STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1045

In the Matter of the Welfare of the Children of:
A. F. M., Parent.

Filed November 26, 2012
Reversed and remanded
Ross, Judge

Todd County District Court
File No. 77-JV-11-461

Timothy M. Churchwell, Long Prairie, Minnesota (for appellant)

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Considered and decided by Ross, Presiding Judge; Kirk, Judge; and Klaphake, Judge.*

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

ROSS, Judge

A.F.M. challenges the termination of her parental rights to her two sons, D.D.M. and R.R.M., arguing that the district court failed to consider conditions as they existed at the time of the termination hearing. Because the district court's finding that A.F.M. met

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

the statutory criteria for termination of parental rights was not based on the circumstances that existed at the time of the termination hearing, we reverse and remand.

FACTS

This appeal arises from the termination of a mother's parental rights after three years of her poor cooperation with county social services was followed by a sudden and positive change in her behavior and lifestyle. A.F.M.'s two preschool boys were referred to the county social services office in 2006 after a domestic dispute involving A.F.M. led to concerns about the cleanliness of A.F.M.'s home, A.F.M.'s mental health, A.F.M.'s alcohol use, and A.F.M.'s attentiveness to the children's special needs. A.F.M. was diagnosed with bipolar disorder, dissociation, anxiety disorder, ADHD, borderline intellectual functioning, PTSD, learning disability, and borderline personality disorder. She attended therapy for one month but quit because it interfered with her employment and because she considered it unproductive. A.F.M. attended therapy again for several months in 2008, and then she quit until 2010.

In September 2009 the county filed a petition asserting that A.F.M.'s sons were in need of protection or services after it received reports of continuing uncleanliness in the home and that A.F.M. was having difficulty staying awake. A social worker reported that A.F.M. wanted to stop all services and that she was inconsistent in her use of prescribed medication. A.F.M. (and O.D.M., the children's father) consented to the petition. The district court adopted a family assessment service plan that assigned A.F.M. eleven tasks, including securing employment, developing a budget, applying for social security

benefits, providing discipline and structure for the children, maintaining a clean home, and managing her mental health.

The county assigned A.F.M. an in-home parenting educator from January 2010 to August 2011 to improve her parenting skills. The parenting educator perceived that A.F.M. would sometimes merely yell at the children to address their misbehavior. She also found the home unclean, citing insect infestation, food residue on the floors, and cat urine and feces in various unhealthy places, including on the children's clothing. A.F.M. responded by getting rid of the cats. But she did not consistently keep the home clean. The parenting educator attributed some of A.F.M.'s difficulties to her inconsistent use of mental-illness medication. A social worker also believed that problems arose from A.F.M.'s medication use and alcohol use. A.F.M. unintentionally overdosed on her medication in May 2010.

In June 2010 the social worker recommended that the children be removed from A.F.M.'s home due to neglect. The district court ordered that the children be placed in foster care. The county established an out-of-home placement plan for the children, assigning to A.F.M. substantially similar tasks as before, with the addition of a parenting assessment and random urinalyses for chemical use. Over the year, A.F.M. sometimes tested positive for alcohol and marijuana and sometimes refused to submit to testing at all.

The county placed the children with O.D.M. but later ordered them moved to California to live with their aunt and uncle. But the relatives eventually withdrew their request for custody and the children were returned to Minnesota foster care. One of the

boys was diagnosed with ADHD and oppositional defiance disorder, and the other was diagnosed with ADHD and adjustment disorder. They received therapy and education plans to address their special needs. A.F.M. and both boys were also diagnosed with mild forms of Cornelia de Lange Syndrome, which can cause physical abnormalities and cognitive delays.

A.F.M. submitted to a parenting assessment in September 2010. The assessment report stated that A.F.M.'s home contained many live flies, fly-strips full of dead flies, a bare light fixture hanging from a cord, and standing water in the basement. But the report observed that feces, urine, and other insects were no longer present. It included only one first-hand observation of A.F.M.'s parenting, which was the assessor's opinion that "[A.F.M.] did not know what to do, from a parenting perspective, when the boys did not get along . . . . She stated a consequence on several occasions but never did follow through with the stated consequences." The assessor suspected that A.F.M. continued to use alcohol, but A.F.M. denied it. His report recommended termination of A.F.M.'s parental rights.

The county filed a petition to terminate both parents' parental rights in December 2011, and the district court conducted a trial in April 2012. O.D.M. failed to appear and his parental rights were involuntarily terminated. A.F.M. testified during the trial that she had moved in with her grandmother and was employed at Rising Phoenix, a supported work environment that provided transportation to and from work. She recognized that she had been unable to care for the boys at the time they were removed from her home, but she asserted that she is now capable of caring for them. She attributed her prior

difficulties mostly to her medication, which she said made her tired, unable to function, and unable to comprehend. She testified that she used the medication only because she had been threatened with losing her children if she did not. She also testified that since discontinuing it, she has more energy, requires less sleep, and can keep her house clean. She stated that she can and will attend therapy and that her grandmother is available as support. Her mental health case manager confirmed that A.F.M. "has had a period of stabilization" since quitting her medication and that her employment had "really been good for her." The case manager opined that the absence of the children might partly explain her improvements, but she also believed that the more stable home environment also helped. She testified that A.F.M. is now more willing and able to participate in treatment and cope with her condition.

The district court expressly noticed the demonstrated positive change in A.F.M.'s demeanor, contrasting her pattern of "angry and resentful" behavior at previous hearings with her "remarkably calm and reasonable demeanor" throughout the trial. The district court nevertheless ordered that A.F.M.'s parental rights be terminated. It found that the county had offered extensive services to A.F.M. and that she had resisted them. The court also found that A.F.M.'s mental health problems and "inconsistent parenting style and home maintenance[] continued" and that A.F.M. "still does not accept the various diagnoses given to her and the children, still rejects the need for the medication prescribed for her, and still minimizes the special needs of her children." Because of this, the district court predicted that "she can[not] correct the conditions that led to the

children's out-of-home placement in the reasonably foreseeable future." The district court dismissed A.F.M.'s explanation for the change it saw in her and stated instead that it

> seems more likely to be the result of her having at least four large burdens lifted from her shoulders: first, the wanted but nonetheless impossibly difficult task of addressing her sons' special needs and behavioral issues along with her own; second, not having to maintain a home and being able to live with her grandmother in her grandmother's small home; third, freedom from the obligations of the case plan and her enjoyment of current employment at Rising Phoenix in Wadena (which provides transportation); and last, her enjoyment of not only a new relationship with a counselor in Wadena, but also a new romantic relationship with a co-worker.

The district court did not explain how it determined that these were the real causes of A.F.M.'s improvement. And it saw the improvement as inconsequential in that "it did not change her long history of failing to successfully complete the case plan, or her failure or inability to otherwise correct the problems that led to the children being placed out-of-home." The court concluded that the best interests of the children were served by termination.

The district court based its decision on four statutory factors. First, it found that A.F.M. had "substantially, continuously, and repeatedly been unable or neglected to comply with the duties imposed upon her by the parent and child relationship." *See* Minn. Stat. § 260C.301, subd. 1(b)(2) 2010. Second, it found that A.F.M. "has shown a consistent pattern of specific conduct and of specific conditions directly relating to the parent and child relationship, which . . . render the mother unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, and emotional

needs of the children." *See id*., subd. 1(b)(4) (2010). Third, it determined that "the reasonable efforts of [the county], under the direction of the Court, have failed to correct the conditions leading to the out-of-home placement." *See id*., subd. 1(b)(5) (2010). And, fourth, it concluded that "the children are neglected and in foster care, as that term is defined in Minn. Stat. § [260C.007, subd. 24]." *See id*., subd. 1(b)(8) (2010).

A.F.M. appeals.

D E C I S I O N

A.F.M. asks us to reverse the district court's termination of her parental rights. We will affirm a 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 best interest of the child. *In re Children of T.R.*, 750 N.W.2d 656, 661 (Minn. 2008). We defer to the district court's factual findings so long as they address the statutory criteria and are not clearly erroneous. *Id.* at 660. But we closely examine those findings to determine whether they actually constitute clear and convincing evidence supporting termination. *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005). The deference given to underlying factual findings is greater than the deference given to the conclusions drawn from those facts. *See In re Children of J.R.B.*, 805 N.W.2d 895, 899–900 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). We therefore review underlying factual findings for clear error, but we review the ultimate determination that those findings fit the statutory criteria for abuse of discretion. *Id.* at 901.

A.F.M. challenges the district court's application of its factual findings to the statutory criteria for termination, arguing that the district court failed to consider her

conditions as they existed at the time of the termination hearing. Her argument has merit. To support an order terminating parental rights, the district court must "make clear and specific findings which conform to the statutory requirements for termination" and those findings must "address conditions that exist at the time of the [termination] hearing." *In re Welfare of Chosa*, 290 N.W.2d 766, 769 (Minn. 1980). The district court held that four independent statutory criteria for termination were supported by clear and convincing evidence. Because even one of these is sufficient to support the termination order, we review them individually.

I

The district court did not indicate which of its underlying factual findings supported its ultimate finding that A.F.M. "substantially, continuously, and repeatedly [has] been unable or neglected to comply with the duties imposed upon her by the parent and child relationship." *See* Minn. Stat. § 260C.301, subd. 1(b)(2). It concluded that "her own mental health issues, together with the children's special needs, make that impossible in the reasonably foreseeable future." But a decision to terminate parental rights "must be based on the parent's failure to care for and nurture the child both now and into the future; it cannot reflect simple, obvious factors such as mental illness." *In re Welfare of M.M.D.*, 410 N.W.2d 72, 75 (Minn. App. 1987). And mental illness alone cannot be the basis for terminating parental rights; the district court must focus on actual conduct. *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996).

The district court recounted at length A.F.M.'s mental illnesses, her struggles with accepting diagnoses and treatment, and her reluctance to take prescribed medication. But

the district court did not make any findings about specific symptoms that undermined her ability to parent either at the time of the hearing or into the future. And it identified no actual conduct caused by her mental illness that was harmful to the children. The district court appears to have assumed that her reluctance to accept her and her children's diagnoses and to comply with treatment was itself harmful. In the absence of any finding of harmful effects on the children, however, we cannot say that the district court received clear and convincing evidence of A.F.M.'s refusal or neglect of parental duties.

A.F.M. persuasively challenges the district court's decision to summarily dismiss her testimony that her conditions and behavior had substantially improved in the recent months before the termination hearing. The court recognized that A.F.M. had improved her living situation by moving in with her grandmother, by obtaining steady employment, and by developing a new support system including her grandmother and a new therapist. But rather than analyzing the petition in light of these conditions that existed at the time of the hearing and applying them to the statutory criteria for termination, the district court speculated that *not* having the children was the real reason for A.F.M.'s improvement, and it otherwise discussed A.F.M.'s conduct mainly before her improvement.

II

The district court did not indicate which of its factual findings supported its determination that A.F.M. "has shown a consistent pattern of specific conduct and of specific conditions directly relating to the parent and child relationship[,] which . . . have not been corrected, and which render [her] unable, for the reasonably foreseeable future, to care appropriately for . . . the children." *See* Minn. Stat. § 260C.301, subd. 1(b)(4). The

district court's analysis implies that A.F.M.'s mental health problems and her struggles with social workers and with the court warranted an assumption that she was unable to appropriately address her children's needs. But "termination of parental rights for palpable unfitness requires a showing of 'a consistent pattern of specific conduct or specific conditions existing *at the time of the hearing* that appear will continue for a prolonged, indefinite period and that are permanently detrimental to the welfare of the child.'" *Children of T.R.*, 750 N.W.2d at 662 (quoting *In re Welfare of M.D.O.*, 462 N.W.2d 370, 377 (Minn. 1990)) (emphasis added).

The district court did not identify findings supporting these elements. It did not identify any specific conduct or current conditions that made A.F.M. unfit. It frequently referred to the 2010 parenting assessment when it described A.F.M.'s mental health, living conditions, and parenting capabilities. But the relevant period is the time of the termination trial in 2012. The district court did not refer to timely information on which we can effectively review its prediction that those former conditions would persist "for the reasonably foreseeable future" or its conclusion that A.F.M. is palpably unfit to parent.

III

The district court also did not indicate which of its factual findings supported its determination that "the reasonable efforts of [the county], under the direction of the Court, have failed to correct the conditions leading to the out-of-home placement." *See* Minn. Stat. § 260C.301, subd. 1(b)(5). The district court again appears to have relied on the 2010 assessment and A.F.M.'s prior resistance to social workers to support its

determination that she refused to address concerns about home cleanliness and her parenting skills.

The district court may presume that reasonable efforts have failed if (1) the child has resided outside the home for 12 of the last 22 months, (2) the court approved a case plan, (3) the parent has not "substantially complied" with the case plan, and (4) the county has made reasonable efforts to rehabilitate and reunite the family. *See id.* The district court found that "[a] substantial part of [A.F.M.'s case plan] required her to regularly attend to [her] mental health issues as directed by her physician and counselors" because she was unable to address the children's "behavioral issues, which were severe enough to require individual paraprofessional aides at school." It also cited A.F.M.'s discipline deficiencies as a reason for out-of-home placement, noting that "her primary means of disciplining the children was generally inconsistent, that is, yelling at or ignoring them, resulting in a worsening of their behaviors." And it found that A.F.M. had not attended therapy sessions, had not complied with medication regimens, and had resisted the efforts of the parenting educator.

But to justify termination of parental rights based on noncompliance with case plan requirements, the district court must also "address whether full compliance with the case plan's requirements was necessary to correct the conditions that led to the out-of-home placement and whether the efforts [the parent] did make were insufficient to correct the conditions." *In re Child of E.V.*, 634 N.W.2d 443, 447 (Minn. App. 2001). Here the district court did not address the necessity of the case plan's requirements in light of A.F.M.'s positive changes, despite her failure to follow all the particulars prescribed. It

did not explain how participation in therapy or use of medication would help A.F.M. keep her home clean or change her parenting style. It did not explain how a particular parenting style was necessary to address the children's special needs or how an "inconsistent" parenting style was harmful enough to warrant termination of parental rights. And most significantly, it again failed to address recent improvement in A.F.M.'s circumstances and mental health that might have resolved some or all of the concerns that led to out-of-home placement.

IV

The district court also did not indicate which of its factual findings supported its determination that "the children are neglected and in foster care, as that term is defined in Minn. Stat. § [260C.007, subd. 24]." *See* Minn. Stat. § 260C.301, subd. 1(b)(8). Children are neglected and in foster care when (1) they were placed in foster care by a court order, (2) the "parents' circumstances, condition, or conduct are such that the child[ren] cannot be returned to them," and (3) the parents "have failed to make reasonable efforts to adjust their circumstances, condition, or conduct." Minn. Stat. § 260C.007, subd. 24 (2010).

We do not see in the findings sufficient support for the second and third elements. The district court did order the children placed into foster care. But it did not address A.F.M.'s current "circumstances, condition, or conduct" or update its assessment of her efforts to adjust them to allow her children to be returned to her. Again, it appeared to rely chiefly on the 2010 assessment for its findings. For example, the district court found that "[t]he unsafe and unsanitary conditions of the [A.F.M.'s] home were never corrected to a sufficient and sustained level that could have allowed the children to be safely

returned to her care." This finding misses the fact that A.F.M. had moved into her grandmother's home more than a year before the termination hearing. The district court made no findings about the conditions in A.F.M.'s current home even though the record suggests that A.F.M. intended to continue living there.

On balance, despite the district court's thoughtful effort, we cannot affirm because we do not see evidence that could clearly and convincingly prove any of the four grounds for termination based on A.F.M.'s conditions at the time of trial. The original concerns of domestic violence were addressed by O.D.M.'s departure from A.F.M.'s life. The concerns about animal waste in the home were resolved when A.F.M. got rid of the animals. Concerns about structural dangers and uncleanliness in A.F.M.'s house may have been resolved when she moved to her grandmother's home. Concerns about A.F.M.'s unhealthy and combative behavior appeared at least on the surface to have been abated by the time of the trial, purportedly as a result of A.F.M.'s decision to stop taking psychotropic medication and to rely on new therapy. We see no evidence establishing that this choice was unreasonable or ineffective. And the concerns about A.F.M.'s parenting skills—including her yelling and failing to appreciate the seriousness of her children's ADHD and other behavior-related conditions—do not appear to be of a nature that can justify termination of parental rights, especially in the face of A.F.M.'s apparent improvement. We conclude only that the evidence relied on by the district court is not clear and convincing. We do not suggest that the immediate remedy is unsupervised replacement with A.F.M. We remand for further proceedings that address the current

relevant circumstances, including but not limited to current mental health, living conditions, and parenting ability.

Because we are persuaded that the district court did not focus sufficiently on A.F.M.'s conditions at the time of the termination hearing when it made its statutory findings, we hold that the district court abused its discretion, we reverse its termination judgment, and we remand for new findings. The district court may reopen the record on remand in its discretion. Despite our holdings, we recognize that the record does support some ground for concern about A.F.M.'s parenting capacity and "we express our desire that the proper authorities carefully monitor the situation and promptly seek termination of [A.F.M.'s] parental rights again if [she] is unable to meet the challenge of parenthood." *T.R.*, 750 N.W.2d at 666 n.9 (quotation omitted).

Reversed and remanded.