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Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0509

In the Matter of the Welfare of the Child of: L. R. D. and Y. F. K., Parents.

Filed November 22, 2021
Affirmed
Johnson, Judge
Concurring specially, Kirk, Judge*

Hennepin County District Court
File No. 27-JV-20-940

Kyle Wermerskirchen, Wermerskirchen & Blomquist, L.L.C., Wayzata, Minnesota (for appellant mother L. R. D.)

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John Kearns, Minneapolis, Minnesota (guardian *ad litem*)

Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Kirk, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A child's mother petitioned the district court for the termination of the parental rights of the child's father. The district court denied the petition. We conclude that the

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

district court did not err by finding that termination of the father's parental rights is not in the child's best interests. Therefore, we affirm.

FACTS

L.R.D. and Y.F.K. shared an intimate relationship for six weeks in mid-2011. Approximately one week after the relationship ended, L.R.D. discovered that she was pregnant. She informed Y.F.K., who was surprised but pleased.

Shortly thereafter, L.R.D. met and began a relationship with another man, A.R., who supported her during her pregnancy and was present when she gave birth to a boy, N.D., in May 2012. Y.F.K. visited L.R.D. and N.D. a few days later. Y.F.K. visited N.D. approximately 12 times in the remainder of 2012. In November 2012, a Wisconsin court adjudicated Y.F.K. as N.D.'s father, granted L.R.D. and Y.F.K. joint legal custody, and ordered that Y.F.K. has a right to visitation with reasonable notice.

L.R.D. later moved from Wisconsin to Minneapolis to be closer to A.R., who lived in Minneapolis, and to her job in Wayzata. In 2013, after learning that L.R.D. had moved to Minneapolis, Y.F.K. moved from Wisconsin to Bloomington. Shortly thereafter, Y.F.K. texted L.R.D. to request a "real plan" for shared custody that provided for more than short visits. But Y.F.K.'s visits became less frequent, in part because he often did not have a valid driver's license or access to a vehicle, which required him to rely on others for transportation. Nonetheless, in 2013 and 2014, Y.F.K. visited with N.D. occasionally, often at a local park.

In 2014, Y.F.K. lost his job and moved back to Wisconsin. During a few of his occasional visits with N.D., L.R.D. perceived that Y.F.K. was exhibiting signs of substance abuse. Y.F.K. later testified that he was using methamphetamine and alcohol during that period of time but not on the days he visited N.D.

Meanwhile, L.R.D. and N.D. lived with A.R. at his home in Minneapolis and received financial support from him. In 2013, L.R.D. and A.R. decided that they wanted N.D. to have a sibling. In May 2014, L.R.D. gave birth to a daughter.

In November 2014, during one of Y.F.K.'s visits with N.D., L.R.D. told Y.F.K. that she and A.R. wanted a "nuclear family," in which N.D. called A.R. "papa" and called Y.F.K. by his nickname. After this conversation, Y.F.K. did not visit N.D. or request to do so, and L.R.D. and Y.F.K. fell out of touch.

In July 2016, Y.F.K. pleaded no-contest to domestic-abuse charges arising from two incidents involving a former girlfriend. A Wisconsin court imposed a sentence of two years but withheld the sentence, ordered Y.F.K. to serve 30 days in jail, and placed him on probation. His probation was revoked in January 2017, and he was ordered to serve nine months in a county jail. In June 2017, Y.F.K. pleaded no-contest to battery arising from an incident involving his brother. A Wisconsin court again imposed a sentence of two years but withheld the sentence and placed Y.F.K. on probation.

In June 2017, Y.F.K. also was convicted of a felony for possessing child pornography in December 2015. Y.F.K. was imprisoned in Wisconsin until approximately May 2020. While in prison, Y.F.K. completed cognitive-behavioral therapy to address his substance abuse. He also participated in programs providing anger-management strategies

to address his history of domestic violence. He is on extended supervision until May 2023, with two additional years of probation to follow. His release is conditioned on his completing sex-offender treatment, having no contact with minors, having no unauthorized internet access, not leaving Wisconsin without permission, complying with a curfew, maintaining sobriety, and submitting to drug tests upon request. At the time of trial, Y.F.K. was in a sex-offender-treatment program that typically lasts between 12 and 18 months.

In late 2017 or early 2018, L.R.D. and A.R. ended their romantic relationship, and A.R. moved out of the home they had shared into a nearby home. But L.R.D. and A.R. continued to maintain a friendly relationship and had a "flexible" arrangement in which N.D. and his younger sister spent roughly three days per week with A.R. At the time of trial, L.R.D. and A.R. did not have a court order for custody or parenting time with respect to N.D.'s younger sister and had not discussed such arrangements with respect to N.D.

In November 2019, L.R.D. petitioned the district court for the termination of Y.F.K.'s parental rights to N.D. The case was tried over two days in February 2021. L.R.D. and A.R. testified that they wanted Y.F.K.'s parental rights to be terminated so that A.R. could adopt N.D. Their testimony emphasized the close bond between A.R. and N.D.

Y.F.K. testified on his own behalf. He stated that he had a "great desire" to be a parent to N.D. He testified that L.R.D.'s move from Wisconsin to Minnesota in 2012 made it difficult for him to visit N.D. He testified that he had received chemical-dependency treatment while in prison, that he is making progress in sex-offender treatment, and that he is employed.

N.D.'s interests were represented by a guardian *ad litem*, who had 18 years of experience as a practicing attorney and 11 years of experience as a guardian *ad litem*. He prepared a written report after meeting and talking with L.R.D., Y.F.K., A.R., N.D., and five other persons. In his report, the guardian *ad litem* summarized his assessment of N.D.'s best interests as follows:

> Obviously, [Y.F.K.] has a significant history of mental and chemical health issues, domestic violence, and involvement in the criminal justice system. And having been out of prison less than a year, it is speculative whether he will be able to maintain on a long-term basis the compliance with his parole conditions that he had been demonstrating until early this month. However, there is in my opinion only one arguably compelling reason in favor of termination of [Y.F.K.]'s parental rights. That reason would be that it would clear a path for [A.R.] to pursue adoption and thus ensure his legal standing should [L.R.D.] die or become unable to care for [N.D.] during his minority. On the other hand, there is no particular reason to anticipate that [L.R.D.], who is healthy and under the age of 50, will die or become unable to care for [N.D.] over the next 10 or so years. Even if such an unfortunate scenario were to come to pass and [Y.F.K.] still retained parental rights, [A.R.] would likely have a strong claim for third-party custody unless by that time [Y.F.K.] had proven stability and fitness to parent. While I also understand [L.R.D.]'s wish to shield her family and [N.D.] from the potentially disruptive and emotionally taxing challenge of [Y.F.K.] seeking custody or parenting time, there are ample safeguards that I would expect any judicial officer to insist upon before granting [Y.F.K.] any custody rights or parenting time. First among these safeguards would be a requirement that [Y.F.K.] show that he is mentally and chemically stable enough to reconnect with his son in a child-centered way. Another safeguard would be a requirement that any reunification process be therapeutically guided so that [N.D.]'s emotional needs are paramount, supported, and protected.

At trial, the guardian *ad litem* testified that after considering N.D.'s well-being and relationships and the potential consequences of termination and non-termination—he believed that termination of Y.F.K.'s parental rights is *not* in N.D.'s best interests.

In March 2021, the district court filed an order in which it found that L.R.D. had proved one of the four alleged statutory grounds for termination. But the district court found that termination of Y.F.K.'s parental rights is not in N.D.'s best interests. Consequently, the district court denied L.R.D.'s petition. L.R.D. appeals.

DECISION

L.R.D. argues that the district court erred by finding that termination of Y.F.K.'s parental rights is not in N.D.'s best interests.

A district court may not terminate a parent's parental rights unless the court finds that termination is in the child's best interests. *In re Welfare of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). A best-interests analysis should include consideration and evaluation of "all relevant factors," Minn. Stat. § 260C.511(a) (2020), 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.511(b). The supreme court has identified three factors that must be considered in every analysis of a child's best interests: (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 interests. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 399 (Minn. 1996); *see also* Minn. R. Juv. Prot. P. 58.04(c)(2)(ii). This court applies a clear-error standard of review to a district court's findings of fact, *In re Welfare of A.D.*, 535 N.W.2d 643, 648 (Minn. 1995), and an abuse-

of-discretion standard of review to a district court's ultimate finding of a child's best interests, *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 905 (Minn. App. 2011), *rev. denied* (Minn. Jan. 6, 2012).

In this case, the district court considered and discussed each of the three standard best-interests factors. L.R.D. has challenged the district court's findings with respect to each of those factors as well as the district court's ultimate best-interests finding.

A. Child's Interest in Preserving Relationship

With respect to the first factor, the district court noted L.R.D.'s acknowledgement that N.D. should know about his father and possibly meet him again someday. The district court also noted L.R.D.'s argument that Y.F.K. does not presently have an actual relationship with N.D. But the district court stated that L.R.D. is partially responsible for N.D.'s current belief that A.R., rather than Y.F.K., is his father. The district court found that N.D. "has an interest in preserving the parent-child relationship."

L.R.D. contends that the district court erred on the ground that N.D. and Y.F.K. do not have an actual relationship because N.D., who was eight years old at the time of trial, has not spent time with Y.F.K. since he was very young. For that reason, L.R.D. asserts that there is no parent-child relationship to preserve except for "a legal and biological bond."

L.R.D.'s contention is not supported by the relevant caselaw. There is no authority for the proposition that a child cannot have an interest in a parent-child relationship unless the child and the parent are actively engaged in a personal relationship at the time of a termination trial. It is not uncommon for district courts to consider terminating the parental

rights of persons who are not in contact with a child due to incarceration or other reasons, yet neither the supreme court nor this court has held that such a situation necessarily forecloses a finding that the child has an interest in preserving the parent-child relationship. *See, e.g.*, *In re Welfare of M.D.O.*, 462 N.W.2d 370, 379 (Minn. 1990); *In re Welfare of Chosa*, 290 N.W.2d 766, 768-69 (Minn. 1980); *J.R.B.*, 805 N.W.2d at 904-05. L.R.D.'s contention also is inconsistent with the Minnesota Parentage Act, which defines the term "parent and child relationship" to mean "the legal relationship existing between a child and the child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." Minn. Stat. § 257.52 (2020); *see also* Minn. Stat. § 260C.007, subd. 25 (2020) (defining "parent" in manner consistent with chapter 257). That statutory definition does not require any particular amount of active engagement between a parent and a child for a parent-child relationship to exist.

Thus, the district court did not clearly err by finding, with respect to the first best-interests factor, that N.D. has an interest in preserving the parent-child relationship between him and Y.F.K.

B. Parent's Interest in Preserving Relationship

With respect to the second factor, the district court stated that Y.F.K. testified that he has a "great interest" in re-establishing a relationship with N.D. The district court stated that Y.F.K. has made progress toward rehabilitation through the programming available in prison. The district court found that Y.F.K. had "adequately supported his interest in preserving a relationship with his son."

L.R.D. again contends that this factor should favor the termination of Y.F.K.'s parental rights on the ground that he "does not presently have a relationship with the child." That contention fails for the same reasons that are stated above. *See supra* part A.

L.R.D. also contends that Y.F.K.'s interest in the parent-child relationship is simply a weak interest on the ground that Y.F.K. has no more than "a general stated curiosity . . . to maybe develop some relationship with the child" and that Y.F.K. has not made any attempt to develop a relationship with N.D. since he was very young. This contention is inconsistent with the district court's statement that Y.F.K. has a "great interest" in re-establishing a relationship with N.D. The district court's statement is supported by the evidentiary record. Y.F.K. testified that he "absolutely" wanted a relationship with his son and that it was his "great desire" for the relationship to include visitation and parenting time. He also testified that he understands that the reunification process will be time-intensive and will require therapy. The record reveals that Y.F.K. pursued a relationship with N.D. until L.R.D. told him that she wanted a "nuclear family." Y.F.K. later committed crimes that resulted in his incarceration, which impeded his ability to contact L.R.D. and visit N.D.

Thus, the district court did not clearly err by finding, with respect to the second best-interests factor, that Y.F.K. had "adequately supported his interest in preserving a relationship with his son."

C. Competing Interests

With respect to the third factor, the district court acknowledged L.R.D.'s argument that terminating Y.F.K.'s parental rights would promote stability for N.D. The district

court also stated that N.D. presently has a stable environment. The district court noted that, in the near future, "there is no realistic possibility that [Y.F.K.] will be able to enforce any legal custody rights or function as a custodial parent." But the district court stated that Y.F.K. might be able to have parenting time with N.D. at some point in the future if he makes progress in his treatment. Accordingly, the district court stated that termination of Y.F.K.'s parental rights "is not necessary to ensure that the child has a stable environment." The district court also noted L.R.D.'s argument that terminating Y.F.K.'s parental rights would allow him to be adopted by A.R. But the district court stated that such an adoption would not promote permanency because L.R.D. and A.R. do not live together and have no legal relationship with each other.

L.R.D. contends that the district court "erred in failing to give weight to" N.D.'s interests in a stable home environment and in being adopted by A.R. Again, the district court acknowledged those interests but found that they are outweighed by other interests. Specifically, the district court found that N.D. presently has a stable home environment that would continue to be stable even if the termination petition were denied, and the district court further found that adoption by A.R. would not necessarily promote permanency.

The district court's findings on these issues are supported by the record. Throughout their testimony, L.R.D. and A.R. emphasized that creating and preserving a stable environment for their children has always been a priority for them. The guardian *ad litem* testified that A.R. was "ensconced" in N.D.'s "family system," but he also noted that the preservation of a "family system" is never guaranteed. In addition, the record shows that A.R. does not reside with L.R.D. or N.D., that A.R. and L.R.D. do not have a legal

relationship, and that A.R. and L.R.D. do not have a court-ordered custody arrangement regarding their daughter. In November 2014, L.R.D. discouraged Y.F.K. from visiting N.D. by saying that she wanted a "nuclear family," but her household has changed since then. The district court did not clearly err by reasoning that termination might not promote the goal of permanency.

Thus, the district court did not clearly err in its findings concerning the competing interests identified by L.R.D.

D. Summary

The district court concluded its best-interests analysis as follows:

> [T]he Court concludes that the competing interest of a potential adoption by [A.R.] does not outweigh the child's interest and the parent's interest in preserving the relationship. . . . [A.R.] has testified that he intends to remain in the child's life as he has from the beginning and will continue to be a father figure for the child, regardless of the outcome of this case. The child is in a stable healthy environment, and there are many safeguards in place to ensure that when the time is right, [Y.F.K.] will be able to work toward having a healthy relationship with the child. Preserving [Y.F.K.'s] parental rights will not alter the stability of the child's environment.

L.R.D. contends that this case is similar to *In re Welfare of R.T.B.*, 492 N.W.2d 1 (Minn. App. 1992), in which this court affirmed a district court's grant of a mother's private petition to terminate a father's parental rights. The facts of the *R.T.B.* case are similar to this case in some ways but different in other ways. Notably, the father in *R.T.B.* frequently was violent toward both the child and the child's mother. *Id.* at 2. On one occasion, the father threatened the child and his mother with a loaded handgun. *Id.* The father had been

sentenced to 138 months of imprisonment in federal prison, and it appears that the sentence would not expire until the child was approximately 16 years old. *Id.* In addition, the mother had married another man. *Id.* Most importantly, the district court found that termination of the father's rights *was* in the child's best interests, and this court concluded that the district court's finding was supported by the evidence. *Id.* at 4. Because a deferential standard of review applies, the outcome of the *R.T.B.* case does not compel the same outcome in this case.

L.R.D. also contends that termination is in N.D.'s best interests because Y.F.K. was found to be palpably unfit to be a parent, because Y.F.K. is a convicted sex offender who presently is prohibited from having contact with minors, and because N.D. has a strong relationship with another parental figure, A.R. We acknowledge that L.R.D.'s argument has some merit. L.R.D.'s evidence and arguments likely presented the district court with a difficult decision. The district court noted that the prospects of a meaningful parent-child relationship between Y.F.K. and N.D. are contingent on his rehabilitation, which is not imminent. But N.D. was only eight years old at the time of trial, so he would remain a child for approximately ten more years. As the guardian *ad litem* noted in his report, if Y.F.K. were to seek parenting time or custody at a later date, there would be "ample safeguards" to protect N.D.'s best interests, including "a requirement that [Y.F.K.] show that he is mentally and chemically stable enough to reconnect with his son in a child-centered way" and "a requirement that any reunification process be therapeutically guided so that [N.D.]'s emotional needs are paramount, supported, and protected." The district court also reasoned that termination of Y.F.K.'s parental rights is not necessary to alleviate

any present risk to the stability of N.D.'s environment. With or without an order terminating Y.F.K.'s parental rights, N.D. and A.R. can continue to pursue a relationship that is beneficial to N.D. Furthermore, the benefits of termination are somewhat limited by the fact that L.R.D. and A.R. do not live together and do not have an intimate relationship. L.R.D.'s explanation that A.R.'s adoption of N.D. would provide security for N.D. is rather attenuated given the low probability that L.R.D. will die during N.D.'s childhood. And if that scenario were to present itself, A.R. could, as the guardian *ad litem* noted in his report, pursue a third-party custody action. Moreover, the district court's decision is supported by the written report and oral testimony of an experienced guardian *ad litem*. Finally, we are mindful of our deferential standard of review, which is based on the district court's superior understanding of the facts and nuances of the case. *See In re Tanghe*, 672 N.W.2d 623, 625 (Minn. App. 2003); *L.A.F.*, 554 N.W.2d at 396. All things considered, we cannot say that the district court abused its discretion in making its ultimate determination that termination of Y.F.K.'s parental rights is not in N.D.'s best interests.

Before concluding, we note that L.R.D. also argues that the district court erred by finding that she did not prove three of the four statutory grounds for termination that she alleged in her petition. It is not necessary to resolve those issues. Only one statutory basis is necessary for the termination of parental rights. Minn. Stat. § 260C.317, subd. 1 (2020); *In re Welfare of S.Z.*, 547 N.W.2d 886, 890 (Minn. 1996). The district court found that L.R.D. had proved the existence of one statutory basis. The district court's denial of L.R.D.'s petition is based on the district court's finding that termination is not in N.D.'s best interests. The outcome of the case in the district court would have been no different

if the district court had found that additional statutory bases were proved. Likewise, the outcome of the case on appeal would be no different if we were to conclude that the district court erred in its findings concerning the three other statutory bases.

In sum, the district court did not err by denying L.R.D.'s petition to terminate Y.F.K.'s parental rights to N.D.

Affirmed.

KIRK, Judge (concurring specially)

While I concur in the result, because of the broad discretion we as an error-correcting court give to the district court, I write separately to address an issue that we do not reach under the unusual facts in this case. The legislature has constructed the law on termination of parental rights (TPR) to make it relatively easy and straightforward for a petitioner, usually the county, to terminate the parental rights of a parent convicted of certain crimes and who, as a result of the conviction, is now required to register as a predatory offender. *See* Minn. Stat. §§ 260C.301, subd. 1(b)(9), 260.012(g)(5) (2020). Because the district court found, on the basis of the plain language of the statute, that conviction of a predatory crime cannot be proven as a ground for termination where the parent is not, at the time of the TPR trial, a Minnesota resident, it did not do a complete analysis of the child's best interests considering that statutory ground for termination. Such an analysis may have led to a different result, particularly because the underlying crime in this case involves a crime against a child or children.

I have repeatedly read the string of statutes that leaves a Minnesota resident-parent subject to loss of parental rights but not a nonresident parent, and I agree with the district court that under the plain language of the statutes involved in this case, this ground should be applied only if the parent is a Minnesota resident. *See* Minn. Stat. §§ 260C.301, subd. 1(b)(9), 260.012(g)(5), 243.166, subd. 1b(a)(2)(vii), (b) (2020). As a result, the district court was not required to consider the child's best interests specifically as to this statutory ground for TPR, although the legislative intent would seem to suggest a heightened cause for concern.

The legislative intent when this type of conviction is present is obvious in the statutory scheme. All the petitioner must prove is that the parent has been convicted of a crime that would require registration as a predatory offender in Minnesota, and the string of statutes creating this requirement includes crimes committed in another state that are similar to the same crime in Minnesota. *See* Minn. Stat. §§ 260C.301, subd. 1(b)(9), 260.012(g)(5), 243.166, subd. 1b(b)(1) (2020). In this case each state, Minnesota and Wisconsin, has a similar crime for possession of child pornography. *See* Minn. Stat. § 617.247 (2014); Wis. Stat. § 948.12 (2015-16). In 2017, the defendant was convicted of this crime in Wisconsin and is presently registered as a sex offender in Wisconsin. Yet the plain language in our statutes indicate that he must be required to register as a predatory offender in Minnesota to meet the elements of this ground for a TPR. *See* Minn. Stat. §§ 260C.301, subd. 1(b)(9), 260.012(g)(5), 243.166, subd. 1b(b)(2) (2020). Because he is a resident of Wisconsin, he is not required to register in Minnesota. As a result, on the facts of this case, we end up treating a nonresident differently than a resident when this ground for termination is asserted. That is not likely to have been the intent of these laws.

The intent of the legislation was to protect children from predatory offenders, and a stronger analysis of best interests of the child in this type of case can be inferred from these and related statutes. For instance, where the county has brought a child protection proceeding, it is relieved of the duty to exercise reasonable efforts to reunite the child with the parent where the parent has been convicted of possession of child pornography. Minn. Stat. § 260.012(a)(6) (2020). And Minn. Stat. § 260C.503, subd. 2(a)(6) (2020) indicates that the county must immediately ask the county attorney to terminate parental rights where

a parent has committed a crime under Minn. Stat. § 243.166, subd. 1b(a) or (b), which includes possession of child pornography. The statute then says that the county attorney shall file a TPR petition unless certain conditions apply that are not present in this case. *See* Minn. Stat. § 260C.503, subd. 2(d) (2020).

It is unlikely that the legislature intended to treat nonresident parents differently than resident parents under Minn. Stat. § 260C.301, subd. 1(b)(9). An error in drafting the legislation may have created this anomaly; however, it is up to the legislature or the supreme court to address this quirk in the law, not an error-correcting court like ours. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *rev. denied* (Minn. Dec. 18, 1987).