STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0716

In the Matter of the Welfare of the Child of: S.J.W. and D.L.P.,
Parents.

Filed December 16, 2008
Affirmed in part and remanded
Stauber, Judge

Clay County District Court
File No. 14JV072822

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Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from a CHIPS adjudication, appellant-parents argue that (1) the district court's findings that the minor child was physically abused are not supported by clear and convincing evidence and (2) the district court's findings do not sufficiently address the statutory criteria set forth in Minn. Stat. § 260C.201, subd. 2 (2006). Because there is clear and convincing evidence in the record that the minor child was physically abused,

we affirm the CHIPS adjudication. But because the district court's findings do not sufficiently address the statutory criteria set forth in Minn. Stat. § 260C.201, subd. 2, we remand the matter for the necessary findings.

FACTS

Appellant-mother S.J.W. and appellant-father D.L.P. are the parents of E.J.W.-P., born September 21, 2007. On November 14, 2007, respondent Clay County Social Services received a report indicating that E.J.W.-P. may be a "possible shaken baby" due to concerns of "red spots in [E.J.W.-P.'s] eyes and bruising on his legs." In response to the report, Child Protection Investigator Jill Meyer, along with law enforcement, met with appellants at their home to investigate the allegation. After examining the baby, Meyer recommended that E.J.W.-P. be examined by a doctor. E.J.W.-P. was subsequently taken to a hospital where he was examined by Dr. Arnie Graff. An examination of E.J.W.-P. revealed multiple small bruises on both of his legs, subconjunctival hemorrhages in both eyes, and a fractured clavicle. Based on Dr. Graff's report documenting E.J.W.-P.'s injuries, D.L.P. was charged with third-degree assault for allegedly inflicting E.J.W.-P.'s injuries.

On November 20, 2007, a petition was filed alleging that E.J.W.-P. was in need of protection or services (CHIPS). A trial related to the CHIPS petition was conducted on March 11, 2008. At trial, Dawn Kuntz testified that she has been S.J.W.'s therapist since February 2005. According to Kuntz, she met with S.J.W. on November 13, 2007, for a scheduled appointment. At this appointment, S.J.W. reported to Kuntz that E.J.W.-P. had red marks in his eyes and bruises on his legs, and that she was afraid D.L.P. may have

hurt E.J.W.-P. Kuntz testified that based on S.J.W.'s concerns, she recommended that S.J.W. take E.J.W.-P. to a doctor to have him "checked out."

Dr. Graff testified that the injuries to E.J.W.-P.'s eyes were nonspecific injuries that could easily have been caused by the infant poking himself in the eye. But Dr. Graff testified that "in a child who is immobile, bruising that's found . . . is inflicted by someone or due to a medical problem. It has to be one or the other." According to Dr. Graff, the medical tests conducted revealed no evidence of any bruising disorder. Dr. Graff further testified that there is no evidence that E.J.W.-P. suffers from metabolic bone disease. Thus, Dr. Graff testified that the bruising and the fractured clavicle were both "inflicted," either accidentally or non-accidentally, and that the fractured clavicle would have taken a significant amount of force, more than would result from just playing with the child.

S.J.W. testified that she was not aware of any accidents or incidents in which the child was involved that may have caused E.J.W.-P.'s injuries, and there was no testimony or evidence linking S.J.W. to the child's injuries. S.J.W. also testified that she never believed D.L.P. intentionally caused any harm to E.J.W.-P., and denied making any statement that D.L.P. intentionally harmed E.J.W.-P. D.L.P. invoked his Fifth Amendment right to remain silent during the CHIPS trial, and has had no unsupervised contact with E.J.W.-P. since the CHIPS petition was filed.

On April 1, 2008, the district court issued its order finding that following Clay County Social Services intervention, and long before the CHIPS trial, S.J.W. voluntarily accepted services, followed all recommendations, and cooperated with social services.

During this time, E.J.W.-P. remained in the care and control of S.J.W. Nevertheless, the district court's order adjudicated E.J.W.-P. in need of protection or services. The district court's dispositional order, dated April 18, 2008, granted Clay County Social Services protective supervision of E.J.W.-P. This appeal followed.

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 (2006). At a CHIPS trial, the court must "determine whether the statutory grounds set forth in the petition are or are not proved[,]" Minn. R. Juv. Pro. 39.01, and "the burden of proof in the district court is 'clear and convincing' evidence." *In re Welfare of B.A.B.*, 572 N.W.2d 776, 778 (Minn. App. 1998); Minn. Stat. § 260C.163, subd. 1(a) (Supp. 2007) (requiring CHIPS allegations to be proved by "clear and convincing evidence"). When reviewing a disposition, this court must determine whether the district court made the necessary findings and whether those findings are supported by clear and convincing evidence in the record. *See* Minn. Stat. § 260C.201, subd. 2 (2006) (requiring written findings be made); *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261 (Minn. App. 1996) (requiring allegations of petition be supported by clear and convincing evidence). Questions of law, such as the interpretation of the statutory criteria for adjudicating a CHIPS petition, are reviewed de novo. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 54 (Minn. 2004).

I.

Minnesota law defines a "child in need of protection or services" to include a child who "has been a victim of physical or sexual abuse." Minn. Stat. § 260C.007, subd. 6(2)(i) (2006). Here, the district court found that E.J.W.-P. sustained bruising to his legs and a fractured clavicle. The court concluded that based on the evidence presented, the injuries were "inflicted," and there was no evidence that the child was "involved in a traumatic accident or incident that could have caused these injuries." Thus, the court concluded that E.J.W.-P. was in need of protection or services because he had been a victim of physical abuse.

Appellants argue that the district court's finding that E.J.W.-P. was physically abused is not supported by the record because there is no evidence that E.J.W.-P. was intentionally abused. Conversely, respondent argues that a finding of physical abuse does not require evidence that the abuse was "intentional."

"Physical abuse" is not defined in Minn. Stat. § 260C.007 (2006). Instead, the statute only defines "child abuse" and "domestic child abuse." *See* Minn. Stat. § 260C.007, subds. 5, 13. Recently, however, the Minnesota Supreme Court clarified that a "child is . . . in need of protection or services under section 260C.007 if there is physical conduct toward the child that causes either physical injury, or mental injury." *In re Welfare of Children of N.F.*, 749 N.W.2d 802, 810 (Minn. 2008). In reaching its decision, the supreme court sought to define "physical abuse," and "look[ed] to section 626.556 for guidance in defining physical abuse under section 260C.007, subdivision 6(2)(i)." *Id.* at 808-09. The court noted that section 626.556 requires certain persons

who know or have reason to believe a child is being physically abused to report that information to local authorities, and that although not every report of physical abuse will result in an adjudication of the child as in need of protection or services, "it is reasonable to assume that the legislature intended there to be some symmetry between conduct that must be reported to authorities, and the conduct that actually renders a child in need of protection or services." *Id.* at 809. The court went on to state that "physical abuse" for purposes of the reporting requirement under section 626.556 is defined as:

> any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child *other than by accidental means*, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 121A.67 or 245.825.

Id. (quoting Minn. Stat. § 626.556, subd. 2(g) (2006)) (emphasis added).

Here, based on the definition of "physical abuse," contained in section 626.556, and addressed by the supreme court in *N.F.*, we conclude that appellants' argument that there must be some evidence of intent to prove "physical abuse" is without merit. Rather, under the statute, "physical abuse" is any injury that is not accidental or cannot be explained based on the child's history of injuries or some other aversions. Minn. Stat. § 626.556, subd. 2(g). Thus, although the state must prove that the injury was not the result of an accident, the state's burden of proof does not rise to the level of proving intent to injure.

We now turn to whether there is clear and convincing evidence in the record to support the district court's findings of physical abuse. It is undisputed E.J.W.-P. suffered

from a broken clavicle and had bruising to his legs. Moreover, Dr. Graff testified that these injuries were "inflicted" injuries "caused by someone," and that a fracture to an immobile seven-week-old child "would require some force to break the bone." Dr. Graff further testified that there is no evidence that E.J.W.-P. suffered from any bruising disorders or bone diseases. Finally, Kuntz testified that, at a therapy session on November 13, 2007, S.J.W. seemed "anxious," and when asked about E.J.W.-P., S.J.W. told Kuntz that he "didn't look very well" and that she "was afraid that [D.L.P.] might have hurt [E.J.W.-P.]." We conclude that this evidence and testimony, along with the adverse inferences that could be drawn from D.L.P.'s decision not to testify,[1] and S.J.W.'s failure to offer an explanation for E.J.W.-P.'s injuries, establishes that E.J.W.-P.'s injuries were caused "other than by accidental means." Accordingly, the district court's findings that E.J.W.-P. was physically abused are supported by clear and convincing evidence.

Appellants argue that by finding that appellants failed to offer an explanation as to how E.J.W.-P. was injured, the district court impermissibly shifted the burden of proof to appellants to prove that the injuries were the result of an accident. We disagree. The finding did not shift the burden of proof. Rather, the finding simply recognized that appellants did not offer a reasonable explanation of the child's injuries. As respondent points out, the state still had to prove that the child was injured, that the injuries were

[1] When a party asserts the Fifth Amendment in a civil action it does not prohibit the district court from making an adverse inference when that party refuses to testify. *Parker v. Hennepin County Dist. Court*, 285 N.W.2d 81, 83 (Minn. 1979).

non-accidental, and that the injuries could not reasonably be explained by the child's history of injuries or other aversions. *See* Minn. Stat. § 626.556, subd. 2(g).

II.

Minnesota law provides:

> Any order for a disposition authorized under this section shall contain written findings of fact to support the disposition and case plan ordered and shall also set forth in writing the following information:
>
> (1) Why the best interests and safety of the child are served by the disposition and case plan ordered;
>
> (2) What alternative dispositions or services under the case plan were considered by the court and why such dispositions or services were not appropriate in the instant case.

Minn. Stat. § 260C.201, subd. 2 (2006).

Appellants argue that the district court's findings are deficient under Minn. Stat. § 260C.201, subd. 2, because the court failed to explain why the disposition is in E.J.W.-P.'s best interests, and what dispositional alternatives were considered and why such alternatives were rejected. In contrast, respondent argues that appellants erroneously rely on the district court's adjudication order rather than the dispositional order. Respondent argues that in the court's dispositional order, the district court properly addressed the relevant statutory criteria set forth in Minn. Stat. § 260C.201, subd. 2.

Respondent is correct in that Minn. Stat. § 260C.201, subd. 2, concerns dispositional orders. The district court's dispositional order provides: "The Court finds that after considering alternative dispositions, the most appropriate disposition is

hereinafter ordered. The Court further finds that said disposition is in the best interests of the child, based on all the information gathered at said hearing." The order contains no further explanation as to why the disposition is in the best interests of the child, and no further discussion pertaining to alternative dispositions.

Respondent argues that the language contained in the court's order sufficiently complies with section 260C.201, subdivision 2. Respondent further argues that the fact that the district court's dispositional order differs from the disposition recommended by the social service agency demonstrates that the district court considered alternative dispositions.

We disagree. Although the court may have considered alternative dispositions and determined that the disposition ordered was in the best interests of E.J.W.-P., the statute requires findings specifically stating "[w]hy the bests interests . . . of the child are served by the disposition . . . ordered." Minn. Stat. § 260C.201, subd. 2(1). Moreover, the statute mandates specific findings as to "[w]hat alternative dispositions . . . were considered by the court and why such dispositions . . . were not appropriate." Minn. Stat. § 260C.201, subd. 2(2). The district court's findings do not sufficiently address the statutory criteria set forth in Minn. Stat. § 260C.201, subd. 2. Accordingly, we remand for the necessary findings.

Affirmed in part and remanded.