STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0629

In the Matter of the Welfare of the Children of: H. O., Parent.

Filed October 28, 2013
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-JV-12-4215

William M. Ward, Chief Fourth District Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for appellant H.O.)

Michael O. Freeman, Hennepin County Attorney, James R. Hanneman, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Jody Alholinna, Minneapolis, Minnesota (for guardian ad litem)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

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

BJORKMAN, Judge

Appellant challenges the involuntary termination of her parental rights, arguing that (1) the district court abused its discretion by admitting 27 hearsay documents as exhibits, without which the record lacks clear and convincing evidence of any

termination grounds and (2) the district court erroneously terminated her parental rights based on her mental illness. We affirm.

FACTS

Appellant H.O. (mother) has three children, 11-year-old T.O., 4-year-old N.O., and 2-year-old G.O.[1] Mother has a long and admitted history of mental-health problems, starting at least when she immigrated to the United States from Kenya in 2001. Respondent Hennepin County Department of Human Services (the county) first became involved with mother in early 2010 when T.O. and N.O. were removed from mother's custody based on concerns about her mental health. The county filed a child-in-need-of-protection-or-services (CHIPS) petition. Mother admitted the petition, and the district court adjudicated the children in need of protection or services. Mother continued to struggle with her mental health, but in early 2011 she began regularly attending therapy appointments and taking her medication and began to stabilize. G.O. was born in May 2011, and T.O. and N.O. were returned to mother under protective supervision in August. The CHIPS case was dismissed the following month, after 19 months of court-ordered out-of-home placement.

In January 2012, N.O.'s father, E.A., filed a petition seeking custody of N.O. based on concerns about mother's mental health and ability to parent. The district court appointed Vickie Goulette as N.O.'s guardian ad litem (GAL) for the custody matter. Goulette had no concerns about mother's behavior when she met with mother in January,

[1] Mother's ex-husband, P.O., is the father of T.O. A.B. is the father of G.O. The district court terminated the parental rights of P.O. and A.B. Those terminations are not at issue in this appeal.

but by mid-February, Goulette noticed that mother's behavior was volatile and aggressive. Goulette communicated with mother's therapist, Chiara Mesia, who shared Goulette's concerns about mother's behavior and confirmed that mother had discontinued her medications. Between mid-February and the end of April, Goulette observed numerous instances of delusional and aggressive behaviors, often in front of and affecting the children.

At a hearing in the custody matter in late February, mother was argumentative and hostile, unable to regulate her emotions or behavior despite the court's attempts to calm her. As mother continued to yell, Goulette noticed that N.O. was curled up on a bench in the back of the courtroom sobbing quietly with his hands over his face—behavior she had never before observed from a child his age (two and one-half years old). On other occasions around that time, Goulette noticed that N.O. had a "flat" affect and was largely nonverbal. E.A. expressed concerns to Goulette about the same issues and about N.O.'s low weight (28 pounds).

During this same time frame, mother made numerous statements that reflected her mental illness. She made allegations against E.A., such as claiming that he threatened to feed the children to the dog. Mother also claimed that Goulette was conspiring against her with E.A. and the United States government and the police department. And in early spring, mother left her apartment with the children, explaining that G.O.'s father and E.A. were sending people there to harm her and that the police had instructed her to leave the apartment; Goulette confirmed with police that they had not done so.

After mother failed to bring N.O. to a doctor's appointment in late April for a recently diagnosed heart murmur, Goulette reported her concerns to her supervisor and obtained an emergency ex parte order transferring custody of N.O. to E.A. Goulette also reported her concerns to the county, and the county initiated a child-protection investigation regarding T.O. and G.O. But the county initially could not locate mother and the children because she refused to tell Goulette where they were, explaining that police told her it was unsafe to reveal her location. After several days, the county found them, placed T.O. and G.O. in foster care, and transferred custody of N.O. to E.A.

On May 3, 2013, the county filed a termination-of-parental-rights (TPR) petition with respect to all three children, alleging three statutory grounds for termination: failure to comply with parental duties, palpable unfitness, and failure of reasonable efforts to correct the conditions that led to the children's out-of-home placement. Mother agreed to a case plan that required her to participate in weekly therapy sessions with Mesia, take all prescribed medications, complete a parenting assessment, participate in supervised visitation with T.O. and G.O., and establish safe and suitable housing. Mother initially demonstrated some compliance with the case plan. But beginning in August or September 2012, her behavior once again became erratic and aggressive. She expressed delusional concerns that county staff were plotting against her and that the foster parents were not caring properly for G.O., for which she blamed T.O. She missed several visits with her children, and eventually the district court suspended visitation because of her aggressive behavior toward the foster parents and county staff. Mother failed to appear for numerous parenting assessments and refused to communicate with the county about

her living arrangements or provide contact information. And while she attended her therapy sessions with Mesia, she refused to sign authorizations to permit the county to obtain records from other providers or otherwise demonstrate medication compliance.

Before trial, mother filed motions in limine identifying numerous evidentiary issues and emphasizing the foundational requirements for the business-records exception to the hearsay rule. At the two-day trial in January 2013, the district court heard testimony from Charlotte Miller, the county social worker assigned to this case; Nancy Lange, the children's GAL for this case; Goulette; E.A.; and mother. The district court also received 51 exhibits, nearly all based on Miller's testimony and more than half over mother's objections.

The district court determined that the county made reasonable efforts toward reunification, that the county proved all three grounds for termination, and that termination is in the children's best interests. Mother moved for a new trial or amended findings; the district court denied the motion. This appeal follows.

D E C I S I O N

Parental rights may be terminated "only for grave and weighty reasons." *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). Termination requires clear and convincing evidence that (1) the county has made reasonable efforts to reunite the family, (2) there is a statutory ground for termination, and (3) termination is in the child's best interests. *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). On appeal, we review the district court's findings "to determine whether they address the statutory criteria and are not clearly erroneous, in light of the clear-and-

convincing standard of proof." *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 665 (Minn. App. 2012) (citation omitted). We will affirm as long as at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the children's best interests. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). We review a district court's ruling regarding whether a particular statutory basis for termination is present for an abuse of discretion. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

I. The district court did not commit prejudicial evidentiary error.

Whether to admit or exclude evidence is discretionary with the district court. *See In re Welfare of Children of J.B.*, 698 N.W.2d 160, 172 (Minn. App. 2005), *review dismissed* (Minn. May 3, 2005). A district court abuses its discretion if it improperly applies the law. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997). We will order a new trial on the basis of an improper evidentiary ruling only if the appellant demonstrates both error and resulting prejudice. *Id.*

Mother challenges the admissibility of 27 exhibits, principally arguing that the county did not establish a sufficient foundation to admit them under the business-records exception to the hearsay rule. *See* Minn. R. Evid. 802 (general rule); Minn. R. Evid. 803(6) (business-records exception to hearsay rule). A party seeking to have a document admitted as a business record must present testimony establishing that

> the records were (1) made by a person with personal knowledge of the matters recorded and a business duty to report accurately or from information transmitted by a person with such knowledge, (2) made at or near the time of the recorded event, (3) kept in the course of a regularly conducted

> business activity, and (4) made as part of the regular practice of that business activity.

In re Welfare of Child of Simon, 662 N.W.2d 155, 160 (Minn. App. 2003). The custodian of the record need not testify, but the witness laying foundation must be sufficiently familiar with how the business creates and maintains its records to address the requisite factors. *See id.* at 160-61 (holding that a therapist's evaluation letters were inadmissible under the business-records exception because the witness, a social worker, was unfamiliar with the therapist's method for compiling records).

Mother's challenge in this appeal is the same that other parents have made to the county's practice of laying only cursory business-records foundation, or purporting to lay business-records foundation for numerous exhibits at once by reciting the *Simon* factors without addressing how each document satisfies the applicable standard. The county's approach does not comport with the clear and now well-known requirements articulated in *Simon*. We are sensitive to the time constraints district courts and county attorneys face in managing heavy caseloads. *See In re Welfare of D.J.N.*, 568 N.W.2d 170, 175 (Minn. App. 1997) (attributing the increased use of written hearsay materials in child-protection cases to "the mushrooming body of judicial activity in the field[]"). But we share mother's concern that the batch-foundation approach unfairly lowers the county's burden of proof and places the onus on parents to track and object to the sufficiency of each document's foundation. In short, neither crowded court dockets nor the short timelines for making permanent-placement decisions for young children relieve the county of its obligation to comply with the rules of evidence.

Nonetheless, error without prejudice does not warrant reversal, *see Kroning*, 567 N.W.2d at 46, and no prejudice is apparent from this record. First, while mother emphasizes the number of exhibits admitted without proper business-records foundation, she has not articulated any reason to consider these exhibits inaccurate or otherwise unreliable. *See Simon*, 662 N.W.2d at 160 (stating that business records are "presumed to be reliable" because regularity and review ensure accuracy). To the contrary, eight of the challenged exhibits are therapy records (exhibits 21-24, 27-29, and 59) and two are psychological reports, albeit court-ordered (exhibits 25 and 26), which are the types of documents commonly admitted as business records. *See In re Welfare of J.K.*, 374 N.W.2d 463, 467 (Minn. App. 1985) (stating that "reports of social workers and psychologists are admissible as business records"), *review denied* (Minn. Nov. 25, 1985); *Murray v. Antell*, 361 N.W.2d 466, 469 (Minn. App. 1985) (holding mental-health reports on mother and stepfather admissible as business records).

Second, the unchallenged testimony and numerous unchallenged exhibits amply support the district court's termination decision.[2] *See In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 93 (Minn. App. 2012) (stating that "evidentiary error is not prejudicial if the record contains other evidence that is sufficient to support the findings"). Mother acknowledges that she is "sick," and the prior CHIPS order (exhibit 39) and the TPR out-of-home placement plans (exhibits 14-18) document her long "history of severe mental

[2] Mother asserts that the existence of sufficient evidence without the challenged exhibits means the exhibits are cumulative. But even if the challenged exhibits are cumulative, that fact alone does not render their admission reversible error. *See J.B.*, 698 N.W.2d at 172 (stating that "erroneous admission of evidence that is cumulative of other admissible evidence is harmless and will not warrant a new trial" (quotation omitted)).

illness." Every trial witness other than mother herself testified to observing delusional, erratic, and aggressive behaviors from mother, often in front of or directed at the children. And the district court observed that mother exhibited delusional thinking during her testimony at trial.

Unchallenged evidence also establishes mother's long-standing inability or refusal to manage her mental illness. As the CHIPS order indicates, T.O. and N.O. were placed in foster care in early 2010 because mother was not taking her medications or otherwise managing her illness. During the next 19 months, she stabilized with regular medication and therapy with Mesia, and the children were returned to her care in the fall of 2011. But Goulette testified that within six months, mother stopped taking her medication and again exhibited aggressive, delusional, erratic behaviors that led to the emergency order transferring custody of N.O. (exhibit 42),[3] and led to the county filing the TPR petition. Mother again made initial efforts to manage her mental illness with medication and therapy, but Miller, Lange, and Goulette noticed a return of aggressive, delusional, erratic behaviors by fall 2012.

The unchallenged evidence also indicates that mother's unmanaged mental illness has harmed and likely will continue to harm her children. Miller, Goulette, and Lange all

[3] Mother did not object to the district court taking judicial notice of this Hennepin County order. Mother now challenges the exercise of judicial notice. Though mother failed to preserve an objection to the exhibit, *see J.K.T.*, 814 N.W.2d at 96 (holding that failure to object to admission of exhibit at trial waives right to appellate review as to that exhibit), we conclude that the district court properly took judicial notice of the order. *See* Minn. R. Evid. 201(a) (permitting judicial notice of adjudicative facts in civil cases); Minn. R. Juv. Protect. P. 3.02, subd. 3 (expanding scope of judicial notice for juvenile-protection proceedings to include "findings of fact and court orders in the juvenile protection court file" and any other proceeding involving the child or parent).

testified that mother's volatile and aggressive behaviors and persistent delusions pose a risk to her children's emotional and psychological well-being. The district court credited their testimony, and the record supports their concerns. Goulette observed N.O. exhibit extreme emotional disturbance when faced with mother's volatile courtroom behavior. And Goulette and E.A. both noticed that N.O. was unexpressive and largely nonverbal when he was removed from mother's care, but these conditions improved in E.A.'s care. Miller testified that mother focused obsessively on G.O.'s well-being, despite medical evidence indicating he was healthy, and blamed T.O. for the perceived lack of care. T.O.'s therapy records (exhibits 31-32) and Lange's testimony indicate T.O.'s anxiety about this obsessive, delusional focus on G.O.'s well-being.

In sum, our careful review of the record reveals that clear and convincing admissible evidence supports the district court's determination that, despite the county's reasonable efforts, mother is unwilling or unable to consistently manage her mental illness so that (1) the conditions requiring the children's placement out of the home have not been corrected, (2) mother is unable to meet her parental duties, and (3) she is palpably unfit to parent now and in the foreseeable future. Accordingly, any error the district court may have committed by admitting hearsay documents without adequate foundation did not prejudice mother.

II. The district court did not erroneously terminate mother's parental rights based on her mental illness.

"Mental illness, in and of itself, is not sufficient basis for the termination of parental rights." *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996). But if a

parent's mental illness renders the parent foreseeably incapable of caring safely and appropriately for the child, termination of parental rights is appropriate. *Id.*; *see also In re Welfare of Kidd*, 261 N.W.2d 833, 836 (Minn. 1978) (focusing on whether the "conduct of the parent is likely to be detrimental to the physical or mental health of the child"). The district court did not terminate mother's parental rights because she is mentally ill but because mother's unmanaged severe mental illness, and her resulting behavior, "have a significant and adverse impact on her children's emotional and psychological well-being." We conclude that sufficient admissible evidence supports that determination, as well as the unchallenged finding that termination of mother's parental rights is in her children's best interests.

Affirmed.