**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A21-0290**

In the Matter of the Welfare of the Children of:
C. A. H., C. B. P., Jr., and J. L. S. C., Parents.

**Filed September 7, 2021**
**Affirmed**
**Johnson, Judge**

Clay County District Court
File No. 14-JV-20-1424

Brian P. Toay, Wold Johnson P.C., Fargo, North Dakota (for appellant C.A.H.)

Brian J. Melton, Clay County Attorney, Kathleen M. Stock, Assistant County Attorney, Moorhead, Minnesota (for respondent Clay County Social Services)

Shawn Schmidt, Moorhead, Minnesota (for respondent father C.B.P. Jr.)

Michael Minard, Moorhead, Minnesota (for respondent child)

Turtle Mountain Band of Chippewa, Belcourt, North Dakota (respondent)

Rosebud Sioux, Mission, South Dakota (respondent)

Emily Shaffer, Moorhead, Minnesota (guardian *ad litem)*

Considered and decided by Johnson, Presiding Judge; Bryan, Judge; and Frisch, Judge.

## NONPRECEDENTIAL OPINION

**JOHNSON**, Judge

The district court terminated a woman's parental rights to three children. We conclude that the district court did not err in its findings of fact and did not err by denying appellant's motion for a new trial. Therefore, we affirm.

## FACTS

C.A.H. is the birth mother of three children, who now are 12, 9, and 4 years old. On July 2, 2019, the children were placed in the custody of Clay County. The next day, the county petitioned the district court for an adjudication that the children are in need of protection or services (CHIPS). The district court granted the CHIPS petition and ordered that the children be placed in foster care.

C.A.H.'s case plan required her to, among other things, submit to a parental-capacity evaluation and follow its recommendations, follow the recommendations of her mental-health providers, submit to a chemical-health assessment and follow its recommendations, and submit to random drug tests. But C.A.H. did not promptly take the actions required by her case plan and did not maintain consistent contact with the county. In September 2019, C.A.H. became unemployed and homeless. The assigned county child-protection worker was unable to locate C.A.H. between September 2019 and December 2019.

In April 2020, the county petitioned for the termination of the parental rights of three adults: C.A.H.; C.B.P. Jr., to whom C.A.H. was married when her first two children were born; and J.L.S.C., the putative father of C.A.H.'s third child. The county amended the petition in June 2020. In the amended petition, the county alleged five grounds for

termination with respect to C.A.H. *See* Minn. Stat. § 260C.301, subd. 1(b)(1), (2), (4), (5), (8) (2020).

The county again could not locate C.A.H. between April 2020 and September 2020. C.A.H. was arrested in September 2020. Between September 2020 and December 2020, C.A.H. submitted to two chemical-dependency assessments. In the first assessment in October 2020, C.A.H. reported that she had been using methamphetamine on a daily basis for the past 14 months. C.A.H. was offered a bed in an in-patient treatment program, but she declined it, stating that she had other obligations and case-plan requirements to complete and could not focus on treatment.

In November 2020, C.A.H. contracted the COVID-19 coronavirus and was ill for approximately three weeks. The TPR trial was continued and later was rescheduled for January 2021.

C.A.H. participated in a parental-capacity evaluation in December 2020. The evaluating psychologist diagnosed her with post-traumatic stress disorder, stimulant-user disorder, and borderline personality traits. The psychologist's report noted that she had "relatively severe mental and chemical health conditions." The psychologist concluded that her "functional impairments . . . resulted in [a] failure to provide basic needs to her children," including stability, putting the children's needs first, providing stable emotional warmth, and ensuring that her children are supervised and safe. Finally, the psychologist concluded that C.A.H. likely will "continue to experience mental health difficulties, particularly anxiety, throughout her life, and be prone to relapse for substance abuse" but

that her prognosis could be favorable if she were to maintain her mental and chemical health.

The case was tried on three days in January 2021 using a commercially available interactive video-conferencing application. The district court heard testimony from 11 witnesses and received 30 exhibits into evidence. In February 2021, the district court filed a 42-page order in which it granted the county's TPR petition with respect to C.A.H. based on findings that the county had proved four of the five grounds alleged against her. The district court denied the county's TPR petition with respect to C.B.P. Jr. and terminated all parental rights as to the "known and unknown fathers to Child 3." In February 2021, C.A.H. moved for a new trial. The district court denied the motion. C.A.H. appeals.

## DECISION

### I. Findings of Fact

C.A.H. first argues that the district court erred in its findings of fact for two reasons. She argues that the findings do not adequately consider the impact of the COVID-19 pandemic and that they are not based on the circumstances as they existed at the time of trial.

#### A. Impact of Pandemic

C.A.H. argues that the district court's findings of fact do not appropriately recognize that the pandemic made it more difficult for her to receive services and to complete the requirements of her case plan. Specifically, C.A.H. argues that her progress on her case plan was interrupted when she contracted the virus and that the pandemic impeded her ability to receive chemical-dependency treatment. This court applies a clear-error standard

of review to the district court's findings of fact. *In re Welfare of A.D.*, 535 N.W.2d 643, 648 (Minn. 1995).

Contrary to C.A.H.'s argument, the district court's order appropriately acknowledges the existence of the pandemic. The district court noted that the trial had been continued because of the pandemic and because C.A.H. was, for a time, ill with the virus. The district court noted the testimony of one witness, a representative of the Rosebud Sioux Tribe, of which C.A.H. is a member, who testified that the pandemic affected C.A.H.'s ability to complete her case plan. But the district court was not persuaded by that evidence, as indicated by the following finding:

> While there is no doubt that the COVID-19 pandemic did have some impact on this case, the undeniable evidence before the Court is that the children were removed from [C.A.H.'s] care on July 2, 2019, over seven months before the first COVID-19 case was even reported in the United States, and that during those seven months, [C.A.H.] did nothing to work on her case plan. The primary reason that [C.A.H.] did not complete the requirements of her case plan was because of her failure to maintain contact with [Clay County Social Services] and her lack of follow through with services. While [C.A.H.] has made progress on her mental health, she has, by her own testimony, admitted to not engaging in services for 14 months, instead choosing drugs and living on the streets, to reunification with her children. Permanency timelines have well past. Therefore, even though the Rosebud Sioux Tribe does not support termination of [C.A.H.'s] parental rights, the evidence presented to the Court proves, beyond a reasonable doubt, that the statutory grounds for termination have been met.

To reiterate, a clear-error standard of review applies. *In re Welfare of A.D.*, 535 N.W.2d at 648. "A finding is clearly erroneous only if there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a

mistake occurred." *In re Welfare of J.H.*, 844 N.W.2d 28, 35 (Minn. 2014) (quotation omitted).

There is evidence in the record to support the district court's finding that the pandemic had a limited impact on the ultimate disposition of the case. It is apparent that the absence of any progress by C.A.H. on her case plan from July 2019 (*before* the pandemic began) to September 2020 was the predominant reason why C.A.H. was unsuccessful in defending against the county's termination petition. The evidence shows that the treatment center that assessed C.A.H. remained open for business throughout the pandemic but that C.A.H. did not take advantage of those services, which were recommended following her assessment. The evidence also shows that C.A.H.'s illness did not unavoidably prevent her from completing her case plan. C.A.H. was ill for approximately three weeks in November 2019, but the trial was continued for approximately eight weeks, which suggests that the continuance may have provided her with additional time to make progress on her case plan. In essence, C.A.H. simply disagrees with the district court's findings. But this court may not reverse findings of fact if they are supported by evidence in the record. *See In re Welfare of J.H.*, 844 N.W.2d at 35. Thus, the district court did not clearly err in its findings of fact concerning the impact of the pandemic.

**B. Circumstances at Time of Trial**

C.A.H. argues that the district court's findings of fact do not appropriately recognize that she had made progress on her case plan between September 2020 and January 2021

and that, at the time of trial, the circumstances that led to the children's out-of-home placement would soon end.

The decision to terminate parental rights should be based on evidence concerning the "conditions that exist at the time of the hearing." *In re Welfare of Chosa*, 290 N.W.2d 766, 769 (Minn. 1980); *see also In re Welfare of Child of J.L.L.*, 801 N.W.2d 405, 409 (Minn. App. 2011), *review denied* (Minn. July 28, 2011). In addition, to order the termination of parental rights, the evidence must show "that the conditions giving rise to the termination will continue for a prolonged, indeterminate period." *In re Welfare of P.R.L.*, 622 N.W.2d 538, 543 (Minn. 2001). A district court may consider "past history" but should focus on "the projected permanency of the parent's inability to care for his or her child." *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996) (quotations omitted). We apply a clear-error standard of review. *In re Welfare of A.D.*, 535 N.W.2d at 648.

In this case, the district court's findings of fact are appropriately focused on the circumstances that existed at the time of trial. For example, the district court made the following finding: "At this time, [C.A.H.] is wholly unable to meet her own basic needs, let alone parent Child 1, Child 2 or Child 3. Her expectations and beliefs that she can parent the children are not realistic." The district court also found, "Because [C.A.H.] has not adequately addressed her chemical or mental health sufficiently, this pattern is likely to continue and the children would be placed at great risk of harm if they were returned to [C.A.H.'s] custody." The district court further found that C.A.H. "is unlikely to adequately correct the conditions and will not complete the requirements of her case plans in the reasonably foreseeable future." The district court also found that C.A.H.'s children had

been in out-of-home placement for 568 days and were "in need of a permanency determination."

These findings are supported by evidence presented at trial. The evidence shows that C.A.H. had submitted to multiple chemical-dependency assessments but had not followed through on any of the recommendations arising from the assessments. The evidence also shows that, at the time of trial, C.A.H. continued to struggle in managing her mental health. C.A.H. had not followed through on opportunities to visit the children, having done so only once after September 2020. Again, it appears that C.A.H. simply disagrees with the district court's findings of fact, which does not present this court with a reason to reverse the findings. *See In re Welfare of J.H.*, 844 N.W.2d at 35. Thus, the district court's findings of fact are based on the circumstances that existed at the time of trial.

In sum, the district court did not clearly err in its findings of fact.

## II. Motion for New Trial

C.A.H. also argues that the district court erred by denying her motion for a new trial on the ground that the use of interactive video-conferencing denied her a fair trial.

C.A.H. relies on rule 21.04 of the rules of juvenile protection procedure, which provides as follows:

> A new trial may be granted on all or some of the issues for any of the following reasons:
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> (a) irregularity in the proceedings of the court, referee, or prevailing party, or any order or abuse of discretion whereby the moving party was deprived of a fair trial;

> (b) misconduct of counsel;
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> (c) fraud, misrepresentation, or other misconduct of the county attorney, any party, their counsel, or their guardian ad litem;
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> (d) accident or surprise that could not have been prevented by ordinary prudence;
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> (e) material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;
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> (f) errors of law occurring at the trial and objected to at the time, or if no objection need have been made, then plainly assigned in the motion;
>
> (g) a finding that the statutory grounds set forth in the petition are proved is not justified by the evidence or is contrary to law; or
>
> (h) if required in the interests of justice.

Minn. R. Juv. Prot. P. 21.04. C.A.H. relies specifically on paragraphs (a) and (h).

We begin our analysis with paragraph (a), which may justify a new trial if there was an "irregularity in the proceedings" or "any order or abuse of discretion whereby the moving party was deprived of a fair trial." Minn. R. Juv. Prot. P. 21.04(a). The use of interactive video-conferencing for purposes of trial is expressly authorized by the rules, which provide: "By agreement of the parties, or in exceptional circumstances upon motion of a party or the county attorney or on the court's own initiative, the court may hold hearings and take testimony by telephone or interactive video." Minn. R. Juv. Prot. P. 11.02. This rule, by itself, indicates that the use of interactive video-conferencing for purposes of trial is not irregular.

Furthermore, there is additional authority for the use of interactive video-conferencing during the COVID-19 pandemic. On March 13, 2020, the governor issued an executive order declaring a peacetime emergency. Emerg. Exec. Order No. 20-01, *Declaring a Peacetime Emergency & Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19* (Mar. 13, 2020). Thereafter the chief justice issued a series of standing orders governing proceedings in the district courts, including an order providing that "all proceedings in all case types shall be held by . . . remote technology that permits the parties and attorneys to appear without being in the courtroom," unless the chief judge of the district court grants an exception to allow an in-person proceeding. *Order Governing the Continuing Operations of the Minnesota Judicial Branch Under Emergency Executive Order No. 20-33*, No. ADM20-8001, at 3-4 (Minn. Apr. 9, 2020). In its order denying C.A.H.'s motion for a new trial, the district court stated that C.A.H. had received notice that the trial would be conducted by interactive video-conferencing but did not object or request an exception. C.A.H. does not challenge that statement on appeal.

C.A.H. also contends that the use of interactive video-conferencing disadvantaged her on the ground that "there were several instances during the trial where [she] was . . . disconnected from the trial." C.A.H. identifies with specificity two instances in which she became disconnected, both of which were noted by the district court on the record. In each instance, C.A.H.'s absence was very brief. On the second day of trial, before recessing for lunch, the district court noted that C.A.H. had become disconnected during the re-direct examination of a witness, which was brief enough to be printed on fewer than two pages of the trial transcript. On the third day of trial, the district court noted that C.A.H. had

become disconnected "at some point in the last couple minutes." The district court noted on the next page of the transcript that C.A.H. was reconnecting. In its order denying C.A.H.'s motion for a new trial, the district court stated that C.A.H. "never requested to continue the proceedings or take a break." C.A.H. does not challenge that statement on appeal. C.A.H. does not identify any particular reason why she was prejudiced by being disconnected briefly while her attorney remained connected.

C.A.H. contends further that the use of interactive video-conferencing disadvantaged her on the ground that, on the third day of trial, she "was in an area that did not provide a quiet or safe location for [her] to view the trial." The transcript indicates that, on the third day of trial, C.A.H. was connected to interactive video-conferencing while in an apartment but "was uncomfortable there," so she moved to another apartment. The district court resumed trial proceedings after C.A.H. stated that she was ready to proceed. Later that day, the district court noted that C.A.H. had been "moving around." The district court asked C.A.H. whether she could "stay in one place," and C.A.H. agreed to do so.

C.A.H. contends on appeal that the district court erred because "[n]o accommodations were made to ensure [C.A.H.] could attend trial." In its order denying C.A.H.'s motion for a new trial, the district court stated that "the Court has devices for parties to utilize at the courthouse to participate in remote hearings and those devices and a conference room were always available to" C.A.H. but she did not "utilize the devices at the courthouse." C.A.H. does not challenge that statement on appeal. In addition, C.A.H.'s contention fails to acknowledge that, in any trial, a party's attorney is responsible for ensuring that his or her client is prepared for trial and able to participate in the trial. In the

context of the pandemic, C.A.H.'s attorney could have taken steps to ensure that C.A.H. was in an appropriate location and had the appropriate equipment and arrangements.

C.A.H. contends further that the use of interactive video-conferencing prevented her from receiving the benefits of her right to counsel. Specifically, C.A.H. contends that her attorney was unable to prevent her from interrupting the proceedings on a few occasions and was unable to ensure that she understood the proceedings. The trial transcript reflects that, on at least four occasions, the district court muted C.A.H. so that she would not interrupt the testimony of other witnesses. In its order denying C.A.H.'s motion for a new trial, the district court stated that "the Court allowed [C.A.H.] to speak with her attorney in breakout rooms during trial and her attorney indicated that some matters could be addressed with his client during regular breaks in the proceedings." C.A.H. does not challenge that statement on appeal, and she does not identify any particular occasion when she wanted to consult with her attorney but was not allowed to do so. The trial transcript reveals that C.A.H. sometimes asked the district court for a break to consult with her attorney and that the district court granted her requests. Accordingly, the record does not reflect that the use of interactive video-conferencing infringed on C.A.H.'s right to counsel.

Thus, the district court's use of interactive video-conferencing for purposes of trial was neither "irregular" nor an abuse of discretion by the district court. Similarly, C.A.H. has not presented any reasons for this court to conclude that the use of interactive video-conferencing requires a new trial in the interests of justice.

Before concluding, we note that the county also argues that the district court should be affirmed on the ground that C.A.H. did not properly serve her new-trial motion on the

Indian tribes that are parties to the case. The district court denied C.A.H.'s motion for that reason as well. On appeal, C.A.H. does not challenge the district court's determination that she did not properly serve all parties. Accordingly, C.A.H.'s failure to serve all parties is an additional reason to affirm the district court's denial of C.A.H.'s motion for new trial. *See Hunter v. Anchor Bank, N.A.*, 842 N.W.2d 10, 17 (Minn. App. 2013), *review denied* (Minn. Mar. 18, 2014).

In sum, the district court did not err by denying C.A.H.'s motion for a new trial.

**Affirmed.**