STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0604
A13-0605
A13-0625
A13-0635

In the Matter of the Welfare of the Child of:
B. E. R. R. and E. A. D.,
Parents.

Filed October 21, 2013
Affirmed
Chutich, Judge

Beltrami County District Court
File Nos. 04-JV-13-306;
04-JV-12-2726;
04-JV-13-51

Arlen R. Larson, Bagley, Minnesota (for appellant mother)

George L. Duranske, III, Bemidji, Minnesota (for appellant father)

Timothy R. Faver, Beltrami County Attorney, Kristy Cariveau, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Jose Hernandez, Bemidji, Minnesota (guardian ad litem)

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellants B.E.R.R. and E.A.D. challenge the district court's decision terminating their parental rights to their child, E.D., asserting that the district court applied the wrong standard of proof, the timelines to complete the case plan were unreasonable, and Beltrami County did not use reasonable efforts to reunify the family. Appellants further contest the district court's determination that clear-and-convincing evidence supported adjudicating their other daughter, A.D., as a child in need of protection or services. Because clear and convincing evidence supports the district court's termination decision, and because substantial evidence supports the district court's adjudication of A.D. as a child in need of protection or services, we affirm.

FACTS

E.D. was born June 11, 2010, to appellant mother B.E.R.R. and appellant father E.A.D. Because B.E.R.R. needed help caring for E.D., B.E.R.R.'s mother lived with B.E.R.R. and E.A.D. for almost all of the time E.D. was in B.E.R.R.'s care. In August 2011, Polk County Social Services received a child-protection report from a medical facility that B.E.R.R. was using marijuana and Oxycodone. Polk County attempted to provide services to B.E.R.R., but, after one conversation with her, was not able to get in contact with B.E.R.R. again. From November 2011 to March 2012, E.A.D. was in prison.

In May 2012, E.A.D. assaulted B.E.R.R.'s mother when E.D. was present, and as a result, B.E.R.R.'s mother went to a women's shelter. Beltrami County Health and

Human Services received a child-protection report concerning the assault. Because B.E.R.R. was so reliant on her mother's care for E.D., B.E.R.R. brought E.D. to the shelter and left her with B.E.R.R.'s mother. E.A.D. was charged with domestic assault and convicted of disorderly conduct.

In July 2012, the family, including B.E.R.R.'s mother, became homeless and stayed in various hotels. Beltrami County Health and Human Services received two child-protection reports that month, alleging drug use by both parents and possible physical abuse of the child by E.A.D. On July 9, 2012, E.D.'s parents brought her to urgent care claiming that she had been hit in the face while at a friend's home. B.E.R.R.'s mother testified at trial, however, that E.A.D. hit E.D.

On August 7, 2012, the car B.E.R.R. and E.A.D. were traveling in was stopped by Pike Bay Police Chief Zebulon Hemsworth. E.D. was in the car with them, not fastened in her car seat. Chief Hemsworth saw B.E.R.R. "inappropriately yelling" at E.D., and B.E.R.R. told him that "she was having a difficult time not beating" the child. The police found several prescription bottles in the car, two in B.E.R.R.'s name and one bottle of Oxycodone in the name of B.E.R.R.'s mother, as well as other evidence of drug use, including a pill cutter, syringe needles, alcohol pads, bandages, and a spoon. Chief Hemsworth also observed small marks above the veins on both of B.E.R.R.'s arms, consistent with needle marks. B.E.R.R. was arrested and later charged with felony possession of a controlled substance.

After B.E.R.R. was arrested, E.D. went with her father to the hotel where they were staying. B.E.R.R.'s mother, accompanied by Chief Hemsworth, picked E.D. up

from the hotel out of concern for E.D.'s safety. The chief observed that E.A.D.'s eyes were red and watery, leading him to believe E.A.D. was under the influence of marijuana. B.E.R.R.'s mother was homeless at this time, and she and E.D. eventually went to a women's shelter.

On August 13, 2012, Beltrami County Health and Human Services picked up E.D. from the shelter and placed her in protective care. Beltrami County petitioned for E.D. to be found a child in need of protection or services (CHIPS). B.E.R.R. was in jail from August 7 to August 20, and August 27 to October 5, stemming from her August 7 arrest and other criminal charges. E.A.D. was in jail for parts of September and October 2012, serving a sentence for disorderly conduct.

B.E.R.R. and E.A.D. admitted that E.D. was a child in need of protection or services on November 1, 2012. B.E.R.R. and E.A.D.'s case plan required that they: (a) provide safe and stable housing free of drugs and alcohol; (b) complete diagnostic assessments and follow all recommendations; (c) complete chemical dependency assessments and follow all recommendations; (d) participate in a parenting class; (e) refrain from the use of alcohol, non-prescribed controlled substances, and illegal drugs, and submit to random urinalysis or other drug testing; (f) sign all necessary authorizations and releases for the child and themselves; (g) cooperate with Beltrami County and the Guardian ad Litem; (h) allow random access to their place of residence to Beltrami County and the Guardian ad Litem; (i) provide prescriptions for any medication; and (j) keep service providers informed of their whereabouts and current address and phone numbers.

Another child, A.D., born January 2, 2013, to B.E.R.R. and E.A.D., tested positive for Oxycodone at birth and experienced severe symptoms of withdrawal for two weeks. B.E.R.R. tested positive for THC and Oxycodone the day before A.D.'s birth. Two days later, B.E.R.R. was arrested for a probation violation and E.A.D. was arrested for felony theft of a motor vehicle. Beltrami County petitioned for A.D. to be adjudicated a child in need of protection or services. B.E.R.R. remained incarcerated until February 12, 2013, and entered chemical dependency treatment shortly thereafter; E.A.D. remained incarcerated until trial in this case, when he had approximately three months left to serve.

As of the January 10, 2013, permanency progress review hearing, the parents were not complying with the case plan in E.D.'s case. The district court ordered the county to file a permanency plan. On January 28, Beltrami County petitioned to terminate B.E.R.R. and E.A.D.'s parental rights to E.D.

A joint termination-of-parental-rights and CHIPS-adjudication trial was held on March 4, 2013, in Beltrami County. Witnesses included Pike Bay police officers, the Guardian ad Litem, B.E.R.R.'s mother and grandmother, and social workers from Beltrami County Health and Human Services, Polk County Social Services, and Sanford Bemidji Medical Center. Both parents testified as well.

The district court ordered B.E.R.R. and E.A.D.'s parental rights to E.D. terminated, ruling that reasonable efforts had failed to correct the conditions leading to out-of-home placement. In a separate order, the district court concluded that A.D. is a child in need of protection or services, finding that (a) she is without proper parental care because of the emotional, mental, or physical disability, or state of immaturity of her

parents and (b) she is a child whose environment is such as to be injurious or dangerous to her. This appeal followed.

D E C I S I O N

I. Termination of Parental Rights to E.D.

Parental rights may be terminated "only for grave and weighty reasons." *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). "We defer to the district court's decision on termination if at least one statutory ground for termination is supported by clear-and-convincing evidence and termination is in the children's best interests." *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 665 (Minn. App. 2012) (citation omitted). We review the district court's findings of fact "to determine whether they address the statutory criteria for termination and are not clearly erroneous in light of the clear-and-convincing standard of proof." *Id.* (citation omitted). We review the district court's determination of whether a statutory basis is present for an abuse of discretion. *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 87 (Minn. App. 2012). For the reasons set forth below, we affirm the district court's determination.

As a threshold issue, B.E.R.R. and E.A.D. argue that the district court wrongly applied a clear-and-convincing standard of proof instead of a beyond-a-reasonable-doubt standard because it is a violation of the Equal Protection Clause to use a different standard for non-Indian children than Indian children.[1] *See* Minn. R. Juv. Prot. P. 39.04,

[1] On the record developed before the district court, E.D. and A.D. were not eligible for membership in an Indian tribe. After these appeals were argued before this court on September 18, 2013, counsel for appellant E.A.D. moved for a declaration that this case be considered under the Indian Child Welfare Act, relying on newly discovered

subd. 2 (stating that the standard of proof in a termination of parental rights matter involving an Indian child, pursuant to the Indian Child Welfare Act, is beyond a reasonable doubt). Because B.E.R.R. and E.A.D. cite no authority and do not engage in any constitutional analysis, their assertions are waived. *See State Dep't of Labor & Indus. by the Special Comp. Fund v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issue in absence of adequate briefing); *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971) (stating that unsupported assertion of error "will not be considered on appeal unless prejudicial error is obvious on mere inspection").

Even if we were to consider the issue, B.E.R.R. and E.A.D.'s argument is without merit. "A threshold consideration in determining whether a statute violates equal protection is whether similarly situated individuals are treated differently." *Healthstar Home Health, Inc. v. Jesson*, 827 N.W.2d 444, 449 (Minn. App. 2012). The Indian Child Welfare Act is meant to "protect the best interests of Indian children and to promote the stability and security of Indian tribes." *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 166 (Minn. App. 2005) (quotation omitted). Because Indian children and non-

---

information about the eligibility of E.D. for enrollment as a tribal member. This issue was not raised during the proceedings from which these appeals are taken, and it was not decided by the district court. The documentation on which E.A.D. relies is not part of the record on appeal. *See* Minn. R. Civ. App. P. 110.01 (limiting record on appeal to papers filed in the district court, exhibits, and transcripts). The appellate rules do not authorize a party to seek a first-time declaration on tribal eligibility from this court. Because the motion is not properly before us, we decline to consider the extra-record evidence or to comment on any remedies that may be available to E.A.D. beyond the context of this appeal.

Indian children are not similarly situated individuals, B.E.R.R. and E.A.D.'s equal-protection argument fails.

A. *Statutory Basis for Termination*

The district court terminated B.E.R.R. and E.A.D.'s parental rights under Minn. Stat. § 260C.301, subd. 1(b)(5) (2012). Parental rights may be terminated under this statutory basis if "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." *Id.* A presumption that reasonable efforts have failed arises if (1) the child is under age eight and has resided in court-ordered, out-of-home placement for six months; (2) the court approved an out-of-home placement plan; (3) the conditions leading to the out-of-home placement have not been corrected, which is presumptively shown by a parent's failure to "substantially compl[y] with the court's orders and a reasonable case plan;" and (4) the county made reasonable efforts to rehabilitate the parent and reunite the family. *Id.*

Here, the district court found that the out-of-home placement plan provided reasonable goals, the conditions leading to out-of-home placement of E.D. have not been corrected, neither B.E.R.R. nor E.A.D. have substantially complied with the court's orders or the case plan, and the county made reasonable efforts to rehabilitate the parents and reunite the family. Because E.D. was two years old at the time of trial and had resided in out-of-home placement for about six-and-a-half months, the presumption that reasonable efforts have failed applies. *See id.*

These findings are not clearly erroneous, and they meet the clear-and-convincing-evidentiary standard. Based on the testimony at trial, B.E.R.R. and E.A.D. did not cooperate or maintain contact with the county or the Guardian ad Litem, did not refrain from the use of alcohol or drugs, did not complete a parenting class, did not have a safe and stable place to live that was free of drugs, and did not provide access to where they were staying—all of which were required by the case plan. E.A.D. did not complete the assessments as ordered. B.E.R.R. completed a chemical-dependency assessment five months after E.D. was placed and while in jail on probation violations, one of which was the failure to complete that very assessment. B.E.R.R. met the criteria for opiate dependence and went to treatment shortly before trial in this matter, as required for her Polk County conviction. The diagnostic assessment that B.E.R.R. completed, six months after E.D. was placed in protective custody, was not valid due to B.E.R.R.'s lack of cooperation.

The county attempted to stay in contact with the parents throughout the case and offered many times to set up the assessments and the parenting class, but the parents refused or the county was unable to reach them. And neither parent kept in contact with the county.

Despite the county's reasonable efforts, B.E.R.R. and E.A.D. did not take the steps necessary to work towards reunification. They showed little to no effort in trying to reunify with E.D. It is clear from the record that it was only after the termination-trial date had been set that B.E.R.R. attempted to make slight progress.

The district court's findings of fact satisfy the criteria for terminating B.E.R.R. and E.A.D.'s parental rights to E.D. under subdivision 1(b)(5) of Minn. Stat. § 260C.301. By determining that this statutory basis was present, the district court did not abuse its discretion.

1. Timelines

B.E.R.R. and E.A.D. argue that the county moved too quickly in terminating their parental rights to E.D. Without citing case law, they state that this case should be compared to others "where the timelines are extended and extended over and over" for several years. B.E.R.R. and E.A.D. request, after acknowledging that they did not comply with the court's orders, a chance to prove they have turned their lives around.

The district court and the county did not move too quickly in this case. Rather, the district court followed Minnesota law in ordering the county to file a permanency petition when it did. A permanency progress review hearing must be held within six months of placement of a child under the age of eight. Minn. R. Juv. Prot. P. 42.03; *see also* Minn. Stat. § 260C.204(a) (2012) (stating that "no later than six months after the child's placement the court shall conduct a permanency progress hearing"). If the district court determines, based on that review hearing,

> that the . . . parent is not complying with the case plan or out-of-home placement plan, the court may order the responsible social services agency to develop a plan for permanent placement of the child away from the parent and to file a petition to support an order for the permanent placement plan within thirty (30) days of the hearing.

Minn. R. Juv. Prot. P. 42.03, subd. (b)(2). A trial on a termination petition must be held within 60 days of the filing of the petition. Minn. Stat. § 260C.204(d)(3).

As of January 10, 2013, the date of the permanency progress review hearing and about five months since E.D. was placed out of the home, B.E.R.R. and E.A.D. had not completed the diagnostic or chemical-dependency assessments, had not arranged to attend a parenting class, and were not cooperating and staying in regular contact with the county. As a result, the district court ordered that a permanency plan be filed by January 31. This action accorded with Minn. R. Juv. Prot. P. 42.03 and Minn. Stat. § 260C.204. Contrary to B.E.R.R. and E.A.D.'s assertions, Minnesota law does not prohibit a permanency petition from being filed before a child has been out of the home for six months. *See* Minn. Stat. § 260C.204.

Although the case plan was approved by the court in November 2012, three months after E.D. was placed out of the home, the district court found that B.E.R.R. and E.A.D. "were made aware of [the case plan] requirements before the case plan was reduced to writing during their meetings with [the county]." In fact, the record shows that the social workers met with B.E.R.R. in jail in early September 2012. The district court specifically addressed the parties' concerns about timing in its order, finding that the court "has scheduled regular review hearings and has set reasonable goals . . . to work toward reunification. The parents ignored the court orders, the case plan and the reasonable efforts made by Beltrami County."

These findings are supported by the record. The approval of the case plan three months after E.D.'s placement does not warrant reversal. *See Matter of Welfare of*

J.J.L.B., 394 N.W.2d 858, 863 (Minn. App. 1986) (holding reversal unwarranted where county filed case plan two years after children's placement because mother failed to cooperate and the underlying purpose for the case plan was met through court orders that gave guidelines for reunification).

The parents also allege that the county "paid lip service to reunification," hoping the foster parents would adopt E.D. But the district court did not base its termination decision on E.D.'s adoptability. Instead, the court properly found that the county made reasonable efforts to reunify the family.

2. Reasons for Termination

B.E.R.R. and E.A.D. assert that their parental rights were terminated because of their chemical-dependency issues and their incarceration during the case. These problems were not the sole bases for termination, however. "Although a parent's incarceration alone is not enough to warrant termination of parental rights, the district court may consider the fact of incarceration in conjunction with other evidence supporting the petition for termination." *In re Child of Simon*, 662 N.W.2d 155, 162 (Minn. App. 2003). The district court terminated appellants' parental rights not based on incarceration alone, but, as discussed above, because the conditions leading to E.D.'s out-of-home placement were not corrected after reasonable efforts by Beltrami County.

B.E.R.R. and E.A.D. attempt to minimize any chemical-dependency issues they have, and B.E.R.R. argues that no evidence shows she abused her Oxycodone prescription. But both B.E.R.R. and E.A.D. admit on appeal that they are "untreated chemically dependent individuals." The district court credited B.E.R.R.'s mother's

testimony that B.E.R.R. and E.A.D. stole her prescriptions for Oxycodone and that B.E.R.R. used a syringe to inject the Oxycodone with E.A.D.'s help. We defer to the district court's credibility determinations. *See Matter of Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996) (stating that district courts are in a superior position to appellate courts in assessing witness credibility).

3. B.E.R.R.'s Depression

B.E.R.R. argues that the evidence does not support the finding that the county provided reasonable efforts because the case plan did not take her mental-health issues into consideration. The case plan did, in fact, consider B.E.R.R.'s mental health. The plan required B.E.R.R. to complete a diagnostic assessment to evaluate her mental health, after which the county could provide services to address any issues that arose. The county attempted to set up the assessment for B.E.R.R., but she refused its help. B.E.R.R. told Beltrami County that she had been treated for depression, but did not provide the county with records of her diagnosis or treatment. The district court found that service providers did not have any documentation regarding her diagnosis or any prescriptions provided to treat depression, that the county attempted to get this information, and that it was only at trial that the information was provided to the county and to the court. These findings are not clearly erroneous.

B. *Best Interests*

"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." *K.S.F.*, 823 N.W.2d at 668. "We review a district court's ultimate

determination that termination is in a child's best interest for an abuse of discretion." *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 905 (Minn. App. 2011), *review denied* (Jan. 6, 2012).

In assessing a child's best interests, "the court must balance three factors: (1) the child's interest in preserving the parent-child relationship; (2) the parent's interest in preserving the parent-child relationship; and (3) any competing interest of the child. Competing interests include such things as a stable environment, health considerations and the child's preferences." *Id.* (internal citations and quotations omitted).

B.E.R.R. and E.A.D. do not challenge the district court's ruling on E.D.'s best interests. After detailed findings, the district court concluded that it is in E.D.'s best interests for B.E.R.R. and E.A.D.'s parental rights to be terminated. Regarding E.D.'s interest in preserving the parent-child relationship, the testimony at trial supports the court's findings that E.D. is not bonded with her parents and that she had very negative reactions after visitation with them, including becoming insecure, worried, and distressed; regressing in toilet training; and exhibiting self-injurious behavior.

The district court's findings also showed that neither parent made much effort to preserve the parent-child relationship. B.E.R.R. attended seven of the eleven scheduled visits with E.D., and E.A.D. attended only five. They showed no recognition of the need to put their daughter's needs ahead of their own. E.A.D. did not progress on the case plan, and, although B.E.R.R. began making tentative progress shortly before trial, her overall lack of effort and cooperation during the case showed that she had little interest in preserving her relationship with her daughter.

In weighing any competing interests, the record is clear that the balance falls in favor of termination. The record shows that E.D.'s parents could not provide her with a stable environment and that E.D. was not provided adequate medical or dental care while in their care. Since being removed, E.D.'s medical and dental needs have been met and she is attending an early-childhood-education class. The Guardian ad Litem recommended termination and stated that it would be "disastrous" for E.D. to return to the care of her parents, where "there's no stable housing, there's chemical use, [and] there's been domestic assaults witnessed." In sum, the district court did not abuse its discretion in determining that termination of B.E.R.R. and E.A.D.'s parental rights is in E.D.'s best interest.

II. Adjudication of A.D. As a Child In Need of Protection or Services

"Findings in a CHIPS proceeding will not be reversed unless clearly erroneous or unsupported by substantial evidence." *Matter of Welfare of B.A.B.*, 572 N.W.2d 776, 778 (Minn. App. 1998). We determine "whether the record contains substantial evidence to support the district court's decision, taking into account that the burden of proof in the district court is clear and convincing evidence." *Id.* (quotation omitted). "The district court is vested with broad discretionary powers when deciding juvenile-protection matters." *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 733 (Minn. App. 2009) (quotation omitted).

The district court found that reasonable efforts were made to prevent placement of A.D. and determined that, based on two statutory bases, A.D. is a child in need of protection or services. The court found that (a) A.D. is without proper parental care

because of the emotional, mental, or physical disability, or state of immaturity of her parents; and (b) she is a child whose environment is such as to be injurious or dangerous to her. *See* Minn. Stat. § 260C.007, subds. 6(8), 6(9) (2012).

B.E.R.R. argues that insufficient evidence supported the district court's determination that A.D. is a child in need of protection or services. We disagree. The district court's findings are supported by substantial evidence and are not clearly erroneous. When Beltrami County learned that B.E.R.R. was pregnant with A.D., social workers urged her to seek prenatal care and offered to help her arrange it. B.E.R.R. refused the help and did not receive any prenatal care. She tested positive for THC and Oxycodone at the time of A.D.'s birth despite being under court order to comply with the case plan in E.D.'s case that forbade use of drugs. A.D. tested positive for Oxycodone when she was born and experienced severe withdrawal symptoms for two weeks. Because B.E.R.R. was not active enough in caring for A.D., she was not allowed to stay at the hospital with A.D. while her daughter received further care. The district court properly exercised its broad discretion in finding that A.D. is without proper parental care and that her environment is injurious to her.

Affirmed.