STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0265

In the Matter of the Welfare of the Child of:
D.R.F. and R.S.B., Parents.

Filed September 1, 2009
Affirmed
Bjorkman, Judge

Scott County District Court
File Nos. 70-JV-07-21043, 70-FA-07-12688

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D.R.F., 26552 Evergreen Court, Elko, MN 55020 (pro se respondent)

Debra Lynch, 206 Scott Street, Shakopee, MN 55379 (guardian ad litem)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges the district court's termination of his parental rights, arguing that (1) the record does not support the district court's findings as to the statutory bases for termination and the child's best interests; (2) the district court abused its discretion in not permitting four of his witnesses to testify by telephone; and (3) respondent failed to join the county social-services agency as required by statute. We affirm.

FACTS

Sixteen-year-old C.B.B. is the daughter of appellant-father R.S.B. and respondent-mother D.R.F. During the first seven months of C.B.B.'s life, appellant exercised sporadic and infrequent voluntary parenting time with her. The last time he had contact with her was December 23, 1993. Since then, appellant has spent most of his years in jail, in prison, or on some sort of supervised release. He is currently incarcerated in Arizona, with release scheduled for no earlier than January 30, 2012.

In October 2006, appellant wrote to respondent, asking to have contact with C.B.B. After consulting with C.B.B., respondent denied the request. In early January 2007, appellant petitioned the district court for an order granting him parenting time, which he would accomplish by communicating with C.B.B. in writing and by telephone, sending her gifts and holiday cards, and receiving her school reports and pictures.

Respondent then initiated this termination of parental rights (TPR) proceeding, alleging three grounds under Minn. Stat. § 260C.301 (2006): abandonment, under subdivision 1(b)(1); refusal or neglect to fulfill parental duties, under subdivision 1(b)(2); and palpable unfitness to parent, under subdivision 1(b)(4). Respondent later alleged a fourth ground, egregious harm, under Minn. Stat. § 260C.301, subd. 1(b)(6).

The district court appointed a guardian ad litem (GAL) who interviewed the parties, C.B.B., and other present and former extended family members. Following a trial, the district court concluded that respondent proved two statutory bases for termination: abandonment and refusal or neglect to fulfill parental duties. The district

court also determined that termination of appellant's parental rights was in C.B.B.'s best interests. This appeal follows.

D E C I S I O N

I. Clear and convincing evidence supports the district court's termination findings.

Because "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), "[t]his court exercises great caution" when reviewing termination proceedings, *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996). We review decisions to terminate parental rights to determine "whether the [district court's] findings address the statutory criteria, whether those findings are supported by substantial evidence, and whether they are clearly erroneous." *In re Welfare of D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997). "A finding is clearly erroneous if it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660–61 (Minn. 2008) (quotation omitted). "[B]ecause a child's best interests are a paramount consideration in TPR proceedings," the district court cannot terminate parental rights unless it is in the child's best interests. *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 149 (Minn. App. 2007), *review denied* (Minn. Mar. 28, 2007).

Here, the district court found that the evidence supported two of respondent's asserted statutory grounds for termination and that termination of appellant's parental

rights was in C.B.B.'s best interests. Appellant argues that the district court's findings lack support in the record and are clearly erroneous.

A. Abandonment

The district court may terminate parental rights if it finds "that the parent has abandoned the child." Minn. Stat. § 260C.301, subd. 1(b)(1). "Abandonment may be established . . . if the parent has actually deserted the child and has an intention to forsake the duties of parenthood." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004) (quotation omitted).

In *R.W.*, the supreme court concluded that the record supported the district court's finding that R.W. abandoned his children when he "failed to maintain any direct contact with the children during incarceration, failed to inquire about their welfare . . . , [and] relied on the children's mother to assume sole responsibility." *Id.* at 56. R.W. lived with his children for less than three years before he was incarcerated and did not maintain contact with them through letters, cards, or gifts while he was in prison. *Id.* at 52. Although R.W. claimed that he did not want to lose his children, he did not seek information about their whereabouts or status even though he contemporaneously maintained contact with a child by another woman. *Id.* at 53. The supreme court noted the district court's finding that "as a result of appellant's failure to maintain contact with his children, the parent–child relationship between them is now nonexistent." *Id.* at 56 (quotation omitted).

Here, as in *R.W.*, the district court found that appellant abandoned his daughter by not being present or having contact with her since she was about seven months old. The

district court also found that appellant intended to forsake his parental duties as evidenced by his failure to make any effort to establish contact or fulfill his parental duties during periods when he could have done so. The record substantially supports these findings. Appellant's argument that he has established and maintained relationships with his other children by other mothers is unavailing. The issue is whether he has abandoned *this* child. The district court's finding that he has is not clearly erroneous.[1]

B. C.B.B.'s best interests

When analyzing a child's best interests, the court must balance "(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). "During this balancing process, the interests of the parent and child are not necessarily given equal weight." *Id.*

Appellant argues that the district court erred in even considering C.B.B.'s best interests and in concluding termination was in her best interests. We disagree. First, the district court properly conducted its best-interests analysis only after concluding that respondent had established two statutory grounds for termination. *See R.W.*, 678 N.W.2d at 54 (noting "the clear statutory directive that parental rights cannot be terminated in the absence of at least one statutory ground for termination"). Second, the district court addressed the three best-interests factors, finding that C.B.B. has no interest in

[1] Appellant also challenges the district court's conclusion that he refused or neglected to fulfill his parental duties. But to affirm, we only need to conclude that one of the grounds the district court relied on to terminate parental rights is supported by the evidence. *T.R.*, 750 N.W.2d at 661. Accordingly, we do not reach the alternative basis for termination.

establishing or preserving a relationship with appellant, and that she has a considerable interest in preserving the stable family she has, including a desire to be adopted by the "father she knows," respondent's husband, who has known C.B.B. since she was two years old and raised her since he married respondent in 2001. Other testimony in the record also supports the district court's best-interests findings. The GAL opined that termination of appellant's parental rights is in C.B.B.'s best interests. And appellant's mother advised the GAL that it is not in C.B.B.'s best interests to have contact with appellant. The district court properly weighed appellant's interest in establishing or maintaining a relationship with C.B.B. against C.B.B.'s expressed desire to have nothing to do with appellant and the other evidence regarding C.B.B.'s best interests.

Finally, we observe that appellant, in his brief, raises a constitutional argument that TPR generally violates parents' due-process rights. Appellant did not present this argument to the district court and we will not consider it on appeal. *In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981).

The district court's best-interests determination is substantially supported by the evidence and is not clearly erroneous.

II. The district court did not abuse its discretion by denying appellant's request to permit certain witnesses to testify by telephone.

"By agreement of the parties, or in exceptional circumstances upon motion of a party or the county attorney, the court may hold hearings and take testimony by telephone or interactive video." Minn. R. Juv. Prot. P. 12.02. Rule 12.02 provides the district court

"the opportunity, *in all but the most exceptional cases*, to personally observe witnesses in order to effectively weigh credibility." *Id.*, 1999 advisory comm. cmt. (emphasis added).

The admission of evidence is generally within the district court's broad discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). A new trial will be granted only if the complaining party can demonstrate prejudicial error. *Id.* at 46. "In the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Id.*

Appellant cites Minn. Stat. § 260C.163, subd. 8 (2008), for the proposition that he has an unconditional right "to have witnesses heard." While the statute expresses the rights to present testimony and "to be heard, to present evidence material to the case, and to cross-examine other witnesses," our review of the record shows that these rights were vindicated here. Minn. Stat. § 260C.163, subd. 8. The trial transcript indicates that appellant exercised his right to be heard, to present evidence, and to cross-examine witnesses.

Further, appellant does not articulate how this case presents exceptional circumstances warranting telephonic examination of witnesses. Of the four witnesses he wanted to call by telephone, two reside in Oakdale and one resides in Rochester. The fourth witness resides in Texas. Appellant has never articulated how the mere fact of the witnesses' residencies somewhere other than Shakopee, where the Scott County Justice Center is located, presents exceptional circumstances and he has not identified any circumstances that prevented the four witnesses from traveling to Shakopee. Nor does he

argue how the district court's denial of his motion was arbitrary or capricious. The district court's ability to personally observe testifying witnesses is significant in cases such as this. On these facts, we conclude that appellant has not shown that the district court abused its discretion in denying appellant's request to present witness testimony by telephone.

III. Respondent's failure to join the social-services agency does not warrant reversal of the TPR or a new trial.

Appellant assigns as error the fact that this case proceeded without the involvement of Scott County Human Services (the agency) as a party. He relies on a portion of Minn. Stat. § 260C.301, subd. 3(a), that states: "If a termination of parental rights petition has been filed by another party, the responsible social services agency shall be joined as a party to the petition." Appellant cites no authority for the proposition that respondent's failure to join the agency warrants reversal of the TPR.

Because the supreme court has the primary responsibility to regulate matters of trial procedure, the Minnesota Rules of Juvenile Protection Procedure control over a contrary statute on procedural matters. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 3 (Minn. 2003). The provision on which appellant relies is procedural, not substantive, because it does not create a cause of action, affect the defense of any parent who is a party to a TPR proceeding, or create, define, or regulate a right of the agency. *See Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989) (distinguishing between substantive and procedural provisions). Therefore, we look to the rules for guidance on the questions of if and how the agency should have been involved in this TPR proceeding.

Under the rules, a non-petitioning social-services agency is merely a participant, not a party to a TPR proceeding. Minn. R. Juv. Prot. P. 22.01(c). As a participant, an agency (1) is entitled to notice and a copy of the petition, (2) may attend hearings, and (3) may offer information "at the discretion of the court." Minn. R. Juv. Prot. P. 22.02, subd. 1. Although the record does not reflect whether the agency was provided notice and a copy of the TPR petition, we do not presume error on appeal. *Waters v. Fiebelkorn*, 216 Minn. 489, 495, 13 N.W.2d 461, 464-65 (1944). And even if the agency did not receive notice of this proceeding and was deprived of the ability to attend hearings, appellant has not shown that this error has prejudiced him, or the agency, in any way. *See In re Welfare of D.J.N.*, 568 N.W.2d 170, 176 (Minn. App. 1997) (concluding appellants suffered no prejudice where parties were given inadequate notice to respond to files used by court in reaching termination decision). Because the rule vests the district court with discretion as to the participation at trial, if any, of a non-petitioning agency, it is unclear what impact the failure to join the agency had in this case. The agency was not involved with C.B.B., and appellant does not suggest that the agency, had it been involved, would have urged the court to deny the TPR petition.

Finally, we note that although appellant raised the agency's absence from the proceeding to the district court, he never sought any affirmative relief on that basis. Appellant did not ask the court to join the agency or to stay the proceedings until the agency could be consulted on whether it wished to exercise its participant rights under rule 22.02.

We conclude that, on this record, appellant has not shown that the district court erred by permitting the matter to proceed without the agency's participation.

Affirmed.