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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1020**

In the Matter of the Welfare of the Children of:
D. J. E., R. R. E. and D. V. V., Parents.

**Filed November 24, 2009
Affirmed in part, reversed in part, and remanded
Harten, Judge***

Itasca County District Court
File No. 31-JV-09-341

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Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Harten,
Judge.

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

UNPUBLISHED OPINION

HARTEN, Judge

A stepfather challenges the adjudication of his children, S.K.E. and J.D.V., as children in need of protection or services (CHIPS) and their removal from his home; he also asserts that the district court impermissibly drew adverse inferences from his refusal to testify at trial. Because adverse inferences from a party's failure to testify in a civil case are permitted and because the district court's findings on S.K.E. are supported by substantial evidence, we affirm her adjudication as CHIPS. In that the district court's findings are not adequate to support the adjudication of J.D.V. as CHIPS, we reverse and remand his adjudication.

FACTS

R.R.E. is the stepfather of, J.D.V., a boy born in 1995, and S.K.E., a girl born in 1996.¹ He was married to their mother, D.J.E., from 1998 to 2004 and was granted physical custody of them when he and D.J.E. divorced.

In January 2009, S.K.E. reported to a school counselor that R.R.E. had sexually abused her by touching her breasts with his hands and his mouth. After S.K.E. was interviewed by an Itasca County social worker, CHIPS petitions were filed concerning her, alleging that she was the victim of abuse, and concerning J.D.V., alleging that he was residing with an abuse perpetrator and an abuse victim.

On 4 February 2009, at an emergency protective care hearing, the district court ordered that the children be placed out of R.R.E.'s home because it would be contrary to

¹ The children's biological father, D.V.V., takes no part in these proceedings.

their welfare to be returned home at that time.² The CHIPS trial took place the following April. During the trial, R.R.E. declined to be examined, but cross-examined witnesses. On 7 May 2009, the district court issued its findings and conclusions holding that both children were CHIPS as charged in the petition and that out-of-home placement was in their best interests. The district court ordered that the emergency placement would remain in effect until the disposition hearing. Several days later at the disposition hearing, the district court found that out-of-home placement was in the best interests of both children and ordered that disposition.

R.R.E. challenges the disposition order, arguing that the district court's findings on S.K.E. and on J.D.V. are clearly erroneous and unsupported by substantial evidence and that he was deprived of due process because the district court drew an adverse inference from his decision not to testify.

D E C I S I O N

1. Findings on S.K.E.

This court does not reverse findings in a CHIPS proceeding unless they are clearly erroneous or unsupported by substantial evidence and the record as a whole leaves this court with a firm and definite conviction that a mistake has been made. *In re Welfare of B.A.B.*, 572 N.W.2d 776, 778 (Minn. App. 1998). We are bound by a “very deferential” standard of review of factual findings in a CHIPS determination. *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 734 (Minn. App. 2009).

Specifically, R.R.E. challenges the district court's findings that:

² In March 2009, R.R.E. was charged with criminal sexual conduct in relation to S.K.E.

6. . . . [S.K.E.] credibly testified that [R.R.E.] was “sort of laughing” while he was touching her [on the breast, after removing her shirt] and that she laughed too even though she didn’t think it was funny because she “didn’t want him to feel like I was mad at him.”

7. . . . [S.K.E.] credibly testified that [R.R.E.] entered her room, asked her to remove her shirt and then he began touching her breast with his hands and mouth.

8. [S.K.E.] credibly testified that [R.R.E.] generally didn’t talk during the incidents except to say goodnight and that he loved her when he left the room, but that on one occasion he told her, “Sorry, just don’t tell anybody.” When [S.K.E.] asked why not, [R.R.E.] said “cause it’s not right.”

9. [S.K.E.] loves [R.R.E.] thinks that he is a good dad, and she wants to live with him.

10. [S.K.E.] didn’t report [R.R.E.’s] conduct for a number of months because she “keeps her problems inside” and because she told [R.R.E.] she wouldn’t tell on him.

. . . .

15. [S.K.E.] continues to feel guilty about reporting [R.R.E.’s] actions because she told him she wouldn’t say anything. She felt compelled to come forward because it was “getting awkward” and she was feeling scared.

R.R.E. also disputes the statement in the district court’s memorandum that:

The most significant evidence in this case came from [S.K.E.]. She was a credible and persuasive witness. [Her] testimony that [R.R.E.] intentionally touched her breasts on a number of occasions and that he placed his mouth on her breast on one occasion is sufficient to support a finding that [S.K.E.] has been a victim of sexual abuse and that [J.D.V.] resides with a victim and [a] perpetrator of domestic abuse. This testimony was from a child who clearly loves her father, cares for him[, and] has consistently wanted to remain in his care and custody. All of this enhances her credibility.

R.R.E. makes five objections to these findings.

First, R.R.E. refers to S.K.E.’s “propensity to lie” and argues that a comment from the district court showed its bias in her favor. The district court overruled an objection when a witness was asked if she had ever caught S.K.E. in a lie, but first commented, “I don’t know that anybody on the planet has never lied. . . . I don’t think [the witness’s

answer is] all that probative.” The fact that S.K.E., then age 12, may have had lied previously when not under oath does not make the finding that her testimony was credible clearly erroneous.

Second, R.R.E. argues that S.K.E.’s testimony was inconsistent and vague. But “even when a child’s statements are inconsistent, such evidence standing alone may support a conviction. Further, the weight and credibility of witnesses [sic] testimony are the province of the fact-finder.” *State v. Levie*, 695 N.W.2d 619, 627 (Minn. App. 2005) (citation omitted). “[G]enerally, exact dates need not be alleged where sexual abuse is charged, particularly when child-victims are involved.” *Id.* at 627-28. Thus, any inconsistencies in S.K.E.’s testimony do not make the district court’s finding of credibility clearly erroneous.

Third, R.R.E. argues that S.K.E. was exposed to and possibly abused by her brother, J.D.V. Even if that were true, it does not affect S.K.E.’s credibility as to the acts of R.R.E.

Fourth, R.R.E. claims that S.K.E., who has been diagnosed as lacking self-esteem, had a motive to report abuse because she was told she was “brave” by the school counselor and that she “did a nice job” after the interview with the county social worker. But S.K.E. was not complimented until *after* she had reported the abuse, so the effect of the compliments did not motivate her. In any event, the district court also heard testimony indicating that S.K.E.’s low self-esteem may be a result of her abuse. The evidence does not show that S.K.E.’s mental health issues detract from her credibility.

Fifth, R.R.E. argues that S.K.E.'s testimony was uncorroborated. But R.R.E. told S.K.E. not to tell anyone about the abuse, and, for months, S.K.E. obeyed him and did not tell her counselor or anyone else about the abuse. The absence of corroboration does not mean that S.K.E.'s testimony was inherently not credible.

We conclude that the district court's finding that S.K.E. credibly testified about the abuse is based on substantial evidence and is not clearly erroneous.

2. Adjudication of J.D.V. as CHIPS

A district court is vested with broad discretionary powers to decide juvenile-protection matters. *S.S.W.*, 767 N.W.2d at 733. If, as here, no motion for a new trial has been made, questions for review are limited to whether the evidence sustains the findings of fact and whether the findings sustain the conclusions of law and the judgment. *Id.*

To challenge the determination that J.D.V. should be adjudicated CHIPS and placed out of the home, R.R.E. relies on Minn. Stat. § 260C.01, subd. 2(b)(3) (2008) (providing that a purpose of the child protection law is “removing the child from the custody of parents only when the child’s welfare or safety cannot be adequately safeguarded without removal”) and on *In re Welfare of N.F. and S.F.*, 749 N.W.2d 802 (Minn. 2008). *N.F.* construes Minn. Stat. § 260C.007, subd. 6(2)(ii)(iii) (2008) (defining CHIPS to include a child who has not been abused but who resides with a victim or a perpetrator of child abuse or domestic child abuse) in light of Minn. Stat. § 260C.001, subd. 2(b)(3). The court stated that “a narrow construction of subdivision 6(2) is reasonable in light of [Minn. Stat. § 260C.001, subd. 2]” and contrasts this with the broad

construction appropriate for children adjudicated CHIPS because they are “actual victims of abuse and maltreatment.” *N.F.*, 749 N.W.2d at 808.

In the instant case, the district court did not make explicit findings that J.D.V.’s welfare or safety cannot be adequately safeguarded without removal from R.R.E.’s home or that he needs protection or services as a result of residing with R.R.E. and S.K.E. A CHIPS adjudication requires proof both “that one of the enumerated child-protection grounds exists and that the subject child needs protection or services as a result.” *S.S.W.*, 767 N.W.2d at 728. *S.S.W.* affirmed the dismissal of a CHIPS petition that failed to show the child needed protection and services as a result of residing with a perpetrator of abuse. *Id.* at 735. Absent findings that J.D.V. needs protection or services as a result of living with R.R.E. and S.K.E., his adjudication as CHIPS cannot be upheld.

On the record before us, the district court’s adjudication of J.D.V. as CHIPS and his placement outside the home are not supported by substantial evidence. We therefore reverse that determination.³

3. Adverse Inference From R.R.E.’s Failure to Testify

R.R.E. argues that, by drawing adverse inferences from his failure to testify, the district court violated his due process right to a fair and meaningful hearing, his right to the custody and companionship of his children, and his right not to incriminate himself. Because this argument pertains to a substantive question of law rather than trial

³ While this appeal was pending, we were advised that the district court had received additional information about the progress and needs of J.D.V. That evidence is not before us in this appeal. We express no opinion on whether developments during the pendency of this appeal warrant a new petition or further action in the district court regarding J.D.V.

procedure, the absence of a motion for a new trial is irrelevant and we review the issue de novo. *Alpha Real Estate v. Delta Dental*, 664 N.W.2d 303, 310-11 (Minn. 2003) (explaining decision to review de novo two questions of law raised during trial and not pertaining to trial procedure).

R.R.E. claims that the Fifth Amendment precludes drawing adverse inferences from his exercise of his privilege to remain silent. But “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment does not preclude the inference where the privilege is claimed by a party to a *civil cause*.” *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558 (1976) (quotation omitted); *see also In re Welfare of J.W. and A.W.*, 391 N.W.2d 791, 795-96 (Minn. 1986) (upholding drawing of adverse inferences from parties’ decision “to invoke the privilege against self-incrimination and to refuse to answer deposition questions [relative to the death of a two-year-old nephew who had been in their care] that they apparently feared would implicate them in a possible homicide prosecution”) (*J.W. I*).

R.R.E. relies on *In re Welfare of J.W. and A.W.*, 415 N.W.2d 879 (Minn. 1987) (*J.W. II*), but his reliance is misplaced. *J.W. II* affirms the *J.W. I* holding that a refusal to testify can result in evidence being deemed admitted. *J.W. II*, 415 N.W.2d at 883. “[A] discovery sanction deeming the unanswered questions to be admitted by the parents did not violate the privilege against self-incrimination.” *Id.* at 881 n.1. The district court’s negative inferences from R.R.E.’s failure to testify were lawful.

The district court's findings on S.K.E. are supported by substantial evidence and its adverse inferences did not violate R.R.E.'s fifth amendment privilege; its adjudication of J.D.V. as CHIPS was not supported by the necessary findings.

Affirmed in part, reversed in part, and remanded.