

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0103**

In the Matter of the Welfare of the Child of: H.H. and G.M., Parents.

**Filed July 29, 2008  
Affirmed  
Minge, Judge**

Brown County District Court  
File No. 08-JV-07-214, 08-JV-07-245

James R. Olson, Brown County Attorney, John L.R. Yost, Assistant County Attorney,  
519 Center Street, New Ulm, MN 56073 (for appellant Brown County)

Paul E. Grabitske, Eskens, Gibson & Behm Law Firm, Chtd., 151 St. Andrews Court,  
Suite 610, P.O. Box 1056, Mankato, MN 56002 (for respondent G.M.)

Philip J. Elbert, P.O. Box 26, St. Peter, MN 56082 (for respondent H.H.)

Shiree Oliver, Brown County Courthouse, P.O. Box 248, New Ulm, MN 56073 (guardian  
ad litem)

Considered and decided by Wright, Presiding Judge; Lansing, Judge; and Minge,  
Judge.

**UNPUBLISHED OPINION**

**MINGE**, Judge

Appellant challenges the dismissal of its petition to terminate the parental rights of  
father, arguing that the district court clearly erred by determining that it was not in the  
child's best interests to terminate his parental rights. We affirm.

## FACTS

This case began with a petition by appellant Brown County on behalf of Brown County Family Services (BCFS) to terminate the parental rights of respondent father G.M. to his infant daughter M.M. M.M. was born prematurely on May 12, 2007. Mother H.H. and father G.M. are not married. M.M. lived with and was cared for by both parents.

The district court found that at approximately 2:00 p.m. on August 19, 2007, mother went to work, leaving M.M. in the care of father. M.M. had no bruises or other apparent injuries when mother left for work. Father cared for M.M. from that time until approximately 7:00 p.m., when father requested T.M., his own father, to watch M.M.<sup>1</sup> As father dropped M.M. off at T.M.'s house, father advised T.M. that some red marks had developed on M.M.'s face, explaining that he had fallen asleep on the couch with M.M. and that she had fallen to the floor while he slept. T.M. cared for M.M. until sometime after 10:00 p.m., when mother picked her up.<sup>2</sup> T.M. pointed out the bruise on M.M.'s face and redness around one of her eyes and told mother to take M.M. to the doctor if they got any worse.

---

<sup>1</sup> Father claims he left because his employer asked him to come to work. In its appellate brief, the county claims that in the related criminal proceeding, father admitted that he had not gone to work but had instead gone gambling at a local casino. In this case, the district court found that father had gone to work. There is nothing in the record of this proceeding that indicates father went to a casino instead of to work. The discrepancy is ultimately immaterial to the case before us.

<sup>2</sup> In a subsequent attempt to explain M.M.'s injuries, T.M. testified that he placed M.M. on the floor during the visit, and that his black lab might have come into contact with her. The district court found that neither of these explanations was a credible explanation for M.M.'s injuries.

Mother returned home, placed M.M. into her crib, and went to sleep. By morning, M.M.'s bruising appeared more serious, and it continued to worsen during the day. Mother called the family physician and took M.M. to the clinic for a 3:00 p.m. appointment. The doctor concluded that M.M. had suffered non-accidental trauma and contacted BCFS regarding M.M.'s injuries. Other doctors who examined M.M. also ruled out accidental causes for M.M.'s injuries.

A skeletal survey of M.M. was conducted. The survey revealed that she had three rib "healing fractures" that were indicative of abuse because they are usually caused by squeezing of the rib cage. The examining doctor testified that the fractures had occurred four to six weeks prior to the skeletal survey. M.M. also had a fractured thumb. X-rays taken two months earlier showed no fractures. One doctor stated that certain neck bruises were possibly caused by strangling. However, he also indicated that these neck bruise marks were consistent with the fat folds in M.M.'s neck. A CT scan of M.M. at Children's Hospital indicated normal results. Since August 20, 2007, father has not cared for M.M, and she has not suffered any new injuries. The foregoing facts are from the record of the termination-of-parental-rights proceeding.

At the termination hearing, father testified that M.M.'s injuries were due to her accidental fall from a couch while he was sleeping. In its findings, the district court observed that "[t]he father faces potential criminal liability in connection with the incidents underlying this file, which certainly gives him motivation to prevaricate or to minimize what happened." The district court found that father's explanations were not credible and concluded that M.M. sustained non-accidental injuries caused by her father.

The district court determined that it was not in M.M.'s best interests for her father's parental rights to be terminated. The district court reasoned that M.M. would continue to be in her mother's custody, that mother planned to continue her involvement with father, and that

[i]f the father's rights are terminated and [M.M.] is returned to the care of the mother who then reunites with the father, that presents a far greater risk to [M.M.] than does finding her to be a child in need of protection or services, offering a case plan to the parents, and then monitoring their progress in the CHIPS file.

The district court stated that a case plan and the continued involvement of the county were required. The district court further observed that, unless father "came clean" and candidly addressed what happened with M.M., "then it may be that termination of his parental rights will be appropriate at some future point in time."

The district court finally concluded that termination of G.M.'s parental rights was not in the best interests of M.M. and denied the petition. This appeal follows.

## **DECISION**

Generally, our review of a ruling on a petition to terminate parental rights is limited to determining whether the findings address the statutory criteria, whether those findings are supported by substantial evidence, and whether they are clearly erroneous. *In re Welfare of P.R.L.*, 622 N.W.2d 538, 543 (Minn. 2001) (addressing a petition for involuntary termination); *In re Welfare of D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997) (applying the same standard to review of a voluntary termination). "The weight to be given any testimony, including expert testimony, is ultimately the province of the fact-

finder.” *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 167 (Minn. App. 2005). Moreover, because the district court is in a superior position to observe witnesses during trial, its assessment of witness credibility is accorded deference on appeal. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). But we will “[c]losely inquire into the sufficiency of the evidence [to terminate parental rights] to determine whether it was clear and convincing.” *In re Welfare of J.M.*, 574 N.W.2d 717, 724 (Minn. 1998). And we will affirm the district court’s termination of parental rights if “at least one statutory ground for termination” is supported by clear and convincing evidence and termination is in the child’s best interests. *In re Welfare of the Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). Conversely, when a district court declines to terminate parental rights because it is not in the best interests of the child, our review is limited to determining whether the court’s conclusion is clearly erroneous. This is a relatively narrow scope of review.

#### *A. Egregious Harm*

Minn. Stat. § 260C.301, subd. 1(b)(6) (2006) provides that a court may terminate parental rights when

a child has experienced egregious harm in the parent’s care which is of a nature, duration, or chronicity that indicates a lack of regard for the child’s well-being, such that a reasonable person would believe it contrary to the best interest of the child or of any child to be in the parent’s care.

“Egregious harm” is defined as “the infliction of bodily harm to a child or neglect of a child which demonstrates a grossly inadequate ability to provide minimally adequate parental care.” *Id.*, § 260C.007, subd. 14 (2006). The statute provides a nonexclusive list

of conduct that constitutes egregious harm, including crimes of sexual abuse, infliction of “substantial bodily harm,” and felony neglect, among others. *Id.*, .007, subd. 14(1)–(10). “Substantial bodily harm” is statutorily defined to include fractured bones. Minn. Stat. § 609.02, subd. 7a (2006).

Because the parties do not dispute that M.M. suffered egregious harm and that there is strong evidence that father caused that harm, the statutory basis for termination exists. However, any such termination must also be in the child’s best interests. *See In re Tanghe*, 672 N.W.2d 623, 625 (Minn. App. 2003). The county disputes the district court’s decision not to terminate father’s parental rights based the district court’s best interests determination.

#### *B. Best Interests*

“An order terminating parental rights must explain the district court’s rationale for concluding why the termination [decision] is in the best interests of the children,” and the lack of specific findings may merit remand. *Tanghe*, 672 N.W.2d at 625-26. The best interests of the child are the paramount consideration in any termination proceeding. Minn. Stat. § 260C.301, subd. 7 (2006); *In re Welfare of M.P.*, 542 N.W.2d 71, 74 (Minn. App. 1996) (noting that “the paramount nature of a child’s best interests is a principle that has been part of Minnesota child welfare law for at least 100 years” and stating that the child’s best interests are “of more weight and importance than other considerations”), *overruled in part on other grounds by In re Welfare of J.M.*, 574 N.W.2d 717, 723 (Minn. 1998). When determining whether termination of parental rights is in the best interests of the child, the district court must consider: “(1) the child’s interest in preserving the

parent-child relationship; (2) the parent's interests in preserving the parent-child relationship; and (3) any competing interest of the child." *In re Welfare of the Child of W.L.P.*, 678 N.W.2d 703, 711 (Minn. App. 2004) (quotation omitted). In the child-custody context, this court has stated that the law "leaves scant if any room for an appellate court to question the trial court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000).

In *In re Welfare of M.D.O.*, 462 N.W.2d 370 (Minn. 1990), the supreme court considered a case where the district court refused to terminate a mother's parental rights and this intermediate appellate court reversed. The supreme court reinstated the district court decision, reasoning that although the mother had previously been convicted of unintentional second-degree murder related to the death of an adopted child, that conviction did not require that the mother's parental rights be terminated with regard to a child subsequently born to her. *Id.* at 375-79. The district court found that although the deceased child had been subjected to incidents of abuse by the mother, these incidents did not demonstrate a "consistent pattern of abuse" as required by the statute. *Id.* at 374. In reversing this court, the supreme court stated that the court of appeals had impermissibly engaged in making factual findings of its own accord. *Id.* at 376-77.

A recent case illustrated serious conditions that constituted a situation where best interests of the child required the termination of parental rights. See *In re Welfare of the Children of S.E.P.*, 744 N.W.2d 381 (Minn. 2008). In *S.E.P.*, the father had been ordered to have no contact with his children or their mother because of his malicious punishment of his 19-month-old daughter. *Id.* at 382. The children were placed in foster care when

mother told a deputy sheriff that she could not care for the children without father's help. *Id.* Both parents signed case plans and the county petitioned to have their parental rights terminated when the parents failed to comply with several of the conditions they contained. *Id.* at 382-83. Mother showed poor parenting skills on several occasions, twice stated that she was willing to give up custody of the children, lied to her social worker regarding her relationship with father, failed to fully participate in the parenting services provided to her by the county, did not recognize dangers to the children, and allowed father to live in her home in violation of court orders. *Id.* at 384. Because mother continually failed to comply with the aspects of her case plan that demanded that she ban the father from her home and because mother had consistently exhibited other parenting problems, the district court's decision to terminate her parental rights was held not clearly erroneous. *Id.* at 388-89.

Here, mother testified that she believed it was in M.M.'s best interests that father's parental rights not be terminated. She stated that "it's important for children to know their real parents, their biological mother and father." She testified that, other than having observed father playfully toss M.M. into the air a couple times, she had not observed father engage in any hurtful, malicious, or inappropriate treatment of M.M., and that he is a "good father." She also stated that she had been following the case plan, and when asked whether she would continue to do "whatever is required to make sure that the County . . . and . . . the guardian ad litem [are] satisfied that [M.M.] is safe," she replied "[y]es." When asked if she had any ideas about what may have caused M.M.'s bruising,

she stated “[m]aybe. There are scenarios, you know, that have been presented to me, but I can’t say for sure what I exactly believe.”

The guardian ad litem (GAL) in this case submitted a report based on her observations of the parents and M.M. The GAL noted that, when mother was pregnant, father was more excited for the baby than mother. She found that the parents had a good relationship and that they worked together to try to learn to care for M.M. She also reported that father needed help during supervised visits to learn appropriate burping and how to try different things to soothe M.M. when she cried, but that he was open to learning and trying new things and appeared “sincerely happy” to be with M.M. during these visits. She summarized:

Based on personal observation, first-hand knowledge or information I believe that egregious harm was committed against [M.M.] by [father]. I do however believe that the egregious harm was not malicious in nature and that the injuries were inflicted unintentionally.

[Father] has overcome significant personal barriers including having been raised by a single parent[] since the age of five[,] after having suffered emotional/mental abuse by his birth mother. Additionally, after having had numerous legal issues as a teen and in early 2006, [father] has not had any legal issues since meeting [mother] and becoming a father to [M.M.]. Further, none of these legal issues have ever involved crimes against a person, which would be an indicator of a violent personality or a person who has issues with anger.

. . . I believe that . . . this child has caused [father] to re-think his life and his priorities in a way that nothing else ever has.

Not only does [father] need an opportunity to continue to parent his child, [M.M.] deserves the right to grow up with her birth father.

The GAL recommended that father's rights not be terminated; that father work with BCFS to develop a case plan that will protect M.M. before he moves back into the home; that father complete a parental capacity evaluation and follow all recommendations; that BCFS provide protective supervision for M.M. while she is in the care of her parents; that M.M. be checked by a doctor once a month to assure her continued health and safety; and that should M.M. sustain any additional injuries that would indicate physical abuse by the father, his rights be terminated.

The district court made extensive and thorough findings. The district court concluded that it is not in M.M.'s best interests to have father's parental rights terminated. The district court observed that M.M. is better off in mother's care than in foster care, that it expects mother to continue her involvement with father, and that such continued involvement will pose a risk to M.M., who will encounter her father without a case plan in place or the continued supervision of BCFS to safeguard her welfare if father's rights are terminated. If father's rights are not terminated, the district court concluded that there is greater assurance of adherence to a case plan and oversight by BCFS. Further, the district court stated that if the father does not "come clean" during the course of his case plan and "candidly address what happened so that his parenting deficiencies can be addressed," then "it may be that termination of his parental rights will be appropriate at some future point in time."

The county argues that the best-interest findings of the district court are clearly erroneous. The county argues that the record is clear that father beat M.M. and likely fractured her ribs. The county urges reversal, emphasizing that being a victim of

egregious harm is not in the best interests of M.M. Clearly, this is an weighty consideration. The county also argues that the district court took too limited a view of its options in assuming that after a termination of father's parental rights, he would have unsupervised contact with M.M. The county points out that the district court could order no contact between mother and father to insulate M.M. from his presence and argues that the court should have terminated G.M.'s parental rights and ordered this separation rather than risk exposing M.M. to her father again.

Although a case plan *may* prohibit a mother's interactions with the father, our caselaw does not *mandate* that a district court terminate the parental rights for an individual that has caused egregious harm or forbid the continuing parent from having contact with the abusive-terminated parent. *See* Minn. Stat. § 260C.301, subd. 1 (2006) (stating that a district court "may" terminate parental rights for the reasons listed in the statute); Minn. Stat § 645.44, subd. 15 (2006) (stating that "[m]ay" is permissive"); *M.P.*, 542 N.W.2d at 74-75 (noting that the termination statute allows a child's best interests to preclude termination despite the existence of a statutory basis for termination).

The termination decision involved weighing relative risks: the risk of father's continued parental rights versus the risk that if father's rights were terminated and BCFS was no longer involved in supervising the family, M.M. would be exposed to harm despite court orders. Also, there was substantial evidence of father's genuine interest in M.M. and sincere efforts to care for her. The district court carefully considered its decision, and incorporated its assessment of M.M.'s best interests in its conclusions. The district court required both parents to follow case plans developed with BCFS and

recognized termination proceedings could be instituted in the future if father did not acknowledge the harm he had caused to M.M.

The district court acknowledged that “[t]his matter is a very difficult situation.” We agree. The determination of M.M.’s best interests and the role the county and her father should take in her life to best provide for her welfare is complex and troubling. In light of the constellation of weighty circumstances presented, we recognize that the district court is best suited to decide how to act in M.M.’s best interests and conclude that, based on this record, the district court did not clearly err in allowing father to maintain his parental rights for the time being.

**Affirmed.**

Dated: