record does not substantiate appellant's claim. It indicates only that M.L. was not sure if he could continue providing needed services for A.H. and M.W. if he were to adopt them, and it includes no evidence of either M.L.'s monthly income and expenses or the cost of needed services for A.H. and M.W. Witnesses merely estimated that M.L. would receive a monthly subsidy of $1,100 if he adopted the boys. While M.L. would naturally prefer to receive a $2,200 monthly foster-care subsidy instead of a $1,100 monthly adoption subsidy, appellant cites no authority stating that this preference is a compelling reasons for long-term foster care. Because appellant's financial claim is speculative, we cannot conclude that adoption would diminish the boys' standard of living.

The district court did not clearly err in finding that, even if it were permitted to consider long-term foster care, no compelling reasons weigh in favor of long-term foster care and that the best interests of A.H. and M.W. mandate termination of parental rights so that they are free to be adopted.

III.

Appellant claims that the district court erred in concluding that long-term foster care would not encourage contact between A.H. and M.W. and their parents, instead of considering sibling contact. The department has the obligation to pursue joint sibling placement and contact whenever possible, up to and including the adoption process. Minn. Stat. §§ 259.57, subd. 2(c), 260C.212, subd. 2(2)(d) (Supp. 2007).

Here, nothing in the record indicates that there is a danger that A.H. and M.W. will be separated or lose contact with their siblings if adopted. The district court did not err in not addressing sibling contact; the record indicates that there was no danger of loss of sibling contact. Appellant can point to no authority requiring the district court to address sibling contact in its written termination-of-parental-rights order.

IV.

Appellant contends that the district court erred when it concluded: "The record before the Court is not sufficient to determine that [M.L.] could not provide care for the children should he adopt them." But nothing in the record conclusively establishes that M.L. would be unable to provide necessary services and care for A.H. and M.W. if he adopted them, and, as the district court noted, alternative or additional funding sources may not be available to him if he adopts. The district court did not clearly err in finding

that the evidence does not establish that M.L. could not provide necessary care for the boys if he were to adopt them.

Affirmed.

CRIPPEN, Judge (concurring specially).

Although our standards of review properly lead us to affirm the district court, the facts in this record compellingly establish that future planning for A.H. and M.W., soon to be 15 and 13, will require that public authorities preserve care of these boys by M.L., their foster parent for nearly two years. M.L. was also the godfather for M.W. and provided care for him until he was age six.

Neither the district court nor any of the parties dispute that M.L.'s care is in the best interests of A.H. and M.W. M.L. has given the boys stable circumstances and meets their educational, medical, and developmental needs, including special needs arising from A.H.'s health. Both boys have notably progressed toward goals set in their individual educational plans, and both have become involved in library and YMCA activities.

M.L. testified that he loves the boys and accepts them with open arms. Not surprisingly, both boys, now at ages that require deference, plainly prefer to remain in M.L.'s care. The maturity of A.H. is demonstrated both by his age and by his experience as a caregiver for many of his younger siblings.

The district court wrestled with additional evidence, which it found undisputed, that M.L. will receive reduced financial assistance in the event he elects to adopt the

boys. This evidence shows that M.L. has limited earnings and that adoption would decrease his monthly income by over 40%.

The district court found that adoption of A.H. and M.W., despite their ages, cannot be ruled out. The district court found that it was not clear that M.L. could not care for the boys with reduced assistance, and that M.L.'s testimony on this issue was equivocal. This equivocal testimony includes M.L.'s declaration of love for the boys and his wish, "[m]ost definitely" to care for them—but his added testimony that he could not "go forward" with the adoption if he had to live in "poverty," and that he "couldn't possibly" manage with the $1,100 reduction in assistance.

There are critical problems inherent in the district court's conclusions, aside from the fact that the reasoning is itself "equivocal." Perhaps M.L. will choose to adopt, but perhaps he will conclude that this simply cannot be done.

In any event, adoption may be a great blow to the welfare of the children. If M.L. adopts, given what the record tells us, the boys may be living in an impoverished surrounding. And if someone else adopts, the boys will suffer still a further stinging blow to their best interests, augmented by the fact that they have no relationship with a natural father, that the giver of excellent paternal care for the boys died in 2005, and that their mother cannot care for them. These unfortunate risks, all can hope, are not increased by the public will to save foster-care costs.

As a general rule, there is merit in the district court's findings that adoption would provide the most long-term stability for A.H. and M.W. But the record leaves room for very few of the usual policy concerns for foster care; aside from emergent circumstances

that are inherent in any lives, the record shows unlimited stability in the care of the boys by M.L. for the remaining years (only three to five) before these boys reach their ages of majority.

Certainly, in my opinion, this record would permit a finding that termination of the parental rights to A.H. and M.W. is not in their best interests, and that the record shows compelling interests of the boys for a plan of long-term foster care.[5] Still, as the court determines today, the district court can and should be affirmed in the exercise of its discretion. But termination is not, in this case, without an inherent condition. It should not be, in any circumstance not foreseeable from the record before us, an avenue for any steps that deprive A.H. or M.W. of the care by M.L.

[5] The parties, as well as the district court, have engaged in efforts to determine whether the option of long-term foster care was properly before the district court. By statute, the court may grant this relief only when it "approves the responsible social service agency's compelling reasons" that termination would not be in the best interests of the children. Minn. Stat. § 260C.201(d)(3)(i) (Supp. 2007). In my opinion, there is an overwhelming reason why this language is not viewed to support what it does not say, that the social service agency has veto power over the inherent power of the court to consider the best interests of the child. Under well-established law, both statutory and judicial, the granting of termination relief is always conditioned upon a finding that it serves the bests interests of the children. Minn. Stat. § 260C.301, subd. 1 (2006) (stating that court "may" terminate parental rights if statutory basis for doing so is proved); *see In re Welfare of M.P.*, 542 N.W.2d 71, 74-75 (Minn. App. 1996) (stating that child's best interests can preclude termination of parental rights even if one or more statutory bases for termination are proven). If the petitioner does not establish that termination serves the best interests of the children, the court necessarily anticipates and determines alternative care arrangements. And with or without the provision of section 260C.201, continued foster care, hopefully long term, is the primary alternative. At worst, the statute would limit use of the category label, "long term foster care."