STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2244

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

Filed July 21, 2009
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-JV-06-1379

Peter W. Gorman, Assistant Hennepin County Public Defender, 701 4th Avenue South, Suite 1400, Minneapolis, MN 55415 (for appellant H.W.)

Michael O. Freeman, Hennepin County Attorney, Mary Martin Lynch, Assistant County Attorney, C-2000 Government Center, 300 S. 6th Street, Minneapolis, MN 55487 (for respondent Hennepin County Human Services and Public Health Department)

John M. Jerabek, Niemi, Barr & Jerabek, P.A., 510 Marquette Avenue, Suite 200, Minneapolis, MN 55402-1121 (for respondent guardian ad litem)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Klaphake, Judge.

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

KLAPHAKE, Judge

Appellant H.W. challenges a district court order terminating his rights to his daughter, T.W., under Minn. Stat. § 260C.301, subd. 1(b)(2), (4) and (5) (2008). Appellant claims that the district court's findings on these statutory grounds for termination are not supported by clear and convincing evidence and that the district court

erred in finding that termination was in T.W.'s best interests. Finally, appellant argues that the district court erroneously relied on irrelevant, stale, and hearsay evidence, thereby depriving him of his right to a fair trial. Because we conclude that (1) the record includes clear and convincing evidence supporting each of the statutory grounds for termination and that termination is in the child's best interests; and (2) the district court did not rely on erroneously admitted evidence in making its termination decision, we affirm.

D E C I S I O N

A court will terminate parental rights only for grave and weighty reasons. *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). The district court's findings in a termination case must be supported by clear and convincing evidence addressing the statutory requirements. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004); Minn. R. Juv. Prot. P. 39.04, subd. 1. The court need find only one statutory ground to support termination, if termination is in a child's best interests. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396-97 (Minn. 1996). A reviewing court will give considerable deference to a district court's credibility determinations. *Id.* at 396.

Appellant challenges each of the statutory grounds relied on by the district court in terminating his parental rights. Appellant also challenges the district court's best-interests determination.

Palpable Unfitness

Appellant contends that there was insufficient evidence to support termination under Minn. Stat. § 260C.301, subd. 1(b)(4), which provides for termination if a parent

> is palpably unfit to be a party to the parent and child relationship because of a consistent pattern of specific conduct before the child or of specific conditions directly relating to the parent and child relationship either of which are determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child.

While a court may not terminate merely on a parent's past behavior, a court must consider the pattern of conduct or conditions involved. *In re Welfare of S.Z.*, 547 N.W. 2d 886, 893-94 (Minn. 1996). Emphasizing that there must be a causal link between a parent's drug use and the parent's inability to parent a child, the supreme court has held that "substance or alcohol use alone does not render a parent palpably unfit; rather, the county must demonstrate that the parent's substance or alcohol use is of a nature and duration that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the child's ongoing needs." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 663 (Minn. 2008).

In its November 25, 2008 order denying appellant's motion for a new trial and amended findings, the district court found a link between appellant's substance abuse and his ability to parent, stating:

> [T]here is clear and convincing evidence that [appellant] has used cocaine, alcohol, and other mood altering drugs since he was about 15 years old and continued to use cocaine as recently as the weeks preceding trial. There is a definite causal connection between [appellant's] drug use and his ability to parent the child. [Appellant] has been in several treatment programs throughout his life and has relapsed during or after each program. . . . [Appellant's] use is of a duration and nature that renders him unable to care appropriately for the needs of [T.W.]

When appellant's cocaine use is considered, in addition to his history of child endangerment,[1] domestic violence,[2] and serious medical issues,[3] as well as T.W.'s documented special needs,[4] the record includes clear and convincing evidence that appellant is palpably unfit to parent T.W. Unlike the parent in *T.R.* and contrary to appellant's claim that his cocaine use is "very occasional," appellant's substance abuse is consistent and frequent, dating back to 1997, and involves a more serious drug—cocaine—than the marijuana and alcohol at issue in *T.R.* 750 N.W.2d at 662.

Further, the evidence supports the court's finding that appellant's past parenting problems, combined with his lack of insight into his behavior, create a pattern of detrimental conduct rendering him unfit to parent. During the case plan, appellant continued to actively use cocaine and alcohol, but he consistently denied using, despite repeated positive urinalysis testing, the last of which was taken less than two weeks before trial. Appellant's past history of domestic violence and poor parenting call into question his current ability to parent. In regard to another of his children, appellant

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[1] In September 1996, appellant entered a guilty plea to gross misdemeanor child endangerment in which another of his seven children was the victim. That child is now in an out-of-home placement.

[2] Appellant has recurring domestic assaults dating from 1990 to 2006 that include guilty pleas to six charges of fifth-degree domestic assault and agreement to an order for protection filed against him. The two most recent incidents involved the mother of H.W.

[3] Appellant, who is 59 years old, has chronic back problems, glaucoma (he is blind in one eye), hepatitis C, vascular problems, and has been treated for H.I.V. for 14 years. Although the district court made no factual findings on this issue, the record suggests that appellant's sole source of income is social security disability. Appellant takes approximately 10 different daily medications, including Vicodin and Ambien.

[4] T.W.'s mother used cocaine while pregnant, and T.W. was born with severe health problems, including seizures, hypotonicity, and orthotic problems. She was hospitalized for the first two months following her birth. She is now a special needs child who, as of the time of trial, required a spectrum of medical, pediatric, and educational services.

agreed that the child was in need of protection and services due to an unsafe household, that he has a history of chemical abuse interfering with his safe parenting, and that he had imposed physical discipline that amounted to physical abuse. Appellant's denial of these problems during the current case suggests that this pattern of behavior will continue. We conclude that the record amply supports the district court's termination of appellant's parental rights for palpable unfitness to parent.

Refusal or Neglect to Comply with Parental Duties

A district court may terminate parental rights if the parent "substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed" by the parent and child relationship. Minn. Stat. § 260C.301, subd. 1(b)(2). Appellant asserts that there is insufficient evidence to show that he refused or neglected to comply with his parental duties with regard to T.W.

While the record shows that appellant attempted to make progress on his case plan so that he could comply with his parental duties and that he did make progress in some areas, particularly in visiting the child, his efforts were wholly inadequate or ineffectual overall. Appellant's substance abuse history shows that he has been unable or unwilling to address his chemical dependency issues, which respondent labeled a "threshold issue" for his case plan. Most recently, although out-patient treatment was recommended in June 2008, appellant refused to enter treatment and continued to produce positive urinalyses for cocaine until August 2008. His discharge summary from his most recent chemical dependency program indicates that appellant continued to struggle with cocaine use throughout the program. Although he completed his after-care program, appellant

failed to attend AA on a regular basis or maintain a sponsor relationship. Appellant continued to use cocaine despite being monitored under the child protection case plan in 2008. At trial, he initially claimed that he did not need treatment, but he later admitted that he should go to treatment. He also stated that he could stop using controlled substances at any time, claimed that the social worker was the cause of his controlled substance use, and claimed that he was influenced to use controlled substances when he was with the child's mother because she was using. The guardian ad litem's termination recommendation was premised on her concern that appellant, to date, has not shown that he is "able to maintain a sober lifestyle." The district court found that appellant's "lack of insight and responsibility indicate that he will continue to make poor decisions and engage in volatile or unsafe behavior that will prevent safe and adequate parenting in the reasonable future." This finding is strongly supported by appellant's chemical dependency history.

Further, the county offered appellant services to assist him with his volatile behavior, parenting, and lack of personal insight with regard to these and his chemical dependency issues. The district court noted that appellant's volatile behavior has a direct impact on his ability to provide a safe home for T.W. Regarding his past parenting, the court found that appellant minimized his prior parenting failures and presented himself as a competent parent, but he was unable to properly care for T.W., even in a supervised setting, without prompts. The court also noted that appellant was unwilling or unable to engage in threshold parenting services offered to him in the four months before trial. As to his lack of insight, the court found that appellant's testimony was "striking" for its lack

of candor and for his "complete lack of insight into his role as a primary actor in the problems requiring [T.W.'s] placement." Overall, appellant's lack of progress on most portions of his case plan demonstrates that he has neglected the duties of the parent-child relationship. *See In re Welfare of Child of Simon,* 662 N.W.2d 155, 163 (Minn. App. 2003) (affirming termination of parental rights under Minn. Stat. § 260C.301, subd. 1(b)(2) when "failure to satisfy key elements of the court-ordered case plan provide[d] ample evidence of [parent's] lack of compliance with the duties and responsibilities of the parent-child relationship"). We observe no error in the district court's termination of appellant's parental rights under Minn. Stat. § 260C.301, subd. 1(b)(2).

Reasonable Efforts by the County

Minn. Stat. § 260C.301, subd. 1(b)(5) allows the district court authority to terminate a party's parental rights if, "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." Appellant argues that the court erred in terminating his parental rights because reasonable efforts by the county failed to correct the conditions that caused T.W.'s out-of-home placement.

The district court's findings detail the efforts made by the county and demonstrate how those efforts failed to correct the conditions that necessitated T.W.'s out-of-home placement. The services the county offered included visitation, a psychological evaluation, parenting services, chemical health assessments, and referral for chemical dependency treatment and focused on "establishing adequate parenting, addressing chemical health problems, and engaging in safe behavior." The court found that the

services offered "were relevant to the child's safety and adequate to both the child and parent's needs, appropriate, available, timely, consistent, and realistic." Based on our review of the record, we concur with this assessment. As we have noted earlier in this opinion, while appellant achieved some success in meeting the objectives of the case plan, the record establishes that he was unprepared to parent T.W. at the time of trial due to his chemical dependency, propensity to become physically violent, poor health, and his inability to provide a safe environment for T.W.

Appellant's claim that the county's efforts to unify the family were not reasonable is premised on specific instances in which he alleges that the county offered inadequate or inappropriate programming to him. He suggests that a county social worker failed to assist him in finding an alternate out-patient chemical dependency program that would not conflict with his other appointments, that respondent refused to assist with the in-home parenting program ordered by the court, that he was not offered an occupational assessment recommended by senior clinical psychologist Dr. Michael Kearney, and that when Dr. Kearney offered an informal first draft assessment, the county should have offered a different referral. These claims find no support in the record.

With respect to the occupational assessment that was not provided to appellant, the district court found that it is not clear that this service would have allowed appellant to substantially change his condition or conduct in the near term. The record shows that appellant is not employed due to serious medical conditions. Thus, the county was not required to offer this service in order to meet the reasonable efforts standard.

Next, the fact that Dr. Kearney's assessment was late or based on flawed assumptions does not negate the efforts made by the county in obtaining services for appellant. The court was aware of Dr. Kearney's initial flawed assumption that appellant was depressed, and the court had the opportunity to hear his more informed opinions at trial.

In regard to parenting services, although the individual training provided in appellant's home was changed to an out-of-home location, that change was occasioned by concerns for T.W. because appellant had been the victim of an aggravated robbery in front of his home. The county's failure to provide in-home parenting services to appellant did not undermine their efforts to provide parenting services.

With respect to the chemical health assessment and referral, any delay did not substantially affect the outcome here. Appellant claims that because the referral was made just two weeks before trial, he had insufficient time to complete the program. However, the county offered appellant a case plan to address his chemical use in 2006, shortly after it confirmed his status as adjudicated father, but appellant did not initiate the services offered. The out-patient program to which appellant was eventually referred in 2008 is located where appellant lives and is tailored to his individual needs. Further, for the current proceedings, appellant initially denied using controlled substances and declined to go to the first meeting for a referral of services for chemical dependency. Thus, any delay in addressing the issue of his chemical dependency was caused by appellant. While appellant now complains that he should have been recommended for residential treatment, had he truthfully apprised the district court and the county of his

chemical dependency history, different programming may have been offered to him, and at a more opportune time in the proceedings.

The court's finding that reasonable efforts were made by the county is supported by the long list of services provided as part of his case plan, and the objections raised by appellant lack merit.

Best Interests

Appellant claims that termination of his parental rights is not in T.W.'s best interests. In addition to finding a statutory ground for termination, a court must base its termination decision on the best interests of the child. Minn. Stat. § 260C.301, subd. 7 (2008) (stating child's best interests are "paramount" in termination proceedings). A best-interests analysis balances the child's interest in preserving the parent-child relationship with the parent's and any competing interest of the child, including that of "a stable environment, health considerations and the child's preferences." *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992).

The district court found that it is in T.W.'s best interests to terminate appellant's parental rights. The court noted that T.W. has been in foster placement since birth, until recently with appellant's approval, that the testimony of the county's witnesses and the guardian ad litem show that permanency "in the very near term" is in T.W.'s best interests, and that appellant will not be able to make changes in his life to allow him to parent T.W. in the reasonably foreseeable future. In summary, the court stated:

> [Appellant] appears to genuinely love [T.W.] and his desire to be involved in his child's life is commendable. He is, however, simply unable to care adequately for any child at

> this time and will not be able to do so in the reasonably foreseeable future. [T.W.] additionally requires parenting that requires effectively accessing services and [appellant's] own problems and performance during the child protection case indicate he will be unlikely to meet that need. [T.W.] is nearing the age of three and requires a permanent home that can meet her needs as she enters her pre-school years. She deserves permanency now and can only achieve that if [appellant's] parental rights are terminated.

The court's best-interests determination is supported by clear and convincing evidence.

Admission of Evidence

Appellant finally claims that the district court erroneously admitted certain documentary and oral evidence at trial; such evidence was highly prejudicial to him; and the erroneous admission was not harmless error. The evidence includes court records pertaining to appellant's prior prosecutions dating to 1990, police reports, plea agreements, chemical assessment reports from 1997 and 2002, and records pertaining to another of appellant's children in foster care. Appellant complains that introduction of this evidence turned the trial into a summary proceeding based only on documentary evidence.

A district court's ruling on admission of evidence is discretionary, and this court will not disturb an evidentiary ruling unless the district court has erroneously interpreted the law or abused its discretion. *Kroning v. State Farm Auto. Ins., Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). An appellate court will grant a new trial because of improper evidentiary rulings only if a party demonstrates prejudicial error. *Id.* at 46. Appellant's counsel objected to most of this evidence pretrial and again during trial, primarily on the grounds of hearsay or lack of foundation, but the district court admitted the evidence.

Generally, the rules of evidence apply in juvenile protection proceedings, Minn. R. Juv. Prot. P. 3.02, subd. 1, and a district court may take judicial notice of any court order involving the child's parent. *Id.* at subd. 3. Before deciding to terminate a parent's rights, a district court may "consider any report or recommendation" made by agencies or individuals in regard to the child, "or any other information deemed material by the court." Minn. Stat. § 260C.193, subd. 2 (2008).

Further, although hearsay statements are generally inadmissible, Minn. R. Evid. 802, certain hearsay statements may be admissible under one of the exceptions to the rule, including the public-records or business-records exceptions. *See* Minn. R. Evid. 803(6) (permitting admission of regularly kept, accurate business records that are relied upon by a business); Minn. R. Evid. 803(8) (permitting admission of public records that have indicia of trustworthiness that set forth or report the activities of the office or "matters observed pursuant to duty imposed by law"). The public-records exception specifically includes records in civil actions that include "factual findings resulting from an investigation made pursuant to authority granted by law." *Id.*

While some of the evidence appellant objects to could have been admitted under the business records exception, appellant claims that respondent failed to lay a proper foundation for its admission by offering the testimony of a custodian or other qualified witness who could explain how the records were prepared. *See Nat'l Tea Co. v. Tyler Refrig. Co.*, 339 N.W.2d 59, 61-62 (Minn. 1983) (setting forth foundation requirements for admission of business record). Further, while the court records and police reports

may have been admissible under the public-records exception, appellant claims that they contain inadmissible hearsay-within-hearsay.

Although the district court may have admitted some apparently inadmissible hearsay, we must reject appellant's request for a new trial because of evidentiary errors. First, appellant has not shown how the objectionable evidence constituted prejudicial error. Trial witnesses testified and conceded the essence of the facts set forth in the objectionable records, and the district court's findings were based, predominantly, on first-hand testimony. The admissible evidence was based on witnesses' personal knowledge and supports the district court's conclusions. Second, as this case was tried to the court, presumably the court disregarded any evidence that was improperly admitted. *See Chris/Rob Realty v. Chrysler Realty Corp.*, 260 N.W.2d 456, 459 (Minn. 1977) ("We have confidence in the ability of a court in a trial without a jury to be objective and to disregard evidence improperly admitted"). Third, appellant does not identify the alleged hearsay-within-hearsay, which makes it difficult for this court to review the individual documents. And, fourth, some of the content of the objectionable documents would not have constituted hearsay, because it could have been offered for other purposes. Overall, we conclude that if the court erred in admitting this evidence, any such error was harmless, given other admissible evidence in the record that provided the strong factual basis for termination.

Affirmed.