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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0785

In re the Matter of the Welfare of the Children of:
A. B. and M. J. B., Parents.

Filed November 4, 2019
Affirmed
Johnson, Judge

Brown County District Court
File No. 08-JV-18-145

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant father M.J.B.)

Elizabeth Weinandt, Mankato, Minnesota (for respondent mother A.B.)

Charles W. Hanson, Brown County Attorney, Jill M. Jensen, Assistant County Attorney, New Ulm, Minnesota (for respondent Brown County Human Services)

Shiree Oliver, New Ulm, Minnesota (guardian *ad litem*)

Considered and decided by Cochran, Presiding Judge; Johnson, Judge; and Hooten, Judge.

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

JOHNSON, Judge

Police officers received a report that a 48-year-old man sent a note to a 10-year-old girl in which he encouraged her to meet him at an inconspicuous location at midnight. In a subsequent investigation, police officers found six nude photographs of the man's young daughter on his home computer. The county petitioned the district court for a

determination that the man's five children are in need of protection or services. After an evidentiary hearing, the district court so found. On appeal, the man argues that the district court's findings are inadequate to allow appellate review, that the district court erred by finding that all of the children are in need of protection or services, and that the district court did not make a proper finding concerning the children's best interests and safety. We conclude that the district court did not err and, therefore, affirm.

FACTS

M.J.B. and A.B. are the father and mother, respectively, of five children who are the subject of a petition alleging that the children are in need of protection or services. In December 2017, the Springfield Police Department began investigating M.J.B.'s interactions with a female friend of his eldest daughter. M.J.B. used his daughter to deliver a note to her friend in which he expressed his love for the friend and encouraged her to meet him at midnight at an inconspicuous location near railroad tracks. At the time, both girls were ten years old. While the criminal investigation was ongoing, M.J.B. sent several e-mail messages to an employee of the Brown County Human Services office in which he expressed his love for his daughter's friend and his belief that God intended them to be married someday.

The next month, police officers obtained a warrant to search M.J.B.'s residence and automobile. In the search, officers seized several electronic devices, including a Mac Mini computer and a children's tablet computer known as a LeapPad. The Bureau of Criminal Apprehension (BCA) extracted a large amount of digital data from the electronic devices, including 90 photographs of children in various states of undress, and provided the data to

the Springfield Police Department. The photographs include six images of M.J.B.'s eldest daughter, fully nude in what police officers described as sexually explicit poses. M.J.B. claimed that he was unaware of the nude photographs of his daughter on the computer but admitted that he managed the computer and determined who could use it.

In December 2018, the state charged M.J.B. in Brown County with six counts of using a minor in a sexual performance or pornographic work, in violation of Minn. Stat. § 617.246, subd. 2, and six counts of possessing pornographic work involving a minor, in violation of Minn. Stat. § 617.247, subd. 4(a).

That same month, the county filed a petition in which it alleged that M.J.B.'s five children are in need of protection or services. *See* Minn. Stat. § 260C.007, subd. 6(2), (8), (9) (2018). At an emergency protective-care hearing, the children were placed in A.B.'s custody, and M.J.B. was prohibited from having any contact with them.

The district court conducted an evidentiary hearing on the CHIPS petition in April 2019. A county caseworker expressed concern about further contact between the children and M.J.B. based on her belief that the children are vulnerable and that M.J.B. has a history of manipulating vulnerable persons. That concern was shared by the guardian *ad litem*, who recommended that M.J.B. not have unsupervised contact with the children. A BCA forensic examiner testified that the nude photographs recovered from the Mac Mini likely were created in 2014 using a LeapPad. A police officer testified that he reviewed the photographs and that six of them depicted M.J.B.'s eldest daughter completely nude in various positions with her vagina, anus, and breasts visible. Another officer, who had investigated M.J.B.'s note to his daughter's friend, testified that M.J.B.'s conduct created

"a major concern for [the] children's safety." A.B. denied taking the nude photographs of her daughter and did not believe that any of the other children took them. She testified that M.J.B. was the only person in the household who knew how to transfer photographs to the Mac Mini. She agreed with the county that the children should be found to be in need of protection or services.

M.J.B. testified and denied taking the nude photographs of his daughter or knowing who took them. He also denied reviewing the nude photographs but admitted that he managed most of the electronic devices in the house and that the children would need his help to connect the LeapPad to the Mac Mini. M.J.B. also testified about his daughter's friend, saying that it was his intention to adopt her and later marry her. He admitted that, on one occasion when his daughter's friend was at his house for a sleepover, he woke the friend by tickling her and led her to his home office, where he told her that it was God's plan for them to be married in the future.

The district court filed a 13-page order in which it determined that the county had established, by clear and convincing evidence, that M.J.B. had abused the oldest child and that all five of the children have resided with both a victim and a perpetrator of child abuse. As a consequence, the district court concluded that all five children are in need of protection or services. M.J.B. appeals.

D E C I S I O N

M.J.B. argues that, for three reasons, the district court erred in concluding that his children are in need of protection or services.

I. Adequacy of Findings

M.J.B. argues that the district court erred by making inadequate findings of fact that preclude effective appellate review. Specifically, he argues that the district court's findings simply recite the evidence, do not explain credibility determinations, and are conclusory, vague, and formulaic. He relies on this court's opinion in *In re Civil Commitment of Spicer*, 853 N.W.2d 803 (Minn. App. 2014), in which we concluded that a district court's findings of fact were inadequate because they merely recited the evidence, were conclusory, and were not tied to the conclusions of law. *See id.* at 810-11.

Our review of the district court's order reveals that the district court's findings of fact are not inadequate. After appropriately summarizing the procedural history of the case and the evidence presented, the district court made particular factual findings on issues that are essential to its legal conclusion that the children are in need of protection or services. The district court at times recited the testimony of particular witnesses but only as a preface to an express finding that the witness's testimony is credible. The findings are not conclusory, vague, or formulaic. On the contrary, the findings typically are specific and tailored to the particular facts of the case. Thus, the district court did not make inadequate findings of fact.

II. Need for Protection or Services

M.J.B. also argues that the district court erred by concluding that his children are in need of protection or services.

A child is in need of protection or services if one or more of 19 statutory grounds is found to exist. Minn. Stat. § 260C.007, subd. 6 (2018). In its order, the district court relied

primarily on the second statutory ground, which provides that a child is in need of protection or services if the child

> (i) has been a victim of physical or sexual abuse as defined in section 626.556, subdivision 2, (ii) resides with or has resided with a victim of child abuse as defined in subdivision 5 or domestic child abuse as defined in subdivision 13, (iii) resides with or would reside with a perpetrator of domestic child abuse as defined in subdivision 13 or child abuse as defined in subdivision 5 or 13, or (iv) is a victim of emotional maltreatment as defined in subdivision 15.

Id., subd. 6(2). In finding that all five children are in need of protection or services, the district court focused on the second and third clauses of subdivision 6(2).

Both the second clause and the third clause refers to "child abuse" and "domestic child abuse." *Id.*, subd. 6(2)(ii), (iii). The term "child abuse" is defined by statute to include "an act that involves a minor victim that constitutes a violation of section 609.221, 609.222, 609.223, 609.224, 609.2242, 609.322, 609.324, 609.342, 609.343, 609.344, 609.345, 609.377, 609.378, 617.246." *Id.*, subd. 5. Similarly, the term "domestic child abuse" is defined by statute to include "subjection of a minor family or household member by an adult family or household member to any act which constitutes a violation of sections 609.321 to 609.324, 609.342, 609.343, 609.344, 609.345, or 617.246." *Id.*, subd. 13(2).

Both the definition of "child abuse" and the definition of "domestic child abuse" refer to section 617.246, which provides, in pertinent part: "It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage minors in posing or modeling alone or with others in any sexual performance or pornographic work if the person knows or has reason to know that the conduct intended is a sexual performance

or a pornographic work." Minn. Stat. § 617.246, subd. 2(a) (2018); 2019 Minn. Laws 1st Spec. Sess. ch. 5, § 12, at 993. A different subdivision within section 617.246 defines "pornographic work" to mean:

> (1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor; or
>
> (2) any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that:
>
> > (i) uses a minor to depict actual or simulated sexual conduct;
> >
> > (ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or
> >
> > (iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.

Id., subd. 1(f). Another provision in section 617.246 defines "sexual conduct" to mean:

> (1) an act of sexual intercourse, normal or perverted, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal;
>
> (2) sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed;
>
> (3) masturbation;
>
> (4) lewd exhibitions of the genitals; or

> (5) physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

Id., subd. 1(e).

The district court found that six of the photographs saved to M.J.B.'s Mac Mini showed his eldest daughter "fully nude in various sexually explicit poses, exposing her anus, vagina, and breasts." The district court described the six photographs as follows:

> The photographs of Child 1 include one of her naked on the ground with her feet and hands above her head, showing her anus and vagina. There is a close-up of a vagina and anus and a photograph of Child 1's torso, including her breast and vaginal area. The angles of the photographs suggest they were taken by an adult, not one of the other children or Child 1 herself.

The district court found that there is clear and convincing evidence that, in 2014, M.J.B. "took the photographs of Child 1 and kept them on his computer." The district court concluded that the county "proved by clear and convincing evidence that all five (5) of the children reside with or have resided with" both "a victim of domestic child abuse" and "a perpetrator of domestic child abuse." Implicit in the district court's reasoning are findings that that the six photographs are "pornographic works," *see* Minn. Stat. § 617.246, subd. 1(f)(2)(i); that M.J.B. engaged in child abuse by "an act that involves a minor victim that constitutes a violation of section . . . 617.246," *see* Minn. Stat. § 260C.007, subd. 5; and that M.J.B. engaged in domestic child abuse by the "subjection of a minor family or

household member . . . to any act which constitutes a violation of section[] . . . 617.246," *see id.*, subd. 13(2).

M.J.B. challenges the district court's findings and conclusions on three grounds.

A.

M.J.B. contends that the district court erred by finding that he took the six photographs and intentionally retained them on his computer. This court applies a clear-error standard of review to a district court's findings of fact in a CHIPS proceeding. *In re Welfare of S.R.K.*, 911 N.W.2d 821, 830 (Minn. 2018); *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

In challenging the district court's finding that he created and possessed the six nude photographs, M.J.B. emphasizes his own testimony that he does not know who took the photographs or how they were saved to his computer. M.J.B. contends that the county did not introduce any direct evidence that M.J.B. took the photographs and that the district court drew unwarranted inferences. He also notes that another one of his children, a boy, stated in an interview that he used the LeapPad to take nude photographs of a friend, who also is a boy.

The district court's findings resolve conflicts and uncertainties in the evidence. A BCA analyst testified that the six photographs were created using a LeapPad. A LeapPad was found in M.J.B.'s vehicle. M.J.B. testified that the children could not have connected the LeapPad to the Mac Mini. He also told a police officer that the Mac Mini was password-protected and that he manages the device and deletes inappropriate photographs taken by his children. The district court considered all of this evidence and determined that

M.J.B. "is the only person remaining who could have transferred the photographs" from the LeapPad to the Mini Mac. This finding is not an unreasonable inference from the evidence in the record. A district court is vested with authority to consider the credibility of witnesses, and it is apparent that the district court did not credit M.J.B.'s testimony. *See S.R.K.*, 911 N.W.2d at 831.

In light of the applicable evidentiary standard in the district court and the deferential standard of review in this court, the district court did not clearly err in its finding that M.J.B. took the six nude photographs and kept them on the Mac Mini computer.

B.

M.J.B. contends that he did not engage in child abuse or domestic child abuse on the ground that none of the six photographs on his home computer is a "pornographic work." M.J.B. does not elaborate on the reasons why the six photographs are not within the statutory definition of pornographic work. In response, the county contends that the six photographs satisfy the statutory definition of "pornographic work" because that definition includes the term "sexual conduct," which is defined by statute to include a "lewd exhibitions of the genitals." *Id.*, subd. 1(e)(4).

This court previously has considered the meaning of the word "lewd" in the context of a municipal ordinance regulating nude bar-room dancing. In *State v. Botsford*, 630 N.W.2d 11 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001), we consulted dictionaries, which defined the word to mean "obscene." *Id.* at 17 (quoting *Black's Law Dictionary* 886 (7th ed. 1999), and *The American Heritage Dictionary of the English Language* 1016 (3d ed. 1992)). We in turn defined the word "obscene" according to its

"particular judicial meaning," as reflected in the caselaw of the United States Supreme Court. *Id.* Specifically, we stated that obscene works are those "'which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.'" *Id.* (quoting *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 2615 (1973)).

The district court's description of the six photographs at issue is based, at least in part, on the testimony of a police officer as well as the district court's own review of the six photographs. This court also has reviewed the six photographs with the above-described legal standard in mind. At least two of the six photographs may be considered "lewd." They are close-up photographs of a young girl's vagina and anus while her legs are spread wide. The evidence is sufficient to support a finding, based on a clear-and-convincing evidentiary standard, that these two photographs "appeal to a prurient interest in sex," are "patently offensive," and "do not have serious literary, artistic, political, or scientific value." *See id.* (quotations omitted). This conclusion is consistent with an opinion of this court in which we considered similar conduct and the same statute. *See State v. Levie*, 695 N.W.2d 619, 626-28 (Minn. App. 2005) (affirming conviction under section 617.246 based on evidence that defendant took nude photographs of minor, including photograph of her vagina). There is no indication that M.J.B.'s daughter, who was approximately seven years old at the time the photographs were taken, understood or intended the exhibition to be lewd, but her state of mind is immaterial. *See State v. Borden*, 455 N.W.2d 482, 485 (Minn. App. 1990), *review denied* (Minn. July 13, 1990).

Thus, the district court did not clearly err in its implicit finding that the county proved by clear and convincing evidence that at least two of the photographs on M.J.B.'s home computer are pornographic and, consequently, that he engaged in child abuse and domestic child abuse of his oldest child. In light of that premise, the district court did not err by finding that all five of the children reside with both a victim and a perpetrator of child abuse and domestic child abuse.

C.

M.J.B. contends that the district court erred by concluding that all five children are in need of protection or services based solely on a finding of abuse of only one child. He contends that the district court is required to find that each child actually is in need of protection or services. For this contention, he cites this court's opinion in *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723 (Minn. App. 2009), in which we affirmed the dismissal of a CHIPS petition on the ground that a mother's history of child-abuse and mental-health issues were insufficient bases for declaring her child in need of protection or services. *Id.* at 734-35.

M.J.B. is correct that, in light of *S.S.W.*, a petitioner must prove one of the statutory grounds for a CHIPS determination and, in addition, that "the child needs protection or services as a result" of the facts that satisfy the statutory ground. *Id.* at 732. But the result in *S.S.W.* was due in significant part to the atypical facts of that case. The mother's mental-health and child-abuse issues predated the child's birth. *Id.* at 726. The district court found that the child was doing well in the mother's care, and the guardian *ad litem* testified that the child was not in need of protection or services. *Id*. at 726, 734-35. The district court

found that the county had proved the statutory ground alleged in the petition but nonetheless determined that the child was *not* in need of protection or services. *Id.* at 726. This court applied a deferential standard of review and affirmed. *Id.* at 733.

In this case, however, the evidentiary record is different. A county caseworker testified that M.J.B. is inclined to exploit vulnerable persons and that all five of his children are vulnerable. M.J.B. used one of his children to facilitate contact with a ten-year-old female friend of his child. A police officer who investigated M.J.B.'s conduct toward his daughter's friend testified that M.J.B.'s conduct created "a major concern for [his] children's safety." This evidence is sufficient to support a finding that each of M.J.B.'s children is in need of protection or services.

Thus, the district court did not clearly err by finding that all five of M.J.B.'s children are in need of protection or services.

III. Best Interests and Safety

M.J.B. last argues that the district court erred by not making a particularized finding concerning the best interests and safety of the children.

After an evidentiary hearing on a CHIPS petition, the district court is required to set forth in writing "why the best interests and safety of the child are served by the disposition and case plan ordered." Minn. Stat. § 260C.201, subd. 2(a)(1) (2018); 2019 Minn. Laws 1st Spec. Sess. ch 9, § 28, at 1260-61. M.J.B. contends that the district court did not comply with that statute because the district court made only a single, conclusory finding pertaining to the best interests of the children. Paragraph 46 of the order states, "It is in the best interests of the children that father have no contact with them pending further order of the

Court." The following paragraph states, "There is no alternative other than the disposition set forth below that will keep the children safe." The findings in paragraphs 46 and 47 are not, in themselves, detailed or extensive. But they follow 45 other findings, which collectively explain why the best interests and safety of the children are served by a determination that the children are in need of protection or services. For example, the district court found that M.J.B. "is attracted to young, vulnerable females" and had engaged in predatory grooming behavior. The district court also credited testimony that M.J.B.'s children could be harmed by living with him. Considered in context, the district court's findings specifically relating to the best interests and safety of the children adequately explain why those principles "are served by the disposition and case plan ordered." *See* Minn. Stat. § 260C.201, subd. 2(a)(1).

M.J.B. also contends that the district court's findings concerning best interests and safety are inadequate on the ground that they omit any discussion of three particular factors that, he asserts, are relevant to the children's best interests. M.J.B. cites this court's opinion in *In re Welfare of Children of M.A.H.*, 839 N.W.2d 730 (Minn. App. 2013), in which we performed a three-factor best-interests analysis in a termination-of-parental-rights (TPR) case. *Id.* at 744. In response, the county contends that the three factors discussed in *M.A.H.* apply in TPR cases but not in CHIPS cases. The county is correct. The three best-interests factors identified in *M.A.H.* are required only in TPR cases. *See* Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(3) (effective July 1, 2015) (current version at Minn. R. Juv. Prot. P. 58.04(c)(2)(ii) (effective Sept. 1, 2019)).

Thus, the district court did not err in its findings concerning the best interests and safety of the children.

In sum, the district court did not err by determining that all of M.J.B.'s children are children in need of protection or services.

Affirmed.