STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1623

In the Matter of the Welfare of the Children of:

B. M. S., T. J. R. T., and D. A. M., Parents.

Filed June 21, 2021
Affirmed
Jesson, Judge

McLeod County District Court
File No. 43-JV-20-81

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Victoria Herr, Minneapolis, Minnesota (for respondent D.A.M.)

Jeff S. Jones, Pawhuska, Oklahoma (for respondent Osage Nation of Oklahoma)

Erica Mendez, Chaska, Minnesota (guardian ad litem)

Considered and decided by Smith, Tracy M., Presiding Judge; Jesson, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Appellant mother challenges the district court's termination of her parental rights to her younger child and the transfer of permanent legal and physical custody of her older

child. Because mother's substantive and procedural due-process rights were not violated by any deficiencies in the case plan and the county made active efforts to reunite mother with her older child, we affirm.

FACTS

Appellant B.M.S. (mother) and her two children came to the attention of McLeod County Social Services (the county) after law enforcement reported finding methamphetamine and hair detoxifying shampoo in mother's apartment during the execution of a search warrant. Law enforcement placed a 72-hour hold on the children and the county filed a child in need of protection or other services (CHIPS) petition for the children.[1] This was not the first time the county had intervened. The county had filed CHIPS petitions on two prior occasions—the first after the children's hair follicle tests came back positive for methamphetamine and the second after mother was involved in a physical altercation.

Upon filing the third CHIPS petition and placing the children in foster care, the county attempted to find and establish contact with mother. But the task proved difficult, as she refused to disclose her location. It was not until she entered an inpatient chemical treatment facility—several weeks later—that the county knew mother's whereabouts. Without that information, the county had been unable to serve her with the CHIPS petition or work with her to create a case plan to identify a potential path towards reunification.

[1] The children were not in the apartment at the time of the search, but were later found in the care of their grandparents.

Shortly thereafter, the county petitioned for the termination of mother's—and the children's respective fathers'—parental rights.

While trying to locate mother, the county contacted the Osage Nation. Because child 1's paternal grandfather is a member of the Osage Nation, child 1 is eligible for enrollment in the Tribe. As a result, child 1 is an "Indian child" as defined by the Indian Child Welfare Act (ICWA) and its state counterpart, the Minnesota Indian Family Preservation Act (MIFPA).[2] The county was therefore required to—and did—notify the Tribe of the proceedings.[3] A tribal representative appeared by phone at three hearings early in the case, but did not attend later hearings.[4] Nevertheless, the district court continued to reach out to the tribal representative before each hearing.

Over the next four months, mother successfully completed her inpatient treatment program and moved into a sober living house, where she continued outpatient treatment and received therapy for her mental health concerns. Despite mother's progress, the county still supported the termination of her parental rights as to child 2. But because child 1's father had made substantial progress on his own case plan, the county amended its original petition to terminate his and mother's parental rights to child 1. Instead of terminating mother's parental rights to child 1, the county petitioned the court for the transfer of permanent legal and physical custody of child 1 to his father.

[2] 25 U.S.C. § 1903(4) (2020); Minn. Stat. § 260.755, subd. 8 (2020).
[3] 25 U.S.C. § 1912(a) (2020); Minn. Stat. § 260.761, subd. 2 (2020).
[4] The Osage Nation also submitted an affidavit supporting the transfer of custody of child 1.

At trial, the district court received testimony from mother, social workers, the guardian ad litem, and others involved in the case. Particularly relevant to this appeal is the testimony from one of the social workers and mother about the case plans and the county's efforts to support reunification. The social worker testified to creating the initial case plan without input from mother. After doing so, the social worker mailed a copy to the treatment facility and delivered a copy to mother's attorney. When the mailed copy was returned undelivered, the social worker faxed the plan to the facility. Then, to ensure that mother understood the terms of the case plan, the social worker and mother reviewed the plan by phone. The social worker attested to reading each line of the case plan, including the county's directives that mother remain sober, complete an inpatient treatment program, honestly acknowledge her chemical use, and avoid contact with drug users. According to the social worker, although mother failed to sign the initial plan, she signed all subsequent case plans.

The social worker also identified the county's active efforts made in support of reunification, which included providing supervised and unsupervised visits with the children, referring the children to therapy, and offering mother assistance obtaining inpatient and outpatient treatment. But mother refused the county's assistance in obtaining most of her treatment and instead sought admission to an inpatient treatment facility on her own. And despite mother's requests, the county did not approve overnight, weekend, or trial home visits because of concerns over mother's admitted relapse while living at the sober house, ongoing sexual abuse allegations regarding mother's ex-boyfriend and

child 2, and mother's failure to tell the county that she ran into a different ex-boyfriend who uses drugs.

In her testimony, mother disputed most of the social worker's statements, telling the court that she was "left in the dark" about what the county expected of her to have her children returned to her care. But mother also testified that she understood the terms of the case plan, did not disagree with them, and was in full compliance with the plan. Nor did she contest having signed all but the first of her case plans. Additionally, mother acknowledged that while treatment had so far been successful, she had "a long road ahead of [her] yet." And despite mother's testimony that the county did not help her get into a treatment facility, she did not identify how the county failed to provide adequate services or make active efforts at reunification.

Furthermore, although the Osage Nation did not appear at the hearing, the Tribe submitted an affidavit from its qualified expert witness.[5] The affidavit stated that the Tribe had been notified of the proceedings, agreed that child 1 was in need of continued protective services and permanency, and supported the transfer of custody of child 1 to his father, who had recently become a member of the Osage Nation.

[5] A qualified expert witness is a person with specific knowledge of the Indian child's tribe's culture and customs who provides testimony regarding the out-of-home placement or termination of parental rights relating to an Indian child. Minn. Stat. § 260.755, subd. 17a (2020). An individual's parental rights to an Indian child may not be terminated without testimony from a qualified expert witness that the parent's continued custody of the child is likely to result in serious emotional or physical damage. 25 U.S.C. § 1912(f) (2020); Minn. Stat. § 260.771, subd. 6 (2020).

Based on the evidence and testimony presented at the hearing, the district court terminated mother's parental rights to child 2 and transferred permanent legal and physical custody of child 1 to his father. In reaching its decision, the district court acknowledged mother's obvious love for her children, and their love for her. The district court also found that the county had made active efforts at reunification as to child 1 and reasonable efforts as to child 2 through its support of services to both mother and the children. Despite these services and mother's efforts to achieve the goals outlined in her case plan, the district court found that she "has not managed to adequately rectify the concerns leading to the removal of the children in the first place." And although mother successfully completed chemical dependency treatment and had begun to address her mental health concerns, the district court found that "she has a long road ahead of her still, to achieving and sustaining a genuine recovery."

Mother appeals.

DECISION

Mother challenges the district court's termination of her parental rights as to child 2 and the transfer of permanent custody of child 1, arguing that the child protection statutes, as applied to the facts in this case, deprive her of her substantive and procedural due-process rights. Mother also asserts that the county did not make active efforts to reunify her family as required by ICWA and MIFPA. We address each argument in turn.

I. The juvenile protection statutes are constitutional as applied to mother.

Mother argues that her substantive and procedural due-process rights were violated by the district court's failure to strictly apply the requirements of the juvenile protection

statutes. Specifically, mother challenges the constitutionality of Minnesota Statutes section 260C.212, subdivision 1 (2020), as applied to her case, arguing that the absence of the required signatures on the case plans and the lack of consultation with mother and the Osage Nation in preparing the case plans violated her substantive and procedural due-process rights.[6]

Whether a parent's due-process rights have been violated in a termination of parental rights proceeding is a question of law which we review de novo. *In re Welfare of Children of D.F.*, 752 N.W.2d 88, 97 (Minn. App. 2008). Where a parent makes an as-applied challenge to the constitutionality of a statute arguing that it violates their substantive due-process rights, we first determine whether the district court applied the correct legal framework before considering whether the statute at issue cannot be constitutionally applied to the facts. *SooHoo v. Johnson*, 731 N.W.2d 815, 824-25 (Minn. 2007).

Section 260C.212, subdivision 1, establishes the requirements for an out-of-home placement plan, or case plan, in child placement proceedings. Within 30 days of placing a child in foster care, social services agencies must prepare a case plan detailing, among other things, why the child has been placed in foster care and the steps to be taken to reunify the family. Minn. Stat. § 260C.212, subd. 1(a)-(c). Case plans are prepared by the social services agency "jointly with the parent or parents or guardian of the child and in

[6] Generally, a facial challenge to the constitutionality of a statute requires the party making the challenge to notify the attorney general of the challenge. Minn. R. Civ. App. P. 144. We consider mother's appeal as an as-applied challenge rather than a facial challenge requiring notice to the attorney general.

consultation with the child's guardian ad litem, [and] the child's tribe." *Id.*, subd. 1(b). And, "as appropriate," the plan should be "signed by the parent or parents or guardian of the child, the child's guardian ad litem, a representative of the child's tribe, the responsible social services agency, and if possible, the child." *Id.*, subd. 1(b)(3).

Our review of the record confirms that the district court applied the correct legal framework established in section 260C.212, subdivision 1. Prior to the termination of mother's parental rights, the district court periodically reviewed and approved the updated case plans. When mother objected to the delay in filing the initial case plan, the court found that "good faith efforts have been made by the county to develop a case plan for [mother], including that a case plan has been created and was mailed to [mother] at her treatment facility." Then, in its order terminating mother's parental rights, the district court found that because mother refused to disclose her location to the agency, the social worker "could not, therefore, actually work with [mother] to create or discuss a case plan for services." The court also acknowledged the efforts made by the social worker to get a copy of the case plan to mother, including mailing the document to her treatment facility, hand delivering a copy to her attorney, and calling mother to go over the case plan before filing the unsigned copy. And although mother did not sign the first case plan, the court concluded that because she signed "every case plan e-filed since," her arguments that "social services didn't do enough to communicate with her early on, or that she didn't have knowledge of or understand her case plans, are without merit."

As to the Osage Nation's involvement, the court found that the Tribe "was notified of every hearing, court report, case plan, and any other document that was e-filed" and that

the Osage Nation "participated early on in the case, chose not to participate on an ongoing basis for a period of time, and has again participated now by supporting the placement of child 1 with his father." Furthermore, the court observed, the Osage Nation's qualified expert witness's affidavit did not "note *any* concern about . . . the agency's handling of the case." The district court also addressed the guardian ad litem's involvement in the case, noting that she had been involved since the beginning and supported the termination of mother's parental rights to both children. By ensuring that the interested parties had the opportunity to be involved in the case plan, the district court applied the appropriate legal framework from section 260C.212, subdivision 1.

The second part of our analysis asks whether section 260C.212, subdivision 1, cannot be constitutionally applied to the facts in this case. Mother concedes that section 260C.212, subdivision 1, is constitutional. And she does not point to—nor does our review of the record reveal—any other facts which suggest that the statute is unconstitutional as applied. We conclude, therefore, that the district court's application of section 260C.212, subdivision 1, to mother's case did not violate her substantive due-process rights. *SooHoo*, 731 N.W.2d at 820.

Mother's procedural due-process argument is similarly unsuccessful. Procedural due process requires "notice, a timely opportunity for a hearing, the right to counsel, the opportunity to present evidence, the right to an impartial decision-maker, and the right to a reasonable decision based solely on the record." *In re Welfare of Children of D.F.*, 752 N.W.2d at 97. When considering whether a parent has been deprived of their procedural due-process rights, this court balances: (1) the private interest affected; (2) the

risk of erroneous deprivation of that interest and the value of additional procedural safeguards; and (3) the government's interest in the matter. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976); *see also In re Welfare of Children of B.J.B.*, 747 N.W.2d 605, 608 (Minn. App. 2008). This balancing test "embodies the notion of fundamental fairness." *In re Child of P.T.*, 657 N.W.2d 577, 587 (Minn. App. 2003).

Here, the private interest affected by the social worker's preparation of the case plans is mother's right to parent. *SooHoo*, 731 N.W.2d at 820. The government has a corresponding interest in "preserving and promoting the welfare of the child." *Santosky v. Kramer*, 455 U.S. 745, 765, 102 S. Ct. 1388, 1401 (1982). The question, then, is whether the alleged deficiencies in the case plans created an undue risk of depriving mother of her fundamental right to parent and whether any additional procedures—the consultation of mother and the Tribe in preparing the case plan and the inclusion of the relevant signatures—would have affected the outcome of the case.

Although mother did not sign the first case plan, the record demonstrates that she not only received a copy of the plan and knew the requirements listed therein, but that she also signed all subsequent case plans. As the social worker testified, copies of the case plan were mailed and faxed to the treatment facility and delivered to mother's attorney. And the social worker and mother discussed each element of the plan via phone. This procedure was fundamentally fair. Mother had notice of the county's expectations and understood the terms of the case plan. She had the opportunity to discuss the terms of the case plan with the social worker, and did so. And, most significantly, she signed subsequent case plans, whose terms were nearly identical to those of the initial case plan.

The lack of her signature on the first case plan did not create an undue risk of depriving her of her right to parent, nor would the presence of her signature have changed the outcome of the district court's decision.[7]

But mother also contends that the social worker did not prepare the case plan in consultation with the appropriate parties. We discern no support for this assertion in the record. The guardian ad litem stated at trial that she was consulted by the social worker in the preparation of the case plan. Mother talked through the case plan with the social worker before it was filed. And the Tribe "was notified of every hearing, court report, case plan, and any other document that was e-filed," yet chose to participate in a limited manner. Because the interested parties had the *opportunity* to provide input on the case plan, but chose not to, there was no undue risk of depriving mother of her right to parent.

In sum, despite mother's termination of parental rights to child 2 and the transfer of custody of child 1, the juvenile protection statutes are constitutional as applied to mother's case.

II. The district court did not err by finding that the county made active efforts to reunify mother and child 1.

Mother further argues that the district court erred in terminating her parental rights to child 2 and transferring permanent custody of child 1 to his father because the county did not make active efforts at reunification. In particular, mother asserts that under the juvenile protection statutes, the county's efforts must have included overnight visits,

[7] We further note that these proceedings took place in the midst of the COVID-19 pandemic, which undoubtedly presented additional challenges to the execution of the typical in-person procedures for creating and reviewing case plans.

weekend visits, and a trial home visit. Whether the county was statutorily required to provide such visits is a question this court reviews de novo. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 54 (Minn. 2004). And with regard to the district court's findings that the county made active efforts at reunification, we apply a clear-error standard of review. *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 387 (Minn. 2008) ("Our review of the record confirms that the district court's findings as to the county's efforts are supported by substantial evidence and are not clearly erroneous.").

Generally, before a district court terminates an individual's parental rights to a non-Indian child, it must find that there is clear and convincing evidence that "reasonable efforts" were made by the social services agency to "rehabilitate the parent and reunite the family," and those efforts proved unsuccessful to correct the conditions leading to the out-of-home placement. Minn. Stat. §§ 260.012 (defining "reasonable efforts"), 260C.301, subd. 1(b)(5)(iv) (establishing the requirements for the termination of parental rights) (2020); *In re Welfare of A.M.C.*, 920 N.W.2d 648, 655 (Minn. App. 2018). But where the child is an Indian child, a higher standard applies and the court must find beyond a reasonable doubt that the agency made "active efforts" to reunify the family. 25 U.S.C. § 1912(d) (2020); Minn. Stat. § 260.762, subd. 3 (2020); *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 165 (Minn. App. 2005).

The parties agree that child 1 is an Indian child under both ICWA and MIFPA, and that both statutes apply here. 25 U.S.C. § 1903(4); Minn. Stat. § 260.755, subd. 8. But because child 2 is not an Indian child, the active-efforts standard only applies to child 1. 25 U.S.C. § 1912(d) ("Any party seeking to effect a . . . termination of parental rights to,

an *Indian child* . . . shall satisfy the court that *active efforts* have been made.") (emphasis added); Minn. Stat. § 260.762, subd. 3 ("A court shall not order an out-of-home or permanency placement for an *Indian child* unless the court finds that the local social services agency made *active efforts* to the Indian child's family.") (emphasis added). Despite mother's assertions that the county failed to make active efforts with regard to both children, we only address whether the county made active efforts with regard to child 1.[8]

With this in mind, we consider de novo whether overnight, weekend, and trial home visits are required as part of a social service agency's active efforts at reunification, as mother asserts. *In re Welfare of Children of R.W.*, 678 N.W.2d at 54. Active efforts are not defined within the language of ICWA itself, but federal regulations define active efforts as "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family." 25 C.F.R. § 23.2 (2020). MIFPA provides a more detailed description of what social services agencies must do to make active efforts in child custody and placement proceedings:

> "Active efforts" means a rigorous and concerted level of effort that is ongoing throughout the involvement of the local social services agency to continuously involve the Indian child's tribe and that uses the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. . . . Active efforts sets a higher standard than reasonable efforts to preserve the family, prevent the breakup of the family, and reunify the family.

Minn. Stat. § 260.755, subd. 1a (2020).

[8] Additionally, because mother makes no assertion that the county did not make "reasonable efforts" regarding child 2, we do not address the issue here.

To determine whether a social services agency met this requirement, the district court must consider whether the agency "made appropriate and meaningful services available to the family based upon that family's specific needs." Minn. Stat. § 260.762, subd. 3. Specifically, the court should consider whether: (1) the agency made efforts as early as possible to identify whether the child is an Indian child and request the relevant Tribe's participation in the proceedings; (2) a tribally designated representative was asked to assist in developing a case plan; (3) the social services agency provided services to members of the Indian child's family, including "financial assistance, food, housing, health care, in-home services, community support services, and specialized services" throughout the proceedings; (4) extended family members were notified and consulted with about the proceedings; and (5) social services arranged for visitation to occur in the home of the Indian child's parent, custodian, or other family whenever possible. *Id.*

Neither ICWA nor MIFPA, as set out above, dictate that overnight, weekend, or trial home visits are a *required* part of a social services agency's active efforts at reunification. Underlying federal regulations establish that active efforts "are to be tailored to the facts and circumstances of the case and *may* include, for example . . . supporting regular visits with parents or Indian custodians in the most natural setting possible *as well as trial home visits* of the Indian child during any period of removal, *consistent with the need to ensure the health, safety, and welfare of the child*." 25 C.F.R. § 23.2 (emphasis added). Similarly, MIFPA provides that a court should consider whether a social services agency has arranged for visitation "*whenever possible*" and "*when consistent with protecting the child's safety*." Minn. Stat. § 260.762, subd. 3(6) (emphasis added). In

short, overnight, weekend, and trial home visits are not required by statute, but discretionary with the district court and social services agency.

Turning to the district court's conclusion that the county made active efforts at reunification, we review for clear error. *In re Welfare of Children of S.E.P.*, 744 N.W.2d at 387. A finding is clearly erroneous if it is contrary to the weight of the evidence or unsupported by the evidence as a whole. *In re Children of T.R.*, 750 N.W.2d 656, 660 (Minn. 2008).

Here, the district court determined that the county made active efforts to reunify mother with child 1. Specifically, the county made efforts

> to ensure [mother] had resources to address her significant mental and chemical health challenges; to ensure ongoing contact with the children; to expand her contact with the children as she made some progress with her case plans . . . to ensure the children received the therapeutic help and support they needed; to support the children's relationship with [child 1's father], grandparents, uncles, family friends and others; to overcome transportation and financial barriers to ensure visits happened even during a once-in-a-century pandemic; [and] to work with mother and her treatment advocate.

The record supports the district court's conclusion. As detailed in the social worker's reports to the court, the children were provided with foster care placement, therapy, and child care. Mother was offered assistance to obtain inpatient services through the county, but instead chose to seek her own inpatient treatment. Mother was also allowed increasingly frequent visits with her children, progressing from video and phone calls to supervised and unsupervised visits. And the county assisted with transportation for those

visits. As such, the district court's findings were supported by substantial evidence and are not clearly erroneous.[9] *In re Welfare of Children of S.E.P.*, 744 N.W.2d at 387.

Still, mother raises two related arguments to suggest that the district court and the county failed to perform their duties. Neither are persuasive. First, mother contends that the social worker's inability to define "active efforts" suggests that the county could not make such efforts. But as explained above, the record supports the district court's finding that the county *did* make active efforts towards reunification, even if the social worker could not recite this definition.

Second, mother argues that the social worker's failure to immediately contact the Osage Nation is "concerning." But as the district court and the Osage Nation's qualified expert witness noted, the Tribe was updated on all subsequent filings, hearings, and other actions in the case. Furthermore, the Osage Nation also participated in some of the earlier review hearings, and when they were not present, the court made consistent efforts to contact the tribal representative.

In sum, the juvenile protection statutes are constitutional as applied to the facts in this case. Although not all of the case plans were signed by mother and the guardian ad litem, the lack of those signatures is not grounds for reversal. And while mother and

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[9] Mother also asserts as part of her active-efforts argument that the county imposed additional, "secret" requirements that she was expected to meet. And at oral argument, mother presented this issue as one of adequate notice under procedural due process. We are not persuaded by the argument under either legal theory. The case plan established an expectation of continued sobriety: "[Mother] needs to *stay* clean and sober." (Emphasis added.) And our review of the trial transcript reveals that the six-month community-based sobriety "requirement" was not specific to mother's case, but rather what the social worker wants to see accomplished "in general" in termination of parental rights cases.

the Osage Nation do not appear to have provided input on every case plan, both had the opportunity to do so. We also observe that while sole legal and physical custody of child 1 was transferred to father, mother retained parental rights to child 1. And father indicated at trial that he would promote a continued relationship between mother and child 1, and was "very supportive" of ongoing visitation.[10] Finally, we discern no clear error in the district court's findings that the county made active efforts to reunite mother with child 1.

Affirmed.

[10] Although father stated that he was comfortable with the existing visitation schedule, he was hesitant to allow overnight visits and suggested that they be implemented "on a trial basis."