STATE OF MINNESOTA
IN COURT OF APPEALS
A10-795

In the Matter of the Welfare of the Children of:
M.E.B. and A.J.B., Parents.

Filed October 26, 2010
Affirmed
Bjorkman, Judge

Lake County District Court
File Nos. 38-JV-07-332, 38-JV-07-334, 38-JV-09-516

Patrick Dinneen, Silver Bay, Minnesota (for appellant A.J.B.)

Russell Conrow, Lake County Attorney, Laura Auron, Assistant County Attorney, Two Harbors, Minnesota (for respondent Lake County)

M.E.B., Duluth, Minnesota (respondent)

Karen Gale, Grand Marais, Minnesota (guardian ad litem)

Considered and decided by Bjorkman, Presiding Judge; Stoneburner, Judge; and Wright, Judge.

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

BJORKMAN, Judge

Appellant father challenges the termination of his parental rights to three children, arguing that the district court (1) erred in considering evidence and legal issues that were not listed in the termination petition, (2) made findings of fact that are not supported by

the record, and (3) abused its discretion by inadequately analyzing the children's best interests. Because the district court considered the statutory criteria for termination, including the children's best interests, and its findings of fact are not clearly erroneous, we affirm.

FACTS

Appellant A.J.B. is the father of D.A.B., K.T.B., and Z.A.B. On September 14, 2009, Lake County Human Services (the county) filed a petition to terminate the parental rights of appellant and mother, M.E.B. On March 31, 2010, the district court issued an order granting the petition.[1]

Father and mother married in June 2004. D.A.B. was born the following January. On August 15, 2005, the county filed the first of three child-in-need-of-protection-or-services (CHIPS) petitions after mother pleaded guilty to theft of a controlled substance. The county supervised father's custody of D.A.B. during mother's two-month in-patient treatment program due to concerns about his ability to parent the child on his own.

On October 31, the district court adjudicated D.A.B. as a child in need of protection or services. Father and mother were ordered to comply with case plans that required them to remain chemically free and receive marital counseling due to their history of mutual physical and emotional abuse. K.T.B. was born on March 31, 2006. Based on the county's recommendation, the district court terminated its jurisdiction on November 27.

[1] M.E.B. does not challenge the termination of her parental rights.

Over the next few months, father and mother periodically separated and reunited, while the county continued to provide services to the family. Both parents continued to abuse chemicals. On January 31, 2007, mother admitted using alcohol and methamphetamine while pregnant with the couple's third child. On March 16, father was charged with his second felony driving-while-impaired offense. He was convicted and placed on probation through 2012. In April, mother and the children moved back to father's apartment. Father's chemical abuse continued. On May 11, he tested positive for cocaine.

Because of the parents' ongoing chemical dependency, financial issues, and concerns about the children's welfare, the county commenced a second CHIPS proceeding on May 18. The county obtained custody of the two children and placed them in foster care. Father and mother admitted the CHIPS petition, acknowledging that their chemical dependency and psychological issues interfered with their ability to care for the children. The district court ordered both parents to complete chemical-dependency, parenting, and psychological evaluations, and to comply with all recommended treatment. They were also required to maintain sobriety, refrain from domestic violence, and visit the children in a supervised setting.

Z.A.B. was born on July 9, while the other two children were in foster care.[2] Over the next few months, both parents maintained sobriety and increased their participation in the required programs, including parenting classes and mentoring. On December 10, D.A.B. and K.T.B. were returned to the parents' home on a trial basis. Over the next few

[2] Z.A.B. was born after the petition was filed and was allowed to remain with the parents.

months, father was frequently absent from the family home in Two Harbors. Although couple's therapy was not progressing, by June 2008, the county had seen enough progress to recommend that court involvement cease.

Just days after the county recommended that the parents regain full legal and physical custody, mother relapsed. She was convicted of fifth-degree felony possession of a controlled substance after taking Z.A.B. to various residences in Two Harbors for the purpose of obtaining prescription drugs. On June 19, the county filed a CHIPS petition on behalf of Z.A.B.[3] Father declined to take custody of the children because he did not have appropriate housing or child-care arrangements. The trial home placement of the older children was terminated, and all three children were placed in foster care, where they remained for one year.

In early fall 2008, father and mother moved to Duluth. The county arranged for them to continue receiving treatment and other services, and continued supervising visits with the children. Although the parents were not complying with all the requirements of their case plans, the district court denied the county's request to be relieved of further reunification efforts, concluding that services were not "futile" at that point.

Father and mother made progress on their respective case plans over the winter, but financial concerns remained, and couple's therapy was not successful due to persistent arguments during the sessions. The arguments carried over into the supervised visitation, which affected the children. The county referred the couple to a different therapist, but they did not keep all of the appointments, and when they did participate, the

[3] Father admitted the petition on October 16, 2008.

therapist noted that they displayed insufficient "motivation" to overcome the desire to be the "bigger victim."

In June 2009, the county returned the children to the parents on the condition that they live and parent the children separately. Two months later, the county learned that the two were, in fact, living together periodically, in violation of their case plans. And when they were together, mother and father continued to engage in domestic abuse, even though they knew that this was harmful to the children.

In September, the electricity was shut off in mother's apartment because the bills were not paid for three months due to arguments over who should pay them. Mother took the children to a hotel and then to a shelter. Father paid the bills but did not seek custody of his children, instead arranging for mother's family to take them. Father believed that he was not authorized to take the children from their mother. He also expressed his belief that mothers are supposed to take care of children while fathers provide for the family's financial needs.

Mother tested positive for cocaine on September 13, and the county once again took custody of the children. When the district court offered father the opportunity to take the children, father declined, indicating that mother should be allowed to care for them.

On September 14, the county filed a termination-of-parental-rights (TPR) petition alleging three statutory grounds: neglect of parental duties, palpable unfitness to parent, and failure of reasonable efforts to remedy the conditions that caused the out-of-home placement. The county continued to offer services under the case plans during the TPR

proceedings. Domestic issues between the parents continued to dominate the supervised visits. On October 8, the visitation supervisor had to end the visit because father and mother would not stop fighting with each other. On November 25, the visitation supervisor observed father yell at the children and throw D.A.B. against a chair. Father did not visit the children on Sundays because he was uncomfortable in the church environment where the visits were to occur. By the end of 2009, father's weekday visits with his children had become less frequent. He missed visits in December and only visited the children once during January 2010.

The TPR trial took place over five days during January and February 2010. The court heard testimony from numerous witnesses, including father and mother, therapists, and visitation supervisors. The GAL and county social worker testified that termination is in the children's best interests. The district court issued an order terminating both parents' rights to the three children. The court concluded that the county proved all three of the statutory bases for termination and that termination is in the children's best interests. This appeal follows.

D E C I S I O N

"[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). "We review the termination of parental rights to determine whether the district court's findings address the statutory criteria and whether the district court's findings are supported by substantial evidence and are not clearly erroneous." *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). A finding is clearly erroneous when it is either manifestly

contrary to the weight of the evidence or it is not reasonably supported by the evidence as a whole. *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660-61 (Minn. 2008). We give the district court's decision considerable deference, but "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *S.E.P.*, 744 N.W.2d at 385; *see also In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996) (noting that district court is in a "superior position to assess the credibility of witnesses").

I. The district court properly considered evidence that developed between the filing of the TPR petition and the trial.

In a termination proceeding, the district court must examine conditions as they exist at, and up to, the time of the termination hearing. *In re Welfare of Clausen*, 289 N.W.2d 153, 156 (Minn. 1980). But the court may not terminate parental rights based on a statutory ground that was not included in the TPR petition. *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 556 (Minn. App. 2007), *review denied* (Minn. July 17, 2007). Father contends that the district court erred in basing certain findings of fact and conclusions of law on allegations and evidence that were not included in the TPR petition. We disagree.

The petition lists three statutory grounds for termination of parental rights: neglect of parental duties, palpable unfitness to parent the children, and failure of reasonable efforts to remedy the conditions that led to the out-of-home placement. Minn. Stat. § 260C.301, subd. 1(b)(2), (4), (5) (2008). The district court addressed each of these grounds in the TPR order. Nothing in the order or the record indicates that the district

court considered any statutory ground that was not included in the TPR petition. Father's argument to the contrary is unavailing.

Father's assertion that the district court erred by considering evidence that was not referenced in the TPR petition is also unpersuasive. The petition was filed on September 14, 2009. The trial did not take place until January and February 2010. Many relevant facts and circumstances developed during the intervening months, including concerning interactions between the parents and father's unwillingness to regularly visit the children and meet their various needs. The district court was not only permitted but was obligated to consider this evidence. *See Clausen*, 289 N.W.2d at 156. Accordingly, we discern no error in the scope of the evidence the district court considered.

II. Clear and convincing evidence supports the district court's termination findings.

The district court found that clear and convincing evidence supports all three statutory termination grounds. Only one statutory ground must be proven by clear and convincing evidence to support the district court's termination, provided termination is in the children's best interests. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). Father argues that the district court's findings with respect to each termination ground lack support in the record and are clearly erroneous. We address each statutory basis for termination in turn.

A. Failure to comply with parental duties

Parental rights may be terminated if a "parent has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by

the parent and child relationship," but only if "reasonable efforts by the social services agency have failed to correct the conditions that formed the basis of the petition or reasonable efforts would be futile and therefore unreasonable." Minn. Stat. § 260C.301, subd. 1(b)(2). Noncompliance with parental duties includes, but is not limited to, failure to provide a child with necessary food, clothing, shelter, education, or other care and control necessary for the child's physical, mental, or emotional health and development. *Id.* Failure to comply with key elements of a court-ordered case plan is evidence that the parent has neglected the duties of the parent-child relationship. *In re Child of Simon*, 662 N.W.2d 155, 163 (Minn. App. 2003).

The district court determined that father displayed a "significant lack of progress on key parts of the case plan," specifically finding that father did not complete individual therapy and couple's therapy, and did not show progress in "visiting with and parenting his children." Substantial evidence supports these findings.

Although father complied with some aspects of his case plan, most notably by maintaining sobriety, his commitment to other important components of the plan was lacking. Father admitted he did not attend mandatory couple's therapy on many occasions due to "pure laziness." While father attended parenting classes and received mentoring, the evidence demonstrates that he did not successfully implement the training he received. He also passed up opportunities to parent the children, refusing to care for them on at least three occasions following mother's relapses. Father's visits with the children decreased in frequency as the TPR trial approached, and he made no attempts to reschedule the missed visits. And father did not demonstrate the willingness or ability to

meet the children's physical needs. In September 2009, when the children were to be returned, he allowed the electricity in their apartment to be turned off because of his dispute with mother. The parents were evicted from their apartment for failing to pay rent in December 2009. Although father testified that he had a plan to provide the children with shelter, food, education, and other care, he admitted that he had not secured housing or finalized any childcare arrangements by the time of the TPR trial.

Father points to the county's willingness to return the children before mother's final relapse as evidence that he has not neglected and is able to comply with the duties of the parent-child relationship. We disagree. The county has never recommended that father have sole, unsupervised custody of the children. At no time during the children's young lives has father sought or assumed the day-to-day duties of a parent. Father has repeatedly demonstrated by his words and conduct that he does not consider himself responsible for meeting the children's physical and emotional needs. He considers that to be mother's responsibility.

On this record, we conclude that the district court's determination that father has not complied with the duties of the parent-child relationship is substantially supported by the evidence and the court's findings are not clearly erroneous.

B. Palpable unfitness to parent

A district court may terminate the rights of a parent who is "palpably unfit to be a party to the parent and child relationship." Minn. Stat. § 260C.301, subd. 1(b)(4). A parent is palpably unfit when the evidence shows either "a consistent pattern of specific conduct before the child" or "specific conditions directly relating to the parent and child

relationship," which the court determines are "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." *Id.* A parent's inability to meet the child's needs at the time of the trial or in the reasonably foreseeable future justifies termination. *In re Child of P.T.*, 657 N.W.2d 577, 591 (Minn. App. 2003), *review denied* (Minn. Apr. 15, 2003).

The district court concluded that father "engaged in specific conduct that appears will continue for a prolonged, indefinite period and that are detrimental to the welfare of the children," including "domestic violence . . . a generally chaotic lifestyle and an inability to put the needs of his children before his needs and those of Mother." The court also found that father is "unable or unwilling to assume a primary parenting role" and that he "is unable to parent his three children on his own without considerable assistance." Substantial evidence supports these findings.

The children have been in and out of foster care for four years. At the time of trial, the two older children had been in out-of-home placement for more than two years. The youngest child had been out of the home for almost one and one-half years. On three separate occasions, when mother had relapsed and engaged in criminal activity, father refused to take on the role of the children's primary caretaker when given the opportunity. While father testified that he had finally decided to elevate his children's needs over his relationship with mother, he acknowledged that, as of the time of trial, he had no residence and had not arranged for appropriate childcare during the time he was in school or working. The evidence shows father's consistent inability and unwillingness to

parent his children. The district court's finding that this pattern is likely to continue for a prolonged period of time is supported by the evidence.

The district court further found that the children would "not be safe and stable in the care and custody of either or both parents at this time or the reasonably foreseeable future." The evidence amply supports this finding. Father continues to separate and reunite with mother, and counseling and therapy have not resolved the consistent pattern of domestic abuse that occurs in the children's presence. And father broke his promise to remain separated from mother during the summer of 2009 and subjected the children to additional conflict and disruption. In short, the record shows a consistent pattern of father placing his needs and his relationship with mother before the children and their needs and little indication that this situation would change in the foreseeable future.

The district court's findings on this statutory ground are not clearly erroneous. Clear and convincing evidence supports the district court's finding that father is palpably unfit to parent the children now or in the reasonably foreseeable future.

C. Failure to correct conditions leading to out-of-home placement

A district court may also terminate parental rights upon a finding that reasonable efforts have failed to correct the conditions that resulted in the out-of-home placement of the children. Minn. Stat. § 260C.301, subd. 1(b)(5). "Reasonable efforts" is defined as "the exercise of due diligence by the responsible social services agency to use culturally appropriate and available services" to meet the specific needs of the child and the child's family in order to reunify the family. Minn. Stat. § 260.012(f)(2) (2008); *see also In re Welfare of M.A.*, 408 N.W.2d 227, 235-36 (Minn. App. 1987) (describing minimum

reasonable-efforts requirements), *review denied* (Minn. Sept. 18, 1987). Whether a county has made reasonable efforts depends on the nature of the problem and the duration and quality of the county's involvement and efforts. *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996); *In re Welfare of H.K.*, 455 N.W.2d 529, 532 (Minn. App. 1990), *review denied* (Minn. July 6, 1990); *see also* Minn. Stat. § 260.012(h) (2008) (listing considerations).

Reasonable efforts are presumed to have failed upon a showing that

> a child has resided out of the parental home under court order for a cumulative period of 12 months within the preceding 22 months. In the case of a child under age eight at the time the petition was filed alleging the child to be in need of protection or services, the presumption arises when the child has resided out of the parental home under court order for six months unless the parent has maintained regular contact with the child and the parent is complying with the out-of-home placement plan.

Minn. Stat. § 260C.301, subd. 1(b)(5)(i). "It is [also] presumed that conditions leading to a child's out-of-home placement have not been corrected upon a showing that the parent or parents have not substantially complied with the court's orders and a reasonable case plan[.]" *Id.*, subd. 1(b)(5)(iii).

The district court determined that the statutory presumption applies because the children were all under the age of eight years when the CHIPS petitions were filed and have been in out-of-home placement for longer than six months. Father does not dispute this finding, but asserts that he has substantially complied with his case plan. We disagree. Father has had nine separate court-approved child-protection plans over the four years since the first CHIPS petition was filed. During these four years, the county

has provided numerous voluntary and court-ordered services, which the county has adapted to accommodate changed circumstances. These services include multiple chemical-dependency treatments, multiple individual and couple's therapists, ongoing urinalysis, parenting education, budgeting education, financial assistance, and transportation assistance. Despite the myriad services, father has not demonstrated the desire or ability to put the techniques he has learned into action. The conditions leading to the placement have not been corrected, and the children remain in foster care.

Father argues that the county has focused primarily on mother and that neither the county nor the district court has appropriately credited his compliance with his case plans. The district court considered and noted father's success in maintaining sobriety and the fact that he completed parenting education, received parent-mentoring during supervised visitation, obtained budgeting information, and participated in some therapy sessions. But the district court also found that father "failed to complete other key elements of the case plans . . . including participat[ing] in individual therapy, couple's therapy and visiting with and parenting his children." These elements of the case plan were no less important. In its memorandum of law, the district court emphasized that both father and mother "failed to gain or develop any insight into their conduct and behavior and have failed to make use of tools given to them in the parenting of their children." Ultimately, despite father's partial compliance with his case plan, the district court found that father "failed to correct the conditions leading to the placement of the children," noting especially his continuing "volatile relationship" with mother.

The district court's findings are not clearly erroneous. After four years of targeted programming and numerous attempts to reunite father with the children, the children remain in foster care. The permanency deadlines for these young children have long passed. *See* Minn. Stat. § 260C.201, subd. 11a (2008). The record amply supports the district court's conclusion that reasonable efforts failed to correct the conditions leading to the children's out-of-home placement.

III. The district court did not abuse its discretion in finding that termination serves the children's best interests.

In a TPR proceeding, "the best interests of the child must be the paramount consideration." Minn. Stat. § 260C.301, subd. 7 (2008). The best-interests analysis requires the district court to balance the child's interest in preserving the parent and child relationship, the parent's interest in preserving the parent and child relationship, and any competing interests of the child. Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(3); *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." *R.T.B.*, 492 N.W.2d at 4. "Where the interests of parent and child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301, subd. 7. The district court must consider the children's best interests and address those interests in its findings of fact and conclusions of law. *In re Tanghe*, 672 N.W.2d 623, 626 (Minn. App. 2003). Failure to do so requires a remand. *Id.*

Father argues that the district court abused its discretion because it did not sufficiently and independently analyze the children's best interests. We disagree. The

district court made several distinct findings of fact and conclusions of law related to the best-interests analysis and did not improperly merge the best-interests analysis with its consideration of the statutory bases for termination. In particular, the district court relied on the testimony of the GAL that the best interests of the children would be served by terminating both mother and father's parental rights. In reference to father, the district court found that the GAL's testimony about the significance of father's "inexperience . . . and lack of preparedness to assume custody" was credible. The district court also addressed the children's best interests in its memorandum of law, emphasizing that "it is in the best interests of the children that they may finally be given safety, security, and stability."

The district court also appropriately balanced the interest in preserving the parent-child relationship with the competing interests of the children. While the court acknowledged that father and mother "love their children and the children love them," the court found that the parents' love would not protect the children from the parents' "volatile relationship" and failure to utilize the services provided. The district court emphasized that "[t]he children's need for permanency and stability, as well as the extreme length of time these young children have been in placement, require that it is in their best interests" that parental rights be terminated. The district court's clear conclusion that the children's immediate need for permanent, stable, and nurturing, caretakers outweighs the parents' competing interests demonstrates that the court engaged in the required best-interests analysis. *See W.L.P.*, 678 N.W.2d at 711.

Father also argues that the district court erred in failing to make specific findings or conclusions regarding alternatives to terminating father's parental rights. But the district court was not required to make such findings. The best-interests analysis does not require consideration of long-term foster care as an alternative to adoption, *R.W.*, 678 N.W.2d at 57-58, and the district court was under no obligation to make findings or conclusions regarding alternatives to the relief requested in the TPR petition.

We note father's substantial accomplishments in addressing his chemical-dependency issues and his sincere intention to begin prioritizing his children's needs. But these young children have waited their entire lives for him to put his expressed intention into action. They cannot wait any longer. On this record, we conclude that the district court's best-interests-of-the-children analysis was adequate, and the court did not abuse its discretion in terminating father's parental rights.

Affirmed.