STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0124

In the Matter and the Welfare
of the Child of:
K. B. and J. B., Parents

Filed September 15, 2009
Affirmed in part, reversed in part, and remanded
Minge, Judge

Hennepin County District Court
File No. 27-JV-07-12004

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Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Stauber, Judge.

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

MINGE, Judge

In this termination-of-parental-rights (TPR) proceeding, appellants mother and father challenge the order terminating their parental rights, arguing that the district court erred by (1) terminating mother's parental rights, in part, for failure to comply with

parental duties, Minn. Stat. § 260C.301, subd. 1(b)(2) (2008), because that ground is not included in the TPR petition; (2) terminating mother's parental rights for palpable unfitness to parent, Minn. Stat. § 260C.301, subd. 1(b)(4) (2008), because the record does not support termination on this statutory ground; and (3) terminating the parental rights of both parents for a failure to correct the conditions leading to the out-of-home placement, Minn. Stat. § 260C.301, subd. 1(b)(5) (2008), because the record does not support termination on this statutory ground. Because the record provides clear and convincing evidence to support two statutory grounds for the termination of mother's parental rights, we affirm the termination of her parental rights. Because the record does not support termination of father's parental rights on the basis set forth in the order, we reverse and remand the termination of his parental rights.

FACTS

Appellant mother K.B. gave birth to Ke.B., her sixth child, on September 8, 2007. On September 12, the Hennepin County Human Services and Public Health Department (county) filed an expedited petition to terminate the parental rights of both mother and appellant father, J.B., under Minn. Stat. § 260C.301, subd. 1(b)(4), (5) (2006). Ke.B. was immediately placed in out-of-home care.

Mother has a history of chemical abuse and has unsuccessfully undergone chemical dependency treatment numerous times. In August 2007, when mother was in her third trimester of pregnancy with Ke.B., she voluntarily entered a chemical dependency treatment program and began a methadone maintenance treatment program. Because she admitted to using heroin during treatment, she was discharged from the

program within a week. The county was notified of mother's advanced pregnancy and that she has significant mental health and chemical dependency issues.

Mother has five other children and an extensive history with child protection services. Because of substance abuse and maltreatment issues prior to her pregnancy with Ke.B., mother voluntarily transferred the legal and physical custody for four of her children and voluntarily terminated her parental rights to a fifth child, who had tested positive for methamphetamine at birth.

Although not married, father and mother lived together for an extended time. Ke.B. has never lived with father because at the time of Ke.B.'s birth, father was incarcerated in the Prairie Correctional Facility in Appleton for a felony weapons possession conviction. Father remains incarcerated, and his expected release date is September 14, 2010. Father may be illiterate. He is also the apparent father of four of mother's other children. However, because father has not established paternity for the other children, his parental rights to those children have not previously been legally determined.

At the outset, a county social worker began developing case plans related to Ke.B. for both mother and father. Mother's case plan required her to complete a chemical dependency program, a psychological evaluation, and a parenting assessment; undergo urinalysis (UA); participate in a methadone treatment program; and establish a visitation plan with Ke.B. In addition, mother's plan required her to follow all recommendations from her chemical dependency treatment counselors, her psychological evaluation, and her parenting assessment.

Mother was provided and had access to numerous services and addressed several items in her case plan. Mother completed a parenting assessment with Dr. Reena Pathak, who reported that mother may need more knowledge of redirection and calming techniques for infants and toddlers. Dr. Pathak also reported that mother had an elevated "faking good" score during testing, which indicated she was attempting to provide acceptable answers and may be less likely to discuss her own personal deficits. Dr. Pathak concluded that mother would have overall difficulties parenting her children.

Mother also underwent a psychological evaluation with Dr. Pathak, and she was diagnosed with features of antisocial and obsessive-compulsive personality disorders. Dr. Pathak recommended that mother complete chemical dependency treatment, follow through with her case plan, and undergo individual therapy, cognitive and dialectical behavior therapy, and intensive parenting education. Dr. Pathak also recommended that mother reside in a sober house and have support to maintain her sobriety.

Mother had difficulty in completing chemical dependency treatment programs. As stated earlier, she was discharged from one program in early August 2007. She then entered another inpatient program with RS Eden. In that program, mother relapsed and was placed on probation. She also engaged in several drug solicitation behaviors, including inquiring how to identify drug dealers and what the costs of the drugs were, obtaining prescription medications from other patients, and testing positive for benzodiazepines. Because of her consistent drug solicitation behaviors, mother was discharged from the RS Eden program in November 2007. Mother smoked marijuana and used heroin while she was out of the program. Mother was readmitted to RS Eden on

December 10, 2007. After returning to the program, staff reported that mother made elaborate explanations and excuses for her previous behavior.

In April 2008, mother completed the RS Eden treatment program. In her discharge papers, her counselor reported that mother was "lazy" in her recovery and tended to minimize her mistakes. The RS Eden counselor recommended that mother be placed and continue to live in safe, sober, and supportive housing for at least two years.

The county social worker placed mother in a safe, sober, and supportive housing program. Just two weeks after entering the housing program, mother tested positive for cocaine during a random UA. Because of the positive test, she was required to provide another sample at Hennepin County Medical Center (HCMC). But the UA at HCMC was invalid because mother substituted clean urine for that test. Mother has a history of tampering with tests, and she admitted to saving clean urine to avoid an adverse test result. Mother also blamed the positive test for cocaine on bacteria growth. In addition, mother admitted to the county social worker that she took Vicodin because she was upset that she had been subjected to a UA and was upset with the guardian ad litem regarding visits. Mother was not asked to leave the housing program, but she was placed on restrictions, and a second incident would have resulted in her termination from the program.

On May 17, 2008, against the advice of the county social worker, mother voluntarily left the sober housing program and rented a room in a single-family home with people whom she did not know. Mother was involved in at least one incident of violence at the home after she moved in. In addition, the rental made mother ineligible

for many sober housing programs. Mother's social worker recommended that she move into a shelter, at least for a short term, so that she could qualify for admission to a new sober housing program, but mother refused to follow the social worker's advice.

In March 2008, mother's social worker referred her to Family Focus for parenting education classes, but mother did not attend this program. In May 2008, mother began attending a parenting program designed to support women with chemical health issues. Although the program facilitator agreed that mother was making progress, she noted a few incidents of concern and that she was unable to do home visits due to mother's living situation. The facilitator also testified that mother would need to maintain sobriety and participate in the program for at least a year before she would be ready to parent independently.

Mother had numerous supervised visits with Ke.B. The reports from the supervisors indicate that mother had difficulty picking up Ke.B.'s cues as to what his needs were. One report noted with concern that mother gave Ke.B. Tylenol or Motrin because he felt warm without first checking to see if he had a fever or had previously been given some medication.

Mother began seeing an individual therapist in February 2008. The therapist testified that she hoped that with another six months to one year of treatment and parenting interaction, mother could be reunited with Ke.B. The therapist also testified that she believed that mother's decision to leave sober housing made successful completion of treatment less likely.

In April 2008, due to mother's progress on her case plan, the parties reached a

settlement on the TPR initiative. Mother would admit that Ke.B. was a child in need of protection and services, and Ke.B. would be so adjudicated. In exchange, the county would not pursue a termination of her parental rights. But mother's relapse in May 2008, coupled with the attempt to conceal her drug use, prompted the county to proceed to a hearing on the TPR petition.

Although father was included in the TPR petition, the focus of the programming, evaluation, and TPR proceeding was on mother. Father's initial case plan was short. It required him only to establish paternity, which he did through genetic testing. The significant parts of his subsequent case plan required him to remain chemically free, attend AA or NA meetings; and successfully complete programs in parenting education and critical thinking. Upon his release from prison, he was to participate in a parenting assessment and in marital counseling with mother.

Because father was incarcerated, services were offered to him at the discretion of the Department of Corrections. Although he was able to participate in AA and obtain UA tests, father had difficulty obtaining other services. There were substantial waiting lists for the programs, and when he was transported from the prison to attend court hearings, he was moved to the end of the lists. Eventually, the county social worker spoke with a prison official and was able to advance father on the waiting lists so that he could begin addressing his case plan. Father was scheduled to begin classes on May 5, 2008. But before the first class convened, he was placed in segregation for violating a prison rule by having Ke.B.'s name tattooed on his leg. As a result, he missed the May start date for

classes and was unable to begin until September 2008. At the time of the hearing, father was enrolled in classes and working toward completing his case plan.

The district court heard the case in August and September 2008. On November 3, 2008, the district court ordered termination of mother's parental rights under Minn. Stat. § 260C.301, subds. 1(b)(2), (4), and (5) and termination of father's parental rights under Minn. Stat. § 260C.301, subd. 1(b)(5). Both parents moved for a new trial. The district court denied the motion, and this appeal followed.

D E C I S I O N

Parenthood is a basic civil right, and the integrity of the family unit is protected by the due process clauses of the United States Constitution and Minnesota Constitutions. *Stanley v. Ill.*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1213 (1972); *In re Welfare of the Child of P.T.*, 657 N.W.2d 577, 588 (Minn. App. 2003), *review denied* (Minn. Apr. 15, 2003). This constitutional protection is not lost because one has not been a model parent; every parent retains an interest in preventing loss of parental rights and must be provided a fundamentally fair procedure. *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1394-95 (1982); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 166-67, 117 S. Ct. 633, 641-42 (1996); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2159 (1981).

A district court may terminate parental rights only if clear and convincing evidence establishes that a statutory ground for termination exists and that termination is in the child's best interests. *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). The heightened burden of proof is used because of the serious nature of

judicial deprivation of parental rights. A decision in favor of the welfare authority amounts to "a judicial determination that the parents are unfit to raise their own children." *Santosky*, 455 U.S. at 760, 102 S. Ct. at 1398. In conducting its inquiry, the district court must cite evidence "relat[ing] to conditions that exist at the time of termination . . . ." *In re Welfare of P.R.L.*, 622 N.W.2d 538, 543 (Minn. 2001). In reviewing an order terminating parental rights, we closely inquire into the sufficiency of evidence, taking into account the clear-and-convincing standard, and recognizing that the district court assesses the credibility of witnesses. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

I.

The first issue is whether the district court erred in terminating mother's parental rights under Minn. Stat. § 260C.301, subd. 1(b)(2) ("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"). The termination petition, which was filed immediately after Ke.B.'s birth, did not allege this statutory ground as a basis for terminating mother's parental rights, and the petition was never amended.

The county argues that mother failed to raise this issue to the district court and should be barred from doing so on appeal. Even if evidence presented at trial demonstrates that mother neglected the duties of the parent-child relationship, the district court may not terminate her parental rights on this basis because "the termination of parental rights cannot be based on a statutory ground that was not included in a petition to terminate parental rights." *In re Welfare of Child of B.J.-M.*, 744 N.W.2d 669, 673

(Minn. 2008). Because the petition did not include Minn. Stat. § 260C.301, subd. 1(b)(2), the district court erred in terminating mother's parental rights under this statutory ground.

II.

The second issue is whether there was clear and convincing evidence to support the district court's decision to terminate mother's parental rights under Minn. Stat. § 260C.301, subd. 1(b)(4), which provides that parental rights may be terminated 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.

A parent's inability to meet a child's physical, mental, and emotional needs now and in the reasonably foreseeable future justifies terminating parental rights. *P.T.*, 657 N.W.2d at 591. The Minnesota Supreme Court has held that the burden under this statute is onerous, that substance abuse alone is insufficient to prove a parent palpably unfit, and that "[t]he petitioning party must prove a consistent pattern of specific conduct or specific conditions existing at the time of the hearing that appear will continue for a prolonged, indefinite period and that are permanently detrimental to the welfare of the child." *In re Welfare of the Children of T.R.*, 750 N.W.2d 656, 661 (Minn. 2008) (quoting *In re Welfare of M.D.O.*, 462 N.W.2d 370, 376-77 (Minn. 1990)).

"In each case, the actual conduct of the parent is to be evaluated to determine his or her fitness to maintain the parental relationship with the child in question so as to not be detrimental to the child." *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996) (quotation omitted). A termination of parental rights based on a finding that a parent is palpably unfit to be a party to a parent-child relationship "requires that the [district] court make the determination of whether reasonable efforts have been made to rehabilitate the parent and to reunite the family, even if that determination is that provision of services for the purpose of rehabilitation is not realistic under the circumstances." *Id.*

Here, the district court found, and mother does not dispute, that the county has made reasonable efforts to rehabilitate and reunite mother with Ke.B. The district court acknowledged that legal and physical custody of mother's five other children has been transferred either voluntarily or through court proceedings because of neglect or maltreatment. The district court also found that mother has abused drugs for over ten years, has attended numerous treatment programs, has a history of relapsing and tampering with UA tests, and suffers from mental health problems. The district court found that mother's abstinence from chemical use is contingent upon her obtaining sober housing and that mother left such housing offered to her by the county and failed to find other sober housing.

This court has carefully reviewed the record, and we conclude that the district court's findings are supported by the record, that clear and convincing evidence supports the district court's determination that mother is palpably unfit, and that the district court did not err in terminating mother's parental rights under Minn. Stat. § 260C.301, subd.

1(b)(4).

III.

The third issue is whether the district court erred in terminating mother's parental rights on the ground that, despite reasonable efforts by the county, the parent failed to remedy the conditions that caused out-of-home placement. Minn. Stat. § 260C.301, subd. 1(b)(5). A presumption supporting termination arises if the petitioner establishes four factors: (1) a child under eight years old has lived outside "the parental home under court order for six months"; (2) the court has approved a reasonable out-of-home placement plan; (3) the parent has not substantially complied with the court's orders and the plan; and (4) social services has made reasonable efforts to rehabilitate and reunite the parents with the child. *Id.*

Mother questions the proof of the third factor, arguing that she substantially complied with the requirements of her case plan. We note that the following factors are unchallenged: Ke.B. is under eight years of age and has been out of the parental home well over six months; the district court approved reasonable out-of-home placement; and reasonable efforts were made to reunify the family. As previously summarized, at the time of the hearing, mother was not in compliance with her case plan because she was not residing in safe, sober, and supportive housing; she had not followed through with the recommendations of her chemical dependency counselor; she had not followed up on the recommendations of her psychological evaluation; and her other efforts at compliance were ineffectual.

Because the record supports the district court's findings of fact that mother failed

to make reasonable efforts to correct the conditions that led to out-of-home placement, that mother's non-compliance with the court ordered plan is substantial, that the county's reasonable efforts to rehabilitate mother and reunite her with Ke.B. have failed, we conclude that the district court did not err in determining that there was clear and convincing evidence supporting termination of mother's parental rights under Minn. Stat. § 260C.301, subd. 1(b)(5), and we affirm the termination decision.

IV.

The fourth issue is whether the district court erred in terminating father's parental rights. We are mindful that a parent's rights are terminated only for "grave and weighty reasons." *M.D.O.*, 462 N.W.2d at 375. We are also mindful that termination of parental rights must be an informed decision, based only on "clear and convincing evidence." *S.E.P.*, 744 N.W.2d at 385; *see also In re Welfare of J.M.*, 574 N.W.2d 717, 724 (Minn. 1998) (stating that appellate court will "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing"). Finally, in termination proceedings, the child's best interests are always paramount. Minn. Stat. § 260C.001, subd. 2(a), .301, subd. 7 (2008); *see In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 9 (Minn. 2003).

Here, in contrast to the well-developed record as to mother, the record as it pertains to father is modest. In the initial case plan dated September 12, 2007, father was asked only to establish paternity as to Ke.B., which he did, taking a blood test on October 29, 2007. Thereafter, in January 2008, four months after Ke.B.'s birth, the county initiated a second case plan in which key provisions required father to remain chemically

free and participate in AA/NA, parenting education, and critical thinking classes, and he was asked to take a parenting assessment and participate in marital counseling upon release from prison. Due to his incarceration and the fact that he was moved to the end of program waiting lists each time he left the prison to make court appearances in these proceedings, father was not scheduled to begin programming, except AA/NA, until May 2008. At that time, apparently because of prompting by the county, father was to be in the next section of the available programs.

The last setback to father's progress occurred when he was placed in prison segregation for 20 days in May 2008 for tattooing Ke.B.'s name on his leg, an act which violated a prison rule set forth in a handbook given to father upon his arrival at prison. This act resulted in father's termination from all prison programs and return to the waiting lists. It is unclear whether father was aware of this prison rule due to his limited reading ability. At the time of the September evidentiary hearing, father was participating in the programs.

The existing record shows that at the time of the termination hearing, father substantially complied with the second case plan by attending the required classes; he even requested to attend an anger management class because he thought that it might be useful. He attended AA/NA meetings and had negative UAs. Within the confines of the conditions of his incarceration, father attempted to comply with the requirements of the case plan to maintain his status as parent to Ke.B.

The only statutory ground upon which termination was premised as to father was that "reasonable efforts" on the part of the county failed to correct the conditions that led

to Ke.B.'s out-of-home placement under Minn. Stat. § 260C.301, subd. 1(b)(5).[1] To be reasonable, the county's efforts must be designed to address "the problem presented," *S.Z.*, 547 N.W.2d at 892, and must "include real, genuine help to see that all things are done that might conceivably improve the circumstances of the parent and the relationship of the parent with the child." *In re Welfare of M.A.*, 408 N.W.2d 227, 236 (Minn. App. 1987), *review denied* (Minn. Sept. 18, 1987). "Reasonable efforts at rehabilitation are services that go beyond mere matters of form so as to include real, genuine assistance." *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007) (quotations omitted), *review denied* (Minn. Mar. 28, 2007). Whether efforts are reasonable "requires consideration of the length of time the county has been involved with the family as well as the quality of effort given." *In re Welfare of M.G.*, 407 N.W.2d 118, 122 (Minn. App. 1987) (quotation omitted). But a county's efforts must be realistic under the circumstances of the case and do not include efforts that would be futile. *In re the Welfare of Children of R.W.*, 678 N.W.2d 49, 56 (Minn. 2004).

Although father complied with both case plans, he challenges the sufficiency of the plans and their implementation by the county. *See In re Welfare of Children of Wildey*, 669 N.W.2d 408, 413 (Minn. App. 2003) ("Case plans for inmates can and have been formed for a long time in Minnesota."), *aff'd, modified sub nom, In re Welfare of*

[1] Termination for failure to correct conditions that led to out-of-home placement under Minn. Stat. § 260C.301, subd. 1(b)(5), appears to assume that the child has resided with the parent. This statutory ground is difficult to apply to father under the facts of this case because Ke.B. was taken from the mother at birth due to the mother's chemical dependency, and father was incarcerated. As a legal and practical matter, it is impossible for father to correct these conditions. This matter is not addressed by the parties or the district court, and we do not further consider it.

Children of R.W., 678 N.W.2d 49 (Minn. 2004). First, other than incidental references to father in prior termination proceedings involving mother's[2] other children, the record does not establish a history of father's presence within the family in which he lived for many years. Without an accurate history, it is difficult to envision how the county could meet its requirement to provide current "appropriate" services to father. The county's efforts relied on the prison resources, but the record does not disclose the adequacy of prison services or the possibility of other resources. Further, there is little in the record showing contact between the county and the prison to evaluate father's status. For example, father claims that he successfully completed chemical dependency treatment; the county challenges this claim but does not provide supporting evidence from which the district court could make findings regarding father's chemical dependency problems or prospects. Finally, the record does not show that the guardian ad litem ever met with father and shows that the county social worker met with him only when he was in Hennepin County awaiting court proceedings.

In addition, incarceration alone does not provide a basis for termination of parental rights or excuse the county from providing appropriate services to him. "[T]here is no legal basis for granting termination solely because the child cannot be returned immediately to the parental home." *M.A.*, 408 N.W.2d at 233. And, while parental incarceration is a factor that the district court may consider, *In re Welfare of A.Y.-J.*, 558 N.W.2d 757, 761 (Minn. App. 1997), *review denied* (Minn. Apr. 15, 1997), a father's

[2] Father may be the biological parent of four of mother's other children, but his paternity was not legally established in prior termination proceedings involving those children.

parental rights may not be terminated solely because he is imprisoned. *See In re Welfare of Walker*, 287 N.W.2d 642, 644 (Minn. 1979) (stating incarceration alone cannot constitute intentional abandonment) (citing *In re Welfare of Staat*, 287 Minn. 501, 505-06, 178 N.W.2d 709, 712-13 (1970)).

We recognize that in *R.W.* the supreme court affirmed termination of an imprisoned father's parental rights even though the county offered the father no services. 678 N.W.2d at 56. However, *R.W.* is factually inapposite because that court emphasized that the father provided only marginal care for his children before being imprisoned, expressed no interest in the children while incarcerated, and failed to respond to the CHIPS petition. *Id*. at 52-55. By contrast, father in this case has shown interest in Ke.B., and the county does not claim, and the record does not indicate, that efforts to unite father with Ke.B. would be futile. Thus, on this record, father's imprisonment does not provide an independent basis for terminating his parental rights to Ke.B.

Because the record is inadequate regarding the efforts made by the county to assess the father's parental fitness or to show the adequacy of its efforts to provide services to the father or to establish that father has failed to comply with the plan, we conclude that the district court erred by terminating father's parental rights to Ke.B. at this time under Minn. Stat. § 260C.301, subd. 1(b)(5). We therefore reverse the termination of father's parental rights and remand.[3] The county may amend or refile a

[3] We have not addressed either Ke.B.'s best interests or the permanency considerations that should be afforded him, because those considerations are premised on the existence of a valid statutory ground for termination of father's parental rights and because neither party has addressed them incident to this appeal.

termination petition; the district court may reopen the record.

Affirmed in part, reversed in part, and remanded.

Dated: