STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0203
A17-0206

In the Matter of the Welfare of the Children of:
A.G. and A.H., Parents

Filed July 31, 2017
Affirmed
Smith, John, Judge[*]

Dakota County District Court
File No. 19HA-JV-15-2378

David A. Jaehne, West St. Paul, Minnesota (for father A.G.)

James C. Snyder, Snyder Law Office, P.A., Maplewood, Minnesota (for mother A.H.)

James C. Backstrom, Dakota County Attorney, Donald E. Bruce, Assistant County Attorney, Hastings, Minnesota (for respondent county)

David Elliott, West St. Paul, Minnesota (guardian ad litem)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and Smith, John, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

SMITH, JOHN, Judge

We affirm the termination of mother's and father's parental rights to their four children, because the evidence is sufficient that they were palpably unfit to be parties to the parent/child relationship, and termination was in the children's best interests. We reject father's arguments that the county failed to provide him with a case plan and that his trial counsel was ineffective.

FACTS

Mother A.G. and father A.H. are the parents of I.H., born in 2010; E.H., born in 2012; J.H., born in 2013; and L.H., born in 2014.[1] Father has an extensive criminal history, including several convictions for domestic violence toward mother. Between 2007 and 2014, father was convicted of more than a dozen crimes involving domestic abuse of mother as the victim or drug crimes. When the children-in-need-of-protection-or-services (CHIPS) petition was filed, mother was the sole legal and physical custodian of the children, and father was in prison after being convicted of felony-level violation of a domestic no-contact order prohibiting his contact with mother. Father was released from prison shortly before the TPR trial began.

Respondent Dakota County had sporadic contact with mother and father for a number of years. In January 2015, mother was evicted from her subsidized housing

[1] Mother has an older child who is in his father's legal and physical custody, and a sixth child, J.H., Jr., who was born shortly before the termination-of-parental-rights (TPR) trial. The sixth child has a different father and was not a subject of this TPR.

because of conditions in the home, mother's habit of permitting others to stay there in violation of the lease, and several police visits to the home. County workers decided that the children had to be removed, and they were placed in foster care on a 72-hour hold. A CHIPS petition was filed on January 21, 2015.

At her initial appearance in the CHIPS proceeding, mother tested positive for methamphetamine and was referred to the Family Dependency Treatment Court. She completed inpatient chemical dependency treatment and attended a few days of aftercare, but was arrested for shoplifting, after which the aftercare program refused to let her continue treatment. The case was transferred back to CHIPS court in June 2015.

Under the CHIPS plan, the county offered the following services to mother: assistance with basic needs like shelter and food, parenting education, mental health assessment and services, and chemical health assessment and services. Mother was offered combined mental-health and chemical-dependency residential treatment, which she refused. Two psychological evaluations disclosed serious issues of anxiety, depression, and personality disorders. She received in-home therapy services for anxiety and depression. She "sporadically" participated in visitation. All four children exhibited extreme behavior upon placement. Mother brought her new boyfriend, a convicted sex offender, to visits and told the children he would be their new father. The children were "highly dysregulated" following visits with mother.

When the TPR petition was filed in November 2015, father was still in prison. Father was not a custodial parent when the CHIPS petition was filed, therefore no case plan was developed for him because the county could not provide services while he was in

prison, but the county social worker encouraged father to participate in services offered by the prison. The GAL recommended that the children not visit father in prison because of the trauma experienced by the children, who had been present during some of the domestic abuse. While in prison, father participated in but did not complete classes in anger management and parenting. He completed programming in alternatives to violence. He did not have chemical dependency treatment, but he attended AA.

The TPR petition alleged three bases for termination: palpable unfitness, the failure of reasonable efforts to correct conditions, and the children being neglected and in foster care. The parties agreed to bifurcate mother's and father's trials. Mother's TPR trial was held on May 16, 2016; father's TPR trial began on May 26, 2016, and was continued to permit him to be assessed as a possible custodial parent. Father's trial was resumed in November 2016.

Mother denied having chemical dependency problems or failing to cooperate with service providers. She had no settled housing, was unemployed, and engaged sporadically in visitation. She was working with a therapist. She acknowledged father's history of domestic abuse against her, but she believed her major problem was a lack of housing and thought she could support the children if she qualified for Social Security disability benefits.

Beth Dehner, the child protection social worker, was concerned about mother's parenting because she permitted unsavory people to be around the home; the county investigated allegations that I.H. had been sexually abused by one of mother's visitors and that drug activity took place in the home. Dehner was concerned about mother's chemical

dependency despite her denial of a problem. Mother had a series of negative urinalyses (UAs) and then refused to provide any further samples. Mother was anxious about housing and Dehner intervened with the housing program to extend her voucher, but mother failed to complete the necessary paperwork. Dehner said the children were reported to react badly to visits with mother and often had days of emotional behavior after a visit. Dehner testified that mother missed all visits in August and September 2015, but resumed visits in October.

Dehner referred mother for a psychological examination with Dr. Lopno, a clinical psychologist, but mother felt that Lopno was too intrusive and resisted answering some questions. Mother participated in counseling for mental health issues. Mother was often angry with Dehner and would yell at her and blame her for her problems.

Dehner described the very difficult behaviors of the children when they were first placed in foster care. The oldest child, I.H., was particularly traumatized and was diagnosed with post-traumatic stress disorder (PTSD). Visitation with mother ended in November 2015 when the county decided to file a TPR petition.

Dehner offered her opinion that mother was palpably unfit to parent the children because she has shown no ability to correct the problems that led to placement. She believed it was in the children's best interests that mother's rights be terminated.

The guardian ad litem (GAL), David Elliott, also testified. Elliott, who is an experienced GAL and has a background in psychological counseling, stated that he was "shocked at the condition of the children" when he first saw them. He noted "constant diarrhea, violent outbursts, [and] tantrums going on for hours at a time." The children

improved after a short time in foster care. He observed a visitation with mother that was "very, very, very chaotic." The oldest child, at age five, noticed that the baby needed a new diaper and started to change him; mother did not. The foster parents reported days of misbehavior following each visit with mother. Elliott requested that the visits end because they were harmful to the children. He noted that the oldest child, I.H., was diagnosed with PTSD. In his opinion, mother was palpably unfit to be a parent. Elliott believed it was in the children's best interests to be adopted by the foster parents.

Father's trial initially began on May 26, 2016. Father testified that he had been released from prison and was at a sober living house. The county reviewed his criminal history and father agreed that he had been in jail or prison from August 5, 2014 until May 2, 2016. Father said he was not really aware of the children's behavioral issues except through reading case notes. Father had limited contact with the youngest two children because he had been incarcerated for most of their lives, but he had more contact with the older two because he continuously violated the parties' no-contact order and lived with mother. The older two children witnessed some of the incidents of domestic abuse. He admitted to long-term use of methamphetamine. In prison, father participated in a number of groups, including AA, Fathers' Circle, anger management, parenting, Thinking for Change, sleep and anxiety groups, Family Transformed, church services, Supportive Living Service, Alternatives to Violence, and grief and loss groups. He had not had any visitation with the children because it was seen as too traumatic for them. He did not finish the parenting and anger management groups for lack of time.

Dehner testified again about her involvement with the family. Dehner spoke monthly with father while he was in prison. She encouraged him to participate in services in prison because the county could not provide services at the prison. Although Dehner attempted to arrange visitation in prison, father was unavailable while in segregation for a period of time, and I.H.'s therapist recommended no visitation because of the PTSD diagnosis. In Dehner's opinion, father was palpably unfit based on domestic violence, chemical abuse, his criminal history, and the impact those factors have had on the children. She stated that it was in the children's best interests to be adopted after parental rights were terminated. At this point, the district court concluded that the trial should be continued to permit father to be assessed as a possible placement. The district court ordered father to undergo a psychological and parenting examination, and a chemical dependency evaluation.

The second phase of the trial began in November in 2016. Lopno testified about his psychological and parenting evaluation of father. Lopno had to rely primarily on interviews with father and other collateral sources because visitation with the father was thought to be too traumatizing to the children. Lopno opined that father had a poor prognosis for parenting the children and father had not adequately addressed his history of violence, anger, and chemical usage.

Dehner testified about events that occurred since the original hearing. She provided father, through his attorney, with a list of recommended actions after the first hearing. Father began, but did not complete, an anger management program. Father had some UAs while he was still on parole, but after he was discharged he told Dehner he lacked

transportation to go to drug testing. Father had not participated in a parenting class, and had no chemical dependency treatment since May 2014. Dehner concluded that father was palpably unfit to parent based on his years of violent behavior and his lack of contact with the children, and that the children's best interests would be served by termination and adoption by their foster parents.

GAL Elliott testified that a return to father would be too traumatizing to the children and that father lacked the capacity to parent the children, who have special needs. In particular, I.H. was "terrified" about the prospect of seeing father. Elliott stated that father was palpably unfit to parent the children based on his history of violence. He believed that any further attempts to reunite the children with their father would be "tragic" and "disastrous." He testified that termination and adoption by the foster parents was in the best interests of the children.

D E C I S I O N

I.

An appellate court will "affirm the district court's termination of parental rights when at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the best interests of the child, provided that the county has made reasonable efforts to reunite the family." *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008) (citation omitted); *see* Minn. Stat. § 260C.301, subds. 1(b)(1-9); 7 (2016)

We review the record to determine whether the evidence is clear and convincing. *In re Welfare of Children of B.M.*, 845 N.W.2d 558, 562 (Minn. App. 2014). If the evidence

is sufficient, we defer to the district court's decision to terminate parental rights. *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005). The district court concluded that appellants are palpably unfit to be parties to the parent/child relationship, reasonable efforts had been made to reunify the family, and termination was in the children's best interests.

A parent is palpably unfit to be a party to the parent/child relationship if he or she engages in "a consistent pattern of conduct before the child" or if there are "specific conditions directly relating to the parent and child relationship" that make 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). "If a parent's behavior is likely to be detrimental to the children's physical or mental health or morals, the parent can be found palpably unfit and have his parental rights terminated." *In re Children of Vasquez*, 658 N.W.2d 249, 255 (Minn. App. 2003). Palpable unfitness can also be demonstrated by a lack of rudimentary parenting skills, psychological limitations, or a refusal to take advantage of parenting education opportunities. *In re Welfare of J.D.L.*, 522 N.W.2d 364, 368-69 (Minn. App. 1994).

GAL Elliott described the effect of the parents' behavior on the children, who suffered emotional harm from father's violence toward mother. Elliott also described how I.H. noticed and attempted to change the baby's diaper during a supervised visitation while mother appeared to be unaware of the need. Neither parent participated in parenting education. When removed from the home, the children were unclothed, hungry, dirty, and ill. The children's behavior became "dysregulated" following supervised visitation with mom. The county refused to schedule visitation with father because of the children's

fearful reaction to the suggestion. Both parents have longstanding psychological issues. Dehner, Elliott, and Lopno all opined that neither mother nor father would be able to effectively parent these children, who have special needs, in the reasonably foreseeable future. Both parents showed no insight into and persistently denied that their actions affected the children. Clear and convincing evidence supports the district court's determination that these parents are palpably unfit.

II.

Once a court has determined that there is a statutory basis for termination of parental rights, it must consider whether termination is in the child's best interests. *In re Welfare of the Children of J.R.B.*, 805 N.W.2d 895, 905 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). The court balances 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 interests of the child." *Id.* (quotation omitted).

"Competing interests include such things as a stable environment, health considerations and the child's preferences." *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). In *R.T.B.*, the district court found that there was essentially no relationship to preserve and that the child was "presently part of a stable and loving two-parent family." *Id.* The district court can consider such things as "the children's need for stability and predictability, [and a parent's] limited bond with the children." *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 668 (Minn. App. 2012). This court further commented, "[A] mother's love and desire to care for her children does not outweigh her children's needs for basic care and adequate nutrition." *Id.*

The district court concluded that termination of parental rights was in the children's best interests. The district court found as to mother:

> It is in the best interest of the children that the parent/child relationship between the mother and children be severed to free the children for adoption. The children are less than six years of age and have spent significant time out of the mother's care. Even when the children were in the mother's care, there was not a meaningful parent/child relationship or significant bond. The children need and deserve permanency. The children need a safe, sober, structured, consistent home environment that the mother is not able to provide. The mother is incapable of parenting the children in a consistent and effective manner in the immediate or reasonably foreseeable future. The mother is unable to care appropriately for the ongoing physical, mental and emotional needs of the children. The children's interest in permanency in a sober safe, and stable home where their needs can be consistently met outweigh the mother's interest in maintaining the parent/child relationship.

Other findings also support the district court's statement of best interests: one child suffered from PTSD, they were "exposed to drug abuse and criminal behavior," they were moved to three foster homes after being removed from mother's home, two of the children have counselors who work with them at the foster home, one child receives speech therapy and another child receives speech therapy and physical therapy, and two of the children had almost no speech when first removed. These children have significant special needs, some which were created by their parents, and none of which their parents are able to adequately address.

The district court made similar findings about father, while also noting that he had not had contact with the children for a prolonged period of time because of his incarceration. In addition, the findings reflect that I.H. had PTSD because of her father's

behavior and, with counseling, she had largely recovered from this but remained fearful of her father; two of the children were born while father was serving jail or prison terms and had no significant relationship with him; when he was with the children, he abused mother in front of the children and regularly used methamphetamine and marijuana; and he failed to take any responsibility for the harm done to the children through his actions. Elliott testified that the children had been out of the home for 666 days by the time of father's trial, and, although they were thriving in foster care, the older children knew that the legal situation was still unsettled, which Elliott believed was harmful.

Although the children here are too young to express an interest in maintaining the parent/child relationship, the oldest child has convincingly demonstrated through her behavior that she is not interested. Both parents argue that they have an interest in maintaining a parent/child relationship, but they have been unwilling to undertake the hard work necessary to preserve the relationship.

Clear and convincing evidence supports the district court's findings regarding the children's best interests. The decision to terminate the parental rights was not an abuse of discretion.

III.

Father argues that the county did not make reasonable efforts to reunite him with his children because he was not given a case plan. During the CHIPS proceeding, father, who was a noncustodial parent, was a "participant" rather than a "party." Minn. R. Juv. Prot. P. 21.01, subd. 1, 22.01(b). The responsible agency must provide a case plan to parties and foster parents when a child is placed out of home as CHIPS. Minn. R. Juv.

Prot. P. 37.01. Father was not a party and would have been unable to have physical custody of the children because he was in prison during the CHIPS proceedings. Although no formal case plan was drawn up after the TPR trial was continued, the district court ordered father to complete psychological, parenting, and chemical dependency evaluations, and the county provided father's attorney with a list of recommended services.

According to the GAL's testimony, these children suffered severe psychological damage because of their father's violent actions toward mother. The district court recognized that father did not have a case plan and continued the trial for almost six months to permit evaluation of his capacity to parent. Father nevertheless failed to fully engage in the very services that would address his anger and violence. *See Vasquez*, 658 N.W.2d at 253 (stating that agency need not provide services if attempt would be "futile and therefore unreasonable under the circumstances").

IV.

Father argues that he was deprived of his right to a fair trial through the ineffective assistance of his trial counsel. Father argues that counsel was ineffective because he was not on the state roster of qualified CHIPS attorneys and because he failed to call an expert witness. Parents in TPR proceedings are entitled to effective assistance of counsel. Minn. Stat. §§ 260C.163, subd. 3; .307, subd. 2 (2016). Appointed counsel must meet one of the following criteria: (1) a minimum of two years' experience in handling child protection cases; (2) Judicial Council approved training in handling juvenile protection cases; or (3) supervision by someone with the qualifications under clause (1) or (2). Minn. Stat. § 260C.163, subd. 3(g). Father's appointed counsel had more than ten years of experience

representing parents in juvenile protection cases and had been under contract with Dakota County since 2007 to represent parents in CHIPS cases. Father's argument that his appointed attorney was not qualified is meritless.

Generally, in order to prevail on a claim of ineffective assistance of counsel, a party must demonstrate that "counsel's performance fell below an objective standard of reasonableness" and "a reasonable probability exists that, but for counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). A reviewing court presumes that counsel's performance was reasonable. *Id.* A reviewing court will not second-guess counsel's trial strategy, but the strategy chosen must be objectively reasonable. *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013).

Counsel did not call an expert witness on behalf of father, but Lopno, who had evaluated father, testified at trial and was cross-examined. Counsel also submitted a recommendation, which stated that father needed no further treatment, from a chemical-dependency treatment group. A review of the entire record confirms the district court's conclusion that father received effective assistance from his trial counsel.

Father also argues that he was prejudiced by the district court's failure to appoint an attorney to represent him in the CHIPS proceedings. Father argues that if he had been adjudicated as the father of the children and been appointed as legal guardian, he would have been included as a party in the CHIPS proceeding and would have been eligible for a court-appointed attorney under Minn. R. Juv. Protect. 21.02(b). But the district court found that father was incarcerated, the children were subject to an appropriate case plan, and even had father been represented as a party during the CHIPS proceeding, he would have been

unable to have physical custody because he was incarcerated. Finally, the record reflects that father's conduct toward mother and actions in front of the children were the cause of the children's traumatized behavior and it would have been very unlikely that the district court would have appointed him as the children's legal guardian.

Affirmed.