STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2150

In the Matter of the Welfare of the
Children of: T. M. A. and E. L. L., Parents.

Filed June 23, 2009
Affirmed
Halbrooks, Judge

Itasca County District Court
File No. 31-JV-08-2077

Erica Austad, P.O. Box 130, Grand Rapids, MN 55744 (for appellant T.M.A.)

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Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.*

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

HALBROOKS, Judge

Appellant challenges the district court order denying his motion for a new trial following the termination of his parental rights. Appellant contends that the district court

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

abused its discretion by admitting certain evidence, by concluding that there are sufficient grounds for terminating his parental rights, in analyzing the best interests of the children, and by not transferring custody of the children to his parents. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

E.L.L. is the mother of two children: T.R.A., born June 13, 2007, and M.R.E.A., born June 29, 2008. Appellant T.M.A., having signed a declaration-of-parentage form that was filed with the Minnesota Department of Health, is the presumed father of T.R.A. Appellant is the alleged father of M.R.E.A.

On June 13, 2007, while E.L.L. was in active labor before the delivery of T.R.A., she provided a urine sample that tested positive for methadone. E.L.L. did not have a prescription for methadone. Appellant was present at the delivery and was very disruptive. Hospital security and law enforcement were called, and appellant had to be removed from the premises. Two days after T.R.A. was born, Itasca County Health and Human Services (ICHHS) petitioned the district court to find T.R.A. to be a child in need of protective services (CHIPS). The district court awarded temporary custody of T.R.A. to ICHHS for out-of-home placement.

At the CHIPS hearing, appellant admitted that he had chemical-dependency issues that he needed to address. He agreed to complete a chemical-dependency assessment and to follow all recommendations, abstain from possessing or using controlled substances except for prescription medication, engage in approved visitation, remain law abiding, and comply with all the terms of his probation. E.L.L. admitted to using controlled

substances while she was pregnant with T.R.A. and acknowledged that she too had chemical-dependency issues.

Appellant was ordered to complete therapy. Appellant subsequently missed ten scheduled therapy sessions; and his therapist, Catherine A. McDonald, reported that while appellant had made some progress, he needed more time to resolve his issues. Appellant also participated in several treatment programs following T.R.A.'s temporary placement with ICHHS. Appellant's progress in many of these programs was poor. In September 2007, appellant was suspended from the Recovery Specialist program due to aggressive and intimidating behavior toward the staff. Appellant was suspended in August 2007 and discharged in October 2007 from an out-patient program at Rapids Counseling for poor progress. In January 2008, after successfully completing chemical-dependency treatment at the Riverplace in-patient program, appellant reenrolled at Rapids Counseling but again missed meetings and was disruptive during group sessions.

In June 2005, appellant was placed on probation for the felony offense of receiving stolen property. As a condition of probation, he was ordered to abstain from the use of alcohol and drugs. Following a positive test for methadone in June 2007, appellant admitted to violating his probation; appellant was ordered to serve 30 days in jail. On October 12, 2007, while in the Recovery Specialist chemical-dependency treatment program, appellant tested positive for morphine. Appellant again admitted to violating his probation and was ordered to serve 45 days in jail. On November 29 and 30, 2007, appellant was directed to provide a urine sample for a random drug test. Although he was given multiple opportunities to provide a sample, appellant did not do

so. Appellant was arrested for failing to provide a sample and admitted to violating his probation. He was ordered to serve 30 days in jail but was allowed early release if he entered an in-patient chemical-dependency treatment program. Appellant was released from jail on December 7, 2007, and entered the in-patient chemical-dependency treatment program at Riverplace. On April 29, 2008, and May 3, 2008, appellant's urine tested positive for oxycodone. When asked to provide an additional sample, appellant avoided contact with the treatment-program specialist. A warrant was subsequently issued. Appellant's probation was revoked, and the sentence for his felony offense of receiving stolen property was executed.

On June 18, 2008, ICHHS petitioned to terminate both appellant's and E.L.L.'s parental rights under Minn. Stat. § 260.301C, subd. 1(b)(2), (5) (2008). M.R.E.A. was born on June 29, 2008. The following day, ICHHS filed an amended petition to include M.R.E.A. in the petition to terminate parental rights.

At the start of the termination-of-parental-rights (TPR) trial, E.L.L. admitted the allegations in the petition and voluntarily terminated her parental rights. Appellant petitioned to transfer permanent legal and physical custody of the children to his parents. At the close of evidence, the district court ordered the termination of appellant's parental rights, determining that, based on the potential for stability, it was in the children's best interests that appellant's parental rights be terminated rather than transferring custody of the children to appellant's parents.

Appellant moved for a new trial on several grounds: (1) the district court abused its discretion by some of its evidentiary rulings and by allowing the guardian ad litem

(GAL) to testify in rebuttal; (2) there was insufficient evidence to terminate his parental rights; (3) the district court failed to consider the best interests of the children; and (4) the district court erred by not transferring legal custody of the children to appellant's parents. The district court denied appellant's motion for a new trial. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by admitting certain records under the business-records exception to the hearsay rule and by allowing the GAL to testify in rebuttal. "Evidentiary rulings . . . are committed to the sound discretion of the [district] court and those rulings will only be reversed when that discretion has been clearly abused." *Pederson v. United Servs. Auto. Ass'n*, 383 N.W.2d 427, 430 (Minn. App. 1986). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997).

A. Business records

"Under Minn. R. Evid. 803(6), reports of social workers and psychologists are admissible as business records." *In re Welfare of J.K.*, 374 N.W.2d 463, 467 (Minn. App. 1985) (citing *In re Welfare of Brown*, 296 N.W.2d 430, 435 (Minn. 1980), *amended on denial of reh'g* (Minn. Sept. 30, 1980)), *review denied* (Minn. Nov. 25, 1985).

> Business records are admissible under the business-records exception if the custodian or another qualified witness can testify that the records were (1) made by a person with personal knowledge of the matters recorded and a business duty to report accurately or from information transmitted by a

> person with such knowledge, (2) made at or near the time of the recorded event, (3) kept in the course of a regularly conducted business activity, and (4) made as part of the regular practice of that business activity.

In re Child of Simon, 662 N.W.2d 155, 160 (Minn. App. 2003) (citing Minn. R. Evid. 803(6)). "[T]he phrase 'other qualified witness' should be interpreted broadly and the witness need only understand the system involved." *A & L Coating Specialties Corp. v. Meyers Printing Co.*, 374 N.W.2d 202, 204 (Minn. App. 1985) (citing *Nat'l Tea Co. v. Tyler Refrigeration Co.*, 339 N.W.2d 59, 61 (Minn. 1983)). "[I]t is not necessary that the person who prepared the reports testify to their contents." *Id.* (citing *Nat'l Tea*, 339 N.W.2d at 62).

Appellant contends that the chronology reports, risk assessments, and case notes from Rapids Counseling were inadmissible due to lack of foundation. This argument is meritless. Sarah Swenson, the county social worker assigned to the case, provided sufficient foundation for the chronology reports. Swenson identified her chronology reports or "case notes," and testified that they are compiled in the normal course of her work and that she reviews them and relies on them to make decisions regarding the children. Mary Ann Butts, appellant's chemical-dependency counselor and director of Rapids Counseling, identified the case notes from that facility and testified that they are written by the counselors in the course of their work with clients. The district court did not clearly abuse its discretion in admitting these documents.

Appellant has also cited a number of other documents admitted into evidence, but has provided no argument as to why these documents were inadmissible. Accordingly,

we do not address these other documents. *See State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issue in absence of adequate briefing).

Appellant also maintains that the chronology reports, risk assessments, social worker reports, routing transmittals,[1] and chemical-dependency case notes were inadmissible under the business-records exception because they were prepared for the purpose of litigation. *See* Minn. R. Evid. 803(6). "In determining whether a document was prepared for litigation, a district court must consider when and by whom the report was made and the purpose of the report." *Simon*, 662 N.W.2d at 161. In *Simon*, this court concluded that a letter written five days before the TPR hearing for the purposes of updating the district court on the progress of the child's therapy and recommending a placement option for the child was written for the purpose of litigation. *Id.* at 159, 161; *but see In re Welfare of W.R.*, 379 N.W.2d 544, 549–50 (Minn. App. 1985) (admitting notes from a phone conversation prepared by a social worker under the business-records exception), *review denied* (Minn. Feb. 19, 1986).

Appellant concedes that all of the documents were prepared for the purpose of facilitating his reunification with the children and not for the purpose of terminating his parental rights. Because none of the documents was prepared for the purpose of terminating appellant's parental rights, they cannot fairly be characterized as having been prepared for the purpose of this litigation. Under appellant's argument, no social-work

[1] The routing transmittals are the reports from the social worker to the county attorney regarding the status of the child-protection matter.

record would ever be admissible in a TPR trial. But this court has concluded that a district court acted within its discretion by admitting social-work reports into evidence in a TPR trial. *W.R.*, 379 N.W.2d at 549–50. Therefore, appellant's argument that the exhibits were inadmissible because they were prepared for the purpose of litigation is meritless.

Appellant also asserts that many of the documents were inadmissible because they contained opinions on the ultimate issue before the district court. "[A] business record containing an opinion on an ultimate issue is admissible only if the witness offering the opinion is available to permit the fact-finder to test the weight and credibility of the opinion through cross-examination." *Simon*, 662 N.W.2d at 161. Appellant claims that "[a]ll of the reports specifically gave opinions on the ultimate issue of whether [appellant] can successfully parent his children." Appellant has provided no citation or detail as to this argument. But even if all of the documents contained an opinion on whether appellant can successfully parent his children, this is not the ultimate issue. The ultimate issue is whether appellant has actually neglected his duties or failed to correct the conditions that led to the out-of-home placement. *See* Minn. Stat. § 260C.301, subd. 1(b)(2), (5).

Appellant next argues that the "routing transmittals contained essentially the same information in the CHIPS and termination petitions against" appellant. While one of the routing transmittals does contain an opinion "that a termination of parental rights is in the best interest of the child," it was written by Swenson, who later testified. Appellant's argument seems to be that the facts contained in the routing transmittals are duplicative of

those in the petition. But the prohibition of opinions on the ultimate issue does not prohibit the admission of underlying facts. Therefore, none of the documents was inadmissible on the ground that it improperly included an opinion on the ultimate issue.

Finally, appellant maintains that the business records were inadmissible because admitting these records placed a burden on him to refute the documents and nullified his guarantee of due process. But "[b]usiness records are presumed to be reliable . . . ." *Simon*, 662 N.W.2d at 160. We find no merit in this argument.

B. GAL

Appellant argues that the district court abused its discretion by allowing the GAL to testify in rebuttal because it was improper rebuttal testimony, it was cumulative, and it served only to "bolster the credibility" of ICHHS's witnesses. The question of proper rebuttal testimony "rests almost wholly in the discretion of the [district] court" and will not be reversed absent an abuse of discretion. *Briggs v. Chicago Great W. Ry. Co.*, 248 Minn. 418, 427, 80 N.W.2d 625, 633 (1957).

Generally, "[r]ebuttal evidence is that which explains, contradicts, or refutes the defendant's evidence." *Molkenbur v. Hart*, 411 N.W.2d 249, 252 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987). The mere fact that testimony should have been presented in a party's case-in-chief will not preclude its admission during rebuttal if such testimony is proper in both contexts. *Farmers Union Grain Terminal Ass'n v. Indus. Elec. Co.*, 365 N.W.2d 275, 277 (Minn. App. 1985), *review denied* (Minn. June 14, 1985). For example, the supreme court has allowed a witness to be recalled in rebuttal to clarify the content of his conversation with the defendant that he had testified about on

direct examination after the defendant gave a different version. *State v. Turnbull*, 267 Minn. 428, 434, 127 N.W.2d 157, 161–62 (1964). But rebuttal evidence "does not permit mere repetition of evidence in chief . . . , nor simple confirmation of the original case, the purpose being to cut down the case on the part of the defense and not to confirm that of the prosecution." *Mathews v. Chicago & N.W. Ry. Co.*, 162 Minn. 313, 318, 202 N.W. 896, 898–99 (1925) (quotations omitted). Therefore, "[i]t is not good practice to permit witnesses merely to reiterate their testimony under guise of rebuttal." *Id.* at 318, 202 N.W. at 899.

After appellant rested, ICHHS called the GAL, who had already testified about the best interests of the children. The district court allowed ICHHS to ask the GAL about a meeting with appellant at Rapids Counseling and whether her opinion regarding the children's best interests had changed after listening to appellant's evidence. This testimony was not cumulative. The GAL did not merely reiterate her opinion from the case-in-chief. She was answering in light of the evidence presented by appellant. As in *Turnbull*, because the GAL's testimony was in a different context than her prior testimony, it was proper rebuttal testimony.

We conclude the district court did not abuse its discretion by allowing the GAL's rebuttal testimony. But even if the district court did abuse its discretion by allowing the exhibits to be introduced into evidence or by allowing the GAL to testify in rebuttal, "[a] new trial will be granted because of an improper evidentiary ruling only if the complaining party demonstrates prejudicial error." *Simon*, 662 N.W.2d at 160 (citing

Kroning, 567 N.W.2d at 46). Appellant has provided a general assertion of prejudice but has not demonstrated actual prejudice from the district court's evidentiary rulings.

II.

Appellant contends that there was insufficient evidence to support the termination of his parental rights. "Termination of parental rights will be affirmed as long as at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the child's best interests." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). Appellate review of a district court's termination-of-parental-rights decision is "limited to determining whether the findings address the statutory criteria, whether those findings are supported by substantial evidence, and whether they are clearly erroneous." *In re Welfare of D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997).

The district court concluded that there was clear and convincing evidence showing that appellant's parental rights should be terminated based on Minn. Stat. § 260C.301, subd. 1(b)(2), (5). Minnesota law provides that termination of parental rights is possible if there is proof

> that the parent has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship, including but not limited to providing the child with necessary food, clothing, shelter, education, and other care and control necessary for the child's physical, mental, or emotional health and development, if the parent is physically and financially able, and either reasonable efforts by the social services agency have failed to correct the conditions that formed the basis of the petition or reasonable efforts would be futile and therefore unreasonable.

Minn. Stat. § 260C.301, subd. 1(b)(2); *see also Simon*, 662 N.W.2d at 163 (noting that failure to complete parts of a case plan is evidence of "lack of compliance with the duties and responsibilities of the parent-child relationship"). In addition, Minnesota law provides that termination of parental rights is possible if there is proof "that following the child's placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement." Minn. Stat. § 260C.301, subd. 1(b)(5).

Here, the record supports the district court's conclusion that appellant's parental rights should be terminated based, in part, on appellant's failure to comply with the case plans that were developed for him. Appellant was ordered to abstain from the use and possession of alcohol and controlled substances, with the exception of prescribed medication. But there is evidence in the record that appellant consistently used drugs following the birth of T.R.A. In June 2007, appellant tested positive for methadone; in September 2007 and on October 12, 2007, appellant tested positive for opiates; in November 2007, appellant refused to provide a urine sample for a drug test; and on April 29, 2008, appellant tested positive for oxycodone. Appellant was ordered to undergo therapy. But appellant missed ten sessions of scheduled therapy. McDonald, appellant's therapist, testified that appellant had "a lot of work to do" and "[i]t's not a quick fix." McDonald also testified that appellant had problems with authority, that he "needs more time," and that she did not "know whether he will resolve these issues." Heather Lovdahl, who had worked with appellant in a chemical-dependency program, testified

that appellant was noncompliant on numerous occasions and had been suspended. Butts testified that in March 2008 appellant was discharged from chemical-dependency counseling because of his disruptive behavior. Appellant was ordered to provide the children with a chemically free home, to remain law abiding, and to comply with all conditions of probation. But appellant was in jail for violating his probation on numerous occasions following the birth of T.R.A. In addition, appellant's sentence for his underlying felony conviction was executed on May 10, 2008. Appellant also admitted that he will need to enter long-term care when he finishes his sentence and has acknowledged that he has unresolved chemical-dependency issues.

Because appellant cannot provide food, education, or safe housing for his children due to his continued drug use and problems with therapy and treatment, termination of his parental rights is appropriate under Minn. Stat. § 260C.301, subd. 1(b)(2). In addition, because appellant failed to correct the conditions leading to the placement of T.R.A., termination of his parental rights is appropriate under Minn. Stat. § 260C.301, subd. 1(b)(5). Accordingly, the record supports the district court's determinations that appellant neglected his parental duties and that the conditions that led to the out-of-home placement were not corrected, despite reasonable efforts.

III.

Appellant argues that the district court erred in addressing the best-interests factors.

> In analyzing the best interests of the child, the 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. Competing interests include such things as a stable environment, health considerations and the child's preferences. During this balancing process, the interests of the parent and child are not necessarily given equal weight.

In re Welfare of R.T.B., 492 N.W.2d 1, 4 (Minn. App. 1992) (citations omitted). "In considering the best interests of a child, stability is a factor which must be given high priority." *In re Welfare of K.T.*, 327 N.W.2d 13, 18 (Minn. 1982).

Appellant contends that the district court erred by considering the most permanent option for the children instead of the best interests of the children. But the district court expressly found that "[t]he best interest of these children is served by terminating parental rights of the parents . . . ." and that the "children need a permanent home with sober, predictable, responsive and nurturing care providers." The record supports these findings by the district court. The GAL testified that the age of the children made a stable and secure home particularly necessary. She also testified that "my concern with a transfer is that later on they would allow [appellant] to come back into the role as a father, and I want these kids to be able to have the security of knowing all along that these are their parents." Further, Swenson, the social worker, testified that the children would "have a better chance to attach to the parents if they're considered their adoptive parents instead of someone they're just living with as custodial parents and that they would understand—have more of a sense of family and what their role in that family is." Swenson also opined that termination of parental rights is in the children's best interests. Because this court has indicated that stability is a high priority and because there is

evidence that termination of appellant's parental rights would provide more stability and would be in the best interests of the children, the district court did not err when it determined the best interests of the children.

Appellant argues that the district court erred by failing to address the children's interest in preserving the parent-child relationship, appellant's interest in preserving the parent-child relationship, and any competing interests of the children. Although the district court did not explicitly analyze these other interests, the district court's findings of fact indicate that it considered the best interests of the children. The district court indicated that "[t]hese two young children are in need and deserve a safe, stable, nurturing home with responsible caregivers who will ensure that the children's developmental, emotional and physical needs are being met." The district court then analyzed and compared the two options of a transfer of custody to the paternal grandparents and the termination of appellant's parental rights. The district court indicated that the lack of permanency associated with the transfer would not be in the best interests of the children. As stated above, the record supports the district court's finding that the termination of appellant's parental rights is the most permanent option and in the best interests of the children. Because of this, the district court did not err in concluding that the termination of appellant's parental rights was in the children's best interests.

IV.

Appellant maintains that the district court erred by not granting his petition to transfer custody instead of terminating appellant's parental rights. When transferring legal custody, the district court must consider the following factors:

> (1) the child's current functioning and behaviors;
> (2) the medical, educational, and developmental needs of the child;
> (3) the child's history and past experience;
> (4) the child's religious and cultural needs;
> (5) the child's connection with a community, school, and church;
> (6) the child's interests and talents;
> (7) the child's relationship to current caretakers, parents, siblings, and relatives; and
> (8) 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.

Minn. Stat. §§ 260C.201, subd. 2(a)(3), .212, subd. 2(b) (2008). In addition to these factors, when considering a transfer of custody, the best interests of the children are a central concern and stability is a high priority. Minn. Stat. § 260C.201, subd. 11(i) (2008); *K.T.*, 327 N.W.2d at 18. "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

Here, while appellant may have presented evidence as to many of the factors relating to the transfer of legal custody, the district court found that "[t]hese very young children need a permanent home" and that TPR and adoption "would be a more permanent disposition for these two very young children." The district court then

concluded that "[t]he best interest of these children is served by terminating parental rights of the parents . . . ." The record supports that conclusion.

Affirmed.