STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0695

In the Matter of the Welfare of the Child of:
N. A.-M. W. and R. R. O., Parents.

Filed October 29, 2018
Affirmed
Hooten, Judge

Mille Lacs County District Court
File No. 48-JV-17-2750

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Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

HOOTEN, Judge

In an appeal from a district court's adjudication that her child is a Child in Need of Protection or Services (CHIPS), appellant-mother challenges several of the district court's factual findings and the statutory grounds for the CHIPS adjudication. We affirm.

FACTS

Appellant's child was born on May 16, 2016. While the child's parents never married, the father remained involved in the child's life. During the course of the child's first 19 months, he underwent multiple surgeries, received casting, and wore a special boots-and-bars apparatus[1] at night to correct a club foot on his right leg. Although the child was only 19 months old at the time of the CHIPS petition, he had sustained two fractures of his right leg. The first fracture was to the child's tibia when he was nine months old. Appellant claimed the fracture occurred when the child, while in her custody, fell out of his crib.

The second fracture was to his femur, which occurred when the child was 19 months old. According to appellant, the child sustained this fracture when he fell off a kitchen counter on December 18, 2017. However, the child's father claimed that on December 19, 2017, he had visitation with the child and appellant did not mention that the child had fallen on the previous day. He also noted that when he brought the child to a clinic for congestion issues associated with a cold, medical staff did a range of motion test of the child's limbs during their physical examination of the child and noted no issues.

On December 20, appellant brought the child to the hospital after noticing that his leg was swollen. An x-ray revealed a transverse fracture of the right femur. The case was referred to Dr. Linda Thompson to evaluate for possible physical abuse. Dr. Thompson

[1] The witnesses refer to this as the child's "boots and bars" and "Ponseti Bars and sandals." The apparatus consists of two sandal-like "boots with straps and buckles" that are connected by a bar that slides into a latch on the bottom of the boots, and the purpose is to keep the child's feet in a proper position.

interviewed both parents. In her report, Dr. Thompson noted that "[t]his type of fracture would not have occurred without significant trauma and is very unlikely to be a result of [Child's] past history of [club foot], especially with radiologist's report of normal bone density. Physical abuse is strongly suspected in the absence of a history of plausible trauma." A police hold was then placed on the child pending an investigation.

On December 22, appellant met with Allen Tutland, an investigator with the Mille Lacs County Sheriff's Office, and two child protection investigators. Appellant initially did not report any trauma to the child. Suspecting that appellant was not telling the truth, Investigator Tutland met with appellant again by himself. Appellant then told him that on December 18, after she had placed the child on a counter to give him medicine, which was located above the sink, the child leaned toward appellant and fell off of the counter, landing on his feet and butt.

On January 9, 2018, appellant told a treating pediatrician, Dr. Nancy Harper, that when the child fell off of the counter, he struck his knee and then landed on his stomach. Dr. Harper testified at the CHIPS hearing that the child's femur fracture was not consistent with this kind of knee-strike fall and that such a fall would cause a fracture on the end of the femur, not the middle. She also testified that after reviewing the x-rays of the child's prior tibia fracture, it was her opinion that the tibia fracture had been misdiagnosed as a buckle fracture when it was actually a transverse fracture. Dr. Harper further opined that for the fracture to be consistent with a fall from a crib, the child would have fallen feet first (instead of head first) from the crib and "stick the landing" on his feet.

Investigator Tutland spoke with appellant again on January 22 about the child's December 18, 2017 incident. Appellant told Investigator Tutland that she had lied about the location of the medicine and that it had actually been located on a speaker in another area farther away from the child. And in a subsequent interview with Investigator Tutland, she told him that at one point she had stepped outside of the kitchen completely while the child was on the counter. At trial, appellant testified that she had her back turned to the child when he fell off the counter and she turned in time to see his head "clear the counter."

The county filed a CHIPS petition on December 26, 2017, and a court trial was held on March 12 and 13, 2018. The district court found that the state had proven by clear and convincing evidence that the child is in need of protection or services. This appeal follows.

D E C I S I O N

Appellant makes several challenges on appeal. She challenges five of the district court's factual findings. She argues that the district court abused its discretion in deciding that the child is in need of protection or services on three statutory grounds. She asserts that her due process rights were violated. And she claims that the district court erred by not considering her willingness to accept services.

1. Findings of Fact

Findings of fact are reviewed for clear error. *In re Welfare of J.H.*, 844 N.W.2d 28, 34–35 (Minn. 2014). "A finding is clearly erroneous only if there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred." *Id.* at 35 (quotation omitted).

In finding of fact number 18, the district court found that on the day after the child supposedly fell from the kitchen counter, father brought the child into a clinic for congestion issues, and during that visit medical staff performed range of motion exams on the child's limbs, and no abnormalities or concerns were noted. Appellant claims there is insufficient evidence that a range of motion exam took place. But there is medical paperwork in the record indicating that "the physical exam mentioned normal range of motion of all extremities." And the paperwork is corroborated by father's testimony that medical staff moved the child's "knee back and forth, moving his ankle, making sure his legs move."

The district court's finding of fact number 49 states: "In her evaluation, Dr. Harper noted concern for neglect because the child was behind on his immunizations and had fallen from the 75-80 percentile on the growth curve for weight to the third percentile, despite being in a SPICA cast." Appellant disputes that Dr. Harper used the word neglect. While it is true that Dr. Harper did not specifically use the word neglect in her evaluation, Dr. Harper noted that "there remain concerns . . . of whether the femur fracture represents an accidental injury or an inflicted injury" and that the child's weight met the criteria for failure to thrive. It is reasonable to infer, based upon these circumstances, that Dr. Harper was concerned about parental neglect of the child.

Appellant also disputes that Dr. Harper said that the child was in the third percentile for weight. Dr. Harper's report indicates that the child was in the 5-10 percentile range, and she testified that the child was in the fifth percentile. While appellant is correct that the district court clearly erred in attributing the third-percentile statement to Dr. Harper,

we note that the child was weighed wearing a SPICA cast that inflated his weight and that appellant herself conceded on cross-examination that the child was in the third percentile for weight when he went into foster care.

Appellant takes issue with the district court's characterization of Dr. Harper's testimony that "Child's club foot diagnosis does not affect the density or strength of the bones" in finding of fact number 53. But when Dr. Harper was asked, "Is there anything about having a clubfoot that would have made his bones weaker," she answered "no, not on its own."

Finding of fact number 56 states:

> Dr. Harper testified that Child's injury could not have happened as a result of the fall as Mother described. The location of the femur fracture is inconsistent with any of the variations of a fall off a counter that Mother reported. If Child had fallen [off] the counter in any way described by Mother, the fracture would have occurred lower in the femur, not in the middle. This fracture is consistent with a blow or impact to the femur. The location of the fracture is consistent with the area where Mother strikes Child's thigh when putting on his boots and bars.

Appellant takes issue with four aspects of this finding.

First, she argues that Dr. Harper did not testify that the injury could not have resulted from the fall that appellant described. Second, she argues that it was clearly erroneous to say that the fracture's location "is inconsistent with any of the variations of a fall off a counter that Mother reported." Third, she argues that the district court clearly erred in finding that the fracture would have occurred lower on the femur "[i]f Child had fallen [off] the counter in any way described by Mother." All three of these findings are

supported by Dr. Harper's testimony that she was "still concerned that [the counter fall] doesn't explain the fracture to a reasonable degree of medical certainty, just based on the location of the fracture and the type."

Appellant's fourth dispute with finding of fact number 56 is with the statement that "[t]he location of the fracture is consistent with the area where Mother strikes Child's thigh when putting on his boots and bars." The district court appears to have misinterpreted appellant's testimony about how she sits the child on top of her own legs when putting the boots on him. There is nothing in the record to indicate that she strikes the child's thigh when putting on his corrective boots. Though appellant does not challenge finding of fact number 11, the district court similarly clearly erred in finding that appellant's "fists and/or forearms rest on the point of the thigh where doctors would later diagnose a displaced fracture."

Finally, appellant challenges finding of fact number 57, in which the district court found that, "Child's femur fracture . . . was the result of non-accidental trauma." There was nothing in the record other than the fall from the counter that would suggest that the fracture was the result of accidental trauma. The district court did not find the fall to be a credible explanation in light of Dr. Harper's testimony that it did not "explain the fracture to a reasonable degree of medical certainty." And in her report, Dr. Harper stated that "a changing history of injury does have association with physical abuse or inflicted injury."

Our review of the record shows that the district court did not clearly err with respect to findings of fact 18, 53, and 57. As for finding of fact number 49, the record shows that the district court clearly erred only in attributing the "third percentile" statement about the

child's weight to Dr. Harper since the doctor testified that the child was in the fifth percentile for weight and the reference to being in the third percentile came from appellant's testimony. All of the district court's findings in finding of fact 56 are supported by the record except for the sentence stating that appellant strikes the child's thigh. That last sentence is clearly erroneous, as is the district court's reference in finding of fact number 11 to appellant placing her fists and forearms on the child's thigh in putting on his corrective boots.

2. Statutory Grounds

Appellant argues that the district court erred in determining that the child is in need of protection or services under Minn. Stat. §§ 260C.007, subd. 6(2), (8), and (9) (2016). We review a district court's "finding of a statutory basis for the order" for an abuse of discretion. *In re Welfare of Child of D.L.D.*, 865 N.W.2d 315, 322 (Minn. App. 2015), *review denied* (Minn. July 20, 2015).

i. Minn. Stat. § 260C.007, subd. 6(2) – abuse

Under Minn. Stat. § 260C.007, subd. 6(2), a child is in need of protection or services if he "has been a victim of physical or sexual abuse as defined in section 626.556, subdivision 2." And physical abuse is defined as "any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries." Minn. Stat. § 626.556, subd. 2(k) (2016). The district court concluded that there was a physical injury and that "Mother provided no medical explanation for the injury." The district court discredited the notion that the fracture came

from the fall, citing to Dr. Harper's testimony and the fact that the injury is "extremely painful, yet Child did not exhibit signs of distress as his legs were put through a range of motion test" the day after the alleged fall. From this, the district court concluded that the injury occurred after the date of the purported fall and therefore could not be explained by the child's history of injuries.

This conclusion is supported by the evidence in the record. Dr. Harper testified that the fall did not "explain the fracture to a reasonable degree of medical certainty, just based on the location of the fracture and the type." And there was evidence in the record to support a finding that a range of motion test was performed on the child the day after the alleged fall from the counter and that he did not show discomfort while undergoing this test. Minn. Stat. § 626.556, subd. 2(k) asks whether the fracture can "reasonably be explained by the child's history of injuries." In other words, it places the burden on the state to prove that the femur fracture did not occur by accidental means, but it does not require the state to prove the specific blow or strike that caused it. The evidence presented shows that the fracture could not have occurred in the manner or at the time that appellant describes. Therefore, the injury cannot reasonably be explained by the child's history of injuries, and we conclude that the district court did not abuse its discretion.

Appellant also argues that the district court improperly shifted the burden on her to prove that the fractures were the result of an accident. While the district court did state that "Mother provided no medical explanation for the injury," when read in context of the order, the district court was not shifting the burden on appellant, but rather was pointing out that the fracture could not be explained by the child's history of injuries.

ii. Minn. Stat. § 260C.007, subd. 6(8) – immaturity of parent

Under Minn. Stat. § 260C.007, subd. 6(8), a child is need of protection or services when he is "without proper parental care because of the emotional, mental, or physical disability, or state of immaturity of the child's parent, guardian, or other custodian." The district court concluded that the child was without proper parental care because of appellant's immaturity. Appellant contends that the district court abused its discretion in making this ruling. But the district court's conclusion is supported by the record. The district court said that appellant's "state of immaturity is shown throughout the facts of the case," and it gives examples like: (1) the child suffering two separate fractures to his right leg and appellant giving explanations that are inconsistent with the injuries sustained; (2) appellant not following up with the child's well-child checks or ensuring that he was up-to-date with his immunizations; and (3) the child dropping from the 75-80 percentile in weight to the third percentile[2] while in appellant's care. The district court finishes by saying "[t]hese facts show Child is without proper parental care when in the care of Mother." The district court's conclusion is reasonable in light of the evidence, and it did not abuse its discretion.

iii. Minn. Stat. § 260C.007, subd. 6(9) – dangerous environment

Under Minn. Stat. § 260C.007, subd. 6(9), a child is in need of protection or services when he "is one whose behavior, condition, or environment is such as to be injurious or dangerous to the child or others." Appellant asserts that the district court abused its

[2] While Dr. Harper said fifth percentile, appellant herself agreed that the child had dropped to the third percentile before going into foster care.

discretion in finding that this statutory ground applied to the child. The district court relied on three facts to support its conclusion: (1) the child has not suffered any fractures in foster care, but he suffered two while in appellant's care; (2) the child fell down to the third percentile for weight while in appellant's care, but in foster care he has risen to the sixteenth percentile; and (3) appellant "failed to provide an environment where she could or would ensure Child was consistent with his well-child visits and up-to-date on his immunizations." These facts give reason to be concerned about the child's welfare and his living environment. Dr. Harper's observation that the child's weight fell into the failure-to-thrive range is especially probative on this point. Accordingly, we hold that the district court did not abuse its discretion in determining that this statutory ground applied to the child.

3. Due Process

Appellant next argues that her due process rights were violated because the CHIPS petition did not give her notice of certain facts that the district court relied on to make its decision. She refers to three specific facts in the district court's order that are not in the petition: the lack of explanation for the tibia fracture, the failure to follow up on well-child checks and immunizations, and the child's drop in weight.

Respondent counters that appellant forfeited this claim by not raising it in district court. Indeed, constitutional rights "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *State v. Beaulieu*, 859 N.W.2d 275, 278 (Minn. 2015). And a review of the record shows no mention of a due process argument. Appellant asserts that she preserved

the issue in her closing argument, but none of the examples she cites to make any mention of due process. We conclude that appellant forfeited her due process claim.

Even if appellant had not forfeited her due process argument, it is meritless. The CHIPS petition alleges that the child was abused and not being given proper parental care, and the three facts she takes issue with fit logically with those allegations. Moreover, Dr. Harper's report, which was provided to appellant prior to the CHIPS petition trial, mentions the tibia fracture, the drop in weight, and the well-child checks and immunizations. The idea that appellant was blindsided by these facts is disingenuous.

4. Willingness to Accept Services

Finally, appellant seems to ask us to create new caselaw saying that a district court cannot make a CHIPS adjudication unless there is evidence that a parent is unwilling to accept services offered by the county or comply with a case plan. Appellant cites to an unpublished case from our court in support of this proposition. Our review of that case shows it to be distinguishable. Further, unpublished cases are not precedential. Minn. Stat. § 480A.08, subd. 3(c) (2016).

Affirmed.