STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2187

In the Matter of the Welfare of the Child of: L. O. and J. O., Parents.

Filed June 24, 2008
Affirmed
Connolly, Judge

Todd County District Court
File No. 77-J3-06-050030

Timothy R. Churchwell, Peters & Churchwell, 274 Central Avenue, Long Prairie, MN 56347 (for appellants)

Jane Gustafson, Todd County Attorney, 212 Second Avenue South, Suite 2, Long Prairie, MN 56347 (for respondent)

Cynthia J. Vermeulen, 26 North 7th Avenue South, St. Cloud, MN 56303 (for guardian ad litem)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Muehlberg, Judge.*

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

CONNOLLY, Judge

L.O. and J.O., the parents of K.M.O., appeal the district court's decision granting the guardian ad litem's (GAL) petition to transfer permanent legal and physical custody

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

of K.M.O. to M.M., arguing that they corrected the conditions that initially led to K.M.O.'s out-of-home placement. Because the district court's finding that appellants did not correct the conditions that led to K.M.O.'s out-of-home placement is not clearly erroneous, we affirm.

FACTS

K.M.O. is the daughter of L.O. (mother) and J.O. (father). She was born in 1996 and, before her removal, she lived with her parents and two adult brothers. The original grounds listed in the February 7, 2006 child-in-need-of-protection-or-services (CHIPS) petition for K.M.O.'s removal from her parents' custody were that she was: (1) without proper parental care because of her parents' emotional, mental, or physical disabilities, or states of immaturity and (2) a child whose behavior, condition, or environment is such as to be injurious to the child or others. *See* Minn. Stat. § 260C.007, subd. 6(8)-(9) (defining a child in need of protective services) (2004). The facts alleged in the CHIPS petition focused on the condition of the residence, noting that there were junk vehicles parked around the house, substantial amounts of clothes and garbage strewn about the home, open food containers, dirty dishes that appeared to have been left out for several weeks, the smell of rotting food, and garbage and food strewn about K.M.O.'s bedroom. The petition also noted that K.M.O. had not attended any school in the public school system serving her residence.

On March 7, 2006, the parents admitted to part of the petition. Specifically, they admitted that K.M.O. was in need of protection and services under Minn. Stat. § 260C.007, subd. 6(9), which states that a child in need of protective services "is one

whose behavior, condition, or environment is such as to be injurious or dangerous to the child or others." That same day, the district court granted temporary physical custody of K.M.O. to Todd County Social Services. K.M.O. was eventually placed with her cousin, M.M., and an out-of-home placement plan (OHP) was formulated. On March 15, 2006, Todd County Social Services Department filed a petition seeking to transfer permanent legal and physical custody of K.M.O. to M.M. On April 27, 2006, the district court extended K.M.O.'s temporary placement. On August 17, 2007, K.M.O.'s guardian ad litem (GAL) filed her own petition for permanent placement.[1] After a six-day trial in which the district court heard testimony from 16 witnesses and admitted 61 exhibits, the district court granted the petition, which transferred permanent legal and physical custody of the child to M.M., and issued an accompanying 26-page order that included 57 findings of fact. This appeal follows.

[1] The county withdrew its support for the petition on the day of trial, proposing that K.M.O. be returned to appellants' home under protective supervision. In response to this unusual and unexpected development, the district court pointed out that:

> The requirement of protective supervision with conditions, after the County had already extended service over an 18-month period at the time of trial, undermines the notion that the child could be safely returned home. Even if a period of protective supervision is an option when a child is returned home under Minn. R. Juv. Prot. 42.05, subd. 2(a)(ii), the fact that in this case, the parents have already had 18 months of services and the child still needs protection supervision, would suggest that a return home would not be in the child's best interests.

D E C I S I O N

"The paramount consideration in all proceedings concerning a child alleged or found to be in need of protection or services is the health, safety, and best interests of the child." Minn. Stat. § 260C.001, subd. 2 (2004). The allegations of a permanent-placement petition must be proven by clear-and-convincing evidence. *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261 (Minn. App. 1996); *see also* Minn. R. Juv. Prot. P. 39.04, subd. 1 (requiring that the statutory grounds set forth in petition be proven by clear-and-convincing evidence). If a court decides not to return the child to the home, it must order one of the dispositions listed in the governing statute, which includes permanently placing the child in the custody of a relative if that decision is in the child's best interests. Minn. Stat. § 260C.201, subd. 11(d)(1) (2004). An order permanently placing a child outside of the home of a parent or guardian must include findings addressing the following statutory criteria:

> (1) how the child's best interests are served by the order;
>
> (2) the nature and extent of the responsible social service agency's reasonable efforts . . . to reunify the child with the parent or guardian where reasonable efforts are required;
>
> (3) the parent's or parents' efforts and ability to use services to correct the conditions which led to the out-of-home placement; and
>
> (4) that the conditions which led to the out-of-home placement have not been corrected so that the child can safely return home.

Id., subd. 11(i) (2004).

When reviewing a permanent-placement order, this court determines whether the district court's permanency "findings address the statutory criteria and are supported by substantial evidence, or whether they are clearly erroneous." *A.R.G.-B.*, 551 N.W.2d at 261 (quotation omitted). To successfully challenge a district court's findings, a party "must show that despite viewing that evidence in the light most favorable to the [district] court's findings . . . the record still requires the definite and firm conviction that a mistake was made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Id.* Whether the district court correctly applied the law is a legal question, which this court reviews de novo. *In re A.R.M.*, 611 N.W.2d 43, 47 (Minn. App. 2000).

In their brief, appellants state that the only issue on appeal is whether "they did, in fact, comply with the OHP to the extent it corrected the condition which led to K.M.O.'s placement." *See A.R.G.-B.*, 551 N.W.2d at 262 ("As a threshold matter, the trial court must determine whether the conditions that led to the out-of-home placement have been corrected so that the child can return home."). The OHP outlined three goals to remedy the conditions that led to K.M.O.'s out-of-home placement. These goals related to: (1) K.M.O.'s safety; (2) L.O. and J.O.'s lifestyle; and (3) K.M.O.'s well-being. The district court made detailed findings that addressed appellants' failure to meet any of the three goals. In their brief, appellants do not cite any specific factual errors that the

district court made in making its findings.[2] Instead, they primarily take issue with the weight that the district court gave to certain witnesses' testimonies.

K.M.O.'s safety:

This goal focused generally on improving the condition of appellants' home. It specifically required appellants to clean all areas inside and outside of the home, fix any areas of the home which were potentially dangerous to K.M.O., remove all outdated medications, maintain the home's upkeep on a daily basis, and develop appropriate housekeeping skills.

The district court recognized that K.M.O.'s parents made some progress on this goal but noted that recent pictures indicated that the residence was not "tidy." While the district court acknowledged that improvements had been made to the house, it noted that, in the past, these "improvements were only temporary." On September 15, 2007, during the course of the trial, the GAL made an unannounced visit to the residence and testified that the condition of the home had slipped backwards. She also testified that J.O. had refused to let her see portions of the house. This was not an isolated incident. Earlier, on June 16, 2007, the GAL made an unannounced visit to the home and found that the house's condition had not actually improved. On July 22, 2007, the GAL made another unannounced visit to the residence and found that, while there was some improvement, the house was messy in general. On August 22, 2007, the GAL made yet another unannounced visit to appellants' residence, and noted that some electrical issues had not

[2] Appellants even acknowledge that "it may be true [K.M.O.'s cousin and current custodian] offered a better opportunity for K.M.O."

been addressed, that several rooms were still very messy, and that there were prescription medications left in the open and presumably within reach of K.M.O. While it is true that when a representative of the relevant child-protection agency visited the home, and found that conditions had improved, this discrepancy can be explained by the simple fact that the visits occurred on different dates.

Given the evidence presented to it, the district court found that the condition of appellants' home "does not appear to be a problem of poverty, or just a messy house, but rather a longstanding willingness to accept conditions and behaviors that have not allowed and will not allow [K.M.O.] to live and grow up in a safe and healthy environment." We conclude that this finding has sufficient evidentiary support.

L.O. and J.O.'s lifestyle:

This goal required appellants to develop a lifestyle appropriate to raising a ten-year old child, with an emphasis on routine, structure, consistency, and discipline. This goal specifically required appellants to complete a parenting class, institute a routine and structure for K.M.O., establish an appropriate parent-child relationship with K.M.O., participate in psychological and parenting assessments and initiate needed services, and obtain and visit a therapist on a regular basis.

The district court found that K.M.O.'s parents completed parenting classes but failed to complete in-home counseling and parental-skills training. On this issue, the district court found that the testimony of Robert Braun, the family's therapist from March 2006 to July 2006, credible. He testified that L.O. was angry, indignant, and dismissive of her antisocial-personality-disorder diagnosis. He further testified that L.O. used bribes

and threats to maintain control of the family, intimidated K.M.O., and talked inappropriately about sex in front of the child. Following the discontinuation of Braun's services, two other in-home counselors stopped coming to the residence because they were made to feel unsafe and uncomfortable. Even after the counseling sessions were moved out of the residence and into an office, they were eventually terminated because L.O. made what the district court described as a "clearly threatening comment"[3] to one of the counselors. The district court credited the GAL's testimony regarding J.O. and L.O.'s lifestyle changes, or lack thereof. In particular, the district court emphasized the GAL's belief that "[K.M.O.'s parents] have not made meaningful progress on the goals of [the] out-of-home placement plan, and they still have no genuine insight into the issues that led to the child's removal from their home." The district court went on, noting that: "In the [GAL's] assessment, the parents have not completed the OHP plan for services in that they have not followed or completed adequately the recommendations of their neuropsychological evaluations nor made significant progress in establishing a parent-child relationship with discipline and appropriate conversation for the child."

K.M.O.'s well-being:

This goal focused on meeting K.M.O.'s emotional, social, and educational needs. It specifically required that K.M.O. attend a school, receive academic and psychological testing, participate in family counseling, and participate in individual counseling.

[3] The counselor testified that L.O. asked her: "Are you safe here, Shelly? Will someone hear you scream?"

Appellants' brief acknowledges that "K.M.O. did well in placement and made significant advances, particularly in her education and socialization needs." There is no evidence in the record that K.M.O.'s parents have taken any meaningful steps to ensure that she would receive appropriate educational instruction if she were to return to appellants' custody. This is particularly relevant in light of the fact that the original CHIPS petition specifically addressed K.M.O.'s lack of schooling, noting, among other things, that: "At the time of the inspection, when the child and father were asked to produce some of her homework materials, etc. they could not find any with the exception of a book."[4]

The district court heard testimony from 16 witnesses. As was its prerogative, the district court chose to give greater weight and credibility to the testimony that favored the transfer of custody. *See General v. General*, 409 N.W.2d 511, 513 (Minn. App. 1987) (stating that "[t]his court must defer to the trial court's assessment of credibility of witnesses and the weight to be given to their testimony"), *superseded by statute on other grounds by* Minn. Stat. § 518.14, subd. 1 (1990), *as recognized in Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2001). While appellants may disagree with the district court's weighing of evidence and credibility determinations, our standard of review requires more than mere disagreement about these determinations to overturn the decision of a fact-finder. Because the district court's finding that appellants did not

[4] K.M.O. was home-schooled at this time.

correct the conditions that led to K.M.O.'s out-of-home placement is not clearly erroneous, we affirm.

Affirmed.