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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-177**

In the Matter of the Welfare of the Children of:
K.H., Parent.

**Filed September 8, 2009
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-JV-07-11322

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Considered and decided by Worke, Presiding Judge; Ross, Judge; and Muehlberg, Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

One hot summer midnight in 2006, K.H. drove to Gabby's Saloon in Minneapolis. K.H. went into the bar. It was 80 degrees outside. It was much hotter than that inside the car, where K.H. left her then five-year-old son, who suffers from fetal alcohol syndrome. The incident prompted Hennepin County officials to take custody of K.H.'s two children and to file a petition for children in need of protection or services. K.H. pleaded guilty to child neglect. The district court determined that reasonable efforts failed to correct the conditions leading to K.H.'s neglectful behavior and ordered that her parental rights (and any rights of the alleged father) be terminated. K.H. appeals from the district court orders terminating her parental rights. She argues that there was no legally adequate basis to terminate her parental rights because the district court considered only stale evidence when it concluded that the conditions had not been corrected and that the district court erred in concluding termination was in the children's best interest. Because the district court applied the statutory criteria and because its findings are supported by substantial relevant evidence, we affirm.

FACTS

In August 2007, Hennepin County Human Services and Public Health Department petitioned to terminate K.H.'s parental rights to her then six-year-old son K.S. and her four-year-old daughter K.S. The county claimed that K.H. failed to comply with the case plan ordered by the district court after it found that K.H.'s children were in need of protection or services. The case plan arose from K.H.'s criminally neglectful behavior in

leaving her developmentally delayed son K.S. in her dangerously hot car while she patronized a bar. The county alleged that K.H. failed to comply with her probation terms and that she failed to complete chemical-dependency treatment and cooperate with parenting services, as her case plan required.

For a short time after her neglect conviction, K.H.'s case-plan compliance justified unsupervised visits with, and eventually physical custody of, her two children. But her compliance did not last and the children were again removed to foster care. K.H. initially worked with Hennepin County Human Services to meet her case-plan obligations. At that time the children lived in a series of foster homes. The case plan required K.H. to undergo a chemical-dependency assessment and to comply with related recommendations. She successfully completed the primary phase of chemical-dependency treatment. She was expected to live in a supportive housing environment, called Perspectives, where her children could live with her and she could complete the aftercare portion of her treatment. But the district court found that K.H. "failed to attend any aftercare event and failed to provide any service hours" at Perspectives. Approximately four months after K.H. moved into Perspectives, officials detected cocaine in her urine. The children were again removed from her custody and placed in another foster home, their sixth home since K.H. first left her son in the hot car.

K.H. continued to falter. After she lost her custodial privileges at Perspectives, K.H. failed to comply with any of the facility's program requirements, used illegal drugs, was discharged, and moved out without informing Perspectives of her whereabouts. K.H. also did not reliably report for sobriety tests, so the district court ordered her to wear an

alcohol-monitoring bracelet, from which she was required to download data regularly. On five occasions she failed to timely download the data from the bracelet, preventing officials from verifying her sobriety. K.H. underwent another chemical-dependency assessment, which recommended that she receive outpatient treatment from African American Family Services. She attended sporadically, and she was eventually discharged for failure to attend. After another assessment, the case worker recommended that she participate in the Recovery Resource Center's primary treatment. But she did not do so in a timely fashion. K.H. underwent a total of four chemical-dependency assessments and she was referred to treatment each time. But she never completed any recommended treatment.

Hennepin County and K.H. reached a settlement agreeing that K.H. would voluntarily terminate her parental rights if a home study did not support a decision to transfer custody to the children's paternal grandmother. The paternal grandmother lives in Texas. The home study extended over six months without resolution, until the district court finally ordered a trial "to assure finality for these young children." The district court also ordered a "zero tolerance case plan" for K.H. in July 2008, requiring K.H. to use the alcohol-monitoring bracelet and to undergo a mental-health assessment and counseling. The date of trial arrived, and the Texas home study had not been completed.

At trial, K.H. testified that she is not chemically dependent. The district court found that K.H. failed to acknowledge her chemical dependency or to significantly improve the mental-health issues underlying her chemical use, and that these shortcomings prevented K.H. from caring for her children. The district court also found

that K.H. “repeatedly fails to attend programming, continues to deny that she is chemically dependent and refuses to comply with the requirements of her case plan.” It therefore concluded that reasonable efforts had failed to correct the circumstances leading to the children’s out-of-home placement, and that it was in the children’s best interests to terminate K.H.’s parental rights. K.H. appeals.

D E C I S I O N

K.H. argues that the district court improperly terminated her parental rights because it evaluated the conditions based on evidence too remote from the time of trial and because she substantially complied with her case plan. She also contends that the district court did not consider less drastic options than termination of rights. We review district court decisions terminating parental rights for whether the district court addressed the statutory criteria and for whether factual findings are supported by substantial evidence and are not clearly erroneous. *In re Welfare of D.T.J.*, 554 N.W.2d 104, 107 (Minn. App. 1996). A district court may terminate parental rights if at least one statutory ground supports termination and if termination is in the children’s best interests. *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005). Parental rights may be terminated when “reasonable efforts . . . have failed to correct the conditions leading to the child’s placement.” Minn. Stat. § 260C.301, subd. 1(b)(5) (2008). When a parent has not substantially complied with a court’s orders and a reasonable case plan, it is presumed that conditions leading to out-of-home placement have not been corrected. *Id.*, subd. 1(b)(5)(iii).

The district court found that reasonable efforts had failed to correct the conditions that led to the children's placement outside K.H.'s home. The district court cited the conditions that remained uncorrected as K.H.'s "failure to acknowledge or deal effectively with her chemical dependency [and] to make significant progress on the mental health issues out of which [her] chemical use apparently manifests." K.H. argues that the district court did not address conditions that existed at the time of the hearing, and she contends that the district court's related findings are erroneous. She argues that because her July 2008 case plan did not require her to participate in additional chemical-dependency treatment or aftercare, the district court could not rely on her history of nonparticipation in her earlier case plan as evidence that conditions remained uncorrected. The district court's finding that reasonable efforts had failed to correct the circumstances leading to placement of K.H.'s children is supported by the record.

K.H. argues that by the time of trial she had substantially complied with her case plan and that the district court erroneously imposed a strict burden of absolute compliance in the July 10, 2008 order. K.H. underwent the mental-health assessment as ordered and was diagnosed with a depressive disorder. Julie Kloss, an employee of Hennepin County Medical Center, testified that although she had tried to schedule a time for K.H. to begin receiving mental-health services, K.H.'s problems with her phone and failure to return phone calls precipitated a delay that was so long that K.H. would have to undergo an updated intake evaluation to receive the services.

K.H. eventually referred herself to a clinic for mental-health treatment. The examining clinician noted that K.H. lacked insight into her own depression. The clinician

recommended that K.H. take an anti-depressant drug, but K.H.'s only response was that she would think about it. She was prescribed Trazodone. K.H. returned for a medication evaluation one month later, when she discontinued her Trazodone prescription and was prescribed Lexapro. She testified at trial that she sees a therapist weekly.

But the record supports the finding that K.H. had established a long history of merely sporadic commitment to her case plan. She failed to complete any chemical-dependency treatment. She failed to comply with the requirement that she regularly upload the data collected by her alcohol-monitoring bracelet, resulting in "days" of lost data. Her urine tested positive for cocaine. K.H. settled with Hennepin County in January 2008 to voluntarily relinquish her parental rights if custody could not be transferred to the children's paternal grandmother. As the agreement is described in her brief, "[K.H.] decided to agree . . . to a voluntary [termination of parental rights] if the [transfer of legal custody] did not happen, as a 'way to keep [the] children in the family.' Thus, this settlement did not contemplate the return of the children to K.H." The settlement delayed the district court's review of K.H.'s case-plan compliance, but as the year wore on the paternal grandmother's home study did not progress. By the time of the September 2008 trial, the home study "seem[ed] no closer to fruition [than] it did in January 2008."

K.H. contends that the district court should not have considered her case-plan performance prior to July 10, 2008, both because her case-plan performance had improved in the weeks leading up to trial and because her case plan consisted only of the terms expressly stated in the July 10 order. Although K.H.'s argument that she had

recently been substantially compliant has some merit, it was her persistent failure to address her chemical dependency and to comply with her case plan that were the district court's original concerns. And the July 10 order did not reflect that the district court's concern had diminished. K.H.'s refusal to acknowledge that she has a chemical-dependency problem persisted at trial. Even at the time of trial, she had never successfully completed a chemical-dependency treatment program despite her repeated referrals. K.H.'s arguments seem to overlook the heart of the matter, which is that she has historically and consistently demonstrated a propensity to place her own desire for drugs and alcohol above her duty to care for and protect her children. Even though K.H. began to comply with certain elements of her case plan in the weeks leading up to trial, the district court's conclusion that reasonable efforts had not corrected the conditions leading to out-of-home placement is not clearly erroneous.

At oral argument, K.H. argued that because she was not ordered again to undergo chemical-dependency testing and treatment in the July 10 order, the district court could not fault her for failing to pursue treatment before trial. She cites as support *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 664–66 (Minn. 2008). But the issue in *T.R.* was whether the county failed to make reasonable efforts at reunification. *T.R.*, 750 N.W.2d at 664. The supreme court expressed concern that although the parent was diagnosed with chemical-dependency issues, the county admittedly failed “to provide services, counseling or assistance to aid [the parent] in coming to grips with [his] conduct.” *Id.* at 665. And it ultimately concluded that reasonable efforts were not made because “no services were offered to address [the parent]’s lack of verbal skills and

acknowledged difficulty in understanding the proceedings.” *Id.* at 666. The circumstances here are materially different.

K.H. does not frame her argument in terms of whether the county made reasonable efforts toward reunification. Rather, she focuses on whether the district court could consider her pre-July 10, 2008, chemical-dependency related behavior despite not specifically ordering K.H. to undergo yet another chemical-dependency evaluation. At the time of the July hearing, the district court understood the straight-forward terms of the January settlement agreement: if custody could not be transferred to the children’s paternal grandmother, K.H. would agree to voluntarily terminate her parental rights. After it learned that the home study had not been completed, the court ordered strict sobriety monitoring and a mental-health assessment for K.H.

At the time of trial, K.H.’s history of chemical-dependency related behavior and noncompliance with her case plan were relevant to the district court’s evaluation of the underlying circumstance that gave rise to the children’s placement—K.H.’s dangerous prioritization of chemicals over her children’s safety. On four occasions K.H. had been referred to, and failed to complete, chemical-dependency treatment. The relationship between this failure and the life-threatening chemical-related conduct as a parent cannot be overlooked: K.H. had consumed so much alcohol during pregnancy that K.S. suffers from fetal alcohol syndrome; K.H. so preferred her own alcohol-related entertainment over the welfare of K.S. that she left him in the dangerously hot car at midnight to patronize a bar; and even under the threat of losing her parental rights, she continued to use drugs and refused to comply with chemical-related aspects of her initial case plan.

Unlike *T.R.*, where the services were never provided, no evidence exists that chemical-dependency treatment or any other reasonably necessary service was unavailable to K.H. even after the July 10 order. *Cf. id.* at 665–66 (noting that a county “may not . . . decide for itself that further efforts are futile”). The district court noted that the county “would continue to give [K.H.] services” in its July 10 order. Under these circumstances we cannot read into the district court’s July 10 order that it intended to disregard K.H.’s case-plan failures regarding her chemical-dependency issues. The district court’s decision to consider K.H.’s repeated failure to comply with her court-ordered case plan and to complete chemical-dependency treatment was not clearly erroneous.

K.H. also disputes that termination of her parental rights is in the children’s best interests. To determine a child’s best interests, a court must balance (a) the child’s interest in the relationship with its parent; (b) the parent’s interest in a relationship with the child; and (c) any competing interest of the child. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). “Where the interests of the parent and the child conflict, the interests of the child are paramount.” Minn. Stat. § 260C.301, subd. 7 (2008). The district court found that the children’s interests in permanency, a stable home, and consistent care outweighed the other two interests. The district court’s finding is not clearly erroneous and is supported by substantial evidence.

K.H. cites *In re Welfare of Chosa*, 290 N.W.2d 766, 767–68 (Minn. 1980), to support her contention that termination is not in the children’s best interests. *Chosa* does not apply the present legal standard and it does not address the balancing test relevant to ascertaining the children’s best interests. K.H. argues that the district court should have

ordered a continued CHIPS disposition, or delayed the proceedings to complete the paternal grandmother's home evaluation. She contends that "[o]ther than ability to timely complete paperwork, there were no deficiencies whatsoever reported at trial about the paternal grandmother's prospects as a caregiver for the children." The district court concluded that it would not transfer custody to the paternal grandmother because she had failed for an extended time to even complete the paperwork required to begin evaluating her fitness to care for the children. The grandmother had told the children's social worker that the process was simply "too much." The district court reasonably questioned the paternal grandmother's commitment to care for the children in light of this evidence and it soundly concluded that transferring custody to her would not be a viable option.

K.H. cites *In re Welfare of M.H.*, 595 N.W.2d 223, 229 (Minn. App. 1999), for the proposition that a continued CHIPS disposition would have been appropriate in light of K.H.'s "substantial progress." But in *M.H.* this court *upheld* a district court's decision *not* to terminate parental rights as being "within the [district] court's inherent discretion" to protect the welfare of the child. *M.H.*, 595 N.W.2d at 229. The district court here did not exercise its discretion to grant a continuance. It instead concluded that termination would be the best way to secure the welfare of the child. The district court acted according to the statute and within its discretion when it terminated K.H.'s parental rights.

We recognize that the issues on appeal are complicated by the long delay between the CHIPS petition and trial, by the unusual intervening agreement, and by K.H.'s effort to meet the subsequent, unique case plan. These complications raised during the

exceptional advocacy of K.H.'s appellate counsel make this a close case. But on balance, we affirm because K.H. failed to convince the district court that she overcame the issues causing the out-of-home placement and because our analysis of the issues K.H. presents is constrained by our standard of review.

Affirmed.