STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0230
A17-0231

In the Matter of the Welfare of the Children of:
F.I.S., D.S.H., Sr., T.C.H., and A.L.F.,
Parents (A17-0230),

and

In the Matter of the Welfare of the Children of: F.I.S. and D.S.H., Sr.,
Parents (A17-0231).

Filed August 28, 2017
Affirmed
Reyes, Judge

Pope County District Court
File Nos. 61-JV-16-379; 61-JV-16-380; 61-JV-16-381

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Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Stauber, Judge.*

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

REYES, Judge

In these consolidated appeals, appellant-mother and appellant-father challenge the district court's termination of parental rights (TPR). Appellants argue that the district court abused its discretion in determining that (1) the county made reasonable efforts to rehabilitate the parents and reunite the family; (2) a statutory basis for TPR exists; and (3) TPR was in the best interests of the children. Appellant-mother also argues that she received ineffective assistance of counsel. We affirm.

FACTS

Appellant-mother F.I.S. is the biological parent of three children: D.H. (born 2008), D.F. (born 2012), and J.S. (born 2015). Appellant-father D.S.H. is the biological parent of D.H. The children resided with mother.

In November 2015, after receiving a report concerning mother's treatment of the children, Amanda Schonhardt, a child-protection worker for Pope County Human Services (the county), initiated services for mother, including an in-home worker, individual therapy, a chemical-dependency assessment, and services for the children.

On March 18, 2016, the county removed the children from mother's home after receiving reports alleging that mother left the children unattended, smoked marijuana in

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

front of the children, and threatened to harm and then physically harmed D.H. The children were placed on a 72-hour hold, and the county commenced a child-in-need-of-protection-or-services (CHIPS) proceeding. Removing the children from mother's home started the statutory six-month timeline to reunite the children with mother. *See* Minn. Stat. § 260C.204(a) (2016).

Prior to the CHIPS trial, mother agreed to admit that the children are CHIPS in exchange for a 90-day stay of adjudication and a trial home visit. A case plan was entered as part of the pre-trial order, requiring mother to comply with adult mental-health case management, individual therapy, a parental-capacity assessment, and in-home services. D.S.H. and D.F.'s father were also ordered to complete at least three random urinalysis tests to show that their drug levels had decreased. The children were returned to mother for a trial home visit on April 21.

Four days after the trial home visit began, the assigned guardian ad litem (GAL) and a child-protection worker found the two youngest children home alone. The children were again removed from mother's home. The county placed D.H. and D.F. with a foster parent and J.S. with his father.

On July 19, 2016, a dispositional review hearing was held in Pope County. After the hearing, the district court adjudicated the children CHIPS. Temporary care and custody of J.S. was awarded to his father. Custody and care of D.H. and D.F. remained with the county.

On August 22, 2016, the county filed petitions for TPR against mother, D.S.H., and D.F.'s father. The petitions alleged that it was in the best interests of the children that the

custody of D.H. and D.F. be transferred to Pope County until a permanency home could be established and that the custody of J.S. be transferred to his father.

The district court held a bench trial on the county's petitions on November 10 and December 12, 2016, and granted the TPR petitions. Mother and D.S.H. appealed, and their appeals were consolidated.

D E C I S I O N

A natural parent is generally presumed to be fit and suitable to care for his or her child. *In re Child of P.T.*, 657 N.W.2d 577, 583 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Apr. 15, 2003). We also presume that it is in a child's best interests to remain in the natural parent's care. *Id.* Nevertheless, "parental rights are not absolute" and will not be "enforced to the detriment of the child's welfare and happiness." *Id.*

This court will affirm a district court's TPR where there is clear and convincing evidence that (1) the county made reasonable efforts to reunite the family; (2) a statutory ground for termination exists; and (3) termination is in the children's best interests. *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). We review "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." *Id.* "A finding is clearly erroneous if it is 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 (Minn. 2008) (quotation omitted). We review the district court's determinations on whether a particular statutory basis for TPR is present and whether termination is in the best interests of a child for an abuse of discretion. *In re Welfare of*

Children of J.R.B., 805 N.W.2d 895, 901, 905 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

I. The district court did not abuse its discretion in determining that the county made reasonable efforts to rehabilitate the parents and reunite them with their children.

In a TPR proceeding, the district court must determine whether the county has provided reasonable efforts to rehabilitate the parent and reunite the child and parent. *T.R.*, 750 N.W.2d at 664. "Reasonable efforts at rehabilitation are services that go beyond mere matters of form so as to include real, genuine assistance." *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Mar. 28, 2007). For efforts to be reasonable, the services the county offers must be "(1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances." Minn. Stat. § 260.012(h) (2016). The district court must make "specific findings" that the county made reasonable efforts. Minn. Stat. § 260C.301, subd. 8 (2016).

A. Mother

Mother argues that the county did not make reasonable efforts because (1) the parental-capacity assessment and services it recommended were delayed, which impeded mother's progress; (2) the services provided were not culturally appropriate; and (3) some services were used only to demonstrate mother's failures as a parent. We are not persuaded.

In an extensive and detailed order, the district court determined that the county made reasonable efforts to rehabilitate mother and no other efforts were practical or likely to be effective at remedying the underlying problems. The district found that the efforts the county made to reunite mother and her children included inpatient treatment, an in-home worker, "individual therapy, mental health case management, parental capacity assessment, extensive visitation, and a failed trial home visit." The county also provided services for the children, including placements and mental and physical health appointments. In addition, the district court found that "[t]he services that were Court-ordered and provided were culturally, linguistically, and clinically appropriate." A careful review of the record supports the district court's determination.

Moreover, the timing of the assessment's results and recommendations did not render the county's efforts unreasonable. An independent mental-health practitioner completed the court-ordered parental-capacity assessment with mother on two days in April and May 2016. The parties received the results of the parental-capacity assessment at about the half-way point of the six-month reunification timeline. In addition, the in-home service ended to allow mother time to focus on her mental health, yet mother only attended two of the suggested dialectical-behavioral-therapy sessions because she was "too distressed" to continue. Further, there is no evidence that the services provided were culturally inappropriate or intended to demonstrate mother's parental failures.

B. D.S.H.

D.S.H. argues that the county did not make reasonable efforts to place D.H. in D.S.H.'s day-to-day care, asserting that the county provided only minimal services to D.S.H. We disagree.

The district court determined that additional efforts at reunification of D.S.H. with D.H. would not be fruitful within the six-month timeframe because D.S.H. rejected the idea that he would benefit from a drug-treatment program. The district court found that the efforts the county made included "supervised visits, a home visit and drug testing." The district court also found that "[t]he services that were Court-ordered and provided were culturally, linguistically, and clinically appropriate."

Due to D.S.H.'s drug use and minimal contact with the county, the county did not place D.H. with D.S.H. when the children were removed from mother's home. The county also required that D.S.H. take drug tests as a condition for visitation and show that his drug levels were decreasing or negative. The county provided D.S.H. with mileage reimbursement and gas cards to facilitate his compliance with the case plan. Further, the county did not offer D.S.H. chemical-dependency treatment, and D.S.H. did not ask for it because "[he] did not believe [he] needed extra services because [he] was clean."

D.S.H.'s absence from April to July 2016, his inconsistent communication with the county, and his denial that he needed treatment prevented the county from providing additional services. Accordingly, the district court did not abuse its discretion in determining that the services the county provided D.S.H. constituted reasonable efforts to put D.H. in D.S.H.'s day-to-day care. In addition, because the district court analyzed the

efforts the county provided to D.S.H. under the standard for a custodial parent, we decline D.S.H.'s invitation to address the difference between custodial and noncustodial parents in the context of Minn. Stat. § 260C.301.

II. The district court did not abuse its discretion in determining that a statutory basis for terminating mother's and D.S.H.'s parental rights exists.

A statutory basis for TPR exists where the district court determines that "following the child's placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement." Minn. Stat. § 260C.301, subd. 1(b)(5). A presumption that reasonable efforts have failed arises upon a showing that (1) the child is under age eight and has resided outside the parental home for six months unless the parent has maintained regular contact with the child and complied with the out-of-home placement plan; (2) "the court has approved the out-of-home placement plan;" (3) the conditions leading to the child's out-of-home placement have not been corrected; and (4) the social-services agency made reasonable efforts to rehabilitate the parent and reunite the family. *Id.* Evidence in support of termination "must relate to 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).

A. Mother

Mother argues that a statutory basis for TPR does not exist because the presumption that reasonable efforts failed did not arise where mother maintained contact with her

children and complied with the case plan. Even if we were to assume that the presumption does not arise, we disagree.

The district court thoroughly analyzed the circumstances for each of the three children under Minn. Stat. § 260C.301, subd. 1(b)(5), and determined that, although mother maintained regular contact with her children and followed the case plan to the best of her abilities, she made "little to no progress." The district court noted that "[w]hile some of the conditions leading to out-of-home placement have been partially addressed (such as [m]other's mental health), [m]other's progress has been minimal and an uncertain timetable of when she could parent her children, if ever [exists]."

The district court's findings and determination are supported by the record and testimony. While the district court found that mother has complied with her therapy sessions and recommendations for in-home services, the individual therapist testified that mother's progress was "slow and erratic," and her mental health was deteriorating prior to trial. The individual therapist also testified that mother's improvement has been sporadic, and did not believe that mother has benefited from or applied the services provided. Similarly, the GAL testified that, until a couple weeks before trial, mother has not progressed in her mental health despite participating in the services offered. Further, two of mother's sisters testified that mother was not yet prepared to care for her children.

"The critical issue is not whether the parent . . . complied with the case plan, but rather whether the parent is presently able to assume the responsibilities of caring for the child." *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 89 (Minn. App. 2012). "[M]aking only minimal progress supports the conclusion that the present conditions will continue for

a prolonged, indeterminate period and that termination is proper." *In re Welfare of M.H.*, 595 N.W.2d 223, 227 (Minn. App. 1999). The record shows that mother is not presently able to parent her children. Thus, even if mother is correct in asserting that this record does not support the district court's ruling that it is presumed that reasonable efforts have failed to correct the conditions leading to the children's placement out of mother's home, the district court did not abuse its discretion in its separate determination that reasonable efforts had, in fact, failed because the conditions that led to removal of the children from mother's home have not been corrected.

B. D.S.H.

D.S.H. argues that a statutory basis for TPR does not exist because the presumption that reasonable efforts failed does not arise where (1) the district court could not determine that the presumption arose under subdivision 1(b)(5)(i)-(iv) and (2) a statutory presumption that reasonable efforts failed *on the basis of his chemical dependency* does not arise. Even if we were to again assume without deciding that the presumption did not arise under either analysis, we conclude that the record supports the district court's determination.

Here, the county sought to place D.H. in the day-to-day care of D.S.H. The county filed a case plan for D.S.H. with three goals: (1) maintain sobriety; (2) participate in supervised visits with D.H.; and (3) communicate service progress and needs to the county. The county did not include chemical-dependency treatment in the case plan, *see* Minn. Stat. § 260C.301, subd. 1(b)(5)(A)-(E), and D.S.H. did not request such treatment.

The district court found that D.S.H. failed to comply with the case plan's drug-testing requirement by either not attending or missing drug tests and continuing to test

positive, failing to maintain contact with the county, and not attending all hearings related to this matter. The district court noted that D.S.H.'s "lack of involvement" prevented the county from offering him additional treatment options, and even if D.S.H. believes he complied with the case plan, "he has proven he is not presently able to assume the responsibilities of caring for the child."

The record shows that D.S.H. was absent from the case between April and July 2016, and his communication with the county from August to October 2016 was sporadic. D.S.H. was offered six visits with D.H., of which D.S.H. attended four, was late to three, cancelled one due to illness, and cancelled another due to weather. In addition, D.S.H. missed four random color-wheel drug tests, and his visitation was suspended in September 2016 as a result. For the tests D.S.H. took, he tested positive for amphetamines as well as marijuana, and his levels increased at times. In light of the record, D.S.H. did not sufficiently comply with the case plan to correct the conditions leading to D.H.'s placement.

D.S.H. cites to *In re Children of T.R.* and contends that the district court abused its discretion by relying on D.S.H.'s drug use in its analysis. In a footnote in *T.R.*, the supreme court questioned whether the parental rights of a noncustodial father could be terminated under subdivision 1(b)(5) when his substance abuse did not lead to the removal of the child from the mother's home and when it did not appear that the father's substance use was a factor in placing the child in foster care. 750 N.W.2d at 663 n.5. *T.R.* is distinguishable because here D.S.H.'s drug use was a factor in D.H.'s foster-care placement. Accordingly,

the district court did not abuse its discretion in determining that a statutory basis for terminating D.S.H.'s parental rights exists.

III. The district court did not abuse its discretion in determining that TPR was in the best interests of the children.

In considering the best interests of the child, the district court must analyze (1) the child's interest in maintaining the parent-child relationship; (2) the parent's interest in maintaining the parent-child relationship; and (3) any competing interests of the child, "includ[ing] a stable environment, health considerations, and the child's preferences." *In re Welfare of Children of M.A.H.*, 839 N.W.2d 730, 744 (Minn. App. 2013). "[T]he best interests of the child are the paramount consideration, and conflicts between the rights of the child and rights of the parents are resolved in favor of the child." *J.R.B.*, 805 N.W.2d at 901-02.

The district court determined that termination of mother's and D.S.H.'s parental rights was in the best interests of the children so they could "be raised in a stable and safe environment." The district court noted and agreed with the GAL's recommendation that D.H. and D.F. stay together.

A. Mother

Mother argues that the TPR was not in the best interests of her children based on the connection between mother and her children, the connection between the siblings, and mother's ability to learn to be an effective parent. We disagree.

With reference to the first factor, the GAL testified that D.H. and D.F. desire to stay in their current placement and want the case to end. However, at the conclusion of a scheduled visit, D.F. resisted his foster father holding him and cried, "MaMa."

As to the second factor, mother has expressed her desire to preserve the parent-child relationship and to comply with the services the county offered in order to be reunited with her children. At trial, mother testified that she was better than she has been. In addition, the individual therapist testified that she believes that mother loves her children and was motivated to cooperate with the services the county provided in order to be reunited with her children.

On the third factor, D.H. and D.F. have experienced six placements since March 2016. The GAL testified that D.H. and D.F. are progressing positively in their current placement. The GAL further testified that J.S.'s placement with his father has been successful and J.S.'s father facilitates visits between J.S. and his brothers. The individual therapist also testified that D.H. and D.F. are improving, noting positive behavioral changes, an established routine, and better sleep. Significantly, while several witnesses testified that TPR is in the best interests of the children, no witness testified that mother is able to parent now or will be able to do so in the near future.

Despite mother's bond with her children and her desire to maintain the parent-child relationship, the record supports the district court's determination that the best-interest-of-the-child factors weigh in favor of TPR. *See In re Welfare of A.V.*, 593 N.W.2d 720, 722 (Minn. App. 1999) (TPR appropriate where father's inability to adequately parent outweighed bond between father and children), *review denied* (Minn. Aug. 25, 1999).

Thus, the district court did not abuse its discretion in determining that it was in the best interests of the children to terminate mother's parental rights.

B. D.S.H.

D.S.H. contends that the district court abused its discretion in determining that TPR was in the best interests of D.H. because the district court did not make sufficient findings or provide sufficient analysis to justify its conclusions. He asserts that the district court should have made specific best-interests findings as set out in Minn. Stat. § 518.17, subd. 1(a)(1)-(12), which relate to custody and parenting time. We disagree and note that, contrary to father's assertion, the best-interests-of-the-child analysis in this context only requires consideration of the factors set out above. *See M.A.H.*, 839 N.W.2d at 744.

As to the first factor, the district court noted that D.H. was happy to see D.S.H. during their first visit in August 2016. However, D.H. expressed interest in staying at his current placement. With reference to the second factor, D.S.H. has expressed his interest in maintaining the parent-child relationship.

On the third factor, trial testimony establishes that D.H. is improving while in placement. The individual therapist and the GAL testified that they believed that it was in the best interest of D.H. to remain at his placement. The GAL also recommended that D.H. and D.F. stay together. In addition, the record shows that D.S.H.'s drug use has not consistently declined during the course of this matter. In fact, D.S.H.'s drug levels increased during the period between the two trial dates and days before a scheduled visitation with D.H. Accordingly, the record supports that D.H.'s competing interests outweigh any interests in preserving the parent-child relationship. Thus, the district court

did not abuse its discretion in determining that termination of D.S.H.'s parental rights was in D.H.'s best interests.

IV. Mother's ineffective-assistance-of-counsel claim fails.

Mother argues that she received ineffective assistance of counsel because her trial attorney did not argue the constitutionality or proper application of Minn. Stat. § 260C.301, subd. 1(b)(5), or the burden of proof. Mother also asserts that her trial attorney should have called other therapists that treated mother. We are not persuaded.

Post-trial motions in a TPR proceeding "shall be filed with the court and served upon the parties within ten (10) days of the service of notice by the court administrator of the filing of the court's order." Minn. R. Juv. Prot. P. 45, subd. 1. Mother did not file a post-trial motion in the district court asserting her ineffective assistance of counsel claim. Accordingly, mother's claim is barred. *See Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1980).

Even if mother's claim was not barred as untimely, her arguments fail. Mother has "the right to effective assistance of counsel in connection with a proceeding in juvenile court." Minn. Stat. § 260C.163, subd. 3(a) (2016). However, "[w]e will generally not review an ineffective-assistance-of-counsel claim that is based on trial strategy." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Here, mother's arguments in support of her claim of ineffective assistance of counsel are based on trial strategy, which we decline to review.

Affirmed.