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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0970

In the Matter of the
Welfare of the Children of:
J. L. M. and J. J. F., Parents.

Filed December 23, 2013
Affirmed
Johnson, Judge

Scott County District Court
File Nos. 70-JV-12-25434, 70-JV-13-1340

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Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Smith, Judge.

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

JOHNSON, Judge

The Scott County District Court terminated J.J.F.'s parental rights to two children on three independent grounds: that he is palpably unfit, that reasonable efforts failed to

correct the conditions that led to the children's out-of-home placement, and that the children were neglected and in foster care. The district court also found that termination is in the children's best interests. On appeal, J.J.F. argues that the record does not support the district court's findings or its ultimate determination. We conclude that the district court's findings are supported by substantial evidence and that the district court did not err by deciding that termination is appropriate. Therefore, we affirm.

FACTS

J.J.F. and J.L.M. met in chemical-dependency treatment in 2005 and have been in a volatile, intermittent relationship since then. They have had four children together. Their parental rights to their first child previously were terminated. J.J.F.'s parental rights to their second and third children are at issue in this appeal.

In February 2006, J.L.M. gave birth to the couple's first child, N.M., who was born with cocaine in her system and immediately was taken into the custody of Dakota County child-protection authorities. Dakota County subsequently filed a CHIPS petition and pursued the termination of J.L.M.'s and J.J.F.'s parental rights to N.M.

During the pendency of the Dakota County case, J.L.M. became pregnant with the couple's second child. Dakota County proposed that J.L.M. voluntarily terminate her rights to the first child, N.M., in exchange for the county's agreement to not pursue termination of her parental rights to the second child, so long as the second child was born without controlled substances in his or her system. The parties so agreed.

The second child, N.J.M., was born in April 2007 without any chemicals in his system. At a hearing later that month, J.L.M. voluntarily terminated her parental rights to

N.M. J.J.F. was given notice of the termination proceedings regarding N.M. and attended a preliminary hearing in the matter. He requested that his first appearance be continued. He was given a new hearing date, but he failed to appear. In June 2007, the district court found the allegations in the county's petition to be true with respect to J.J.F. and, accordingly, issued an order terminating his parental rights to N.M. by default. J.J.F. did not appeal. By all accounts, J.L.M. and N.J.M. did well on their own, and Dakota County closed its file in November 2007.

In March 2010, J.L.M. gave birth to the couple's third child, A.F., who tested positive for methadone and opiates at birth. Ramsey County child-protection authorities intervened and informally placed A.F. with J.L.M.'s brother and sister-in-law. In June 2010, Ramsey County filed a CHIPS petition. N.J.M. remained in J.L.M.'s care during the pendency of the Ramsey County CHIPS case. Ramsey County returned A.F. to J.L.M. in October 2010 and closed its file in June 2011.

In August 2011, J.L.M. gave birth to the couple's fourth child, Z.M. Z.M. was healthy and chemical-free at birth but died of sudden-infant-death syndrome in December 2011. A child-welfare assessment and a law-enforcement investigation were conducted, the death was ruled accidental, and no legal proceedings were initiated.

From 2007 to 2012, J.J.F. spent a significant amount of time in jail, prison, or civil commitment. In the summer of 2012, J.J.F. was released from prison. He lived with J.L.M. and the children in an apartment in Shoreview until the end of October 2012, when the landlord refused to renew the lease because of problems arising from J.J.F.'s presence at the apartment. J.J.F. was struggling with mental illness at the time and was

not appropriately medicated. The family moved into a motel for a short time and then moved in with J.J.F.'s sister and her family in Burnsville. Shortly thereafter, J.J.F. began having conflicts with his brother-in-law. The living situation soon became untenable, and J.J.F. was asked to leave in mid-November 2012. J.L.M., N.J.M., and A.F. were permitted to stay for a couple of additional weeks, during which time J.L.M. found a townhome to rent in Savage.

While awaiting approval of the rental application in Savage, J.L.M., J.J.F., A.F., and N.J.M. moved into a motel. One night during the motel stay, J.L.M. and J.J.F. went out for the evening and left A.F. and N.J.M. with another resident in the motel. J.L.M.'s mother arrived at the motel and found A.F. and N.J.M. unsupervised. She stayed in the room with the children until the babysitter arrived, but she then took the children to her home in Farmington. J.L.M. attempted to get the children back from her mother, but she had no transportation and was unable to travel to Farmington. J.L.M.'s mother contacted Dakota County child-protection authorities and made allegations about both J.L.M. and J.J.F., but she later clarified that she was principally concerned about J.J.F. and the negative effects of his mental illness, drug use, and criminal behavior on his children. During its initial investigation, Dakota County discovered that J.L.M. was a Scott County resident and referred the matter to Scott County Human Services.

Scott County filed a CHIPS petition in December 2012 and a petition to terminate J.L.M.'s and J.J.F.'s parental rights to A.F. and N.J.M. in January 2013. The latter petition alleged four statutory bases for termination: (1) failure to comply with the duties of the parent-child relationship, *see* Minn. Stat. § 260C.301, subd. 1(b)(2) (2012);

(2) palpable unfitness, *see id.* § 260C.301, subd. 1(b)(4); (3) failure of reasonable efforts to correct conditions leading to placement, *see id.* § 260C.301, subd. 1(b)(5); and (4) the children are neglected and in foster care, *see id.* § 260C.301, subd. 1(b)(8). Because J.J.F.'s parental rights to another child previously had been involuntarily terminated, the district court, at a pre-trial hearing in January 2013, approved the county's request to be relieved of any reunification efforts with respect to J.J.F., pursuant to Minn. Stat. § 260.012(a)(2).

The district court held a seven-day trial in March and April of 2013. The county called 19 witnesses. J.L.M. called one witness, her mother. J.J.F. testified on his own behalf but did not did not call any other witnesses. A total of 121 exhibits were introduced.

The evidentiary record reveals that J.J.F. has been diagnosed with schizoaffective disorder, bipolar type; antisocial personality disorder; impaired judgment; very poor functioning; and polysubstance dependence (methamphetamine, cocaine, cannabis, alcohol). In July 2008, he was committed as a person who is mentally ill to a secure treatment facility, and his commitment was continued until April 2009. He has been referred for commitment three times. In October 2012, shortly before Scott County commenced this case, J.J.F. was placed on a 72-hour hold after his mother called 911 because J.J.F. was convinced he was being followed. He has expressed the belief that people are tracking him through cellular telephones.

Many of the witnesses testified to J.J.F.'s extensive mental health problems and troublesome behavior. The witnesses testified that when he is not properly medicated,

J.J.F.'s behavior is "bizarre," "erratic," "strange," "incoherent," "crazy," "not normal," "unstable," "irrational," "dishonest," and "dangerous." Every witness, including J.J.F. himself, testified that he is incapable of properly caring for his children when he is not properly medicated.

The evidence also reveals that J.J.F.'s mental health issues affect his relationships with his children and other persons. The Scott County social worker testified that, during visits with the children, J.J.F.'s behaviors were erratic and unpredictable and that he was unable to understand when his children were uncomfortable with his behavior. The Scott County case manager testified that the county stopped providing transportation services to J.J.F. because they were concerned for the safety of their social workers. On one occasion, when J.J.F. was in the car with his mother and not medicated, he grabbed the steering wheel, jeopardizing her safety.

In addition, J.J.F. has an extensive history of chemical dependency. He has abused alcohol, marijuana, crack cocaine, methamphetamine, heroin, and other opiates. In December 2012, shortly after Scott County commenced this case, he tested positive for cocaine and methamphetamine. J.J.F. was scheduled to provide Scott County with twelve urinalysis samples during the pendency of the CHIPS case. At the time of trial, he had missed appointments to provide eleven of those samples.

J.J.F. also has an extensive criminal history. On the day of A.F.'s birth, J.J.F. stole computers from the hospital, for which he later was convicted of felony theft. He has been convicted of a total of ten felonies, including the sale of a simulated controlled substance, possession of burglary tools, second-degree burglary, third-degree burglary on

four occasions, receiving stolen property on two occasions, and fleeing in a motor vehicle. In the time between the termination petition and trial, J.J.F. was charged with an eleventh felony offense, which was pending in the Dakota County District Court at the time of trial.

The Scott County case manager testified that terminating both parents' rights would be in the best interests of the children because of J.L.M.'s and J.J.F.'s past history and pattern of not maintaining sobriety and stability, combined with J.J.F.'s recent instability and chemical use, which resulted in the children being placed in foster care. The guardian *ad litem* also testified that termination of both parents' rights would be in the best interests of the children. She expressed concern that J.L.M. and J.J.F. would be unable to provide the children the stability and consistency that they need.

In May 2013, the district court issued a 28-page order and memorandum, which denied the petition to terminate J.L.M.'s parental rights but granted the petition to terminate J.J.F.'s parental rights. The district court concluded that the county had established, by clear and convincing evidence, three of the four alleged statutory grounds for terminating J.J.F.'s parental rights. First, the district court concluded that J.J.F. did not rebut the presumption of palpable unfitness and, in addition, that the county proved that J.J.F. is palpably unfit to parent. *See* Minn. Stat. § 260C.301, subd. 1(b)(4). Second, the district court concluded that reasonable efforts failed to correct the conditions that led to the children's out-of-home placement. *See id.*, § 260C.301, subd. 1(b)(5). And third, the court concluded that the children are neglected and in foster care. *See id.*,

§ 260C.301, subd. 1(b)(8). The court also concluded that it is in the best interests of A.F. and N.J.M. that the parental rights of J.J.F. be terminated. J.J.F. appeals.

D E C I S I O N

J.J.F. argues that the district court erred by concluding that the county proved three bases for termination of his parental rights and in concluding that termination would be in the children's best interests.

"We review the termination of parental rights to determine whether the district court's findings address the statutory criteria and whether the district court's findings are supported by substantial evidence and are not clearly erroneous." *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). "We give considerable deference to the district court's decision to terminate parental rights[,]" but we also "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *Id.* 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 child's best interests." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004).

The district court concluded that the county had established three statutory grounds for terminating J.J.F.'s parental rights. Because we conclude that the first ground is sufficient to support the district court's order, we confine our discussion to that issue, without addressing the second and third grounds.

A. Palpable Unfitness

A district court may terminate parental rights to a child if it finds that the 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)(4).

1. Presumption

In general, the petitioning party bears the burden of proving palpable unfitness by clear and convincing evidence. *See id.* § 260C.317, subd. 1. But if a parent's rights to another child previously were involuntarily terminated, a presumption of palpable unfitness arises. *Id.* § 260C.301, subd. 1(b)(4). If the presumption is triggered, the parent has the burden of producing evidence to rebut the statutory presumption. *In re Welfare of Child of J.L.L.*, 801 N.W.2d 405, 412 (Minn. App. 2011), *review denied* (Minn. July 28, 2011). The presumption "'does not shift to [a parent] the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.'" *In re Welfare of J.W.*, 807 N.W.2d 441, 445 (Minn. App. 2011) (alteration in original) (quoting Minn. R. Evid. 301), *review denied* (Minn. Jan. 6, 2012). Rather, the statutory presumption shifts to a parent a burden of production. *Id.*

In this case, it is undisputed that J.J.F.'s parental rights to his first child, N.M., were involuntarily terminated. Accordingly, the district court applied the presumption of palpable unfitness and concluded that J.J.F. failed to meet his burden of production to rebut the presumption. On appeal, it is unclear whether J.J.F. is arguing that the district

court erred by concluding that he failed to meet his burden of production for rebutting the presumption. In the interests of thorough appellate review, we will construe his brief to raise that issue.

To satisfy the burden of production and thereby rebut the presumption created by section 260C.301, subdivision 1(b)(4), a parent must introduce evidence that would "'justify a finding of fact'" that he or she is not palpably unfit. *Id.* at 445-46 (quoting Minn. R. Evid. 301, 1977 comm. cmt.); *see also J.L.L.*, 801 N.W.2d at 412; *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 554 (Minn. App. 2007), *review denied* (Minn. July 17, 2007). But "'a parent must do more than engage in services'" and "'must demonstrate that his or her parenting abilities have improved.'" *J.W.*, 807 N.W.2d at 446 (quoting *In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 545 (Minn. App. 2009)). This court has stated that "'a parent must affirmatively and actively demonstrate her or his ability to successfully parent a child.'" *Id.* (quoting *In re Welfare of D.L.R.D.*, 656 N.W.2d 247, 251 (Minn. App. 2003)). "'To shoulder this burden, the parent . . . is inevitably required to marshal any available community resources to develop a plan and accomplish results that demonstrate the parent's fitness.'" *Id*. (alteration in original) (quoting *D.L.R.D.*, 656 N.W.2d at 251). This court applies a *de novo* standard of review to the district court's determination as to whether a parent has met his burden of production. *Id*. at 446.

At trial, J.J.F. testified that his mental health had been stable for only three weeks. He acknowledged that he had missed nearly every scheduled urinalysis test with Scott County, but said, "I'm willing to put my everything into full compliance" in the future. He testified that he planned to attend regular chemical-dependency treatment meetings,

but he had not yet taken any steps toward doing so. He also testified that he had obtained a job from his brother, but acknowledged that he had not actually started working.

To satisfy his burden, J.J.F. is required to do more than make plans. He "must demonstrate that [his] parenting abilities have improved," *see D.L.D.*, 771 N.W.2d at 545, and "affirmatively and actively demonstrate [his] ability to successfully parent a child," *see D.L.R.D.*, 656 N.W.2d at 251. A plan to do better is not enough; a parent must "accomplish results that demonstrate the parent's fitness." *Id*. On this record, J.J.F. has failed to introduce evidence capable of supporting a finding that his parenting skills had actually improved. Because J.J.F.'s evidence would not justify a finding contrary to the assumed fact that he is palpably unfit, he did not rebut the statutory presumption of unfitness. *See J.W.*, 807 N.W.2d at 445. Accordingly, the district court did not err by concluding that J.J.F.'s efforts were "too little, too late" to rebut the presumption and by terminating J.J.F.'s parental rights on the basis that he is palpably unfit to parent.

2. Petitioner's Proof

The district court concluded, in the alternative, that the county proved by clear and convincing evidence that J.J.F. is palpably unfit to parent. On appeal, J.J.F. contends that the district court's conclusion is not supported by the record and is clearly erroneous.

By his own admission, and the testimony of all other witnesses, J.J.F. is unable to adequately parent small children when he is not properly medicated. In addition, J.J.F. has a long history of decompensating and failing to responsibly take care of his mental health. His erratic behavior has caused the family to lose their housing on at least two occasions. There have been no periods of substantial stability that might indicate an

ability to successfully parent the children. And there is no evidence that, for the reasonably foreseeable future, J.J.F. has the ability to appropriately care for the needs of his children. Thus, even without the presumption, the evidence is sufficient to support the conclusion that J.J.F. is palpably unfit to parent.

3. Reasonable Efforts

J.J.F. argues that the district court erred by rejecting his argument that Minn. Stat. § 260.012(a)(2), which allows the district court to relieve the county of its obligation to make reasonable efforts to reunify the parent and child, is unconstitutional. In the alternative, he contends that, even if section 260.012(a)(2) is not unconstitutional, Scott County failed to provide additional reunification efforts under subsections (e) and (f) of section 260.012.

Generally, in a CHIPS case, the responsible social services agency is required to make reasonable efforts to facilitate reunification of the parent and child. Minn. Stat. § 260.012(a); *P.T.*, 657 N.W.2d 577, 583-84 (Minn. App. 2003). But the county is relieved of this obligation if the parent's rights to another child previously were involuntarily terminated. Minn. Stat. § 260.012(a)(2). As this court has stated, "The termination statutes clearly provide that when a parent has had parental rights to one or more children involuntarily terminated, the agency is not required to make reasonable efforts to develop a case plan and reunite the parent and child." *D.L.R.D.*, 656 N.W.2d at 251. Because J.J.F.'s parental rights to his first child, N.M., were involuntarily terminated in June 2007, the district court relieved Scott County of its reasonable-efforts obligation with respect to A.F. and N.J.M.

J.J.F. contends that the provision in section 260.012(a)(2) that relieves the county of its reasonable-efforts obligation violates his constitutional rights. This court, however, rejected that argument in *P.T.*, stating that "elimination of the reasonable efforts requirement in [section 260.012(a)(2)], involving cases where there has been a prior involuntary termination, does not violate the Minnesota Constitution." *P.T.*, 657 N.W.2d at 586. Indeed, the *P.T.* court noted that no legal authority had been offered for the proposition that there is a constitutional right to "judicial review of an agency's reasonable efforts in a parental termination case." *Id.* at 585. We find no reason to distinguish this case from *P.T.* Thus, in light of *P.T.*, we conclude that J.J.F.'s argument is without merit.

J.J.F. also contends that, even if the statute is not unconstitutional, the district court erred by concluding that Scott County did not have an obligation to provide additional reunification efforts pursuant to subsections (e) and (f). The district court rejected this argument on the ground that a *prima facie* showing of a prior termination under subsection (a)(2) relieved Scott County of the obligation to make reasonable efforts "*to prevent placement and for rehabilitation and reunification.*" (Emphasis in original.) The district court's analysis is consistent with the plain and unambiguous language of the statute, which provides, "Reasonable efforts to prevent placement and for rehabilitation and reunification are always required except upon a determination by the court . . . that the parental rights of the parent to another child have been terminated involuntarily." Minn. Stat. § 260.012(a), (a)(2). Subsections (e) and (f) do not create an obligation broader than the reasonable-efforts obligation created by subsection (a). Rather,

subsections (e) and (f) merely define and describe the concept of reasonable efforts that is at issue in subsection (a). *See id.* § 260.012(e), (f). But subsections (e) and (f) do not apply if the exception in paragraph (a)(2) is triggered by a prior termination. *See id.* § 260.012(a)(2). Because subsections (e) and (f) do not apply, J.J.F. cannot establish that the county failed to perform any of the actions described in those paragraphs. Thus, the district court did not err by concluding that Scott County was relieved of the requirement to provide reasonable efforts under any of the subdivisions of section 260.012.

B. Best Interests

J.J.F. also argues that the district court erred by concluding that termination is in the children's best interests.

"In analyzing the best interests of the child, 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." *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). "Competing interests include such things as a stable environment, health considerations and the child's preferences." *Id.* "Where the interests of parent and child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301, subd. 7. "Whether termination of parental rights is in a child's best interests is a decision that rests within the district court's discretion." *In re Welfare of Children of D.F.*, 752 N.W.2d 88, 95 (Minn. App. 2008).

The district court found that J.J.F.'s presence in the children's lives "has consistently brought about unsuitable conditions for the children" and that he "has failed

to demonstrate any solid, positive impact that he has made in their lives." The district court further found that the children are able to enjoy a "safe, stable environment free from substance abuse and crime" only when J.J.F. is incarcerated, hospitalized, or otherwise not involved in their lives. The district court found that "[r]ather than contribute to the family in the limited times that he has been present, [J.J.F.] has instead brought the family down."

The evidence in the record supports the district court's findings and conclusion regarding the best-interests requirement. The Scott County case manager testified that terminating J.J.F.'s rights would be in the best interests of the children because of J.J.F.'s past history of not maintaining sobriety and stability, combined with the recent instability and chemical use, which resulted in the children being placed in foster care. The guardian *ad litem* testified that the termination of J.J.F.'s parental rights would be in the best interests of the children because J.J.F. would be unable to provide the children the stability and consistency that they need. Many of the children's relatives testified that the children have enjoyed stability only when J.J.F. has been incarcerated. Thus, we conclude that the district court did not err by concluding that termination of J.J.F.'s parental rights would be in the children's best interests.

Affirmed.