STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2233

In the Matter of the Welfare of the Children of: J. L., C. H. and J. G., Parents

Filed July 7, 2009
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-JV-07-5456

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Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant-mother argues that the district court erred by transferring legal and physical custody of her three children to the foster mother with whom they had been placed rather than the paternal aunt of two of the children. Because the district court's

finding that this transfer was in the best interests of the children is substantially supported by the evidence in the record and the district court did not err in reaching its conclusion, we affirm.

FACTS

The facts of this case are largely undisputed. Appellant is the mother of three children: five-year old H.L., four-year old C.G.H., and three-year old B.H. J.G. is the father of H.L., and C.H. is the father of C.G.H. and B.H.

On October 26, 2006, the Hennepin County Human Services and Public Health Department (the department) filed a petition alleging that appellant-mother's children were in need of protection or services. The children were placed out of home on November 6 and were adjudicated in need of protection or services on January 10, 2007. The children were reunified with their mother several times, but were removed from her care permanently on January 25, 2008. On March 7, the children were placed with R.D., where they resided at the time of trial.

Appellant-mother and both fathers agreed that it was proper to have the physical and legal custody of their children transferred because it was in the children's best interests. They disagreed with the department, however, on the proper custodian for the children: the parents wanted the children placed with T.H., the paternal aunt of C.G.H. and B.H., whereas the department argued that the best placement was with R.D.

The district court heard testimony, over the course of two days, from a therapist, a child-services social worker, a child-protection social worker, the guardian ad litem, as well as R.D., T.H., both fathers, and appellant-mother. The therapist, who had been

working with H.L., concluded that "[a]lthough she [believed] that potential conflict between [R.D.] and the parents would be harmful to [H.L.] moving her to yet another home environment would cause a regression in the progress made thus far." The child-services social worker determined that "it is in the children's best interest to remain in the current foster home. [The children] have made great progress. They would regress if moved again." The child-protection social worker did not believe that placing the children in T.H.'s home would be in the children's best interests. He testified that the children would regress if moved out of the current home. The guardian ad litem posited "that it is in the children's best interests to remain in the current foster home pursuant to a transfer of legal and physical custody. Moving the children to a different home is not in their best interests." Appellant-mother, both fathers, and T.H. asserted that T.H. should be given custody, while R.D. argued that it was in the children's best interests for her to be given custody.

After hearing the testimony, the district court transferred legal and physical custody of the children to R.D. Appellant-mother filed a motion for new trial, or in the alternative, amended findings or an evidentiary hearing. The district court denied appellant-mother's motion, and this appeal follows.

D E C I S I O N

Appellant-mother asserts that the department did not adequately carry out its obligation to pursue relative placement for the children, and the district court erred by transferring legal and physical custody of the children to R.D. instead of T.H.

> Consistent with the level of proof generally required in child protection proceedings, the county must prove the allegations of the petition for permanent placement by clear and convincing evidence. *See* Minn. R. Juv. P. 59.05 (allegations of petition must be proved by clear and convincing evidence). As in termination of parental rights cases, the reviewing court determines on appeal whether the trial court's findings address the statutory criteria and are supported by substantial evidence, or whether they are clearly erroneous.

In re Welfare of A.R.G.-B., 551 N.W.2d 256, 261 (Minn. App. 1996) (quotation omitted).

A. Initial Placement

For a child placed outside his home pursuant to court order, "[t]he policy of the state of Minnesota is to ensure that the child's best interests are met by requiring an individualized determination of the needs of the child and of how the selected placement will serve the needs of the child being placed." Minn. Stat. § 260C.212, subd. 2(a) (2008). The child will be placed in a foster home "selected by considering placement with relatives and important friends in the following order: (1) with an individual who is related to the child by blood, marriage, or adoption; or (2) with an individual who is an important friend with whom the child has resided or had significant contact." *Id.*

Appellant-mother argues that the department did not fulfill its duty to attempt to secure placement of her children with a relative. The record does not support this assertion. The department did conduct a relative search, which yielded both R.D. and T.H. as potential foster care placements for the children. In fact, at trial, the child-

services social worker testified that the only reason that the children were not placed in foster care with T.H. initially was a licensing issue.[1]

Furthermore, a relative is defined in the statute as "a person related to the child by blood, marriage, or adoption, or an individual who is an important friend with whom the child has resided or had significant contact." Minn. Stat. § 260C.007, subd. 27 (2008). It appears that R.D. qualified as a relative because she is an "important friend with whom the child has. . . had significant contact." *Id.* R.D.'s brother is engaged to and has two children with T.H. R.D. testified that she knew the children prior to the child-protection case as she would see them at family functions or when visiting the home of her brother and T.H. This contact included weekend visits and birthday parties. Therefore, R.D. qualified as a relative under the statute. We agree with appellant that given the preference for an individual related by blood, marriage or adoption, T.H. would have been preferred over R.D but the analysis does not end there. T.H., although preferred, was not suitable because she was unable to be licensed as a foster placement, and the children were placed with R.D. Appellant-mother's argument that the department failed to conduct a thorough relative search is without merit. Moreover, as discussed below, the district court ultimately concluded that it was in the best interests of the children for them to remain with R.D.

[1] T.H. has an adult foster-care license for an 18-year old individual living in her home. Because of that license, she was unable to obtain a foster-care license for the children as well.

B. Transfer of Legal and Physical Custody

After it was determined that the children could not be returned to appellant-mother on a permanent basis, the district court had the option of: (1) transferring "permanent legal and physical custody to a relative in the best interests of the child[ren]," (2) terminating parental rights to the children, or (3) transferring the children to long-term foster care. Minn. Stat. § 260C.201, subd. 11(d) (2008). The district court transferred legal and physical custody to R.D., and appellant-mother argues that this was clearly erroneous. We disagree. There is substantial evidence in the record to support the district court's decision.

A therapist, two social workers, and the guardian ad litem testified that it was in the children's best interests for custody to be transferred to the current foster mother, R.D. R.D. is considered a relative under the definition articulated in Minn. Stat. § 260C.007, subd. 27, and she knew the children before they were placed in her care. The children have a very close relationship with R.D. According to H.L.'s therapist, the foster parents provide structure, consistency, stability, and compassion for the children. The child-services social worker testified that the foster parents meet the children's needs and will continue to do so, and the guardian ad litem concluded that it was not in the children's best interests to be moved to another home.

The heart of appellant-mother's thoughtful and well-briefed argument is that the district court should have placed the children with T.H. because they had previously lived with her, she had demonstrated consistent and continued love for them, and had an ability to provide a safe and suitable environment for them. We do not doubt any of this.

However, these same arguments were presented to and rejected by the district court. It is not our role to second guess that decision but only to determine if it was in error. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them"). Moreover, the district court was rightly concerned about uprooting these children once again when they already had been the subject of four out-of-home placements in less than 15 months. All of the child-welfare professionals and the guardian ad litem opposed yet another placement, especially when the children, who had been with R.D. for seven months, were doing so well. This evidence is sufficient to sustain the district court's decision to transfer legal and physical custody to R.D.

C. Best-Interest Factors

Appellant-mother argues that because the district court did not outline the best interest factors contained in Minn. Stat. §§ 518.17, 257.025 (2008), its order granting physical and legal custody to R.D. was in error. We disagree. The current law in Minnesota does not require the district court to make these findings.

The relevant statute once read: "In transferring permanent, legal and physical custody to a relative, the juvenile court shall follow the standards and procedures applicable under this chapter, chapter 260, or chapter 518." Minn. Stat. § 260C.201, subd. 11(e)(1) (2000). That language has been removed from the statute. It now reads: "In ordering a permanent placement of a child, the court must be governed by the best interests of the child, including a review of the relationship between the child and relatives and the child and other important persons with whom the child has resided or

had significant contact." Minn. Stat. § 260C.201, subd. 11(e) (2008). Removal of the specific language indicates that the district court must continue to act in the best interests of the child, but no longer must make findings specifically addressing the statutory factors listed in Minn. Stat. §§ 518.17, 257.025. The district court explicitly concluded that it was in the best interests of the children that physical and legal custody be transferred to R.D.

D. Visitation

Appellant-mother finally requests that if we fail to reverse the district court's decision, we should remand for an evidentiary hearing on the issue of visitation. She is concerned that, based on R.D.'s past history, R.D. will not follow the court-ordered visitation schedule. The district court rejected this request. It had terminated juvenile court jurisdiction over this matter in its October 23, 2008 order. Therefore, it noted that any further proceedings must be brought in family court. *See* Minn. R. Juv. Prot. P. 42.05, subd. 2(b) ("If the court transfers permanent legal and physical custody to a relative, juvenile court jurisdiction is terminated unless specifically retained by the court in its order. . . . When juvenile court jurisdiction is terminated, the court shall include an order directing the juvenile court administrator to file the order with the family court. Any further proceedings shall be brought in the family court pursuant to Minnesota Statutes § 518.18.").

We believe a remand is not appropriate. At this point, there is no evidence that the visitation schedule is being violated. If the schedule is violated, appellant-mother would have recourse in family court because she can move to enforce the visitation schedule.

Additionally, while Minn. Stat. § 518.18 (2008) states that "no motion to modify a custody order or parenting plan may be made earlier than one year after the date of the entry of a decree of dissolution or legal separation containing a provision dealing with custody,"[2] this one-year time limit "shall not prohibit a motion to modify a custody order or parenting plan if the court finds that there is persistent and willful denial or interference with parenting time."[3] *Id.* Therefore, if there is a persistent and willful denial or interference with parenting time, appellant-mother can file a motion in the district court seeking modification of the original custody order prior to the one-year time limit. Because that is not the issue before us now, appellant's request for remand is denied.

Affirmed.

[2] Minn. Stat. § 260C.201, subd. 11(j) (2008) states: "An order for permanent legal and physical custody of a child may be modified under sections 518.18 and 518.185."

[3] Parenting time is defined as "the time a parent spends with a child regardless of the custodial designation regarding the child." Minn. Stat. § 518.003, subd. 5 (2008).