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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0174**

In re the Matter of the Welfare of the Child of:
A. P. (deceased) and P. K., Parents.

**Filed June 24, 2019
Affirmed
Peterson, Judge***

St. Louis County District Court
File No. 69DU-JV-18-483

Adrienne Pearson, Pearson Law L.L.C., Duluth, Minnesota (for appellant J.K.K. paternal grandmother)

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Jessica L. Sterle, Sterle Law, Duluth, Minnesota (for respondent R.A.G. maternal grandmother)

Bill L. Thompson, Duluth, Minnesota (for respondent P.K. father)

Bad River Band of Lake Superior Chippewa c/o Gina Secord, Tribal Representative, Odanah, Wisconsin

Rachel Plachta, Cloquet, Minnesota (guardian ad litem)

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

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

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a district court order that transfers permanent legal and physical custody of a child from the child's father to the child's maternal grandmother, the child's paternal grandmother argues that the district court abused its discretion in concluding that transferring custody of the child to the maternal grandmother is in the child's best interests. We affirm.

FACTS

A.K. was born in 2009 and is the daughter of A.P. (mother) and P.K. (father). In July 2017, mother died. Soon after, respondent St. Louis County Public Health and Human Services Department (the county) filed a petition alleging that A.K. was a Child in Need of Protection or Services (CHIPS) and removed A.K. from father's custody. At that time, father was living with his mother, appellant J.K.K. At an emergency protective-care hearing in late July 2017, the district court awarded temporary custody of A.K. to the county for appropriate out-of-home placement. The county placed A.K. with A.K.'s maternal great aunt, who provided foster care for A.K. until June 2018.

Father denied that A.K. was in need of protection or services. A trial on the CHIPS petition was held in October 2017, and the district court adjudicated A.K. in need of protection or services. The district court allowed father to pursue a reunification plan that required him to comply with several conditions.

After A.K. was removed from father's care, a licensed therapist provided individual therapy for A.K. and family therapy for A.K. and father. In February 2018, the therapist

terminated family therapy involving father because father became dysregulated and A.K. was taking the position of needing to calm father and make him feel better, which caused additional stress for A.K. and was counterproductive to her therapy. Also in February 2018, the county suspended A.K.'s visits with father because of father's behavior in family therapy and his refusal to be drug tested and because father was telling A.K. that she had been abducted by the county and by mother's family.

In June 2018, after A.K. finished her school year, the county transferred A.K.'s care from A.K.'s great aunt to A.K.'s maternal grandmother, respondent R.A.G. (maternal grandmother), who is an enrolled member of the Bad River Band of Lake Superior Chippewa. A.K. is eligible for enrollment in the tribe.

In July 2018, the county filed a petition to transfer permanent legal and physical custody of A.K. from father to maternal grandmother. Both maternal grandmother and appellant paternal grandmother moved to intervene, and, without objection, both were made parties. Appellant filed a competing petition to transfer permanent legal and physical custody of A.K. from father to her.

The case proceeded to trial in October 2018. Father testified that he agreed to a transfer of custody and that he preferred that custody be transferred to his mother, but he understood that the district court would make the decision regarding custody. After hearing testimony from several additional witnesses, the district court concluded that A.K. should not be returned to father's home and that it is in the best interests of A.K. that legal and physical custody be transferred to maternal grandmother. The district court deemed the transfer of custody from father to be a voluntary transfer, granted the county's petition,

denied appellant's petition, and transferred permanent sole legal and sole physical custody of A.K. to maternal grandmother, with visitation with father at the reasonable discretion of maternal grandmother, in consultation with A.K.'s therapists and mental-health providers. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred “when it found that clear and convincing evidence supports the conclusion that it is in the best interests of [A.K.] that legal and physical custody of [A.K.] be transferred to maternal grandmother under Minnesota Statute § 260C.212, subd. 2(b).” In appeals from a permanent placement order involving the transfer of legal custody, this court “review[s] the juvenile court’s factual findings for clear error and its finding of a statutory basis for the order for abuse of discretion.” *In re Welfare of Child of D.L.D.*, 865 N.W.2d 315, 321 (Minn. App. 2015), *review denied* (Minn. July 20, 2015).

This court is “not to weigh the evidence as if trying the matter de novo[;] [r]ather, a reviewing court determines from an examination of the record if the evidence as a whole sustains the trial court’s findings.” *Haas v. Harris*, 347 N.W.2d 838, 839 (Minn. App. 1984). “We do not disturb findings of fact based on conflicting evidence unless manifestly and palpably contrary to the evidence as a whole.” *In re S.G.*, 828 N.W.2d 118, 127 (Minn. 2013) (quotation omitted). “That the record might support findings other than those made by the trial court does not show that the court’s findings are defective.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

The policy of [Minnesota] is to ensure that the best interests of children in foster care, who experience transfer of permanent legal and physical custody to a relative under section 260C.515, subdivision 4, . . . are met by requiring individualized determinations under section 260C.212, subdivision 2, paragraph (b), of the needs of the child and of how the selected home will serve the needs of the child.

Minn. Stat. § 260C.193, subd. 3(a) (2018).

In determining the needs of a child, the agency shall consider:

- (1) the child's current functioning and behaviors;
- (2) the medical needs of the child;
- (3) the educational needs of the child;
- (4) the developmental needs of the child;
- (5) the child's history and past experience;
- (6) the child's religious and cultural needs;
- (7) the child's connection with a community, school, and faith community;
- (8) the child's interests and talents;
- (9) the child's relationship to current caretakers, parents, siblings, and relatives;
- (10) the reasonable preference of the child, if the court, or the child-placing agency in the case of a voluntary placement, deems the child to be of sufficient age to express preferences; and
- (11) for an Indian child, the best interests of an Indian child as defined in section 260.755, subdivision 2a.

Minn. Stat. § 260C.212, subd. 2(b) (2018). The court must also review “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) (2018). The standard of proof for a juvenile protection trial is clear and convincing evidence. Minn. R. Juv. Prot. P. 39.04, subd. 1.

Appellant argues that the district court erroneously analyzed factor 1 and factors 4 through 11, listed above,¹ and, as a result, the district court's best-interests determination is an abuse of discretion. She contends that the district court ignored important evidence that she presented to support transfer of custody to her and that "[t]he factual findings do not support a transfer of custody of [A.K.] to [maternal grandmother] as they are manifestly contrary to the weight of the evidence."

Factor 1: The child's current functioning and behaviors

The district court determined that A.K.'s current functioning and behaviors support a transfer to maternal grandmother because A.K.'s functioning and behaviors have improved since she was transferred to the maternal family. The district court found that, under the care of her paternal family, A.K. lived in a chaotic environment and had to act like a parent. With maternal grandmother, A.K. lives in a "consistent, stable, and supportive" environment, no longer bullies peers, feels supported, and feels safe to love her entire family.

Appellant argues that she presented witnesses who testified that A.K. did not have behavioral or functioning issues before she was removed from the paternal family and that A.K.'s functioning is worse than it was when she was removed. She contends that the district court abused its discretion by disregarding her evidence about A.K.'s functioning before she was placed with the maternal family.

¹ Although appellant states in her appellate brief that she challenges the best-interests factors listed in Minn. Stat. § 260C.212, subd. 2(b)(1) and (4)-(11), she has presented no argument regarding the district court's consideration of factors 6 and 8, and we will not separately address those two factors.

The district court's findings regarding A.K.'s improvement in functioning and behaviors are supported by the testimony of Lindsey Saukko, who is a therapist with Fond Du Lac Human Services, and Devon Maycock, who is a therapist at the Northwood Day Treatment Program, which A.K. participated in at her school. Saukko testified that she began treating A.K. in August 2017, after A.K. was removed from father's custody, and initially diagnosed A.K. with Posttraumatic Stress Disorder (PTSD). A.K. also suffered from traumatic grief and trauma symptoms, including hypervigilance, regular nightmares, angry outbursts, emotional dysregulation, and avoidance.

Saukko testified that, before visitation and family therapy with father were suspended, A.K. did not show much progress on her treatment goals, but after family therapy and visitation with father ended, A.K. began to show progress. Saukko testified that by the end of the 2017-18 school year, A.K. had no oppositional or combative language in school, fewer peer relationship problems, and was calmer. Saukko also testified that A.K.'s mental-health symptoms continued to improve when she transitioned from maternal great aunt's home to maternal grandmother's home, and that by August 2018, A.K. no longer had the symptoms to warrant a PTSD diagnosis.

Maycock testified that A.K. entered the Northwood program in February 2018 because she was struggling at school with emotional regulation, peer relationships, verbal aggression, and anxiety. A.K. has been making progress on her treatment goals, and her behavior in school is better. When visitation with father stopped in February 2018, A.K. did not regress, and her anxiety improved.

Appellant's argument regarding this factor urges this court to focus on A.K.'s functioning and behaviors before mother died, instead of A.K.'s current functioning and behaviors. While it may have been true that A.K. did not suffer from mental-health or behavioral problems before mother died (which is not clear from the record), the record shows that she suffered from these problems after mother died and supports the district court's finding that when visitation with the paternal family was suspended, A.K. showed improvement in her functioning and behaviors.

Factor 4: The developmental needs of the child

The district court determined that this factor weighs in favor of transfer to maternal grandmother because maternal grandmother provides the type of environment that fulfills A.K.'s developmental needs and appellant would not. The district court identified A.K.'s developmental needs as including living in an environment where she feels safe to express her feelings and does not have to choose between family members, feels safe loving all the people in her life, and where she is allowed to go to therapy and programs that help her develop as an individual.

Appellant argues that the district court abused its discretion in finding that this factor favors transfer of custody to maternal grandmother because appellant's witnesses testified that she had a significant and loving relationship with A.K. and provided a safe home for A.K. when mother and father did not. Appellant asserts that she spent significant time with A.K. in the past and that the evidence demonstrates that she would continue to support services for A.K.'s mental health and contact with her extended family. She argues that the district court erroneously found that she would not provide the environment that would

support A.K.'s developmental needs and that the county's witnesses could not credibly opine about whether she would provide for A.K.'s developmental needs because they did not learn about her home.

The district court's findings regarding A.K.'s developmental needs and maternal grandmother's ability to provide for them are supported by evidence in the record and are not clearly erroneous. Saukko testified that it was important that A.K. live in a "safe environment for her to express her feelings, an environment that doesn't make her feel like she has to choose," because A.K. had expressed to her in therapy that she wanted to feel safe loving all the people in her life. As far as Saukko could tell from A.K.'s therapy, maternal grandmother provided the environment and caretaking qualities that A.K. needed. Saukko spoke with maternal grandmother and found her to be cooperative, insightful to A.K.'s needs, and open to A.K. needing continuing services.

Although Saukko had never met appellant, A.K. expressed positive feelings about appellant, and Saukko had no concern that interaction with appellant would be harmful to A.K. Saukko, however, recommended that A.K. not be transitioned again because it would increase her stress level and have a negative effect on her mental-health symptoms.

Maycock testified that maternal grandmother has worked well with the Northwood program, understands A.K.'s needs, and is supportive of the services provided to A.K. She testified that maternal grandmother provides predictability, structure, and a loving and safe environment, which A.K. needs. She was concerned that a change in placement could affect A.K.'s anxiety and testified that it was important that whoever has custody of A.K. supports her participation in therapy.

Maternal great aunt testified that when A.K. was first placed with her after mother died, she did not have concerns about A.K.'s interactions with appellant and father. But maternal great aunt supervised phone calls between A.K. and father, and father would frequently say negative things about mother's family and tell A.K. that she was kidnapped. A.K. sometimes pushed back against father and told him that mother's relatives were not bad people. Maternal great aunt would end the calls when the conversation took this turn. Maternal great aunt also testified that A.K. was initially afraid of maternal grandmother because of things that father told her about maternal grandmother, but maternal great aunt spoke with A.K. about the issue, and A.K. became more open, accepting, and comfortable in maternal grandmother's care. Maternal great aunt testified that, given father's statements to A.K., she did not believe that father's family would involve mother's family with A.K.'s life if A.K. was placed with appellant.

The record supports the district court's finding that appellant has "demonstrated her negative feelings towards the maternal grandmother and [maternal great aunt], not only outside the courtroom, but in front of this court." There is also a significant amount of evidence that appellant and father made statements to A.K. or in A.K.'s presence that suggested that A.K. should not express love for the maternal family and that A.K. needed to choose between the families. Appellant's argument that the county's witnesses could not credibly testify about her ability to provide for A.K.'s developmental needs is unfounded, as the witnesses had a basis for their opinions about appellant's attitude toward the maternal family and the county. The district court's finding that appellant has stated that A.K. does not need some of the services that she receives also supports the district

court's conclusion that maternal grandmother is better suited than appellant to meet A.K.'s developmental needs.

Factor 5: A.K.'s history and past experience

The district court determined that this factor weighs in favor of transfer to maternal grandmother because A.K.'s "life was chaotic, disrupted, and traumatic until she was removed from the home and placed with [maternal great aunt] in the summer of 2017." The district court described A.K.'s life before being transferred to great aunt's care as "sad depictions of a childhood." The district court found that A.K. has been given her childhood back after being placed with mother's relatives; she no longer has to act as a parent and is thriving under maternal grandmother's care following the suspension of visitation with father.

Appellant argues that the district court did not consider A.K.'s relationship with her in determining that this factor weighs in favor of transfer to maternal grandmother. She cites the testimony of her witnesses that she provided a safe place for A.K. and that she provided stability for A.K. whenever possible. She argues that she can be angry with social services and, at the same time, be a good caretaker, and that the county's witnesses ignored the stable environment that she provided for A.K.

The district court's findings are supported by the evidence. The district court took judicial notice of the CHIPS order, in which the CHIPS court found that there were reports made to the county regarding A.K. that involved neglect, abuse, abandonment, domestic violence, and lack of housing. The CHIPS court also described drug use and stated that father overdosed on methamphetamine in April 2017.

There is evidence in the record that could support a finding that appellant has been a good caretaker for A.K. in the past. But, appellant's interpretation of the court's findings regarding this factor focuses on her past care of A.K. and not on the needs that A.K. has developed as a result of her past experiences. The district court's findings about A.K.'s chaotic life before being removed from father's care are not clearly erroneous. Nor is the district court's finding that A.K. no longer acts as a parent. Significantly, the district court found that A.K.'s improvement is attributable to the loving and supportive environment that mother's relatives have provided and the suspension of visits with father. The district court considered A.K.'s history and past experiences and compared them to her current, stable environment. The district court did not abuse its discretion in considering this factor.

Factor 7: The child's connection with a community, school, and faith community

The district court concluded that this factor weighs in favor of transfer to maternal grandmother. It determined that both grandmothers live outside the school district where A.K. attended school and that a decision will need to be made about where A.K. will go to school. The district court noted that it will be important for A.K. to receive services wherever she goes to school and that, in the past, appellant, who did not testify about where A.K. will go to school, has questioned A.K.'s need for services. Consequently, the district court concluded that this factor weighs in favor of transfer to maternal grandmother because she plans to make sure that, wherever A.K. goes to school, she will get the services that she needs.

Appellant acknowledges the evidence presented about A.K.'s positive connection to mother's extended family and argues that the district court did not discuss "the

community [A.K.] knows best, the community that revolves around [appellant's] home.” Appellant essentially asks this court to reverse the district court’s conclusion on this factor because A.K.’s connection to her paternal family was more significant than her connection to her maternal family. The district court instead decided that this factor weighs in favor of maternal grandmother because she plans to make sure that A.K. receives services at the next school that she attends and appellant did not testify about that issue. Appellant does not specifically challenge this finding. Furthermore, the district court found that maternal grandmother would facilitate a relationship with father’s relatives but that father’s relatives would not facilitate a relationship with mother’s relatives. The district court did not abuse its discretion in determining that this factor weighs in favor of maternal grandmother.

Factor 9: The child’s relationship to current caretakers, parents, siblings, and relatives

The district court concluded that this factor weighs in favor of maternal grandmother because of father’s and appellant’s behavior and statements around A.K. The district court found:

While there is clearly a strong bond between the child and the father and between the child and the paternal grandmother, until the paternal relatives can demonstrate insight into the impact of their statements and actions on the child and place her best interest ahead of their negative attitudes towards her maternal family, these relationships will continue to be strained and difficult for the child.

Appellant argues that the district court disregarded the good relationship that A.K. shared with her. She contends that the district court focused on her inability to separate from father’s issues despite her testimony that father needs help and that father cannot live

with her. She argues that the district court could not rely on the county's professional witnesses to testify about her because their contact with her was limited and because the professionals assumed that her anger with social services shows her inability to care for a child even though they are separate issues. She also argues that the district court did not give sufficient weight to A.K.'s statements to her therapist that she wanted to see appellant but spoke neutrally about maternal grandmother's home.

Appellant's argument reflects a misunderstanding of the district court's finding—the district court found that father's and appellant's behavior and disparaging statements to A.K. about mother's relatives was detrimental to their relationships with A.K., not that appellant's anger rendered her unable to care for a child. The district court specifically acknowledged appellant's love and devotion to A.K., but it also recognized the strain and difficulty that appellant's statements about mother's relatives caused for A.K.

Factor 10: The reasonable preference of the child, if the court, or the child-placing agency in the case of a voluntary placement, deems the child to be of sufficient age to express preferences

The district court ruled before trial that A.K. was not competent to testify, citing her age and maturity, and that the court did not want to place her in a position to choose her placement. When addressing this factor in its order following trial, the district court said only that it “does not deem the child, who is presently 9 years of age, to be of sufficient age or maturity to express a preference.”

Appellant argues that the district court abused its discretion because it referred only to A.K.'s age when finding that A.K. lacked sufficient maturity to express preferences.

Appellant contends that the district court did not make necessary findings regarding this factor.

This court has affirmed district court findings that children younger than nine are of a sufficient age and maturity to express preferences. *See e.g., Mowers v. Mowers*, 406 N.W.2d 60, 64 (Minn. App. 1987) (child seven years and ten months old at the time of trial was competent). But a child's emotional state and confusion may render a discussion with a child about the child's custodial preference to be fruitless. *See Pekarek v. Pekarek*, 384 N.W.2d 493, 498 (Minn. App. 1986) (stating that "[t]he children are all such an age that they could express a custodial preference, since at the time of trial, the youngest was eight years old. The trial court determined, however, that the children were in such a confused and anxious state that a discussion with them about their custodial preference would be fruitless").

The district court's reference in its order to only A.K.'s age is arguably too limited to explain why A.K. was not of a sufficient age or maturity to express preferences. After trial, however, appellant moved to reopen the proceedings to take testimony from A.K. The district court denied appellant's motion and explained in a memorandum that it "does not find that the child is competent to testify based upon her age, the trauma she has experienced, the statements made to her by her paternal family, and her own statements that she does not want to choose. These findings are supported by her mental health providers."

In denying appellant's post-trial motion, the district court made sufficient findings to explain why it found A.K. to not be of a sufficient age or maturity to express preferences.

The trial testimony of A.K.’s mental-health providers established that it was important for A.K.’s mental health that she not be asked to choose between family members. The district court did not abuse its discretion in finding that A.K. was not of sufficient age or maturity to express her preferences at the time of trial.

Factor 11: The best interests of an Indian child, as defined by Minn. Stat. § 260.755, subd. 2a

Appellant argues that the district court abused its discretion in considering this factor because A.K.’s tribe did not participate in the trial and the court was not in a position to determine what was in the best interests of A.K.’s tribe.

“Best interests of an Indian child” means compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child’s family. The best interests of an Indian child support the child’s sense of belonging to family, extended family, and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child’s tribe.

Minn. Stat. § 260.755, subd. 2a (2018).

The district court concluded that this factor weighs in favor of transfer to maternal grandmother because maternal grandmother allowed A.K. to become connected to her maternal family and to participate in activities such as powwows and jingle dress dancing. The district court found that these activities give A.K. a “good sense and pride in her cultural background” and that the paternal family did not impart this sense onto A.K. There is evidence in the record, however, that appellant has attended about six powwows with A.K.

Even though A.K.'s tribe did not participate in the trial, there is sufficient evidence in the record to support the district court's determination that transfer to maternal grandmother is in the best interests of A.K. as an Indian child. Maternal grandmother testified that she was connected to the Native American community of Duluth and that she valued and supported A.K.'s participation in that community. Her testimony showed that she supports A.K.'s sense of belonging to her extended family and tribe.

A.K.'s best interests

The factors listed in Minn. Stat. § 260C.212, subd. 2(b) guide a district court in determining the ultimate question of whether permanent placement of a child with a particular person is in the child's best interests. The district court considered the conflicting evidence regarding the factors, and we conclude that the record as a whole sustains the district court's findings. Because we do not weigh the evidence and make our own findings and the district court conducted a reasoned analysis of each factor, we also conclude that the district court did not abuse its discretion in determining that transfer of permanent sole legal and sole physical custody of A.K. to maternal grandmother is in A.K.'s best interests.

Affirmed.