STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1441, A11-1474

In the Matter of the Welfare of the Children of:
K. O. W., R. W. and M. R., Parents.

Filed February 6, 2012
Affirmed
Worke, Judge

Blue Earth County District Court
File Nos. 07-JV-10-3043, 07-JV-11-597

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Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Crippen, Judge.[*]

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

WORKE, Judge

These are consolidated appeals from the district court's termination of appellant-fathers' parental rights. Appellant-father R.W. argues that the district court abused its

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

discretion in terminating his parental rights by finding that: (1) he failed to satisfy the duties of the parent-child relationship; (2) reasonable efforts failed to correct the conditions leading to the children's placement; (3) the children are neglected and in foster care; and (4) termination is in the children's best interests. Appellant-father M.R. argues that: (1) the district court clearly erred in making several findings of fact; (2) the district court abused its discretion in finding that M.R. abandoned his child; and (3) the county failed to make reasonable efforts to assist M.R. We affirm.

FACTS

K.O.W. is the mother of K.H.W., born in July 2005; L.R.W., born in March 2009; and K.D.W., born in March 2010. Appellant R.W. is the father of L.R.W. and K.D.W. and appellant M.R. is the father of K.H.W.

In August 2010, K.O.W. called the Mankato Police Department and stated that she was homeless, could not care for the children, and wanted them to be placed into foster care. The children were placed into foster care and Blue Earth County filed a children-in-need-of-protection-or-services (CHIPS) petition. R.W. and K.O.W. have a history of domestic violence and, at the time the CHIPS petition was filed, a domestic abuse no contact order (DANCO) was in place between them.

R.W. visited the children once in September 2010, but was not in contact with the county again until November, when he appeared for a hearing. R.W. was given a case plan that required him to, among other things, complete a chemical-dependency assessment and a parenting assessment and follow the corresponding recommendations; participate in a parenting-skills program; obtain a stable and safe home for himself and his children; comply with probation requirements; and participate in the children's

educational and medical appointments. In addition, people who spent a significant amount of time in his home were required to pass a background check.

M.R. and K.O.W. were in a relationship that ended in 2006 when M.R. moved to Michigan. Shortly after M.R. arrived in Michigan, he was incarcerated for committing an assault with a firearm. He was incarcerated from March 2006 until June 2010, when he was released on parole. M.R. has not seen K.H.W. since she was nine months old. M.R. testified that he sent birthday cards and Christmas cards to K.H.W. at an address that he found on child-support documents and that some things he sent came back undeliverable or as address-changed. K.O.W.'s mother, N.W., confirmed that on two occasions M.R. sent cards and gifts to K.H.W. at N.W.'s home.

The county filed a petition to terminate the parental rights of K.O.W., R.W., and M.R., and a trial was held in June 2011. K.O.W. did not appear for trial and the county social worker assigned to the case testified that K.O.W. had not had contact with the county since December 2010. M.R. and R.W. were both present during the trial.

The social worker testified that the children have special needs. K.H.W. was diagnosed with reactive-attachment disorder and she sees a therapist on a weekly basis. L.R.W. and K.D.W. have asthma and receive nebulizer treatments at least twice per day and cannot be exposed to smoke or dust. L.R.W. was diagnosed with fetal-alcohol-spectrum disorder (FASD) and receives personal-care-assistance (PCA) services.

The social worker testified that R.W. completed part of his case plan. He completed a chemical-dependency assessment in February 2011, but then R.W. failed three UAs. The social worker requested that R.W. complete another chemical-dependency assessment, and R.W. failed to do so. R.W. completed a parenting

assessment and a psychological assessment. The assessor testified that the psychological testing indicated that "[R.W.] has the type of personality that will [often] harbor anger, aggression, [has] difficulty expressing it . . . feels inadequate, has trouble trusting other people . . . has a rather [nomadic] lifestyle." She further testified that the domestic-violence testing she performed was concerning because it was "in the problem risk range." The assessor observed R.W. with the children and did not "see a lot of spontaneous hugging, kissing" and the children did not show any "reluctance to leave." She recommended that R.W.'s rights be terminated because he would not "have the stability and means to parent these children" in the immediate future and it would be very difficult for him to meet their needs.

In the parenting/psychological assessment report, the assessor recommended that: R.W. participate in an anger-management program and a substance-abuse program; complete his GED; complete parenting-skills classes; participate in ECFE classes; participate in mental-health-case-management services; secure stable, gainful employment; maintain housing; and remain law-abiding and complete the terms of probation. R.W. completed an anger-management program, attended ECFE classes, and applied for mental-health-case-management services, but was found ineligible. He did not enroll in or complete a GED program or participate in a parent-support group. R.W. was employed by a temporary-work agency, but the work was inconsistent.

The social worker testified that R.W. lived in a two-bedroom apartment with a roommate, but he was not sure how long he can live in the apartment and has applied for section-eight housing, which she was unable to confirm. The social worker testified that R.W. told her that he does not want his children to live in his apartment because it is not

clean enough and there is not enough room. R.W. testified that his home was not how he would like it to be for his kids, but he thought it was suitable. No background checks for people in R.W.'s home were submitted, and R.W. testified that he did not know anything about his roommate, other than his first name.

The social worker testified that R.W. does not really understand how FASD will affect L.R.W. as he gets older and that R.W. told her that "everything would be fine" if L.R.W. were with him. R.W. testified that he has experience giving asthma treatments. The social worker testified that, although R.W. has been told that the children cannot be around smoke because of their asthma, he was seen smoking and he told her "that he can't stop other people from smoking around his children."

The social worker testified that since December 2010, R.W. has attended most of the visits, but she had concerns about the visits. For example, R.W. did not consistently change the children's diapers, he was asked to tear up the children's food so it would not be a choking hazard and he did not do so, and at one visit, R.W. did not feed K.D.W. after he was told he needed a bottle, causing him to go seven hours without eating. The social worker testified that K.H.W. has not attended visits because she feels afraid of R.W., and R.W. stated to the social worker that "[K.H.W.] should get over that."

The county did not have an address for M.R. when the CHIPS case was filed. Once the social worker obtained an address for M.R., court notices were sent to him. M.R. left the social worker a message on March 2, 2011, but she did not call him back. The social worker left M.R. a message on April 13, tried to call him on May 9, but his phone was not in service, and met with him in-person after a hearing on May 24. M.R. never contacted the county to arrange a visit with K.H.W. The social worker testified

that M.R. was offered a visit with K.H.W. in May but he told her he was returning to Michigan. The social worker testified that she mailed a case plan to M.R. shortly before the trial; he did not complete any case-plan services.

M.R. testified that he contacted the county when the CHIPS petition was filed and was told that the children would not be separated. He testified that he is currently enrolled in parenting classes. M.R. acknowledged that he did not complete a questionnaire that the children's guardian ad litem (GAL) sent to him, but stated that he answered the questions when he met with her in May. M.R. testified that he was not able to visit with K.H.W. in May because he had to be back in Michigan by a certain date, but that he would like to visit K.H.W.

The social worker testified that K.H.W. had not mentioned M.R. to her or anyone else involved in the case. She recommended that the children stay together because "they see themselves as full brothers and sisters and they have a very tight bond with each other," and it would be "detrimental" to the children if they were separated.

The GAL testified that it was in the children's best interests to remain together and that "it would be very devastating to the children to be separated." She recommended that the children not be returned to the care of R.W. or M.R.

The district court terminated the parental rights of K.O.W., R.W., and M.R. to the children because it found that the county had established by clear and convincing evidence that: (1) K.O.W. abandoned her children; (2) M.R. abandoned K.H.W.; (3) R.W. substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed on him by the parent-child relationship; (4) the county's reasonable efforts failed to correct the conditions that led to the children's placement out of the

home; (5) the children were neglected and in foster care; and (6) termination of parental rights was in the best interest of the children. M.R.'s and R.W.'s appeals followed.

D E C I S I O N

R.W. and M.R. challenge the district court's decision to terminate their parental rights. We review a decision terminating 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." *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). We will affirm the district court's termination of parental rights if "at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the child[ren]'s best interests." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). "[W]e 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 re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). On review we evaluate the sufficiency of the evidence, taking into account that the district court assesses the credibility of witnesses. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

Termination of R.W.'s Parental Rights

Refusal or neglect to comply with parental duties

A district court may terminate parental rights if it finds that the parent

> has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship . . . and either reasonable

> efforts by the social services agency have failed to correct the conditions that formed the basis of the petition or reasonable efforts would be futile and therefore unreasonable.

Minn. Stat. § 260C.301, subd. 1(b)(2) (2010). Noncompliance with parental duties includes, but is not limited to, failure to provide a child "with necessary food, clothing, shelter, education, or other care and control necessary for the child's physical, mental, or emotional health and development." *Id.* A parent's failure to satisfy the requirements of a court-ordered case plan provides evidence of that parent's noncompliance with the duties and responsibilities under subdivision 1(b)(2). *In re Child of Simon,* 662 N.W.2d 155, 163 (Minn. App. 2003).

The district court found that R.W. neglected to comply with the duties imposed upon him after finding that he failed to provide a home for the children, that his history of domestic violence against the children's mother contributed to their need for services, and that he is not able to provide for his children or adequately care for their special needs. R.W. contends that the weight of the evidence is contrary to the district court's findings that he is unable to provide for his children or care for their special needs. We disagree. First, despite acknowledging that he wanted a better home for his children than his current apartment, there is no evidence in the record that R.W. made any attempts to secure alternative housing. R.W. also did not provide any information about his roommate to the county, and a background check was never completed.

Second, the social worker testified that R.W. does not fully understand his children's needs, and, while R.W. testified that he had experience providing asthma treatments, he told the social worker that he would not be able to prevent people from smoking around the children. In addition, despite the fact that R.W. visited the children

for several months, the social worker continued to be concerned about R.W.'s ability to meet the children's basic needs. Finally, R.W. does not have a GED or consistent employment that would allow him to financially support his children. We conclude that the evidence supports the district court's findings and conclusion that R.W. failed to comply with the duties of the parent-child relationship. Therefore, the district court did not abuse its discretion by terminating R.W.'s parental rights on this basis.

Failure of reasonable efforts to correct conditions

The district court may terminate a parent's rights if it finds that "following the child's placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement." Minn. Stat. § 260C.301, subd. 1(b)(5) (2010). A presumption of failure of reasonable efforts arises if "conditions leading to the out-of-home placement have not been corrected," as demonstrated by a parent's failure to "substantially compl[y] with the court's orders and a reasonable case plan." *Id.*, subd. 1(b)(5)(iii). "[A] case plan that has been approved by [a] district court is presumptively reasonable." *S.E.P.*, 744 N.W.2d 381 at 388.

The district court found that R.W. would not be able to adequately provide and care for the children or keep them safe in the reasonably foreseeable future. R.W. contends that this finding is clearly erroneous and that he substantially completed his case plan. He argues that the only requirements of his case plan that he did not satisfy were obtaining his GED and completing a parenting course. We disagree. R.W. completed part of his case plan, but he did not complete several key components of the case plan. While R.W. completed a parenting/psychological assessment, he did not complete all of the recommendations. He completed anger-management classes, ECFE classes, and

applied for mental-health-case-management services. But R.W. did not attend and participate in a parenting-skills course, secure stable employment, or complete his GED.

In addition, R.W. acknowledged that his apartment was not suitable for his children, he was not sure if he could remain in the apartment, and a background check of his roommate was never completed. R.W. also did not complete a second chemical-dependency assessment after he failed three UAs, and so he did not receive any chemical-dependence treatment. We conclude that the evidence supports the district court's findings and conclusion that reasonable efforts failed to correct the conditions leading to the child's placement, and therefore that the district court did not abuse its discretion by terminating R.W.'s parental rights on this basis.

Children neglected and in foster care

A district court may terminate parental rights when a child is neglected and in foster care. Minn. Stat. § 260C.301, subd. 1(b)(8) (2010). "Neglected and in foster care" means that the child is in foster care by court order, the parent's circumstances are such that the child cannot be returned to the parent, and the parent has failed to make reasonable efforts to correct conditions, despite the availability of rehabilitative services. Minn. Stat. § 260C.007, subd. 24 (2010). To determine whether parental rights should be terminated because a child is neglected and in foster care, a district court considers: the length of time the child has been in foster care; the effort the parent has made to adjust circumstances, conduct, or conditions to allow return to the home; the parent's contact with the children preceding the petition; the parent's contact with the responsible agency; the adequacy of services; the availability of relevant services; and the social

service agency's efforts to rehabilitate and reunite. Minn. Stat. § 260C.163, subd. 9 (2010).

The district court found that the children had been in foster care since August 2010, and R.W. failed to adjust his circumstances, condition, or conduct in order for the children to be returned to his care. R.W. contends that the district court clearly erred by finding that the children were neglected and in foster care and again argues that he substantially complied with his case plan. R.W. asserts that there is no connection between his marijuana use and his ability to parent and that the county did not make reasonable efforts to address his positive UAs. We disagree.

The record demonstrates that R.W. complied with some requirements of his case plan but he did not complete several key aspects. Most significantly, R.W. does not have a safe and stable home for the children and he has not demonstrated an ability to safely parent the children. R.W. asserts that the county did not make reasonable efforts to address his chemical dependence. But R.W.'s case plan required that he complete a chemical-dependency assessment and follow recommendations. While R.W. completed one assessment, the social worker asked R.W. to complete a second assessment after he submitted three positive UAs. R.W. never completed a second assessment and, as a result, he did not receive any services. The record demonstrates that the county made reasonable efforts and R.W. did not make the effort required for the children to be returned to his home. We conclude that the evidence supports the district court's findings and conclusion that the children were neglected and in foster care. Therefore, the district court did not abuse its discretion by terminating R.W.'s parental rights on this basis.

Best interests

"[T]he best interests of the child must be the paramount consideration" in every termination proceeding. Minn. Stat. § 260C.301, subd. 7 (2010). Even if a statutory ground for termination exists, the district court must still find that termination is in the best interests of the child. *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005). In considering the child's best interests, the district court must balance the preservation of the parent-child relationship against any competing interests of the child. *In re Welfare of M.G.*, 407 N.W.2d 118, 121 (Minn. App. 1987). "Competing interests include such things as a stable environment, health considerations and the child's preferences." *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). "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. When there is evidence supporting the district court's best-interests determination, this court will not "comb[] through the record to determine best interests . . . because it involves credibility determinations." *In re Tanghe*, 672 N.W.2d 623, 625 (Minn. App. 2003) (citing *Schmidt v. Schmidt*, 436 N.W.2d 99, 105 (Minn. 1989)).

R.W. argues that the district court did not make sufficient findings to support its conclusion that termination of his parental rights was in the children's best interest. He contends that it is in the children's best interest to be reunified with him because they are bonded to him, he complied with his case plan, and he can meet their needs. The district court found that it was in the children's best interest to terminate R.W.'s parental rights because R.W. did not "display[] sufficient motivation to comply with a case plan, as evidenced by his ongoing use of marijuana." The district court further found that the

GAL, the social worker, and the parenting assessor all agreed that it was not in the children's best interest to be separated from each other and that retaining R.W.'s parental rights "necessarily operates to move the children toward separation." The district court found that "[t]he children's best chance for success in the future is to remain together with the current foster family who provide the type of stability, attentiveness to special needs, and safety that the children need," and that R.W. would not be able to provide in the foreseeable future. The district court concluded that the children's interest in "safety and security for the future" outweighed R.W.'s interest in preserving his relationship with the children. We conclude that the district court's findings are supported by the record and adequately explain the district court's conclusion that the children's best interests support termination of R.W.'s parental rights.

Termination of M.R.'s Parental Rights

General findings of fact

M.R. argues that the district court clearly erred in making five findings. First, M.R. asserts that the district court clearly erred by finding that he did not contact the county between October 2010 and April 4, 2011. M.R. argues that both he and the social worker testified that he called the social worker on March 2, 2011, and left her a voicemail, which she did not return. While M.R. is correct that the district court overlooked the phone call made on March 2, we conclude that the error was harmless because M.R. did not actually talk to the social worker until April 4, despite her attempts to reach him. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that, absent prejudice, error is not ground for reversal); *In re Welfare of Children of D.F.*, 752 N.W.2d 88, 98 (Minn. App. 2008) (applying

harmless-error doctrine in a termination-of-parental-rights (TPR) appeal); Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

Second, M.R. argues that the district court clearly erred by finding that M.R. was served with the TPR petition in February 2011 because the affidavit of service establishes that he was not served with the petition until March 21. Again, however, M.R. does not demonstrate any prejudice arising from the error, and we conclude that the error was harmless.

Third, M.R. contends that the district court clearly erred by finding that he sent only two letters to K.H.W. But there is no evidence in the record that corroborates M.R.'s claim that he sent K.H.W. additional letters, and we defer to the district court's credibility determinations. *L.A.F.*, 554 N.W.2d at 396. We conclude that the district court's finding was not clearly erroneous.

Fourth, M.R. argues that the district court clearly erred by finding that the GAL mailed a questionnaire to M.R. and he did not respond, claiming that he addressed the GAL's questions when he met with her on May 24. But because M.R. acknowledges that he did not respond to the mailed questionnaire, we conclude that the district court's finding was not clearly erroneous.

Finally, M.R. argues that the district court clearly erred by finding that K.H.W. does not know him. M.R. testified that he has not seen K.H.W. since she was nine months old. At the time of the TPR trial, K.H.W. was five years old and the social worker testified that K.H.W. had not mentioned M.R. to her or anyone else involved in this case. We conclude that it was not clearly erroneous for the district court to find that K.H.W. did not know M.R.

Abandonment

The district court may terminate a parent's rights if it finds that the parent abandoned the child. Minn. Stat. § 260C.301, subd. 1(b)(1) (2010). A presumption that a parent has abandoned a child arises if "the parent has had no contact with the child on a regular basis and not demonstrated consistent interest in the child's well-being for six months and the social services agency has made reasonable efforts to facilitate contact." *Id.*, subd. 2(a)(1) (2010).

In the absence of the presumption, abandonment may be established if the parent actually deserts the child and intends to forsake his or her parental duties. *L.A.F.*, 554 N.W.2d at 398. To satisfy the statute, the parent's abandonment must be intentional rather than the result of misfortune or misconduct. *Id.* A parent's failure to have contact with the child, failure to show consistent interest in the child's well-being, and failure to offer help with child-rearing expenses are factors that support a district court's conclusion that the parent has abandoned the child. *Id.* at 398-99. Inferences as to a parent's intentions are best made by the district court and will not be disturbed on appeal. *Id.* at 399.

A finding of abandonment may not be based solely on a parent's incarceration. *R.W.*, 678 N.W.2d at 55. Factors in addition to incarceration must support an abandonment finding. *Id.* Such factors may include a parent's failure to maintain direct contact with the child during incarceration, failure to visit or inquire about the child when not incarcerated, violent history, current behavior, lack of financial support, and intent to forsake the duties of parenthood. *Id.* at 56; *In re Staat*, 287 Minn. 501, 506, 178 N.W.2d

709, 713 (Minn. 1970); *In re Children of Vasquez*, 658 N.W.2d 249, 254 (Minn. App. 2003).

The district court found that M.R. abandoned K.H.W. because he had not had contact with her since she was nine months old and had not demonstrated a consistent interest in her well-being. The district court found that "[a]lthough [M.R.] may have attempted more contact, two cards during his incarceration is not significant contact from perspective of the child" and that "[K.H.W.] does not know [M.R.]."

M.R. acknowledges that he has not seen K.H.W. since she was nine months old, but argues that he has done his best to maintain his relationship with her. Although M.R. was incarcerated in Michigan during most of K.H.W.'s life, the record establishes that he had very little contact with K.H.W. during his incarceration. In addition, there is no evidence in the record that he attempted to contact K.H.W. after he was released on parole in June 2010. The county made reasonable efforts to facilitate contact between M.R. and K.H.W., but M.R. was not in regular contact with the county throughout these proceedings. While M.R. initiated contact with the county, the social worker was subsequently unable to reach him by phone and he did not appear in-person at a hearing until May 2011. Further, M.R. never requested a visit with K.H.W. and he chose not to visit K.H.W. when a visit was made available to him. We conclude that the evidence supports the district court's findings and conclusion that M.R. abandoned K.H.W. Therefore, we also conclude that the district court did not abuse its discretion by terminating M.R.'s parental rights on this basis.

Reasonable Efforts

In all TPR proceedings, a district court is required to find "that reasonable efforts to prevent the placement and to reunify the child and the parent were made" or "that reasonable efforts at reunification are not required." Minn. Stat. § 260C.301, subd. 8 (2010). Reasonable efforts are not required in certain circumstances, including if the district court determines that the petition makes a prima facie showing that the child is abandoned under Minn. Stat. § 260C.301, subd. 2(a) (2010). Minn. Stat. § 260.012(a)(3) (2010).

The district court did not make a finding about reasonable efforts regarding M.R. and M.R. argues that the district court erred because it did not make a finding that either the county made reasonable efforts or reasonable efforts were not required. The county acknowledges that it made minimal efforts. But because we conclude that the evidence supports the district court's finding and conclusion that M.R. abandoned K.H.W. and that the county made reasonable efforts to facilitate contact with K.H.W., we need not consider whether the county made reasonable efforts to reunify M.R. with K.H.W. *See* Minn. Stat. § 260C.301, subd. 2(a)(1) (stating that the presumption of abandonment applies if a parent has not had regular contact with a child or demonstrated a consistent interest in the child for six months and the county "made reasonable efforts to facilitate contact").

Affirmed.