STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1684

In The Matter of the Welfare of the Children of:
B.J.M., Parent.

Filed March 23, 2010
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-JV-08-11242

William M. Ward, Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for appellant C.L.M.)

William M. Ward, Hennepin County Public Defender, F. Lee Hagens, Assistant Public Defender, Minneapolis, Minnesota (for respondent B.J.M.)

Michael O. Freeman, Hennepin County Attorney, Mary M. Lynch, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services Department)

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Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

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

SCHELLHAS, Judge

Appellant, a minor child, challenges the termination of her mother's parental rights, arguing that the district court's decision was not supported by sufficient evidence,

that the court did not adequately consider her preference, and that the court should have granted a new trial. We affirm.

FACTS

Respondent Hennepin County Human Services and Public Health Department (the department) became involved with respondent-mother B.J.M. and her children in August 2007, because of concerns about B.J.M.'s ability to provide for her children due to her alcohol use. On a voluntary basis, the department provided B.J.M. with a child-protection services plan (voluntary case plan). The terms of the voluntary case plan included: no use of alcohol or illegal drugs in the home; alcohol monitoring of B.J.M. with either a SCRAM bracelet or breathalyzer device; completion by B.J.M. of a chemical-dependency assessment and follow-through with all recommendations; submission by B.J.M.'s boyfriend, V.W., to random urinalysis (UA) and, if he refused UAs or if his UAs tested positive for illegal drugs, removal of V.W. from the home by B.J.M.; provision by B.J.M. of basic necessities for her family, including safe and suitable housing, food, and a means to prepare it; and provision by B.J.M. for the medical, dental, educational, emotional and psychological needs of her children, including cooperation with in-home parenting, ensuring the children's daily attendance at school, and attending all individualized education plan (IEP) meetings for her children. B.J.M. wrote on the voluntary case plan that she did not agree with "the part about [V.W. her] boyfriend and not about alcohol abuse." The department warned B.J.M. in the written case plan that "[i]f [B.J.M. did] not provide for the welfare of her children, the case may be taken into court for monitoring."

In December 2007, the department filed a petition alleging that B.J.M.'s four minor children, including appellant-child C.L.M., born June 30, 1994, and her brother, C.D.M., born November 14, 2000, were in need of protection or services (CHIPS).[1] The department alleged that the children were without necessary food, clothing, shelter, education, or other required care because B.J.M. was unable or unwilling to provide the care, and that the children were without proper parental care because of the emotional, mental, or physical disability of B.J.M. The factual bases for the department's allegations were B.J.M.'s alcohol abuse, the dirty and unmaintained condition of the home, a lack of food in the home, and the children's school-attendance problems.

On February 2, 2008, the district court appointed Nancy Lange as guardian ad litem for all four minor children. On February 27, 2008, based on B.J.M.'s admission that her children had special needs and that she needed county services to take care of her children properly, the district court adjudicated C.L.M. and C.D.M. to be CHIPS and the next day ordered a detailed case plan. The court-ordered case plan required B.J.M. to: update her chemical-dependency assessment and follow recommendations; participate in SCRAM alcohol monitoring; provide random UAs upon request; participate in in-home parenting services; schedule and attend all of the children's appointments for school, medical, and special needs; ensure the children's regular and consistent school

[1] Before trial, the district court dismissed B.J.M.'s twin children, who were age 17 when the CHIPS petition was filed. A man alleged to be the father of C.L.M. was excluded by genetic testing. The whereabouts of another man alleged to be the father of C.D.M. are unknown. Neither man has made an appearance in these proceedings.

attendance; complete a psychological evaluation and follow recommendations; and cooperate with social workers and the children's guardian ad litem.

On June 16, 2008, due to B.J.M.'s noncompliance with her case plan, the district court ordered the children into out-of-home placement. On September 15, 2008, the department petitioned the court to terminate B.J.M.'s parental rights (TPR) or transfer their legal and physical custody to a suitable custodian. In November 2008, the district court approved overnight visits by the children with their maternal grandmother, L.M.

The district court conducted a trial on April 5, May 8, and June 1, 2009. The court received substantial testimony from numerous professionals who were or had been involved with the family, including but not limited to: Lisa Hill, a school-based mental-health clinician, who had worked with C.D.M. since October 2008; Nancy Lange, the children's guardian ad litem; Kathleen Johnson, a chemical-health case manager with Vinland National Center; Sondra Williams, the children's foster parent; Patrick Mathieu, a psychologist who assessed B.J.M.; Jennifer McGill, B.J.M.'s permanency worker; Mary Sandstrom, a department social worker; and L.M.

The district court received substantial testimony and documentary evidence to support the department's allegation that both C.L.M. and C.D.M. are children with special needs. This opinion focuses primarily on C.L.M., because neither the department nor C.D.M.'s guardian ad litem has appealed on behalf of C.D.M.

C.L.M. has been diagnosed with mild mental retardation and depressive disorder and can be very withdrawn. According to Lange, in most areas, C.L.M. functioned at a second-grade level, but in some areas, functioned at a lower level. Lange described

C.L.M. as a very vulnerable child, "very easily distractible," and "very easily triggered in his behaviors." Lange opined that B.J.M. could not provide an appropriate environment for the children and expressed concern about L.M.'s ability to care for the children, because L.M. did not step forward as a foster placement resource earlier in the case. Lange opined that L.M. did not appear to have a real understanding of either child's special needs. Lange expressed concern about the transitional housing contemplated by L.M. Lange thought that the program may not understand the extent of C.D.M.'s behavioral outbursts, that other families would live there, and that C.D.M. needed a non-chaotic environment.

Williams, age 60, testified that, while C.D.M.'s behavior included "hitting, kicking, very impulsive behavior," C.L.M.'s behavior was different—she withdrew. Williams explained that C.L.M. did not have behavioral problems but functioned in some areas at second- and third-grade levels and would be vulnerable in an environment without guidance and structure. Although Williams had not set an end date for her care of the children, she was not able to be an adoption option for the children and would not accept a transfer of their legal custody because of her age.

Although B.J.M.'s alcohol treatment provider gave her a poor prognosis after she completed inpatient treatment and, although she failed to attend all of her group or one-on-one meetings in aftercare, on April 5, Johnson opined that B.J.M. would not relapse into "alcohol abuse that goes on for a long period of time as she has historically over the last ten years." Johnson based her opinion on B.J.M.'s newly developed coping skills and "how she had changed." But by June 1, Johnson had changed her opinion and

testified that she had concerns about B.J.M. and thought that she had been drinking on a regular basis for the past two months. Although B.J.M. admitted that she had consumed alcohol twice, on two separate days, she also denied consuming alcohol, but was unable to explain three UA results that were consistent with alcohol use.

Mathieu conducted a psychological evaluation of B.J.M. that began in August 2008 and was completed in early October 2008. Mathieu testified that B.J.M. has a full-scale I.Q. of 75, and that her I.Q. could affect her ability to deal with professionals, keep appointments, set up meetings, go to AA, and address her chemical health. B.J.M.'s global-functioning score reflected mild moderate difficulty in daily functioning, including day-to-day routines, getting to work, getting to school, time management, and organizational skills. B.J.M. reported that she was raped at knife point at the age of 27, and Mathieu diagnosed her with post traumatic stress disorder (PTSD), adjustment disorder with anxiety, and alcohol abuse based on B.J.M.'s history. Mathieu recommended individual therapy for B.J.M. Between Mathieu's assessment and trial, B.J.M. attended four therapy appointments and missed three.

McGill testified that during her second visit to B.J.M.'s home on May 1, 2009, B.J.M.'s speech seemed a little slurred, she was very emotional and crying, and had trouble forming sentences. McGill expressed concern about B.J.M.'s production of UA results positive for alcohol on March 31, April 8, and April 9, 2009, two missed UAs during the week of April 8, and two missed UAs during the preceding week. B.J.M. also missed a family-therapy appointment and two supervised visits with the children, although one visit was missed due to B.J.M. being ill. McGill spoke with someone at the

transitional housing program where L.M. had been accepted and thought that the person with whom she spoke seemed unaware of C.D.M.'s behavioral issues, although the person said she thought the program could handle his behaviors after McGill described them. McGill understood that L.M. had applied to qualify for subsidized housing through the St. Paul Housing Authority. But McGill explained that the department was not recommending a transfer of custody of the children to L.M. because of the ongoing, unresolved concerns described by Sandstrom.

Sandstrom testified about B.J.M.'s court-ordered case-plan progress. While on the SCRAM bracelet, B.J.M. was supposed to provide random UAs. B.J.M. did not begin wearing the SCRAM bracelet until three months after it was ordered and then was not consistent in providing the UAs or in doing SCRAM downloads. She provided only one SCRAM download in March and one in April 2008. After B.J.M. was taken off the SCRAM bracelet, she was supposed to produce at least 50 ethyl glucuronide (ETG) UAs, which can detect alcohol for a longer period than a regular UA for alcohol. Eleven of the ETG UAs came back positive, and B.J.M. missed 14. B.J.M. obtained safe and suitable housing. The children's school attendance was inconsistent, B.J.M. missed the children's IEP meetings, and missed medical, dental, and mental-health appointments for the children. According to Sandstrom, "[t]here was a lack of progress being made addressing the chemical issues, the children's special needs, the suspected mental health issues." Sandstrom explained that although the department contemplated a transfer of the children's legal and physical custody to L.M., when the department filed the TPR petition, L.M. had difficulty securing appropriate housing for the children and had

difficulty with a daycare plan. At trial, Sandstrom testified that she would not support L.M. as an option even if she secured housing. Sandstrom expressed concern about whether L.M. would provide safe daycare for the children and meet the children's special needs.

L.M. testified that she thought she understood the children's special needs and talked about their needs, but she also explained that the children acted differently when they were with different people and that they did not exhibit behavioral problems with her. When asked if she knew C.L.M.'s diagnosis, L.M. said that it was "supposed to be mental retardation." She disagreed that C.L.M. was mentally retarded, stating "I would simply say she is delayed in some areas." L.M. said she was willing to cooperate with the school and incorporate some of their suggestions. Regarding her housing, she explained that she was in subsidized housing in a one-bedroom apartment when the case started and that only one of the children could stay with her. L.M. could not go on a waiting list for a larger apartment until she had custody. L.M. explained that the transitional housing program would assist her in obtaining permanent housing, and that the St. Paul Public Housing Authority's denial of her application for public housing had recently been overturned. Regarding daycare, L.M. was still thinking and investigating options and said she wanted to find a babysitter, if she got custody.

After the close of trial, the district court requested written closing arguments by June 15, 2009. The court received two e-mails from the department before it terminated B.J.M.'s parental rights on July 31, 2009. C.L.M. moved for a new trial and/or amended

findings. On August 26, 2009, the district court denied C.L.M.'s posttrial motion. This appeal follows.

D E C I S I O N

C.L.M. argues that the district court erred in terminating parental rights rather than transferring legal custody, that the district court failed to adequately consider C.L.M.'s preference, and that a new trial is warranted because the district court was "contaminated" by a July 9, 2009 e-mail.

When a child is in foster care and is not returned to the home, the district court must order permanent placement according to several possible dispositions set forth in Minn. Stat. § 260C.201, subd. 11(d) (2008). These dispositions include a permanent transfer of legal and physical custody to a relative, termination of parental rights, long-term foster care, and foster care for a specified period of time. In determining permanent placement, "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).

Here, C.L.M. moved the district court to transfer custody of C.D.M. and her to her grandmother, L.M. The district court denied the motion, terminated B.J.M.'s parental rights, and ordered the continued placement of the children in foster care pending adoption. C.L.M. argues that the district court erred by denying her motion to transfer legal custody of C.D.M. and her to L.M. and instead terminating B.J.M.'s parental rights.

Termination of parental rights may be ordered when the requirements of Minn. Stat. §§ 260C.301-.328 (2008) are met. Minn. Stat. § 260C.201, subd. 11(d)(2). Section 260C.301, subdivision 1, sets forth grounds for termination of parental rights. Here, the statutory grounds for termination alleged by the department were B.J.M.'s failure to comply with her parental duties, failure to correct the conditions that led to the children's out-of-home placement, and that the children were neglected and in foster care. *See* Minn. Stat. § 260C.301, subd. 1(b)(2) (addressing parental duties), (5) (failure to correct conditions), (6) (neglected and in foster care).

A district court's decision terminating parental rights is reviewed to determine whether the court's findings address the statutory criteria, are supported by substantial evidence, and are not clearly erroneous. *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). Appellate courts give considerable deference to the district court's decision, but also "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *Id.* A district court "need find only one of the statutory grounds exists to terminate parental rights." *In re Welfare of S.Z.*, 547 N.W.2d 886, 890 (Minn. 1996).

A transfer of permanent legal and physical custody must be in the best interests of the child and is subject to statutory conditions, including that the court must review the suitability of the prospective custodian. Minn. Stat. § 260C.201, subd. 11(d)(1). When transferring legal custody, the district court must consider "the appropriateness of the particular placement" under factors listed in Minn. Stat. § 260C.212, subd. 2(b) (2008). Minn. Stat. § 260C.201, subd. 2(a)(3) (2008). Section 260C.212, subdivision 2(b), lists

factors that include among others: the medical, educational, and developmental needs of the child; the child's relationship to current caretakers, parents, siblings, and relatives; and the reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference. Permanent-placement decisions are reviewed to determine whether the district court's findings address statutory criteria and are supported by clear and convincing evidence. *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261 (Minn. App. 1996).

C.L.M. argues that the district court's decision terminating B.J.M.'s parental rights was not supported by clear and convincing evidence and that the decision was not in her best interests. She also argues that the law prefers a transfer of custody to termination of parental rights, and we address this argument first.

Citing Minn. Stat. § 260C.201, subd. 11(d)(1), C.L.M. states that "a transfer of legal custody to a relative is not only *an* option under the permanency statute, it is the *first* option." But the statute does not state that the permanency option of transferring custody is preferred over termination of parental rights, and C.L.M. provides no legal authority to support her argument. In her informal reply brief, C.L.M. states that there is an implied legislative preference for a transfer of custody. But this court must follow the "letter of the law" when "the words of a law in their application to an existing situation are clear and free from all ambiguity." Minn. Stat. § 645.16 (2008). Because the statute does not state that a transfer of custody is preferred over a termination of parental rights and C.L.M.'s argument is unsupported by legal authority, we reject her argument on this point.

Sufficiency of Evidence

This court may rely on the sufficiency of the evidence of one of the district court's grounds for termination without evaluating other grounds identified by the court. *See In re Children of T.A.A.*, 702 N.W.2d 703, 708 n.3 (Minn. 2005) (declining to address other grounds for termination after concluding termination based on palpable unfitness was appropriate). Here, the district court identified B.J.M.'s failure to correct the conditions that led to out-of-home placement as a ground for termination. This ground is set forth in Minn. Stat. § 260C.301, subd. 1(b)(5), which provides that a court may terminate a parent's parental rights if the court finds that, following the child's placement out of the home, "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement."

The district court, in its order terminating B.J.M.'s parental rights, found that B.J.M. was offered "a substantial array of appropriate services" before and after court involvement, and that the department tried to help B.J.M. "correct her problems" while the children remained in B.J.M.'s home under protective supervision for almost a year. When the district court ordered the children's out-of-home placement, it found that B.J.M. had failed to meet the court-ordered conditions of protective supervision, that her chemical-dependency issues put the children in danger, and that the children were in an unstable environment and at risk of harm. The court incorporated the content of a written report from the department that stated that B.J.M.: was discharged from chemical-dependency treatment as unsuccessful; only sporadically attended a subsequent treatment program; had not provided SCRAM downloads for chemical-use monitoring pursuant to

an established schedule; had not begun her psychological evaluation; was unable to schedule and arrange transportation for the children's appointments without the assistance of the in-home parenting worker; did not attend appointments consistently; and struggled to meet the children's special needs, even with intensive support in place. Additionally, the children's school attendance was poor, and they missed important appointments at school and outside of school.

The district court found that the conditions precipitating the children's out-of-home placement "did not improve significantly or sustainably." The court noted that B.J.M. did not complete her psychological assessment until October 2008, a year after the case opened, and did not start therapy until March 2009. The court found that had B.J.M. completed her psychological assessment "much closer to December 2007, as she was ordered to do, she could have been much further along in her therapeutic process." The court also made extensive findings regarding B.J.M.'s failure to remain sober. The court found that B.J.M. failed to demonstrate that she could meet the children's needs, failing to attend numerous appointments even when she was not burdened with the day-to-day care of the children because they were in out-of-home placement.

The district court noted that, while the case was pending, L.M. had not put herself in a position to be a foster-care placement for the children, and that L.M. did not follow through on Sandstrom's suggestions regarding housing. The court found that L.M.'s "lack of proactivity and initiative suggests struggles that might carry over to meeting the children's special needs," noting that Sandstrom and Lange expressed this concern. The court said: "More important, during her testimony, [L.M.] did not appear to have a

realistic understanding of how significant the needs of the children are." The court also found that L.M.'s plan for transitional housing was "fraught with potential problems." The court's findings are amply supported by clear and convincing evidence, including but not limited to the above-described trial testimony elicited by the department. The findings are not clearly erroneous, and they reflect the court's rationale for denying C.L.M.'s motion to transfer custody of the children to L.M.

The Children's Best Interests

"Having concluded that statutory grounds for termination exist, the only remaining issue is whether termination is in the best interests of the children." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 57 (Minn. 2004). On review, this court should determine if the district court's finding that termination was in the best interests of the children is supported by clear and convincing evidence. *See T.A.A.*, 702 N.W.2d at 709 (reaching this conclusion in reviewing termination). A court analyzing the best interests of the child in a termination case should 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 Child of W.L.P.*, 678 N.W.2d 703, 710-11 (Minn. App. 2004).

C.L.M. argues that the children's best interests called for a transfer of custody rather than termination of parental rights. She argues that the children love their grandmother, enjoy their overnight visits with her, and want to continue their relationship with her. She argues that placement with L.M. would be superior to other placements because L.M. loves the children, is familiar with them, can provide them housing, can

meet their needs, and has had regular contact with them. C.L.M. also argues that she and C.D.M. could be separated by termination and adoption.

The district court analyzed the children's best interests by acknowledging C.L.M.'s preference to be reunited with her mother and her strong bond with her grandmother, but concluded that the affiliation interests were subordinate to the importance of meeting, on a consistent and sustained basis, the special needs of the children. These findings are supported by clear and convincing evidence, including but not limited to the testimony of Hill and Lange, regarding the children's special needs and their need for a consistent caregiver who can meet those needs. Further, the previously discussed findings regarding L.M. show that the court was not convinced that L.M. could meet the children's special needs or provide appropriate housing.

As to C.L.M.'s concern over possible separation from C.D.M., although we appreciate the seriousness of her concern, it seems speculative. The law prefers the placement of children with their siblings in foster care and adoptive placements. *See* Minn. Stat. § 260C.212, subd. 2(d) (2008) (providing that siblings "should be placed together" for foster care or adoption unless it is contrary to their safety or well being, or unless it is "not possible after appropriate efforts by the responsible social services agency"). Sandstrom testified that the department's concern that the children not be separated in long-term foster care was part of its reason for preferring adoption as the children's permanency option, although Sandstrom acknowledged that the children *could* be separated for adoption. But the court found that "if adoption does not eventually

occur, the court can reconsider transfer of custody to [L.M.]" and ordered that "[i]t is in the best interests of the children to have ongoing visits with [L.M.]" pending adoption.

As part of its best-interests analysis, a district court is not required to assess the likelihood that a child will be adopted, *In re Welfare of J.M.*, 574 N.W.2d 717, 723 (Minn. 1998), and the law does not require that a district court find that children are likely to be adopted *together* before terminating parental rights.

Regarding C.L.M.'s argument that the district court should have considered her preference more extensively, we note that cases reflect that a child's preference can be a relevant factor in termination cases. In one dependency case, *In re Welfare of M.M.B.*, 350 N.W.2d 432, 435 (Minn. App. 1984), this court stated that the preference of a child as to future custody was entitled to considerable weight if the child was of sufficient age "to exercise discretion in the matter." *M.M.B.* relied on *In re Klugman*, in which the supreme court considered a child's preference when addressing the child's best interests and determining if the child was neglected. 256 Minn. 113, 122-23, 97 N.W.2d 425, 431-32 (1959).

Here, the district court's findings reflect that it considered C.L.M.'s preference. The court noted that C.L.M. "strongly desires to be with her mother and has a strong bond with her grandmother," but as previously noted, the court found that the affiliation interests are subordinate to the importance of meeting, on a consistent and sustained basis, the special needs of the children. These findings are supported by the record and are consistent with *Klugman* in treating C.L.M.'s welfare as a priority over her

preference. We therefore conclude that the district court did not err by considering but rejecting C.L.M.'s preference.

In summary, the district court's findings adequately address the children's best interests and are supported by clear and convincing evidence.

Alleged Contamination of Fact-Finder

In her motion for a new trial or amended findings, C.L.M. argued that there had been "significant contamination" of the fact-finder because of an e-mail sent to the district court by the department on July 9, 2009. In the e-mail, the department informed the court of a report that alleged that C.L.M. had been sexually abused while in the custody of L.M. The department did not request that the court take any action in connection with the e-mail, such as, suspending the children's overnight visitation with L.M. Before the court issued its termination decision on July 31, 2009, the department informed the court that no maltreatment was found.

C.L.M. argues that the district court erred by denying her motion for a new trial on the basis that the information in the department's e-mail was so prejudicial that it contaminated the court, and that the contamination requires corrective action by this court without deference to the district court's discretion. The district court denied C.L.M.'s posttrial motion, stating in its memorandum and order that the July 9, 2009 e-mail "did not affect the Court's decision in this matter," and found that no grounds existed for ordering a new trial or amending the findings. On appeal, citing *United States v. Bayer*, 331 U.S. 532, 540, 67 S. Ct. 1394, 1398 (1947), C.L.M. argues that "we ask too much of a judge, who is human like all of us, to put this kind of cat back in the bag once it gets

out." We review the district court's denial of C.L.M.'s motion for a new trial for an abuse of discretion. *See In re Welfare of V.R.*, 355 N.W.2d 426, 430 (Minn. App. 1984) (reviewing new-trial decision in dependency and neglect case for an abuse of discretion), *review denied* (Minn. Jan. 11, 1985).

Under the rules of juvenile protection procedure, a new trial may be granted for, among other reasons, irregularity in the proceedings, any abuse of discretion that deprives the moving party of a fair trial, newly discovered evidence that could not have been found and produced at trial with reasonable diligence, and when it is required in the interests of justice. Minn. R. Juv. Prot. Proc. 45.04. In response to a posttrial motion, a district court may conduct a new trial, reopen the proceedings and take additional testimony, amend the findings of fact and conclusions of law, or make new findings and conclusions as required. Minn. R. Juv. Prot. Proc. 45.06.

Based on the legal analysis provided by the parties, we are not persuaded either that the department should or should not have sent the e-mail to the district court on July 9, 2009. But even if the department's submission was improper, we conclude that the district court did not abuse its discretion by denying C.L.M.'s motion for a new trial because of the e-mail. The district court concluded that a new trial was not warranted because the department sent the second report informing the court that no maltreatment had been found. Under the circumstances in this case, we are confident about the accuracy of the district court's statement in its posttrial memorandum and order that "[t]he e-mail did not affect the Court's decision in this matter."

The district court identified at least one ground for termination, which was supported by clear and convincing evidence, and found that termination of parental rights was in the children's best interests. Therefore, the district court did not err by denying C.L.M.'s posttrial motion for a new trial or amended findings, and we affirm.

Affirmed.