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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1374

In the Matter of the Welfare of the Child of: B. L. S., Parent

Filed January 23, 2012
Affirmed; motion denied
Collins, Judge[*]

Hennepin County District Court
File No. 27-JV-10-10507

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

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

COLLINS, Judge

On appeal from the termination of her parental rights, appellant-mother B.L.S. argues that (1) the district court abused its discretion by admitting certain exhibits at trial; (2) the record does not support the determinations regarding the existence of any of the

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

four statutory bases invoked by the district court for terminating her parental rights; and (3) the record does not show that termination of her parental rights is in her child's best interests. Because mother has not shown that the district court abused its discretion by admitting exhibits on which it relied for its decision, and has not shown that the record does not support the district court's determinations supporting its decision to terminate her parental rights, we affirm.

FACTS

Mother, who has a full-score IQ of 69, has five children, only the youngest of whom is the subject of these proceedings. The parental rights of the father of mother's youngest child (father) were terminated by default in these proceedings. Mother's eldest child has been in the physical custody of his father since February 2002, and mother has joint legal custody of that child. In 2004, mother was residing in North Dakota and authorities there placed her second child in foster care because of concerns that the child had been abused by mother's then-boyfriend. During the pendency of the North Dakota investigations, mother's third child was born, mother was periodically incarcerated, and she made minimal progress on her North Dakota case plan. In July 2006, a North Dakota court involuntarily terminated mother's parental rights to her second and third children. Mother subsequently moved to Minnesota.

In March 2008, mother was convicted of check forgery and sentenced to five-years' supervised probation. When mother's fourth child was born six months later, mother tested positive for cocaine, the child had fetal-alcohol syndrome and withdrawal issues and, because mother failed to participate in her case plan for this child, the Stearns

County District Court involuntarily terminated mother's parental rights to her fourth child in December 2008.

In March 2009, mother was charged with felony controlled-substance sales, for which she received a stayed sentence of 39 months and 20-years' supervised probation. In May 2009, mother was charged with felony escape from custody, for which she received a stayed sentence of 19 months.

Five days after mother's youngest child was born on April 21, 2010, Hennepin County petitioned to find the child in need of protection or services. After an emergency hearing that day, the district court ordered out-of-home placement for the child, and the child was discharged from the hospital into a foster home. Mother's case plan required, among other things, that she abstain from alcohol and controlled substances, complete in-home parenting education, meet with her psychiatrist and follow recommendations, complete a domestic-abuse program, and attend individual therapy. Mother's case plan was developed in light of her IQ level.

Mother started a parenting program at Genesis II in May 2010. After a June 28, 2010 hearing at which the facts were stipulated, the district court ordered that the child remain in out-of-home placement and that mother continue to comply with her case plan.

Mother and father have a history of domestic abuse. The child-protection worker assigned to the case was at mother's apartment in September 2010. At this time, mother told the worker that she no longer had a relationship with father. But during the interview, father, using a key, entered mother's apartment, apparently intoxicated.

On October 21, 2010, the county petitioned to terminate mother's parental rights. In November 2010, Genesis II assigned mother to its intensive parenting program because, although she visited the child regularly, mother had trouble identifying the child's needs due to an inability to read the child's "cues." Mother also lacked the "emotional regulation" necessary to allow her to avoid being temperamental with the child and program staff, and she lacked appropriate expectations for the child and the child's abilities.

In about December 2010, Genesis II staff, who had been working on domestic-abuse and home-safety concerns with mother, began to encourage her to seek an order for protection (OFP) against father. In February 2011, mother allowed a homeless man known to her only as "Noodles" to stay in her apartment for about five days. Also in February 2011, the child's foster mother saw mother panhandling, something mother did at least periodically to supplement her public-assistance benefits. Mother's child-protection worker had previously expressed safety and other concerns to mother regarding her panhandling.

In March 2011, mother obtained an ex parte permanent OFP against father. The next day, mother and father got into an argument out of which father was charged with disorderly conduct. In April 2011, father was arrested for another violation of the OFP despite mother's request that the police not arrest him.

In May 2011, mother received a stayed sentence of 90 days for misdemeanor theft. Also that month, trial occurred on the petition to terminate mother's parental rights. At trial, mother objected to the admission of certain exhibits on the grounds that the

documents were not relevant or lacked an adequate basis for admission under the rules of evidence. By an order filed June 21, 2011, the district court terminated mother's parental rights under Minn. Stat. § 260C.301, subd. 1(b) (2), (4), (5), (8) (2010), respectively addressing failure to satisfy the duties of the parent-child relationship, palpable unfitness of a party to the parent-child relationship, failure to correct the conditions leading to a child's out-of-home placement, and a child being neglected and in foster care. The district court denied mother's motion for a new trial. This appeal followed.

D E C I S I O N

I.

Mother challenges the district court's admission of certain contested exhibits. Generally, admission of evidence is discretionary with the district court, its ruling on the subject will not be disturbed on appeal unless it is based on an erroneous view of the law or is an abuse of its "broad" discretion, and reversal of a district court for an evidentiary error requires the complaining party to show prejudice arising from the error. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997); *see In re Child of Simon*, 662 N.W.2d 155, 160 (Minn. App. 2003) (applying *Kroning*).

The district court admitted several exhibits that mother contends are not relevant. Only relevant evidence is admissible. Minn. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Even relevant evidence may be excluded if its

probative value is substantially outweighed by a danger of unfair prejudice. Minn. R. Evid. 403.

A. Exhibits 18, 20, 81, and 85

These are records related to mother's check-forgery, escape-from-custody, misdemeanor-theft, and controlled-substance cases. Mother argues that these exhibits are not relevant to her ability to care for her child. At the time of trial however, mother was on probation and under a stayed sentence for the check-forgery conviction, was awaiting sentencing on the escape-from-custody and controlled-substances convictions, and had recently pleaded guilty to the misdemeanor-theft charge. Mother's future incarceration on one or more of these cases was—and still is—possible, depending on her compliance with the terms of her probation, among other things. In addressing whether to terminate parental rights, a district court relies "'not primarily on past history, but to a great extent upon the projected permanency of the parent's inability to care for his or her child.'" *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996) (quoting *In re Welfare of A.D.*, 535 N.W.2d 643, 649 (Minn. 1995)), *review dismissed* (Minn. Aug. 16, 2005). The likelihood and duration of a future incarceration is relevant to mother's future ability to care for her child, and the nature of the charges of the convictions for which she might be incarcerated is also relevant to this concern.

B. Exhibit 22

This is the police report of the August 2010 theft of $600 from mother. Mother asserts that this incident of being a theft victim "has no bearing on whether or not she could adequately parent her child." We disagree. The report states, in part, that when

mother gave the report she "appeared to be under the influence of some type of drug, and she frequently changed her story" and that, at one point, mother stated that she knew the thief through selling crack cocaine and that the thief was a crack-cocaine user. However, mother's affiliation with drug users prone to offending against her is indeed relevant to her ability to care for her child and keep the child safe.

C. Exhibits 28, 63, and 73-76

Exhibit 28 is a police report regarding father's domestic assault of a woman other than mother. Exhibit 63 is a register of actions for a March 2011 charge against father for disorderly conduct and loitering. Exhibits 73-76 are a police report, a register of actions, a felony complaint, and a conditional-release no-contact order regarding father's April 2011 violation of the OFP. The record is unclear about whether mother ended her relationship with father. If father continues to be part of mother's life, he will be—or could become—part of the child's life, despite the termination of father's parental rights. Thus, these exhibits are relevant to both mother's personal safety, and to her projected future ability to provide for the safety of the child.

II.

The district court terminated mother's parental rights because she failed to satisfy the duties of the parent-child relationship, failed to rebut the presumption that she is a palpably unfit parent and is palpably unfit to be a party to the parent-child relationship, failed to correct the conditions leading to the child's out-of-home placement, and because the child is neglected and in foster care. *See* Minn. Stat. § 260C.301subd. 1(b)(2), (4), (5), (8). Mother challenges each basis for termination.

Appellate courts

> review the termination of parental rights to determine whether the district court's findings address the statutory criteria and whether the district court's findings are supported by substantial evidence and are not clearly erroneous. 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 Children of S.E.P., 744 N.W.2d 381, 385 (Minn. 2008) (citations omitted).

> [T]o determine whether a particular statutory basis for involuntarily terminating parental rights is present, a district court finds the underlying facts regarding the statutory criteria relevant to a particular basis for terminating parental rights and then, in light of its findings of those underlying facts, exercises its judgment to address whether that basis for terminating parental rights is present.
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> . . . .
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> Thus, on appeal from a district court's decision to terminate parental rights, we will 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 doing so, we are mindful that, in termination proceedings,
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> > [t]he burden of proof is upon the petitioner and is subject to the presumption that a natural parent is a fit and suitable person to be entrusted with the care of a child. We require . . . that the evidence relating to termination must address conditions that exist at the time of the hearing, . . . and that it must appear that the present conditions of neglect will continue for a prolonged, indeterminate period. Finally, this court, while giving deference to the findings of

> the trial court, will exercise great caution in termination proceedings.
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> *In re Welfare of Chosa*, 290 N.W.2d 766, 769 (Minn. 1980) (citations omitted) . . . [I]n terminating parental rights, the best interests of the child are the paramount consideration, and conflicts between the rights of the child and rights of the parents are resolved in favor of the child. Minn. Stat. § 260C.301, subd. 7 (2010).

In re Welfare of Children of J.R.B. & J.D.B., 805 N.W.2d 895, 900-02 (Minn. App. 2011) (footnotes omitted), *review denied* (Minn. Jan. 6, 2012).

A district court may terminate parental rights to a child if the district court finds that the parent

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

Minn. Stat. § 260C.301, subd. 1(b)(4). This statute also creates a rebuttable presumption that a person is a palpably unfit parent if that person's parental rights to at least one child were previously involuntarily terminated. Minn. Stat. § 260C.301, subd. 1(b)(4); *see In re Welfare of Child of J.L.L.*, 801 N.W.2d 405, 412 (Minn. App. 2011) (noting the presumption is rebuttable), *review denied* (Minn. July 28, 2011). Here, the district court noted that mother's parental rights to her other children were previously involuntarily terminated, recognized that mother was presumed to be a palpably unfit parent, and terminated her parental rights because she failed to rebut that presumption. The district

court also expressly ruled that mother "is palpably unfit to be a party to the parent-child relationship."

A. Rebutting the presumption

A presumption that a parent is palpably unfit places on that parent the burden of presenting evidence to rebut or meet the presumption, *J.L.L.*, 801 N.W.2d at 412; *see* Minn. R. Evid. 301 (addressing evidentiary presumptions, generally). "If sufficient evidence is introduced that would justify a finding of fact contrary to the assumed fact the presumption is rebutted and has no further function at the trial." Minn. R. Evid. 301, 1977 comm. cmt. To rebut a presumption of palpable unfitness, "a parent must introduce evidence that would justify a finding of fact that he or she is not palpably unfit." *In re Welfare of Child of J. W. & G.P.*, ___ N.W.2d ___, ___, 2011 WL 5903404, at *4 (Minn. App. Nov. 28, 2011) (quotation omitted), *review denied* (Minn. Jan. 6, 2012). To satisfy this burden, the parent "must demonstrate that his or her parenting abilities have improved." *In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 545 (Minn. App. 2009); *see In re Welfare of D.L.R.D.*, 656 N.W.2d 247, 251 (Minn. App. 2003) (addressing rebuttal of presumed palpable unfitness). Whether the evidence introduced could, at trial, justify a finding in favor of the parent is reviewed de novo, and on a case-by-case basis. *J.W.*, ___ N.W.2d at ___, 2011 WL 5903404, at *4.

Possibly because some recent caselaw addressing the *rebutting of presumed palpable unfitness*, as opposed to *finding the existence of palpable unfitness*, had not been issued when the present case was before the district court, neither the parties nor the district court clearly separate these two analyses, and this complicates our review. We

note however, that, in addition to ruling that mother failed to rebut the presumption that she is a palpably unfit parent, the district court independently ruled that "[mother] is palpably unfit to be a party to the parent-child relationship[.]"

B. Findings

To support the point that mother "has not affirmatively and actively demonstrated that she can successfully parent [the child,]" the district court found:

> [Mother] has participated in intensive parenting education for over a year, including parenting classes and parent-child interaction therapy. However, [mother's Genesis II manager] testified that [mother] has not made any significant improvements in her ability to parent. [The Genesis II manager] further testified that she would be concerned about [the child's] safety if [mother] had unsupervised contact with [the child]. [Mother] has not gained the insight necessary to learn how to successfully parent [the child]. She has not consistently met with an individual therapist, and she participated minimally with the ARMHS worker and the adult behavioral health case manager. Finally, [mother] has continued to associate with unsafe people, including [father].

Having carefully reviewed the record, we are satisfied that these findings are supported by substantial evidence, including significant portions of testimony from the Genesis II manager and the child-protection worker.

Mother argues that

> [t]he testimony elicited at trial showed her steady progress with regard to her parenting, her continual attention to and work on her mental health issues, her participation in domestic violence education, her continued sobriety, her plans for making her home safe and her steps toward securing supportive housing, and her consistent visitation with her [child].

We disagree. While we grant that she may have maintained sobriety and consistently visited her child, mother's other assertions are contrary to the record. Her Genesis II manager testified that there was no significant change in mother's parenting since she started at Genesis II. The child's foster mother and the child-protection worker testified similarly. Mother's claim of progress on her mental-health and therapy issues is directly contradicted by testimony of her child-protection worker and the child's guardian ad litem (GAL). Regarding the avoidance of domestic violence, the child-protection worker testified that while mother had attended the educational component of the domestic-violence program, she failed to complete the life-application phase of the program. Likewise, the Genesis II manager testified that mother failed to abide by a prescribed domestic-violence safety plan. And regarding housing, mother was, at best, inconsistent: the Genesis II manager testified that mother initially declined transitional housing because she did not think she needed the services associated with it and she would not be free to do what she wanted to do, but she later got on two waiting lists for housing; the child-protection worker testified similarly, and noted that one of mother's concerns was that if she accepted the housing, it would exclude father.

On this record, we conclude that mother has not shown that the district court abused its discretion by invoking Minn. Stat. § 260C.310, subd. 1(b)(4) regarding palpable unfitness to be a party to the parent-child relationship, as a statutory basis for terminating mother's parental rights.[1]

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[1] Exhibit 11 is a series of documents from 2004-2006 produced in the North Dakota child-protection investigation suggesting, among other things, that mother knew that her

III.

The paramount consideration in a proceeding to terminate parental rights is the child's best interests. Minn. Stat. § 260C.301, subd. 7 (2010). Even if a statutory basis for termination is present, termination is inappropriate if it is not in the child's best interests. *In re Welfare of M.P.*, 542 N.W.2d 71, 74-75 (Minn. App. 1996), *overruled in part on other grounds by In re Welfare of J.M.*, 574 N.W.2d 717, 722-24 (Minn. 1998). Here, the district court found that terminating mother's parental rights would be in the child's best interests. Mother challenges this ruling.

Evaluating a child's best interests for termination purposes requires considering the child's interest in preserving the parent-child relationship, the parent's interest in preserving the relationship, and any competing interest of the child. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). Competing interests of a child may include emotional and psychological stability, the child's health needs, and the child's interest in a stable, safe environment. *In re Welfare of J.J.B.*, 390 N.W.2d 274, 279 (Minn. 1986); *In re Welfare of M.G.*, 407 N.W.2d 118, 121 (Minn. App. 1987). Mother argues that it is

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second child was being sexually abused, that she mentioned the abuse to the child's father, but that she did nothing to prevent that abuse. Exhibit 11 was introduced through the child-protection worker, and mother objected on the ground that the county did not lay adequate foundation for its admission under the "business records" exception to the hearsay rule. As set out above, no reference was made to the substance of exhibit 11 supporting the district court's invocation of Minn. Stat. § 260C.301, subd. 1(b)(4) as a statutory basis for terminating mother's parental rights, or in our determination to affirm it. Therefore, we need not analyze whether the district court abused its discretion by admitting that exhibit. For similar reasons, we decline to address the admission of exhibits 22, 28, 63, 73-76. Finally, having attached no significance to exhibit 11, we deny as unnecessary mother's motion to submit a memorandum responding to a question related to its admission raised at oral argument.

in the child's best interests for her to raise the child because she "did the best she could" on her case plan, "complied with nearly all directives," and "worked tirelessly" to address her parenting deficiencies, chemical dependency, mental-health issues, and domestic-violence issues, and was in the process of securing supportive housing at the time of trial. These arguments do not specifically address the factors of the best-interests analysis.

It is undisputed that mother exhibits love for her child. Mother's Genesis II manager, the child-protection worker, and the GAL all testified, however, that permanency is in the child's best interests because mother is not currently able to care for the child and will not be able to do so in the foreseeable future. Further, the child-protection worker and the GAL each testified that termination is in the child's best interests. This is consistent with the fact that mother has failed to acquire the skill necessary to parent the child despite her participation in what the Genesis II manager, the child-protection worker, and the GAL all testified was one of, if not *the*, most intensive parenting programs available. The record amply supports the district court's determination that termination is in the child's best interests.

IV.

To terminate parental rights, the district court must find the existence of at least one statutory basis for doing so. Minn. Stat. § 260C.301, subd. 1(b). We are affirming this termination under Minn. Stat. § 260C.301, subd. 1(b)(4) (palpable unfitness) and because the record supports the district court's determination that termination is in the child's best interests. Therefore, we decline to address in detail the other statutory bases for terminating mother's parental rights analyzed by the district court. *See In re Children*

of T.A.A., 702 N.W.2d 703, 708 n.3 (Minn. 2005) (declining, after affirming on one statutory ground to terminate parental rights, to review other grounds found by the district court). We note however, that we have considered mother's arguments challenging the other statutory bases for terminating her parental rights invoked by the district court and have concluded that her arguments are, on this record, unpersuasive.

We also note the county's argument that, under *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986), mother waived her ability to challenge certain rulings, including that she failed to correct the conditions leading to the child's out-of-home placement, by not raising those questions in a motion for a new trial. While we need not address the issue, it appears that the county's argument misconstrues *Sauter* in a manner similar to the misreading that the supreme court corrected in *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 309-11 (Minn. 2003). And *Alpha Real Estate* has been applied in juvenile-protection matters. *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 733 (Minn. App. 2009).

Affirmed; motion denied.