STATE OF MINNESOTA
IN COURT OF APPEALS
A09-753

In the Matter of the Welfare of the Children of:
D.D.B. and C.E.J., Parents

Filed October 27, 2009
Affirmed
Stauber, Judge

Nobles County District Court
File No. 53JV0891

Allen P. Eskens, Eskens, Gibson and Behm Law Firm, Chtd., Suite 610, 151 St. Andrews Court, Box 1056, Mankato, MN 56002-1056 (for appellant D.D.B.)

Jason C. Kohlmeyer, Rosengren Kohlmeyer, Suite 305, 201 North Broad Street, Mankato, MN 56001 (for C.E.J.)

Gordon Moore, III, Nobles County Attorney, Kathleen A. Kusz, Assistant County Attorney, Suite 400, 1530 Airport Road, Box 337, Worthington, MN 56187 (for respondent)

Mark D. Fiddler, Fiddler Law Ofice, P.A., Suite 200, 510 Marquette Avenue South, Minneapolis, MN 55402 (for guardian ad litem)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Minge, Judge.

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

STAUBER, Judge

On appeal from the termination of her parental rights, appellant mother argues that (1) the district court should not have terminated her parental rights for egregious harm

because the district court failed to consider her progress on her reunification plan and efforts at remedying the conditions leading to the out-of-home placement; (2) the district court's best-interests analysis lacks adequate findings, and the record does not show that termination is in the children's best interests; and (3) she was denied due process of law when the county filed criminal charges against her shortly before the termination trial, thereby limiting her ability to testify in the termination trial without collateral consequences in the criminal trial. We affirm.

FACTS

C.E.J. and appellant D.B. are the biological parents of Ch.B., born April 8, 2004, C.B., born March 6, 2006, and C.J., born January 7, 2008. Before moving to Minnesota, appellant, C.E.J., and the two older children lived in Tennessee, where C.E.J. did not consistently live with the family. In December 2007, the family relocated to Minneapolis where appellant and her children initially lived in shelters. A month later, C.E.J. found employment with Swift & Company and moved to Worthington. Shortly thereafter, appellant moved herself and the children to Worthington where the family resided at a motel, and appellant would watch the children while C.E.J. worked his shift.

On January 30, 2008, C.E.J. returned to the motel after working his shift to find that Ch.B. had a swollen and painful shoulder. When asked what happened, appellant told C.E.J. that she had been nursing C.J. when C.B. started jumping on the bed. According to appellant, she told C.B. to stop and reached out for her. Appellant claimed that when C.B. tried to avoid appellant's reach, C.B. collided with Ch.B., knocking him off the bed.

Appellant told C.E.J. that Ch.B. was injured when he fell onto a dresser that was next to the bed and C.B. fell on top of him.

C.E.J. took Ch.B. to the hospital where C.E.J. reiterated appellant's story to hospital staff. Ch.B. was initially treated by Dr. Lisa Gerdes, a board certified pediatrician with 11 years of experience. Dr. Gerdes concluded that Ch.B. suffered bilateral clavicle factures and trauma to his liver. According to Dr. Gerdes, the fractures required significant force which would not normally result if a child fell from a bed. Dr. Gerdes also testified that liver damage typically occurs from high force because the liver is protected by the ribs during minor falls. Thus, Dr. Gerdes concluded that based on the injuries sustained and the explanations provided, Ch.B.'s injuries were likely non-accidental.

After Dr. Gerdes's examined Ch.B., a report of suspicious injuries was made to the Worthington Police Department. Ch.B. was subsequently taken to a hospital in Sioux Falls, where he was examined by Dr. Edward Mailloux and Dr. Susan Duffek. Both Dr. Mailloux and Dr. Duffek have substantial experience in pediatrics and examining injuries to children. Dr. Mailloux and Dr. Duffek concluded that the bilateral clavicle fractures and liver trauma suffered by Ch.B. were likely non-accidental and were not consistent with the explanation given by the parents.

On January 31, 2008, the children were removed from their parents' care and placed in foster care. The next day, a CHIPS petition was filed alleging that the children were in need of protection or services. Shortly thereafter, the county filed a termination of parental rights (TPR) petition, alleging egregious harm. However, because appellant had been maintaining regular contact with her children, the county, supported by the GAL,

subsequently sought and was granted a continuance of the TPR proceeding so that appellant could improve her parenting skills in an attempt to reunify the family. In the meantime, C.E.J. moved to South Dakota, visited the children only once, and thereafter made no appearances or otherwise defended his parental rights in these proceedings.

Over the summer of 2008, appellant entered and completed parenting classes, "worked really hard" to improve her parenting skills, and became eligible for unsupervised visits with her children. But, by the fall of 2008, appellant began having difficulties maintaining her visitation schedule. Beginning in September 2008, appellant canceled or shortened approximately twelve visits with her children. Appellant also declined to attend counseling visits with her children, failed to find help for Ch.B. to overcome his speech difficulties, declined to participate in training for the use of an apnea monitor and nebulizer for the infant child, C.J., and allegedly showed no ability to care for her children on a long-term basis. As a result, the county filed an amended TPR petition on January 5, 2009, and a second amended TPR petition shortly thereafter. The amended petition alleged that a child experienced egregious harm while in the care of the parents, and that the parents are palpably unfit to be parties to the parent and child relationship.

A trial on the termination proceeding was scheduled to commence on February 25, 2009. Approximately two weeks before the schedule TPR trial, the state filed criminal charges against appellant alleging assault and malicious punishment of a child stemming from the injuries Ch.B. suffered on January 30, 2008. At the TPR pretrial hearing on February 19, 2009, appellant raised an objection to the state bringing criminal charges on this late date and so close to the beginning of the TPR proceedings. The state opposed any

continuance and refused to grant immunity for appellant's testimony in order to alleviate the objection to the state's decision to file criminal charges so close to the TPR trial.

At the TPR trial, appellant testified that she attended parenting classes and learned better parenting skills by using appropriate discipline. Holly Barkeim, the social worker assigned to appellant's case plan, described appellant's initial efforts as "phenomenal" and testified that appellant was "very engaged" in the reunification process. Although appellant admitted that she had to cancel and cut short some of her visits with her children, appellant explained that the issues with visitation stemmed from her opportunity to work overtime.

Dr. Gerdes, Dr. Mailoux, and Dr. Duffek testified on behalf of the state. All three doctors testified that a great amount of force must be applied to each point of the clavicle in order to break it. The doctors also testified that force must be applied to the chest or abdomen to cause liver damage. Thus, all three doctors opined that the injuries suffered by Ch.B. were non-accidental.

Carol Morgan, the Guardian ad Litem (GAL), submitted a report opining that appellant has no time-management skills and no stress-management skills. Morgan also noted that despite appellant's claim that her issues with visitation with her children were attributable to working overtime, social workers and foster parents often saw appellant around town during the times appellant claimed to be at work. At trial, Morgan testified that appellant offered no consistent reason for failing to participate in counseling with the two older children and that when Ch.B. was placed in foster care, Ch.B. had a significant speech problem. Morgan testified that after living with his foster parents and receiving special education, Ch.B.'s speech problems have substantially improved. Morgan further

testified that appellant has failed to develop the required long-term parenting skills necessary to raise the three children. Morgan's GAL reports to the court, beginning with her May 15, 2008 report, all recommended TPR.

On March 24, 2009, an order was filed terminating the parental rights of appellant and C.E.J. The district court found the testimony of the doctors to be credible and concluded that Ch.B. is a child who has experienced egregious harm in the care of appellant and that C.B. and C.J. are siblings of a child who was subjected to egregious harm. The court further found that C.E.J. had abandoned his children. Therefore, the court concluded that it is in the best interests of the children that the parental rights of appellant and C.E.J. be terminated. This appeal followed.[1]

D E C I S I O N

I.

Appellant argues that the district court erred in terminating her parental rights. A district court may, upon petition, terminate all rights of a parent to a child on one or more statutory grounds and a finding that termination of parental rights is in the child's best interests. Minn. Stat. § 260C.301, subds. 1(b), 7 (2008). This court's review of the district court's decision 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 D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997). "Considerable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." *In*

[1] C.E.J. did not appeal the termination of his parental rights.

re Welfare of L.A.F., 554 N.W.2d 393, 396 (Minn. 1996). However, "parental rights may be terminated only for grave and weighty reasons." *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). Thus, this court will "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *In re Welfare of J.M.*, 574 N.W.2d 717, 724 (Minn. 1998).

One ground for termination of a parent's rights occurs 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 interests of the child or of any child to be in the parent's care.

Minn. Stat. § 260C.301, subd. 1(b)(6). "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" that includes the infliction of "substantial bodily harm" as defined in Minn. Stat. § 609.02, subd. 7a (2008). Minn. Stat. § 260C.007, subd. 14 (2008). "Substantial bodily harm" is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, subd. 7a.

When a social-services agency has determined that a child has been subjected to egregious harm as defined in section 260C.007, subdivision 14, the county is required to file a TPR petition within 30 days of the responsible social-services agency's determination. Minn. Stat. § 260C.301, subd. 3(a) (2008). Generally, when a CHIPS petition is filed, and when a TPR proceeding is pending, the district court must ensure

that social-service agencies provide reasonable efforts, including culturally appropriate services, to prevent placement and reunite children with their parents at the earliest possible time. Minn. Stat. § 260.012(a) (2008); Minn. Stat. § 260C.001, subd. 3(1) (2008). However, when there is a finding of egregious harm, the services mandate does not apply. Minn. Stat. § 260.012(a)(1).

Here, the district court found that Ch.B. experienced egregious harm in the care of appellant. The court then found that pursuant to Minn. Stat. § 260.012(a)(1), reasonable efforts to reunify Ch.B. and his siblings with appellant was not required. Consequently, the district court terminated appellant's parental rights after concluding that termination was in the children's best interests.

Appellant argues that the district court should not have terminated her parental rights for egregious harm because the record shows that the court failed to consider her progress on her reunification plan and her efforts at remedying the conditions leading to the out-of-home placement. To support her claim, appellant cites Minn. Stat. § 260C.301, subd. 3(b)(2) (2008), which provides an exception to the rule set forth in section 260C.301, subdivision 3(a). This exception provides that the requirement set forth in section 260C.301, subdivision 3(a) does not apply if the county files

> a petition alleging the child, and where appropriate, the child's siblings, to be in need of protection or services accompanied by a case plan prepared by the responsible social services agency documenting a compelling reason why filing a termination of parental rights petition would not be in the best interests of the child.

Minn. Stat. § 260C.301, subd. 3(b)(2).

Appellant argues that because a continuance was requested by the county, and granted after the TPR petition was filed, to allow appellant to attempt rehabilitation and reunification, the district court should have considered the effectiveness of rehabilitation before it terminated her parental rights. In other words, appellant argues that the county must prove that it provided an appropriate rehabilitation and reunification plan, and used reasonable efforts to assist appellant in successfully accomplishing that plan.

We disagree. Although Minn. Stat. § 260C.301, subd. 3(b)(2), provides the county with the option of substituting a CHIPS petition for a TPR petition if there are compelling reasons why termination of parental rights is not in the best interests of the child, this exception is not a requirement. Here, the county instead moved to continue the TPR proceedings to provide appellant with the opportunity to rehabilitate and reunify herself with her children. But when these efforts failed, the TPR proceedings were reset for trial based on the allegations of, among other things, egregious harm. Following the trial, the district court's sole basis for terminating appellant's parental rights consisted of the finding of egregious harm. Minn. Stat. § 260.012(a)(1), unambiguously provides that where there has been a finding of egregious harm, reasonable efforts to prevent placement and for rehabilitation and reunification are not required. We note that we support the county's efforts, although statutorily unnecessary, as family reunification is always favored. But because the sole basis for the termination of appellant's parental rights was egregious harm, appellant's efforts with respect to rehabilitation and reunification are irrelevant.

Appellant further argues that *In re Welfare of M.D.O.*, 462 N.W.2d 370, 373 (Minn. 1990), supports her position that her rehabilitation efforts should have been considered by the district court. But appellant's reliance on *In re Welfare of M.D.O.* is misplaced because, in that case, the legal basis for termination was palpable unfitness and failure to correct the conditions that led to the initial placement. 462 N.W.2d at 373. Here, although the petition filed by the county alleged that appellant was palpably unfit to parent and that the conditions leading to the placement remained unchanged, the petition also alleged egregious harm. As noted above, the district court terminated appellant's parental rights based solely on a finding of egregious harm. The court's finding of egregious harm is supported by the record. Accordingly, the district court did not err in terminating appellant's parental rights for egregious harm.

We further note that the district court did address appellant's rehabilitation efforts. A review of the district court's order reveals that after making extensive findings pertaining to the egregious harm suffered by Ch.B., the court made many findings concerning appellant's conduct following the out-of-home placement. In fact, the district court specifically found that "[appellant] did show for a time, an improvement in her parenting." But the court went on to address appellant's many canceled or shortened visits with the children in the fall of 2008, appellant's failure to participate in the training for the medical devices needed for C.J., and appellant's inability to provide consistent and predictable parenting for the children. The findings show that appellant was provided with the opportunity to rehabilitate herself and reunify with her children, but that appellant failed to take advantage of the opportunity.

II.

In addition to finding at least one ground for termination, the district court must consider whether termination of parental rights is in the children's best-interests. *In re Termination of Parental Rights of Tanghe*, 672 N.W.2d 623, 625 (Minn. App. 2003). "In analyzing the best interests of the child, the court must balance three factors: (1) the child's interest in preserving the parent-child relationship; (2) the parent's interest in preserving the parent-child relationship; and (3) any competing interest of the child." *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). An order terminating parental rights must contain best-interests findings that facilitate effective appellate review, provide insight into which facts or opinions were most persuasive of the decision, and demonstrate the court's comprehensive consideration of the statutory criteria. *Tanghe*, 672 N.W.2d at 626.

Appellant argues that the matter should be remanded because the district court did not properly analyze whether termination of appellant's parental rights is in the best interests of the children. But the district court's order expressly states that before terminating appellant's parental rights, the court "must consider the best interests of the children." After listing the three factors that must be considered, the district court concluded that the best interests of the children "are secured by the termination of the parental rights of [appellant]." Moreover, a review of the court's findings indicates that the court addressed the necessary factors. The court's findings detail the children's living situation before the out-of-home placement, and state that the children are "thriving" due to their opportunity to live in a stable home. The findings also address appellant's

deficiencies in parenting, her failure to cooperate with her case plans, and her complete lack of skills necessary to adequately parent the children. The findings further address the GAL's testimony regarding appellant's lack of effort in addressing her parental deficits, as well as the GAL's testimonial conclusion that termination was in the children's best interests. Although the district court's findings do not expressly balance each consideration, the court made detailed findings that consider the appropriate factors. Accordingly, the district court conducted a proper best-interests analysis before terminating appellant's parental rights.

Appellant also contends that the record does not support the district court's conclusion that termination is in the children's best interests. We disagree. As we noted above, the district court found that Ch.B. suffered egregious harm in appellant's care, and that finding is supported by the record. Moreover, the district court heard extensive testimony from the GAL. The GAL testified that appellant has not corrected the conditions that were in place at the time Ch.B. suffered egregious harm. The GAL also testified extensively about appellant's lack of adequate parenting skills, her failure to improve her parenting skills despite the case plan that was in place, and the children's demeanor in the presence of appellant as compared to their demeanor when they are with their foster parents. If believed, this testimony supports the conclusion that termination of appellant's parental rights is in the children's best interests. The district court specifically found the GAL's testimony to be credible, and apparently found appellant's testimony to be not credible. *See L.A.F.*, 554 N.W.2d at 396 (stating that this court defers to the district court's credibility determinations). Therefore, the record supports the

district court's conclusion that termination of appellant's parental rights is in the children's best interests.

III.

"The due process clause provides that the state may not deprive a person of life, liberty, or property without due process of law." *R.B. v. C.S.*, 536 N.W.2d 634, 637 (Minn. App. 1995). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner." *Brooks v. Comm'r of Pub. Safety*, 584 N.W.2d 15, 19 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Nov. 24, 1998). The question of whether a person's due process rights have been violated is reviewed de novo. *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

Minn. Stat. § 260C.301, subd. 3(a), provides that "[t]he county attorney shall file a [TPR] petition within 30 days of the responsible social services agency determining that a child has been subjected to egregious harm." The statute goes on to state that "[i]f criminal charges have been filed against a parent arising out of the conduct alleged to constitute egregious harm, the county attorney shall determine which matter should proceed to trial first, consistent with the best interests of the child and subject to the defendant's right to a speedy trial." Minn. Stat. § 260C.301, subd. 3(a).

Appellant argues she was denied due process of law when the county filed criminal charges against her shortly before the TPR trial, thereby limiting her ability to testify in the TPR trial without collateral consequences in the criminal trial. Although appellant concedes that pursuant to section 260C.301, subdivision 3, the state may choose whether to proceed

with the TPR or the criminal case, appellant claims that "the events that occurred in the present case act to make the State's decision fundamentally unfair." Appellant claims that the state's "improper motives" are even more apparent because the state refused to grant her immunity so that she could testify at the TPR trial.

We note that it could be abuse of prosecutorial discretion and fundamentally unfair to purposely time collateral criminal proceedings to coerce appellant to choose between testifying and not testifying, particularly in a TPR case. *See Gardner v. Broderick*, 392 U.S. 273, 279, 88 S. Ct. 1913, 1916 (1968) (stating that the privilege against compelled self-incrimination will not abide any attempt, regardless of its ultimate effectiveness, to coerce a waiver of one's constitutional immunity); *see also In re Welfare of J.W.*, 415 N.W.2d 879, 892-83 (Minn. 1987) (discussing state compelled witness testimony by threatening to terminate parental rights). While there is no proof here that the county deliberately created such a scenario, the county attorney at oral argument did not categorically deny it, and even insinuated that the coincidental prosecution of the criminal complaint may have benefitted appellant. We cannot agree with this logic and conclude that the timing of the county's criminal case is troublesome. However, under the totality of the proceedings, appellant was not denied the due process of law.

Affirmed.