STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0500

In the Matter of the Welfare of the Child of:
S.L.W. and J.H.O., Parents.

Filed November 15, 2021
Affirmed
Gaïtas, Judge

Stearns County District Court
File No. 73-JV-20-6206

Kimberly Stommes, Stommes Law Office, LLC, St. Cloud, Minnesota (for appellant-father J.H.O.)

Wanda Gierman, St. Cloud, Minnesota (for respondent-mother S.L.W.)

Janelle P. Kendall, Stearns County Attorney, Dana D. Erickson, Assistant County Attorney, St. Cloud, Minnesota (for respondent department)

Lori Hanson, Albany, Minnesota (guardian ad litem)

Considered and decided by Smith, Tracy M., Presiding Judge; Slieter, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

In this appeal from an order terminating parental rights to his child, appellant-father J.H.O. argues that the district court erred in determining that a statutory ground to terminate parental rights existed, that termination was in the best interests of the child, and that reasonable efforts had been made to reunite the family. We affirm.

FACTS

Father and respondent-mother S.L.W. are the parents of J.K.J.O., a child born in 2014. Following a court trial in 2021, the district court terminated father's parental rights to child. Mother, who voluntarily terminated her parental rights before the court trial, does not participate in this appeal.

In August 2019, child and his maternal half-siblings were taken from mother's care and placed on an emergency protective care hold and in emergency foster care. The children were removed due to mother's chemical dependency issues and because they were staying with a relative who had previously lost her parental rights. Child and child's half-siblings have been with the same foster-care family since that time.

Father has been incarcerated for most of child's life. Shortly after child was removed from mother's care, father was convicted of receiving profits from prostitution and sex trafficking. He was sentenced to 156 months in prison for these offenses.

A family reunification plan was created on August 16, 2019, and signed by father on September 19, 2019. Child was adjudicated in need of protection or services (CHIPS) on October 22, 2019, and an amended CHIPS petition was filed in Stearns County on March 26, 2020. Father was initially a party to the CHIPS action. But because he opted not to attend the termination trial in person, which would have required his temporary transfer from prison to the Stearns County jail, he agreed to change his status to a "participant" in the proceeding. As a participant, he was permitted to remotely appear at the trial via a video conferencing application.

Respondent Stearns County (the county) filed a termination of parental rights petition on September 17, 2020, seeking to terminate both parents' rights. The petition alleged two grounds for termination—that parents were each palpably unfit and that reasonable efforts had failed to correct the conditions leading to child's out-of-home placement. *See* Minn. Stat. § 260C.301, subd. 1(b)(4), (5) (2020) (setting forth these statutory grounds for termination of parental rights).

Father's criminal history

Child was six years old at the time of the termination proceedings. Father has been incarcerated for the entirety of child's life except for nine months. His criminal history is as follows:

- On August 17, 2006, father was charged with aiding and abetting first-degree aggravated robbery. The execution of his sentence was stayed.
- On January 8, 2007, father was charged with aiding and abetting aggravated first-degree robbery. Father pleaded guilty and was sentenced to 50 months in prison.
- On July 18, 2012, father was charged with felony possession of a firearm. Father was convicted and sentenced to 60 months in prison.
- On October 11, 2013, father was charged with fifth-degree drug possession. He was convicted and sentenced to 19 months in prison.
- Father was placed on supervised release on October 4, 2016.

- In January 2017, after father was charged with driving after suspension and possession of marijuana, father's supervised release was "restructured," and he was allowed to remain in the community.

- In April 2017 father's supervised release was "restructured" again following a new domestic assault.

- On July 23, 2017, father was arrested for simple robbery and was later charged with sex trafficking, promotion of prostitution, receiving profits from prostitution, and domestic abuse. Father was convicted of receiving profits from prostitution and sex trafficking and was sentenced to 156 months in prison.

At the time of the district court proceedings in this case, father was scheduled to be released from prison in 2026. Father testified, however, that he had been approved for a six-month boot camp that could begin as early as November 2021, which could result in his early release from prison.

Due to father's extended periods of incarceration, he has not seen or talked to child since August 16, 2019, the date that child was placed in emergency foster care. However, father has sent letters, pictures, and gifts to child and has inquired about child since that time.

Family reunification plan

The reunification plan was jointly created by mother and a county social worker, in consultation with the guardian ad litem (GAL) and child's foster parent. As to father's "needs for reunification," the plan states, "Due to [father]'s current status of being incarcerated, his needs or case requirements will be to abide by all criminal case

requirements. If there are parental courses or family engagement services offered at the current place of incarceration, [father] will be asked to participate in those services." The plan also addresses what parents must accomplish for child to return home. As to father, this section of the plan states, "Due to [father]'s current status of being incarcerated, child returning to [father]'s care is not applicable."

Termination trial and district court order

The district court held a termination trial on March 11, 2021. The county presented seven exhibits, including the case plan and certified copies of father's criminal records. Additionally, five witnesses testified: the foster parent, a career corrections agent, a county social worker assigned to the case, the GAL, and father.

The foster parent testified about child's relationship with the half-siblings, who are also in the foster home. According to the foster parent, child and the siblings have a bond, which includes playing with one another and checking in with one another.

The corrections agent testified that he supervised father's supervised release between 2016 and 2017. According to the agent, father did not comply with the conditions of his release and had two supervised-release violations during this period. Ultimately, the agent testified, father committed new felony offenses while on supervised release, which resulted in an additional lengthy prison sentence.

The social worker testified that father was never considered the reunification home at any point during the CHIPS case. She explained that, to the best of her knowledge, child had never lived with father. The social worker also testified that she met with father over the course of the CHIPS case and that she gave child letters and pictures from father.

During the GAL's testimony, she noted that father had been incarcerated for almost all of child's life. Because child is so young, and child's relationship with father had been so limited, the GAL was unable to provide an opinion about the parent-child relationship. But given father's extensive incarceration, the GAL recommended termination of father's parental rights.

Finally, father testified about his relationship with child. According to father, during the period that he was not in prison, he regularly visited with child. He also paid for child's daycare. Because father is a professional barber, he cut child's hair whenever he could.

Following the trial, the district court issued an order terminating father's parental rights. The district court determined that father was palpably unfit to parent child, that termination was in child's best interests, and that the county had made reasonable efforts to reunite the family.

Father appeals.

DECISION

Father challenges the district court's order terminating his parental rights. Parental rights should only be terminated "for grave and weighty reasons." *In re Welfare of H.G.B.*, 306 N.W.2d 821, 825 (Minn. 1981). Here, the district court concluded that one statutory reason supported termination of father's parental rights—that father "is palpably unfit to be a party to the parent and child relationship." *See* Minn. Stat. § 260C.301, subd. 1(b)(4).

Generally, an appellate court will affirm the district court's termination of parental rights when (1) "at least one statutory ground for termination is supported by clear and convincing evidence," (2) "termination is in the best interests of the child," and (3) "the

county has made reasonable efforts to reunite the family." *In re Welfare of Child. of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008); *see* Minn. Stat. §§ 260C.301, subd. 1(b) (listing statutory grounds for the involuntary termination of parental rights), .317, subd. 1 (requiring clear and convincing evidence of a statutory ground to terminate parental rights) (2020); Minn. R. Juv. Prot. P. 58.03, subd. 2(a) (stating that the standard of proof in juvenile protection proceedings not involving an Indian child is clear and convincing evidence).

On appeal from a district court's termination of parental rights, appellate courts "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing," *S.E.P.*, 744 N.W.2d at 385, and "[c]onsiderable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). Appellate courts review the district court's findings of the underlying or basic facts for clear error but review for an abuse of discretion the district court's determination of whether those underlying or basic facts show the existence of a particular statutory basis to terminate parental rights. *In re Welfare of Child. of J.R.B.*, 805 N.W.2d 895, 899-901 (Minn. App. 2011), *rev. denied* (Minn. Jan. 6, 2012).

I. The district court did not abuse its discretion in concluding that clear and convincing evidence established that father was palpably unfit to be a party to the parent and child relationship.

Father argues that the record does not support the factual findings underlying the district court's determination that he is palpably unfit to be a party to the parent and child relationship. Thus, father contends, the district court abused its discretion in terminating his parental rights on this ground.

The supreme court recently discussed the clear-error standard that appellate courts use to review a district court's findings of fact:

> In applying the clear-error standard, [appellate courts] view the evidence in a light favorable to the findings. [Appellate courts] will not conclude that a factfinder clearly erred unless, on the entire evidence, [they] are left with a definite and firm conviction that a mistake has been committed.

In re Commitment of Kenney, 963 N.W.2d 214, 221 (Minn. 2021) (quotations and citations omitted).[1] An appellate court must "fully and fairly consider the evidence, but so far only as is necessary to determine [whether that evidence] reasonably tends to support the findings of the factfinder." *Id.* at 223 (quotation omitted). And "[w]hen the record reasonably supports the findings at issue on appeal, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Id.* (quotation omitted).

Under Minnesota Statutes section 260C.301, subdivision 1(b)(4), a statutory basis to terminate parental rights exists when a parent is deemed

> palpably unfit to be a party to the parent and child relationship because of a consistent pattern . . . of specific conditions directly relating to the parent and child relationship . . . 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.

[1] In *Kenney*, which is a civil-commitment case, the supreme court prefaced its discussion with the observation that "[t]he clear-error standard of review is familiar because it applies across many contexts." *Id.* We therefore presume that *Kenney*'s discussion of the clear-error standard of review is not limited to the commitment context.

Father argues that there is no causal connection between his criminal history and his alleged inability to care for his child. He is correct that "a parent's incarceration alone is not enough to warrant termination of parental rights." *In re Child of Simon*, 662 N.W.2d 155, 162 (Minn. App. 2003). However, the court may consider "the fact of incarceration in conjunction with other evidence supporting the petition for termination." *Id.*; *see also In re Welfare of A.Y.-J.*, 558 N.W.2d 757, 761 (Minn. App. 1997) (concluding that no error was committed in considering the father's incarceration, limited contact with son, and failure to cooperate with social workers), *rev. denied* (Minn. Apr. 15, 1997). "If a parent's behavior is likely to be detrimental to the [child]'s physical or mental health or morals, the parent can be found to be palpably unfit and have his parental rights terminated." *In re Child of Vasquez*, 658 N.W.2d 249, 255 (Minn. App. 2003).

The district court did not conclude that father was palpably unfit simply because he was incarcerated. Rather, the district court found that father's chronic incarceration has "negatively affected the development of an appropriate parent-child relationship." And the district court determined that, because of father's lengthy prison sentence, he will be unable to care for child for the foreseeable future. The record supports this finding. It shows that father has been incarcerated for all but nine months of child's life. Child was six at the time of the termination trial and, as the district court observed, child "would have to wait between one and five years to possibly have his father back in his life." At the trial, the county social worker testified that this timeline would be well beyond the recommended permanency timelines designed to provide child with a permanent, stable, and safe place to live—even if father is able to obtain an early release from prison.

Father also argues that the district court received no evidence and made no findings that his pattern of felonious criminal conduct would likely be detrimental to child's mental health or morals. We disagree.

Father himself testified about his extensive criminal history. Most of the exhibits at the trial related to father's criminal activity. The county presented six criminal complaints filed against father, which detailed his alleged conduct, and the corresponding conviction records. Based on this evidence, the district court found that father had engaged in a pattern of felonious conduct that included domestic assaults, robberies with firearms, profiting from prostitution, and sex-trafficking offenses. And given father's pattern of criminal activity, the district court determined that father's conduct would be detrimental to the mental health or morals of child. This finding, which has record support, is not clearly erroneous.

Because the district court's factual findings are well supported by the record and clear and convincing evidence established father's palpable unfitness, the district court did not abuse its discretion in determining that this ground for termination was met.

II. The district court did not clearly err in determining that the county made reasonable efforts to reunify the family.

Before terminating parental rights, a district court must also find that a county made reasonable efforts to reunify the child and the parent. Minn. Stat. § 260C.301, subd. 8 (2020). In deciding whether reasonable efforts were made, the district court must consider whether the efforts were "(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) (2020). "Reasonable efforts" must "go beyond mere matters of form so as to include real, genuine assistance." *In re Welfare of Child. of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007) (quotation omitted), *rev. denied* (Minn. Mar. 28, 2007). However, "the nature of the services which constitute reasonable efforts depends on the problem presented." *In re Welfare of Child. of T.R.*, 750 N.W.2d 656, 664 (Minn. 2008) (quotation omitted). And what constitutes "reasonable efforts" depends on the facts of each case. *In re Welfare of Child of A.M.C.*, 920 N.W.2d 648, 663 (Minn. App. 2018). On review, the appellate court examines the record to determine whether "the district court's findings as to the county's efforts are supported by substantial evidence and are not clearly erroneous." *S.E.P.*, 744 N.W.2d at 387.

For a noncustodial parent, the social services agency must perform due diligence to "assess [the parent's] ability to provide day-to-day care for the child and, where appropriate, provide services necessary to enable the noncustodial parent to safely provide the care." Minn. Stat. § 260.012(e)(2) (2020). Reasonable services are required until the district court determines that "the provision of services or further services for the purposes of reunification is futile and therefore unreasonable under the circumstances." *In re Child. of T.R.*, 750 N.W.2d 656, 664 (Minn. 2008).

Father argues that because the county's reunification plan did not comply with the statute, the district court erred in determining that the county's efforts were reasonable. He first contends that the plan did not satisfy the statute because it did not prescribe services

or identify any specific actions required of father for reunification. Thus, according to father, he was effectively deprived of a case plan.

In support of his argument, father cites *In re Welfare of Child. of A.R.B.*, which holds that a parent's incarceration alone does not excuse a county from creating a reunification plan. 906 N.W.2d 894, 899 (Minn. App. 2018). However, *A.R.B.* is distinguishable. There, the county made no court-approved, written case plan for reunification. *Id.* at 898. By contrast, here, the county did create a plan signed by father and approved by the court. "[A] case plan that has been approved by the district court is presumptively reasonable." *S.E.P.*, 744 N.W.2d at 388. "[O]nce a case plan has been approved by the court, the appropriate action for a parent who believes some aspect of the case plan to be unreasonable is to ask the court to change it, rather than to simply ignore it." *Id*. The Minnesota Rules of Juvenile Protection Procedure provide parents with a legal mechanism to challenge the reasonableness of a case plan. *See* Minn. R. Juv. Prot. P. 51.03. But father did not object to the plan or ask for it to be changed. Indeed, even in his brief father does not suggest what the county could have done differently to help him achieve the objective of providing a safe, stable, and healthy environment for child.

Father also argues that the county failed to meet its duty of making *reasonable* efforts to reunite him with child. However, the record supports the district court's finding that father's chronic incarceration for almost all of child's life meant that father had "little relationship with his son." "The purpose of the child-protection laws is not to create relationships between children and their biological parents where none previously existed but rather to preserve existing relationships where reunification in the foreseeable future is

possible and such relationships are in the [child]'s best interests." *In re Child. of R.W.*, 678 N.W.2d 49, 56 (Minn. 2004).

The district court recounted father's involvement with the county and concluded that, at the time child was placed in foster care, father had been continuously incarcerated for over two years for his current offenses. Father had not been released throughout the pendency of the child protection case. And one month after child was removed from his mother's home, father was committed to his current term of imprisonment. The district court continued:

> [The county] met with [father] in prison, reviewed the case plan with him, and kept in contact with him during the case. [The county] also facilitated contact between the child and [father], as well as between the child and [father's] relatives during the pendency of the case. These efforts were reasonable, given [father's] incarceration.

The record—including father's own testimony—supports these conclusions.

Again, while incarceration alone cannot justify termination of parental rights, it is a factor for the court to consider. *In re Child. of Wildey*, 669 N.W.2d 408, 414-16 (Minn. App. 2003), *aff'd as modified sub nom. R.W.*, 678 N.W.2d 49. Father cannot expect the courts "to view the case as if he were 'outside' and available tomorrow to take over day-to-day parenting." *Id.* at 416.

Based on our review of the record, we conclude that the district court's findings as to the reasonableness of the county's efforts are supported by substantial evidence and are not clearly erroneous.

III. The district court did not abuse its discretion by determining that termination of father's parental rights was in the best interests of the child.

Father argues that the district court abused its discretion by concluding that it was in child's best interests to terminate father's parental rights. A district court may only terminate parental rights if it is in the best interests of the child. *S.E.P.*, 744 N.W.2d at 385. In evaluating the best interests of a child in a proceeding to terminate parental rights, a district court must consider (1) "the child's interests in preserving the parent-child relationship," (2) "the parent's interests in preserving the parent-child relationship," and (3) "any competing interests of the child." Minn. R. Juv. Prot. P. 58.04(c)(2)(ii). "Competing interests include health considerations, a stable environment, and the child's preference." *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 92 (Minn. App. 2012).

"[D]etermination of a child's best interests is generally not susceptible to an appellate court's global review of a record, and . . . an appellate court's combing through the record to determine best interests is inappropriate because it involves credibility determinations." *In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 546 (Minn. App. 2009) (quotation omitted). We review a district court's best-interests determination for an abuse of discretion. *In re Welfare of Child of J.R.R.*, 943 N.W.2d 661, 669 (Minn. App. 2020).

Father argues that in determining that termination was in child's best interests, the district court erroneously concluded that "the child has little relationship with [father] to preserve." Father points to his testimony detailing his attempts to maintain a relationship with child. However, appellate courts must defer to the district court's determinations of

witness credibility and the weight to be given the evidence they present. *In re Welfare of T.D.*, 731 N.W.2d 548, 555 (Minn. App. 2007), *rev. denied* (Minn. Jul. 17, 2007); *see also S.W.*, 727 N.W.2d at 148 ("Considerable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." (quotation and citation omitted)). While the district court found that "[i]t is hard for [father] to be separated from his son" and that father sends things to child and writes child letters, the court did not credit much of father's testimony.

The record supports the district court's determinations that it is in child's best interests to have his basic needs met by a parent who is present to provide day-to-day supervision and to provide safe, stable, and secure housing; that child has an interest in having caretakers who are not involved in continuous criminal activities that lead to incarceration; and that child has an interest in living with half-siblings "with whom he has a strong bond." Each of these conclusions is founded on concern about providing stability for child, "a factor which must be given high priority" when considering the best interests of a child. *In re Welfare of K.T.*, 327 N.W.2d 13, 18 (Minn. App. 1982) (considering best interests of the child in the context of a motion to vacate a voluntary termination of parental rights).

The district court acknowledged father's competing interests, observing that father loves his child and desires to have a strong relationship with him. However, "the best interests of the child must be the paramount consideration . . . [and] . . . [w]here the interests of parent and child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301 subd. 7 (2020). The district court concluded, and the record supports the

finding that, because of his chronic incarceration, father is unable to provide safe and stable care for child.

We conclude that the district court did not abuse its discretion by determining that child's interest in a permanent, safe, and stable home outweigh father's competing interest in maintaining his parental rights.

Affirmed.