STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0517, A09-0533

In the Matter of the Welfare of the
Children of: S. A. W. and J. W. W., Parents.

Filed September 22, 2009
Affirmed
Hudson, Judge

Anoka County District Court
File Nos. 02-JV-07-1935 and 02-JV-08-2124

Sherri D. Hawley, 13055 Riverdale Drive Northwest, Suite 500, PMB 246, Coon Rapids, Minnesota 55448 (for appellant S.A.W.)

David A. Cossi, 5005 Bassett Creek Drive, Minneapolis, Minnesota 55422 (for appellant J.W.W.)

Robert M.A. Johnson, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, Minnesota 55303-5025 (for respondent Anoka County)

Patricia A. Zenner, Zenner Law Office, 901 South Third Street, Suite 203, Stillwater, Minnesota 55082 (for guardian ad litem)

Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

HUDSON, Judge

In these consolidated appeals, appellants S.A.W. (mother) and J.W.W. (father) challenge the district court order terminating their parental rights to their minor children

B.A.W. and J.A.W. We affirm because: (1) clear and convincing evidence supports the district court's termination order; (2) terminating appellants' parental rights and placing the children in their current foster home is in the children's best interests; (3) respondent State of Minnesota's failure to file a statutorily required out-of-home placement plan does not warrant reversal; (4) respondent made sufficient reasonable efforts towards reunification and conducted a sufficient relative search; and (5) appellants were not deprived of their rights to counsel.

FACTS

Mother and father, both 34, are married and are the biological parents of B.A.W., 5, and J.A.W., 2. Father suffered a traumatic brain injury as a child, and, as a result, functions in the mild-to-moderate range of developmental disability. Mother has been diagnosed with depression, bipolar disorder, low cognitive functioning, and a personality disorder.

On June 4, 2007, respondent Anoka County Human Services received a report from Coon Rapids police that J.A.W. had been taken by ambulance to the emergency room for rectal bleeding. Officers reported that the family's apartment was "extremely cluttered and foul smelling." The next day, a social worker observed the apartment to be "very cluttered" and was informed by mother that J.A.W. had been prescribed medication for constipation but had not taken the medication because appellants were unable to afford it.

The social worker arranged for an in-home skills worker to help appellants with cleaning and parenting. Later, the in-home skills worker reported concerns about

appellants' parenting, indicating that mother "slept a lot during the day," leaving the children in father's care, but that father did not understand the children's cues and seemed unaware of their needs. She noted that the condition of the home had not improved despite three weeks of training.

In August 2007, another social worker found the apartment so cluttered that B.A.W. could not sleep in her bed because it was completely covered with various items. In September 2007, the in-home skills worker reported that there was "very little food" in the apartment and determined that the family needed food stamps.

Respondent filed a non-emergency child-in-need-of-protection-or-services (CHIPS) petition on October 5, 2007. At a pretrial hearing, appellants, represented by counsel, admitted the facts as amended, and the children were adjudicated CHIPS and placed with appellants under protective supervision. The district court appointed a guardian ad litem (GAL) for the children, ordered appellants to complete parenting assessments, and ordered appellants to obtain approval of any caretakers for the children. Respondent was authorized to conduct random unannounced home visits.

A social worker visited the apartment unannounced three times in November and December and noted that during each visit, the apartment was in "total disarray with every surface piled with clothing, toys and other items." In December 2007, B.A.W. was placed in foster care overnight after respondent learned that B.A.W.'s front tooth was missing, her lip was swollen, and she had welts and scratches.

On December 13, 2007, the court ordered that the children remain under protective supervision, denied mother's motion to discharge her attorney, appointed a GAL to

represent mother, approved the CHIPS written case plan, and ordered mother to complete a psychiatric evaluation.

The next day, a social worker visited the apartment at 2:30 p.m. and noted that appellants were fighting and that J.A.W. appeared hungry because she had not been fed since 6:30 that morning. In January 2008, a social worker visited the apartment and found the homeless maternal grandparents living there. She noted that appellants' bedroom "continued to be extremely cluttered, with clothing piled several feet high on the floor and bed and causing them to sleep in the children's bedroom." Two days later, police officers were called to the apartment due to a verbal domestic altercation between appellants. Mother told officers that she had stopped taking her psychiatric medication. That same day, mother's GAL and the children's GAL reported concerns about the children's safety due to mother's behavior, such as "blacking out" and attempted overdose of her medication.

On January 10, 2008, the court held a disposition review hearing and ordered the children placed in foster care under respondent's legal custody. Appellants began supervised visits with the children and parent-education classes. The visitation observer reported that appellants scored "poor" in every assessment category. During later visits, appellants were noted to be "minimal" or "adequate" in the areas of communication, attachment, enjoyment of the children, basic needs, discipline, child development, and supervision. The children's foster parents attempted to arrange additional visits between the children and appellants, but appellants did not take full advantage of these opportunities.

In January 2008, a social worker brought father and the children to a Women, Infants, and Children (WIC) appointment, and staff were concerned about J.A.W.'s growth. When the social worker told mother that WIC staff recommended that J.A.W. drink whole milk and see a pediatrician, mother "screamed at her." That same day, father's guardian, the paternal grandfather, determined that father was no longer safe living with mother and placed father in adult foster care.

Social workers continued to observe the appellants' visitation sessions, and on one occasion, noted that mother "paid little attention to the children during the first 10 minutes of the visit" and was unresponsive to B.A.W. A social worker reported that the children were often "quiet" around appellants, but happy around their foster parents. She noted that mother had trouble greeting her children and smiling, even after prompting. The social worker also reported a staff observation that, when B.A.W. scratched her bottom, mother asked who was sexually molesting her. The foster parents testified that the children often cried on their way to visitation and had to be coaxed to visit with appellants. The foster father also reported that mother yelled at the children during a visitation session and once did not bring diapers as required.

The psychologist who conducted father's parenting assessment reported that father "ha[d] adequate knowledge of parenting skills," but that he "may have difficulty implementing the knowledge into direct practice." She also noted that appellants' "inconsistent parenting practices are an unhealthy environment for their children." A second examiner evaluated father and reported that he "demonstrates intellectual ability that falls within the mild mental retardation range." He reported that father lacks insight

regarding his mental health and "shows some mild to moderate impairment in his ability to problem solve or demonstrate cognitive flexibility and create alternative solutions to a problem when one solution does not work."

A psychologist conducted mother's parenting assessment, noting concerns about mother's "mental health, the impact of her relationship with her spouse on her children, and her tendency to be easily influenced by others." She recommended alternative placement options for the children if mother was "unable to increase her ability to parent under stress and demonstrate increased ability to regulate her emotional and mental health symptoms." On March 3, 2008, mother moved into adult foster care.

On June 26, 2008, the children were placed in a concurrent foster home.[1] The children received early intervention services. J.A.W. was eighteen months old, but was very small, not walking, and not sitting up without support due to very weak muscle strength. B.A.W. was "very speech delayed" and attended early-childhood-education classes five days a week. The concurrent foster parents, the Hamlins, noticed that J.A.W. had a skin tag on her rectum, requiring surgical consultation. A doctor determined that the skin tag resulted from previous chronic constipation due to lack of adequate fluids. With the appropriate diet she eats in foster care, J.A.W. no longer suffers from constipation and has gained weight so that she is currently the size of a normal two year old. The foster parents also determined that B.A.W.'s enlarged adenoids and tonsils worsened her speech problems and scheduled surgery.

[1] In a concurrent-foster-home placement, the foster parents desire to adopt the children in the event of the termination of parental rights.

On July 8, 2008, because the state public defender withdrew representation from all parents in CHIPS proceedings, appellants lost their legal representation. That same day, father's sister and brother-in-law, the Barkers, who are enlisted in the Navy and are stationed in Germany and South Carolina respectively, visited the children at their foster home, and later notified respondent that they were interested in serving as a permanency option.[2]

In August 2008, parenting-skills-education staff reported that appellants had made "minimal change" in their parenting skills during the prior seven months because of lack of talking with the children, inability to read the children's cues, not appearing to enjoy the time with the children, and an inadequate ability to look at things from the children's perspective. Staff discontinued their services to appellants.

On October 16, 2008, respondent filed a petition to terminate appellants' parental rights, alleging that they were palpably unfit parents; that reasonable efforts to correct the conditions leading to the children's placement had failed; and that the children were neglected and in foster care. The state public defender resumed representation of mother on October 16, 2008; father was appointed counsel on October 31, 2008, in conjunction with the admit-or-deny hearing on the petition.

After learning of the petition, the Barkers sent the district court a letter expressing their desire to obtain custody of the children or to adopt them. At trial, Ms. Barker testified that she was deployed to Germany until August 2009.

[2] The Barkers had never met the children in person before July 2008, although they had been updated about their lives through father.

At trial, father testified but mother did not. Father told the court that their apartment was very messy and cluttered because the children were always sick with colds. He testified that the children ate a proper diet in his care. He explained that he supported a plan for the Barkers to adopt the children. Following trial, the district court issued an amended order terminating appellants' parental rights.

D E C I S I O N

I

Appellants contend that there was insufficient evidence to support the termination of their parental rights. "[P]arental rights may be terminated only for grave and weighty reasons." *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). Thus, this court "exercises great caution in termination proceedings, finding such action proper only when the evidence clearly mandates [the] result." *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996). Appellate review of a district court's termination-of-parental-rights (TPR) 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). "Considerable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

"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).

1. Palpable Unfitness

Minn. Stat. § 260C.301, subd. 1(b)(4) (2008) provides for termination of parental rights if a district court finds

> that 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 is palpably unfit if his or her behavior "is likely to be detrimental to the children's physical or mental health or morals." *In re Children of Vasquez*, 658 N.W.2d 249, 255 (Minn. App. 2003). The supreme court has held that the state's burden under this provision is "onerous." *In re Children of T.R.*, 750 N.W.2d 656, 661 (Minn. 2008) (quotation omitted).

A parent's rights cannot be terminated solely due to his or her mental retardation or illness. *In re Welfare of J.J.B.*, 390 N.W.2d 274, 281 (Minn. 1986). If, however, the mental illness or other mental or emotional disability precludes the parent from providing proper parental care, the statutory requirement for termination has been met. *Id.*

Here, the district court's determination that appellants are palpably unfit to parent the children is based only in part upon their respective mental illnesses. The district court considered the actual conduct of the parents to determine fitness to parent. Appellants'

mental illnesses are one of several factors which led the district court to find, as required by statute, "a consistent pattern of specific conduct or specific conditions existing at the time of the hearing that, it appears, will continue for a prolonged, indefinite period and that are permanently detrimental to the welfare of the child." *In re Children of T.R.*, 750 N.W.2d at 661 (quotation omitted); *see also In re Welfare of Kidd*, 261 N.W.2d 833, 835–36 (Minn. 1978) (affirming TPR on grounds of palpable unfitness, not because mother was mentally ill, but because her mental illness was likely detrimental to child's well being); *In re Welfare of P.J.K.*, 369 N.W.2d 286, 290 (Minn. 1985) (affirming TPR on grounds of palpable unfitness, not because father was mentally disabled, but because he "could not grasp even the most basic parenting skills").

Appellants claim that the record does not establish a pattern of conduct rendering them unfit. But the record indicates that, as a result of their mental illnesses, appellants lack the ability, skills, and motivation to understand and meet their children's needs; in other words, there is a causal relationship between appellants' mental illnesses and their conduct, even though we acknowledge that appellants made some progress toward reunification. Substantial evidence in the record supports the district court's findings that appellants are unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the children, and those findings accurately describe appellants' palpable unfitness.

2. Failure to Correct Conditions

Appellants argue that the conditions leading to the children's placement in foster care were corrected because they complied with the case plan. The district court may

terminate parental rights if it finds "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) (2008). It is presumed that reasonable efforts have failed on a showing that, among other things, the conditions prompting a court-approved out-of-home placement plan have not been corrected by the parents. *Id.* Here, this presumption does not apply because the statutory conditions have not been met—specifically, respondent failed to file an out-of-home placement plan with the district court for approval. While this case does not involve a presumed failure of reasonable efforts to correct the conditions leading to the out-of-home placement, the record does contain clear and convincing evidence supporting the district court's finding that, despite the county's reasonable efforts, the parents failed to correct the conditions leading to the children's out-of-home placement. While appellants received substantial training and services, they continued to lack insight into the problems leading to the children's placement. There is no doubt that appellants love their children, but, despite a multitude of services, they did not improve the unsafe condition of their apartment, did not seek proper medical attention and/or medication for themselves and their children, and did not provide their children with proper nutrition. Their treatment of the children has also prevented J.A.W. from developing adequate muscle strength and motor skills.

3. Neglected and in Foster Care

Minn. Stat. § 260C.301, subd. 1(b)(8) (2008) provides that the district court may terminate parental rights if it finds "that the child is neglected and in foster care."

> "Neglected and in foster care" means a child:
>
> (1) who has been placed in foster care by court order; and
>
> (2) whose parents' circumstances, condition, or conduct are such that the child cannot be returned to them; and
>
> (3) whose parents, despite the availability of needed rehabilitative services, have failed to make reasonable efforts to adjust their circumstances, condition or conduct, or have willfully failed to meet reasonable expectations with regard to visiting the child or providing financial support for the child.

Minn. Stat. § 260C.007, subd. 24 (2008). To determine whether a child meets this definition, the district court considers a series of statutory factors, including the amount of time the children have spent in foster care, whether the parents have corrected the conditions leading to the removal, and the adequacy of the services provided to the parents. Minn. Stat. § 260C.163, subd. 9 (2008).

Appellants challenge the district court's invocation of this basis for termination, arguing that the children had only been in foster care for four months when respondent filed the TPR petition and that they complied with the case plan and did not receive sufficient services. But even if a parent has made recent attempts to develop the ability to assume parental responsibilities and has a sincere desire to do so, the court is not compelled to find the parent able to assume parental responsibility. *In re Welfare of J.L.L.*, 396 N.W.2d 647, 652 (Minn. App. 1986).

The record supports the district court's finding that appellants did not fully comply with the case plan. The initial case plan and subsequent district court orders required

appellants to maintain a home with reasonable safety standards and to follow the recommendations of parenting-skills educators, among other things. The record establishes that appellants did not maintain a safe home and did not comply with many of the recommendations of the educators, especially the recommendations for nurturing visitation with the children. And as discussed below, appellants received sufficient services.

Although the district court did not discuss each factor explicitly, there is clear and convincing evidence in the record to support its finding that the children were neglected and in foster care. *See In re Welfare of A.D.*, 535 N.W.2d 643, 648–49 (Minn. 1995) ("While the trial court did not support its conclusion that [the child] is neglected and in foster care with specific reference to each of the factors outlined in [the statute], the court's detailed findings of fact demonstrate the existence of many of the factors . . . .").

Additionally, witnesses' testimony at trial establishes that the children cannot be safely returned to appellants' care now or in the foreseeable future. For example, mother's social worker stated that mother "has demonstrated . . . that she does not handle stress and responsibility on a level that would allow her to care for [the children] for 24 hours." Father's social worker testified: "[Father is] very vulnerable and needy himself, and I think just based on what I saw with him and everything we've heard I've got some big concerns for the children in his care." When asked if her opinion that the children could not be safely returned to mother changed due to the fact that mother is medicine compliant in adult foster care, mother's GAL responded, "No," and testified that mother is not capable of caring for the children "on a full-time basis now or in the foreseeable

future." Father's GAL opined that the children could not be capably cared for by father because he "struggles with meeting his own needs, and . . . it would be very difficult for him to meet his children's needs and put his children's needs before his own." The CHIPS social worker testified that the children could not be safely returned to appellants because appellants are vulnerable adults who "require an adult caregiver to meet their day-to-day needs, and [are not] capable to provide for children a safe home, provide for them emotionally, educationally." No witness at trial supported reunification, not even father, who supported adoption by the Barkers.

Thus, we conclude that the record establishes by clear and convincing evidence that the children are neglected and in foster care, and the district court did not err in finding this statutory basis for termination.

4. Children's Best Interests

"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." *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). "Competing interests include such things as a stable environment, health considerations and the child's preferences." *Id.* "Where the interests of the parents and the child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301, subd. 7 (2008).

Minn. Stat. § 260C.201, subd. 11(c)(2) (2008) defines "best interests of the child" as "all relevant factors to be considered and evaluated"; *cf.* Minn. Stat. § 260C.212, subd. 2(b) (2008) (listing eight factors to be considered in making a best-interests

determination in child-placement decision). The district court thoughtfully considered all relevant factors in determining the children's best interests.

The district court found that before the children were placed in concurrent foster care, four-year-old B.A.W. functioned at the developmental level of a two-year-old child, and eighteen-month-old J.A.W. was unable to crawl or speak. But since the foster-care placement, B.A.W. has learned more words and is able to play creatively. J.A.W. has learned to walk and climb stairs. In terms of the children's medication and developmental needs, the court found that in appellants' care, J.A.W. had chronic constipation and developed a rectal skin tag, which was reportedly caused by lack of adequate hydration as an infant. In foster care, J.A.W. has had a medically appropriate diet and has no issues with constipation. B.A.W. is scheduled to have her adenoids removed, an appropriate surgical intervention that did not occur when she lived with appellants.

The court noted reports that during supervised visitation, appellants did not initiate contact with the children and were unresponsive to the children. The court found, on the other hand, that the children were very comfortable in the care of their foster parents; that they had received support, nurturing, and stimulation in the Hamlins' home; and that they had bonded to the other children in the home. The court found that "[t]ermination of parental rights would allow the children to be adopted and be a part of a stable, nurturing home."

These findings are supported by the record. Therefore, the district court did not err when it concluded that termination of appellants' parental rights is in the best interests of the children.

II

The district court concluded "that the appropriate family which is capable of providing for the welfare of the minor children is the family of [the Hamlins], and is not the family of [the Barkers]." The record supports this conclusion.

The record demonstrates that the children have thrived physically and emotionally in the Hamlins' care and are very well adjusted. The Hamlins implemented a consistent routine, structure, proper medical and emotional care, proper nutrition, additional county services, and also extended an offer of additional visitation to appellants, which they declined.

The children's GAL testified that in the Hamlins' care, the girls "seem very content and comfortable [and have] confidence . . . [and are] secure and content." She described the Hamlins as "a stable, loving, nurturing family who is aware of [the children's] various gifts and needs who can provide them with the stimulation that they need so they can continue to grow and develop in a healthy manner."

The Barkers had never met the children prior to July 2008, and when given the opportunity, the Barkers did not ask questions about the children's personalities, special needs, and functioning, and did not call the foster parents' home to talk to the children. The CHIPS social worker expressed her concern about the Barkers' ability to care for the

children, given the Barkers' military careers. The CHIPS social worker also expressed concern about the fact that the Barkers currently have no relationship with the children.

The Barkers testified about a military program that would release Ms. Barker from her deployment in the event that she adopts "special needs" children, but there is no evidence in the record that the children would be classified by a military physician as "special needs" children. And even if the military did deem the children to have "special needs," the record indicates that it would take the military approximately six weeks to find and train a replacement for Ms. Barker in Germany. Ms. Barker stated that if the children were not determined to have special needs, there was a high likelihood that she would be deployed again. She testified that her husband and sister would care for the children in South Carolina until she could return home, but such disruption in the lives of the children is not in their best interests. The children are not bonded to the Barkers, have never met father's other sister, have never been to South Carolina, and are thriving in the Hamlins' care, to whom they are extremely attached and call "Mom" and "Dad." And the Barkers could not describe how placement with them would be in the children's best interests, other than stating that placement with them would "keep them in the family."

On this record, we cannot say that the district court erred in concluding that the Barkers are not an appropriate placement for these children, either through transfer of custody or adoption.

III

Respondent filed an initial case plan for appellants in December 2007, and that plan was approved by the district court. In January 2008, the district court ordered the children placed in foster care. This placement required respondent to file a written out-of-home placement plan within 30 days of the order placing the children in foster care. Minn. Stat. § 260C.212, subd. 1(a), (b) (2008). Respondent, however, refused to provide the statutorily required out-of-home placement plan, reasoning that providing a second plan might confuse the parents, who had received the initial case plan less than one month earlier and who suffered from significant cognitive disabilities. Appellants argue that respondent's failure to file an out-of-home placement plan with the district court requires reversal of the termination of their parental rights.

A lack of a placement plan does not require reversal if the county's case-planning efforts have been ongoing, the parent's lack of cooperation is responsible for the county's failure to construct a plan, and the evidence clearly shows that the parent would not have been aided by a written placement plan. *In re Welfare of R.M.M. III*, 316 N.W.2d 538, 542 (Minn. 1982); *see In re Welfare of J.J.L.B.*, 394 N.W.2d 858, 863 (Minn. App. 1986) (affirming TPR despite a two-year delay in providing a placement plan where the delay was partly caused by the parent's lack of cooperation and prior court orders adequately informed the parent of what needed to be done before the children could return home), *review denied* (Minn. Dec. 17, 1986). A failure to provide a timely written plan is reversible error, however, if the parents have not been informed of, or do not understand,

the conditions they must satisfy to achieve reunification. *See In re Welfare of Copus*, 356 N.W.2d 363, 366–67 (Minn. App. 1984).

A written out-of-home placement plan is mandatory after an out-of-home placement for good reason: an out-of-home placement is a crucial period for parents and children in CHIPS proceedings, and the written plan provides, among other things, an objective identification of the goals that the parents are expected to achieve, as well as a baseline for assessing their progress toward those goals. Here, for two reasons, we categorically and emphatically reject respondent's assertion that not providing a plan was somehow justified on a theory that providing the plan would have confused appellants. First, because a written out-of-home placement plan is statutorily required, respondent has no authority to select which statutory mandates it will honor. The legislature has not conferred on respondent or the district court the authority to dispense with a written out-of-home plan based whenever respondent asserts that it is pointless to do so. Second, the record shows, and respondent does not dispute, that mother and father cooperated with respondent throughout these proceedings. Therefore, instead of arrogating to itself the authority to not provide a statutorily required plan that it deemed pointless, respondent should have made the filing of a simplified out-of-home placement plan consistent with appellants' cognitive limitations, as well as the provision of any associated services, an even *greater* priority.

We caution respondent that, in another case, a deliberate failure to provide and file a written out-of-home placement plan might warrant reversal. Here, however, the CHIPS social worker testified that, following the children's foster placement, the case-plan

requirements were never changed without notification to appellants. The evidence establishes that any new placement plan would have included substantially the same requirements as the initial plan, with the addition of a visitation plan—a visitation plan that was initiated and carried out with appellants' cooperation. In addition, subsequent written court orders notified appellants that they were required to comply with their case plan and other requirements. Most importantly, nothing in the record establishes that appellants were prejudiced by respondent's failure to file the out-of-home placement plan or that they did not understand their requirements for reunification. Thus, based on our careful review of this record, we conclude that respondent's failure to file the out-of-home placement plan does not require reversal.

IV

Appellants argue that respondent failed to make reasonable efforts seeking reunification. "Once a child alleged to be in need of protection or services is under the court's jurisdiction, the court shall ensure that reasonable efforts, including culturally appropriate services, by the social services agency are made to prevent placement or to eliminate the need for removal and to reunite the child with the child's family at the earliest possible time. . . ." Minn. Stat. § 260.012(a) (2008). In every TPR action, the district court must find specifically

> (1) that reasonable efforts to prevent the placement and to reunify the child and the parent were made including individualized and explicit findings regarding the nature and extent of efforts made by the social services agency to rehabilitate the parent and reunite the family; or

> (2) that reasonable efforts at reunification are not required.

Minn. Stat. § 260C.301, subd. 8 (2008). "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) (quotation omitted), *review denied* (Minn. Mar. 28, 2007). Reasonable efforts do not include efforts that would be futile. *R.W.*, 678 N.W.2d at 56; *S.Z.*, 547 N.W.2d at 892.

Respondent made reasonable efforts to prevent the need to file a CHIPS petition, then to prevent the need to remove the children, and finally to reunify the family. Respondent initially provided family-assessment case management, in-home services including parenting education, housekeeping assistance, job-coach assistance for father, anger-management training for father, depression management for mother, safety planning, personal-health and hygiene counseling, early-childhood classes for B.A.W., and the assignment of social workers for father. After the CHIPS petition was filed, additional services included a child-protection social worker, parenting assessments and psychological evaluations for appellants, a modified case plan to facilitate appellants' understanding, assignment of a social worker and GAL for mother, and assignment of a GAL for the children. Once the family members were placed in their respective foster-care homes, respondent provided weekly supervised visitation, parenting classes, medical and psychiatric care, couples' counseling, and a GAL for father.

Appellants claim that respondent ignored mother's therapist's recommendation that she receive dialectical behavioral therapy (DBT). But the CHIPS social worker

testified that: "DBT is such an involved therapy and it wasn't something that we were going to start with [mother] until we could get as far as an updated psych[ological] eval[uation] and so the intention was to take that in steps for her. And all that was happening at the time was quite overwhelming for [mother]." She also told the court that all of mother's other services were "comprehensive in scope," and DBT "mimicked" the services mother was already receiving. Even if respondent failed to follow through on this recommendation, the record establishes sufficient reasonable efforts.

V

Appellants argue that respondent failed to engage in a reasonable and comprehensive relative search. When selecting a foster home for a child, the county "shall" consider placing the child "with relatives and important friends" by giving priority to persons "related to the child by blood, marriage, or adoption[,]" and then to "an important friend with whom the child has resided or had significant contact." Minn. Stat. § 260C.212, subd. 2(a) (2008). To fulfill this duty, the county must identify the child's relatives and notify them of the child's need for a foster home "and of the possibility of the need for a permanent out-of-home placement of the child." *Id.*, subd. 5(a) (2008). This search "shall be reasonable and comprehensive in scope and may last up to six months or until a fit and willing relative is identified." *Id.*

The relative-notification requirements "do not apply when the child is placed with an appropriate relative or a foster home that has committed to being the permanent legal placement for the child and the agency approves of that foster home for permanent placement." *Id.*, subd. 5(c) (2008). Here, because the children's first out-of-home

placement was not committed to serving as a permanent placement, respondent sent letters to the paternal grandfather and the maternal aunt notifying them of the CHIPS petition and asking them to respond if they wanted to become a permanency option.[3] Because the children's second foster family, the Hamlins, committed to eventually adopting the children, that placement relieved respondent of its relative-search duties. But because respondent was not relieved of its relative-search duty by court order, respondent was not relieved of its separate duty to notify the children's relatives of the then-anticipated filing of the TPR petition. *See id.*, subd. 5(d) (2008) (stating that, unless relieved of a relative-search duty by the court, "in anticipation of filing a [TPR] petition, the agency shall send notice to the relatives").

While respondent's compliance with its relative-search duties was minimal, we see no reversible error. A relative placement is an important part of the TPR process, but where a child is to be placed is distinct from, and ancillary to, whether parental rights to that child will be terminated. Consistent with this fact, the parties have cited us to no caselaw holding that a defective relative placement precludes TPR. Indeed, the relative-search statute only directs that a placement agency "*consider[ ]*" placement with relatives before other placements and does not provide a basis for placement with a relative when such a placement is not otherwise in the best interests of the child. *Id.*, subd. 2(a) (emphasis added). Therefore, we conclude that the placement question does not legally drive the result of the termination question. *See In re Welfare of J.M.*, 574 N.W.2d 717,

[3] Mother's sister initially replied that she was interested in serving as a permanency option, but later informed respondent that she and her husband could not become a permanency option.

723 (Minn. 1988) (rejecting the idea that the imminence or non-imminence of adoption is a legitimate consideration in addressing whether to terminate parental rights). Moreover, here, respondent's limited relative search is at least partially explained on the record: neither appellants nor the paternal grandfather ever informed respondent about the existence of other relatives willing to act as a permanency option. Respondent was not informed about the existence of the Barkers until contacted directly by them. For these reasons, we conclude that respondent's relative search does not require reversal of the termination of appellants' parental rights.[4]

VI

On July 8, 2008, the state public defender withdrew as counsel for mother and father. The district court noted that this withdrawal "was not due to any negligence on the part of the parents," but "was caused in part [by] the budget crisis which resulted in the [p]ublic [d]efender's office deciding they could no longer represent parents in social service cases." Mother and father were not appointed counsel again until three and a half months later, in October 2008, when respondent filed its termination petition. The

[4] Father seems to request that this court transfer his custodial rights to the Barkers. We reject father's request for four reasons. First, we affirm the termination of father's parental rights. Second, the record supports the district court's determination that placement of the children with the Barkers is not in the children's best interests. Third, not only did mother not request a transfer to the Barkers on appeal, but in district court, she appeared to oppose such a transfer. And fourth, while father makes several arguments regarding the Barkers, he lacks standing to seek relief on their behalf. We note that while the district court's order denying the Barkers' motion for permissive intervention was not appealable itself, *Engelrup v. Potter*, 302 Minn. 157, 159–60, 224 N.W.2d 484, 485–86 (1974), that order has not been otherwise challenged in this appeal. *See* Minn. R. Civ. App. P. 103.04 (stating that the scope of review on appeal includes rulings affecting the ruling from which the appeal is taken). Therefore, we will not alter the district court's decision on the Barkers' motion to intervene.

district court characterized the lapse in representation "[as] a serious breach of the parents' right to counsel." The district court emphasized that, as a result of this breach of the parental right to counsel, it reviewed the record carefully and ultimately concluded that the withdrawal of counsel did not prejudice mother and father. We commend the district court for the attention it paid to this issue.

Appellants claim that their due-process rights to counsel were violated when they were without counsel for this three-and-a-half-month period. Whether a parent's due-process rights have been violated in a TPR proceeding is a question of law, which we review de novo. *In re Child of P.T.*, 657 N.W.2d 577, 583 (Minn. App. 2003), *review denied* (Minn. Apr. 15, 2003). Both the United States and Minnesota constitutions guarantee due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. The parent-child relationship is among the fundamental rights protected by the constitutional guarantees of due process. *In re Welfare of Children of B.J.B.*, 747 N.W.2d 605, 608 (Minn. App. 2008). The United States Supreme Court has noted that an indigent parent has no presumptive due-process right to counsel in TPR proceedings. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32, 101 S. Ct. 2153, 2162 (1981). But Minnesota has afforded indigent parents a statutory right to counsel at public expense in proceedings in juvenile court in juvenile-protection matters. Minn. Stat. § 260C.163, subd. 3(a), (b) (2008); *see* Minn. Stat. §§ 260C.151, subd. 1; .176, subd. 3(7); .212, subd. 1(d) (2008).

Father claims that appellants lost their counsel at a "critical stage" in the proceedings, resulting in their right to "a placement of their children with a relative [being] seriously compromised." We reject this "critical-stage" argument. The "critical-

stage" analysis is primarily used in criminal proceedings. *See, e.g.*, *State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006) (stating that "[t]raditionally, the Sixth Amendment right to counsel attaches at the 'critical stages' of criminal proceedings") (quoting *United States v. Wade*, 388 U.S. 218, 224, 87 S. Ct. 1926, 1931 (1967)). A juvenile-protection proceeding, however, is not a criminal proceeding. *See In re Welfare of G.L.H.*, 614 N.W.2d 718, 722 (Minn. 2000) (stating that "[u]nlike criminal proceedings, TPR proceedings cannot deprive the parent of her physical liberty"). In addition, to the extent the critical-stage analysis is used in noncriminal proceedings, it is used in proceedings that are "inextricably intertwined" with criminal proceedings. *See Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 832–33 (Minn. 1991) (holding that a driver has a right to counsel at the chemical-testing stage of DWI proceedings because the testing is "inextricably intertwined with an undeniably criminal proceeding") (quotation omitted). A termination proceeding is not inextricably intertwined with a criminal proceeding. Furthermore, the statutory right to counsel in TPR proceedings, "while deserving of protection," is not the equivalent of the constitutional right to counsel in criminal proceedings, and "the United States Supreme Court has noted that its precedents establish a presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *G.L.H.*, 614 N.W.2d at 722 (citations and quotations omitted). And, as noted, "TPR proceedings cannot deprive the parent of her physical liberty." *Id.* Finally, appellants have not cited this court to any authority allowing the critical-stage analysis to be applied to termination proceedings. Under these

circumstances, appellants have not shown that the critical-stage analysis is available here, and we decline to extend the "critical stage" analysis to these proceedings.

Appellants also argue that, with representation, the Barkers would have been identified as a permanency option earlier. Presumably, from this assertion, we are to infer that if appellants had counsel, it is more likely that the district court would have deemed the Barkers a viable permanency option for the children. Regardless of when and how the Barkers first became involved in this proceeding, the district court's detailed order shows that it thoroughly considered the Barkers as a permanency option and determined that adoption by the Barkers was not in the children's best interests. That determination is amply supported by this record. Thus, appellants have not shown that, if they had had counsel for the three and a half months in question, the record on which the district court rejected the Barkers would have shown them to be a viable permanency option.

We, like the district court, are deeply troubled by appellants' lack of counsel for three and a half months. On this record, however, we conclude for three reasons that reversal for lack of counsel is not required. First, because no substantive hearings occurred and no court rulings were made during the period that appellants lacked counsel, appellants could not have been prejudiced by court-related events occurring during that time. Second, the record shows that appellants had counsel for the entire subsequent TPR proceeding. And third, appellants have not shown how having counsel during the time in question would have affected the subsequent TPR proceeding.

We hasten to point out that we are *not* holding that appellants would not have benefited from legal representation during the period in question. During that time, their case was still classified as a CHIPS proceeding. By the time that the public defender's office resumed representation, however, respondent had abandoned the CHIPS petition and filed a TPR petition. For this reason, the permanency-review hearing that was statutorily required in the CHIPS proceeding, which had been scheduled and continued at least twice (apparently by respondent), did not occur. Whether the presence of counsel would have forestalled the filing of the TPR petition is admittedly speculative. We specifically reject, however, respondent's suggestion that because appellants retained their respective guardians ad litem, appellants' interests were adequately protected. As appellants correctly note, there is no question "that the role of an attorney and the role of a guardian ad litem are distinct and drastically different." *See* Minn. Stat. § 260C.163, subd. 5(b)(2) (2008) (stating that guardian ad litem's primary role is to advocate for child's best interests); Minn. R. Juv. Prot. P. 26.02, subd. 2 (providing that when a guardian ad litem is appointed in child-protection matter, the parent's attorney shall not be discharged); Minn. Stat. § 260C.163, subd. 3(d) (2008) (prohibiting child's counsel from acting as child's guardian ad litem).

Appellants are mentally disabled parents facing the possible loss of their children because appellants lack the sophistication to adequately feed and care for their children. Minnesotans should be deeply concerned when a lack of adequate funding causes parents like appellants to be thrown, without representation, into the complex and fast-paced environment of statutes, rules, case plans, and time-critical rehabilitation efforts that are

the focus of juvenile-protection proceedings. As part of the judiciary that reviews these proceedings and is entrusted with dispensing justice in this state, we are genuinely disturbed by this case, and particularly by what the lack of counsel for these parents may portend for other parents in other cases. While the exceptional effort put into this case by this district court leaves us confident that appellants were not prejudiced here, the aggregate effect of a systemic failure to provide counsel to parents like appellants threatens to seriously impair the rights of parents, the rights of children, and, in the unfortunate cases where those rights conflict, the legal system's ability to strike a just balance between those rights.

Affirmed.