STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1835

In the Matter of the
Welfare of the Children of:
J. A. and M. B., Parents.

Filed March 22, 2011
Reversed
Hudson, Judge

Otter Tail County District Court
File No. 56-JV-10-1131

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Considered and decided by Toussaint, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellant-father challenges the termination of his parental rights on the grounds that respondent-county failed to make reasonable efforts at reunification and did not establish statutory grounds for termination. Because the record lacks clear and convincing evidence of reasonable efforts at reunification, we reverse.

FACTS

This case involves two children, J.R.B., born August 22, 2006, and M.L.B., born January 30, 2008. J.R.B. has significant developmental delays and has difficulty speaking and walking. She may never live independently.

J.R.B. and M.L.B. are the biological daughters of appellant M.B., their father, and J.A., their mother. J.R.B. and M.L.B. are also the half-sisters of H.L.A., born November 17, 2000, who is J.A.'s biological daughter from a prior relationship. M.B. considers H.L.A. to be his daughter, but he is an unlikely candidate to adopt her because of his criminal background. H.L.A. is not a subject of this appeal.

On October 3, 2008, the Otter Tail County Department of Human Services (the county) filed child-in-need-of-protection-or-services (CHIPS) petitions on behalf of J.R.B., M.L.B., and H.L.A. because M.L.B.'s hair tested positive for methamphetamine. The county immediately removed the children from J.A.'s care and placed them in the foster care of S.B., the mother of M.B. and the paternal grandmother of J.R.B. and M.L.B. The children remained in foster care until September 30, 2009, when they were returned to the care of J.A. But the children were once again removed from J.A.'s care on March 31, 2010, when J.A. resumed the use of drugs and alcohol. During much of the proceeding, M.B. was incarcerated and unavailable to take custody of the children.

On April 29, 2010, the county filed a petition to terminate the parental rights of J.A. and M.B. On June 3, 2010, J.A. consented to the termination of her parental rights to J.R.B., M.L.B., and H.L.A. But M.B. contested the termination of his parental rights to J.R.B. and M.L.B.

The county asserted three statutory grounds for terminating M.B.'s parental rights: (1) "substantially, continuously, or repeatedly refus[ing] or neglect[ing] to comply with the duties imposed upon [him] by the parent and child relationship," Minn. Stat. § 260C.301, subd. 1(b)(2) (2008); (2) the failure of "reasonable efforts, under the direction of the court, . . . to correct the conditions leading to the [children's] placement," Minn. Stat. § 260C.301, subd. 1(b)(5) (2008); and (3) "the [children are] neglected and in foster care." Minn. Stat. § 260C.301, subd. 1(b)(8) (2008).

M.B. has a long history of substance abuse. M.B. began drinking alcohol and smoking marijuana when he was around 14 or 15, and he started using methamphetamine when he was 17 or 18. He has participated in chemical-dependency treatment on several occasions, but he has ultimately returned to drinking alcohol and using methamphetamine. M.B. also has an extensive criminal record composed of 17 criminal files. But the district court found that only four of M.B.'s convictions were significant—three of first-degree criminal damage to property in June 2006 and November 2007, and one of second-degree controlled-substance offense in June 2007.[1]

At the time of J.R.B.'s birth in August 2006, M.B. was in jail for a probation violation. After he was released, M.B. lived with J.A., J.R.B., and H.L.A. intermittently from December 2006 until August 2007. Both M.B. and J.A. used methamphetamine in the home that they shared with the children. And in June 2007, M.B. committed a

[1] In its findings the district court stated that M.B.'s controlled-substance conviction occurred in June 2008, but based on the record, it appears that this was a typographical error and that the offense occurred around June 2007 and that M.B. was convicted in September 2007.

second-degree controlled-substance offense, the details of which are not in this record. M.B. was convicted of this offense, his probation was revoked for the criminal-damage-to-property convictions, and his sentences were executed. At the time M.B. committed the controlled-substance offense, he knew that J.A. was pregnant with M.L.B.

At the time of M.L.B.'s birth, the children's removal from J.A.'s home, and during much of their out-of-home placement, M.B. was incarcerated at the Minnesota Correctional Facility-St. Cloud (MCF-St. Cloud). M.B. nonetheless participated in intermediate hearings during the proceeding and had monthly visitation with J.R.B., M.L.B., and H.L.A. M.B. also completed a number of required and optional programs, including chemical-dependency treatment, an anger-management group, a program on the trauma outcome process and the cycle of abuse, a 12-week parenting class, a program on transitioning to life outside of custody, a three-part critical-thinking course, computer courses, and a vocational masonry program.

M.B. was transferred to the Otter Tail County jail in April 2010, and he had weekly visitation with J.R.B., M.L.B., and H.L.A. As of the date of trial, M.B. was scheduled to be released from custody in October 2010 and to remain on parole until May 2011.[2]

While M.B. was incarcerated at MCF-St. Cloud, however, the child-protection worker in charge of J.R.B.'s and M.L.B.'s case did not include M.B. in the out-of-home placement plans for the children, nor did she offer M.B. any services. She did not contact

[2] Although it is not part of the record on appeal, an October 21, 2010, report to the district court indicates that M.B. was released as scheduled.

M.B. to discuss out-of-home placement plans until April 23, 2010, after the children had been in foster care for almost one-and-a-half years and only days before the county filed a petition for termination of his parental rights. And she did not execute and file M.B.'s out-of-home placement plans until May 11, 2010, after the county had already filed its petition for termination of parental rights and when trial was two months away.

M.B.'s out-of-home placement plans enumerate three tasks: (1) complete a chemical-dependency evaluation and follow through on all recommendations upon release from jail; (2) remain sober from all drugs and alcohol; and (3) complete a parental-capacity evaluation and anger diagnostic. M.B. underwent a chemical-dependency assessment administered by the county. As a result of the assessment, M.B. was advised to abstain from the use of alcohol and drugs, attend relapse counseling, and go to meetings of A.A. and N.A. M.B. testified that he has remained sober and has been attending weekly relapse counseling, although he has been unable to attend A.A. or N.A. because of conflicts with his work schedule. But M.B. also admitted that he was unlikely to continue with chemical-dependency treatment if he was not involved in this proceeding.

M.B. also underwent a parenting evaluation and anger diagnostic. But the evaluation was performed two days prior to trial, and neither M.B. nor the child-protection worker had an opportunity to incorporate its recommendations into the out-of-home placement plans. From the record, it is unclear who was responsible for the two-month delay between the execution of the out-of-home placement plans and the evaluation.

At trial, two psychologists, Denni Wilson and Dr. Kathleen Schara, testified. Wilson evaluated the needs of J.R.B., and Dr. Schara evaluated M.B.'s parenting capacity. According to Wilson, J.R.B. is significantly developmentally delayed and requires intensive therapeutic and educational services. Wilson stated that for most of her life, J.R.B. will require constant supervision. Wilson opined that J.R.B. has an extreme attachment to her sisters and that it would be difficult for her to cope if she were separated from one or both of them. Wilson testified that she did not take M.B. into account in her evaluation, nor had she met with M.B. to explain her findings.

Dr. Schara performed a number of tests on M.B. and considered a number of issues. Dr. Schara diagnosed M.B. with alcohol, amphetamine, and cannabis dependence in forced remission. According to Dr. Schara, M.B. self-reported his history of chemical dependence and his attempts at treatment, but he may have minimized his problems with alcohol and drugs. Dr. Schara stated that M.B.'s ability to maintain sobriety once he is out of custody is unclear. Dr. Schara also diagnosed M.B. with a personality disorder with antisocial and narcissistic features. According to Dr. Schara's testing, M.B. has a tendency toward frustration, impulsivity, risk-taking, antisocial behavior, extreme anger, and acts of violence, but his potential for child abuse was minimal.

Dr. Schara also performed a parenting stress inventory. This inventory indicated that M.B.'s attachment to his children may be impaired because of the limited time he has spent with them. Dr. Schara opined that M.B. therefore may become angry with his children more easily. The inventory also indicated that M.B. experienced stress while parenting the children for an hour in a supervised setting. Dr. Schara expressed concern

that if M.B. was already experiencing stress while caring for the children in a supervised setting, he would likely experience even more stress parenting the children, particularly J.R.B., in an unsupervised setting.

Dr. Schara also identified specific concerns with M.B.'s ability to parent J.R.B. She opined that M.B. had below average empathy and lacked nurturing skills, both of which would make it difficult to parent a child with special needs. Dr. Schara acknowledged that M.B. was not concerned by the fact that J.R.B. had special needs, although she stated that he may not understand the full extent of care J.R.B. requires. Dr. Schara was concerned that M.B. is "minimizing the seriousness of [J.R.B.'s] problems with speech, or whatever cognitive delays she might have, [which] could lead him to set unrealistic expectations [and] easily get more frustrated with her because of not understanding fully her limitations."

Dr. Schara opined that reunification was a possibility, but it would require extensive rehabilitation and remediation and was complicated by the amount of time the children had been in out-of-home-placement. To achieve reunification, Dr. Schara recommended continued abstinence, participation in chemical-dependency support groups, an anger-management assessment, and further parenting education, including classes or in-home therapy. Dr. Schara testified that, at a minimum, M.B. would require 6 to 12 months to be reunited with his children, although the timeline could be longer if M.B. did not cooperate. When Dr. Schara was informed that M.B. had completed anger-management and parenting-education classes while incarcerated, her reaction was mixed: she was surprised that M.B. exhibited deficits despite participating in these programs, but

she also testified that M.B.'s timeline for reunification may be shorter because he had completed these classes.

At trial, M.B. acknowledged his difficulties with anger management and his limited parenting experience. M.B. was aware of J.R.B.'s special needs, and he was familiar with all of the services that J.R.B. was receiving, but he did not agree that she needed all of them. M.B. also recognized that J.R.B., M.L.B., and H.L.A. have a strong bond and that it is important to keep them together. M.B. acknowledged that his criminal background could prevent him from adopting H.L.A.

M.B. testified that he would be willing to attend additional parenting, anger-management, and chemical-dependency programs to regain custody of his children. M.B. further testified that he did not know everything he needed to know to raise a child with special needs, but he was willing to learn. M.B. also agreed that a good first step toward reunification would be to move in with his parents and his children so that he would have a support system.

The district court determined that there was clear and convincing evidence to support the termination of M.B.'s parental rights. The district court determined that the county had made reasonable efforts to reunite M.B. with his children and that any further attempts at reunification would be futile. But the district court did not make specific findings about what reasonable efforts the county had made, why those efforts were reasonable, and why continuing efforts would be futile, except to say that M.B. still needed significant rehabilitation and remediation to be reunited with his children.

The district court also determined that the county had established by clear and convincing evidence that M.B.'s parental rights should be terminated on all three statutory grounds asserted in the petition. The district court also determined that the termination of M.B.'s parental rights was in the best interests of J.R.B. and M.L.B. The district court specifically found that termination was required due to the children's need for stability and permanency.

M.B.'s appeal follows.

D E C I S I O N

The due process clauses of the United States and Minnesota constitutions protect the integrity of the family unit. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1213 (1972); *In re Welfare of Child of P.T.*, 657 N.W.2d 577, 588 (Minn. App. 2003), *review denied* (Minn. Apr. 15, 2003). Every parent therefore retains an interest in preventing the loss of parental rights and must be provided a fundamentally fair procedure to avoid such a loss. *Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S. Ct. 1388, 1394–95 (1982). The failure to act as a model parent does not automatically extinguish the right to keep one's family intact and remain a parent. *Id.* at 753, 102 S. Ct. at 1394–95.

A court may terminate parental rights only if clear and convincing evidence establishes that a statutory ground for termination exists and termination is in the child's best interests. *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). This court reviews decisions to terminate parental rights to determine "whether the [district court's] findings address the statutory criteria, whether those findings are

supported by substantial evidence, and whether they are clearly erroneous." *In re Welfare of D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997). "A finding is clearly erroneous if it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Children of T.R.*, 750 N.W.2d 656, 660–61 (Minn. 2008) (quotation omitted).

Under the statutory provisions at issue here, the party seeking termination must demonstrate that reasonable efforts at reunification were made before it can obtain termination. *See* Minn. Stat. § 260C.301, subd. 1(b)(2) (2010) (failure to fulfill parental duties); Minn. Stat. § 260C.301, subd. 1(b)(5) (2010) (failure of reasonable efforts following out-of-home placement); Minn. Stat. § 260C.301, subd. 1(b)(8) (2010) (neglected and in foster care). The Minnesota Supreme Court has also held that, in any proceeding to terminate parental rights, the party seeking termination must demonstrate that the responsible social services agency made reasonable efforts at reunification or that such efforts were not required under the circumstances. *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996) (requiring reasonable efforts at reunification prior to termination of parental rights). Thus, if the county failed to make reasonable efforts at reunification or to show that such efforts would be futile, the county cannot terminate M.B.'s parental rights on any of the statutory grounds listed in its petition for termination.

In the case of noncustodial parents, "reasonable efforts" at reunification require a social services agency to exercise due diligence in "assess[ing] a noncustodial parent's ability to provide day-to-day care for the child and, where appropriate, provid[ing] services necessary to enable the noncustodial parent to safely provide the care." Minn.

Stat. § 260.012(e)(2) (2010). To determine whether reasonable efforts have been made, the district court must consider "whether services to the child and family 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) (2010). Whether the services provided in a particular case constitute "reasonable efforts" depends on the duration of the county's involvement, the nature of the problem, and the quality of the county's effort. *In re Welfare of H.K.*, 455 N.W.2d 529, 532 (Minn. App. 1990), *review denied* (Minn. July 6, 1990). Services must "go beyond mere matters of form so as to include real, genuine assistance" to enable the parent to overcome the conditions that led to the child's out-of-home placement. *Id*. But services need not be futile. *S.Z.*, 547 N.W.2d at 892.

Past efforts

The district court determined that "despite reasonable efforts under the direction of the Court, [M.B.] has failed to correct the conditions which led to the children's placement." But the district court made no specific findings regarding the county's efforts at reunification or the reasonableness of those efforts. Nor does the record contain clear and convincing evidence that the county's efforts to reunify M.B. with his children were in fact reasonable.

During much of this proceeding, the county's reunification efforts were concentrated on J.A. because M.B. was incarcerated. But incarceration does not excuse the county from making reasonable efforts. *In re Welfare of Children of R.W.*, 678

N.W.2d 49, 56 (Minn. 2004). M.B.'s incarceration may have justified the county's initial decision to focus its services on J.A. It does not, however, excuse the lengthy delay in offering services to M.B. From our review of the record, it appears that the county could have and should have made services available to M.B. by January 2010. By that time, the county knew that (1) J.A. had relapsed; (2) M.B. had established consistent visitation with the children; and (3) M.B. was only ten months from release. Instead, the county did not contact M.B. to offer services until April 2010, almost one month after the children were removed from J.A.'s home for a second time and only days before the county filed its petition to terminate the parental rights of J.A. and M.B.

In addition, even when the county finally initiated efforts at reunification, those efforts were focused on evaluating M.B.'s deficits as a parent, not on assisting M.B. to overcome those deficits. Evaluations simply identify a parent's problems; they do not help the parent correct those problems and therefore do not constitute reasonable efforts at reunification. *T.R.*, 750 N.W.2d at 665 (determining that parent was addicted to controlled substances does not constitute a reasonable effort to assist parent to end addiction); *In re Welfare of M.D.O.*, 462 N.W.2d 370, 377 (Minn. 1990) (determining that parent has not admitted culpability in child's death does not constitute a reasonable effort to assist parent to admit culpability). When the county finally developed M.B.'s out-of-home placement plans in April 2010, it required M.B. to complete chemical-dependency, anger-management, and parenting evaluations, but included no mechanisms for M.B. to be notified of any deficits in those areas, or for him to obtain services to assist him in overcoming any deficits. Instead, M.B.'s evaluations were completed only two

days prior to trial, too late for the county to provide M.B. with any services to address areas of concern before the termination petition was adjudicated.

The county responds that it provided the only services that it could have and should have provided to M.B. while he was incarcerated—visitation with his children. But "[c]ase plans for inmates can and have been formed for a long time in Minnesota." *In re Children of Wildey*, 669 N.W.2d 408, 413 (Minn. App. 2003), *aff'd on other grounds sub nom. In re Welfare of Children of R.W.*, 678 N.W.2d 49 (Minn. 2004). And there is no indication that the county and M.B. could not have developed an out-of-home placement plan during his incarceration. To the contrary, the record indicates that MCF-St. Cloud offered a number of services that M.B. needed and utilized, including chemical-dependency treatment, anger-management programs, and parenting-education classes. Thus, the county's argument lacks traction.

We acknowledge that even when a social services agency creates an appropriate out-of-home placement plan for an incarcerated parent, it is possible that, as a consequence of the parent's incarceration, the county will not be able to provide all of the services needed to enable the parent to reunite with his children. But in that circumstance, the county nonetheless will have exercised reasonable efforts to reunify the parent and child. That is not the situation here: the county delayed in offering services to M.B., and even when it finally offered M.B. services, those services were directed toward identifying M.B.'s deficits, not assisting him to address those deficits. We therefore conclude that clear and convincing evidence does not support the district court's determination that the county's past efforts at reunification were reasonable.

Continuing efforts

The district court also determined that "continued efforts towards reunification would be futile and not likely to result in successful rehabilitation of . . . [M.B.]." This determination appears to have been based on the finding that

> [w]hile [M.B.'s] remedial actions while incarcerated at [MCF-St. Cloud] are commendable, it is clear to the [c]ourt that in order to provide adequate parental care for his children following his incarceration, [M.B.] will require a significant period of rehabilitation, including sobriety, anger management and child-care training before the children may be placed with him.

We disagree and conclude that, under the circumstances, M.B.'s need for additional rehabilitation and reunification services after his release does not mean that continued efforts at reunification will be futile.

Incarceration is a factor to be considered in determining the futility of efforts at rehabilitation and reunification. *See R.W.*, 678 N.W.2d at 56 (concluding that social services agency did not need to provide services to father who was in prison and had shown minimal interest in children); *In re Children of Vasquez*, 658 N.W.2d 249, 253 (Minn. App. 2003) (concluding that social services agency did not need to develop out-of-home placement plan when father was serving a lengthy prison sentence for murdering children's mother). But, unlike the father in *Vasquez*, M.B. had 24 months left on his prison sentence when his children were initially removed from J.A., and only about 8 months left when they were removed the second time. *See Vasquez*, 658 N.W.2d at 253 (stating that father would be incarcerated until children reached adulthood). And unlike the father in *R.W.*, M.B. had regular visitation with his children while incarcerated at

MCF-St. Cloud, and he increased the frequency of visits after being transferred to the Otter Tail County jail. *See R.W.*, 678 N.W.2d at 53 (stating that father admitted making no attempts to contact the children who were subject to the proceedings while he was incarcerated, even though he was in contact with his other child). We therefore conclude that, on this record, clear and convincing evidence does not demonstrate that continuing efforts at reunification—particularly in light of the minimal efforts made thus far—would be futile.

Moreover, there is evidence in the record that M.B. is attempting to make the improvements necessary to be reunited with his children and that he may be able to do so if given the proper services. The record shows that while M.B. was incarcerated, he voluntarily took proactive measures toward reunification, including enrolling in and completing chemical-dependency, anger-management, parenting-education, and various vocational programs. And although Dr. Schara states that M.B. still needs to make significant strides in his anger-management and parenting skills, she also opined that it was possible that he could be rehabilitated and reunited with his children.

Based on this record, clear and convincing evidence does not support the district court's determination that the county made reasonable efforts to reunite M.B. with his children or that continuing efforts at reunification would be futile. Because reasonable efforts are required to terminate M.B.'s parental rights under the statutory provisions

invoked by the county, we therefore conclude that clear and convincing evidence does not establish any of the statutory grounds for termination.[3]

Reversed.

[3] As our supreme court has previously noted in reversing the termination of parental rights, however, "we express our desire that the proper authorities carefully monitor the situation and promptly seek termination of [M.B.'s] parental rights again if [he] is unable to meet the challenge of parenthood." *T.R.*, 750 N.W.2d at 666 n.9 (quotation omitted).