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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-427**

In the Matter of the Welfare of
the Child of: C. A. W., Parent

**Filed July 18, 2011
Affirmed
Hudson, Judge**

Stearns County District Court
File No. 73-JV-10-9371

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Heidi Santiago DeFord, Assistant County Attorney, St. Cloud, Minnesota (for respondent county)

Shirley Lease, St. Cloud, Minnesota (guardian ad litem)

Cathleen Gabriel, Annandale, Minnesota (for appellant father)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges the district court's order terminating his parental rights, arguing that the record does not support the finding that appellant failed to rebut the presumption that he is palpably unfit to parent the child and the record shows that termination of parental rights is not in the child's best interests. We affirm.

FACTS

Appellant's child, T.L.L., was born on October 12, 2010. Appellant has been incarcerated at the Minnesota Correctional Facility-Faribault since September 2010, based on his felony conviction of violating a domestic-abuse no-contact order. T.L.L.'s mother did not immediately inform appellant or Stearns County Human Services (county) that appellant is T.L.L.'s biological father, and the county initially filed a petition to terminate parental rights naming another person as the father. In December 2010, after T.L.L.'s mother informed the county of her belief that appellant is T.L.L.'s biological father and genetic testing established appellant's paternity, the county amended its petition to name appellant as the father. Appellant contested the petition, and the district court determined that, because appellant's parental rights to another child had been terminated in August 2010, the county need not make reasonable efforts to reunify appellant with T.L.L.

At trial, appellant testified that he wished to have the chance to be a parent and that, while incarcerated, he had taken classes that would help him parent a child. He testified that the parenting classes had "opened [his] eyes to a lot of things that [he] didn't know before" and that he believed his child could learn from the mistakes that he had made in his life. He produced evidence of correctional-facility approval to attend two parenting classes and a pass to visit with a psychologist. He testified and presented evidence that, while incarcerated, he recently completed his GED and that he planned to take an anger-management class, which is required before his release. He presented a

letter from a psychologist indicating that chemical-dependency treatment was not currently warranted, and he articulated a long-term goal of obtaining a barber's license.

A county social worker testified that she did not believe that appellant's efforts while in prison were significant enough to overcome the presumption that he is palpably unfit to parent T.L.L. because appellant's prior case plan had presented appellant with the same opportunities to demonstrate that he is fit to parent a child. T.L.L.'s guardian ad litem (GAL) also testified that she believed it is in T.L.L.'s best interests to terminate appellant's parental rights, based on information relating to his previous contact with his other child, his current incarceration, and his failure to follow the prior case plan. She testified that T.L.L. was a newborn, and that by the time appellant was released from prison, T.L.L. would already be bonded to a preadoptive or adoptive home, and appellant would still need to demonstrate rehabilitation.

The county presented the report of a psychological assessment performed in April 2010 by a licensed psychologist at CORE Professional Services in connection with the termination of appellant's parental rights to his other child. The report stated that appellant "presented as grandiose and narcissistic" when interviewed and failed to complete all of the ordered psychological testing. It noted appellant's diagnoses of bipolar disorder and narcissistic personality disorder and his past history of exploitive behavior. It stated that appellant had been charged with anger-related offenses toward three of his previous partners and that, during his brief participation in anger-management classes, staff reported his difficult and disrespectful behavior. The report recommended that appellant participate in a domestic-abuse program.

The district court granted the petition to terminate appellant's parental rights. The district court noted that because the proposed termination was based on the statutory presumption arising from a prior termination of parental rights, appellant had the burden to rebut the presumption that he is palpably unfit to parent T.L.L. The district court found that, although appellant had been making diligent efforts at rehabilitation while in prison, his efforts were not sufficient to overcome that presumption. The district court also found that appellant had not participated in any visitation with T.L.L., thus he and T.L.L. had not yet developed a parent-child bond. Accordingly, the district court found that T.L.L.'s interest in a permanent placement, which would promote stability, outweighed appellant's interest in establishing a parent-child relationship. On this record, the district court determined that appellant had not overcome the presumption of palpable unfitness and that it is in T.L.L.'s best interests to terminate appellant's parental rights in order to provide T.L.L. with the opportunity for a permanent placement. This appeal follows.

D E C I S I O N

A court may terminate parental rights 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 a decision 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 Welfare of Children of T.R.*, 750 N.W.2d 656, 660–61 (Minn. 2008) (quotation omitted). This court gives “[c]onsiderable deference” to the district court’s decision because that court is in a superior position to assess witness credibility. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). Provided that the district court finds at least one condition for terminating parental rights, the best interests of the child remain the paramount concern. Minn. Stat. § 260C.301, subd. 7 (2010).

Palpable unfitness

A district court may terminate parental rights on a finding that “a parent is palpably unfit to be a party to the parent and child relationship.” *Id.*, subd. 1(b)(4). A finding of palpable unfitness may be based on “specific conditions directly relating to the parent and child relationship,” which the district court determines “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.” *Id.*

A presumption of palpable unfitness exists if it is shown that a party’s parental rights to another child have been involuntarily terminated. *Id.* If that presumption applies, “the district court need not establish independent reasons for termination”; rather, the parent has the burden to establish the existence of conditions showing fitness to parent the child. *In re Welfare of D.L.R.D.*, 656 N.W.2d 247, 250 (Minn. App. 2003). To rebut the presumption of palpable unfitness, “a parent must affirmatively and actively demonstrate her or his ability to successfully parent a child.” *Id.* at 251.

Because the record shows that appellant's parental rights to another child were involuntarily terminated, the district court correctly determined that appellant is presumed to be palpably unfit to be a party to the parent-child relationship. Appellant points out that evidence relating to the statutory requirements for termination must address conditions existing at the time of termination. *In re Welfare of P.R.L.*, 622 N.W.2d 538, 543 (Minn. 2001). Appellant argues that he rebutted the statutory presumption of unfitness with evidence of his recent participation in services while incarcerated, showing his willingness to become a successful parent. He maintains that, although the district court made findings relating to his participation in services, the court did not explain its decision to terminate his parental rights and did not allow him to demonstrate his fitness to parent.

But this court has previously concluded that a parent's evidence of recent progress in a controlled environment failed to rebut a presumption of palpable unfitness. *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 710 (Minn. App. 2004); *see also In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 544 (Minn. App. 2009) (concluding that substantial evidence supported finding that parents did not rebut presumption of palpable unfitness, despite record showing their cooperation with some services). In *W.L.P.*, this court concluded that the district court did not err by concluding that a parent failed to rebut the presumption of palpable unfitness when the record showed that the parent had the ability to stay drug-free for a three-month period while living in a structured environment. 678 N.W.2d at 709–10. We noted that, despite the parent's self-reported evidence of progress, she had a substantial drug history and she failed to present evidence

from chemical-dependency counselors “who could most accurately testify about her ability to remain sober and her progress in treatment.” *Id.* at 710.

Here, the record shows appellant has used services recently available to him in a controlled environment. To rebut a presumption of palpable unfitness, however, a parent “must do more than engage in services; a parent must demonstrate that his or her parenting abilities have improved.” *D.L.D.*, 771 N.W.2d at 545. Appellant testified and submitted evidence that he had attended and would continue to attend classes while incarcerated; this evidence took the form of passes and permission to participate in various programs. But, as in *W.L.P.*, appellant failed to present substantive evidence from any counselors, psychologists, or other correctional-facility staff members who could most accurately testify as to his progress in addressing parenting issues. *See* 678 N.W.2d at 710. And the county social worker testified as to her opinion that appellant did not rebut the presumption of palpable unfitness, based on appellant’s failure to follow his case plan for reunification with his other child in 2009–2010. Appellant did not challenge the county’s allegations that, during this period, he failed to attend or canceled all scheduled parenting time with that child, had only marginal participation in an anger-management program, and did not start a recommended domestic-abuse program.

Although it is commendable that appellant is taking advantage of opportunities available to him while incarcerated, his participation in these activities is recent, and on this record, substantial evidence supports the district court’s finding that appellant did not rebut the statutory presumption of palpable unfitness to parent T.L.L.

Best interests

Appellant also argues that terminating appellant's parental rights is not in T.L.L.'s best interests. Even if a statutory ground for termination exists, "a child's best interests may preclude terminating parental rights." *D.L.D.*, 771 N.W.2d at 545 (quotation omitted). Analyzing the best interests of the child requires balancing the three factors of the child's interest in preserving a parent-child relationship, the parent's interest in preserving that 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 include such things as a stable environment, health considerations and the child's preferences." *Id.* "Where the interests of parent and child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301, subd. 7.

Appellant argues that the district court improperly based its best-interests determination solely on his incarceration. Incarceration does not necessarily preclude a parent from acting in a parental role. *In re Welfare of Staat*, 287 Minn. 501, 506, 178 N.W.2d 709, 713 (1970); *see also In re Welfare of M.A.*, 408 N.W.2d 227, 233 (Minn. App. 1987) (stating that the inability to return a child immediately to the parental home cannot provide the sole reason for terminating parental rights), *review denied* (Minn. Sept. 18, 1987).

But the district court based its best-interests determination not just on appellant's incarceration, but also on T.L.L.'s interest in permanency. "[T]he best interests of a child are not served by delay that precludes the establishment of parental bonds with the child by either the natural parent or adoptive parents within the foreseeable future." *In re*

Welfare of S.Z., 547 N.W.2d 886, 893 (Minn. 1996). Here, the district court found that appellant had not had visitation with T.L.L., three-month-old T.L.L. had been in foster care since birth, and T.L.L. would likely bond with a preadoptive or adoptive family well before appellant's release date.

Appellant argues that the district court clearly erred by determining that he would be unable to care for T.L.L. in the reasonably foreseeable future because, although the district court found that his release date is February 2013, appellant testified that he was anticipating an early release, possibly in the beginning of 2012. But even if appellant were released in early 2012, by that time, T.L.L. would have been in foster care or another placement for at least 14 months. The GAL also testified that appellant would still need to show rehabilitation in the community after his release and that, by that time, T.L.L. would already have bonded with a preadoptive or adoptive home. On this record, the district court did not clearly err by finding that termination of appellant's parental rights is in T.L.L.'s best interests.

Affirmed.