STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1099

In the Matter of the Welfare of the Children of:
T. N., R. H. & J. S., Parents.

Filed November 26, 2012
Affirmed in part and reversed in part
Rodenberg, Judge

Hennepin County District Court
File Nos. 27JV12276, 27JV1011043

William Ward, Hennepin County Chief Public Defender, Kellie M. Charles, Assistant Public Defender, Minneapolis, Minnesota (for appellant J.S.)

Michael O. Freeman, Hennepin County Attorney, Cory A. Carlson, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Eric Rehm, Burnsville, Minnesota (for respondent guardian ad litem)

Considered and decided by Stauber, Presiding Judge; Rodenberg, Judge; and Harten, Judge.*

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

RODENBERG, Judge

The district court issued an order for the termination of parental rights (TPR) of appellant J.S. on the grounds that (1) he is palpably unfit to be a party to the parent-child

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

relationship and (2) his children, C. and T., are neglected and in foster care. Appellant challenges the TPR, arguing that neither ground is supported by clear and convincing evidence; he also argues that the TPR is not in the children's best interests and challenges the district court's denial of his motion to award their physical and legal custody to his mother. Because clear and convincing evidence does not support the finding of appellant's palpable unfitness, we reverse that finding; because clear and convincing evidence does support the finding that appellant's children are neglected and in foster care and the district court did not abuse its discretion in concluding that the TPR is in the children's best interests or in denying the motion to award custody to appellant's mother, we affirm the TPR and the denial of the request to award custody of the children to appellant's mother.

FACTS

Appellant's son, C. was conceived in 2005 and born in January 2006 when his mother, T.N., was 14 years of age and appellant was 19. Appellant and T.N. had another child, T., in August 2010. Appellant had not been adjudicated the children's father and had not been living with them or regularly supporting them when they were declared Children in Need of Protection and Services (CHIPS) and placed in foster care in November 2010.

The social worker testified that the children were placed in foster care after T.N.'s boyfriend, E.G., "broke several ribs on [the two-month-old T. and] gave her a skull fracture" and "was found to have sexually abused both [T. and C.]" as well as having caused "physical abuse to [C.]" The out-of-home placement plan noted that T. had been

brought to the hospital with "numerous rib fractures, a skull fracture, a clavicle fracture, and subdural hematoma with resulting bleeding and swelling on the brain" and that C. "described witnessing [E.G.] choking his baby sister [T.] and throwing her around the room" and "would spank and hit [C.] [and] push and hit his mother on a regular basis." C. also demonstrated that E.G. "put his finger in [T.]'s vagina several times, licked the baby's vagina and also licked [C.'s] penis."

Appellant was adjudicated to be the father of C. and T. in October 2011. The children remained in foster care until November 2011, when they returned to live with their mother and her newborn baby, Q., for two months.[1] In January 2012, C. and T., with Q., returned to foster care, where they remain and are thriving.

Respondent Hennepin County Human Services and Public Health Department (Department) sought to terminate the parental rights of T.N., appellant, and R.H. to all three children. Appellant sought a TPR of T.N. to C. and T. and either their reunification with appellant or the transfer of their physical and legal custody to his mother.

Appellant's mother did not appear at trial. The guardian ad litem testified that all three children were doing well in their current foster-care placement and that permanent placement in their foster home is in their best interests.

The district court issued findings of fact, conclusions of law, and order for TPR, terminating appellant's rights to C. and T. involuntarily. The district court noted that T.N. had voluntarily terminated her rights to them and to Q. Appellant's motion for a transfer of the children's legal and physical custody to his mother was also denied.

[1] Q.'s father is R.H., who takes no part in this appeal.

Appellant challenges the TPR and the denial of his motion, arguing that clear and convincing evidence does not support either the finding that he is palpably unfit to be a party to the parent-child relationship or the finding that C. and T. are neglected and in foster care. He further contends that the district court abused its discretion by concluding that the TPR is in the children's best interests and by denying appellant's motion to transfer their custody to his mother.

D E C I S I O N

I. The finding of palpable unfitness

> A district court, upon motion, may terminate parental rights if it finds:
> (4) that a 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 (2010).

The district court found that appellant is "palpably unfit to be a party to the parent and child relationship." *Id.* "[T]he standard of proof in termination matters is clear-and-convincing evidence." *In re Welfare of Children of K.S.F.*, ___ N.W.2d ___, ___, 2012 WL 4856209, *8 (Minn. App. Oct. 15, 2012). We review the district court's findings of underlying or basic facts for clear error and its determination of whether a particular statutory basis for termination has been proven for abuse of discretion. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *review denied* (Jan. 6,

2012). We conclude here that the district court abused its discretion in finding appellant palpably unfit.

The district court relied almost exclusively on appellant's declination to testify concerning the circumstances of C.'s conception when appellant was 19 and T.N. was 14, and his refusal to "answer questions regarding whether or not he had sexually assaulted four different women . . . over the course of seven years." Because C. and T. have a history of being sexually abused, but not by appellant, the district court concluded that appellant's "past sexual assaultive behavior [was] of a nature and duration that makes him unable to provide for the ongoing physical, mental and emotional needs of the children for the reasonably foreseeable future."

The children were initially removed from T.N.'s home and placed in foster care for reasons that had nothing to do with appellant. Appellant has never lived with them, had little interaction with them, and had no part in their entry into foster care. He therefore could not have engaged in "a consistent pattern of specific conduct before the child[ren]" sufficient to warrant the district court's conclusion regarding palpable unfitness. *See* Minn.Stat. § 260C.301, subd. 1(b)(4). The district court stated that it drew adverse inferences from appellant's refusal to answer questions about C.'s conception with the 14-year-old T.N. when appellant was 19 and about appellant's alleged sexual assaults of three other women, but, in addition to being uncharged alleged offenses, none of these events concerned a small child.

Although appellant did not complete the ordered psychotherapy and a psychosexual evaluation, as discussed below, these services were not ordered because of

any offense or conduct of appellant toward or in the presence of his children and did not involve the abuse of small children at all. While appellant's present unemployment would prevent him from providing support for children, he has been employed in the past and may be employed again, which would enable him to provide support. The record does not contain clear and convincing evidence of any condition that would render appellant unable to care appropriately for children in the future or make him palpably unfit to be part of a parent-child relationship. We therefore reverse the finding of palpable unfitness.

II. The finding that C. and T. were neglected and in foster care

This court will affirm an order for TPR "if at least one statutory ground alleged in the petition is supported by clear and convincing evidence . . . ." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 661 (Minn. 2008). The district court here also found "by clear and convincing evidence sufficient grounds to terminate [appellant's] parental rights under . . . Minn. Stat. § 260C.301, subd. 1(b)(8) [(2010) (providing that a district court may terminate parental rights if it finds 'that the child is neglected and in foster care')]." Findings of fact are reviewed to determine whether they address the statutory criteria and are not clearly erroneous. *T.R.*, 750 N.W.2d at 660. A determination that a statutory basis for termination of rights exists is reviewed for an abuse of discretion. *J.R.B.*, 805 N.W.2d at 901. A finding is clearly erroneous if it is "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *T.R.*, 750 N.W.2d at 660-61 (quotation omitted).

A child is neglected and in foster care if the child has been placed in foster care by court order; the parents' circumstances, condition, or conduct are such that the child cannot be returned to them; and the parents, although rehabilitative services were available to them, did not make reasonable efforts to adjust their circumstances, condition or conduct, or willfully failed to meet reasonable expectations with regard to visiting the child or providing financial support for the child. Minn. Stat. § 260C.007, subd. 24 (2010).

As a threshold matter, we note that the children cannot be "returned" to appellant, because they have never lived with him. Termination of the rights of a parent under Minn. Stat. § 260C.007, subd. 24, does not require that the parent first have had custody of the child(ren) in question as the evident purpose of the statute is to allow termination of the rights of a parent who has not equipped himself to assume care of the child(ren) presently in foster care after the provision of reasonable county efforts to rehabilitate the parent. *See, e.g., In re Welfare of Children of R.W.*, 678 N.W.2d 49, 57 (Minn. 2004) (reversing this court's determination that clear and convincing evidence did not support conclusion that children were neglected and in foster care where parent's efforts were not sufficient and did not meet reasonable expectations with respect to visitation and child support under Minn. Stat. § 260C.301, subd. 24); *In re Welfare of A.D.*, 535 N.W.2d 643, 649-50 (Minn. 1995) (reversing this court's determination that clear and convincing evidence did not support conclusion that child was neglected and in foster care where, during five years of foster care, parent failed to meet "even the most minimal

expectations" with regard to visitation); *J.R.B.*, 805 N.W.2d 902-05 (affirming TPR where neither parent followed the plan to reunite the family in any significant way).

To make the determination that children are neglected and in foster care, the district court considers, among other factors, how long children have been in foster care. Minn. Stat. § 260C.163, subd. 9 (2010). C., now six years old, and T., now two years old, have been in foster care for two years, with the exception of a two-month period between November 17, 2011, and January 17, 2012. An out-of-home placement must be reviewed after six months and may be continued for *up to* an additional six months. Minn. Stat. § 260C.201, subd. 11a. (2010). At the time of the district court's order denying appellant's motion for a new trial on June 6, 2012, the children had been placed out of home for much longer than the statute envisions.

The district court also considered the extent to which appellant had complied with the parenting assessor's recommendations for him. The assessor, after noting that "appellant reported he is upset and confused by the rape allegations [T.N.] has recently made in court, although he does understand that the age difference between him and [T.N.] at the time [C.] was conceived falls within statutory rape guidelines," recommended that appellant participate in individual psychotherapy to address "[e]motions regarding the recent rape allegations made against him." The assessor also recommended that appellant address "any additional concerns regarding rape allegations made by [T.N.] by completing either a Sex Offender Risk Assessment or Psychosexual Evaluation . . . and follows all recommendations made by the provider."

The social worker, whose testimony the district found to be credible, testified about appellant's response to these recommendations, stating that: (1) a psychosexual evaluation was very important for appellant because C. and T. had already been sexually abused by a different man; (2) about a year after the evaluation was recommended, appellant attended an intake interview and did some tests; (3) appellant began individual therapy in May 2011, completed two sessions, stopped for almost a year, then resumed; and (4) appellant's therapist noted that appellant attended therapy only to obtain custody and had not made any actual progress in therapy. The district court's findings that "[appellant's] refusal to engage fully in individual therapy and his long delay in participating in the psychosexual evaluation make it clear that [he] will not be capable of parenting these children in the reasonably foreseeable future" and "[appellant's] unwillingness to address his personal issues in therapy and his delay in participating in the psychosexual evaluation make him unable to provide for his children's mental and emotional needs" are supported by clear and convincing evidence. The district court also found that, despite the county's "reasonable efforts to provide [appellant] services, he remains unable to take custody of his children for the reasonably foreseeable future" and this finding is also supported by clear and convincing evidence.

Appellant argues that the district court erred in finding that appellant had not made any progress in his therapy because his therapist wrote that appellant "has been successful in his goals." But appellant takes this statement out of context. The therapist wrote that appellant's only goal and only reason for attending therapy was the requirement that he do so. The therapist's statement that appellant was "successful in his

goals" was based solely on the therapist's observations that "there have been no incidents related to [appellant's] lack of custody" and that appellant had no goals for therapy other than not having custody of his children granted to someone else.

The parenting assessor also recommended that appellant continue with supervised visitation, and the guardian ad litem testified that she would not be comfortable with appellant having unsupervised visitation. Thus, clear and convincing evidence supports the district court's findings that the children cannot be safely placed with appellant and the district court did not abuse its discretion by ruling that the children are "neglected and in foster care" within the meaning of Minn. Stat. § 260C.301, subd. 1(b)(8).

The facts here are that, while appellant may at some point be capable of assuming the care and custody of children, there is ample support for the district court's finding that he cannot do so now or in the reasonably foreseeable future. He has no stable home. He has not been regularly employed or supporting the children. He has not complied with a reasonable case plan to remedy these deficiencies and his children have remained in foster care for nearly two (2) years. Thus, termination under Minn.Stat. § 260C.301, subd. 1(b)(8), is appropriate. *See T.R.*, 750 N.W.2d at 661 (stating that TPR will be affirmed if at least one statutory basis has been met); *J.R.B.*, 805 N.W.2d at 902-05 (affirming conclusion that children of parents who did not follow case plan were neglected and in foster care).

III. The best-interests factor

Having determined that at least one statutory criterion applies, the district court considers whether TPR would be in the child's best interests. Minn. Stat. § 260C.301,

subd. 7 (2010). "Where the interests of parent and child conflict, the interests of the child are paramount." *Id.* "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.

Appellant notes that both the social worker and the guardian ad litem have conceded that he loves his children and argues that "[n]o child's best interests are served by permanent separation from such a loving and caring father" as himself. But, while appellant's love for his children may indicate his desire to parent them, it does not indicate his ability to do so. The guardian ad litem testified that she does not believe appellant has the ability to parent his children at this time and that she would not be comfortable with appellant having even unsupervised visitation. She also testified that both C. and T. are doing extremely well in their present foster home and that making their placement in that home permanent is in their best interests.

The district court's finding that appellant's children are neglected and in foster care is supported by clear and convincing evidence, and there was no abuse of discretion by the district court in concluding that the TPR is in their best interests.

IV. Denial of motion to change custody

Appellant moved in the alternative to grant legal and physical custody of his children to his mother, their paternal grandmother. The district court denied the motion. A district court's decision regarding whether to transfer legal custody of a child is reviewed for an abuse of discretion. *See In re Welfare of Children of A.I.*, 779 N.W.2d 886, 895 (Minn. App. 2010) (holding that the district court did not abuse its discretion by

ruling on a termination petition instead of waiting for additional information regarding the possibility of transferring legal custody). "[T]he interpretation and construction of statutes are questions of law that [appellate courts] review[] de novo." *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006).

"An order for transfer of permanent legal and physical custody to a relative shall only be made after the court has reviewed the suitability of the prospective legal and physical custodian." Minn. Stat. § 260C.201, subd. 11(d)(1)(i) (2010). Appellant's mother was not present at the trial to testify as to her ability or her willingness to assume physical and legal custody of the children, so the district court could review her suitability only by relying on the testimony of the social worker and the guardian ad litem.

The district court made findings as to their views on the transfer of custody.

> [The social worker] also believes that a TLC to [appellant's] mother is not in [C.'s and T.'s] best interest. [C.] is in therapy as a result of his past experiences and suffers nightmares and has a difficult time trusting others. [C.] was initially acting out at the foster home but his behaviors there have improved. [The social worker] believes it is in [C.'s and T.'s] best interest to continue to be with their brother [Q.] [Appellant] and his mother have shown almost no interest in [Q.] . . . the three children have a strong bond even though [Q.] is only five months old.
> . . . .
> [In the view of the guardian ad litem, t]ransfer of Legal and Physical Custody to [appellant's] mother is also not in [C.'s and T.'s] best interests. Even though their grandmother loves them, [the guardian ad litem] is concerned about them potentially living in the same home as [appellant] and she does not believe the grandmother is able to put [C.'s and T.'s] interests above the interests of [appellant].

The district court also heard appellant testify that, until he moved in with a friend a week before the trial, he had always lived with his mother, and that, if the children were returned to his custody, he intended to move back to his mother's house with them.

Based on this evidence, the district court concluded that:

> Transfer of permanent legal and physical custody of [C. and T.] to their paternal grandmother is not in the best interests of the children. While the court finds evidence that the grandmother cares for her grandchildren, there are serious concerns about the children's safety if living in a home with their father, as well as concerns about their grandmother's ability to put the children's interests above those of [appellant]. Additionally, transfer of custody would result in the separation of [T. and C.] from their brother [Q.]

The record does not reflect that appellant's mother has ever provided care for the children or developed a strong relationship with them. Appellant testified that, until a week prior to trial, he lived with his mother. "'Foster care' means 24 hour substitute care for children placed away from their parents or guardian . . . ." Minn. Stat. § 260C.007, subd. 18 (2010). Because appellant was living with his mother, she was not able to provide foster care for his children. Thus, during the two years the children have spent in foster care, they have bonded with foster parents rather than with appellant's mother.

Here, the district court was unable, on the record before it, to "review[] the suitability" of appellant's mother as a prospective custodian. *See* Minn. Stat. § 260C.201(d)(1)(i). For reasons not entirely clear from the record, appellant did not call his mother to testify at trial. Thus, the district court had a request that the children be placed with their grandmother, but no testimony from her regarding her ability or even willingness to assume the care of the children.

The district court did not abuse its discretion in denying appellant's motion to transfer his children's custody to his mother. *See A.I.*, 779 N.W.2d at 895.

Affirmed in part and reversed in part.