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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0881**

In the Matter of the Welfare of the Children of:
S. J. Z. M and S. M. M., Parents.

**Filed December 11, 2017
Affirmed
Jesson, Judge**

Clay County District Court
File No. 14-JV-17-474

Timothy H. Dodd, Detroit Lakes, Minnesota (for appellant-father S.M.M.)

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Considered and decided by Peterson, Presiding Judge; Hooten, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

JESSON, Judge

S.M. lived with her father until she alleged he made sexual advances towards her and was removed from the home. S.M. then spent approximately a year in foster care. While working with father toward reunification, child protective services located S.M.'s mother, living in Arizona, who was willing to parent S.M. The district court granted a

petition to transfer permanent legal and physical custody of S.M. to her mother. S.M.'s father challenges the court's decision, acknowledging that S.M.'s immediate return to his custody was not in her best interest, but arguing the transfer to her mother was inappropriate as well. We affirm.

FACTS

S.M. lived with her father, the appellant in this case, and younger half-brother in Moorhead until Clay County Social Services removed both children in January 2016, when S.M. was 14 years old. The impetus for the children's removal was an allegation S.M. made, saying her father had come home intoxicated on December 31, 2015, offered her alcohol and asked her to "make love." S.M. said no to the sexual proposition and the interaction ended. Father denied all allegations.

This was not the first time S.M.'s family interacted with Clay County Child Protective Services. The county opened its first case regarding the family in 2013, when another of S.M.'s half-brothers alleged father sexually abused him. That brother was removed from the home and custody was granted to his mother, but S.M. and her other half-brother stayed with father in the home. This was against the family's former guardian ad litem's wishes, who believed all three children should have been removed. Even after the custody of the half-brother was granted to his mother, the county continued to work with the family, but closed the case in the summer of 2015.¹

¹ Throughout the 2013-2015 case, there were concerns going beyond the sexual-abuse allegations, including father's alienation of affection and his willful disruption of his sons' relationships with their mother.

The county opened this case in January 2016, after S.M. made allegations that her father sexually propositioned her and offered her alcohol. S.M. and her remaining half-brother were removed from the home. A court soon granted custody of S.M.'s half-brother to his mother.

Upon removal from the home, S.M. entered shelter care while she awaited appropriate placement in a therapeutic foster home. S.M. has a variety of behavioral and mental-health challenges including rigid thinking, outbursts, mistrust of women, aggressive mannerisms, dishonesty, hygiene issues, trouble with portion control while eating, and a diagnosis of oppositional-defiant disorder. Those challenges required a therapeutic foster home, with a specially trained provider. Eventually S.M. was placed in such a home and remained there until the trial in this case. S.M. struggled to adjust to the home at first, exhibiting her challenging behaviors, but S.M.'s foster mother worked with her and S.M. made a positive adjustment to the placement over time.

While S.M. was in both shelter care and foster care, Clay County Child Protective Services allowed for visitation with father and engaged both S.M. and father in services with the goal of eventual reunification. S.M. received individual trauma-based therapy and mental-health and medication-management services. Father also participated in individual therapy, and after working individually through therapy, father and S.M. took part in intensive, in-home family therapy that started approximately one month prior to trial. Father also underwent a parental-capacity evaluation that showed there was no real change in his mental health, that he has minimal response to mental-health treatment, and a poor prognosis for possible future improvement. The former guardian ad litem noted that

father's parenting style showed little improvement from when she first began working with the family in 2013. At trial, father conceded that S.M.'s immediate transfer back to his home would not be in S.M.'s best interest.

At the same time the county provided reunification services for S.M. and father, it explored other custody options. This included contacting S.M.'s mother, who was living in Arizona. While mother lived with S.M. and father for a time after S.M. was born, the couple's marriage dissolved and father was granted custody of S.M. Mother participated in regular parenting time up until S.M. was eight years old, when mother moved to Arizona. Mother testified that before she left, she and father had an oral agreement that S.M. would spend summers in Arizona with mother. Father disagrees that such an agreement was ever reached. The agreement was never documented, and S.M. never visited Arizona. Mother tried to set up visits but father cancelled them. Father contends he was concerned about S.M. spending time away from Minnesota, as it would disrupt her mental-health services. Mother had some phone contact with S.M., but father was always present and often disruptive, making it difficult to communicate with S.M.

Mother currently lives in Mesa, Arizona, with a younger daughter. That younger daughter is eleven years old and has special needs including a form of epilepsy and some developmental delays. She also has an Individualized Education Program at school. According to mother's testimony at trial, mother addresses these needs by getting the younger daughter to all her medical and therapeutic appointments, managing her medications, and advocating for her in school. Mother is aware that S.M. also has special needs, and while she did not demonstrate a detailed understanding of those needs at trial,

she did know that S.M. has outbursts and oppositional-defiant disorder. Mother testified that she is willing to educate herself on how to appropriately address S.M.'s needs by attending parenting classes, and to engage S.M. in any necessary services.² But while mother has looked into possible services for S.M. in Arizona, she is unable to set up any actual appointments until S.M. is in her custody.

At the time of trial, mother lived in a one-bedroom apartment. Mother testified that she is confident she can move to a larger apartment to accommodate both daughters, if granted custody of S.M. Mother works two jobs and receives Section 8 housing assistance.

While S.M. had not seen her mother since that move to Arizona, during this case mother was able to visit Minnesota multiple times and participate in in-person visitation with S.M., including at least one overnight at mother's hotel. S.M.'s foster mother testified that S.M. looked forward to and enjoyed those visits, and that she was sad when mother had to return to Arizona. When in Arizona, mother also participated in video calls with S.M.

The county worked with the Arizona Department of Children and Safety to complete an Interstate Compact on the Placement of Children (ICPC) to assess whether mother was fit to parent S.M. In order to complete the ICPC, Arizona Department of Children and Safety conducted a home study. The ICPC worker met with mother and asked her to explain her entire history from the time S.M. was born. Mother was asked to provide

² Mother has a support system in Arizona that includes her mother, aunt, cousin and friends. Mother has utilized supportive services from agencies such as the Department of Economic Security and Raising Children with Special Needs, to assist with her younger daughter and intends to continue to use those services to support her care of S.M.

the names of three people who could attest to the fact that she is a good mother. Mother complied. The ICPC worker interviewed mother's younger daughter and toured their apartment. The home study report detailed mother's experience as a parent, her discipline techniques, her financial situation, her relationship history and her current living situation. The ICPC report recommended that mother was fit to parent S.M. The report also suggested that there be transitional visits to Arizona, prior to a custody transfer.

The ICPC was valid for only six months from the date of its approval in November 2016. The county asked for, and received, a one-time, one-month extension. Following this timeline, S.M. needed to be transferred to Arizona by June 2017 or another home study would need to be completed, which would delay transfer of custody for an undetermined period of time.

Following the ICPC's recommended approval of mother as custodian, the county filed a petition to transfer permanent legal and physical custody of S.M. to mother, which father contested.

A trial followed in May 2017, where both father and mother testified, as well as the county social worker who worked with the family, a current and a former guardian ad litem³ assigned to the family, S.M.'s foster mother, the psychologist who completed father's parental evaluation, father's roommate and father's friend. The current guardian ad litem testified that she was unable to determine whether a transfer of permanent custody of S.M. to her mother in Arizona was in S.M.'s best interest, but she also noted that if there

³ The former guardian ad litem worked with the family in both the 2013 case and much of the 2016 case. That guardian was replaced by the current guardian in October 2016.

was a time to transfer S.M., this would be the best time because S.M. was just getting started in some of her therapy and services and had not yet established connections with her providers. That guardian ad litem also testified that continued reunification efforts with father were moot, since the permanency timeline had already run. In addition, the district court engaged in an in-chambers discussion with S.M. Based upon that discussion, the court determined S.M. had a strong preference for her father, and that she would likely sabotage any transitional visits to mother's home.

The court granted the county's petition, concluding that a transfer of permanent legal and physical custody of S.M. to her mother in Arizona was appropriate under Minnesota Statutes section 260C.515, subdivision 4 (2016), governing transfer of custody to a relative, and in S.M.'s best interest since mother is a "suitable custodian," and father "cannot meet [S.M.]'s needs and has little insight into her needs as they relate to her, as opposed to his own needs and how she fits in to them." In granting the petition, the court allowed for S.M. to stay in contact with father if she chooses to, leaving it to mother-and-child services in Arizona to determine the context of that communication when S.M. arrives in the state. Father appeals.

D E C I S I O N

Father challenges the district court's decision to transfer custody of S.M. to mother, because he asserts that the transfer is not in S.M.'s best interest.⁴

⁴ At no point does father challenge the suitability of mother for a transfer of custody to a relative, under the statutory requirements contained in Minnesota Statutes section 260C.515, subdivision 4. Therefore we do not address those statutory requirements here.

“[T]he best interests of the child must be the paramount consideration” in any juvenile-protection proceeding. Minn. Stat. § 260C.301, subd. 7 (2016).⁵ The best-interest analysis “consists of weighing three primary factors: the child’s interest in maintaining the parent-child relationship, the parents’ interest in maintaining the parent-child relationship, and any competing interest of the child. Competing interests include a stable environment, health considerations, and the child’s preferences.” *In re Welfare of Children of M.A.H.*, 839 N.W.2d 730, 744 (Minn. App. 2013) (citation omitted). This court reviews a “district court’s ultimate determination . . . [of] 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. 17, 2012). “A close review inquires into the sufficiency of the evidence to determine whether the evidence is clear and convincing.” *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 733 (Minn. App. 2009).

In this case, the district court concluded the transfer was in S.M.’s best interests, holding that father cannot meet S.M.’s needs, reunification with father is not an appropriate permanency option for S.M., and mother is a suitable custodian. The district court’s best-interests finding is well supported by the record.

As the district court explained, S.M. has significant mental-health and behavioral challenges. And while father expresses a desire to parent S.M. and meet S.M.’s needs, he concedes that an immediate transfer back to his custody would not be in her best interests.

⁵ This statute governs termination of parental rights proceedings, but it is the only statute cited by the district court. Because neither party contests the district court’s application of this statute, it is the termination of parental rights best interest analysis that we will apply in this case.

This concession is supported by the parental evaluator, who testified that father demonstrated minimal response to mental-health programming, and that his mental-health prognosis is poor, as well as the former guardian ad litem, who testified that she saw no sustained improvement in father's parenting style since she began working with the family in 2013. And, as the district court pointed out, while S.M. prefers to stay with father, their relationship is unhealthy: it includes role-reversal, where it is not father taking care of S.M., but S.M. taking care of father.

The district court then turned to consider mother's ability to provide for S.M.'s needs and their relationship. Mother was adequately aware of S.M.'s special needs and ready and willing to address them if granted custody of S.M. The ICPC found mother fit and proper to parent S.M. Mother knows how to access resources to assist her. She has a support system in Arizona. And mother already has a child in her care with special needs whom mother successfully supports. While the district court expressed concern that mother is "not as familiar with [S.M.]'s mental health needs" as it would have liked and "appeared overwhelmed with the ICPC and child protection processes," the court concluded that mother's openness and genuine desire to parent S.M. countered these concerns.

Further, the district court appropriately addressed the best interest factors, looking at the child's interest in maintaining the parent-child relationship, the parents' interest in maintaining the parent-child relationship, and any competing interests of the child. *M.A.H.*, 839 N.W.2d at 744. It acknowledged S.M. and father's "strong bond" and the competing interest of S.M.'s preference to stay with father. But it balanced this preference with the

unhealthy components of the relationship between S.M. and father, including the “parentification of [S.M.], [father]’s alienation of affection between [S.M.] and her mother, and manipulation and grooming of [S.M.]’s relationships.” It considered father’s interest, noting both that he engaged in services to assist with reunification but that he showed little substantive improvement in his mental health or parenting, and that father conceded he could not care for S.M. in his home at this time. Even still, the court provided an avenue to maintain S.M. and father’s relationship by ensuring the custody transfer would not end all contact between the two. S.M. will be allowed to contact father, if she chooses to, while in Arizona.

In contrast to father’s inability to care for S.M. at this time, mother both wants to care for S.M. and demonstrates an ability to do so. While prior to this action S.M. had not seen mother since she moved to Arizona in 2010, it was father who actively disrupted mother and S.M.’s relationship. S.M. and mother have since engaged in successful visitation to rebuild their relationship. As discussed, S.M.’s mother is willing and equipped to address S.M.’s mental-health needs. The district court properly considered the interests of parents and child in assessing the child’s best interest.

But father contends that the permanent transfer of custody to mother was not in S.M.’s best interest. He argues the transfer could not be in S.M.’s best interests because (1) S.M. was transferred without the transitional visits; (2) the court should have granted permanent custody of S.M. to the county instead of to mother; and (3) the current guardian ad litem could not testify that the move was in S.M.’s best interest. We address each argument in turn.

Father's primary argument is that the tight timeline for the child's move to Arizona—without transitional visits—is not in the child's best interests. While acknowledging transitional visits would be preferable, the district court, based on its in-chambers discussion with S.M., found that S.M. would likely sabotage visits because of her preference to stay with father. The court weighed that likelihood of sabotage with the ICPC's impending expiration, as well as the start of a new school year, finding a transfer without those visits appropriate. The court stated as follows:

Everyone who testified and was asked agreed that transitional visits in Arizona between [mother] and [S.M.] would be preferable to a “cold turkey” move. They also voiced concern that [S.M.] would sabotage the visits, a concern the Court shares. . . . Given the distance between Arizona and Minnesota, the current stage of the proceedings in the permanency timeline, the impending end of the school year, and the fact that placement authorization under the ICPC terminates in June 2017, transition visits are simply not realistic.

Father puts great weight on the court's separate finding that a more gradual move to Arizona would necessitate an updated ICPC, thus delaying the transfer of custody. He contends the district court prioritized ICPC deadlines over S.M.'s best interest. But the district court's decision on an immediate transfer of custody was not based merely on the ICPC timelines. Rather, it included that deadline, along with the start of a new school year and a concern over the potential of sabotaged visits, as factors it balanced to make the decision that an immediate transfer of custody was in the child's best interest. That decision is supported both by the record, and the general policy favoring prompt decisions regarding the custody of children.

Father next contends that, instead of granting a permanent custody transfer to mother, the district court should have granted permanent custody to the county, allowing S.M. to remain in long-term foster care and continue reunification efforts with father. But long-term foster care defeats the goal of permanency proceedings, which is to place a child in a *permanent* home after considerable time out of the home. *See* Minn. Stat. § 260C.505(a) (2016) (stating a permanency proceeding must be filed “at or prior to the time the child has been in foster care . . . for 11 months”).

The National Council of Juvenile and Family Court Judges describes the key principle of permanency for children as:

All children are entitled to a safe, permanent and nurturing home in order to reach their full potential as human beings. It is preferable that permanency be accomplished within a child’s own family, but if that is not possible, it should be accomplished in a family setting. From the time a child enters the child welfare system, all participants in that system and *all levels of the judicial system must strive to achieve permanency for the child.*

[2004-2011] Minn. Judges Juvenile Prot. Benchbook 5-2 (Minn. State Ct. Adm’r Office, Nov. 2011) (emphasis added). By granting custody of S.M. to mother, the district court adhered to these principles. At the time of trial, father conceded that he was unable to care for S.M. He could not provide a safe, permanent and nurturing home. Nor does long term foster care, even in the best of circumstances, provide the permanent home that all children deserve.⁶

⁶ There are additional technical barriers to transferring custody of S.M. to the agency as well, since her situation does not meet the criteria of Minnesota Statutes section 260C.515,

Finally, father argues the permanent transfer of custody to mother could not be in S.M.'s best interest because S.M.'s current guardian ad litem could not say the transfer was in S.M.'s best interest. It is accurate that the current guardian ad litem, when asked about whether a transfer of custody to mother would be in S.M.'s best interest, was unable to say that it was. The guardian ad litem instead called the decision a "tough one" and the court in its findings noted that the guardian did not believe "continuing reunification efforts with [father] are a good idea either, given the permanency timeline." And the guardian ad litem noted that if the court was going to cause a disruption in S.M.'s life, now would be the time to do it since she is still in the early stages of her therapy. The court noted the guardian ad litem's multifaceted opinion in its findings and appropriately factored it into the decision that a transfer to mother remained in S.M.'s best interest.

As the guardian ad litem testified, the decision to move S.M. to Arizona, far from her longtime home and without transitional visits, is a "tough one." But the district court, after hearing from numerous witnesses, addressed this dilemma in a nuanced, thoughtful manner, focused on the child's best interest. "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." *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). And we are further mindful that a natural parent is presumptively a "fit and suitable person to be

subdivision 5 (2016), which govern such transfers. First, the statute requires that a child is at least 16 years old, and S.M. was only 15 years old at the time of trial. *See* Minn. Stat. § 260C.515, subd. 5(1) (a court may order permanent custody to the responsible social service agency if "the child has reached age 16"). Second, a permanent transfer of custody to the agency requires that a social service agency's attempts to place S.M. with a fit and willing relative have failed. Minn. Stat. § 260C.515, subd. 5(2).

entrusted with the care of his or her child.” *In re Welfare of A.D.*, 535 N.W.2d 643, 647 (Minn. 1995). The district court’s determination that mother is a suitable custodian and that immediate transfer to her care in Arizona is in S.M.’s best interest is supported by clear and convincing evidence in the record. It is not an abuse of discretion. We affirm the decision to transfer permanent legal and physical custody of S.M. to mother.

Affirmed.