**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-0835**
**A13-0867**

In the Matter of the Welfare of the Children of:
K. R. and B. "S." C., Parents.

**Filed December 16, 2013**
**Affirmed**
**Klaphake, Judge**[*]

St. Louis County District Court
File No. 69VI-JV-12-158

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Patrick Valentini, Chisholm, Minnesota (for respondent K.R.)

Cassandra Hainey, Virginia, Minnesota (guardian ad litem)

Considered and decided by Connolly, Presiding Judge; Schellhas, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

**KLAPHAKE**, Judge

In this consolidated appeal, appellant-father B."S."C. challenges the termination of his parental rights to his three- and four-year-old daughters, C.C. and L.C. B."S."C. argues that the evidence does not support the district court's conclusions that he is a palpably unfit parent and that reasonable efforts have failed to correct the conditions leading to the children's out-of-home placement. Respondent St. Louis County argues that the district court erred by transferring permanent legal and physical custody to respondent-grandmother, J.H.C. Because the record supports the district court's termination decision on the statutory ground of failure of reasonable county efforts to correct conditions and because the district court did not err in transferring permanent custody of the children to J.H.C., we affirm.

## D E C I S I O N

### I.

In a termination-of-parental-rights proceeding, we review the district court's findings to "determine whether they address the statutory criteria for termination and are not clearly erroneous . . . ." *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 665 (Minn. App. 2012) (citation omitted). In order to terminate parental rights, there must be clear and convincing evidence that at least one of the statutory bases for termination exists and that termination is in the children's best interests. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004); *see* Minn. Stat. § 260C.301, subd. 1(b) (2012) (listing nine termination bases). "Considerable deference is due to the district court's

decision [to terminate parental rights] because a district court is in a superior position to assess the credibility of witnesses." *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). A district court's ultimate determination that termination is in the child's best interest is reviewed for an abuse of discretion. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 905 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

A district court may terminate parental rights if it finds "that following the child's placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement." Minn. Stat. § 260C.301, subd. 1(b)(5). It is presumed the conditions leading to a child's out-of-home placement have "not been corrected upon a showing that the parent or parents have not substantially complied with the court's orders and a reasonable case plan" and "reasonable efforts have been made by social services agency to rehabilitate the parent and reunite the family." *Id.* subd. 1(b)(5)(iii), (iv); *see In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 386-87, 389 (Minn. 2008) (reinstating district court's termination of parental rights given mother's failure to comply with terms of case plan). B.C. challenges the district court's determination that the conditions leading to the children's out-of-home placement have not been corrected and that reasonable efforts were made by social services to reunite the family.

The district court identified the following conditions that were not corrected following the children's out-of-home placement: stable and safe housing, B.C.'s inconsistent visitation and irregular phone contact with children, B.C.'s chemical abuse issues, B.C.'s anger and violence issues, and B.C.'s motivation to provide day-to-day

care for the children in a safe and responsible manner. The district court also found that B.C. was not compliant with court orders and his case plan directives to attend court or appear by phone, sign releases, provide information on how he would care for and support the children, participate in urinalysis testing, and provide employment, housing, and school information. These findings are supported by trial testimony and reports submitted by social services that detail B.C.'s failure to attend visits and maintain contact with the children, and his inability to financially support the children or provide stable housing for the children. B.C.'s testimony further supports the district court's conclusion that he did not comply with the case plan.

B.C. also claims, pursuant to Minn. Stat. § 260C.301, subd. 1(b)(5)(iv), that the county did not make reasonable efforts to aid in reunification because it focused exclusively on reunification efforts with the mother and failed to offer him culturally appropriate services. The district court found that the following services constituted reasonable efforts to reunite B.C. with his children: child protection case management, transportation assistance, foster care, parenting assessment, psychological evaluation, supervised visitation, intensive family-based services, domestic abuse programming, home visits, and urinalysis. Two social workers were assigned to the case, and B.C. received other services and accommodations to aid in reunification, such as transportation vouchers to visit the children and scheduling of visitation to suit B.C.'s schedule. As to whether the county offered culturally appropriate services, B.C. discussed with a social worker inclusion of cultural aspects into his supervised visits, but B.C. did not provide the social worker with requested information necessary to include a cultural component

in visitation. Because the district court's decision is based on consideration of this statutory factor and is supported by clear and convincing evidence, we affirm the termination of B.C.'s parental rights under Minn. Stat. § 260C.301, subd. 1(b)(5). We decline to specifically address whether B.C. is palpably unfit to parent the children because only one statutory ground must exist to support a termination-of-parental rights decision. *See In re Children of T.R.*, 750 N.W.2d 656, 661 (Minn. 2008); *see also* Minn. Stat. § 260C.301, subd. 1(b) (2012) (permitting parental termination if "one or more" grounds for termination of parental rights exists).

Regarding whether termination of B.C.'s parental rights is in the children's best interests, the district court found that it is consistent with the children's best interests to terminate B.C.'s parental rights because of B.C.'s "present and future inability to safely care for the children or to provide for their needs, the children's need for a stable and safe home that could meet their needs, the children's need for stability and predictability, father's limited bond with children, and father's competing interests." Based on the record, the children's safety and their need for a stable environment outweigh B.C.'s interest in maintaining the parent-child relationship. The district court's best-interests analysis fully supports its decision to terminate B.C.'s parental rights.

**II.**

The county challenges the district court's decision to grant J.C.'s petition for permanent legal and physical custody of the children. As an initial matter, it asserts that J.C.'s petition should not have been considered by the district court because it was untimely and not properly before the court. But the county did not challenge the

timeliness of J.C.'s petition until it filed a post-trial motion. Generally, Minnesota appellate courts will not consider a claim raised for the first time post-trial, and we decline to deviate from this practice. *See Antonson v. Ekvall*, 289 Minn. 536, 538-39, 186 N.W.2d 187, 189 (1971) (stating that a claim was made "too late" when it was made for the first time in a motion for a new trial); *Allen v. Cent. Motors*, 204 Minn. 295, 299, 283 N.W. 490, 492 (1939) (stating that an issue was raised "too late" when first raised in motion for amended findings); *Superior Shores Lakehome Ass'n v. Jensen-Re Partners*, 792 N.W.2d 865, 868 (Minn. App. 2011) (citing *Antonson* and *Allen* when declining to address a question that was "[a]t best" raised in a party's "request to file a motion for reconsideration"). Because the county's challenge to the timeliness of J.C.'s custody petition was itself untimely, we decline to consider it. And, as noted by the district court, it is in the best interests of the children to consider a petition to transfer custody to a relative.

The county next contends that the district court failed to make sufficient findings to support placement of the children with J.C. When reviewing a permanent placement order, this court determines "whether the trial court's findings address the statutory criteria and are supported by substantial evidence, or whether they are clearly erroneous." *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261 (Minn. App. 1996) (quotation omitted). A party challenging factual findings must show by "definite and firm conviction that a mistake was made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

A transfer of permanent legal and physical custody requires the district court to make specific findings about: (1) the best interests of the child; (2) the nature and extent

of reasonable efforts to reunite the family; (3) the parent's efforts and ability to use services to correct the conditions that led to out-of-home placement; and (4) whether the conditions that led to the out-of-home placement have been corrected. Minn. Stat. § 260C.517(a) (2012). When ruling on a permanency disposition, "the court must be governed by the best interests of the child, including a review of the relationship between the child and relatives and the child and other important persons with whom the child has resided or had significant contact." Minn. Stat. § 260C.511(b) (2012).

In concluding that placement of the children with J.C. is in the children's best interests, the district court relied on evidence that the children's sister, R.C., was placed permanently with J.C. in 2005, is doing well in J.C.'s care, and the children have begun to develop a positive sibling relationship with R.C. In addition to receiving 44 exhibits into the evidence, the district court heard testimony from B.C., J.C., two social workers, the guardian ad litem, and a friend of J.C. J.C. testified to how she would meet the educational, medical, developmental, religious, and cultural needs of the children in addition to recognizing and nurturing the children's talents. The record reveals that J.C. also attended many of the supervised visits with B.C., and that she was actively engaged with the children during these visits and assisted B.C. in his parenting duties.

The district court also noted the instability that has been present the entirety of the children's lives. The children, who have a history of moving frequently, have been in out-of-home placement since July 26, 2011, and have lived with four foster families until the date of trial. A review of the record confirms that there is substantial evidence to

support the district court's conclusion that it is in the children's best interests to grant permanent legal and physical custody to J.C.

The county also argues that the district court erred when it transferred custody to J.C. instead of transferring guardianship to the commissioner of human services pursuant to Minn. Stat. § 260C.325 (2012), once it terminated B.C.'s parental rights. Section 260C.325 provides:

> (a) When the court terminates parental rights of both parents or of the only known living legal parent, the court shall order the guardianship of the child to:
>
> (1) the commissioner of human services;
> (2) a licensed child-placing agency; or
> (3) an individual who is willing and capable of assuming the appropriate duties and responsibilities to the child.
>
> (b) The court shall order guardianship of a child to the commissioner of human services when the responsible county social services agency had legal responsibility for planning for the permanent placement of the child and the child was in foster care under the legal responsibility of the responsible county social services agency at the time the court orders guardianship to the commissioner. The court shall not order guardianship to the commissioner under any other circumstances, except as provided in subdivision 3.

The county also contends that under Minn. Stat. § 260C.515, subd. 1, the court was required to order only one permanency disposition outlined in the statute. The county claims that the use of "shall" and "must" in both statutes mandated that upon termination of B.C.'s parental rights, the district court should have transferred custody of the children to the commissioner.

"Shall" and "must" are typically defined as "mandatory." Minn. Stat. § 645.44, subds. 15a, 16 (2012). It is a well-established rule, however, that statutory provisions defining the '"time and mode in which public officers shall discharge their duties, and which are obviously designed merely to secure order, uniformity, system, and dispatch in public business, are generally deemed directory.'" *Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869, 875-76 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. May 20, 2008).

Furthermore, "a statute may contain a requirement but provide no consequence for noncompliance, in which case we regard the statute as directory, not mandatory." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 541 (Minn. 2007). When determining whether a statute is mandatory, we examine whether the act provided for is subsidiary to a chief purpose of the law, whether it is designed for the protection of specified person, and whether the statute declares a consequence for failing to comply. *Wenger v. Wenger*, 200 Minn. 436, 440, 274 N.W. 517, 519 (1937); *see Szczech v. Comm'r of Pub. Safety*, 343 N.W.2d 305, 308-09 (Minn. App. 1984) (finding the use of "shall" directory when the legislative intent of statute was to ensure order and uniformity, and a mandatory application would be contrary to public safety).

Here, the lack of consequences for noncompliance and the fact that both statutes were enacted to ensure a timely and uniform process in determining a child's placement require directory readings of the statutes. *Riehm*, 745 N.W.2d at 875-76. To apply a mandatory reading in this case would result in placement of the children with the commissioner and return to foster care when a capable relative is willing to provide a

permanent home. This result would frustrate the paramount consideration of the guardianship statute, to serve the best interests of children. Minn. Stat. § 260C.001, subd. 2 (2012). With these considerations in mind, we conclude that the district court did not err in granting J.C.'s petition and not transferring custody to the commissioner of human services.

The county also raises arguments regarding K.R.'s requested placement preferences, the district court's finding that the county did not exercise due diligence under Minn. Stat. § 260C.221, and the contempt language used in the district court's order. We address each issue briefly.

First, when K.R. voluntarily terminated her parental rights, K.R. requested that no relatives be considered for adoption purposes and that the children be placed for adoption with their foster parents. The district court considered K.R.'s placement preferences but ultimately found that it is in the best interests of the children for them to be placed with a relative and a sibling. The court further found in its amended findings that there were no proposals to transfer custody to the foster parents or any other "pending pre-adoption or adoption proceeding." Thus, we observe no error in the district court's rejection of K.R.'s placement request.

Second, to prevail on appeal, an appellant must show both error and prejudice resulting from an alleged error. *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *see Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that the appellant bears the burden of demonstrating that error is prejudicial), *review denied* (Minn. June 28, 1993). The county fails to show how it was

prejudiced by the district court's finding that it did not exercise due diligence as mandated by § 260C.221, and we therefore decline to review this issue on appeal.

Third, because the district court never made a finding that the county was in contempt of court, we will not address this argument on appeal.

**Affirmed.**