STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0894

In the Matter of the Welfare of the Children of: A. O. K. and C. L. K., Parents.

Filed December 20, 2021
Affirmed
Reyes, Judge

Brown County District Court
File No. 08-JV-19-104

Michelle K. Olsen, Birkholz & Associates, L.L.C., Mankato, Minnesota (for appellant-father C.L.K.)

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

Kezia Smith, Killion Smith Law Firm, Mankato, Minnesota (for respondent-mother A.O.K.)

Heather Schwab, New Ulm, Minnesota (guardian ad litem)

Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant-father challenges the involuntary termination of his parental rights (TPR) to his children, arguing that the district court abused its discretion by determining that (1) certain out-of-court statements are admissible; (2) respondent-county proved statutory

grounds for termination; and (3) termination is in the best interests of the children. We affirm.

FACTS

In 2003, after being charged with first-degree criminal sexual conduct, appellant C.L.K. (father) pleaded guilty to an amended charge of fourth-degree criminal sexual conduct. In so doing, father admitted to having sexual contact with his then-girlfriend's five-year-old daughter (victim 1), including touching victim 1's vagina "in a sexual way that should not have been done." Father also later disclosed that he had molested victim 1 about 15 times in a one-to-two-week span, and that during that time he had performed oral sex on victim 1, rubbed his "bare penis against her vaginal area," and continued to "tak[e] it further each time." Following conviction and sentencing on the criminal-sexual-conduct charge, father served one year in jail, completed court-ordered treatment, properly registered as a predatory offender, and completed ten years of probation by 2013.

Father's wife, respondent-mother A.O.K. (mother), gave birth to their first child (child 1) in 2016. Following child 1's birth, respondent Brown County Human Services (the county) investigated father's potential for sexual abuse because of his status as a registered predatory offender. However, the county determined that no services were needed at that time given that father had complied with his sentencing conditions.

On October 7, 2019, the county received child-protection reports on behalf of two minor children who are sisters (victim 2 and victim 3), alleging that father, who is their uncle, had sexually abused them in 2014 (the 2014 incidents). The victims reported that father had sexually abused them when they were ages five and six. Victim 3 alleged that

father had touched her "private[s]" while both she and victim 2 were asleep together in his home and that she had been scared. Both victims stated that they had previously reported the abuse to their own father in the summer of 2018. After an investigation, on October 11, 2019, police arrested father on, and later charged him with, two counts of second-degree criminal sexual conduct.[1] On October 14, a district court ordered father not to have contact with any minor children except for child 1. And, per the county's safety plan, father could only have supervised contact with child 1.

On October 16, 2019, the county petitioned the district court to adjudicate child 1 a Child in Need of Protection or Other Services (CHIPS). Five days later, the county filed a TPR petition to terminate father's parental rights to child 1. The district court determined that the county made a prima facie showing of grounds for termination, and ordered interim conditions for the pretrial stage of the TPR action based on child 1's best interests. Under the order, child 1 remained with mother, and father could only have supervised parenting time at an approved supervising facility.

On January 28, 2020, the county received a report that, in 2008, father had admitted to sexually abusing 15 unknown victims prior to his 2003 criminal-sexual-conduct conviction. No charges were brought against father on behalf of those victims. The unknown victims were between the ages of two and six years old when father was between the ages of 12 and 19 years old. The sexual abuse included father fondling the victims' vagina or penis and performing oral sex multiple times.

[1] We note that as of the date of the TPR trial, father had not yet been convicted on these criminal-sexual-conduct charges.

On February 25, 2020, a social worker met with mother, who was pregnant with her and father's second child (child 2). The social worker reported to the district court that mother denied that father posed any harm to child 1. The county also reported the 15 unknown victims and the observations of Keep Me Safe, the supervising facility, regarding father's parental visits with child 1. Those observations included concern for the amount of physical touching between father and child 1, including that father "frequently pats and tickles [child 1] . . . wraps his arms around her waist, nuzzles his face into her neck, and rubs her back and side." Additionally, supervisors reported that, at some visits, father had child 1 sit on his lap for almost the entire 90-minute visitation, "at which time he is adjusting her, scooting closer to the table, and nuzzling and hugging her." The guardian ad litem also expressed concern when father would rub child 1's back and bottom, which, according to father, he did to help the child with stomach issues.

On June 5, 2020, child 2 was born. Subsequently, on June 18, 2020, the county amended its TPR petition to include child 2. The county also updated its report to the district court, requesting that father comply with the supervising facility's new predatory-offender policy. The district court granted the county's request and ordered father to comply with the facility's predatory-offender policy limiting touch between father and both child 1 and child 2. Father refused to sign the policy and stopped attending supervised visits with child 1 and child 2.

On January 7, 2020, the county filed a notice with the district court asserting that it intended to move the district court to admit out-of-court statements of victim 3 under Minn. Stat. § 260C.165 (2020). The statements were made during a 2019 forensic interview in

which victim 3 discussed the 2014 incidents. Father objected to the admission of the hearsay statements under section 260C.165, asserting that they were not reliable. The district court held a TPR trial in December 2020 and January 2021. It admitted the out-of-court statements of victim 2 and victim 3 after analyzing the reliability factors on *State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1989) and determining that the statements were reliable.

The district court terminated father's parental rights to child 1 and child 2 after determining that three statutory grounds for termination existed and that termination is in the best interests of the children. This appeal follows.

DECISION

I. The district court did not abuse its discretion by admitting into the record victim 3's out-of-court statements.

Father challenges the district court's decision to admit into the record victim 3's out-of-court statements, arguing that the statements were inadmissible under *Conklin*, 444 N.W.2d at 276.[2] We disagree.[3]

[2] Father also appears to argue that the district court abused its discretion by admitting the out-of-court statements of victims 2 and 3, arguing that those statements constitute improper character evidence. Father did not raise this objection at trial. Father also failed to properly brief or provide legal authority on the issue and we therefore decline to address the merits of father's improper-character-evidence argument. *See State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an inadequately briefed question); *In re Child of P.T.*, 657 N.W.2d 577, 586 n.1 (Minn. App. 2003) (applying *Wintz* in TPR appeal); *State, Minn. Pollution Control Agency v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (holding appellate courts may decide not to consider an argument when party fails to cite legal authority unless prejudicial error is "obvious on mere inspection").

[3] For purposes of this appeal, we assume without deciding that the evidentiary standard used in *Conklin*, a criminal case, applies to this juvenile-protection case.

We apply an abuse-of-discretion standard of review to evidentiary rulings in a TPR trial. *In re Child of Simon*, 662 N.W.2d 155, 160 (Minn. App. 2003). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009) (quotation omitted). With certain exceptions, the evidence admissible in a juvenile-protection proceeding is limited to that which would be admissible in a civil proceeding. *See* Minn. R. Juv. Prot. P. 3.02, subds 1-3 (stating, respectively, that (a) the evidence admissible in juvenile-protection matters should be limited to the evidence that would be admissible in a civil trial under the rules of evidence; (b) identifying certain statements that are admissible even if not admissible under the rules of evidence; and (c) noting that the scope of judicial notice in juvenile-protection matters is broader than that allowed under the rules of evidence); *see also* Minn. Stat. §§ 260C.163, subd. 1; .165 (2020) (addressing first two of these matters).

Hearsay is "a statement, other than one made by the declarant while testifying . . . offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Generally, hearsay is inadmissible. Minn. R. Evid. 802. However, in a TPR proceeding, an out-of-court statement made by a child under ten years of age is admissible if it describes an act of sexual contact performed with the child, "the court finds that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability," and the other parties are properly notified. Minn. Stat. § 260C.165 (2020); *see* Minn. R. Juv. Prot. P. 3.02, subd. 2 (addressing admissibility of certain out-of-court statements in juvenile-protection proceedings); *Conklin*, 444 N.W.2d at 276 (identifying factors to consider in admitting

young child's out-of-court statement under Minn. Stat. § 595.02, subd. 3). Father only challenges the district court's determination that victim 3's hearsay statements are admissible under section 260C.165 because they met the *Conklin* reliability factors.

Under *Conklin*, district courts consider certain factors when determining the reliability of hearsay statements including "among other things" (1) their spontaneity; (2) their consistency; (3) the declarant's knowledge and motives to speak truthfully; and (4) the time between the statement and the events. 444 N.W.2d at 276.

Here, the district court properly considered those factors. First, it found that, although a forensic interview "can never be completely spontaneous," victim 3's statements in the 2019 forensic interview were made within days of when victim 3 reported father's abuse to law enforcement. Second, it found that victim 3's statements were consistent. Third, it found that victim 3 "had a motive to speak truthfully," had nothing to gain by lying, and may even face difficulties for accusing father, a family member. Fourth, it considered that the interview occurred five to six years after the 2014 incidents, but found that any concern was outweighed by other factors favoring the reliability of victim 3's statements. The district court also found that victim 3's statements were corroborated by others to a certain extent and that the interviewer did not ask any leading questions. Additionally, the district court found the expert forensic interviewer's testimony credible and helpful regarding the reliability of victim 3's statements in the 2019 forensic interview.

The record supports the district court's findings. Witnesses corroborated the consistency of victim 3's statements. For example, the investigator testified that victim 3's father told the investigator that she had tried to tell her father about the incident in 2018,

the summer before the forensic interview took place. Moreover, evidence shows that victim 3's statements were "fairly spontaneous" given that the forensic interviewer did not "lead" victim 3 during the 2019 interview. Instead, the forensic interviewer asked victim 3 open-ended questions after establishing rapport and trust with victim 3. Additionally, victim 3 provided specific details during the interview: that the incident occurred on Halloween, the clothes she wore at the time, that she and her sister were sleeping in the bottom bunk of a bunk bed when father woke her, and that she felt "weird" and "scared" when he "touched her private parts." Finally, the district court relied on the testimony of the forensic interviewer and found victim 3's interview credible given her responses, self-correction, and her apparent nervousness and discomfort with the subject-matter. The district court's function is "to determine the credibility of witnesses, and only on the rarest of occasions will a reviewing court override that determination." *In re Welfare of C.K.*, 426 N.W.2d 842, 849 (Minn. 1988). This is not that rare occasion.

II. The district court did not abuse its discretion by determining that clear and convincing evidence established statutory grounds for termination and that termination of father's parental rights was in the best interests of the children.

A. Standard of review

A district court is vested with broad discretion in deciding child-protection cases. *In re Booth*, 91 N.W.2d 921, 924 (Minn. 1958). Both the statutory-basis and the best-interests determinations must be based on underlying findings of fact that are supported by clear and convincing evidence. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901, 906 (Minn. App. 2011), *rev. denied* (Minn. Jan. 6, 2012). Thus, we review "the district court's findings of the underlying or basic facts for clear error," but review its

determination that a statutory basis exists, and that termination is in the child's best interests, for an abuse of discretion. *Id.* at 901; *see In re Welfare of K.L.W.*, 924 N.W.2d 649, 656 (Minn. App. 2019), *rev. denied* (Minn. Mar. 8, 2019) (holding abuse-of-discretion standard applies on review of district court's best-interests analysis); *In re Civil Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (addressing clear-error standard of review and stating that, among other things, appellate courts "will not conclude that a factfinder clearly erred unless, on the entire evidence, [they] are left with a definite and firm conviction that a mistake has been committed") (quotations and citations omitted). Finally, this court defers to the district court's "determinations of witness credibility and the weight to be given to the evidence." *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 555 (Minn. App. 2007), *rev. denied* (Minn. July 17, 2007).

B. The district court did not abuse its discretion by determining that clear and convincing evidence established statutory grounds for termination.

The district court terminated father's parental rights based on three statutory grounds, determining that (1) a child experienced egregious harm in father's care; (2) father's prior conviction required him to register as a predatory offender; and (3) father is palpably unfit to be a party to the parent and child relationship. *See* Minn. Stat. § 260C.301, subd. 1(b)(4), (6), (9). Of the three, father only challenges the determination that he is palpably unfit, conceding that clear and convincing evidence established the other two. Because father concedes that the district court did not err by determining that clear and convincing evidence established two statutory grounds for termination, we need not address father's arguments on the third statutory ground. *See* Minn. Stat. § 260C.301,

subd. 1(b) (allowing termination of parental rights upon satisfaction of "one or more" statutory conditions).

C. The district court did not abuse its discretion by determining that TPR was in the best interests of the children.

Father argues that the district court based its analysis of the competing-interests-of-the-children factor solely on his past conviction and the allegations of sexual misconduct and was therefore speculation unsupported by the record. We disagree.

A child's best interests may preclude terminating parental rights even when a statutory basis for termination exists. *In re Tanghe*, 672 N.W.2d 623, 625-26 (Minn. App. 2003). "In analyzing a child's best interests, the district court must balance three factors: '(1) the child's interest in preserving the parent-child relationship; (2) the parent's interest in preserving the parent-child relationship; and (3) any competing interest of the child.'" *In re Welfare of Child of A.M.C.*, 920 N.W.2d 648, 657 (Minn. App. 2018) (quoting *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992)); *see* Minn. R. Juv. Prot. P. 58.04(c)(2)(ii) (requiring district court to make findings on these factors); *see also J.R.B.*, 805 N.W.2d at 905 ("Competing interests [of the child] include such things as a stable environment, health considerations[,] and the child's preferences." (quotation omitted)). The interests of the child are paramount in this analysis. *P.T.*, 657 N.W.2d, at 583.

Here, the district court found that child 1 had a relationship with father, but that child 2 is an infant who had only seen father a few times following birth. It also found that father had an interest in parenting child 1 and child 2. However, the district court found that father had not been allowed to visit them because of his own refusal to sign the

facility's sex-offender policy. Importantly, it found that the children "have a competing interest in their personal safety." The district court found clear and convincing evidence that father "fondled the bare genitals of his niece in 2014 or 2015." Additionally, it found clear and convincing evidence that father's constant touching of child 1 during the supervised visits "raises significant concern that father views her the way he viewed his other victims of sexual abuse" and that several trained professionals were concerned with father's behavior. It also found clear and convincing evidence that father "thought not having physical contact with his child was worse than having no visits with her" and that father's sexual abuse of "other children who were close to him" raises "significant concern that he will sexually abuse his own children." Based on these findings, the district court determined that TPR served the children's best interests.

The record supports these findings. Contrary to father's contention that the district court based its analysis on mere allegations of sexual misconduct, *by father's own account* he has sexually abused at least 15 unknown minor children and victim 1. Multiple victims were related to father by blood and father believed himself to be a "father figure" to many of his victims. Father bathed his victims, took them to school, brushed their hair, watched movies with them, and slept in the same bed with them. All but two of his victims were females between the ages of two and five years old. Child 1 is a five-year-old female and child 2 is a one and-a-half-year-old female. Moreover, the record supports the district court's finding by clear and convincing evidence that father sexually assaulted victims 2 and 3 one year after he completed court-ordered treatment and probation in 2013.

Therefore, the district court's finding that father's predatory behavior did not change after he completed his court-ordered treatment is not clearly erroneous.

The record also reflects that facility supervisors were concerned by father's behavior with child 1 and child 2. Supervisors reported that father referred to child 1 as being "mine," and forced her to sit on his lap. Father also made child 1 sit on his lap for an entire 90-minute visit on multiple occasions. And despite father's argument that the district court's analysis improperly relied on *perceived* threats of harm rather than *actual* harm, allegations of actual harm or neglect are not necessary to a district court's finding that termination would be in a child's best interests.

In *In re Welfare of Child of K.L.W.*, this court affirmed a district court's determination that termination was in a child's best interests based, in part, on the parent's conviction for sexual contact with a person under the age of 13 that had occurred between 11 and seven years before termination and the parent's failure to make adequate progress in sex-offender treatment. 924 N.W.2d at 657. In so doing, we concluded that the district court appropriately considered the parent's prior sexual-offense conviction in its best-interests analysis, when there was no evidence that the parent's behavior had changed, to show a lack of change in that behavior without discussing whether those facts showed a likelihood of abuse against the child. *Id.* So the fact that father had not *yet* harmed child 1 and child 2 does not undermine the district court's finding. *See id.* Because clear and convincing evidence supports the district court's best-interests findings, we conclude that

it did not abuse its discretion by determining that terminating father's parental rights to child 1 and child 2 was in their best interests.

Affirmed.