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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-2329**

In the Matter of the Welfare of the Child of: K.W.,  
Parent

**Filed June 1, 2010  
Affirmed  
Lansing, Judge**

Hennepin County District Court  
File No. JV-08-14038

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Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Worke, Judge.

**UNPUBLISHED OPINION**

**LANSING, Judge**

In a permanency proceeding under Minn. Stat. § 260C.201 (2008), the district court transferred legal and physical custody of AD, one of KW's four children, to AD's

foster parents. On appeal, KW argues that the record fails to provide clear and convincing evidence to support the transfer of legal and physical custody. KW also challenges the adequacy and accuracy of the district court's findings. Because clear and convincing evidence supports the district court's custody transfer, we affirm.

## **F A C T S**

KW is the biological mother of four minor children: AD, SD, JD, and AR. Following a September 2007 petition for Children in Need of Protection or Supervision (CHIPS), Hennepin County Human Services and Public Health Department began exercising protective supervision over the four children. On May 6, 2008, AD moved into foster care. He continued to live with his foster parents and, after a contested permanency hearing in October 2009, the district court transferred AD's legal and physical custody to the foster parents. It is this order that KW appeals.

The county filed the CHIPS petition after police found AD and JD in ten-year-old SD's care at 9:30 p.m. on September 14, 2007. The home was in disarray—dirty and emitting foul odors. Police were unable to locate KW for several hours. JD was then two years old and AD, who has Down syndrome, was eleven. The county placed the three children on a safety and welfare hold. At the protective care hearing on September 19, the district court provided for the children's return to KW's care under the county's protective supervision.

Hennepin County documented two more instances of maltreatment or neglect involving KW's children. First, in January 2008, security officers found AD wandering around the Maple Grove Community Center, unsupervised and wearing only a shirt and a

diaper. Next, on April 3, 2008, JD, then three years old, was left unattended in KW's car for approximately forty minutes. The car's engine was running and JD had managed to remove himself from his seatbelt and was "running around the car."

Following the incident in the car, the county removed all four children from KW's care, subject to supervised visitations. SD, JD, and AR were placed in foster care. Because of his special needs, AD was placed at Mount Olivet shelter. When asked her preference for foster care placement, KW suggested JG and his wife KG as a placement for AD. JG is a paraprofessional who had previously worked with AD. Under the county's supervision, AD moved to JG and KG's home in May 2008, where he has continued to reside.

Throughout 2008 and 2009, KW completed many of the provisions of her parenting plan. She completed a parenting assessment and a psychological assessment, found safe and adequate housing for her family, and participated in therapy for SD and developmental disability services for AD. But KW failed to comply with other requirements of the parenting plan. For example, on February 22, 2008, KW was discharged from an in-home parenting-assistance service because of her failure to initiate the services. She was discharged from two other parenting services based on her failure to engage in the services and apply the material. Additionally, the record shows that KW repeatedly changed therapy providers, raising concerns about the lack of structure and consistency.

In January 2009 KW began the process of attempting to reunite with her children. SD was allowed to return home on a trial basis. This visit was converted to a

reunification, and JD and AR were also allowed home visits on a trial basis. In April 2009, SD became aggressive toward herself and her brothers. This development, combined with evidence of SD's suicidal intentions, led to SD's removal from KW's care. SD's struggle with psychological problems continued for several months. In August 2009 she was able to return to KW's care. Throughout this time, AD remained in JG and KG's care, with supervised visits from KW.

In December 2008, the county filed a petition to terminate KW's parental rights to all four children. Alternatively, the petition sought the transfer of legal and physical custody of all four children. In response, KW filed a petition requesting that the county return AD's legal and physical custody to her. Alternatively, KW requested that AD's legal and physical custody be transferred to KW's mother or other family members. If that option was not possible, KW requested that AD's legal and physical custody be transferred to JG and KG, designating them as kin.

The district court conducted a permanency hearing on October 7 and 8, 2009. At the outset, the county dismissed that part of the petition requesting termination of KW's parental rights to her four children and requested that the court dismiss its jurisdiction over all of the children except AD. The trial proceeded on the sole issue of the permanent transfer of AD's legal and physical custody.

The trial record consists of thirty-two stipulated exhibits and testimony from seven witnesses. A substantial part of the testimony relates to AD's mental and developmental condition while in KW's care and while in JG and KG's care. When AD was initially removed from KW's care, he was noncommunicative, was not toilet trained, and could

not care for himself. Testimony indicated that KW's usual method of supervising AD consisted of putting him in front of the television for long periods of time. When AD initially left KW's care, he occupied himself for long periods of time by staring at and playing with a tissue.

The testimony showed that under JG and KG's care, AD made significant developmental progress. AD began verbal communication with his child-services workers, he was successfully toilet trained, and was able to shower, dress, and feed himself without major assistance. Overall, AD's behavior, including his behavior during school hours, significantly improved.

The county argued that, in addition to an inability to facilitate AD's necessary development, KW was unable to supervise her three other children adequately while ensuring AD's safety. The county provided evidence that another of KW's children had special needs that required constant supervision to ensure her safety. The guardian ad litem concurred in the county's assessment that KW could not provide the necessary attention to AD's safety and testified that AD "needs pretty much constant supervision . . . in order to be safe." Although the guardian ad litem acknowledged that KW had complied with many of the county's requests for parenting improvements, she still believed that KW was unable to provide adequate care for AD. Finally, she testified that KW did not have the ability to provide for AD's physical, mental, or emotional health, and, therefore, a transfer of legal and physical custody would be in AD's best interests.

Following the hearing, the district court ordered that AD’s legal and physical custody be transferred to JG and KG. The order provided for KW’s reasonable visitation and parenting time. KW moved for a new trial, citing “irregularities in the proceedings, including questioning by the court and failure by witnesses to properly disclose discovery in a timely fashion” and arguing that “the statutory grounds set forth in the [permanency] petition were not prove[d] or justified by the evidence.” The county opposed KW’s motion and proposed amended findings for clarification. The district court denied both KW’s motion and the county’s proposed amended findings.

On appeal, KW argues that (1) the district court lacked clear and convincing evidence to justify the transfer of legal and physical custody of AD, (2) the court failed to address the factors set out in Minn. Stat. § 260C.201, subd. 2(a) in findings, and (3) the court improperly included language from Minn. Stat. § 260C.301 in its order.

## **D E C I S I O N**

### **I**

Under Minnesota’s child-protection statutes, the district court is required to make a permanency determination for a child after a specified period of time—usually twelve months—in out-of-home placement. Minn. Stat. § 260C.201, subds. 11(a), 11a(a) and (c) (2008). A transfer of permanent legal and physical custody requires that the district court consider: (1) the best interests of the child; (2) the nature and extent of reasonable efforts to reunite the family; (3) the parent’s efforts and ability to use services to correct the conditions that led to out-of-home placement; and (4) whether the conditions that led to the out-of-home placement have been corrected. Minn. Stat. § 11(i) (2008). “Consistent

with the level of proof generally required in child protection proceedings,” a permanent placement determination must be supported by “clear and convincing evidence.” *Matter of Welfare of A.R.G.-B*, 551 N.W.2d 256, 261 (Minn. App. 1996). KW argues that the record does not contain clear and convincing evidence to satisfy the statutory factors. We disagree. The district court made detailed and careful findings on each of the factors, and those findings are supported by clear and convincing evidence.

On the first factor, the district court recognized that, in making its permanent placement decision, the “paramount consideration must be the best interests of the child” and he addressed those interests directly. After observing that the goal of juvenile-protection proceedings is to obtain permanency for a child within 365 days, the district court noted that AD had been in out-of-home placement for 565 days on the date of the transfer order. The district court found that the evidence showed that it was unlikely that KW’s ability to care for AD in the reasonably foreseeable future would improve and that “[r]eturning him to an environment where he will face continued neglect and inadequate supervision is not in his best interests.”

As part of its consideration of AD’s best interests, the district court carefully reviewed the evidence that related to AD’s safety and his developmental conditions. The district court noted that these were the most significant factors in determining AD’s permanent placement. The findings summarize threats to AD’s safety that arose from KW’s inability or failure to properly attend to AD. KW had left AD in unsanitary conditions under the supervision of his ten-year-old sister who was unable to provide information on how to locate her mother. After AD was returned to KW’s care, security

officers found him wandering around the Maple Grove Community Center, unsupervised and wearing only a shirt and a diaper. KW was in another part of the center and was unaware, until police located her more than twenty minutes later, that AD had wandered away. Even when AD was in foster care and KW exercised supervised visitation she could not adequately monitor AD and the other children simultaneously, and a social worker observed AD wander away from KW in a busy parking lot without KW noticing.

A significant amount of testimony was directed to AD's delayed and neglected developmental needs in KW's care. The evidence indicated that KW did not grasp AD's developmental needs and that she did not give him the necessary attention to advance AD's developmental growth because she was distracted by the other children or by other circumstances. The evidence showed that eleven-year-old AD spent most of his time watching a television and was not developing the critical foundational skills that would allow him to care for himself.

The record shows that AD's development advanced substantially under JG and KG's care. AD was able to be toilet trained, and he learned to feed and bathe himself. He also was able to verbally communicate with his service workers for the first time. Testimony established that JG and KG were able to closely attend to AD and that they did not leave him unsupervised.

On the second statutory factor, the nature and extent of reasonable efforts to reunite the family, the district court made specific findings. The district court found that the county had made reasonable efforts to reunite KW with her family. The findings refer to the many services that had been provided. Although AD was never returned to



KW's care on a trial basis after April 2008, the issues relating to AD's safety were significant, and, in the supervised visitation, KW did not demonstrate that AD's safety could be assured in an unsupervised setting.

On the third factor, the parent's efforts and ability to use services to correct the conditions that led to out-of-home placement, the district court found that in many instances KW had made efforts to use services to correct the conditions. The district court's findings, however, expressed reservations about KW's ability to successfully apply the services to correct the conditions. The findings detailed the inability to monitor her other children and to pay attention to AD during the supervised visitations. In addition KW did not avail herself of all of the recommended services. She was discharged from several in-home parenting-assistance services, and she had difficulty maintaining other court-ordered services with consistency, including family therapy and therapy for SD.

Finally, on the fourth factor, whether the conditions that led to out-of-home placement were corrected, the district court stated that "[u]pon review of the trial record, it is the [c]ourt's conclusion that they have not." The findings further state that "[d]espite a myriad of services, [KW] has been unable to . . . adequately supervise all four of her children together." The district court acknowledged that KW had

worked hard to correct the conditions that led to the out-of-home placement, and . . . because of these efforts . . . the [county] closed its cases with respect to the other three children. But [AD's] special needs require a degree of attention that [KW] has been unable to give him when the other children are present.

Witnesses testified that during supervised visits, KW was unable to manage all four children without the intervention of the supervising professionals. Visitation supervisors described instances in which KW lost track of various children during visits, left AD unattended for significant periods of time, and relied on staff members to prevent injury to AD and the other children. Witnesses also testified that while KW had substantially complied with many of the county's requests to make parenting changes, these changes had not resulted in providing a safer environment for AD.

The record supports, with clear and convincing evidence, the district court's findings that AD's best interests are served by legal and physical custody with JG and KG; that the county made reasonable efforts to reunite the family; that KW made efforts to use many services to correct the conditions, but did not have the ability to correct the conditions; and that, despite the two-year effort, the problems that led to AD's out-of-home placement have not been corrected.

## II

In the second challenge to the district court's order transferring AD's legal and physical custody, KW argues that, in addition to the four factors listed in the criteria for court-ordered permanent placement under Minn. Stat. § 260C.201, subd. 11(i), the district court should also have considered and made written findings on an additional group of factors listed in Minn. Stat. § 260C.201, subd. 2(a). The county, the guardian ad litem, and JG and KG dispute the application of the additional factors and contend that these additional factors listed in subdivision 2(a) relate only to a court's dispositional orders, not to the permanent transfer of legal and physical custody. Statutory

interpretation is a question of law, which we review de novo. *In re A.R.M.*, 611 N.W.2d 43, 47 (Minn. App. 2000).

KW did not raise the additional factors in subdivision 2(a) in the district court, and instead argued that the district court was required to make findings under the four factors in subdivision 11(i), which the district court did and which we have reviewed in Section I and found sufficient. KW acknowledges that the factors in subdivision 2(a) and 11(i) overlap, but nonetheless contends that the district court erred when it did not make findings on the additional subdivision 2(a) factors of (1) why the child's best interests and safety are served by the disposition, (2) what alternative dispositions or services were considered and why they were not appropriate, (3) the appropriateness of the placement in light of the child's best interests, and (4) whether reasonable efforts were made to prevent removal and to reunite the family. *See* Minn. Stat. § 260C.201, subd. 2(a)(1-4) (2008).

KW's failure to assert the subdivision 2(a) factors at the outset impeded the full development and orderly resolution of this issue. Nonetheless, we conclude that the claim of error is not well grounded in this case for two reasons. First, the interpretation advanced by the county, the guardian ad litem, and JG and KG, that subdivision 11(i) sets forth the proper criteria, comports with the facial meaning of the statute. Although no published case addresses the precise issue, we note, for instructive purposes, that several unpublished cases have made a distinction between the factors and have applied, as the district court did in this case, subdivision 2(a) only to dispositional placements and subdivision 11(i) only to the permanent transfer of legal and physical custody. *See, e.g.,*

*In re Welfare of Child of S.J.W.*, No. A08-0716, 2008 WL 5216004, at \*4 (Minn. App. Dec. 16, 2008) (stating that Minn. Stat. § 260C.201, subd. 2(a), relates to *dispositional* orders); *see also In re A.R.M.*, 611 N.W.2d 43, 49 (Minn. App. 2000) (discussing application of subdivision 11(i), not subdivision 2(a), to transfer of legal and physical custody).

Second, the district court's findings amply cover the additional four factors in subdivision 2(a). The district court made detailed findings on AD's best interests and the steps taken to reunite the family. The district court also addressed, at length, the appropriateness of AD's placement with JG and KG. The findings set forth considerations on alternative placements and significant reasons why KW's mother was neither an appropriate nor a willing placement for AD. The district court's findings fully satisfied all of the factors under subdivision 11(i) and subdivision 2(a).

### III

Finally, KW argues that the district court erred in incorporating into its order language that relates to the termination of parental rights in Minn. Stat. § 260C.301, subd. 1(b)(2), (5). The transfer of legal and physical custody is distinct from a termination of parental rights in that a transfer of legal and physical custody allows the parent to retain the right to reasonable parenting time, preserves the parent's right to return to court to regain custody, and permits the parent to request a modification of parenting time or the custody arrangement. Minn. Stat. § 260C.201, subds. 5, 11(j).

Although AD's permanency hearing was not a termination-of-parental-rights proceeding, the district court's order referred to several concepts included in the

termination-of-parental-rights statute. The district court drew from § 260C.301, subd. 7, its statement that the best interests of the child should be a “paramount” consideration in determining AD’s placement and also referred to the county’s allegations from the portion of the petition relating to the termination of parental rights. But the standards that the court applied were the standards in subdivision 11(i) for the transfer of legal and physical custody.

The district court carefully considered AD’s best interests, the county’s reasonable efforts to reunite the family, KW’s efforts and abilities to correct the conditions that led to the out-of-home placement, and whether those conditions had been corrected. Nothing in the district court’s decision suggests that it applied the termination statute rather than the standard for the transfer of legal and physical custody. But, even if the district court had applied the requirements of the termination-of-parental-rights statute, the effect would have required a more stringent analysis and a more scrupulous inquiry that could only inure to KW’s benefit. We find no error in the district court’s order transferring AD’s legal and physical custody.

**Affirmed.**