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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1889

In the Matter of the Welfare of the Children of:

N.V.H. and R.H., Parents.

Filed April 12, 2011
Affirmed
Schellhas, Judge

Kandiyohi County District Court
File Nos. 34-JV-10-107; 34-JV-10-172

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Jennifer Fischer, Kandiyohi County Attorney, Amy J. Isenor, Assistant County Attorney, Willmar, Minnesota (for respondent Kandiyohi County Family Services)

Christopher S. Petros, Tuttle Bergeson P.A., Shakopee, Minnesota (for appellants N.V.H. and R.H.)

Penny Johnson, Willmar, Minnesota (guardian ad litem)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Halbrooks, Judge.

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

SCHELLHAS, Judge

Appellants challenge the district court's orders (1) finding that their children are in need of protection or services, (2) relieving respondent of its duty to provide reasonable

efforts for rehabilitation and reunification of appellants with their children, and (3) terminating their parental rights. We affirm.

FACTS

Appellant-mother N.V.H. and appellant-father R.H. are the biological parents of An.H., born February 21, 2004, C.H., born May 3, 2005, and Al.H., born February 20, 2010. In 1998, mother and father received legal and physical custody of mother's niece, M.H., born February 6, 1996.

On April 15, 2010, respondent Kandiyohi County Family Services (the county) filed a child-in-need-of-protection-or-services (CHIPS) petition against mother and father and sought emergency removal of all four children. At that time, the children's ages were 14, 6, 4, and two months.

The county based the CHIPS petition on allegations that mother physically abused M.H., and father was aware of the abuse and did not stop it. Specifically, the county alleged that mother beat M.H. daily, usually with a belt or a metal rod, resulting in bruising; mother attempted to drown M.H. multiple times; mother threw M.H. across the room, causing M.H. to hit her head against a wall; M.H. wore long sleeves and pants year round to cover the bruises; and M.H. stayed home from school on at least one occasion because mother beat her. An.H. confirmed that mother hit M.H. with a belt, shoe, hand, or slipper, and she had seen marks on M.H.'s body from getting hit. C.H. also confirmed that mother hit M.H. with a belt, resulting in marks. Mother and father denied the allegations.

The district court authorized emergency removal of the children from mother and father and held a CHIPS trial on April 20. After the trial, the court found all four children to be CHIPS, due to physical and emotional abuse, and transferred the children's custody to the county.

On May 6, the district court held a dispositional hearing. The court concluded in a disposition order on May 12 that the CHIPS petition established a prima facie case that M.H. suffered egregious harm, as defined in Minn. Stat. § 260C.007, subd. 14 (2008). The court also concluded that M.H. experienced egregious harm because she was the victim of malicious punishment, child endangerment, and third-degree assault. *See id.*, subd. 14(3), (5), (6). Pursuant to Minn. Stat. § 260.012(a)(1) (Supp. 2009), the district court therefore relieved the county from the duty to provide reasonable efforts to prevent placement and for rehabilitation and reunification.

On May 27, the county petitioned for the termination of parental rights (TPR) of mother and father to An.H., C.H., and Al.H., and for the termination of their custodial rights to M.H. On October 5, the district court held a TPR trial.

The county attorney said in her opening statement:

> Pursuant to Minnesota Statute 260C.007, subdivision 14, and 260C.301, subdivision 1(b)(6), and subdivision 3, when a parent has committed egregious harm against a child it is presumed that it is in the best interests of the children, all of their children, not only the one who has been abused that their parental rights be terminated.

Mother and father's counsel agreed, in both his opening statement and closing argument, that because of the district court's egregious-harm finding in its May 12 order, the burden

of proving the children's best interests shifted to mother and father. But mother and father offered no evidence about the children's best interests; their counsel merely stated, in his opening statement and closing argument, that the best interests of the children were served by residing with mother and father and that the county's relative-placement search was incomplete.

The county presented evidence that mother and father beat M.H. with a belt. On numerous occasions, father left a mark on M.H.'s leg. Mother beat M.H. frequently, from the time she was six or seven years old. Mother hit M.H. with belts, shoes, slippers, or a metal rod used to open blinds. Father witnessed several of these incidents and did not intervene. Sometimes father took An.H. and C.H. outside so they would not see mother abuse M.H. C.H. and An.H. reported that mother and father abused M.H. and if father was not participating, he did not intervene. Sometimes An.H. and C.H. shielded M.H. from beatings.

Mother also attempted to drown M.H. multiple times. On one occasion after M.H. received a poor grade on a school assignment, mother threw her into a bathtub full of water and attempted to drown her. On another occasion, mother pushed her head under dishwater containing bleach because M.H. was not doing the dishes properly. On another occasion, when M.H. stole $500 from mother and father and hid mother's weddings rings and refused to divulge their location, reporting later that she wanted to hurt mother the way she was hurt, mother beat M.H. and held her head under water.

Mother also choked M.H. multiple times, with one incident resulting in M.H. passing out because she could not breathe. Mother hit M.H. in the ribs, causing breathing

problems and requiring a trip to the hospital. Mother burned M.H.'s face with a curling iron, causing scars. Mother threw M.H. across the room by her hair. Mother withheld food from M.H. for several days at a time as a form of punishment. When mother found out that M.H. stole food while she was being punished, mother made her vomit it. When mother caught M.H. heating soup while she was being punished, mother threw it in her face.

Mother also physically abused C.H. When C.H. cut mother's shoelaces, mother beat her with a belt, leaving welts on her arms, legs, and body. C.H. wore long sleeves to cover the welts when the family went to a movie that afternoon. Mother made M.H. go to the movie without shoes as punishment because she was supposed to be watching C.H. Mother told M.H. that it was her fault that C.H. was beaten because she was not watching C.H. closely enough.

The children described a punishment that they called "the position," which consisted of kneeling on the floor or rocks and holding their hands up for one to two hours.

As to Al.H., the county offered evidence that Al.H. cried when mother bathed her because the water was too hot. When the foster mother bathed Al.H., she did not cry.

The county presented evidence that it contacted 18 people as part of its relative-placement search and that the people contacted either did not respond or were unable to take the children.

The evidence showed that mother and father made minimal efforts to rehabilitate themselves. Father took English classes and mother attended a church class. When

asked for more detail about the class, mother stated only that the class was similar to a "10-step class."

The district court concluded that

> a child experienced egregious harm in [appellants'] care which is of a nature, duration, or chronicity that indicates a lack of regard for the child's well-being, such that a reasonable person would believe it contrary to the best interest[s] of the child or of any child to be in [appellants'] care.

The court also concluded that the best interests of An.H., C.H., and Al.H. were served by placing them under the guardianship of the Minnesota Commissioner of Human Services, and it terminated the parental rights of appellants to An.H., C.H., and Al.H.[1]

This appeal follows.

D E C I S I O N

Mother and Father's Challenge to April 23 CHIPS Finding

In their notice of appeal, mother and father state that they are appealing from the district court's finding in its April 23, 2010 order that the children were CHIPS. The county argues that mother and father failed to timely appeal the April 23 order. We agree.

"An appeal may be taken . . . from a final order of the juvenile court affecting a substantial right . . . including . . . an order adjudicating a child to be in need of protection or services . . . ." Minn. R. Juv. Prot. P. 47.02, subd. 1. The appeal must be filed within 20 days of the service of notice by the court administrator of the filing of the court's

[1] In a separate order, the court dismissed M.H. from the petition because mother and father gave up all custodial, guardianship, and attorney-in-fact rights with respect to her.

order. *Id.*, subd. 2. The notice of filing of the order is dated April 28, 2010. Mother and father filed their appeal on October 25, 2010, which was more than 20 days after service of the notice of filing. Mother and father did not make any posttrial motions that tolled the time for appeal. The appeal of the April 23 order is untimely and not properly before the court. We therefore will not consider the CHIPS finding in the district court's April 23, 2010 order.

Order Relieving County of Duty to Engage in Rehabilitation and Reunification Efforts

Mother and father challenge the district court's May 12, 2010 disposition order relieving the county of its duty to rehabilitate and reunite mother and father with their children. The county argues that mother and father are barred from challenging the district court's May 12 order because they did not appeal from it and their appeal is untimely. We disagree.

"An appeal may be taken . . . from a final order of the juvenile court affecting a substantial right . . . ." *Id.*, subd. 1. Although the May 12 order affected mother and father's substantial rights because the district court relieved the county of its duty to provide rehabilitation and reunification efforts, we conclude that the order was not a final order. The court did not make a final determination about mother and father's fitness or whether they could be reunified with their children. In fact, the order required further proceedings. Because of the court's egregious-harm determination, the order required the county to file either permanency pleadings or a TPR petition. Minn. Stat. § 260.012(b) (Supp. 2009). By contrast, a "final" order is "one that ends the proceeding as far as the court is concerned or that finally determines some positive legal right of the appellant

relating to the action." *In re Estate of Janecek*, 610 N.W.2d. 638, 642 (Minn. 2000) (quotation omitted). Because the May 12 order was not a final order, it was not appealable and therefore not subject to the 20-day deadline for filing an appeal under Minn. R. Juv. Prot. P. 47.02, subds. 1 and 2.

We will review the May 12 order because of its effect on the TPR proceeding that resulted in the district court's October 6 order terminating mother and father's parental rights. *See* Minn. R. Civ. App. P. 103.04.

Mother and father argue that, contrary to the district court's determination in its May 12 order, the county's CHIPS petition did not establish a prima facie case of egregious harm and therefore the court erred by relieving the county of its duty to provide rehabilitation and reunification efforts on that basis.

"Reasonable efforts to prevent placement and for rehabilitation and reunification are always required *except* upon a determination by the court that a petition has been filed stating a prima facie case that: (1) the parent has subjected a child to egregious harm as defined in section 260C.007, subdivision 14 . . . ." Minn. Stat. § 260.012(a) (emphasis added). "Egregious harm" is "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. The statute provides ten examples of egregious harm, but notes that the list is non-exclusive. *Id.* "Bodily harm" is not defined in the child-protection statutes, but the criminal code defines "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subd. 7 (2010).

We have already discussed the county's allegations of physical abuse of the children contained in this CHIPS petition. Although egregious-harm cases often involve more serious injuries than those described in the CHIPS petition, *see, e.g.*, *In re Welfare of Children of M.L.A.*, 730 N.W.2d 54, 59 (Minn. App. 2007) (involving nine fractures), in examining the allegations as whole, we conclude that the district court did not err by concluding that the CHIPS petition established a prima facie case that mother inflicted egregious harm upon a child in her care. The CHIPS petition established a prima facie case that mother inflicted bodily harm to M.H., which demonstrated a grossly inadequate ability to provide minimally adequate parental care to her or any other child in her care. And father did nothing to prevent mother's physical abuse and inflicted some of his own abuse on the children. The district court therefore properly relieved the county of its duty to provide rehabilitation and reunification efforts to mother and father.

Sufficiency of Evidence to Terminate Mother and Father's Parental Rights

Mother and father argue that the evidence is insufficient to support the district court's order terminating their parental rights. Our review of an order terminating parental rights is "limited to determining whether the findings address the statutory criteria, whether those findings are supported by substantial evidence, and whether they are clearly erroneous." *In re Welfare of D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997). Because the district court is in a superior position to observe the witnesses during trial, its assessment of witness credibility is accorded deference on appeal. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). But we "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *In re Welfare of J.M.*,

574 N.W.2d 717, 724 (Minn. 1998). We will affirm the district court's TPR if "at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the child's best interests." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004).

The party petitioning to terminate parental rights has the burden to prove the existence of grounds for termination in the trial court by clear and convincing evidence. *In re Welfare of Solomon*, 291 N.W.2d 364, 367–68 (Minn. 1980). This burden is subject to the presumption that the natural parents are suitable to be entrusted with the care of their children and that it is in the children's best interests to be in their natural parents' care. *In re Welfare of Clausen*, 289 N.W.2d 153, 156 (Minn. 1980). We previously noted that both the district court and the parties maintain that because of the court's egregious-harm determination in its May 12 order, mother and father bore the burden at trial of proving that the children's best interests would not be served by a TPR. But neither the district court nor the parties cite to legal authority that supports their contention that the best-interests burden shifted to mother and father.

The county attorney in her opening statement cited sections 260C.007, subdivision 14, and 260C.301, subdivisions 1(b)(6) and 3, as authority. Section 260C.007, subdivision 14, defines egregious harm. Section 260C.301, subdivision 1(b)(6) (2010), provides that the court may terminate parental rights if it finds that

> a child has experienced egregious harm in the parent's care which is of a nature, duration, or chronicity that indicates a lack of regard for the child's well-being, such that a reasonable person would believe it contrary to the best interest of the child or of any child to be in the parent's care.

Section 260C.301, subdivision 3 (2010), requires the county attorney to "file a termination of parental rights petition within 30 days of the responsible social services agency determining that a child has been subjected to egregious harm" or "is determined to be the sibling of another child of the parent who was subjected to egregious harm."

We acknowledge other presumptions contained in section 260C.301. For example, under subdivision 1(b)(4) (2010), which allows a court to terminate parental rights if it finds that a parent is palpably unfit, a parent is presumed to be palpably unfit upon a showing that the parent's parental rights to one or more other children were involuntarily terminated or custodial rights to another child were involuntarily transferred to a relative. And under subdivision 1(b)(5) (2010), which allows a court to terminate parental rights if it finds that reasonable efforts have failed to correct the conditions leading to the child's out-of-home placement, reasonable efforts are presumed to have failed in certain circumstances. But neither subdivision 1(b)(4) nor 1(b)(5) was cited in the TPR petition as a ground for termination. The only ground for termination asserted in the TPR petition is egregious harm under subdivision 1(b)(6). "[T]ermination of parental rights cannot be based on a statutory ground that was not included in a petition to terminate parental rights." *In re Welfare of Child of B.J.-M.*, 744 N.W.2d 669, 673 (Minn. 2008). Palpable unfitness and failure of reasonable efforts therefore do not apply in this case.

Nothing in the statutes cited by the parties shifts the best-interests burden from the county to mother and father because of the district court's egregious-harm determination. And we are unaware of any caselaw supporting such a burden-shifting. And even if a

presumption existed that TPR is in the best interests of the children, the burden of proof would not shift to mother and father; mother and father would only be required to rebut the presumption. *See In re Welfare of Child of T.D.*, 731 N.W.2d 548, 554 (Minn. App. 2007) ("[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof." (quoting Minn. R. Evid. 301)).

But, despite the erroneous assumption of the district court and parties that the burden of establishing the best interests of the children shifted to mother and father, we will affirm the district court's TPR if "at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the child's best interests." *R.W.*, 678 N.W.2d at 55.

The horrific facts in this record, established through evidence presented by the county, amply support the district court's finding that the county proved by clear-and-convincing evidence the ground for TPR in section 260C.301, subdivision 1(b)(6), a child experienced egregious harm in mother and father's care. The court found that M.H. experienced egregious harm in mother's care "which is of a nature, duration, or chronicity that indicates a lack of regard for the child's well-being, such that a reasonable person would believe it contrary to the best interest of the child or of any child to be in the parent's care." Minn. Stat. § 260C.310, subd. 1(b)(6). We conclude that the evidence is sufficient to support the court's findings and order terminating mother and father's parental rights. Although the county offered more evidence of mother's physical abuse than father's, the court properly terminated father's parental rights because the evidence

is clear and convincing that father either knew or should have known that M.H. suffered egregious harm. *See In re Welfare of Child of T.P.*, 747 N.W.2d 356, 362 (Minn. 2008) ("[T]o terminate the rights of a parent who has not personally inflicted egregious harm on a child, a court must find that the parent either knew or should have known that the child had experienced egregious harm." (footnote omitted)); *see also In re Welfare of A.L.F.*, 579 N.W.2d 152, 155–56 (Minn. App. 1998) (affirming TPR when parent harmed another's child).

But termination must also be in a child's best interests. A child's best interests are the "paramount" concern when addressing whether to terminate parental rights. Minn. Stat. § 260C.301, subd. 7 (2010). A child's best interests also outweigh conflicting interests of a parent and may preclude TPR when a statutory basis for termination is otherwise proved. *Id.*; *see also In re Tanghe*, 672 N.W.2d 623, 625–26 (Minn. App. 2003). The best-interests analysis requires the district court to balance the child's interest in preserving the parent and child relationship, the parent's interest in preserving the parent and child relationship, and any competing interests of the child. Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(3); *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). "Competing interests include such things as a stable environment, health considerations and the child's preferences." *R.T.B.*, 492 N.W.2d at 4.

The district court concluded that TPR is in the children's best interests based on the untreated and long-standing pattern of physical and emotional abuse, beginning when the children reach the approximate age of five years old. The record reflects the district court's careful consideration of the children's best interests and contains sufficient

evidence to support the district court's determination that it is not in the children's best interests to be returned to mother and father.

Because the egregious-harm statutory ground is supported by clear and convincing evidence, and because the district court's conclusion that termination is in the children's best interests is not clearly erroneous, we conclude that the district court did not err by terminating mother and father's parental rights to An.H., C.H., and Al.H.

Affirmed.