STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0776

In the Matter of the Welfare of the Child of: J. B., Parent.

Filed November 5, 2012
Affirmed
Cleary, Judge
Concurring specially, Stauber, Judge

Hennepin County District Court
File No. 27-JV-09-12329

William M. Ward, Hennepin County Public Defender, Paul J. Maravigli, Assistant Public Defender, Minneapolis, Minnesota (for appellant father)

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James Dorsey, III, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for foster parents)

Considered and decided by Chutich, Presiding Judge; Stauber, Judge; and Cleary, Judge.

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

CLEARY, Judge

Appellant challenges a district court order terminating his parental rights to his child, arguing that the evidence does not support the court's determination that he is palpably unfit to be a party to the parent-child relationship. Because the evidence does

support such a determination and because the court's findings of fact are supported by clear and convincing evidence and are not clearly erroneous, we affirm.

FACTS

K.B. is the biological mother and appellant J.B. is the adjudicated father of Ke.B., the child who is the subject of this case. Ke.B. was placed in out-of-home care with foster parents four days after his birth, and the Hennepin County Human Services and Public Health Department (county) filed an expedited petition to terminate the parental rights of appellant and K.B. to Ke.B. K.B. has an extensive history of chemical abuse and unsuccessful chemical-dependency treatment, as well as an extensive history with child-protection services, and Ke.B. is K.B.'s sixth child. At the time of Ke.B.'s birth, appellant was incarcerated for a felony weapons-possession conviction.

The district court subsequently issued an order terminating appellant and K.B.'s parental rights to Ke.B. K.B.'s parental rights were terminated under Minn. Stat. § 260C.301, subd. 1(b)(2) (2008) ("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"), subd. 1(b)(4) (2008) (the "parent is palpably unfit to be a party to the parent and child relationship"), and subd. 1(b)(5) (2008) ("reasonable efforts . . . have failed to correct the conditions leading to the child's [out-of-home] placement"). Appellant's parental rights were terminated under Minn. Stat. § 260C.301, subd. 1(b)(5). Appellant remained incarcerated at the time his parental rights were terminated.

Appellant and K.B. appealed, and this court issued an opinion affirming the termination of K.B.'s parental rights and reversing the termination of appellant's parental rights. *See In re Welfare of Child of K.B.*, No. A09-0124, 2009 WL 2928561 (Minn. App. Sept. 15, 2009), *review denied* (Minn. Oct. 20, 2009). This court held that the record was inadequate regarding the county's efforts to assess appellant's parental fitness, to provide services to appellant, or to establish that appellant had failed to comply with his case plan. *Id.* at *9. This court noted that the county could amend its termination petition or refile a petition, or the district court could reopen the record. *Id.*

Following the reversal, the county filed a new petition to terminate appellant's parental rights to Ke.B. After appellant was released from prison, appellant, the county, and the guardian ad litem (GAL) arrived at an oral settlement whereby the termination-of-parental-rights petition would be dismissed; appellant and Ke.B.'s foster parents would share legal custody of Ke.B.; the foster parents would have sole physical custody; and appellant would have reasonable parenting time. Under the settlement, K.B. would be allowed to have contact with Ke.B. four times per year, and these contacts would occur during appellant's parenting time and be supervised by appellant at all times. A written order incorporating this oral settlement was never agreed upon by the parties or signed by the district court, however, because disputes over the order's language arose and because the county, the GAL, and Ke.B.'s foster parents later opposed such an order based on allegations of misconduct on the part of appellant during visits with Ke.B. Appellant moved to enforce the oral settlement, and this motion was denied by the district court.

The county then filed a petition to transfer permanent legal and physical custody of Ke.B. to his foster parents, and the GAL filed a petition to terminate appellant's parental rights to Ke.B.[1] The district court held a trial on these petitions that spanned 12 days between November 30, 2011, and February 14, 2012, during which 33 witnesses testified, including multiple experts. Following trial, the district court issued an order terminating appellant's parental rights to Ke.B. and concluding that "[t]here is clear and convincing evidence that [appellant] is palpably unfit to be a party to the parent-child relationship." The court found that appellant "lacks sufficient parenting skills or supports to parent [Ke.B.] and he is not able to sufficiently provide for [Ke.B.'s] special needs." The court determined that "[t]hese are conditions directly related to the parent and child relationship of a duration or nature rendering [appellant] unable for the reasonabl[y] foreseeable future to care appropriately for [Ke.B.'s] ongoing physical, mental, and/or emotional needs." The court also determined that terminating appellant's parental rights is in the best interests of Ke.B. and that reasonable efforts had been made to reunify appellant and Ke.B. Appellant filed a motion requesting a new trial, amended findings, or visitation with Ke.B. pending appeal, and the district court denied those motions. This appeal follows.

[1] The concurrence suggests that providing the GAL "party" status in child-protection cases is a mistake and in this case led to "far more controversy and litigation." We disagree. The GAL adds a unique perspective to child-protection litigation and, in this case, may have caused more "litigation," but was ultimately vindicated in seeking termination of appellant's parental rights.

D E C I S I O N

When reviewing an order terminating parental rights, an appellate court must determine whether the district court addressed the proper statutory criteria and whether the findings of fact are clearly erroneous. *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). "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) (quotation omitted). The appellate court gives considerable deference to the district court's decision to terminate parental rights. *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). District courts "stand in a superior position to appellate courts in assessing the credibility of witnesses." *M.D.O.*, 462 N.W.2d at 374–75.

A district court may terminate parental rights only if clear and convincing evidence establishes that a statutory ground for termination exists and that termination is in the best interests of the child. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). In addition, the district court must find that reasonable efforts to prevent placement and to reunify the parent and child were made, unless reasonable efforts to reunify are not required under the statute. Minn. Stat. § 260C.301, subd. 8 (2010). Appellant does not challenge the district court's determinations that termination of his parental rights is in the best interests of Ke.B. and that reasonable efforts to reunify were made, but he does challenge the court's determination regarding the statutory ground for termination.

The district court held that clear and convincing evidence establishes that appellant is palpably unfit to be a parent to Ke.B. A juvenile court may terminate all rights of a parent to a child if it 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.

Minn. Stat. § 260C.301, subd. 1(b)(4) (2010). The court must make its decision based on "conditions that exist at the time of termination," and "it must appear that the conditions giving rise to the termination will continue for a prolonged, indeterminate period." *In re Welfare of P.R.L.*, 622 N.W.2d 538, 543 (Minn. 2001). Ordinarily, it is presumed that a natural parent is a fit and suitable person to be entrusted with the care of his or her child. *In re Welfare of A.D.*, 535 N.W.2d 642, 647 (Minn. 1995). "Parental rights are terminated only for grave and weighty reasons." *M.D.O.*, 462 N.W.2d at 375.

The district court found that appellant is palpably unfit because "he lacks sufficient parenting skills or supports to parent [Ke.B.] and he is not able to sufficiently provide for [Ke.B.'s] special needs." The court determined that "[t]hese are conditions directly related to the parent and child relationship of a duration or nature rendering [appellant] unable for the reasonabl[y] foreseeable future to care appropriately for [Ke.B.'s] ongoing physical, mental, and/or emotional needs."

I. The district court's finding that appellant lacks sufficient skills to parent Ke.B.

The district court found that appellant is palpably unfit because he lacks sufficient skills to parent Ke.B. and that this deficiency will continue for the reasonably foreseeable future. The court found that appellant lacks good judgment, the ability to keep a child safe, and the ability to provide necessary structure and stability.

The district court cited appellant's decision to move in and co-parent with K.B. as an example of appellant putting his own needs above those of Ke.B. and demonstrating poor parenting judgment. Appellant and K.B. were residing together at the time of trial, and they both testified that they moved in with one another with the goal of regaining custody of their children. Appellant testified that he knew that K.B.'s parental rights to Ke.B. had been terminated and that their relationship might negatively impact his case, but that his relationship with K.B. is important to him. Appellant's case plans have repeatedly included requirements that appellant have no contact with K.B. and that he not allow Ke.B. to have contact with K.B., although the last case plan did not include such requirements. Appellant argues that the district court placed undue emphasis on appellant's relationship with K.B. when the no-contact conditions had been removed from appellant's case plan before trial. However, appellant has not shown that the district court erred by considering appellant's attempt to co-parent this child with a person who was previously determined to be clearly and convincingly palpably unfit to parent *this* child. Moreover, it is entirely appropriate to consider the person with whom appellant intends to co-parent his children when determining whether appellant is fit to be a parent.

The district court relied in part on the testimony of appellant's mother to support the finding that appellant lacks good judgment and the ability to keep a child safe. Appellant's mother testified that, on one occasion, appellant lit one of his other son's socks on fire while the son was wearing it and that appellant thought the incident was funny. Appellant's mother also testified that appellant interacts with his children like a big-brother figure and puts his and K.B.'s needs before the needs of their children. She further acknowledged that she has never seen appellant "exhibit the skills and behavior needed to be a positive part of his children's lives."

The district court found that appellant "would not be able to provide consistent behavior management or stability in the home" because appellant's home "is anything but a stable home and would be disruptive for [Ke.B.]." The district court indicated that K.B.'s presence in the home would be disruptive to Ke.B. At trial, K.B. and her chemical-dependency counselor testified that K.B. is methadone-dependent and takes prescription medication for depression, anxiety, attention-deficit disorder, and sleep. The district court also indicated that appellant and K.B.'s attempt to reunify with their children would be disruptive to Ke.B. Appellant and K.B. both testified that it is their goal to regain custody of their children, at least some of whom also have special needs.

Given the evidence in the record, the district court's finding that appellant lacks sufficient skills to parent Ke.B. and that this deficiency will continue for the reasonably foreseeable future is supported by clear and convincing evidence and is not clearly erroneous.

II. The district court's finding that appellant lacks the ability to sufficiently provide for Ke.B.'s special needs

Evidence was presented during trial regarding the special needs of Ke.B., leading the district court to state that "[e]ven if [appellant] demonstrated the ability to parent an average child, [Ke.B.] has special needs and behavioral problems that require an 'above-average parent.'" Ke.B. has been diagnosed with disruptive behavior disorders, partial fetal alcohol syndrome, and borderline intellectual functioning. His foster parents have reported disruptive behavior such as physical and verbal aggression, self-injury, impulsivity, stealing, and property destruction. Ke.B. receives numerous services for his special needs, including special education, play therapy, behavioral therapy, and meetings with a school psychologist. It has been recommended that he have a personal care attendant. Sarah Cross, a psychotherapist and Ke.B.'s play therapist, stated:

> I believe that [Ke.B.] requires a very nurturing supportive environment. That is, he is going to need caregivers who can engage in a therapeutic process with him, [who are] going to be able to get him to all of his needed appointments. He is going to have a lot—going to need a lot of additional support, being able to follow those instructions at home, being able to give him gentle and safe boundaries and limits, to encourage nurturing and positive emotional developments. He is definitely going to need caregivers who are going to make him be the most important person in their world for a short time. He is going to need a lot of support to get back on track developmentally in order to progress in school.

The district court found that appellant is palpably unfit because he lacks the ability to sufficiently provide for Ke.B.'s special needs and that this deficiency will continue for the reasonably foreseeable future. Specifically, the court found that appellant does not

have the ability to discern what Ke.B.'s needs are, to make sure that those needs are met, or to put those needs above his own; that appellant has denied that Ke.B. even has special needs; and that appellant's education as to Ke.B.'s special needs and service providers has been minimal.

When testifying at trial, appellant initially denied that Ke.B. has special needs.

> ATTORNEY: Can you tell the Court what your understanding of [Ke.B.'s] special needs are?
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> APPELLANT: His special needs—his behavior problems to my knowledge. I don't know. I don't think he does have special needs, you know. I think he is perfect. I mean he might have a bit of laid back, you know, not sitting and getting comfortable with people right away. But, you know, that's typical kids. You know, I would just work with him and show him how to be comfortable around people.
>
> ATTORNEY: So you don't believe then that some of these services that he is going through are necessary?
>
> APPELLANT: No. No, I don't think so. I don't think none of my kids have special needs.

When his testimony was resumed several weeks later, appellant stated that he doesn't know whether Ke.B. has special needs, but that he would make sure that any needs are taken care of if reunited with Ke.B. Due to appellant's previous denial that Ke.B. has special needs, the district court found that "[appellant's] testimony that he would assist [Ke.B.] in obtaining the services he needs [is] not credible." The court also credited the testimony of Ms. Cross, who stated that a caregiver's acceptance that a child has special needs is an absolute requirement.

Dr. Christopher Boys, a pediatric neuropsychologist experienced in fetal-alcohol-syndrome disorders, testified as to the type of parenting necessary for children with fetal alcohol syndrome.

> DR. BOYS: [T]here has to be absolute consistency for these kids . . . .
>
> ATTORNEY: When you mean consistency, what are you referring to specifically?
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> DR. BOYS: Doing prospective parenting, where we teach the kids what we want to see out of them, not just reacting to the behaviors. What we have learned over the years with Fetal Alcohol Spectrum Disorder kids is that they do not respond very well to corrective measures, rather we have to be out in front of them teaching them before the behavior occurs.

Dr. Seymour Gross, a licensed psychologist who sees appellant on an as-needed basis, stated that appellant has limited intellectual functioning and that this limitation is not expected to change in the reasonably foreseeable future. Dr. Gross testified that a person with appellant's deficiency "is governed more by here and now information with less capability to abstract or generalize ideas and then take action on those generalizations. More like more of being concerned about the current here and now, rather than for future anticipation." The district court credited this testimony of Dr. Boys and Dr. Gross when finding that appellant would be unable to parent Ke.B. given Ke.B.'s special needs.

The district court found that appellant "does not have the capability or motivation to arrange for and provide [necessary] services to [Ke.B.]." The court stated that appellant had minimally connected with Ke.B.'s service providers or learned about Ke.B.'s special needs and that appellant "failed to grasp the importance and significance" of doing so. Marla Olson, Ke.B.'s school psychologist, testified that she met appellant on

one occasion and that appellant stated to her that "his child protection worker had told him it was in his best interest to show interest in [Ke.B.], so he wanted to meet with me." Appellant attended two sessions of Ke.B.'s play therapy with Ms. Cross, during which Ms. Cross observed appellant and Ke.B. playing together. Ms. Cross testified that she had told appellant that he was always welcome to attend Ke.B.'s play therapy sessions. Katherine Welter, Ke.B.'s in-home behavioral therapist, testified that she had never met appellant and that appellant had never participated in or observed any of Ke.B.'s behavioral therapy sessions, although she and appellant did have a telephone conversation about Ke.B. and she e-mailed him regarding Ke.B.

Appellant's case plan included a requirement that appellant become familiar with Ke.B.'s service providers and get updates on Ke.B.'s progress. When asked whether appellant had complied with this requirement, Mary Kay Libra, a child-protection social worker with the county, testified, "It was my intention that it would be an ongoing task that [appellant] would continue to work with the service providers and the school psychologist. So, now do I think it's enough at this point, probably not, no." Joseph Betz, Ke.B.'s court-appointed GAL, also testified on this issue.

> ATTORNEY: How is [appellant's] performance of his current case plan regarding becoming familiar with the providers and the services that [Ke.B.] receives?
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> MR. BETZ: He has minimally made contact, as I understand it, from my contact with those providers and through testimony in terms of fulfilling what I would interpret to be expectation of that in terms of being proactive, in terms of going out and making those kinds of contacts.

Given the evidence in the record, the district court's finding that appellant lacks the ability to sufficiently provide for Ke.B.'s special needs and that this deficiency will continue for the reasonably foreseeable future is supported by clear and convincing evidence and is not clearly erroneous.

III. The district court's finding that appellant lacks sufficient support to parent Ke.B.

The district court found that appellant is palpably unfit because he lacks sufficient support to help him parent Ke.B. and that this deficiency will continue for the reasonably foreseeable future. Dr. Gross testified that appellant likely would not be able to parent Ke.B. independently, but that appellant could parent with an appropriate support system and that appellant would need to have a trusted support person to advise him when things happen that he doesn't fully comprehend or that are out of the ordinary. Dr. Gross stated:

> He would need a resource that helps him understand the different behaviors at different levels of development as his son grows. He would need a resource to be able to practically be available for any written material that the school would offer to a parent, so that he would know, such as signing a permission slip to go on a field trip. He would need to have trust in the person who he is working with, that they would be guiding him correctly regarding his son.

The district court found this testimony "persuasive" and stated that appellant does not have appropriate support that "will be available 24/7 as needed."

At trial, appellant testified that he would receive parenting support from the Midwest Challenge and Young Dads programs. However, the district court found that "Midwest Challenge is not a substantive parenting program." Torl Conley, a program director for Midwest Challenge, testified that the organization provides transitional

housing, aftercare treatment, and a work-release program. Mr. Conley stated that Midwest Challenge does not do parenting assessments or offer parenting education. The district court also found that Young Dads "does not provide support for parenting a child with special needs" and that "parenting education, while part of the curriculum, is not the focus of the program." Anthony Cain, a career counselor for Young Dads, testified that the program includes 12 hours of parenting classes in addition to lessons on self-sufficiency, job training, entrepreneurship, finances and budgeting, literacy, anger management, domestic violence, and volunteerism. Mr. Cain testified that he teaches some of the parenting classes, but that he does not have special education or training in parenting generally, parenting children with special needs, attachment, or child development. Mr. Cain admitted that the program does not include instruction on parenting children with special needs.

The district court found that, if Ke.B. is returned to appellant's care, it is likely that K.B. would end up co-parenting Ke.B. and that K.B. is not an appropriate support person. The finding that K.B. would likely end up co-parenting Ke.B. is supported by appellant's testimony that he resides with K.B.; that he and K.B. moved in with one another with the goal of regaining custody of their children; that he works full-time and frequently works overtime; that K.B. could provide care for Ke.B. when he is at work; and that he would have no concerns with Ke.B. being left alone with K.B. This finding is also supported by K.B.'s testimony that she and appellant moved in with one another with the main goal of getting their children back and that she feels she can "[a]bsolutely" parent Ke.B. The finding that K.B. is not an appropriate support person for appellant and

Ke.B. is supported by K.B.'s history of chemical abuse and unsuccessful chemical-dependency treatment, history with child-protection services, and the previous termination of her parental rights to Ke.B. This finding is also supported by the testimony of Dr. Gross who stated that someone who has lost custody of multiple children would not be an appropriate support person.

Given the evidence in the record, the district court's finding that appellant lacks sufficient support to help him parent Ke.B. and that this deficiency will continue for the reasonably foreseeable future is supported by clear and convincing evidence and is not clearly erroneous.

Appellant makes an argument regarding the weight and credibility to be given to the testimony presented at trial. Appellant claims that the district court should not have given credit to the testimony of Dr. Sandra Hewitt, a licensed child psychologist who reviewed this case, and argues that the doctor had minimal connections to the case and was openly biased, ill-informed, and generously compensated. Dr. Hewitt testified that children with special needs require "[b]etter than average" parenting, that appellant cannot provide this special parenting, and that a situation wherein appellant retains custodial rights to Ke.B., including visitation, would be "extremely destructive." Appellant argues that, rather than giving credit to this testimony, the district court should have adopted the opinions of Ms. Libra, who testified that she believed that appellant "should have some ongoing contact with his son," and Dr. Gross, who testified that he believed that appellant could parent Ke.B. if given appropriate support. Appellant also cites the opinions of Mary Maguire, a licensed psychologist who conducted a parenting

assessment of appellant, and Darren Lane of the Genesis II for Families program, both of whom testified that appellant does have parenting skills and abilities.

Given that 33 witnesses testified during trial, including multiple experts, it is difficult to determine how much credibility the district court gave to any one witness. In its order, the district court cited the testimony of several expert witnesses, and it does not appear that the court relied solely or even predominantly on the testimony of Dr. Hewitt. Moreover, the district court has the responsibility to evaluate the credibility of witnesses and may accept all or only part of any witness's testimony. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). That the district court "chose to give certain testimony more weight does not mean that the [district] court's findings lack evidentiary support and require reversal." *Id.* On appeal, the reviewing court must "defer to the district court's determinations of witness credibility and the weight to be given to the evidence." *In re Welfare of T.D.*, 731 N.W.2d 548, 555 (Minn. App. 2007).

Appellant also argues that the termination of his parental rights to Ke.B. was erroneous because he was in compliance with his case plan. At trial, Ms. Libra testified that it was her belief that appellant had "pretty much completed the case plan that [had been] offered [to] him." However, "A parent's substantial compliance with a case plan may not be enough to avoid termination of parental rights when the record contains clear and convincing evidence supporting termination." *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 89 (Minn. App. 2012). "The critical issue is not whether the parent formally complied with the case plan, but rather whether the parent is presently able to assume the responsibilities of caring for the child." *Id.* Furthermore, the district court found that

appellant had not fully complied with all aspects of his case plan, and this finding is supported by evidence in the record. Appellant's case plan included a requirement that he maintain contact with the GAL. Mr. Betz testified as to that requirement.

> ATTORNEY: And how would you describe [appellant's] compliance with the current case plan?
>
> MR. BETZ: Well, he has had—specific to me is that he has had minimal conversations with me, in terms of maintaining that communication relationship. It has been challenging to have conversations of any substance with him.

As previously stated, the case plan also included a requirement that appellant become familiar with Ke.B.'s service providers and get updates on Ke.B.'s progress, and evidence suggests that appellant did not fulfill this requirement.

The district court's carefully considered and detailed findings of fact are supported by clear and convincing evidence and are not clearly erroneous. Given all of the evidence and testimony in the record, the district court did not err by finding that clear and convincing evidence establishes that appellant is palpably unfit to be a party to the parent-child relationship.

Affirmed.

STAUBER, Judge, concurring specially

I concur in the result but would not terminate appellant's parental rights under Minn. Stat. § 260C.301, subd. 1(b)(4) (2008) (the "parent is palpably unfit to be a party to the parent and child relationship"). A termination under this provision creates a presumption that may deprive appellant of the opportunity to raise a child in the future. Here, the district court determined that the child has many special needs that require special care and unique parenting skills that appellant cannot provide. Despite good efforts, appellant cannot adequately parent his special-needs child. The facts indicate that, despite his shortcomings, appellant was cooperative, worked his case plan, loved his son, and did his best. In fact, the government provided excellent services while attempting to reunify appellant with his son. The TPR could have just as easily and more accurately and humanely been based on an alternative statutory provision, such as Minn. Stat. § 260C.301 subd. 1(b)(5) (2008) ("reasonable efforts . . . have failed to correct the conditions leading to the child's [out-of-home] placement"), thereby avoiding the future adverse consequences of a "palpable unfitness" determination.

This case also exposed an internal "turf war" between the Hennepin County Human Services and Public Health Department (the welfare department), and the Guardian-ad-litem (GAL). The welfare department supported a permanent custody change with nominal parental communication and contact rights, while the GAL vigorously advocated for the foster (and prospective adoptive) parents by petitioning and aggressively pursuing TPR. The district court favored the GAL after a twelve-day, 33-witness trial.

Though now statutorily required, providing the GAL "party" status in child-protection cases creates case-planning confusion; duplication of effort; unnecessary costs; and, as displayed here, far more controversy and litigation. It is up to the district court to exert control over the proceedings, participants, and issues, balancing parental reunification priorities against the best interests of the child. Here, the father's rights and arguably the child's rights were lost in the five years of systemic dysfunction. Father, acknowledging the special needs of his child and his own weaknesses, was supportive of the simple custody change recommended by the welfare department throughout the proceedings.

The result, after two appeals, is a five-year-old child who knows and will remember his father but is now deprived of birth-family contact. And, as those who practice in the child-protection area are aware, birth parents and their children often reunite.