**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A21-0167**

In the Matter of the Welfare of the Child of: J. M. B. and J. W., Parents.

**Filed August 23, 2021**
**Reversed**
**Slieter, Judge**

Olmsted County District Court
File No. 55-JV-20-971

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Vicki Duncan, Rochester, Minnesota (guardian *ad litem*)

Considered and decided by Worke, Presiding Judge; Cochran, Judge; and Slieter, Judge.

**NONPRECEDENTIAL OPINION**

**SLIETER**, Judge

Appellant R.N. (grandmother) challenges the district court's termination of her third-party custodial rights to M.W. as part of its order terminating the parental rights of M.W.'s parents. Because we agree that the statute relied upon by the district court does

not confer upon it the authority to terminate grandmother's third-party-custodial rights, we reverse that portion of the district court's order.

## FACTS

The child, M.W., was born April 7, 2006, and placed in the custody of his grandmother at the age of three in 2009. *See* Minn. Stat. § 257C.07 (2020) (addressing custody consent decrees). Based on the parents' abandonment of M.W., grandmother was granted full legal and physical custody of M.W. in a family court proceeding. In March 2019, respondent Olmsted County Human Services (the county) filed an emergency-protective-care petition, alleging that M.W., then 13 years old, was in need of protection or services due to the inability of his custodian, grandmother, to adequately and appropriately provide for his needs.[1] The county subsequently filed a petition alleging the child to be in need of protection or services (CHIPS), asserting that grandmother had failed to adequately care for the child. M.W. was adjudicated CHIPS following a trial on July 11, 2019, based on findings that M.W. "ha[d] been a victim of physical abuse" and was "without proper parental care because of the emotional or physical disability, or state of immaturity of his parent, guardian or other custodian [i.e. grandmother]."

Grandmother agreed to an out-of-home-placement plan for the child on July 17, 2019, by which the county would continue to place the child outside of his home. On October 30, 2019, the district court approved a trial home visit between M.W. and

[1] Though numerous parties were involved in this matter in the district court, including the county, the child's guardian *ad litem* (GAL), and the child, the only parties participating on appeal are grandmother and the county.

grandmother. The trial home visit was terminated on December 23, 2019, following reports of additional aggressive behaviors by M.W. towards grandmother and grandmother's inability to appropriately parent him or regulate his behaviors without causing further escalation.

Subsequent to the termination of the trial home visit, the county filed a petition to terminate the parental rights of M.W.'s noncustodial parents, and also asking that "the order [granting grandmother custody of M.W.] be terminated in conjunction with the parents' parental rights to [M.W.] so he will be able to be adopted." The portion of the petition seeking to terminate of the parental rights of M.W.'s non-custodial parents noted that M.W.'s parents had previously been found to have abandoned M.W. During trial, the district court received testimony from grandmother, M.W., the child's guardian *ad litem*, the child protection worker, and a parenting educator. The GAL, child-protection worker, and parenting educator all testified that they had concerns regarding grandmother's ability to care for M.W. These concerns largely revolved around grandmother's inability to avoid escalation of conflicts between herself and M.W., which had several times in the past resulted in either grandmother's physical discipline of M.W. or physical violence between grandmother and M.W. The concerns also included grandmother's inability to deal with M.W.'s mental-health diagnoses, which included attention-deficit-hyperactivity disorder, reactive-attachment disorder, oppositional-defiance disorder, and depressive disorder. The professional witnesses all opined that grandmother had failed to appropriately adapt her parenting style to meet the needs of M.W. despite the county's efforts. Grandmother testified that she desired to continue her custody of M.W. despite these concerns.

On January 20, 2021, the district court issued an order terminating the parental rights of M.W.'s parents pursuant to Minn. Stat. § 260C.301, subd. 1(b)(2) (2020), based on its finding that they had "substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon [them] by the parent and child relationship." The district court also found that "the best interests of [M.W.] are best served through termination of the custodial rights of [grandmother] . . . in favor of a grant to the Commissioner of Human Services." The district court "terminate[d]" grandmother's custodial rights and ordered guardianship of M.W. to the Commissioner of Human Services. The district court cited Minn. Stat. § 260C.325 (2020) as its authority to terminate grandmother's custodial rights. Grandmother appeals.

**DECISION**

The sole issue for our consideration is the propriety of the district court's termination of grandmother's custody of M.W.[2] Grandmother argues that the district court erred by concluding that Minn. Stat. § 260C.325 conferred upon it the authority to terminate her third-party-custodial rights of M.W.[3] We review the district court's interpretation of statutes *de novo*. *In re Welfare of R.S.*, 805 N.W.2d 44, 49 (Minn. 2011). Additionally, for purposes of this appeal, we assume without deciding that whether to

[2] Both parents failed to respond to the petition to terminate their parental rights and the district court proceeded against them by default. The parents remain uninvolved in this matter on appeal, and the portion of the order terminating their parental rights is not the subject of this appeal.

[3] Grandmother additionally argues that the district court erred when it issued an order permitting the county to cease its efforts to reunify her and M.W. However, grandmother did not raise this issue in the district court, and we decline to consider it for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

terminate the custody obtained by a person through a custody consent decree, is discretionary with the district court. *Cf. In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 136 (Minn. 2014) (stating that whether to terminate parental rights "is always discretionary with the [district] court."). Misapplication of the law is an abuse of discretion. *In re Adoption of T.A.M.*, 791 N.W.2d 573, 578 (Minn. App. 2010). We agree that the district court erred by concluding that section 260C.325 provided it authority to terminate grandmother's third-party custody rights.

In relevant part, section 260C.325 states:

> When the court terminates parental rights of both parents or of the only known living legal parent, the court shall order the guardianship of the child to . . . the commissioner of human services.
> . . . .
> A guardian appointed under this section has legal custody of the child and the right to visit the child in foster care, the adoptive placement, or any other suitable setting at any time prior to finalization of the adoption of the child.

Minn. Stat. § 260C.325, subds. 1(a)(1), 4. The district court reasoned that upon termination of the parents' parental rights it was required by section 260C.325 to appoint the commissioner of human services as M.W.'s guardian as a result of its termination order. The district court additionally concluded that it had "original and exclusive jurisdiction" over the child, who had previously been found to be in need of protection or services. Therefore, the district court concluded, the previous family court order would be required to "defer" and "submit to th[e] original and exclusive jurisdiction of the juvenile court," which would necessarily result in "terminat[ion] [of] the family court's custody to [grandmother]." The district court found that such a termination was in the best interests

of M.W. and, citing section 260C.325 as the authority for doing so, "terminat[ed] [] the custodial rights of [grandmother] granted to her . . . in favor of a grant to the Commissioner of Human Services." Grandmother argues that "terminating custodial rights is not a concept recognized under Minnesota law."

"If a statute's language is clear and unambiguous, a reviewing court must give effect to its plain meaning." *In re Welfare of Child of SSW*, 767 N.W.2d 723, 727 (Minn. App. 2009). Section 260C.325 provides no justification for the district court's order regarding grandmother. It is silent regarding the custodial rights of third parties and, therefore, provides no justification for the district court's termination of such rights.[4] Misapplication of the law is an abuse of discretion. *See T.A.M.*, 791 N.W.2d at 578. The district court's order terminating appellant's custodial rights was an abuse of discretion.[5]

Regardless, because the termination of the parental rights of M.W.'s parents is not challenged on appeal, that portion of the district court's order remains in effect. As a result of the district court's order terminating their parental rights, it correctly applied section

[4] Notably, section 260C.325 does not even dispose of the custodial rights of *parents*—the custodial rights of parents whose parental rights have been terminated is addressed through Minn. Stat. § 260C.317 (2020), which states that "[u]pon the termination of parental rights all rights . . . including any rights to custody . . . existing between the child and parent shall be severed and terminated."

[5] The county cites to the holding of *Stern v. Stern*, 839 N.W.2d 96 (Minn. App. 2013), as justification for the district court's order. However, though *Stern* did examine the authority of a family court to consider third-party custody relative to the juvenile court, the third party in *Stern* was *simultaneously* seeking custody of the child in both family and juvenile court. *Stern*, 839 N.W.2d at 98-99. In this matter, grandmother had already obtained full legal and full physical custody of M.W. 12 years prior to the county's TPR petition. *Stern* is therefore inapposite.

260C.325 and appointed the commissioner of human services as M.W.'s guardian.[6] Minn. Stat. § 260C.325, subd. 1(a)(1). "A guardian appointed under [section 260C.325] has legal custody of the child." *Id.*, subd. 4(a). "'Legal custody' means the right to the care, custody, and control of a child." Minn. Stat. § 260C.007, subd. 22 (2020). Thus, though Minn. Stat. § 260C.325 does not confer authority on the district court to formally terminate a transfer of custody made in a prior custody consent decree, it does require the district court to issue an order that functionally displaces a prior transfer of custody occurring in a custody consent decree. In this context, we note that the award to the commissioner of legal custody of M.W. as "legal custody" defined by Minn. Stat. § 260C.007, subd. 22—*i.e.*, the award to the commissioner of the right to make decisions regarding the care, custody, and control of M.W. pending his adoption—is not necessarily inconsistent with the custody consent decree to the extent that the commissioner places the child with grandmother. But the propriety of any such placement is not addressed by this record and we express no opinion on the point.

[6] Minn. Stat. § 260C.325, subd. 1(b), indicates that "[t]he court *shall* order guardianship of the child to the commissioner of human services when the responsible county social services agency had legal responsibility for planning for the permanent placement of the child and the child was in foster care," as was the case here (Emphasis added.). *See DSCC v. Simon*, 950 N.W.2d 280, 289 (Minn. 2020) (noting that a statute's use of "shall" is mandatory); *see also* Minn. Stat. § 645.44, subd. 16 (2020) (stating that "'[s]hall' is mandatory"); *but cf. Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 541 (Minn. 2007) (addressing when a statute's use of "shall" is only directory, and not mandatory).

In summary, though we reverse the district court's order terminating grandmother's third-party custodial rights, the January 20, 2021, order of the district court terminating parental rights and ordering guardianship of M.W. remains effective.

**Reversed.**