STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0685

In the Matter of the Welfare of the Children of:
C. E. N. and B. C. K., Parents.

Filed November 22, 2021
Affirmed
Segal, Chief Judge

Traverse County District Court
File No. 78-JV-21-28

John E. Mack, New London Law, P.A., New London, Minnesota (for appellant-mother C.E.N.)

Matthew P. Franzese, Traverse County Attorney, Wheaton, Minnesota (for respondent Traverse County Social Services)

Dawn M. Weber, New London, Minnesota (for respondent-father B.C.K.)

Dawn Krump, Tintah, Minnesota (guardian ad litem)

Considered and decided by Segal, Chief Judge; Cochran, Judge; and Klaphake, Judge.*

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this appeal of the termination of her parental rights to her youngest child, appellant-mother argues that the district court erred (1) in presuming that she is palpably

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

unfit to be a party to the parent and child relationship based on the involuntary termination of her parental rights to another child under the laws of North Dakota, (2) in concluding that termination of her parental rights was in the child's best interests, and (3) by failing to clearly articulate the statutory basis for terminating mother's parental rights. Because we conclude that appellant forfeited certain issues and that the record supports the district court's findings, we affirm.

FACTS

Appellant-mother C.E.N. is the mother of a child born in 2020. Mother was the child's primary caregiver until the child was removed from her care at the start of these proceedings in February 2021.[1] In addition to the child, mother has six other children. The five oldest children, none of whom are involved in this proceeding, live with their maternal grandmother and are not in mother's custody. Mother's parental rights were terminated involuntarily to the sixth child under the laws of North Dakota in June 2020.

Mother has a history of methamphetamine use. Since 2017, she has participated in inpatient residential treatment at four facilities but has relapsed after each treatment. Her struggles with drug use have led to involvement by child protective services in Minnesota and North Dakota.

The child involved in the North Dakota termination of parental rights (TPR) action was removed from mother's custody at birth in 2019 due to mother's history of drug use and her failures to obtain counseling, follow treatment recommendations, and maintain

[1] The child's father was not living with the child's mother, and the father's parental rights are not at issue.

stable housing. A petition to terminate mother's parental rights was filed in North Dakota after mother failed to follow through on reunification recommendations. The North Dakota district court granted the petition by default after mother missed three court hearings. The court found by clear and convincing evidence that the child was a "deprived child" under North Dakota law, that deprivation was likely to continue, and that the child was "subjected to aggravated circumstances," including prenatal drug exposure.[2] The North Dakota court also found that it was in the best interests of the child to terminate mother's parental rights. The North Dakota court issued its order involuntarily terminating mother's parental rights to that child in June 2020.

Mother completed her most recent inpatient treatment program in January 2020. The treatment program was in Minnesota. After completing the treatment program, she lived in a sober living community in Minnesota until May 2020, when the child involved in the current proceeding was born (hereafter, the child). Around that time, mother moved with the child to live with her mother who also resides in Minnesota.

[2] Under the version of the North Dakota TPR statute in effect at the time, a district court could terminate parental rights of a parent to a "deprived child" when the conditions and causes of the deprivation were likely to continue and cause harm to the child, or where the child was "subjected to aggravated circumstances." N.D. Cent. Code § 27-20-44.1.b-.c (2020). The phrase "deprived child" is defined in the applicable version of the North Dakota statutes as a child who, among other things, "[i]s without proper parental care" or "[w]as subject to prenatal exposure to . . . any controlled substance." N.D. Cent. Code § 27-20-02.8.a, .f (2020). "Aggravated circumstances" include a parent's failure "to make substantial, meaningful efforts to secure treatment for the parent's addiction" for a specific time period. N.D. Cent. Code § 27-20-02.3.b (2020). Portions of these statutes have since been amended to use different terminology. *See* 2021 N.D. Laws ch. 245, §§ 23, 45.

In early February 2021, respondent Traverse County Social Services (the county) received allegations that mother was using methamphetamine through intravenous injections and was using while the child was present. The county contacted mother that day and attempted a follow-up visit the next day. When the county representatives went to mother's residence the next day, they learned that mother had left along with the child. One day later, on February 11, the county filed a joint child-in-need-of-protection-or-services (CHIPS) and TPR petition in Minnesota district court. The petition alleged as one of the grounds for the TPR that termination was appropriate because mother's parental rights to another child had been terminated involuntarily. The petition cited Minn. Stat. § 260C.503, subd. 2(a)(4) (2020). On February 12, mother and the child were found in another county in Minnesota, and the child was placed into emergency protective care.

A trial on the TPR petition was held in April 2021. The district court heard testimony at the trial from mother, a county social worker, the guardian ad litem, and two counselors who had worked with mother. While mother admitted at trial that she had used methamphetamine six times between November 2020 and February 2021, she denied she had used after February 2021. But an addiction counselor who worked with mother testified that mother admitted to her in April 2021 that mother was using methamphetamine daily if it was available. The testimony also established that, after a positive test for methamphetamine in February 2021, mother did not take scheduled drug tests when she met with the social worker. The evidence further showed that mother failed to follow through with the recommendation from the chemical-dependency assessor to attend inpatient residential dependency treatment. Other evidence at trial showed that mother had

obtained her own apartment where she had been living for at least a month before the start of the trial. Mother acknowledged, however, that a person with a criminal history involving drugs would stay with her "every other day," but also claimed that he had not stayed with her for two or three weeks. The county submitted evidence that the person's criminal history included a sex offense.

The social worker testified that mother has a loving relationship with the child and that the child reacts very well to his visits with her. The social worker noted that mother appeared to be under the influence of drugs only at her first visit with the child and that subsequent visits went well. The social worker and the guardian ad litem, nevertheless, both recommended termination of mother's parental rights to the child.

The district court terminated mother's parental rights to the child. In so doing, however, the district court noted that while mother

> shall have no further right to visitation or contact with the child unless expressly authorized by . . . County Social Services or ordered by the Court, . . . given the bond between mother and child, the Court has no objection in principle to [mother] continuing to have contact with the child during his minority, provided his guardian feels this is in his best interests.

Mother now appeals the termination decision.

DECISION

Mother challenges the termination of her parental rights on several grounds. First, she claims that the district court erred by applying the statutory presumption that she was palpably unfit to parent the child under Minn. Stat. § 260C.301, subd. 1(b)(4) (2020), because the North Dakota TPR statute is not similar to Minnesota's TPR statute. For her

second argument, mother claims that the district court erred in concluding that termination was in the best interests of the child because the district court did not give sufficient weight to the importance of mother and child's support system. Mother's third argument relates to an error in the statutory grounds cited by the county as the basis for the TPR petition. Mother claims that this caused confusion and that the district court failed to clearly articulate the statutory basis for the termination decision.

A district court may terminate parental rights upon clear and convincing evidence of the existence of at least one of the statutory grounds for termination. Minn. Stat. § 260C.317, subd. 1 (2020). On appeal from a district court's decision to terminate parental rights, we review "the district court's findings of the underlying or basic facts for clear error, but we review its determination of whether a particular statutory basis for involuntarily terminating parental rights is present for an abuse of discretion." *In re Welfare of Child. of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *rev. denied* (Minn. Jan. 6, 2012). "We give considerable deference to the district court's decision to terminate parental rights. But we closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *In re Welfare of Child. of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008) (citations omitted). "The child's best interests, however, remain the paramount consideration in every termination case." *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990).

I. Mother's argument that the district court erred by applying a presumption of palpable unfitness is not properly before this court and the district court did not abuse its discretion in determining that mother was a palpably unfit parent.

Application of Presumption

On appeal, mother argues for the first time that the district court erred in applying a presumption of palpable unfitness in this case. Under Minn. Stat. § 260C.301, subd. 1(b)(4), a district court may terminate parental rights based on a finding that "a parent is palpably unfit to be a party to the parent and child relationship." That section of the statute provides for a rebuttable presumption of palpable unfitness "upon a showing that the parent's parental rights to one or more other children were involuntarily terminated." Minn. Stat. § 260C.301, subd. 1(b)(4).

The presumption imposed by the statute, however, "is easily rebuttable." *In re Welfare of Child of J. A. K.*, 907 N.W.2d 241, 245 (Minn. App. 2018) (quoting *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 137 (Minn. 2014)), *rev. denied* (Minn. Feb. 26, 2018). The presumption

> imposes only a burden of production, which means that a parent may rebut the statutory presumption merely by introducing evidence that would justify a finding of fact that [the parent] is not palpably unfit. In other words, a parent seeking to rebut the statutory presumption needs to produce only enough evidence to support a finding that the parent is suitable to be entrusted with the care of the [child].

Id. at 245-46 (quotations and citations omitted).

The district court here applied the presumption because mother's parental rights to another child were involuntarily terminated in North Dakota and concluded that mother failed to rebut that presumption. Mother challenges the district court's determination,

arguing for the first time that the district court was wrong to rely on the involuntary termination from North Dakota because the North Dakota statute is not similar to Minnesota's TPR statute.

The applicable section of Minnesota's statute provides:

> It is presumed that a parent is palpably unfit to be a party to the parent and child relationship upon a showing that the parent's parental rights to one or more other children were involuntarily terminated or that the parent's custodial rights to another child have been involuntarily transferred to a relative under Minnesota Statutes 2010, section 260C.201, subdivision 11, paragraph (e), clause (1), section 260C.515, subdivision 4, *or a similar law of another jurisdiction*.

Minn. Stat. § 260C.301, subd. 1(b)(4) (emphasis added).

Mother argues that the phrase "a similar law of another jurisdiction" quoted above means that the North Dakota statute must be a "similar law" to the Minnesota TPR statute for the presumption to apply.[3] Mother did not, however, assert this issue before the district court. And while the district court reviewed the provisions of the North Dakota TPR statute to assess commonalities between the circumstances that caused the termination action in North Dakota and mother's current circumstances, the district court did not address the issue mother now raises. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the

[3] Mother also asserts that "[a] termination utilizing the presumption of unfitness is subject to strict scrutiny," and that therefore, the similarity between the two statutes is as well. This appears to be a misinterpretation of the *R.D.L.* case that mother cites. In that case, the supreme court applied strict scrutiny when deciding a constitutional challenge to the statute, Minn. Stat. § 260C.301, subd. 1(b)(4). *R.D.L.*, 853 N.W.2d at 133. The supreme court upheld the statute. *Id.* at 138. This does not mean, however, that each termination under the statute is subject to strict scrutiny.

matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted); *see In re Welfare of Child of A.I.*, 779 N.W.2d 886, 894 (Minn. App. 2010) (applying *Thiele* on appeal from a termination of parental rights). Because the issue was neither presented to nor considered by the district court, we decline to consider this argument now.

Palpable Unfitness

We nevertheless conclude that, even if we were to agree with mother that it was error to apply the presumption in this case, the district court did not abuse its discretion in terminating her parental rights to the child. Indeed, it appears that, in addition to evaluating whether mother rebutted the statutory presumption of palpable unfitness, the district court determined that mother was palpably unfit independent of the presumption. Here, aside from addressing whether mother rebutted the presumption, the district court made credibility findings and made findings of fact that resolved conflicts in the evidence. Thus, in the interests of justice, we will address the merits of the district court's palpable unfitness determination. *See* Minn. R. Civ. App. P. 103.04 (noting that appellate courts may address questions in the interests of justice).

The district court focused its analysis on mother's ongoing issues with drug use, failure to follow recommendations for obtaining additional treatment, instability in her housing situation, and the fact that both the guardian ad litem and the county social worker recommended termination of mother's parental rights to the child. For example, the district court noted that mother admitted she had used methamphetamine six times between November 2020 and February 2021, but discounted her testimony that she had not used after February 2021. The district court instead credited the testimony of mother's addiction

counselor that, on April 12, 2021, mother admitted to the counselor that mother would use methamphetamine daily if it was available and had used as recently as 24 hours before their meeting. The district court also found it significant that mother failed to take any of the drug tests scheduled by the county social worker after the positive drug test in February 2021.

The district court acknowledged mother's argument that she successfully completed inpatient treatment in January 2020, but noted that mother admitted that she did not return to treatment since the county filed the current TPR petition despite having the opportunity to do so. *See M.D.O.*, 462 N.W.2d at 377 (noting that termination cases are concerned with conduct or conditions "existing at the time of the hearing"). The district court also found that mother lacked good reasons for her failure to follow through with the recommendation that mother enter residential dependency treatment. And although mother testified that she "[goes] to meetings" to address her chemical use, she did not explain what type of meetings or otherwise elaborate on her efforts to be sober. *See In re Welfare of N.M.C.*, 447 N.W.2d 14, 17 (Minn. App. 1989) (affirming the district court's dismissal, without an evidentiary hearing, of petitions to vacate a TPR when the petitions failed to allege sufficient facts to support the petition); *cf. In re Civ. Commitment of Poole*, 921 N.W.2d 62, 68-69 (Minn. App. 2018) (citing several cases supporting the idea that "[g]enerally, courts have ruled that mere conclusory assertions are insufficient to avoid an adverse ruling"), *rev. denied* (Minn. Jan. 15, 2019).

Finally, while mother had been in her own apartment for approximately a month as of the date of trial, the district court observed that she has "lived in three separate places

since June 2020" and, in February 2021, left her residence "at the drop of a hat to avoid child protective services." The court also found that a person with a criminal record that includes a sex offense stayed at least "every other day" with mother in the apartment.

In sum, the district court found that the circumstances that caused the North Dakota TPR remained largely unchanged. This finding is supported by the record and we discern no abuse of discretion by the district court in its conclusion that mother is palpably unfit to be a party to the parent and child relationship, that her unfitness precludes her from adequately caring for the child, and that these conditions are likely to continue for the reasonably foreseeable future.

II. The district court did not abuse its discretion in concluding that termination of mother's parental rights was in the child's best interests.

Mother argues that the district court's analysis of the child's best interests was flawed because the district court failed to give adequate weight to mother's claim that she and the child had a strong support system.

"In analyzing the best interests of the child, the court must balance 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 interest of the child." *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992); *see also* Minn. R. Juv. Prot. P. 58.04(c)(2)(ii). A district court "must consider a child's best interests and explain its rationale in its findings and conclusions." *In re Tanghe*, 672 N.W.2d 623, 626 (Minn. App. 2003). "We review a district court's ultimate determination that termination is in a child's best interest for an abuse of discretion." *J.R.B.*, 805 N.W.2d at 905.

Mother does not argue that the district court failed to consider any of the three best-interests factors. Instead, she argues that the district court erred by failing to give greater weight in its analysis to the fact that the child's maternal grandmother and five half-siblings provide a support system for mother and the child. In support of her argument, mother cites testimony describing the strong relationship between the child and his relatives. But "[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 J.L.L.*, 801 N.W.2d 405, 414 (Minn. App. 2011) (quotations omitted), *rev. denied* (Minn. July 28, 2011). And we defer to a district court's determinations of witness credibility and the weight to be given to evidence. *Id.* at 413; *see In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

The district court acknowledged the bonds between the child and his mother, siblings, and grandmother, but noted that "there are other troublesome factors here that are harmful for the child's health and wellbeing." The court observed that "[t]he likely continued exposure of [the child] to methamphetamine, and drug use generally (which necessarily involves criminal activity), will be unhealthy and likely damaging to his mental, moral, emotional, and physical health." The district court also noted the recommendation of the child's guardian ad litem that it is in the child's best interests to be raised in a stable, drug-free environment.

On this record, we conclude that the district court's findings of fact regarding the child's best interests are supported in the record and that mother's claim related to the

child's support system is not sufficient to establish an abuse of discretion by the district court. *See J.R.B.*, 805 N.W.2d at 905-06 (affirming finding that termination was in child's best interests despite an "extended-family support system" because of parents' inability to provide stability); *cf. In re Welfare of Child of J. R. R.*, 943 N.W.2d 661, 669-70 (Minn. App. 2020) (reversing best-interests finding supported only by "mother's conclusory assertions").

III. The district court articulated a clear statutory basis for termination.

Finally, mother asserts that the county miscited the statutory grounds for termination in its TPR petition and claims that the district court failed to clearly articulate the statutory grounds for the termination order. Mother argues that the county cited in its petition the wrong section of the statute as its statutory basis for termination.[4] Mother points out that the county's petition cited Minn. Stat. § 260C.503, subd. 2(a)(4). This section provides that when "the child's parent has lost parental rights to another child through an order involuntarily terminating the parent's rights," the "responsible social services agency must ask the county attorney to immediately file a termination of parental rights petition." Minn. Stat. § 260C.503, subd. 2(a)(4).

The county agrees that it cited to the wrong section of the statute and that the petition should have cited Minn. Stat. § 260C.301, subd. 1(b)(4), which is the provision setting out

[4] Mother also notes that the two other bases for termination cited by the county in the TPR petition were grounds for adjudicating a child as CHIPS, not grounds for a TPR. The county, however, filed petitions both for CHIPS and a TPR. Thus, it appears that the citations to the CHIPS grounds were proper.

the authority of the court to terminate parental rights when a parent is found to be palpably unfit.

Mother claims that the citation error caused confusion and that the district court's TPR order is thereby deficient because it failed to clearly articulate the statutory ground for the termination of mother's parental rights. The county counters that, while it miscited the statutory provision in the petition, mother never raised the issue before the district court and there was no confusion at the trial. The county maintains that mother knew that the basis for the action was mother's palpable unfitness based on Minn. Stat. § 260C.301, subd. 1(b)(4), and that the district court's order addresses that statutory basis for termination.

A TPR petition must state "a prima facie case in support of termination of parental rights." Minn. R. Juv. Prot. P. 55.03, subd. 2(c). As addressed above, however, appellate courts do not generally consider issues that were not raised and considered in the district court. *Thiele*, 425 N.W.2d at 582; *A.I.*, 779 N.W.2d at 894. And because mother never raised this issue before the district court, we decline to address it.

We note, however, that even if this issue were properly before this court, any error would be, at most, harmless. At trial, the parties presented arguments about mother's palpable unfitness. Further, the district court's order and memorandum cited Minn. Stat. § 260C.301, subd. 1(b)(4), and the memorandum was unambiguously clear that this provision was the basis for the termination of mother's parental rights. The district court discussed mother's palpable unfitness in its order and the language that mother complains is "vague about [the district court's] legal basis" directly mirrors the correct section of the

termination statute on palpable unfitness, Minn. Stat. § 260C.301, subd. 1(b)(4). And the court expressly states in its memorandum that Minn. Stat. § 260C.301, subd. 1(b)(4), provides the statutory ground for termination. We would, therefore, reject this argument if it was properly before this court.

Affirmed.