STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0328

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

Filed October 28, 2024
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-JV-22-674

Brooke Beskau Warg, Hennepin County Adult Representation Services, Minneapolis, Minnesota (for appellant-mother S.W.)

Mary F. Moriarty, Hennepin County Attorney, Mary M. Lynch, Senior Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Benjamin Lundquist, Onamia, Minnesota (for respondent Mille Lacs Band of Ojibwe)

Valerie Berrard, Minneapolis, Minnesota (guardian ad litem)

Considered and decided by Larson, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges the order transferring permanent legal and physical custody of one child, arguing that the district court abused its discretion by (1) determining that respondent-county made active efforts to reunify her with the child, (2) determining that

transfer of legal custody is in the child's best interests, and (3) questioning her during trial. We affirm.

FACTS

Appellant S.W. (mother) has two children: N.M.-W. (daughter), born in 2012 and J.M.W. (son), born in 2020. Both children are eligible for enrollment in the Mille Lacs Band of Ojibwe (tribe). Son is the subject of this appeal. Respondent I.D.G. (father) is son's father.[1]

In July 2020, respondent Hennepin County Human Services and Public Health Department (the county) filed a petition alleging daughter to be a child in need of protection or services (CHIPS). The petition was grounded in mother's chemical use and resulting inability to safely care for daughter.

When son was born in October 2020, he experienced withdrawal symptoms due to mother's prenatal use of a prescribed medication that helps manage cravings for controlled substances. Shortly thereafter, the county amended the CHIPS petition, alleging son also needs protection or services. Son was placed in foster care with nonrelative foster providers upon his discharge from the hospital and has never left their care. The tribe approved this placement, which indicates that at least one of the foster providers is a member of an Indian tribe.

One year later, the district court adjudicated both children as CHIPS and ordered mother to comply with a case plan designed to reunify them. The district court's order

[1] The challenged order also transfers father's legal and physical custody of son. Father does not appeal the order.

states that mother admitted that she had "struggled with addiction" in the past, that father likewise has addiction issues, and that she is "not able to stay on top of her children's needs." Her case plan included, in relevant part, requirements that she "demonstrate sobriety" by submitting to random chemical testing, complete a chemical-health assessment and follow its recommendations, and "maintain safe and suitable housing and not allow the use of illegal drugs in the home."

She struggled to comply with her case plan. Despite knowing that the county treated every missed chemical test as a positive test, mother missed "well over 100" requested tests—more than she attended—during the three-year duration of this case. And she tested positive for controlled substances every few months. Mother's lack of documented sobriety was a factor that prevented her from progressing to regular unsupervised visits with the children.[2]

Mother participated in three chemical-health assessments. She completed the first in December 2020; she denied chemical use and treatment was not recommended. After refusing several requests for a follow-up assessment, mother completed a second assessment in March 2023. Because she again denied chemical use, treatment was not recommended. She completed the third shortly before trial began in October 2023. Although mother again denied using chemicals, the county provided contrary information to the assessor, who recommended that mother complete outpatient treatment. At the time

[2] The county initiated unsupervised visitation on three occasions. Each time, they terminated because of safety concerns and mother's failure to document sobriety. The last period of unsupervised visitation ended in May 2023 when mother missed several chemical tests.

of each assessment, mother stated that she had not used controlled substances since 2016, despite the fact that she missed scores of requested chemical tests and tested positive for methamphetamine on several occasions.

In March 2022, the county filed a petition to transfer permanent legal and physical custody of the children, with custody of daughter to her maternal grandmother and custody of son to his foster providers. During an April 2023 hearing, mother agreed to the proposed transfer of daughter's custody and the district court expressly found that the county had made active efforts to reunify the family. The existing case plan remained in place.

The district court held a three-day permanency trial regarding son that ended on November 3, 2023. At the time of trial, son had been in foster care for more than three years—his entire life. The district court received 72 exhibits and heard testimony from 11 witnesses, including mother, the child-protection social worker (social worker), the foster providers, the tribe's qualified expert witness, and the guardian ad litem (GAL).

The social worker described the various services mother received and expressed concern that mother could not "maintain sobriety in the long-term," had not done so previously, and continued to deny any chemical use. While acknowledging that she could not predict the future, the social worker feared that mother's chemical use would affect son's safety. The qualified expert witness expressed the tribe's support for the proposed custody transfer. And the GAL testified that the county provided mother with services to address her chemical dependency and the safety of her home but opined that mother had not "internalize[d]" the information and services she received. The social worker also explained that transferring custody of son is in his best interests because he was doing well

in the foster providers' care and needed permanency. The foster providers, qualified expert witness, and GAL likewise testified that transfer of legal and physical custody of son is in his best interests.

Following the trial, the district court issued a detailed and comprehensive order finding that (1) the county made active efforts to reunify mother with son, (2) mother had the ability to comply with her case plan, (3) mother's efforts did not correct the conditions that led to son's out-of-home placement, and (4) the transfer of custody is in son's best interests. The district court expressly found the testimony of the social worker, qualified expert witness, and GAL credible. In contrast, the court found that mother's testimony concerning her chemical use and relationship with father was not credible. After noting that the evidence established that supervised visits between mother and son had gone well "with very few exceptions," the district court embraced the expressed hope of the tribe and foster providers that mother will become integrated into son's life when it is "safe and reasonable to do so."

Mother appeals.

DECISION

I. The district court did not abuse its discretion by determining that the county made active efforts to reunify mother and son.

On appeal of an order permanently transferring custody of a child, we review the district court's factual findings for clear error and its determinations as to the ultimate, statutory findings for abuse of discretion. *In re Welfare of Child of D.L.D.*, 865 N.W.2d 315, 321 (Minn. App. 2015), *rev. denied* (Minn. July 20, 2015). "A district court abuses

its discretion if it makes findings of fact that lack evidentiary support, misapplies the law, or resolves discretionary matters in a manner contrary to logic and the facts on record." *In re Welfare of Child of T.M.A.*, __ N.W.3d ___, ___, 2024 WL 4113104, at *3 (Minn. App. Sept. 9, 2024) (citing *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022)).

The juvenile-protection provisions of the Juvenile Court Act state that an order permanently placing a child out of a parent's home (other than an order terminating parental rights), must include "detailed" findings as to:

> (1) how the child's best interests are served by the order;
> (2) the nature and extent of the responsible social services agency's reasonable efforts or, in the case of an Indian child, active efforts to reunify the child with the parent or guardian where reasonable efforts are required;
> (3) the parent's or parents' efforts and ability to use services to correct the conditions which led to the out-of-home placement; and
> (4) that the conditions which led to the out-of-home placement have not been corrected so that the child can safely return home.

Minn. Stat. § 260C.517(a) (2022). Each of these statutory findings must be proved by clear and convincing evidence. Minn. R. Juv. Prot. P. 58.03, subd. 1.

Where, as here, the matter is governed by the Indian Child Welfare Act (ICWA) and Minnesota Indian Family Preservation Act (MIFPA), the agency must make "active," rather than "reasonable," efforts to reunify the parent and child. 25 U.S.C. § 1912(d) (2018); Minn. Stat. § 260.762 (Supp. 2023). Active efforts "require[s] a higher standard than reasonable efforts to preserve the family, prevent breakup of the family, and reunify

the family." Minn. Stat. § 260.755, subd. 1a (Supp. 2023). ICWA does not define "active efforts," but MIFPA does, stating the term means

> a rigorous and concerted level of effort that is ongoing throughout the involvement of the child-placing agency to continuously involve the Indian child's Tribe and that uses the prevailing social and cultural values, conditions, and way of life of the Indian child's Tribe to preserve the Indian child's family and prevent placement of an Indian child and, if placement occurs, to return the Indian child to the child's family at the earliest possible time.

Id.

Mother does not challenge the district court's underlying factual determinations or its statutory findings with respect to mother's efforts to engage with services and her failure to correct the conditions that led to son's out-of-home placement. Rather, she argues that the district court abused its discretion by determining that the county made active efforts to reunify her and son. Specifically, mother contends that the county's failure to get her into chemical-dependency treatment constitutes a failure of active efforts. This argument is unavailing.

First, the record shows the county made myriad efforts to help mother meet her case-plan requirements. At trial, mother acknowledged that the social worker offered multiple forms of chemical testing, beginning with urinalysis (UA), so mother could demonstrate her claimed sobriety. When mother continued to miss UA tests, the social worker allowed her to use a sweat patch, which mother could wear for two weeks. But after mother missed appointments for application and removal of sweat patches, and after a sweat patch tested positive for amphetamine and methamphetamine, mother returned to the UA system.

Later, mother was allowed to use oral swabs, but was again returned to UAs because testing results were inconclusive. The social worker further testified that she provided bus passes to mother and offered her rides to chemical-test appointments, which mother sometimes refused.

Mother cites *In re Welfare of Child. of T.R.* for the proposition that simply requiring mother to submit to chemical tests constitutes a failure to provide active efforts. 750 N.W.2d 656, 665 (Minn. 2008). This reliance is misplaced. In *T.R.*, the supreme court concluded that "testing for substance use, *without more*, is not realistic under the circumstances to rehabilitate a parent who, that testing shows, suffers from chemical dependency issues." *Id.* (emphasis added). That is not the situation here. As noted above, the county directed mother to three chemical-health assessments. Unlike the parent in *T.R.*, on all three occasions mother told the assessor that she did not use controlled substances, resulting in no treatment recommendations. Only in October 2023, when the assessor obtained information from the county regarding mother's test results, was treatment recommended.

The county also provided mother with in-home peer-support services—an intensive program that provides support and accountability for a person working on sobriety through in-home chemical testing and weekly individual and group meetings. And the district court extended the permanency proceedings for six months after it transferred custody of the daughter to allow mother additional time to receive services and work on her case plan. *See In re Welfare of Child. of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007) (noting, in discussing whether the county made active efforts, that the "district court extended the time

required for permanency determinations due to [mother's] participation in her case plans"), *rev. denied* (Minn. Mar. 28, 2007).

We are also unconvinced by mother's new argument on appeal that the county's failure to refer mother to treatment as the trial commenced, in itself, constitutes a lack of active efforts. As an initial matter, we generally address only questions previously presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *In re Welfare of Child. of V.R.R.*, 2 N.W.3d 587, 594-95 (Minn. App. 2024) (citing *Thiele* in a juvenile-protection appeal). More importantly, mother cites no authority for the proposition that failure to provide one particular service is a failure of the required active efforts, and we have found none. *See In re Welfare of Child of J.H.*, 968 N.W.2d 593, 602 n.7 (Minn. App. 2021) (stating that the failure to cite legal authority supporting an argument constitutes forfeiture of the argument), *rev. denied* (Minn. Dec. 6, 2021). And the record does not support mother's argument. She agreed to transfer custody of daughter in April 2023 and took no exception to the district court's contemporaneous finding that the county had—up to that point—made active efforts. At trial, the social worker testified that she had just received the October 2023 chemical-health assessment report, which recommended out-patient treatment. The social worker was not asked if the assessor actually made a treatment referral, the report was not submitted to the district court, and mother did not request a continuance to pursue treatment. Simply put, there was no evidence before the district court that the county failed to provide mother a referral to treatment.

Second, the county involved the tribe in its reunification efforts, as required by MIFPA, by communicating with the tribe's qualified expert witness. The qualified expert witness testified by affidavit and at trial that the county made active efforts to reunify and that the tribe supports the transfer of son's custody to the foster providers.

Third, in connection with mother's April 2023 agreement to transfer custody of daughter, the district court found that the county had made active reunification efforts. Mother did not contest this finding, implicitly agreeing—just six months before the trial in this case—that the county had been providing active efforts to reunify her with the children. The record reflects that mother's case plan and the county's efforts were essentially unchanged throughout this proceeding.

In sum, because our careful review of the record reveals ample support for the district court's determination that the county made active efforts—for more than three years—to address mother's issues and reunify her with both children, we discern no abuse of discretion by the district court.[3]

II. The district court did not abuse its discretion when it questioned mother during trial.

Unless displaced by a statute or the Minnesota Rules of Juvenile Protection Procedure, the Minnesota Rules of Evidence apply in juvenile-protection matters. Minn. R. Juv. Prot. P. 3.02, subd. 1. Minnesota Rule of Evidence 614(b) allows a district court

[3] Mother also asserts that the district court abused its discretion by determining that transfer of custody is in son's best interests. Her best-interests argument is solely premised on the county's claimed failure to make active reunification efforts. Because we conclude the district court did not abuse its discretion by determining the county made active efforts, mother's best-interests argument fails and we do not address it further.

to question a witness called by a party. The parties cite neither a statute nor a rule that displaces rule 614(b) in juvenile-protection matters. While rule 614(b) allows a district court to question a witness called by a party, the court may not "assume[] an advocate's position." Minn. R. Evid. 614 1977 comm. cmt. A district court's questions are proper when the purpose of questioning is to "clarify the testimony" that was already elicited by counsel. *Teachout v. Wilson*, 376 N.W.2d 460, 465 (Minn. App. 1985), *rev. denied* (Minn. Dec. 30, 1985). We review a district court's questioning of a witness, like other evidentiary-related decisions, for an abuse of discretion. *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 93 (Minn. App. 2012); *see also* Minn. R. Evid. 614 1977 comm. cmt. (stating "[t]he right to call and question witnesses can be abused by the trial court which assumes an advocate's position, particularly in a jury trial").

Mother argues that the district court abused its discretion by questioning her about her: (1) chemical-testing results, (2) relationship with father, and (3) other commitments and obligations. We are not persuaded for three reasons.

First, the district court's questions addressed and clarified testimony and other evidence the parties previously presented. For example, when the county asked mother if "some" of the UA results were positive, she responded, "So I've been told." And when asked if the sweat-patch results were positive, she responded, "I don't know. It was a long time ago." The social worker explained that mother "never acknowledg[ed] any use despite the positive UAs, just saying the UAs were tampered with, or . . . finding other reasons to explain away any positives." To reconcile the discrepancies in the testimony, the district court asked mother again about the chemical-testing results. She then admitted

that some of her test results were positive, but stated she believed they were not accurate. The record convinces us that the district court's questioning served to clarify certain aspects of mother's testimony. *See Olson v. Blue Cross & Blue Shield*, 269 N.W.2d 697, 702 (Minn. 1978) (concluding the district court did not abuse its discretion by questioning witnesses when counsel had "partially covered the same ground").

Second, we are not persuaded by mother's contention that "[w]hile it is the district court's duty to assess credibility of witnesses, it is not the district court's role to elicit testimony to support a finding that a witness is not credible." Mother relies on *State ex rel. Hastings v. Denny*, in which our supreme court held that the district court's questioning of a witness in a paternity case denied the alleged father a fair jury trial. 296 N.W.2d 378, 379 (Minn. 1980). The supreme court reasoned that the district court's questioning "reflected on the credibility of a key defense witness" and "could have influenced the jury." *Id.* But here, unlike in *Hastings*, the district court was the fact-finder. As such, it was required to make credibility findings, to which we defer. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996); *see also J.K.T.*, 814 N.W.2d at 97 (concluding any prejudice stemming from erroneously admitted evidence was minimal in a bench trial regarding termination of parental rights).

Third, permitting a district court to clarify testimony in a transfer-of-custody case is consistent with its obligation to give "paramount consideration" to the "health, safety, and best interests of the child," Minn. Stat. § 260C.001, subd. 2(a) (2022), and the best interests of an Indian child under ICWA and MIFPA, Minn. Stat. § 260.755, subd. 2a (2022). A district court is entrusted with broad discretion in such cases, *In re Welfare of Child of*

S.S.W., 767 N.W.2d 723, 731 (Minn. App. 2009), including the discretion to add a person as a party if the court deems them "to be important to a resolution that is in the best interests of the child," Minn. R. Juv. Prot. P. 32.01, subd. 1(g). If, to satisfy its statutory obligation to give paramount consideration to a child's best interests, a district court may add a new party to an existing proceeding, it follows that the court may question an existing party to that proceeding to fulfill that same statutory obligation. *Olson*, 269 N.W.2d at 702 (recognizing that if a district court "is doubtful about the testimony of any witness in a court trial" then the district court "may have not only the right but the duty to interrogate a witness").

In sum, we discern no abuse of discretion by the district court in determining that transferring legal and physical custody of son to his foster providers is warranted and in his best interests. We do not doubt mother's love and concern for son. And we share the expressed hope of the foster providers, tribe, and district court that mother will have a place in son's life in the years ahead.

Affirmed.