STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0788

In the Matter of the Welfare of the Child of: G. G., Parent

Filed November 5, 2018
Affirmed; motion denied
Connolly, Judge

Ramsey County District Court
File No. 62-JV-17-2233

Joanna Woolman, Scott Ducharme (certified student attorney), Child Protection Clinic, St. Paul, Minnesota (for appellant mother G.G.)

Jason DePauw, Robins Kaplan, LLP, Minneapolis, Minnesota (for respondent child D.T.)

Kelly Rogosheske, Rogosheske Lawton PC, St. Paul, Minnesota (for respondent father)

John J. Choi, Ramsey County Attorney, Janice K. Barker, Stephanie Wiersma, Jenese Larmouth (Assistant County Attorneys), St. Paul, Minnesota (for respondent Ramsey County Social Services)

Holli Thoemke, St. Paul, Minnesota (guardian ad litem)

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

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

CONNOLLY, Judge

Appellant challenges the district court's order transferring permanent sole legal and physical custody of her child to respondent father, arguing that the district court abused its

discretion when it excluded relevant evidence and the exclusion of that evidence was prejudicial, warranting a new trial. Appellant also argues that the district court abused its discretion when it denied her motion to modify an order for protection (OFP), because the district court based its decision on evidence preservation for her criminal trial. Because any evidentiary error the district court may have committed was not prejudicial, and because the district court did not abuse its discretion in denying appellant's motion to vacate or modify the OFP, we affirm.

FACTS

In September 2016, appellant mother G.G. and her then fiancé L.J. beat appellant's son D.T., who was almost seven years old, with a belt. Respondent father discovered significant bruising on D.T.'s legs and bottom and contacted the authorities. It was later discovered that this was not the first time appellant had beat D.T. with a belt, and that appellant started hitting D.T. with a belt when he was four years old.

An ex parte emergency order for protection was issued, authorizing the Ramsey County Social Services Department (RCSSD) to place D.T. in his father's care. A Child in Need of Protection or Services (CHIPS) petition was filed and appellant admitted to the allegations in the amended petition. D.T. was adjudicated a CHIPS. During and after the CHIPS proceeding, the RCSSD developed and updated case plans for appellant that included a parenting assessment, weekly parenting education, individual therapy, and domestic violence counseling.

Appellant and L.J. were criminally charged for the harm inflicted on D.T. Appellant was charged with gross misdemeanor malicious punishment of a child but her case was

eventually dismissed. D.T. testified at L.J.'s trial and indicated that he did not want to see L.J. again or let L.J. know that he was afraid of him.

Prior to the CHIPS proceeding, respondent father petitioned the court for an OFP on behalf of D.T. against appellant. The OFP was granted after a hearing. The OFP granted appellant one supervised visit with D.T. per week. The OFP was amended to allow appellant supervised parenting time subject to the discretion of the RCSSD.

The RCSSD subsequently filed a petition to transfer permanent sole legal and physical custody of D.T. to respondent father. The petition was tried on December 15 and 19, 2017, and February 8, 2018. The district court concluded that from August 2017 through the end of the trial, appellant made minimal progress in individual therapy and toward addressing her domestic-violence issues. The court, however, found that she had begun to take some preliminary steps on the case plan services.

At trial, D.T.'s therapist testified that D.T. has post-traumatic stress disorder (PTSD) due to the harm he suffered. The therapist testified that D.T. was making minimal progress and needed additional therapy. Appellant testified that she accepted D.T.'s PTSD diagnosis, but did not see the child exhibit any PTSD symptoms. The district court also heard testimony from respondent father and the guardian ad litem, among others.

Appellant testified that she did not always punish D.T. for acting out by beating him with a belt. She stated that other punishments included not letting him watch T.V. or do fun activities, and making him do push-ups and stand with his nose in the corner for 20 or 30 minutes. Appellant further stated that she and L.J. would discuss in advance how they planned to punish D.T. when he acted out. Appellant claimed that while she had hit D.T.

with a belt in the past, she had never seen bruises as a result, prior to the report underlying the case. The district court did not find this testimony credible because appellant admitted to planning and participating in the beatings.

Appellant wanted the district court to hear testimony from D.T. However, D.T.'s attorney brought a motion in limine to exclude him as a witness. That motion was joined by the guardian ad litem, respondent father, and the RCSSD. Appellant protested the court's exclusion of D.T.'s testimony. The district court also prohibited appellant from testifying about delays associated with her criminal trial on relevancy grounds.

The court found that over the duration of the case, appellant's insight into the damages she inflicted, in some respects, improved. The court emphasized that appellant, as a result of her parenting education, now understands the traumatic effects of physical beatings and was able to outline alternatives to physical punishment. The court, however, found that appellant "has not yet had the opportunity to put insight into practice and, more importantly, [she] has not engaged in the significant and difficult work of learning how to address the beating with [D.T.] and how to reengage with him as a child who was traumatized at her hand." The district court found that it was not in D.T.'s best interest to return to appellant's care at that time, and transferred custody to respondent father.

Appellant also moved to vacate or modify the OFP, and arguments were heard regarding the motion at the transfer of custody trial. The district court issued an order denying the request to vacate or modify. Appellant moved for a new trial, which was denied. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred in excluding D.T.'s testimony because it did not have discretion to do so under Minn. Stat. § 260C. 163 subd. 6 (2016), because D.T. was credible, and because his testimony was relevant. Appellant additionally argues that the district court abused its discretion by prohibiting her from discussing the circumstances surrounding the delays in her criminal trial, and by denying her motion to modify the existing OFP in order to preserve D.T.'s potential testimony for her criminal trial.

Child Testimony

Appellant argues that the district court erroneously relied on Minn. Stat. § 260C.163, subds. 6, 7 (2016) to exclude the testimony of D.T. Minn. Stat. § 260C.163, subd. 1(b) establishes certain procedures for "hearings involving a child alleged to be in need of protection." In relevant part, subdivision 6 provides that "the court may, on its own motion or the motion of any party, take the testimony of a child witness informally when it is in the child's best interests to do so." In addition, subdivision 7 provides that "[t]he court may waive the presence of the minor in court at any stage of the proceedings when it is in the best interests of the minor to do so." Appellant contends that the provisions, when read together, clearly indicate that the legislature allows courts to waive the presence of a minor in court, but that it cannot exclude the testimony altogether. Thus, when it is not in the child's best interest to testify in open court, the legislature has provided another option: informal testimony. *See Id.*, subd. 6.

Respondents disagree with appellant's characterization of the statute. They argue that informal testimony under subdivision 6 is permissive and subject to a best-interest-of-the-child analysis. Respondents argue that it is clear that a child can be excluded from testifying altogether because subdivision 7 gives the district court the ability to waive the presence of a minor in court at any stage of the proceeding when it is in the best interest of the child to do so.

We need not determine whether Minn. Stat. § 260C.163, subd. 6-7, prohibits a court from excluding a child from testifying because even if appellant should have been allowed to call D.T. as a witness, the district court's decision to exclude him was not prejudicial error.[1] *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46, 51 (Minn. App. 1998) ("An evidentiary error is prejudicial if the error might reasonably have changed the result of the trial."). An error is not prejudicial if the record contains other evidence that is sufficient to support the findings. *Id.* Here, appellant indicated that D.T. would have testified regarding his love for her and the pain he feels when he is not with her. However, D.T.'s interests and position did not go unrepresented at the hearing. D.T. was represented by counsel and had a guardian ad litem appointed on his behalf. The guardian ad litem spoke about the bond D.T. had with appellant and agreed that D.T. "frequently cries

[1] Although we do not address this issue, we note that appellant's argument is persuasive. Minn. Stat. § 260C.163 does not include any language indicating that a court has discretion to exclude a minor child's testimony based on a best-interest analysis. In addition, there is no doubt that prohibiting a minor child from testifying may affect the substantive rights of a parent and the child. Consequently, we express grave concern with any such exclusions in the future, particularly when the legislature authorized a method to allow the district court to take a child's testimony informally.

because he misses his mother." The district court acknowledged the guardian ad litem's statements and found that D.T. had a desire to spend more time with appellant.

The district court, however, did not order the transfer of custody based on D.T.'s desires or preferences. On the contrary, the district court granted the order because it found that D.T. had suffered physical abuse at the hands of appellant and that he continues to suffer emotional pain in the form of PTSD. The district court determined that appellant failed to show improvements regarding how her insights into the harm she inflicted on D.T. affected his well-being. The district court found that D.T. needed stability so that he could progress in therapy and, over the long term, address his PTSD. It found that he could better achieve these results with respondent father, and that it would not be in the child's best interest to return to appellant's care.

Appellant has failed to demonstrate that D.T.'s informal testimony would have affected the district court's decision in this case. Consequently, even if it was error to exclude the testimony, the error was not prejudicial and does not warrant a new trial.

Appellant's Testimony

Appellant challenges the district court's decision to exclude testimony about the reasons why her criminal trial was delayed. The decision whether to admit or exclude evidence is discretionary with the district court. *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 172 (Minn. App. 2005). A new trial may be granted on the basis of an improper evidentiary ruling only if the complaining party demonstrates prejudicial error. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997).

Appellant argues that the testimony about the delays in her trial was relevant and its exclusion was prejudicial. She argues that such testimony would have allowed her to show that some services in the case plan could not have begun until after the criminal case had been resolved. Appellant, however, mischaracterizes the district court's evidentiary determination. The district court ruled that "if [appellant] was hindered by some aspect of the criminal case from doing things, X or Y, we can get into that." The district court, however, found that "[appellant's] perception of why her trial lasted where it is" did not make any fact more or less likely. Thus, the court distinguished between questions that involved the length of her trial and testimony regarding case plan services that could not be completed until after trial.

Appellant also argues that the inclusion of testimony about the criminal trial's length was relevant to refute disparaging remarks in the record suggesting that appellant intentionally delayed her trial. Appellant's brief does not provide a citation to the record identifying disparaging remarks.[2] But even if there were such disparaging remarks, the exclusion of appellant's testimony in response, even if relevant, was not prejudicial because the district court did not base its custody decision on delays in appellant's criminal trial.

Order for Protection

Appellant challenges the district court's decision to deny her motion to vacate or modify the OFP to allow her unsupervised visits with D.T. The decision to grant an OFP

[2] Appellant does reference respondent's frustration with the delays in her criminal trial at a pretrial scheduling conference.

under Minn. Stat. § 518B.01 (2016), is within the district court's discretion, *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005), "so we will not reverse absent an abuse of that discretion." *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 926-27 (Minn. App. 2006).

Appellant argues that the district court abused its discretion because it upheld the OFP to preserve D.T.'s potential testimony for appellant's criminal trial. We do not read the district court's order in that way. Although the first part of the order acknowledges the district court's concern with tainting D.T.'s potential testimony at L.J.'s and appellant's criminal trial, the district court acknowledged in its order, that L.J.'s case had been resolved and it referenced an email from the Ramsey County Attorney's office stating it had "no concerns about any effect that an amendment to the OFP . . . might have on" appellant's criminal case.

We also note that the district court expressed concern regarding appellant's "lack of insight into the substantial emotional harm caused by the repeated abuse." Although the district court did indicate appellant demonstrated "some insight gained," it went on to state that "[w]hat is absent . . . is recognition or insight into how the past abuse has emotionally harmed [D.T.]." The district court further stated that "unsupervised contact with [D.T.] that minimizes the harm and pretends all can be left buried in the past is not in [D.T.'s] best interests."

The district court, additionally, did not mention the criminal proceedings in the concluding paragraph where it denied the modification request. And, it authorized appellant leave to file a similar motion accompanied by an assessment "from [D.T.'s]

therapist and/or the family therapist as to [D.T.'s] best interests including that appellant has gained significant insight into the emotional harm caused by past abuse and how to address that harm." In sum, the paragraph of the district court's order that denies appellant's motion to modify rebuts appellant's assertion that the district court based its decision on evidence preservation and not on D.T.'s best interest.

The district court did not abuse its discretion in denying the motion to modify. Appellant does not challenge the district court's findings regarding its determination that appellant lacked insight into the effect of past abuse on D.T. As appellant does not challenge that issue, it is waived. *See State v. Grecinger*, 569 N.W.2d 189, 193 n.8 (Minn. 1997) ("[I]ssues not argued in briefs are deemed waived on appeal.").

Respondent also filed a motion to strike portions of appellant's brief that rely on certain transcripts from the CHIPS proceedings. We deny the motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying the motion to strike as moot when the court did not rely on the challenged materials).

Affirmed; motion denied.