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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0034**

In the Matter of the Welfare of the Child of:
M. D. L. and G. M., Parents.

**Filed June 3, 2019
Affirmed
Smith, Tracy M., Judge**

Becker County District Court
File No. 03-JV-18-2036

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Considered and decided by Schellhas, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

Appellant-father G.M. appeals the termination of his parental rights to his child. The district court terminated G.M.'s parental rights based on its findings that G.M. had been convicted of a crime requiring predatory-offender registration, that termination is in the

child's best interests, and that the responsible social services agency had made reasonable efforts to reunite G.M. and the child. G.M. argues that the district court abused its discretion by determining that termination is in the child's best interests without giving G.M. more time to complete a case plan. We affirm.

FACTS

In 2004, G.M. was convicted of gross sexual imposition in North Dakota. Later, he moved to Minnesota. His North Dakota offense falls within the scope of Minn. Stat. § 243.166, subd. 1b(b) (2018), which requires persons entering Minnesota to register as predatory offenders on the basis of certain out-of-state crimes.

In January 2016, G.M. and M.D.L. had a child, J.M. In October 2017, an investigator with Becker County Human Services (BCHS) received reports that M.D.L.'s children may have been experiencing abuse and neglect in M.D.L.'s home. While the subsequent investigation did not substantiate the reported concerns, it did reveal G.M.'s prior North Dakota offense. BCHS filed a child-in-need-of-protection-or-services (CHIPS) petition in November 2017; that petition was granted, giving BCHS protective supervision of J.M. In mid-December 2017, BCHS filed its first petition to terminate G.M.'s parental rights.¹

¹ A responsible social services agency must seek termination of parental rights when a parent "has committed an offense that requires registration as a predatory offender under section 243.166, subdivision 1b, paragraph (a) or (b)," Minn. Stat. § 260C.503, subd. 2(a)(6) (2018), unless the agency files with the district court either a petition to transfer legal and physical custody of the child to a relative or a CHIPS petition including a case plan and documentation of a compelling reason why termination would not be in the best interests of the child, Minn. Stat. § 260C.503, subd. 2(d) (2018).

In March 2018, following a trial, the district court denied the petition for termination. It found that G.M. had committed a crime listed in Minn. Stat. § 260.012(g) (2018). *See* Minn. Stat. § 260C.301, subd. 1(b)(9) (2018) (establishing that a court may terminate parental rights if it finds “that the parent has been convicted of a crime listed in section 260.012, paragraph (g), clauses (1) to (5)”). But the court determined that it was not in J.M.’s best interests to terminate G.M.’s parental rights because G.M. had changed since committing the crime that provided the statutory basis for termination. The district court noted the length of time since the conviction, credited G.M.’s testimony that he had started thinking before making decisions, and found that G.M. no longer drank to excess, that he had been engaged with the services he was offered, that he had been regularly involved with parenting J.M., that he was in a committed relationship with a woman (L.C.), and that he was steadily employed. The court concluded that there were “compelling reasons . . . to explore alternative options; namely, a more thorough case plan offered to [G.M.]” The district court ordered that G.M. remain subject to the related CHIPS adjudication.

Following the March order, BCHS and G.M. agreed to a new case plan. The plan had three main requirements: first, that G.M. complete a capacity-to-parent evaluation; second, that G.M. complete a psychosexual evaluation; and, third, that G.M. attend supervised visits with J.M. In June, a new social worker took over the case at BCHS. Because G.M. had not yet scheduled the two required evaluations, G.M.’s case plan was modified to add a requirement that G.M. complete the capacity-to-parent evaluation and the psychosexual evaluation within 90 days.

A capacity-to-parent evaluation requires four to six appointments to complete. The capacity-to-parent evaluation appointments were free of cost to G.M. By contrast, a psychosexual evaluation requires a single appointment but G.M. was required to pay for it. A psychosexual evaluation generally costs between \$600 and \$800, though BCHS is sometimes able to provide financial assistance. G.M. declined financial assistance when it was offered in June, saying that he could afford the evaluation. G.M.'s supervised visits with J.M. were arranged through Positive Connections, an organization that would schedule and supervise G.M.'s parenting time. Visitation times were scheduled by Positive Connections in consultation with M.D.L. and G.M.

In August, G.M. moved to Grand Forks. He had not yet undergone his capacity-to-parent evaluation or his psychosexual evaluation, and he asked BCHS if he could complete the two evaluations there. But BCHS only had a contract to provide capacity-to-parent evaluations with a local organization that did not provide services in Grand Forks; as a result, to be evaluated in Grand Forks, G.M. would have had to pay for the evaluation himself. Also, the specific organization G.M. asked about in Grand Forks did not have the necessary staff to do either evaluation. BCHS instead offered to help with transportation to appointments in Minnesota.

In the months after he agreed to the modified case plan, G.M. scheduled three appointments for his capacity-to-parent evaluation—in July, August, and October—but missed all three. G.M. eventually did schedule and attend two capacity-to-parent appointments, both in November 2018, including one on the day before trial on the second, and current, petition for termination of his parental rights.

G.M. also scheduled several appointments for psychosexual evaluations—two in July and one at the end of October—but failed to attend them. G.M. did not provide notice or an explanation for missing the July appointments. Before the October appointment, G.M. contacted his social worker, saying that he had made it from Grand Forks to Detroit Lakes on his way to an appointment in Brainerd. He asked for a gas voucher so that he could make it to the appointment. BCHS provided the gas voucher, but G.M. did not attend the appointment. In November, G.M. requested financial assistance from BCHS to pay for the psychosexual evaluation, but BCHS denied the request, reasoning that it was not a worthwhile expense given G.M.’s failure to follow through on other parts of the case plan and previous refusal to accept aid. G.M. had not attended an appointment for a psychosexual evaluation at the time of the trial on the current petition.

G.M. similarly struggled to comply with the supervised visitation called for in his case plan. From the initiation of the case plan in April until early September, 13 visits were scheduled at Positive Connections. G.M. attended four of them; M.D.L. cancelled one of them; and G.M. cancelled the others. G.M. did not attend any supervised visits with J.M. after July, and he was removed from the visitation calendar in September after cancelling four visits in a row.

On September 28, 2018, BCHS brought a second petition for termination of G.M.’s parental rights. The sole statutory basis alleged in the petition was that G.M. had been convicted of a crime listed in Minn. Stat. § 260.012(g)(1)-(5). The case was tried on November 27, 2018. At trial, the district court took judicial notice of its order in the first termination petition.

The evidence in the second action focused primarily on G.M.'s failure to complete the requirements of the case plan and the reasons for that failure. BCHS also introduced new evidence suggesting that G.M.'s conduct did not align with the narrative of stability that he had presented at the first hearing. This evidence included several police reports describing investigations of sexual assaults alleged to have occurred between July 2017 and January 2018. In one incident, G.M. grabbed a woman's breast; G.M. admitted to doing so but claimed that he did not have a sexual motive. Another involved a series of alleged sexual assaults involving a woman who was under the influence of methamphetamine. BCHS also elicited testimony from G.M. indicating that his relationship with L.C. was not actually stable at the time of the previous trial and had since ended. Specifically, he testified that he had impregnated an 18-year-old woman outside of his relationship with L.C. in December 2017, before the first trial. G.M. also testified that he had been in two arguments with L.C. that had led to the police being called. L.C.'s son was present during at least one of those arguments.

The district court found that there was clear and convincing evidence that G.M. had been convicted of a crime on which termination of parental rights could be based, *see* Minn. Stat. § 260C.301, subd. 1(b)(9), and that BCHS had made reasonable efforts to reunite J.M. with G.M. Most importantly for this appeal, it further found that there was clear and convincing evidence that termination is in J.M.'s best interests. The district court based this finding, in large part, on G.M.'s failure to meet the requirements of his case plan. Specifically, it found that J.M.'s interest in preserving the parent-child relationship had dissipated because of G.M.'s infrequent visits, that G.M.'s interest in the relationship was

similarly low because of his lack of diligence in pursuing the case plan, and that G.M.’s noncompliance with the case plan and “ongoing concerning behaviors” meant that termination would promote J.M.’s stability and safety. The district court therefore terminated G.M.’s parental rights.

G.M. appeals, arguing that the district court should not have found that termination is in J.M.’s best interests and seeking an order instructing the district court to allow G.M. more time to complete his case plan.

D E C I S I O N

A natural parent is presumptively a “fit and suitable person to be entrusted with the care of his or her child,” and “[o]rdinarily, it is in the best interest of a child to be in the custody of his or her natural parents.” *In re Welfare of A.D.*, 535 N.W.2d 643, 647 (Minn. 1995). As a result, parental rights may be terminated “only for grave and weighty reasons.” *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990).

To terminate parental rights, a district court must determine that at least one statutory basis for termination exists. Minn. Stat. § 260C.301, subd. 1 (2018); *In re Welfare of P.J.K.*, 369 N.W.2d 286, 290 (Minn. 1985). “Even if a statutory ground for termination exists, the district court must still find that termination of parental rights . . . is in the best interests of the child.” *In re Welfare of Child of A.M.C.*, 920 N.W.2d 648, 657 (Minn. App. 2018) (alteration in original) (quotation omitted); see also Minn. Stat. § 260C.301, subd. 7 (2018) (“In any proceeding under this section, the best interests of the child must be the paramount consideration . . .”). “In analyzing a child’s best interests, the district court must 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.” *A.M.C.*, 920 N.W.2d at 657 (quoting *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992)). Both the statutory-basis and the best-interests determinations are discretionary with the district court and must be based on underlying findings of fact that are supported by clear and convincing evidence. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901, 906 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

A district court is also required to find, based on clear and convincing evidence, either that reasonable efforts to reunify the parent and child were made or that the social services agency is exempted from making efforts toward reunification. Minn. Stat. §§ 260.012; 260C.301, subd. 8 (2018). The ultimate decision to terminate a person’s parental rights is discretionary with the district court. *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 136-37 (Minn. 2014).

We review the district court’s determinations for an abuse of discretion. *J.R.B.*, 805 N.W.2d at 901, 905. When reviewing the district court’s underlying factual findings, “this court must determine whether the district court’s findings address the statutory criteria, are supported by substantial evidence, and are not clearly erroneous.” *In re Children of Vasquez*, 658 N.W.2d 249, 251-52 (Minn. App. 2003). “A finding is clearly erroneous if it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660-61 (Minn. 2008) (quotation omitted). We “closely inquire into the sufficiency of the evidence

to determine whether it was clear and convincing.” See *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008).

G.M. argues that the district court abused its discretion in concluding that termination is in J.M.’s best interests. He makes three specific arguments, which we address in turn.

Findings from the First Petition

G.M. first argues that the district court should have given more weight to its findings in the initial petition, when it determined that G.M. and J.M. had formed a bond, that J.M. had “experienced stability and safety with [G.M.],” and that G.M. had demonstrated his interest in preserving the parent-child relationship. G.M. also asserts that there have been no allegations that he directly harmed or neglected J.M.

G.M.’s latter point is correct—BCHS did not allege, and the district court did not find, abuse or neglect of J.M. But allegations of harm or neglect are not necessary to a district court’s finding that termination would be in a child’s best interests. See, e.g., *In re Welfare of S.N.*, 423 N.W.2d 83, 91 (Minn. App. 1988) (affirming the district court’s finding that termination was in certain children’s best interests based on the children’s success in foster placement, need for permanency, and lack of desire to contact the parent). Thus, the fact that G.M. has not directly harmed or neglected J.M. does not undermine the district court’s determination.

As to G.M.’s argument regarding the findings on the initial petition, the district court did address its prior findings. It specifically found that G.M.’s infrequent visitation with J.M. had dissipated the bond between them, that G.M.’s commitment to being a parent had

not been reflected in his conduct because he failed to pursue visitation or follow through on his case plan, and that G.M.'s "frequent cancellations of visitation, lack of engagement on his Case Plan, and ongoing concerning behaviors" meant that J.M.'s safety and stability would be best preserved by termination. Thus, the district court considered its findings in the previous petition and identified record evidence tending to show that the facts underlying those earlier findings no longer existed. District courts must evaluate the conditions as they exist at the time of the trial. *In re Welfare of Chosa*, 290 N.W.2d 766, 769 (Minn. 1980) ("[E]vidence relating to termination must address conditions that exist at the time of the hearing . . ."). The district court here properly focused on the facts as they existed in November 2018, rather than the facts as they existed at the time of the hearing on the first petition.

Case Plan

G.M. next argues that the district court abused its discretion by relying on his failure to complete the case plan as evidence that termination is in J.M.'s best interests. He claims that the evidence shows that he complied with the case-plan requirements to the best of his ability and blames his noncompliance on barriers to compliance and inflexibility on the part of the organizations involved. "Determination of a child's best interests is 'generally not susceptible to an appellate court's global review of a record,' because of the credibility determinations involved, and because of the multiple factors that must be weighed." *In re Welfare of Children of M.A.H.*, 839 N.W.2d 730, 744 (Minn. App. 2013) (quoting *In re Tanghe*, 672 N.W.2d 623, 625 (Minn. App. 2003)). Nonetheless, G.M. asks us to review

the record as a whole and determine that the district court abused its discretion by determining that termination is in J.M.'s best interests.

G.M. begins by arguing that his failure to attend his scheduled supervised visits does not reflect a lack of desire to be a parent to J.M. but rather was a result of two factors: his inability to make travel arrangements except on weekends, and the uncooperativeness of M.D.L. and BCHS. G.M. asserts that, had visitation been scheduled on weekends, he would have attended. But G.M. made this argument to the district court, which rejected it, finding that G.M. never told his BCHS social workers that his schedule was not being accommodated and had not sought to restore visitation after Positive Connections terminated his visitation schedule.² Those findings are supported by the record. The district court did not abuse its discretion by relying on them to conclude that G.M. had failed to demonstrate a commitment to parenting, thus minimizing his interest in maintaining the relationship. *See In re Welfare of A.J.C.*, 556 N.W.2d 616, 620 (Minn. App. 1996) (stating that a parent's interest may not weigh against termination when the parent engaged in visitation only "sporadically"), *review denied* (Minn. Mar. 18, 1997). Nor did it abuse its discretion by concluding that G.M.'s repeated failure to visit J.M. dissipated the bond between them, reducing J.M.'s interest in preserving the parent-child relationship. *See A.M.C.*, 920 N.W.2d at 657-58 (holding that a parent's inconsistent visits, which rendered

² Additionally, though not noted by the district court, one of the visitation dates was scheduled for August 26, 2018—a Sunday. *See Hesse v. Hesse*, 778 N.W.2d 98, 103 (Minn. App. 2009) ("A court may take judicial notice of the course of the calendar."); *In re Block*, 727 N.W.2d 166, 176 (Minn. App. 2007) ("An appellate court may take judicial notice of a fact for the first time on appeal." (quotation omitted)). G.M. cancelled that appointment as well, even though it was on a weekend; his brief does not address this fact.

the parent “unavailable” to the child, supported the district court’s finding that termination was in the child’s best interests).

G.M. also attempts to excuse his lack of progress on the two evaluations required by the case plan. He points out that the social worker on his case changed and that a new guardian ad litem was assigned to J.M., but it is not apparent why these facts would have impacted his ability to complete either evaluation and G.M. does not explain. G.M. gives no additional reason why he failed to make any progress on the capacity-to-parent evaluation until November 6, nearly two months after his deadline to complete that evaluation. Instead, he argues that, because he belatedly completed part of the evaluation, the district court should not have treated his failure to timely complete the whole evaluation as evidence of his lack of commitment to the parent-child relationship and lack of capacity to provide stability. But, even though G.M. eventually made some progress, the district court considered the fact that he did not attend any appointments until after BCHS had petitioned to terminate his parental rights. The district court did not abuse its discretion in concluding that taking more than seven months to schedule and attend two appointments shows a lack of interest in maintaining the parent-child relationship.

G.M.’s explanation for why he failed to complete his psychosexual evaluation also does not show that the district court’s reliance on that failure was an abuse of discretion. G.M. notes that he was required to pay for the psychosexual evaluation and argues that, because BCHS initially offered financial assistance but later decided not to provide such assistance, his failure to complete the psychosexual evaluation should not be held against him. Just as with G.M.’s other arguments, however, the district court addressed the facts

on which he relies. The district court considered that G.M. would have been required to pay for the psychosexual evaluation but also noted that he did not ask for financial assistance until November 2018, after the deadline to complete the evaluation and after BCHS had already petitioned for termination. G.M.'s explanation for why he declined financial assistance but then later requested it also does not strongly support his argument. He says that when he declined assistance, he was in the highest-paying job of his career, one that he left in August 2018. But this does not explain why he failed to complete the psychosexual evaluation before August or why he did not ask for assistance in September and October. G.M. offers no reason for the two missed appointments in July, to which his argument about his loss of income would not apply. The district court did not abuse its discretion when it relied on G.M.'s failure to complete the psychosexual evaluation as evidence that termination is in J.M.'s best interests.

In sum, the district court's reliance on G.M.'s failure to complete his case plan as evidence that G.M. had not made reunification with J.M. a priority, that the bond between him and the child had diminished, and that terminating G.M.'s parental rights would promote J.M.'s stability and safety was not an abuse of discretion.

Recent Sexual Conduct

Finally, G.M. argues that his recent sexual conduct does not support the conclusion that termination is in J.M.'s best interests because he has not had any recent convictions and because the recent investigations and charge against him do not involve minors. G.M. appears to implicitly argue that, because the recent allegations against him do not involve minors, they do not tend to show that termination is in J.M.'s best interests because they

do not indicate that he is likely to sexually abuse the child. But his earlier conviction nevertheless remains a statutory basis for terminating parental rights, and G.M.'s recent conduct—touching a woman's breast without her consent and engaging in several sexual encounters with a woman who was under the influence of methamphetamine—tends to show that he has not addressed his behavior. In *In re Welfare of Child of K.L.W.*, this court affirmed a district court's conclusion that termination was in a child's best interests based, in part, on the parent's conviction for sexual contact with a person under the age of 13 that had occurred between 11 and 7 years before termination and the parent's failure to make adequate progress in sex-offender treatment, without discussing whether those facts showed a likelihood of abuse against the child. 924 N.W.2d 649, 657 (Minn. App. 2019), *review denied* (Minn. Mar. 8, 2019). Likewise, here, the district court was within its discretion to rely on similar facts when concluding that terminating G.M.'s parental rights would promote J.M.'s safety and stability.

None of G.M.'s arguments persuades us that the district court abused its discretion by concluding that termination of his parental rights is in J.M.'s best interests. G.M. is not entitled to additional time to complete a case plan. We affirm the termination of G.M.'s parental rights.

Affirmed.