STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1685

In the Matter of the Welfare of the Child of:
B. A. and J. H.,
Parents.

Filed March 15, 2011
Affirmed
Lansing, Judge

Ramsey County District Court
File No. 62-JV-09-1259

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Considered and decided by Ross, Presiding Judge; Lansing, Judge; and Connolly, Judge.

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

LANSING, Judge

The district court terminated the parental rights of JH and BA to their daughter, JGH. On appeal, JH and BA allege evidentiary and fair-trial errors and challenge the adequacy of the evidence to support the grounds for termination. Because the district

court did not abuse its discretion in its trial procedures or err in admitting JGH's out-of-court statements and because clear-and-convincing evidence supports each statutory ground for termination and the termination is in JGH's best interests, we affirm.

F A C T S

BA and JH are the parents of JGH who was born on February 5, 2002. Although not married to each other, BA and JH had previous marital relationships and children from those marriages. Two of BA's daughters from a previous marriage, seventeen-year-old LS and sixteen-year-old RA, divided their time between living with their father and living with BA. When BA moved with JGH to JH's house in March 2002, LS and RA spent half their time living with them at JH's house. LS left for college in 2004, but returned to BA's and JH's home on alternate weekends; RA left for college in 2007 and also returned to the house on intermittent weekends. Both LS and RA became increasingly concerned about JH's sexualized interaction with JGH, his pattern of taking showers with JGH, and JGH's crying and screaming when in the bathroom with JH.

On December 27, 2007, LS reported to her pastor and then to the police that JH was possibly sexually molesting JGH. Following a preliminary investigation, Ramsey County sought emergency protective care for JGH, and she was placed with LS and her husband, JS. In August 2008 JGH was adjudicated a child in need of protection services.

Ramsey County developed case plans for JH and BA that aimed at reunification with JGH. BA's plan required a parenting evaluation, individual parenting training, therapy and anger management, a mental-health assessment, a psychosexual evaluation, a decrease in her heavy use of prescription medications, and supervised visits with JGH.

As part of the case plan, JGH began play therapy in February 2008. JGH demonstrated traumatic responses to the play therapy and unusual and violent actions toward the genital area of the mannequin used in the play therapy. In January and February 2009 JGH told LS, JS, the play therapist, her guardian ad litem, and a nurse at Midwest Children's Resource Center about a specific incident of sexual abuse by JH. She consistently described to each of them an incident in which JH touched her vagina with his hand while they were in the shower. In a supervised visit after JGH reported this conduct, BA told JGH that what she had said about showering with her dad was a lie, that people did not believe her, and that she should not say anything more. In March 2009 Ramsey County filed a petition to terminate the parental rights of JH and BA.

In April 2009 the district court found that Ramsey County had made a prima facie showing that JH caused egregious harm to JGH. Consistent with that finding, the district court determined that the county was no longer obligated to assist reunification between JH and JGH. The state charged JH criminally for his sexual conduct with JGH and he entered an *Alford* plea to fifth-degree criminal sexual conduct. Following the adjudication of guilt, JH was ordered to have no contact with JGH for two years.

Before the trial on the termination petition began, JH and BA filed a motion to exclude JGH's out-of-court statements describing JH's inappropriate sexual conduct. After a pretrial hearing, the district court ruled that the statements were admissible.

At trial the state offered testimony from LS, RA, JS, the play therapist, the parenting counselor who conducted an assessment of BA, the child-protection worker

assigned to the case, the nurse at Midwest Children's Resource Center, and JGH's guardian ad litem. JH and BA also testified.

Following the trial, the district court issued an order terminating JH's and BA's parental rights to JGH. The district court made extensive findings based on the testimony and documentary exhibits. In response to post-trial motions, the district court issued additional findings of fact, amended conclusions of law, and restated its order for termination of parental rights. The termination of JH's parental rights was based on egregious harm and palpable unfitness; the termination of BA's parental rights was based on palpable unfitness, failure to comply with parental duties, failure to correct conditions leading to out-of-home placement, and that JGH was neglected and in foster care.

JH and BA appeal from the initial and the amended orders, alleging evidentiary error and fair-trial violations and challenging the sufficiency of the evidence on each ground for termination and on the finding that termination was in JGH's best interests.

D E C I S I O N

I

We first address JH and BA's claim of evidentiary error. "In all adjudicatory proceedings involving a child alleged to be in need of protection or services, the court shall admit only evidence that would be admissible in a civil trial." Minn. Stat. § 260C.163, subd. 1 (2010); *see* Minn. R. Juv. P. 3.02 (addressing evidence admissible in juvenile-protection proceedings). Evidentiary rulings rest within the sound discretion of the district court and will be reversed only if there is an abuse of discretion. *In re Welfare of J.W.*, 391 N.W.2d 791, 796 (Minn. 1986). In a proceeding for termination of

parental rights, an out-of-court statement 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 (2010); *see* Minn. R. Juv. P. 3.02 (addressing admissibility of certain out-of-court statements in juvenile-protection proceedings).

BA and JH challenge the reliability requirement of section 260C.165, asserting that the out-of-court statement JGH made to a nurse at Midwest Children's Resource Center lacked sufficient indicia of reliability. The nurse testified that during an interview with JGH, JGH told her that one time when she was showering with her dad he touched her vagina with his hand.

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). The transcript of the interview indicates that the nurse asked open-ended questions; JGH made some statements spontaneously; JGH's statements were consistent; she clearly expressed disagreement at certain points in the interview; she spoke in age-appropriate language; and her statement was consistent with statements that she made to many others about JH's sexual conduct. *See State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1989) (identifying factors to consider in admitting young child's out-of-court statement under Minn. Stat. § 595.02, subd. 3); *State v. Bellotti*, 383 N.W.2d 308, 312-13 (Minn. App. 1986) (determining admissibility

of young child's out-of-court statement under Minn. Stat. § 595.02, subd. 3), *review denied* (Minn. Apr. 24, 1986). In light of the district court's broad discretion in ascertaining witness credibility and the fulfillment of the admission criteria, we decline to override the determination that JGH's statement to the nurse had sufficient indicia of reliability to allow its admission into evidence.

JH and BA also assert that all of JGH's out-of-court statements are inadmissible as violations of the Confrontation Clause. *See* U.S. Const. amend. VI (guaranteeing right to confrontation in criminal prosecutions). They rely on *Crawford v. Washington*, but *Crawford* is limited to the Sixth Amendment right to confront witnesses in criminal proceedings. 541 U.S. 36, 42, 124 S. Ct. 1354, 1359 (2004). The Minnesota Supreme Court has addressed a similar constitutional claim and held that because a termination-of-parental-rights proceeding does not involve a deprivation of liberty, the constitutional protections available in a criminal proceeding do not apply. *In re Welfare of G.L.H.*, 614 N.W.2d 718, 722 (Minn. 2000) (declining to equate statutory right to counsel in termination-of-parental-rights proceeding with constitutional right to counsel in criminal prosecution). The court did not err by admitting JGH's out-of-court statements.

II

We now turn to the district court's specific determinations on the statutory grounds for termination of JH's and BA's parental rights. A termination of parental rights requires that at least one statutory ground for termination is supported by clear-and-convincing evidence and that the termination is in the child's best interests. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). Our review closely

evaluates the sufficiency of the evidence, taking into account that it is the district court that assesses the credibility of witnesses. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

The district court concluded that the county had clearly and convincingly proved that JH caused egregious harm to JGH and that both JH and BA were palpably unfit to parent JGH. The court terminated BA's parental rights on three additional grounds: failure to comply with parental duties, failure to correct the conditions leading to JGH's out-of-home placement, and that JGH is neglected and in foster care.

We address first the determination that JH caused egregious harm to JGH. *See* Minn. Stat. § 260C.301, subd. 1(b)(6) (2010) (listing egregious harm as ground for terminating parental rights). "Egregious harm" means "the infliction of bodily harm to a child or neglect of a child which demonstrates a grossly inadequate ability to provide minimally adequate parental care." Minn. Stat. § 260C.007, subd. 14 (2010).

Clear-and-convincing evidence establishes that JGH was subjected to JH's inappropriate sexual touching and other sexualized acts and that his sexualized conduct caused JGH egregious harm. The record provides evidence that JH touched JGH's vagina with his hand while they were showering together. LS testified that she had seen JH "running up [JGH's] dress and her thighs, nibbling on her ear, and kissing her neck" and had heard JH tell JGH: "You have a nice butt. All the boys are going to want to be with you when you get older." RA testified that she saw JH touch JGH's buttock, heard him comment that JGH had a big butt, and found a pair of JGH's underpants in JH's nightstand. JH testified that he is attracted to women with large butts and admitted to

biting JGH on her chest, stomach and butt, slapping her butt, and saying: "You gotta fat bootie, Le-le." He acknowledged that JGH found a pornographic DVD cover and that other minor children in the home had seen pornography on his computer.

LS and RA both testified that they had repeatedly observed JGH having nightmares. The play therapist's testimony established that JGH exhibited symptoms of a "high-anxiety child" who suffered from nightmares, bedwetting, soiling, and dissociative responses. In play therapy, JGH exhibited traumatic play: JGH would faint, look up with staring eyes, spread her legs, thrust her hips, and cry "Help me." The play therapist diagnosed JGH with post-traumatic stress disorder. The district court did not err by finding that JH caused egregious harm to JGH.

On the palpable-unfitness ground, the district court concluded that clear-and-convincing evidence established that both JH and BA were palpably unfit to parent JGH. *See* Minn. Stat. § 260C.301, subd. 1(b)(4) (2010) (listing palpable unfitness as ground for terminating parental rights). A parent is "palpably unfit" if the court finds "a consistent pattern of specific conduct" or conditions affecting the relationship that are "of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing . . . needs of the child." *Id.*

In addition to JH's inappropriate sexual touching of JGH, for which he was criminally prosecuted, he also made inappropriate sexualized comments to JGH; disregarded appropriate sexual boundaries between parent and child; and created an improperly sexualized atmosphere for JGH in the home. LS and RA testified that JH regularly showered with JGH when he returned from work, which was after 11:00 p.m.;

that if JGH was not kept awake to shower with him, he would be upset; and that, at times, JGH could be heard shouting or crying behind the locked door in the bathroom. JH admitted to persisting in showering with JGH after he knew it was inappropriate and in spite of her protests. The district court's finding that JH is palpably unfit to parent JGH is supported by clear-and-convincing evidence.

The district court's conclusion that BA is palpably unfit to parent JGH relies on her participation in the improper conduct. LS and RA testified that BA would make JGH stay up to shower with JH; that at times JGH cried because she did not want to shower with JGH and sought to avoid the showers; that when they attempted to discuss their concerns about JH's sexualized behavior toward JGH, BA was defensive and accusatory toward them; and that BA minimized JGH's bedwetting, nightmares, and protests against showering with JH. BA testified that she did not believe JH's conduct toward JGH was sexually inappropriate and that she had no problem with minor children seeing pornography or with an adult biting JGH's naked butt. She also testified that she did not believe JH sexually touched JGH. BA's supervised visits ended after she told JGH to stop telling people that her father had touched her inappropriately. The parenting counselor testified that BA was more like a playmate than a parent, that she had to repeat parenting lessons for BA, and that BA was not able to implement the lessons. The parenting evaluator testified that BA was rigid in her thinking and had limited insight. BA made several pretrial statements about JH's showers with JGH that were inconsistent and, at trial, provided further inconsistent testimony. The district court did not err by

finding that JH and BA are palpably unfit to parent JGH now and for the reasonably foreseeable future.

The termination of BA's parental rights was based not only on palpable unfitness, but also on three other statutory grounds. First, the court concluded that clear-and-convincing evidence established that BA refused to comply with her parental duties. *See* Minn. Stat. § 260C.301, subd. 1(b)(2) (2010) (listing neglect of parental duties as ground for terminating parental rights). A parent's failure to satisfy the requirements of a court-ordered case plan is evidence of a parent's noncompliance with the duties and responsibilities in section 260C.301, subdivision 1(b)(2). *In re Child of Simon*, 662 N.W.2d 155, 163 (Minn. App. 2003).

The record confirms that BA complied with some of the requirements of her case plan. She participated in a parenting evaluation, completed a parenting training program, and obtained a psychological assessment. But BA failed to complete other significant requirements. She failed to undergo a psychosexual evaluation, was unwilling or unable to implement parenting lessons, failed to complete individual therapy or anger management, violated a harassment restraining order, and did not adequately decrease her heavy reliance on medication. And, significantly, BA not only refused to accept that JH sexually touched JGH, but she attempted to keep her from talking to others about JH's sexual abuse—conduct that violated the guidelines for her visitation with JGH. The district court did not err by finding that BA neglected her parental duties.

The second additional ground to terminate BA's parental rights was the failure to correct conditions that led to JGH's out-of-home placement. *See* Minn. Stat. § 260C.301,

subd. 1(b)(5) (2010) (listing failure to correct conditions leading to out-of-home placement as ground for terminating parental rights). A presumption that the conditions that led to the out-of-home placement have not been corrected arises on a showing that a parent has not substantially complied with a case plan or court orders. *Id.*, subd. 1(b)(5)(iii).

JGH was removed from her home because of the report of JH's possible sexual abuse and BA's neglect and failure to protect her from JH's conduct. Despite a case plan that was aimed at reunification and developed to assist BA in correcting the conditions that led to JGH's out-of-home placement, BA did not complete the case plan. BA's refusal to comply with significant parts of her case plan demonstrates a failure to correct the conditions that led to JGH's removal from the home. The district court did not err by finding that the evidence clearly and convincingly showed that the conditions that led to JGH's out-of-home placement were not corrected.

The district court's third additional ground for terminating BA's parental rights was that JGH was neglected and in foster care. *See* Minn. Stat. § 260C.301, subd. 1(b)(8) (2010) (listing "neglected and in foster care" as ground for terminating parental rights). A child is "neglected and in foster care" if the child "has been placed in foster care by court order"; the parent's circumstances or conduct prevent the child's return; and the parent fails to make reasonable efforts to remedy the conduct and circumstances preventing the child's return. Minn. Stat. § 260C.007, subd. 24.

JGH was placed in emergency protective care with LS and JS in February 2008 and remains in their care by court order. The record supports the determination that BA's

conduct and circumstances prevent JGH's return and that BA has failed to make reasonable efforts to remedy the behavior and circumstances that prevent JGH's return. BA attempted to interfere with the investigation about JH's sexual abuse of JGH and denied that abuse occurred. She was unable to recognize inappropriate sexual conduct and boundaries in the home and was unwilling to address her own conduct or circumstances by working on components of her case plan. Because BA failed to complete her case plan, she has not shown that she made reasonable efforts to remedy the behavior or conditions that prevent JGH's return. The district court did not err by finding clear and convincing evidence that JGH was neglected and in foster care.

BA challenges the district court's finding that the county made reasonable efforts to reunify BA with JGH. The record does not support that challenge. The county developed a comprehensive case plan for BA that was aimed at addressing BA's lack of parenting skills with the goal of reunification. The plan's requirements included that BA undergo a parenting evaluation and receive in-home parenting education, attend individual therapy and anger management, undergo psychological and chemical-health assessments, and reduce her substantial reliance on a range of prescription medication. The county made efforts to assist BA in completing her plan. These efforts included checking on BA's progress, reminding BA of incomplete requirements, and connecting BA to needed services. The district court did not err by finding that the county made reasonable efforts to reunify BA with JGH. Although JH asserts the same challenge, his argument is misplaced. On April 21, 2009, the district court found that the county made a prima facie showing that JH had caused egregious harm to his daughter. As a result,

the court properly ordered that the county had no further obligation to JH to attempt reunification. *See* Minn. Stat. § 260.012(a)(1) (2010) (providing that reunification efforts are not required if court finds prima facie case that parent caused child egregious harm).

Termination of parental rights on any of these statutory grounds also requires an evaluation of JGH's best interests. *See R.W.*, 678 N.W.2d at 55 (stating that in terminating parental rights there must be at least one statutory ground for termination and termination must be in child's best interests). In termination-of-parental-rights proceedings, the child's best interests are the "paramount consideration." Minn. Stat. § 260C.301, subd. 7 (2010). The evaluation of the child's best interests requires the court to balance the preservation of the parent-child relationship against any competing interests of the child. *In re Welfare of M.G.*, 407 N.W.2d 118, 121 (Minn. App. 1987).

JH and BA assert that termination is not in JGH's best interests because JGH loves her parents and her parents love her. We recognize that JGH's therapist testified that JGH expressed that she loved her parents. Nonetheless, the record supports the district court's determination that JGH could not safely be reunited with JH or BA in the foreseeable future. Importantly, the therapist testified that a child loving and missing her parents does not mean that traumatic acts did not occur. JH caused egregious harm to JGH and, as a result of his *Alford* plea, a no-contact order currently prevents him from seeing JGH. BA refuses to believe that inappropriate sexual contact occurred between JH and JGH, attempted to silence JGH's reporting of sexual abuse, and was unsuccessful in completing her case plan. JGH's therapist, child-protection worker, and guardian ad litem testified that it was in JGH's best interests to terminate JH's and BA's parental

rights. The district court did not err by finding that termination of JH's and BA's parental rights is in JGH's best interests.

Finally, we turn to JH's and BA's claims that they were denied a fair trial. These claims are based on the timing of the termination proceeding and a reference to a polygraph test in the termination petition.

JH and BA assert that they were prejudiced because the proceeding was not initiated within a year from JGH being placed in foster care. *See* Minn. Stat. § 260C.201, subd. 11(a) (2010) (stating that proceedings to determine permanent status of child must commence within twelve months from child's placement in foster care). Although the record indicates that the proceeding was not commenced within the statutory timeline, JH and BA fail to identify any prejudice attributable to the delay that made the trial unfair. *See* Minn. R. Juv. Prot. P. 45.04(a) (reciting that procedural irregularity may warrant new trial if moving party was deprived of fair trial). The district court specifically found that JH and BA were not denied a fair trial because of the court's or the county's failure to comply with statutory timelines, and the record contains no contrary evidence.

JH also asserts that the termination petition's reference to his polygraph test improperly influenced witness testimony and the district court's finding on egregious harm. The polygraph indicated that when JH was asked, "Did you touch your daughter [JGH] in a sexual way?" and answered "No," he was deceptive. The record demonstrates that the district court properly excluded evidence of the polygraph from trial and redacted the references to it in the exhibits that JH relies on for making this argument. *See State v. Litzau*, 377 N.W.2d 53, 54 (Minn. App. 1985) (stating that polygraph results or

references to results are inadmissible). The record does not support JH's claim that the petition's reference to his polygraph test resulted in an unfair trial.

Affirmed.