STATE OF MINNESOTA
IN COURT OF APPEALS
A09-829

In the Matter of the Welfare of the Children of:
C.R.S., Parent.

Filed November 3, 2009
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-JV-08-11594

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Considered and decided by Schellhas, Presiding Judge; Worke, Judge; and Ross, Judge.

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

SCHELLHAS, Judge

Appellant-mother challenges the termination of her parental rights to her four minor children, arguing that (1) the district court erred in admitting certain documents as business records, (2) the termination of her parental rights was not supported by clear and

convincing evidence, and (3) termination of her parental rights was not in the children's best interests. We affirm.

FACTS

This termination-of-parental-rights (TPR) case involves the following children: C.G.S., born May 27, 1999; C.C.S., born January 25, 2001; C.J.J., born January 9, 2007; and D.M.J., born September 10, 2007. The TPR proceeding was preceded by the filing of a child-in-need-of-protection (CHIPS) petition by Hennepin County Human Services and Public Health Department (the county), alleging that the four minor children of appellant-mother C.R.S. were in need of protection. In February 2008, the district court ordered the children's out-of-home placement, and in April 2008, the court appointed Karen Nancekivell as guardian ad litem for all four children.

According to a June 2008 district court order, mother entered into a settlement agreement waiving her right to a trial on the CHIPS petition. The district court then found that the children were in need of protection or services based on mother's admissions that (1) she struggled with chemical-dependency problems and mental-health issues, (2) her chemical-dependency and mental-health issues affected her ability to parent her children, and (3) she was receiving services to address her issues and to help her be a better parent. Mother's medical records show that she was addicted to prescription painkillers. The court found that it was in the children's best interests to be in out-of-home placement until there was substantial compliance with a case plan.

Mother's court-ordered case plan included: (1) following the recommendations of treatment, including a sober living environment; (2) submitting to random urinalysis;

(3) completing a psychological evaluation and following the resulting recommendations; (4) following the recommendations of mental-health professionals; (5) participating in in-home parenting services; (6) attending children's medical appointments; and (7) meeting with a child protection social worker on a regular basis. As mother acknowledges in her brief, over the summer of 2008 she completed an aftercare program at Transformation House and relapsed, missed some of her visits with the children, and missed some of her urinalysis tests. In September 2008, the county filed a TPR.

The TPR trial began on February 18, 2009. Child protection social worker Mary Sandstrom testified that, in February 2008, while mother's children were present, mother overdosed on medication, some of which had not been prescribed to her. Mother was nonresponsive and was taken by ambulance to Hennepin County Medical Center. This incident led to the children's out-of-home placement. After this overdose, mother completed treatment, relapsed, and completed treatment again. Sandstrom also testified that mother told her that mother currently was not ready to parent her children full time, due to her chemical-dependency and mental-health issues. During Sandstrom's testimony, Exhibits 31, 38, 87, and 88 were received over mother's objections as business records.

Michelle Plummer Torres Shuster, the foster parent of C.G.S. and C.C.S., testified that at a Christmas visit in 2008, mother seemed interested in the children for a short time but then became very drowsy and was nodding off as people spoke to her. She fell asleep, and the children became concerned. C.C.S. asked Shuster why mother was so sleepy, and C.G.S. said mother was scaring her. Shuster asked the children to leave the

room, spoke with mother, and then got a game for mother to play with the children. But mother was still very tired and put her head on the table. Shuster testified that mother's behavior was "very scary to the children because her behavior presented much like the night in which the children were removed from her custody." C.C.S. knew that on the night of mother's overdose in February 2008, mother had taken a "deadly combination," and on the night of the Christmas visit, C.C.S. asked Shuster if mother had taken "another deadly combination." After the visit, both C.G.S. and C.C.S. were in tears. C.G.S. asked Shuster, "What if I was alone with my mom and then I would have had to take care of the rest of the kids?" The urinalysis mother completed after the Christmas visit was negative, meaning that mother had not been under the influence of any illegal drugs or drugs that she was not prescribed during the Christmas visit. Shuster testified that her family was a permanency option for the children but that she would not accept a transfer of legal custody.

Deborah Jorgenson-Nelson, who is the paternal grandmother and foster mother of C.J.J. and D.M.J. and a registered nurse, testified that D.M.J., who was born four months premature, has several special medical needs. In October 2008, D.M.J. had RSV pneumonia and was at very high risk for "any kind of respiratory issues." D.M.J. also had severe reflux requiring special feeding procedures, including a "Mic-Key" button, which was described as a "hole that goes directly into [D.M.J.'s] stomach" for some feedings. Jorgenson-Nelson described D.M.J. as "a difficult feeder" and "easily distracted." D.M.J. has an oral aversion and very low tone in her cheek muscles and tongue due to having had an endotracheal tube for five months. Jorgenson-Nelson and

her husband wanted to provide a stable environment for the girls but were not willing to accept a transfer of legal custody of D.M.J. and C.J.J. because Jorgenson-Nelson thought that would not offer enough stability.

In March 2009, the district court terminated mother's parental rights to all four children and subsequently denied mother's motion for a new trial. This appeal follows.

D E C I S I O N

Mother argues that (1) the district court erred in admitting Exhibits 28, 31, 87, and 88 as business records over her hearsay objections, (2) the termination of her parental rights was not supported by clear and convincing evidence, and (3) the termination of her parental rights was not in the children's best interests.

I. Admission of Evidence as Business Records

"Absent an erroneous interpretation of the law, whether to admit or exclude evidence is a question within the district court's broad discretion." *In re Child of Simon*, 662 N.W.2d 155, 160 (Minn. App. 2003). "A new trial will be granted because of an improper evidentiary ruling only if the complaining party demonstrates prejudicial error." *Id*.

"Although generally inadmissible, hearsay statements may be admissible under one of several exceptions to the rule, including the business-records exception." *Id.* (citing Minn. R. Evid. 802, 803(6)). Rule 803(6) allows admission of "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, diagnoses" (1) "made at or near the time by, or from information transmitted by, a person with knowledge," (2) "if kept in the course of a regularly conducted business activity, and"

(3) "if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation." These requirements must be "shown by the testimony of the custodian or other qualified witness." Minn. R. Evid. 803(6). But "[a] memorandum, report, record, or data compilation prepared for litigation is not admissible under this exception." *Id.*

Under rule 803(6), the "testimony of the custodian or other qualified witness who can explain the recordkeeping of his organization is ordinarily essential." *Simon*, 662 N.W.2d at 160 (quoting *Nat'l Tea Co. v. Tyler Refrigeration Co.*, 339 N.W.2d 59, 61 (Minn. 1983)); *see also* 11 Peter N. Thompson, *Minnesota Practice* § 803.06 (3rd ed. 2001) (stating that the "rule requires that the foundation be established by a custodian or other qualified witness" (quotation omitted)).

In *Simon*, a TPR case in which this court addressed the admissibility of business records for which a social worker attempted to provide foundational testimony, we concluded that the district court erred by admitting two letters from a therapist. 662 N.W.2d at 162. We stated that there was no evidence that the testifying social worker "was familiar with how [the therapist] compiled her records" or that the social worker "participated with [the therapist] in an evaluation." *Id.* at 160. We further stated that even if the social worker had been qualified to "authenticate the [therapist's] letters, his testimony fell far short of what is required to lay the foundational requirements of Rule 803(6)." *Id*. at 161. We noted that the social worker "testified only that he had regular contact with [the therapist] and that she sent him reports . . . upon request." *Id.* The social worker did not provide "testimony as to three of four foundational elements—that

[the therapist] (1) wrote the letters in the regular course of her profession, (2) kept them as part of the routine practice of her work, and (3) prepared them at or near the time of the events." *Id.*

Mother relies heavily on *Simon*. The county argues against reliance on *Simon*, citing the supreme court case of *In re Welfare of Brown*, 296 N.W.2d 430 (Minn. 1980), and unpublished opinions of this court. In *Brown*, a social worker testified that a psychological assessment and a psychologist's evaluation summary were forwarded to the social worker and kept in the social worker's file and that this was the social worker's regular course of practice. 296 N.W.2d at 433. The supreme court noted that these records, as well as "reports from social workers, counselors, a teacher, a psychiatrist, and a speech pathologist" were "similarly identified as records regularly kept" by the social worker, and then stated that the records were admitted as business records. *Id.* at 433. In analyzing the claim of error, the court stated that the records were admissible because of the breadth of the definition of "business," and stated that they were properly received "insofar as they related" to the children's emotional problems. *Id.* at 435. The court cited rule 803(6) in concluding that the documents were properly admitted. *Id.*

We do not read *Brown* as establishing an exception to any of the requirements of rule 803(6), and we therefore conclude that mother's reliance on the authority of *Simon* is well placed. We will not rely on the unpublished opinions of this court, cited by the county, because "[u]npublished opinions of the court of appeals are not precedential." Minn. Stat. § 480A.08, subd. 3 (2008). We will base our analysis of the admissibility of the disputed evidence in this case on the framework provided in rule 803(6).

Mother challenges the district court's admission of Exhibits 31, 38, 87, and 88, arguing that their admission was both error and prejudicial.

A. Admission as Error

1. Exhibit 31

Exhibit 31 is a discharge summary from Transformation House, which provided chemical-dependency-related services to mother. Sandstrom testified that she requested this document in the regular course of her duties; she was familiar with the treatment program at Transformation House; and, in the regular course of its duties, Transformation House makes records and recommendations regarding its clients and keeps the records in files at its facility.

Under the requirements of rule 803(6), to provide foundational testimony for Exhibit 31, Sandstrom needed to be able to testify that the record (1) was made at or near the time of acts, events, conditions, opinions, or diagnoses, (2) was made by a person, or from information transmitted by a person, with knowledge of the acts, events, conditions, opinions, or diagnoses, (3) was kept in the course of a regularly conducted business activity, and (4) was made in the regular practice of the business. *See* Minn. R. Evid. 803(6); *Simon*, 662 N.W.2d at 160-62. Sandstrom's testimony fails to meet the requirements of rule 803(6). Sandstrom's testimony did not establish the author's source of the information contained in the discharge summary, and did not establish that the Transformation House discharge summary was made at or near the time of the acts, events, conditions, or diagnoses contained in the summary.

2. Exhibit 38

Exhibit 38 is mother's psychological evaluation completed by Dr. Darlene Sholtis. Sandstrom testified that she requests that psychological evaluations be completed as part of the normal course of her business, makes referrals for them, and requests copies of reports related to the evaluations. Sandstrom further testified that she was familiar with Dr. Sholtis and that Dr. Sholtis conducts evaluations and makes reports of the evaluations in the normal course of her duties. Sandstrom's testimony fails to meet the requirements of rule 803(6). The testimony does not establish that the record was made at or near the time of the acts, events, conditions, opinions, or diagnoses contained in the record or that the record was made by a person, or from information transmitted by a person, with knowledge of the acts, events, conditions, opinions, or diagnoses contained in the record.

3. Exhibit 87

Exhibit 87 is an evaluation summary completed by Robbi Pulver, a psychiatric nurse. After identifying the exhibit, Sandstrom testified that Pulver prescribes medications for patients experiencing mental-health issues. As part of the regular course of her duties, Sandstrom requests reports from psychiatric professionals and requested Exhibit 87. Sandstrom answered in the affirmative when asked if she was "aware as to whether or not it is part of [Pulver's] duties to regularly record and make evaluations regarding mental health and case management" and "medication management." Sandstrom also answered in the affirmative when asked if she was "aware as whether or not [Pulver] would keep . . . regular records of these evaluations in her regular files." After the state offered Exhibit 87, mother's counsel conducted voir dire of the witness

which revealed that Sandstrom had asked Pulver at the end of January 2009 or beginning of February 2009 to complete the evaluation summary. Sandstrom's testimony fails to meet the requirements of rule 803(6). The testimony does not establish that the record was made at or near the time of the matters contained in the record, that the record was kept in the course of regularly conducted business activity, that it was the regular practice of the author's business to make the report, or that the report was made by a person with knowledge of the matters contained in the report. Sandstrom did testify that she was aware "as to whether or not" it was part of Pulver's practice to make and keep such records, but this testimony does not establish that it was part of Pulver's regular practice to make and keep such records.

4. Exhibit 88

Exhibit 88 is a memo from Nicky Bredeson, a therapist at the Associated Clinic of Psychology. Sandstrom testified that mother had participated in individual therapy with Bredeson as part of her case plan. Sandstrom further testified that she requests reports from therapists as part of her regular duties, and does so to find out if a patient is participating in therapy and if the therapist feels like the patient is actively engaged in the therapeutic process. Sandstrom testified that she believed that Bredeson typically completes progress reports regarding how her clients are doing, and answered in the affirmative when asked if she was "aware as to whether or not [Bredeson] keeps notes or reports in her regular files as to how her clients are doing." Sandstrom's testimony fails to meet the requirements of rule 803(6). This testimony does not establish that the record

was made at or near the time of the matters contained in it, or that Bredeson keeps such memos in her file as part of her regularly conducted business activity.

Because the requirements of rule 803(6) were not met, the district court erred in admitting the exhibits as evidence. Because mother has established error, we will consider whether mother was prejudiced by the error.

B. Prejudice or Harmlessness

Mother argues that the district court's error was prejudicial because the improper admission of hearsay deprived her of the right to cross-examine the authors of the records, deprived her of due process by depriving her of a fundamentally fair proceeding, and led to findings based upon documents that were improperly admitted.

In *Simon*, this court concluded that the district court's error was harmless because, independent of the erroneously admitted exhibits, the record contained sufficient evidence to support the district court's TPR decision. 662 N.W.2d at 162; *see also In re Welfare of Children of D.F.*, 752 N.W.2d 88, 98 (Minn. App. 2008) (applying harmless-error test to due-process argument in a TPR case). A similar analysis in this case, more fully addressed below, shows that the error was harmless because independent of the erroneously admitted exhibits, the record contains sufficient evidence to support the district court's termination of parental rights.

II. Sufficiency of Evidence

Mother challenges the evidentiary support for the specific grounds for termination relied upon by the district court. A district court's decision to terminate parental rights must be supported by clear and convincing evidence. *In re Welfare of S.Z.*, 547 N.W.2d

886, 893 (Minn. 1996). While appellate courts give some deference to the district court in TPR cases, appellate courts also closely inquire "into the sufficiency of the evidence to determine whether the evidence is clear and convincing." *Id.* "The district court must make clear and specific findings conforming to the statutory requirements, and the evidence must address conditions that exist at the time of the hearing." *Id.*

The grounds for termination of parental rights are stated in Minn. Stat. § 260C.301, subd. 1 (2008). A district court "need find only one of the statutory grounds exists to terminate parental rights." *S.Z.*, 547 N.W.2d at 890. Here, the district court found four grounds: (1) failure to comply with the duties of the parent-child relationship; (2) palpable unfitness to participate in the parent-child relationship; (3) failure of reasonable efforts to correct the conditions leading to out-of-home placement; and (4) that the children were neglected and in foster care. Because we conclude that the district court properly found that mother was palpably unfit to participate in the parent-child relationship, and because the district court need find only one statutory ground for termination, we will address only palpable unfitness at length.

A district court may terminate parental rights when, among other things, it finds that a parent is "palpably unfit to be a party to the parent and child relationship because of a consistent pattern of specific conduct before the child or specific conditions directly relating to the parent and child relationship." Minn. Stat. § 260C.301, subd. 1(b)(4). To terminate on this ground, the conduct or condition must be "determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable

future, to care appropriately for the ongoing physical, mental, or emotional needs of the child." *Id.*

Substance abuse alone is insufficient to demonstrate palpable unfitness. *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 663 (Minn. 2008). "[T]he county must demonstrate that the parent's substance or alcohol use is of a nature and duration that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the child's ongoing needs." *Id.* Similarly, mental illness alone is insufficient to justify terminating parental rights, but may justify termination where a parent is rendered unable to provide proper parental care. *In re Welfare of J.J.B.*, 390 N.W.2d 274, 281 (Minn. 1986). Palpable unfitness has been present where a mother "refused to acknowledge her responsibility to protect her children from abuse by others" despite therapy and other services offered by the county. *In re Children of T.A.A.*, 702 N.W.2d 703, 708-09 (Minn. 2008).

In this case, the district court found that mother was palpably unfit because: (1) mother had a long history of chemical dependency with only a short period of sobriety while pregnant with the oldest child, C.G.S.; (2) mother had used chemicals during the entire time she has parented her children, except while pregnant with C.G.S.; and (3) mother had an ongoing pattern of failing to maintain her mental health. The court found that for several years mother had failed to appropriately take medications prescribed to stabilize her condition, mother's behavior during this period was erratic and unstable and negatively impacted the children, and the two oldest children have post-traumatic stress disorder as a result of what they experienced with mother.

Sandstrom's testimony covered mother's overdose with the children present, her CHIPS case plan, and that mother had completed chemical-dependency treatment, relapsed, and then completed treatment again. Mother, at age 30, testified that she had been struggling with chemical dependency for a long time and that she first went to chemical-dependency treatment at age 14. In total, mother has participated in seven to nine treatment programs. At the time of her testimony, mother had maintained sobriety for five months.

The CHIPS petition recounted an incident of domestic violence against mother by D.J., the father of mother's two youngest children. According to the petition, D.J. attacked mother while she was holding C.J.J. and was pregnant with D.M.J., hit her on her head with a gun, blocked her airway, held a gun to her head, and pulled the trigger. The county asked mother about domestic violence and whether she had recently felt that a relationship with D.J. was appropriate. Mother answered that she had deep feelings for D.J. and that he was a recovering addict and was a great father in the right state of mind. Mother identified Exhibit 43 as a letter she had written to D.J., which was written in October 2006. In the letter, mother stated that she was not supposed to be contacting D.J., but "since you get out soon I am!" Mother also stated that she missed D.J. and still loved him.

The letter written by mother to D.J. in October 2008 is particularly relevant because Greg Walsh, a therapist and licensed independent clinical social worker who provides therapy to the two oldest children, testified about the impact of the domestic violence on C.G.S. C.G.S. spoke to Walsh about "seeing an ex-boyfriend of mom's put a

gun to mom's head," and told him of dreams where a man put a gun to her mother's head. Walsh testified about his concern that the children were "re-traumatized" during the Christmas visit and that it was "potentially devastating for them" and hard for them to function "when they are fearing for their mom's life." After the Christmas visit, Walsh recommended that the children not visit with mother. Walsh also testified that "in the process of the year that I've worked with this family it's full of inconsistencies, full of missed times in the lobby where my understanding [was mother] was supposed to be there and she didn't show up or she cancelled." Walsh testified that what he had experienced during the year was "pretty much the opposite of what kids need to thrive." Walsh also stated in a progress report that the two oldest children are suffering from post-traumatic stress syndrome.

The evidence supports a finding that mother's substance abuse has negatively impacted the children. The overdose was traumatic to the children and caused them to be fearful. Mother's long history of substance abuse with only brief periods of sobriety, including two drug-related incidents—the overdose and the relapse after treatment—that occurred after the CHIPS proceeding had commenced, and the impact of substance abuse on the children, are adequate to make mother's chemical dependency a condition that has been of a duration or nature that renders mother unable, for the reasonably foreseeable future, to care appropriately for the needs of the children. Because the district court's findings related to this ground for termination are adequately supported by evidence independent of the improperly admitted exhibits, admission of the exhibits was harmless error. *See Simon*, 662 N.W.2d at 162 (stating harmless-error conclusion); *T.A.A.*, 702

N.W.2d at 708 n.3 (declining to address other grounds for termination after concluding termination based on palpable unfitness was appropriate).

III. Best Interests of Children

"Having concluded that statutory grounds for termination exist, the only remaining issue is whether termination is in the best interests of the children." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 57 (Minn. 2004). On review, this court assesses whether a district court's finding that termination was in the best interests of the children is supported by clear and convincing evidence. *See T.A.A.*, 702 N.W.2d at 709 (reaching this conclusion in reviewing termination).

A court analyzing the best interests of a child must balance three factors: "(1) the child's interest in preserving the parent-child relationship; (2) the parent's interest in preserving the parent-child relationship; and (3) any competing interest of the child." *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 711 (Minn. App. 2004). "Where the interests of parent and child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301, subd. 7 (2008).

In *W.L.P.*, this court concluded that the district court did not abuse its discretion in finding that a child's best interests supported termination where the child had an immediate need for permanency and stable, drug-free, nurturing caregivers and that the child's needs outweighed competing interests. 678 N.W.2d at 711.

Here, the district court made extensive findings about the children's best interests. The court found that the children spent several years in an unstable environment, had been in out-of-home placement for 12 months, and deserved a permanent safe and stable

home. The court found that the parent-child relationship was detrimental to the children's emotional welfare, noting that C.G.S. and C.C.S. had attendance issues in school before out-of-home placement and that C.C.S. had fallen behind. After out-of-home placement, C.G.S. had no further attendance issues and C.C.S., who received tutoring, had moved up to the second grade. Exhibits 92 and 93, letters from the school attended by C.G.S and C.C.S, support the court's findings about the children's schooling. The court credited the testimony of Walsh that the children needed a very structured and stable environment. The court found that mother had not demonstrated that she can provide structure or stability and had rather "shown the opposite." The court noted evidence addressing the medical needs of D.M.J. and found that mother had failed to demonstrate that she understands and can provide D.M.J.'s necessary medical care. The court noted the guardian's testimony about the adjustment by C.G.S. and C.C.S. to their present home and the care D.M.J. receives in her current home. The court found that mother had a need to "intensely focus on maintaining her sobriety and her stable mental health" and that this outweighed "her ability to provide the needed parenting to these four children, at least three of whom have special needs." The court finally found that the children were thriving in a stable environment and that it would not be in their best interests to move them from that environment.

Sandstrom's testimony addressed mother's history and progress that occurred before the trial. Jorgenson-Nelson testified about D.M.J.'s needs and mother's failure to demonstrate an understanding of the needs or ability to address those needs. The guardian ad litem testified in detail about her concerns over mother's instability and lack

of progress, and the guardian testified that she did not think that mother had corrected the conditions that caused the county's involvement.

The district court's findings are supported by sufficient evidence in the record. Though the court did not explicitly balance the three factors noted in *W.L.P.*, the court's balancing is implicit in its findings, which reflect a conclusion that the interest in preserving the parent-child relationship is outweighed by the children's competing interest in needing permanency in their placements. *See W.L.P.*, 678 N.W.2d at 710-11 (detailing three factors to be balanced in analyzing best interests of the child). And like in *W.L.P.*, the children have an immediate need for "stable, nurturing, drug-free caretakers." *See id*. at 711 (stating competing interests of child).

In her reply brief, mother argues that the best interests of the children warranted a continued CHIPS disposition rather than termination, and she cites *In re Welfare of M.H.*, 595 N.W.2d 223 (Minn. App. 1999) in support of her argument. But in *M.H.*, the district court found that termination was in the children's best interests, but that there was no statutory basis for termination. 595 N.W.2d at 225. Here, there was at least one ground that served as a statutory basis for termination, palpable unfitness. *M.H.* is therefore distinguishable and does not support mother's argument that termination was not in the children's best interests.

Mother also opposes the district court's ruling by focusing on the progress she had made in her case plan, arguing that termination is inappropriate when a parent is making adequate progress. "[I]mprovement immediately before the termination hearing" has been insufficient to overcome "the whole of [a parent's] negative track record" before the

court. *In re Welfare of J.K.*, 374 N.W.2d 463, 466 (Minn. App. 1985), *review denied* (Minn. Nov. 25, 1985); *see also In re Welfare of J.L.L.*, 396 N.W.2d 647, 651-52 (Minn. App. 1986) (concluding that termination was proper where parent was not able to parent, even though he had taken recent steps to improve and had a desire to improve). In this case, mother had made recent progress on her case plan but clear and convincing evidence supported at least one ground for termination. And here, the district court's finding that termination was in the children's best interests is adequately supported by the evidence.

Affirmed.