STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1244

In the Matter of the Welfare of the Children of: L.A.D., D.A.L. and G.E.B., Parents.

Filed January 17, 2012
Affirmed
Stoneburner, Judge

Crow Wing County District Court
File Nos. 18JV11241; 18JV096774

L.A.D., Brainerd, Minnesota (pro se appellant)

John P. Chitwood, Law Office of John Chitwood, St. Paul, Minnesota (for appellant D.A.L.)

G.E.B., Duluth, Minnesota (pro se appellant)

Crow Wing County Attorney, Janine L. LePage, Assistant County Attorney, Brainerd, Minnesota (for respondents)

Vicky Pavlacky, Crow Wing County Court Administration, Brainerd, Minnesota (guardian ad litem coordinator)

Eli Loven, Brainerd, Minnesota (guardian ad litem)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

Appellant-father challenges the district court's decision terminating his parental rights to his child. Father argues that (1) the county did not make reasonable efforts at reunification; (2) the district court erred by finding that he refused or neglected to comply with the duties imposed on him by the parent-and-child relationship and that he is palpably unfit to be a party to the parent-and-child relationship; (3) the county failed to conduct an adequate relative search; and (4) termination of his parental rights is not in the best interests of the child. We affirm.

FACTS

Appellant D.A.L. (father) is the adjudicated father of A.J.L. (child), born on November 28, 2001.[1] Father was never married to the child's mother. He lived with mother and the child for a short time in 2002 until July 2003, when father physically assaulted mother, who obtained an order for protection preventing father from having contact with her or the child. Father did not have further contact with the child, and the child was not aware of his existence, until he sent the child a letter in November 2010.

Father has been convicted of six felonies: four before and two after the child's birth. He was incarcerated from 1991-1997 for criminal sexual conduct and robbery. In August of 2001, father was returned to prison for violating the terms of release after his urine tested positive for cocaine, but he was out of prison at the time of the child's birth

[1] *See* Minn. R. Juv. Prot. P. 2.01(1) (defining *adjudicated father*, in relevant part, as an individual determined pursuant to a recognition of parentage under Minn. Stat. § 257.75 (2010)to be the biological father of the child).

in November 2001. In 2003, 2004, and 2005, father was convicted of, and served jail time for, several crimes involving violence. In November 2006, father was indeterminately committed to the Minnesota Sex Offender Program as a Sexually Dangerous Person (SDP) based, in part, on his history of offending since 1990. This court upheld the commitment. At the time of the trial in this matter and after five years of SDP commitment, father was still in Phase I of a three-phase rehabilitation program.

In December 2009, Crow Wing County Social Services (county) petitioned for a determination that the child was in need of protection or services (CHIPS), and in January 2010, the child and her half-sibling were removed from mother's care. At the time of the trial on termination of father's parental rights, the child and her half-sibling had been in the same foster care since being removed from mother's care, and the foster parents had indicated a willingness to adopt both children.

Father was a "participant" in the CHIPS proceedings and appeared by telephone for most of the hearings.[2] In January 2011, the county filed a petition to terminate the parental rights (TPR) of both parents to the child. The TPR petition alleged that father's rights should be terminated under Minn. Stat. § 260C.301, subd. 1(b)(2) (2010) (failure to comply with the duties imposed on him by the parent-and-child relationship) and Minn. Stat. § 260C.301, subd. 1(b)(4) (palpably unfit to be a party to the parent-and-child relationship).

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[2] *See* Minn. R. Juv. Prot. P. 22.01(b), defining "participants to a juvenile protection matter" to include "any parent who is not a legal custodian." Participants' rights in a juvenile protection matter are limited to notice and a copy of the petition, attending hearings, and offering information at the discretion of the court. Minn. R. Juv. P. 22.02, subd. 1 (a)–(c).

The county did not provide any services or case plan for father and, at a March 2, 2010 hearing, the county moved the district court for an order relieving it of reunification efforts with father, asserting that his criminal history and indeterminate commitment made reunification efforts futile and unreasonable. The district court granted the motion.

In May 2011, mother voluntarily terminated her parental rights to the child. Following a trial, the district court terminated father's parental rights to the child, based on detailed findings of fact and conclusions of law, including the conclusions that the county had proved, by clear and convincing evidence, both statutory grounds alleged in the petition and that termination is in the child's best interests. This appeal followed.

D E C I S I O N

"[Appellate courts] 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 if it is either manifestly contrary to the weight of the evidence or 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). "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).

I. The record supports the district court's findings and conclusions that reasonable efforts at reunification were not required in this case.

In a termination-of-parental-rights proceeding, the district court must specifically find "(1) that reasonable efforts to prevent the placement and to reunify the child and the parent were made . . . or (2) that reasonable efforts at reunification are not required as provided under section 260.012." Minn. Stat. § 260C.301, subd. 8 (1)–(2) (2010). In this case, two months after the CHIPS petition was filed, the county moved to be relieved of the responsibility to make reasonable efforts to reunify the child with father, asserting that the provision of reunification services to father would be futile and therefore unreasonable under the circumstances. *See* Minn. Stat. § 260.012 (a)(5) (2010) (providing that reasonable reunification efforts are not required if a district court determines that a petition has been filed stating a prima facie case that the provision of such services "is futile and therefore unreasonable under the circumstances"). The district court granted the motion.

In the order terminating father's parental rights, the district court specifically found that "[o]ffering of services to assist [father] in a plan for reunification with [the child] would be futile, given the facts of this case. Reasonable efforts to reunify are not required of [the county]." In its conclusions of law, the district court concluded that "[b]ased upon [father's] inappropriate behaviors, indeterminate commitment as a sexually dangerous person, and lack of any relationship with the minor child, the provision of services for the purpose of reunification is futile and therefore unreasonable and [the county] is not required to provide such services."

On appeal, father argues that because the county never offered any services, the district court erroneously concluded that provision of reasonable efforts would have been futile. Father asserts that the district court's reference to "inappropriate behaviors" is "so vague as to be unsupported and erroneous," his lack of an established relationship is not entirely his fault, and his SDP commitment is not basis for termination of parental rights.

Minn. Stat. § 260.012(a) requires (1) reasonable efforts to prevent an out-of-home placement; (2) reasonable efforts to eliminate the need for out-of-home placement; and (3) reasonable efforts to finalize an alternative placement plan for the child. The statute provides that such efforts are "always required except upon a determination by the court that a petition has been filed stating a prima facie case that" one of five listed conditions relieves the county from making such efforts, including that "the provision of services . . . is futile and therefore unreasonable under the circumstances." Minn. Stat. § 260.012(a)(5).

With regard to a non-custodial parent, the county's reasonable-efforts obligation is to "assess a noncustodial parent's ability to provide day-to-day care for the child and, where appropriate, provide services necessary to enable the noncustodial parent to safely provide the care, as required by section 260C.212, subdivision 4." Minn. Stat. § 260.012 (e)(2) (2010). Minn. Stat. § 260C.212, subd. 4 (2010), requires, in relevant part, that the county assess whether a noncustodial parent "is willing and capable of providing for the day-to-day care of the child temporarily or permanently," and, if not, to prepare an out-of-home placement plan addressing the conditions that a parent must meet before the child can be in that parent's day-to-day care.

Plainly, the purpose of reunification efforts is to enable a parent to provide day-to-day care for the child. It is equally as clear that, under the circumstances of this case, any such efforts would have been futile given father's indeterminate commitment as a sexually dangerous person that makes him unable to provide any direct care for the child at any time in the foreseeable future.

Nonetheless, the statute and the case law require that a county provide reasonable efforts for rehabilitation and reunification until the district court determines that the county has filed a petition stating a prima facie case justifying cessation of such efforts under one of five situations listed in the statute. *See In re Children of T.R.*, 750 N.W.2d at 664 (reversing a determination that noncustodial, participant father was palpably unfit and concluding that the county had not made reasonable efforts to rehabilitate father and had no authority to conclude that reasonable efforts were futile prior to the district court's determination of that issue).

Father argues that the county could have offered psychological or parenting evaluations, counseling, or parenting skills in the two months between the filing of the CHIPS petition and the order relieving the county of the responsibility to provide reasonable efforts, but father does not explain how the provision of such services would have had any impact on his inability to provide day-to-day care for the child or affected the district court's subsequent determination that reunification services would be futile under the circumstances of this case. We conclude that even if the county's failure to provide any services for the two months between the filing of the CHIPS petition and the order relieving the county of its responsibility to make reasonable reunification efforts is

deemed a violation of the statutory mandate, father has failed to establish that he is entitled to relief in the form of reversal of the order terminating his parental rights based on this violation. *See In re Children of Vasquez*, 658 N.W.2d 249, 253 (Minn. App. 2003) (holding that "when the futility of reunification efforts is irrefutable, as here where the father will be incarcerated until his children's adulthood and efforts at rehabilitation would be futile, the county need not provide the parent with a case plan"). The district court did not err in finding that reunification services would have been futile and that the county was not required to provide such services.

II. The record supports the district court's findings and conclusions that statutory grounds for terminating father's parental rights were proved by clear and convincing evidence.

The petition to terminate father's parental rights alleged two statutory grounds: Minn. Stat. § 260C.301, subd. 1(b)(2) (neglect of parental duties) and Minn. Stat. § 260C.301, subd. 1(b)(4) (palpably unfit). There is clear and convincing evidence supporting both grounds in the record.

A. Neglect of parental duties

Minn. Stat. § 260C.301, subd. 1(b)(2), provides, in relevant part, that parental rights may be terminated if the

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

In this case, the child was not aware of father's existence until he wrote to her in November 2010. Father asserts that he was "unable to maintain his relationship with [the child] because of factors largely outside of his control." But it was not until the CHIPS petition was filed in 2009 that father made any attempt to be a part of the child's life. The district court found that father has not been part of the child's life since 2003 and that he was initially prohibited from having contact with the child because he assaulted mother while the child was present in the home. The district court found that, thereafter, father repeatedly engaged in assaultive behavior that resulted in incarceration and that eventually he was indeterminately committed as a sexually dangerous person because of his behaviors. The district court found that "[d]ue to his actions, [father] did not comply with the duties imposed upon a parent by the parent and child relationship." These findings are supported by clear and convincing evidence in the record.

Father's entire challenge to this statutory basis for termination of his parental rights consists of his attack on the district court's determination that reunification efforts would be futile. Because clear and convincing evidence in the record supports that father repeatedly neglected to comply with the duties imposed on him by the parent-child relationship and that reasonable efforts would be futile, the district court did not err in concluding that this statutory ground supports terminating father's parental rights.

B. Palpably unfit

Minn. Stat. §260C.301, subd. 1(b)(4), provides a statutory basis for termination of parental rights if

> [the] 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 reasonable foreseeable future, to care appropriately for the ongoing physical, mental or emotional needs of the child.

The district court's numerous detailed findings describe father's history of offending; his current indeterminate commitment; his lack of progress in sex-offender treatment; the inappropriate content in a letter father wrote to the child; his failure to recognize that his actions have put him in a position of not being able to parent the child; and his request that the child remain in foster care so that he can have contact with her by letter and telephone. The district court concluded that "[c]lear and convincing evidence exists that [father] is palpably unfit to be a party to the parent and child relationship because of specific conditions directly relating to the parent and child relationship which are of a duration or nature that renders [father] unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child." The district court noted that "[i]f a parent's behavior is likely to be detrimental to a child's physical or mental health or morals, a parent can be found palpably unfit and have his parental rights terminated," citing *In the Matter of the Children of Vasquez*, 658 N.W.2d at 253. The district court concluded that based on father's "long history of criminal sexual conduct, assaultive behaviors, and chemical use that have directly affected his ability to parent [the child,] . . . [h]is behaviors are likely to be detrimental to the minor child's physical or mental health."

On appeal, father does not argue that the district court's finding of palpable unfitness is clearly erroneous. Rather he argues that the district court gave undue weight to his commitment and that his indeterminate commitment alone does not make him palpably unfit or constitute a sufficient basis for TPR. Father argues that his commitment is similar to incarceration and relies on cases holding that incarceration alone is not sufficient to render a parent palpably unfit. *See In re Welfare of Staat*, 287 Minn. 501, 505, 178 N.W.2d 709, 712–13 (1970) (stating that termination of parental rights is unwarranted for an incarcerated parent who maintains a parenting role while in prison). We need not determine, as father suggests, whether indeterminate commitment as an SDP is analogous to determinate incarceration for purposes of termination of parental rights because father's assertion that his rights were terminated based solely on his indeterminate commitment is without merit.

Case law establishes that incarceration may be considered along with other evidence offered in support of a petition for termination of parental rights. *In re Welfare of A.Y.-J.*, 558 N.W.2d 757, 761 (Minn. App. 1997), *review denied* (Minn. Apr. 15, 1997). In this case, the nature and duration of the conduct that led to father's commitment and the indeterminate length of commitment are factors appropriately considered by the district court in assessing father's fitness to parent. Because the record supports the district court's conclusion that father is palpably unfit to be a party to the parent-child relationship and because father's indeterminate commitment as an SDP is a valid factor to be considered in reaching this conclusion, we find no merit in father's

implied assertion that the county failed to prove his palpable unfitness by clear and convincing evidence.

III. The county's failure to conduct a search of father's relatives does not affect the validity of the district court's decision to terminate father's parental rights.

Father argues that the county failed in its statutory obligation to undertake a reasonable and comprehensive search of relatives for the child's placement. The district court did not directly address this issue.

In selecting a foster home for a child, the county is required to consider placement with "relatives and important friends" in the order set out in Minn. Stat. § 260C.212, subd. 2(a) (2010). To facilitate such placement, the county must identify the child's relatives and notify them of the child's need for a foster home "and the possibility of the need for a permanent placement for the child." Minn. Stat. § 260C.212, subd. 5(a)(1) (2010). The relative search is to "be reasonable and comprehensive in scope and may last up to six months or until a fit and willing relative is identified" and shall include both maternal and paternal relatives if paternity is adjudicated. Minn. Stat. § 260C.212, subd. 5(a). If a parent requests that relatives not be contacted or considered for placement, the county is to bring the request to the attention of the district court to determine whether the request is consistent with the child's best interests and the county shall not contact the relatives unless authorized to do so by the court. *Id.* at subd. 5(b). The county is also required to place siblings under its jurisdiction together for foster care and adoption at the earliest possible time, except in circumstances not involved in this case. Minn. Stat. § 260C.212, subd. 5(d) (2010).

On April 13, 2011, more than a month prior to the trial on termination of father's parental rights, the district court granted the county's motion to be relieved of further relative search efforts. The record does not reflect that father objected to this motion. At the time of the TPR trial, the child was in a foster-home placement with her half-brother and the foster parents wished to adopt both children. The district court noted father's request that the child be placed with his minor daughter from a different relationship.[3] The district court found that it would not be in the child's best interest to be removed from her stable foster-home placement with her half-brother, with whom she has lived since his birth and with whom she has a significant relationship, to be placed with a half-sibling whom she does not know.

The record demonstrates that the county failed to conduct a reasonable and comprehensive search of father's relatives and failed to bring to the district court's attention mother's request that father's relatives not be considered for placement. But father has not provided any authority that the county's failure to conduct the required relative search has any impact on the validity of the district court's decision to terminate his parental rights. The statute is silent as to any remedy for a failure to conduct the required relative search. Because we conclude that the relief father seeks—reversal of termination of his parental rights—is not appropriate or available as a remedy for the county's failure to follow the statutory mandates, we decline to further address this issue.

[3] Father also asserts that he has a sister who should have been considered for placement. The record does not contain any information about father's sister.

IV. The district court's findings that TPR is in the child's best interests are adequate and supported by clear and convincing evidence in the record

In any TPR proceeding, "the best interests of the child must be the paramount consideration, provided that . . . at least one [statutory ground for TPR is] found by the court. . . . Where the interests of parent and child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301, subd. 7 (2010). In analyzing the best interests of a child in a TPR proceeding, 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.*

Father asserts that the district court's best-interests findings are insufficient because the district court failed to individually address each of the *R.T.B.* factors. Although the district court does not explicitly address the factors individually, we conclude that the district court's findings adequately address the concepts expressed by the *R.T.B.* factors.[4]

Regarding the child's interest in preserving the parent-child relationship, the district court found that (1) the child did not know father existed until after she was removed from mother's care; (2) father's long history of criminal sexual conduct,

[4] Many of the district court's "findings" about the best interests of the child are found in the district court's conclusions of law. *See Graphic Arts Educ. Found. v. State*, 240 Minn. 143, 145–46, 59 N.W.2d 841, 844 (1953) (stating that "a fact found by the court, although expressed as a conclusion of law, will be treated upon appeal as a finding of fact"); *see also State v. Holiday*, 745 N.W2d 556, 562 (Minn. 2008) (quoting this language from *Graphic Arts*).

assaultive behaviors and chemical use have directly affected his ability to parent and his behaviors are likely to be detrimental to the child's physical or mental health; and (3) it is not in the child's best interests to remain in foster care for the sole purpose of allowing father to contact her by letter and telephone because she needs stability and permanency. The district court concluded that it is not in the child's best interests to have a continuing relationship or establish a relationship with father.

Regarding father's interest in preserving the parent-child relationship, the district court found that, after sending one letter from which inappropriate material had to be deleted before it could be given to the child, father made no further efforts at contact during the pendency of the CHIPS and TPR proceedings.

Regarding competing interests, the district court found that the child's best interests are served by being placed with her half-brother with whom she has a significant relationship, and would not be served by remaining in long-term foster care, an option preferred by father but precluded by statute. The district court found that the child has suffered from witnessing domestic violence and excessive chemical use throughout the majority of her life; it is in her best interests to be placed in a home where domestic violence and chemical use are not present and where she can feel safe and properly cared for; and it is not in the child's best interest to be moved from a permanency placement with her half-brother.

We conclude that the district court's findings supporting its conclusion that TPR is in the child's best interests are adequate and are supported by clear and convincing evidence.

Affirmed.