STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0462

In the Matter of the Welfare of the Child of:
T. L. F. and D. S., Parents.

Filed October 22, 2018
Affirmed
Bjorkman, Judge

Clay County District Court
File No. 14-JV-17-4134

Timothy H. Dodd, Detroit Lakes, Minnesota (for appellants T.L.F. and D.S.)

Brian J. Melton, Clay County Attorney, Cheryl R. Duysen, Assistant County Attorney, Moorhead, Minnesota (for respondent Clay County Social Services)

Emily Shaffer, Moorhead, Minnesota (guardian ad litem)

Pyramid Lake Paiute Tribe of Nevada, Nixon, Nevada (respondent)

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant-parents challenge the district court's termination of their parental rights to their child, arguing that respondent-county did not satisfy the strict requirements of state and federal Indian law, and did not otherwise establish statutory grounds for termination. We affirm.

FACTS

F.M.F. was born on December 20, 2016, and is the only child mother T.L.F. and father D.S. have together. Mother's parental rights to six other children were either terminated in state court or suspended in tribal court. Father does not have custody of his five older children; he has not met two of them.

F.M.F. was born three months premature, tested positive for exposure to THC,[1] and spent the first months of life in hospitalized intensive care. Her most serious health issues include heart, lung, and eye problems, and hemangiomas,[2] all of which require ongoing treatment. And she has developmental deficits and receives early intervention services. The child was released from the hospital directly into foster care through respondent Clay County Social Services (the county) in March 2017 and is eligible for enrollment in the Pyramid Lake Paiute Tribe of Nevada.

Mother has a significant child-protection history since 2009 that is marked by her chemical dependency, physical- and mental-health issues, borderline intellectual functioning, and domestic abuse. Despite receiving multiple chemical-dependency evaluations and both inpatient and outpatient treatment, she remains actively chemically dependent. Pursuant to her court-ordered case plan, mother participated in a chemical-dependency evaluation in January 2017, but was detained for public intoxication in July.

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[1] THC is the common reference to tetrahydrocannabinol, the active ingredient in marijuana. https://www.ncbi.nlm.nih.gov/pubmedhealth/articles/PM3570572.

[2] "A hemangioma is a benign and usually self-involuting tumor . . . of the cells that line blood vessels." https://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002430.

She completed a second evaluation in September, but was intoxicated when arrested in North Dakota the following month for domestic assault against father. She was discharged from outpatient treatment in November and returned to inpatient treatment. At the time of the February 2018 permanency trial, mother had only scheduled a preliminary appointment for the intensive outpatient treatment recommended in January. She was participating in a methadone program at the time of trial.

Mother also struggled with other requirements of her case plan. She completed a parental-capacity evaluation and a neuropsychological evaluation, and she began to participate in individual therapy. She failed to appear for some appointments, declined to meet with a psychologist to receive parenting feedback, and inconsistently participated in visitation with the child. Overall, her case-plan compliance was so inconsistent that the county nearly closed her case. The district court found that mother "cannot meet her own basic needs without support and help" and her "cognitive deficits" adversely impact her parenting ability. And the district court noted that mother received "countless services to improve her parenting" over the years.

Likewise, father has serious chemical-dependency, mental-health, and relationship issues that necessitated out-of-home placement of the child. He was generally uncooperative with the county and his case plan: he declined to reveal his name at the hospital on the day the child was born, did not sign a recognition of his parentage until March 2017, was "combative and aggressive" and "frustrated" with county service providers, did not cooperate in a relative search, and was unavailable to participate in two home studies in North Dakota where he lived. In September, father had an altercation with

mother that resulted in a no-contact order.[3] The district court found that father "apparently" completed chemical-dependency treatment in January, but father later tested positive for THC and refused to comply with ordered hair-follicle testing. Father was laid off from his job in November, but he did not begin accepting services until January 2018, citing his work as a reason for not visiting the child. The district court expressed deep concern that father "has no meaningful relationship" with his other five children.

At the two-day permanency trial, Charlene Dressler testified as a qualified expert representative of the tribe in which the child is eligible for enrollment. Dressler reviewed the pleadings and other records, and testified that she communicated with the parties and the county service providers. She stated that the tribe had determined that (1) the child could not be returned to the parents, (2) placement with the parents would likely cause the child serious physical or emotional damage, and (3) it is in the child's best interests for all parental rights to be terminated.

Following the trial, the district court terminated mother's parental rights on the statutory ground of palpable unfitness, Minn. Stat. § 260C.301, subd. 1(b)(4) (2016), and father's rights on the grounds that active efforts of the county had failed to correct the conditions that led to the child's placement and the child was still neglected and in foster care, Minn. Stat. § 260C.301, subd. 1(b)(5), (8) (2016). Both parents appeal.

[3] Father has a criminal history including a 1999 North Dakota conviction and three-year sentence for having sexual intercourse with a 14-year-old victim. He is required to register as a predatory offender, served a four-year prison sentence for failing to register, and is considered a moderate risk to reoffend. The district court found that father's criminal history did not affect his ability to parent because the county did not consider him a safety risk.

D E C I S I O N

I. The district court satisfied ICWA and MIFPA before terminating parental rights to F.M.F.

The parents challenge the district court's compliance with the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963 (2012), and the Minnesota Indian Family Preservation Act (MIFPA), Minn. Stat. §§ 260.751-.835 (2016). After an Indian child is placed out of home, the district court may not make a permanency decision "unless the court finds that the local social services agency made active efforts . . . for purposes of . . . permanency," including "mak[ing] findings regarding whether . . . the local social services agency made appropriate and meaningful services available to the family based upon that family's specific needs." Minn. Stat. § 260.762, subd. 3; *see* 25 U.S.C. § 1912(d). "Active efforts" are defined as

> a rigorous and concerted level of effort that is ongoing throughout the involvement of the local social services agency to continuously involve the Indian child's tribe and that uses the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe to preserve the Indian child's family and prevent placement of an Indian child and, if placement occurs, to return the Indian child to the child's family at the earliest possible time. Active efforts sets a higher standard than reasonable efforts to preserve the family, prevent breakup of the family, and reunify the family, according to section 260.762.

Minn. Stat. § 260.755, subd. 1a. When an Indian child is the subject of termination proceedings, the statutory grounds for termination must be proved beyond a reasonable doubt. *In re Welfare of M.S.S.*, 465 N.W.2d 412, 416-17 (Minn. App. 1991). The evidence must include testimony from a qualified expert witness who has specific knowledge of the

culture and customs of the Indian child's tribe. *In re Welfare of Children of S.R.K.*, 911 N.W.2d 821, 828 n.5 (Minn. 2018).

The parents argue that the district court did not make the required findings on the county's active efforts to preserve the family, that the county failed to make active efforts with respect to father, and that the testimony of the tribe's expert witness did not comply with ICWA. We address each argument in turn.

First, the district court made the active-efforts findings required by Minn. Stat. § 260.762, subd. 3. As to father, those efforts included "visits, chemical dependency services, a parental capacity evaluation and implementation of services thereunder, case planning and facilitating two interstate compact referrals with the state of North Dakota," as well as two case plans, drug screens, and transportation. The district court found that the county's active efforts included appropriate remedial and rehabilitative services that ultimately "proved unsuccessful." The court made similar active-efforts findings as to mother, and found the tribal representative qualified, well informed, and supportive of the county's efforts. Based on our review of the record, we are satisfied that the district court made the required findings with respect to the county's active efforts.

Second, father contends that the county's efforts fell short because it did not provide in-home parenting services to him. He singles out the testimony of parenting evaluator Krislea Wegner, Ph.D., LP, who acknowledged that an "in-home family skills worker" may have satisfied her concerns about father's ability to parent the child. But Dr. Wegner also testified that because father only sporadically participated in supervised visitation, he was not eligible to have the child in the home, a prerequisite for in-home

services. The district court found the services offered to father were sufficient, and that "[a]ctive efforts do not require every service that may be available be offered." We agree. The record amply demonstrates the county's numerous, active efforts to enhance father's ability to parent. Father simply did not engage with them or comply with other requirements of his case plan. *See In re Welfare of Children of J.B.*, 698 N.W.2d 160, 170 (Minn. App. 2005) (affirming district court's ruling that active-efforts standard was met by county's offering appropriate services to a parent who either rejected them or failed to engage in them successfully).

Third, the parents do not challenge Dressler's qualifications to serve as the tribe's expert witness. Rather, they contend her testimony did not satisfy ICWA's requirement of proof beyond a reasonable doubt "that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Dressler testified that she was unaware of any services that could have prevented the child's out-of-home placement. Citing the child's special needs, Dressler opined "that continued custody of the child by the parents is likely to result in serious physical and/or emotional damage to the child." She based her opinion on her understanding of the parents' parenting capacity, county reports, and conversations with the parents, foster parents, and service providers, and stated that her opinion was reinforced by the testimony she heard at trial. She further testified that the tribe supports termination of the parental rights as in the child's best interests and did not object to the child's placement with her current foster family.

Father's specific ICWA challenges are misplaced. Dressler's confusion on minor points, such as the distance between Moorhead, Minnesota, and Fargo, North Dakota, played little role in her overall testimony, and the weight of her testimony was for the district court to determine. *See In re Welfare of Children of S.W.*, 727 N.W.2d 144, 151 (Minn. App. 2007) (stating, with regard to tribal qualified experts, that "[t]he weight to be given any testimony, including expert testimony, is ultimately the province of the fact-finder" (quotation omitted)), *review denied* (Minn. Mar. 28, 2007).[4] Finally, father's expressed concern about maintaining contact between the child's potential adoptive family and the tribe is premature.

II. The district court did not abuse its discretion in terminating parental rights to F.M.F.

We now turn to the evidentiary support for the district court's termination decision as to each parent.[5] A district court may terminate the rights of a parent who is "palpably unfit to be a party to the parent and child relationship." Minn. Stat. § 260C.301, subd. 1(b)(4) (2016). A parent is palpably unfit when the evidence shows either "a

[4] The parents cite *S.R.K.*, where the supreme court ruled that "in a termination proceeding governed by ICWA and MIFPA, a court cannot terminate parental rights unless it determines that evidence shows, beyond a reasonable doubt, that continued parental custody of the child is likely to result in serious emotional or physical damage to the child," and that the "determination [is] supported by [qualified expert witness] testimony." 911 N.W.2d at 829-30. In *S.R.K.*, the supreme court reversed the termination of a father's parental rights because the expert's testimony addressed only the mother's parental capacity. *Id*. at 831-32. Here, Dressler fully considered father's capacity to parent the child.

[5] The parents do not challenge the district court's determination that termination of their parental rights serves the child's best interests.

consistent pattern of specific conduct before the child" or "specific conditions directly relating to the parent and child relationship," which the district court determines are "of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child." *Id.* When a parent's rights to one or more other children have been involuntarily terminated, a statutory presumption of palpable unfitness applies, Minn. Stat. § 260C.301, subd. 1(b)(4), which the parent must rebut, *In re Welfare of Child of J.K.T.*, 907 N.W.2d 241, 245 n.1 (Minn. App. 2018).

Because mother's parental rights to another child were involuntarily terminated, the presumption of palpable unfitness applies. *See J.K.T.*, 907 N.W.2d at 245 n.1. The district court determined that mother did not rebut the presumption, concluding that her chemical dependency, mental-health problems, and inability to parent were unmitigated by the numerous services the county offered to her. The court also concluded that "[s]erious emotional or physical damage to [F.M.F.] likely would result from the continued custody of [F.M.F.] by" mother. The record fully supports the district court's findings and conclusions. While mother touts various forms of progress she made on her case plan—including working on her chemical-dependency issues and attending a majority of visits with the child—her claimed progress is belied by her repeated incidents of intoxication, failure to complete recommended treatment and therapy, and abusive conduct toward father. On this record, we discern no abuse of discretion by the district court in terminating mother's parental rights based on palpable unfitness. *See In re Child of P.T.*, 657 N.W.2d 577, 591 (Minn. App. 2003) (stating that a parent's inability to meet the child's needs at

the time of the trial or in the reasonably foreseeable future justifies termination), *review denied* (Minn. Apr. 15, 2003); *see also In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011) (applying abuse-of-discretion standard of review in termination decisions), *review denied* (Minn. Jan. 6, 2012).

As to father, the district court found that reasonable efforts[6] had not corrected the conditions that led to the child's out-of-home placement, Minn. Stat. § 260C.301, subd. 1(b)(5), and that the child was neglected and in foster care, Minn. Stat. § 260C.301, subd. 1(b)(8). As to the first statutory termination ground, it is presumed that efforts have failed upon a showing that (1) a child has resided outside the parental home for a cumulative period of 12 months within the preceding 22 months, (2) the court has approved an out-of-home placement plan, (3) the conditions leading to a child's out-of-home placement have not been corrected, and (4) reasonable efforts have been made by the social services agency to rehabilitate and reunite the family. Minn. Stat. § 260C.301, subd. 1(b)(5). It is also presumed that the conditions leading to out-of-home placement have not been corrected upon a showing that a parent has "not substantially complied with the court's orders and a reasonable case plan." *Id.*, subd. 1(b)(5)(iii). As to the second ground, a child is neglected and in foster care if (1) the child is in foster care by court order; (2) the child's "parents' circumstances, condition, or conduct are such that the child cannot be returned to them"; and (3) the child's parents, "despite the availability of needed rehabilitative services, have failed to make reasonable efforts to adjust their circumstances,

[6] As noted above, the record supports the district court's determination that the county's efforts to reunite father with the child were not only reasonable, but active.

condition or conduct, or have willfully failed to meet reasonable expectations with regard to visiting the child or providing financial support for the child." Minn. Stat. § 260C.007, subd. 24 (2016).

Father does not differentiate between these statutory grounds, arguing generally that the evidence is insufficient to terminate his parental rights. At its core, father's argument is that he needs more time to complete his case plan. We are not persuaded. The record defeats father's contentions regarding the cause of his delays and his compliance with court orders and his case plan. Father did not take steps to identify himself as the child's parent until March 2017, delayed signing his case plan, and struggled to complete parenting, chemical-dependency, and mental-health evaluations and recommendations. As one example, father signed parenting-evaluation releases in June, but did not complete the parental-capacity evaluation and provide the report to his caseworker until November. When father finally completed the evaluation, he was diagnosed with "major depressive disorder, recurrent; cannabis use disorder, severe and continuous; and a personality disorder unspecified with symptoms of antisocial and narcissistic tendencies." At the time of trial, father had just begun dialectic behavior therapy, and anger-management and parenting classes. And the district court found that father still needed "chemical dependency treatment and mental health services."

The child's young age—just 14 months at the time of trial—required more from father. The district court expressly found that father was not then able to care for the child and that he needed "at least six to twelve months of engagement in services." The record shows that the county actively engaged in offering services to father, but he was unwilling

to timely address the issues that prevented him from safely parenting F.M.F. *See In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 89 (Minn. App. 2012) (noting that in termination for failure to correct conditions, "[t]he critical issue is . . . whether the parent is presently able to assume the responsibilities of caring for the child"). And the case workers, guardian ad litem, and qualified Indian expert all opined that termination was in the child's best interests. On this record, we conclude that the district court did not abuse its discretion by terminating father's parental rights.

Affirmed.