STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1161

In the Matter of the Welfare of the Child of: T.G., Parent.

Filed December 16, 2013
Affirmed
Minge, Judge[*]

Ramsey County District Court
File No. 62-JV-12-3027

Robert Lawton, St. Paul, Minnesota (for appellant T.G.)

John Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent Ramsey County Community Human Services Department)

James Laurence, St. Paul, Minnesota (for guardian ad litem Elizabeth Johnson)

Considered and decided by Stauber, Presiding Judge; Bjorkman, Judge; and Minge, Judge.

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

MINGE, Judge

Mother T.G. appeals the termination of her parental rights, asserting that the district court erred in (1) concluding that she failed to overcome the statutory

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

presumption of palpable unfitness to parent and (2) adopting verbatim the findings, conclusions, and order proposed by the assistant attorney for Ramsey County. We affirm.

FACTS

Appellant T.G. challenges the termination of her parental rights to N.W. T.G. had five children: (1) C.Y., born in December 1997; (2) L.R., born in June 2002; (3) J.T., born in September 2003; (4) J.C., born in August 2005; and (5) N.W., born on December 23, 2008. T.G.'s parental rights to C.Y. were involuntarily terminated by the Ramsey County District Court in May 2001 for refusal and neglect to comply with her parental duties under Minn. Stat. § 260C.301, subd. 1(b)(2) (2000), and for being "palpably unfit to be a party to the parent-child relationship" under Minn. Stat. § 260C.301, subd. 1(b)(4) (2000). She lost or relinquished custody of L.R. in April 2005 and J.T. and J.C. in October 2006. The termination and custody changes for the four children were due in large part to T.G.'s use of cocaine and other chemical-dependency problems.

On September 13, 2012, respondent Ramsey County Community Human Services Department (Human Services) filed an expedited termination-of-parental-rights (TPR) petition to terminate T.G.'s parental rights to N.W., alleging that T.G. was palpably unfit to be a party to the parent-child relationship pursuant to Minn. Stat. § 260C.301, subd. 1(b)(4) (2012). The allegations of the petition recited that having been concerned about T.G.'s parenting of N.W., Human Services filed a child-in-need-of-protection-and-services (CHIPS) petition in February 2009. This petition was dismissed after T.G.

worked with the agency. On September 4, 2012, St. Paul police went to T.G.'s home after learning that she was extremely drunk, wandering the streets, and picking fights. The police took her "to detox." The police learned that three-year-old N.W. was in T.G.'s second-floor apartment; they entered; and found him, alone, sleeping in a bedroom. They observed that he was wearing only a diaper and laying half on a mattress and half on the floor, that the room had a low window which was open and had no screen, that he could have climbed over the window sill and fallen, and that the apartment's refrigerator lacked food adequate for a three-year-old child. On September 5, 2012, T.G. admitted to a child-protection worker that she had been drinking while N.W. slept in her apartment. She tested positive for cocaine on September 5 and 7; failed to submit to scheduled urinalyses on September 10 and 11; and, between September 11 and 13, failed to respond to voicemail messages from Human Services' staff.

The district court, on September 13, 2012, ordered that N.W. "be placed under the emergency protective care of . . . Human Services" and found that, under Minn. Stat. § 260.012 (2012), Human Services was not required to make reasonable efforts to prevent out-of-home placement.[1] On May 17, 2013, a trial was held on the TPR petition. Due to the prior involuntary termination of T.G.'s parental rights to C.Y., the trial began with T.G.'s presentation to rebut the presumption of palpable unfitness under Minn. Stat. § 260C.301, subd. 1(b)(4). T.G.'s case consisted of her testimony and the testimony of

[1] "Reasonable efforts to prevent placement and for rehabilitation and reunification are always required except upon a determination by the court that a petition has been filed stating a prima facie case that . . . the parental rights of the parent to another child have been terminated involuntarily . . . ." Minn. Stat. § 260.012(a)(2).

the child-protection worker assigned to T.G.'s case since September 9, 2012. The worker recounted what she knew of T.G.'s interactions with N.W., T.G.'s drug use, and the September 2012 incident. T.G. testified regarding her life and record, the September 2012 incident, and events following that incident. Her testimony indicated a history of drug use, including while pregnant with and caring for N.W.; attempts to stop using drugs; and failure to improve her ability to parent a child after losing her parental rights to C.Y.

T.G. testified as to her recent life changes, asserting that she had overcome the presumption against her. Human Services then moved for a "directed verdict." At that point the record consisted of the testimony of the two witnesses and evidence of the prior TPR of C.Y. After hearing oral arguments from Human Services, T.G., and N.W.'s guardian ad litem (GAL), the district court granted Human Services' motion. The court concluded that T.G. failed to produce sufficient evidence to rebut the statutory presumption that she was palpably unfit to parent N.W., reasoning that she failed to produce evidence that she had addressed her deficient parenting skills, her chemical-health issues, and her lack of compliance with her parenting/case plan. The court also reasoned that although T.G. testified that she had been "clean and dry for about six weeks," she provided no corroboration for that testimony.

The TPR trial was then resumed to take evidence regarding N.W.'s best interests. The child-protection worker and N.W.'s GAL testified, and exhibits were introduced. These exhibits contained detailed information regarding T.G.'s history of chemical abuse and parenting failures. Both the worker and GAL testified that the TPR and making

N.W. available for adoption would be in N.W.'s best interests. The worker reasoned that T.G. failed to take any steps to regain custody of N.W. and had chemical-dependency problems indicating an inability to parent N.W. The GAL reasoned that T.G. cannot provide N.W. with permanence and frequently failed to respond to her efforts to contact her outside of court hearings, which even included "driving around . . . calling [T.G.] outside of her house" and leaving voicemail messages. The GAL described N.W.'s situation since leaving T.G.'s custody to reside with T.G.'s cousin for two months preceding the May 2013 trial:

> I've seen a difference in him in the last two months, to just be in what I see as a place where he can just kind of take a deep breath and not worry about other people. You can tell that he's a worrier, and he just really needs to be in a place where he doesn't need to do the worrying and gets to be a child and deal with child things and not deal with a parent that can't take care of him.

At the end of trial, the district court terminated T.G.'s parental rights to N.W. and asked the Human Services attorney to "prepare the order," which the attorney agreed to do. T.G.'s attorney replied by stating the following: "I assume [the Human Services attorney] is preparing a proposed order and not the order. There are certainly going to be numerous findings made, which I assume the court will be making." The Human Services attorney explained that she will be submitting only "a proposed order." The district court asked T.G.'s attorney whether he wanted to submit a proposed order, which T.G.'s attorney declined to do. T.G.'s attorney explained, "I just want to make sure that the findings are independently made by the court and not taken verbatim from [Human

Services'] proposed findings. I assume the court will independently make their findings and use [Human Services'] as a guideline." The court did not respond to that comment.

The district court filed a written TPR order on June 12, 2013. This appeal follows.

D E C I S I O N

Directed Verdict and Judgment as a Matter of Law

A threshold item is the district court's entering of a "directed verdict." However, the parties did not brief or argue the use of directed verdicts, and we do not reach the issue of whether its use was error.[2] In this regard, the directed-verdict ruling may not be relevant because ultimately an extensive record was made on best interests that provided a full basis for the district court's decision.

Palpable-Unfitness Presumption

The first issue is whether the district court erred in concluding that T.G. failed to produce evidence sufficient to overcome the presumption that she is palpably unfit to be a party to the parent-child relationship. Section 260C.301, subdivision 1(b)(4), permits a

[2] If the issue were properly before us, we note that the rules no longer provide for motions for "directed verdict" and that such a request is typically now viewed as a motion for "judgment as a matter of law" (JMOL). Minn. R. Civ. P. 50.01; *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 n.10 (Minn. 2009). We also note that the Minnesota Rules of Juvenile Protection Procedure "govern the procedure for juvenile protection matters," and, "[e]xcept as otherwise provided by statute or [those] rules, the Minnesota Rules of Civil Procedure do not apply to juvenile protection matters." Minn. R. Juv. Prot. P. 1.01, 3.01. No statute or rule makes rule 50.01 applicable to juvenile-protection matters. This is not surprising because, as a juvenile-protection proceeding, this proceeding was a bench trial in which the judge was the finder of fact. Rule 50 JMOL motions apply in jury-trial settings. Minn. R. Civ. P. 50.01(a); *see* 1A David F. Herr & Roger S. Haydock, *Minnesota Practice* § 50.10 (5th ed. 2010) ("This [JMOL] motion is only available in jury trials."); *see also* Minn. Stat. § 260C.163, subd. 1 (2012) (providing that, generally, "hearings on any matter shall be without a jury").

juvenile court to terminate a parent's parental rights to a child "if it finds that . . . a parent is palpably unfit to be a party to the parent and child relationship" for reasons specified by that provision. The statute goes on to state that when, as here, the parent's parental rights to a different child have been previously involuntarily terminated, "[i]t is presumed that a parent is palpably unfit to be a party to the parent and child relationship." That presumption "shifts to a parent a burden of production." *In re Welfare of J.W.*, 807 N.W.2d 441, 445 (Minn. App. 2011) (applying Minn. R. Evid. 301), *review denied* (Minn. Jan. 6, 2012). If the parent fails to satisfy that burden, "the presumption will require a finding or conclusion consistent with the presumption." *Id.* (citing Minn. R. Evid. 301 1977 comm. cmt.).

The evidence necessary to satisfy a rule 301-governed presumption is "essentially any competent evidence." *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 522 (Minn. 2007) (quotation omitted) ("[A] presumption is merely a procedural device for controlling the burden of going forward with the evidence[,] and . . . it has no additional function other than the limited one of dictating the decision *where there is an entire lack of competent evidence* to the contrary . . . ." (alteration in original) (quotation omitted)). A parent satisfies the parent's burden to produce evidence to rebut the palpable-unfitness presumption by "introduc[ing] evidence that would 'justify a finding of fact' that he or she is not palpably unfit." *J.W.*, 807 N.W.2d at 445 (quoting Minn. R. Evid. 301 1977 comm. cmt.).

"We apply a *de novo* standard of review to a district court's determination as to whether a parent's evidence is capable of justifying a finding in his or her favor at trial."

Id. at 446; *cf. Coker v. Jesson*, 831 N.W.2d 483, 490 (Minn. 2013) (stating that "the committed person bears only a burden of production" and "[a]llowing the fact-finder to weigh the evidence, consistent with the court-trial provision, effectively elevates the burden imposed on the committed person"); *Jacobson*, 728 N.W.2d at 523 ("[A]s a general matter, a district court should not engage in a qualitative evaluation or weighing of the evidence when deciding whether a claimant has produced sufficient evidence to rebut the statutory presumption."). *But see In re Estate of Beecham*, 378 N.W.2d 800, 804 (Minn. 1985) (concluding that "the trial court's determination that the presumption of gratuity had been overcome was not clearly erroneous").

Despite the foregoing caselaw limiting the function of a presumption, there is a considerable body of caselaw holding that overcoming the palpable-unfitness presumption is an "onerous," *In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 544 (Minn. App. 2009) (quotation omitted), "often . . . difficult" task, *J.W.*, 807 N.W.2d at 446. To overcome it, a parent must "affirmatively and actively demonstrate [the parent's] ability to successfully parent a child," "demonstrat[ing] that [the parent's] parenting abilities have improved" and showing that the parent has "marshal[ed] any available community resources to develop a plan and accomplish results that demonstrate the parent's fitness." *Id.* (quotations omitted). Overcoming this presumption is an onerous or difficult task because of the content of a failed parenting record in a prior TPR proceeding. It is not a one-size-fits-all presumption. As a reviewing court, we look at the circumstances that led to the prior termination of T.G.'s parental rights and the parent's life up to the date of the TPR trial and, assuming the truth of her evidence of

rehabilitation, ask whether she could reasonably be fit to meet the responsibilities of parenting in the future. We focus on "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) (quotations omitted); *see J.W.*, 807 N.W.2d at 466 (applying *S.Z.* rule to palpable-unfitness-presumption analysis).

The record of T.G.'s relevant history preceding N.W.'s December 2008 birth discloses the following. In May 2001, T.G.'s parental rights to C.Y. were involuntarily terminated after Human Services learned of T.G.'s cocaine use and history of abandoning C.Y. in the care of other people for three-to-four-day periods. In September 2003, T.G. gave birth to J.T. while incarcerated for a controlled-substance crime. In December 2003, T.G. was convicted of a felonious controlled-substance crime. In April 2005, T.G.'s custody of L.R. was transferred to L.R.'s father because T.G. was "unable to care for" L.R.; T.G. had been "getting high" and "using." T.G. abused cocaine when pregnant with J.C., who, when born in August 2005, tested positive for cocaine; after J.C.'s birth, T.G. failed to address her chemical-dependency issues. In September 2005, T.G. was convicted of a second felonious controlled-substance crime and Human Services filed (1) a CHIPS petition as to L.R. and (2) a TPR petition to terminate T.G.'s parental rights to J.T. and J.C. Human Services withdrew its CHIPS petition applicable to L.R. after learning that T.G. did not have custody. Although Human Services withdrew its initial TPR petition after J.T. and J.C. were returned to T.G.'s care "on a trial home visit" in January 2006, in March 2006, "the trial home visit was revoked" after T.G. left J.T. and J.C. with their paternal grandparents and failed to

pick them up or appropriately arrange for their care. Within about two months, Human Services filed another petition for termination of T.G.'s parental rights to J.T. and J.C. Ultimately the TPR proceedings ended when T.G. agreed to a transfer of custody of J.T. and J.C. to their maternal aunt.

T.G. testified that N.W. continued to live with her from his December 2008 birth until the September 2012 incident. She admits that she had resumed using cocaine. She asserts that while N.W. resided with her, he was healthy and that she took him to his doctor appointments; that although N.W. began residing in foster care after the September 2012 incident, she saw him at least two times per week, called him every morning and night, and was "actually the one providing care for" N.W.; that N.W. never saw her smoke marijuana, use cocaine, or become intoxicated; that she never abused, beat, or neglected N.W.; that she believes that, if N.W. was returned to her, he would be safe. We also note that although T.G. admitted that she has no job and has not worked in years, she stated that three weeks before the trial, she resumed taking online college classes.

Whether T.G. overcame the presumption of palpable unfitness depends on whether she addressed questions both about substance abuse and about her parenting skills. T.G. testified that she stopped using cocaine when she learned that she was pregnant with N.W. but continued to smoke marijuana and drink alcohol. T.G. generally admitted to the dramatic and very serious September 2012 incident of out-of-control conduct and leaving N.W. unattended. After that event, T.G. continued to drink alcohol, continued to use marijuana, and resumed using cocaine. She admits using cocaine and marijuana as

late as early April 2013, a month before the TPR trial. T.G.'s case plan required that she "work with an in-home parenting provider." But T.G. testified that she had only a single one-hour session with a parenting provider on December 4, 2012, and admitted that she failed to respond to efforts to set up additional sessions.

T.G. explained that the longest period of her adult life when she did not abuse drugs or alcohol was a two-and-one-half-year period. The record indicates that she was in prison for 15 months of that time. She agreed that "it [would] be better for" N.W. if she underwent chemical-dependency treatment before she regained custody. Despite her agreement, despite a September 2012 "Rule 25 assessment" recommendation that she attend Narcotics Anonymous classes, Alcoholics Anonymous classes, relapse-prevention treatment, and therapy, and despite provisions of her case plan requiring her to participate in such treatment, T.G. admitted that she did not comply with those recommendations. T.G. testified that she declined to seek inpatient treatment because she "decided [she]'d quit on [her] own." Although T.G. submitted to a few urinalyses between September and December 2012 and took approximately three urinalyses between April and the May 2013 trial, she largely failed to comply with a requirement that, beginning in November 2012, she submit to two urinalyses per week.

T.G. claimed that between 2002 and May 2013, she sometimes attended meetings of a church group called Christ Healing Addicts in Recovery Ministry (CHARM), but admitted that she did not attend CHARM meetings when she used drugs. T.G. asserted that, after about one year of not attending, she resumed attendance at CHARM one month before the May 2013 TPR proceeding. T.G. also asserted that although she actively used

cocaine up until March 2013, in early April 2013, a little more than a month before the May 2013 trial, she stopped using cocaine and marijuana. When asked why she stopped using cocaine and marijuana in April 2013, she testified, "I made a decision, and I made up my mind that that's not what I'm going to do anymore. And no matter what anybody says, I'm—I want to fight for my baby."

T.G. argues that any failures by her to comply with her case plan are "irrelevant" to the status of the presumption of unfitness. We disagree. Whether T.G. complied with her case plan *is relevant* to whether she overcame the presumption of palpable unfitness, specifically in light of the case plan's requirement that she "work with an in-home parenting provider." *See* Minn. R. Evid. 401 ("'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."); *see also In re Welfare of Child of J.L.L.*, 801 N.W.2d 405, 412 (Minn. App. 2011) ("Generally, the rules of evidence apply to juvenile-protection proceedings." (citing Minn. R. Juv. Prot. P. 3.02, subd. 1)), *review denied* (Minn. July 28, 2011).

In district court, T.G. pointed out, and the child-protection worker did not disagree, that, if T.G. had been using drugs and improperly parenting N.W. prior to the September 2012 incident, Human Services would have alleged such conduct in that petition. However, the absence of an allegation is not proof of parenting skills. At most the lack of an allegation indicates that Human Services *did not know* whether T.G. used drugs or improperly parented N.W. during that period.

We note that, apart from the limited testimony that T.G. elicited from the child-protection worker, the only evidence that she produced was her own testimony, which the district court found "at many times not credible" and "not credible" as to "her new sobriety." T.G. argues that the court erred by making those credibility determinations.[3] But we need not reach that issue. To the extent the district court so erred, that error was harmless because T.G.'s testimony, *even if completely believed* and combined with the worker's testimony, is insufficient to overcome the presumption in her case. Here, the palpable-unfitness presumption relates not just to past activity, but most significantly to future ability to parent. The district court was required to make a judgment call as to the future based on T.G.'s past.

We conclude that the district court did not err in determining T.G. failed to rebut the palpable-unfitness presumption.

Best Interests

The second issue raised by T.G. deals with the importance of "best interests." The district court found that "[i]t is in the best interests of [N.W.] to have [T.G.]'s parental rights terminated." T.G. argues that "the best interest determination is irrelevant." She is

[3] The application of the presumption can be a challenging task. Minnesota caselaw includes statements that "a burden of production does not generally allow a credibility assessment." *Coker*, 831 N.W.2d at 490; *see also J.W.*, 807 N.W.2d at 447 (concluding that J.W. "rebutted the statutory presumption of palpable unfitness" because her evidence, "*if believed*, would justify a finding contrary to the assumed fact that J.W. is palpably unfit" (emphasis added) (quotation omitted)). But Minnesota also has caselaw declining "to adopt a per se rule prohibiting [district courts from making] any consideration of witness credibility" when determining whether evidence rebuts a statutory presumption. *Jacobson*, 728 N.W.2d at 523. We decline to suggest a simple bright-line rule in this fact-specific TPR area.

mistaken. "In *every termination proceeding*, 'the best interests of the child must be the paramount consideration.'" *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 668 (Minn. App. 2012) (emphasis added) (quoting Minn. Stat. § 260C.301, subd. 7 (2010)). "Even if a statutory ground for termination exists, the district court must still find that termination of parental rights or of the parent-child relationship is in the best interests of the child." *Id.* (citing *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005) ("In reviewing a decision to terminate parental rights, the appellate court determines whether there is clear and convincing evidence to support at least one statutory ground for termination and, if so, whether termination is in the best interests of the child.")). T.G. does not question the accuracy of the best-interests finding.

In sum, we reject T.G.'s argument that the district court erred by terminating her parental rights to N.W.

Verbatim Adoption of Proposed Order

The final issue is whether the district court violated T.G.'s due-process right by adopting verbatim the proposed order submitted by Human Services.

Appellate courts "discourage district courts from adopting proposed findings of fact and conclusions of law verbatim because it does not allow the parties or a reviewing court to determine the extent to which the court's decision was independently made." *Lundell v. Coop. Power Ass'n*, 707 N.W.2d 376, 380 n.1 (Minn. 2006); *see Cnty. of Dakota v. Blackwell*, 809 N.W.2d 226, 230 (Minn. App. 2011) (following *Lundell*); *see also Eden Prairie Mall, LLC v. Cnty. of Hennepin*, 797 N.W.2d 186, 192 (Minn. 2011) (concluding that "the tax court erred in adopting verbatim a valuation of the mall based

on the County's recalculation," noting that "[t]he recalculated values . . . contain several mathematical errors, suggesting that the tax court failed to exercise its own skill and independent judgment"). But the Minnesota Supreme Court has "declined to adopt a blanket prohibition on the practice." *T.A.A.*, 702 N.W.2d at 707 n.2; *see also Blackwell*, 809 N.W.2d at 230 ("The verbatim adoption of a party's proposed findings and conclusions of law is not reversible error per se." (quotation omitted)); *Bersie v. Zycad Corp.*, 417 N.W.2d 288, 292 (Minn. App. 1987) ("Such adoption by itself is not improper if the record supports the findings and shows the trial court conscientiously considered all the issues."), *review denied* (Minn. May 5, 1988); *Sigurdson v. Isanti Cnty.*, 408 N.W.2d 654, 657 (Minn. App. 1987) (similar), *review denied* (Minn. Aug. 19, 1987). *But see Przymus v. Comm'r of Pub. Safety*, 488 N.W.2d 829, 832 (Minn. App. 1992) ("Because there was no basis in the record for the Commissioner's proposed findings of fact regarding details related to the stop, probable cause, and the arrest, the trial court's adoption of the findings was clearly erroneous."), *review denied* (Minn. Sept. 15, 1992).

Here, Human Services agreed to submit "a proposed order" to the district court. On appeal, T.G. states that Human Services e-mailed the proposal to the court and her on June 12, 2013, the same day that the court filed its written factual findings, legal conclusions, and order terminating her parental rights to N.W. However, the record on appeal does not include a copy of Human Services' proposed order. Absent a copy of the alleged proposal, we cannot determine whether or to what extent the district court adopted it. We also note that even if the district court adopted Human Services' proposal verbatim, the court demonstrated some exercise of its independent judgment by, at the

trial, before requesting the proposal from Human Services, orally terminating T.G.'s parental rights to N.W., reasoning in part that T.G. produced no credible evidence that she had attempted to improve her deficient parenting skills or overcome her chemical-health issues.

Affirmed.