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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1277**

In the Matter of the Welfare of the Children of: L. B., J. N. and J. B., Parents

**Filed January 25, 2011
Affirmed
Peterson, Judge**

Big Stone County District Court
File No. 06-JV-10-111

Ronald R. Frauenshuh, Jr., Ortonville, Minnesota (for appellant L.B.)

Kenneth L. Hamrum, Morris, Minnesota (for respondent J.N.)

William Joseph Toulouse, Quarnstrom & Doering, P.A., Marshall, Minnesota (for
respondent J.B.)

Jan M. Nordmeyer, Nelson and Kuhn, Ltd., Glenwood, Minnesota (for respondent A.N.)

William J. Watson, Big Stone County Attorney, Ortonville, Minnesota (for respondent
Big Stone County)

Susan Marsolek, Ortonville, Minnesota (guardian ad litem)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and
Shumaker, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

Appellant-mother challenges a district court order adjudicating mother's children as children in need of protection or services under Minn. Stat. § 260C.007, subd. 6 (2008). We affirm.

FACTS

Appellant married J.N. in 1993. The marriage was dissolved in 2005, and appellant and J.N. share physical custody of their four children. Appellant married J.B. in 2007; they are the parents of three children. Appellant, J.B., and the seven children lived in Marshall, but they were evicted from their residence and moved to Clinton in May 2010.

Four incidents prompted Big Stone County to petition for an order that the children are in need of protection or services. Three of the incidents involved three-year-old Ja.B. leaving the family's house without supervision.

On March 31, 2010, Ja.B. was discovered in the parking lot of a McDonalds restaurant located on a highly traveled four-lane road in Marshall. Ja.B. was wearing pajamas and mismatched shoes that were too large for him. A Marshall police officer picked up Ja.B. and brought him to the police station. Two hours later, appellant and J.B. called the police to report that Ja.B. was missing. When they were told that Ja.B. was at the station, they came to pick him up.

Ja.B. was again discovered in the McDonalds parking lot on April 10, 2010. The temperature was 46 degrees, and Ja.B. was wearing only a diaper and a pair of men's

slippers. A Marshall police officer brought Ja.B. to the police station and placed him on a 72-hour hold with a foster family. Almost an hour later, J.B. called the police station and was told that Ja.B. was in foster care. J.B. became very upset and began swearing at the officer; the officer testified that she could also hear appellant yelling and swearing in the background. J.B. hung up on the officer, and appellant and J.B. made repeated calls to police dispatch that evening, claiming that their child had been kidnapped.

In mid-May 2010, Ja.B. was discovered away from home in the family's new town of Clinton. A neighbor who found Ja.B. playing near a county road about three and a half blocks from the family's home recognized the boy and brought him home.

The fourth incident occurred on May 6, 2010. Appellant arrived home with her four oldest children to find Ja.B. nude, her youngest daughter wearing only a soiled diaper, her youngest son crying in his crib, and J.B. asleep. Appellant began to argue with J.B., and J.B. struck appellant. When appellant's oldest daughter, A.N., told J.B. not to hit her mother, J.B. struck A.N. on the upper left arm and pushed her out of the room. A.N. went to her father's home and called the police. A police officer examined A.N.'s arm and concluded that it would soon be swollen and bruised. Photos of A.N.'s arm taken later show a bright red mark.

Big Stone County filed two petitions on May 13, 2010, alleging that the seven children of appellant, J.N., and J.B. are children in need of protection or services (CHIPS). The petitions alleged identical statutory grounds for a CHIPS determination: (1) the children are the victims of physical abuse or reside with a perpetrator of child abuse or domestic child abuse; (2) the children are without necessary food, clothing,

shelter, education, or other required care for their physical or mental health or morals because their parents are unable or unwilling to provide care; (3) the children are without proper parental care because of the emotional, mental, or physical disability, or state of immaturity of their parents; and (4) the children's behavior, condition, or environment is such as to be injurious or dangerous to the children or others. *See* Minn. Stat. § 260C.007, subd. 6(2), (3), (8), (9). Appellant and J.B. denied the allegations. Following a two-day hearing, the district court issued an order on July 2, 2010, granting the county's CHIPS petition. The district court concluded that all seven children are in need of protection or services under the statutory bases of Minn. Stat. § 260C.007, subd. 6(2) and (9); that Ja.B. is also a child in need of protection or services under Minn. Stat. § 260C.007, subd. 6(3); and that the county had not proved by clear and convincing evidence that any of the children is a child in need of protection or services under Minn. Stat. § 260C.007, subd. 6(8). This appeal followed.

D E C I S I O N

I.

CHIPS Determination

Appellant argues that the district court erred by determining that all of her children are in need of protection or services because she endangered them. A parent is presumed to be a fit and suitable person to care for the parent's child. *In re Welfare of C.K. & K.K.*, 426 N.W.2d 842, 847 (Minn. 1988). The petitioner must prove the allegations in a CHIPS petition by clear and convincing evidence. *In re Welfare of S.J.*, 367 N.W.2d 651, 654 (Minn. App. 1985). This court is "bound by a very deferential standard of review"

when considering an appeal from a district court's CHIPS determination. *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 734 (Minn. App. 2009). "Findings in a CHIPS proceeding will not be reversed unless clearly erroneous or unsupported by substantial evidence." *In re Welfare of B.A.B.*, 572 N.W.2d 776, 778 (Minn. App. 1998). Findings are clearly erroneous if a "review of the entire record leaves the court with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted).

The district court determined that all seven children are in need of protection or services under Minn. Stat. § 260C.007, subd. 6(2) and (9).

A. Physical Abuse

Minn. Stat. § 260C.007, subd. 6(2), creates two categories of children who are in need of protection or services: children who are victims of physical or sexual abuse or emotional maltreatment, and children who reside with, have resided with, or would reside with a victim or perpetrator of child abuse or domestic child abuse. Minn. Stat. § 260C.007, subd. 6(2); *see In re Welfare of Children of N.F.*, 749 N.W.2d 802, 806 (Minn. 2008) (describing these two categories).

The district court determined that A.N. is a child in need of protection or services because she is a victim of physical abuse. Physical abuse means any physical injury inflicted on a child other than by accidental means by a person responsible for the child's care. Minn. Stat. § 626.556, subd. 2(g) (2008); *see N.F.*, 749 N.W.2d at 809 (applying this definition of physical abuse to a CHIPS determination). The record demonstrates that on May 6, 2010, when A.N. told J.B. not to hit her mother, J.B. struck A.N. on the upper left arm and pushed her out of the room. Both appellant and J.B. denied that J.B.

struck A.N. But the district court's decision to credit A.N.'s testimony over appellant's and J.B.'s testimony is within its discretion. *See S.S.W.*, 767 N.W.2d at 733 (observing that district courts are owed "[c]onsiderable deference" because of their "superior position to assess the credibility of witnesses").

The district court also concluded that all seven children are in need of protection or services under Minn. Stat. § 260C.007, subd. 6(2), because they reside with a perpetrator of child abuse or domestic child abuse. Child abuse is defined as an act involving a minor victim that constitutes a violation of one of several enumerated criminal statutes. Minn. Stat. § 260C.007, subd. 5 (2008). The definition of domestic child abuse includes "any physical injury to a minor family or household member inflicted by an adult family or household member other than by accidental means." *Id.* subd. 13(1) (2008).

All seven children meet the definition of children who reside with a perpetrator of child abuse or domestic child abuse. The three youngest children reside full time with appellant and J.B, and the four oldest children reside with the appellant and J.B. during the week and visit their father J.N. on weekends. J.B.'s striking A.N. constitutes domestic child abuse because J.B. caused a physical injury to a minor family member, *id.*, and child abuse because it was a fifth-degree assault (intentional infliction of bodily harm), one of the enumerated crimes in the definition of child abuse. *Id.*, subd. 5 (citing Minn. Stat. § 609.224 (2008)). The district court's conclusion that all seven children reside with a perpetrator of domestic child abuse or child abuse and are therefore in need of protective services is not clearly erroneous.

B. Without Necessary Care

The district court concluded that Ja.B. is in need of protection or care because he “is without necessary food, clothing, shelter, education, or other required care for the child’s physical or mental health or morals because the child’s parent, guardian, or custodian is unable or unwilling to provide that care.” *Id.*, subd. 6(3). The record demonstrates that on three occasions in approximately six weeks Ja.B. wandered away from his house. Each time, he was inadequately dressed for the weather, and he was found on or near roads with traffic on them. Appellant and J.B. failed to discover Ja.B.’s absence for two hours on the first occasion, for almost an hour on the second occasion, and for an unknown period on the third occasion. The district court did not commit clear error in concluding that Ja.B. is a child in need of protection or services under Minn. Stat. § 260C.007, subd. 6(3).

C. Injurious or Dangerous Environment

The district court concluded that all seven children are in need of protective services because their “behavior, condition, or environment is such as to be injurious or dangerous to the child or others.” *Id.*, subd. 6(9). Three-year-old Ja.B. is capable of leaving his house and traveling to dangerous places like roads and parking lots. This risk of harm, coupled with the fact that he is often inappropriately dressed, demonstrates that his environment is such as to be injurious or dangerous to him. Also, the record demonstrates that all seven children reside with J.B., who is a perpetrator of child abuse or domestic child abuse. J.B.’s presence at the children’s home makes their environment

dangerous to them. The district court did not err in concluding that the seven children are in need of protection or services under Minn. Stat. § 260C.007, subd. 6(9).

D. Appellant's Argument Regarding Fault

Appellant argues that the CHIPS determination is erroneous because she is not at fault for the incidents that caused respondent to pursue a CHIPS petition. But the purpose of a CHIPS proceeding is not to place blame or fault on a parent or guardian. “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(a) (2008). Therefore, it is irrelevant whether J.B., rather than appellant, is at fault for striking A.N. or allowing Ja.B. to leave the family's home. The children meet the statutory definition of children in need of protection regardless of which parent is more responsible. Thus, the district court did not commit clear error in finding that the children are in need of protection or services.

II.

Evidentiary and Constitutional Challenges

Appellant argues that the district court erred by admitting several pieces of evidence. But appellant did not move for a new trial following the district court's CHIPS determination. Evidentiary rulings, in both adult and juvenile proceedings, “are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error.” *In re Welfare of D.N.*, 523 N.W.2d 11, 13 (Minn. App. 1994) (declining to review evidentiary issues in a CHIPS determination when appellant did not bring motion for new trial) (quoting *Sauter v. Wasemiller*, 389 N.W.2d 200, 201

(Minn. 1986)), *review denied* (Minn. Nov. 29, 1994). Because appellant did not move for a new trial, the evidentiary challenges raised on appeal are waived.

Appellant raises constitutional challenges to the CHIPS proceeding and the determination that her children are in need of protection or services. She argues that she was denied a fair trial in violation of her procedural-due-process rights. *In re Welfare of Child of P.T.*, 657 N.W.2d 577, 588 (Minn. App. 2003) (declaring that due process requires “a meaningful adversarial hearing”), *review denied* (Minn. Apr. 15, 2003). Appellant further argues that the CHIPS determination violates her substantive-due-process right to raise her children and direct and supervise their upbringing. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000). But neither of these arguments was presented to the district court. Therefore, they are waived on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellate court will not consider matters not presented to the district court).

Affirmed.