STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0292

In the Matter of the Welfare of the Children of: K. L.-B. and R. B., Sr., Parents

Filed August 25, 2009
Reversed and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-JV-07-14006

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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

CONNOLLY, Judge

Appellant-mother argues that the district court erred by terminating her parental rights. Because the record lacks clear and convincing evidence to support the decision to

terminate, we reverse the decision and remand the case so that the children may be reunified with their mother.

FACTS

Appellant-mother K.L.-B. and R.B., Sr. are the parents of R.B., Jr. and R.B. Appellant-mother began using illegal drugs in 1994, four years before R.B., Jr. was born. At trial, appellant-mother testified that she stopped using drugs in 1998 and remained sober until 2005.

On July 13, 2006, the children were placed in court-ordered foster care due to domestic violence and drug use by the parents. In October, the children were adjudicated children in need of protection or services. Appellant-mother was ordered to submit to urinalysis (UAs) to document sobriety, complete a chemical-dependency treatment program, attend domestic-abuse programming, and cooperate with parenting education. The children were returned to appellant-mother under protective supervision on December 8, 2006, due to case-plan progress. In March 2007, the district court dismissed the case due to a series of negative UAs and mother's substantial compliance with her case plan.

On October 15, 2007, appellant-mother, R.B., Sr., R.B., and a friend, Todd Strand, were driving from R.B., Sr.'s father's house to Bloomington. The car was stopped by the police and crack-cocaine was discovered hidden in appellant-mother's bra. Appellant-mother claimed that the cocaine was not hers, but that she grabbed it from the center console to prevent R.B., Sr. and Strand from smoking it in front of R.B. Appellant-mother pleaded guilty to fifth-degree possession of a controlled substance.

R.B. Sr.'s version of the October 15 traffic stop differs. He claimed that for four days leading up to October 15, he and appellant-mother had been using crack-cocaine at their apartment with their children home. R.B., Sr. further testified that the crack-cocaine found on appellant-mother belonged to her.

This incident triggered another child-protection investigation, and a petition to terminate parental rights (TPR) was filed on October 18, 2007. The children were again ordered into out-of-home placement.

The state's social worker, Nicole Markson, offered appellant-mother a case plan including random UAs with completion of a Rule 25 assessment if the UAs were positive for illegal or non-prescribed drugs, verification of attendance at AA/NA meetings, compliance with the terms of her probation, and individual therapy.

Because appellant-mother claimed 15 months of sobriety and her UAs were clean, except for Vicodin for which she had a prescription from her doctor, no Rule 25 assessment was requested. Appellant-mother sporadically provided verification of AA/NA attendance. She did not participate in individual therapy, although she did participate in family therapy with the children. Due to case-plan progress and negative UAs, reunification occurred on March 31, 2008.

In June 2008, Markson was preparing to request dismissal of the case when she discovered a fifth-degree possession charge had been filed against R.B., Sr., but not appellant-mother, related to a June 14, 2008, traffic stop in Motley, Minnesota. Markson asked appellant-mother about this charge, and she claimed that she knew nothing about the traffic stop, that she was sick to her stomach at learning this information, and she was

going to get an order for protection (OFP) against R.B., Sr. Markson reviewed the police report later that day and learned that appellant-mother was in the car at the time of the June 14 traffic stop and had drug paraphernalia in her purse. The children were removed and ordered into out-of-home placement.

Appellant-mother testified at the TPR trial that on June 13, she, R.B., Sr. and the children drove to Motley in a semi-truck.[1] According to appellant-mother, she slept in the sleeper cab with the children while R.B., Sr. drove the truck and a friend, Tom Penman, rode in the passenger seat. The following day, appellant-mother was riding in a car with another friend, Michelle Schuerman, when they were stopped by the police. Appellant-mother testified that her children were with their godmother at this time. She further stated that she had no knowledge of anyone possessing or consuming illegal drugs during her trip to Motley. The police found a socket set[2] and prescription drugs that belonged to someone else in appellant-mother's purse. Appellant-mother claimed that the prescription drugs belonged to a lady in Motley to whom she was returning the drugs.

R.B., Sr.'s version of the events in Motley is significantly different from appellant-mother's version. R.B., Sr. claims that they left for Motley at 3 or 4 a.m. on June 14 and the children were in the sleeper cab with Penman while appellant-mother was riding up front with him. In his version, Penman accompanied the family on the trip to Motley to conduct a drug deal. R.B., Sr. testified that he and appellant-mother smoked crack-

[1] R.B., Sr. and appellant-mother are both semi-truck drivers. They needed to drive the semi to Motley because appellant-mother had two loads she needed to haul the following Monday.

[2] Appellant-mother's typical method of using drugs consisted of smoking crack-cocaine in a pipe and a socket.

cocaine all the way to Motley and he was also drinking. When they reached Motley, R.B., Sr. claimed that they stopped in front of the house where Penman was conducting the drug deal and appellant-mother smoked crack-cocaine and took pills, while he drank and used methamphetamine. While the parents were drinking and using drugs, the children were running around and playing in the immediate area. R.B., Sr. and appellant-mother left the children with Penman at a friend's house and drove to Michelle and Jason Schuerman's house. The Schuermans and R.B., Sr. used methamphetamine. Sometime later, Penman called and asked R.B., Sr. and appellant-mother to come get the children, so they picked up the children and Penman and brought them back to the Schuermans. Penman wanted to return to Minneapolis so they decided to bring him back and get more crack-cocaine while they were in Minneapolis. Therefore, R.B., Sr., appellant-mother, Penman, and Michelle Schuerman left the children with Jason Schuerman. In route to Minneapolis, the vehicle was stopped by police because Michelle Schuerman was driving erratically. R.B., Sr. admitted to having methamphetamine and a small amount of crack on him at the time of the traffic stop.

After this incident, R.B., Sr. testified that he and appellant-mother continued to use drugs together until their separation in August 2008. During this time, he stated that they bought drugs from Timothy English, whom appellant-mother began dating after her separation from R.B., Sr. English was recently sentenced to time in prison for violating an order for protection and the terms of his probation in a domestic assault matter. R.B., Sr. further testified that appellant-mother only obtained an order for protection against him as a ruse to get their children back.

Michelle Schuerman testified that appellant-mother wanted to get together to use drugs over Memorial Day weekend 2008 and that she observed appellant-mother use drugs at her home on the weekend of June 14, 2008. Another friend of appellant-mother, Robin Floyd, testified that on Memorial Day weekend 2008, appellant-mother used drugs in her home.

A trial on the TPR petition was held November 17, 18, and 19, 2008. At trial, R.B., Sr. agreed to voluntarily terminate his parental rights, admitting that he is unable to parent his children. The district court also terminated appellant-mother's parental rights after finding clear and convincing evidence supporting three statutory grounds for termination of parental rights and concluding that termination was in the best interests of the children. Minn. Stat. § 260C.301, subd. 1(b)(2), (5), and (8) (2008). This appeal follows.

D E C I S I O N

Appellant-mother argues that her parental rights were improperly terminated because the district court erroneously emphasized months-old accusations of drug abuse and neglect instead of recognizing her substantial case-plan compliance and correction of the neglect conditions at the time of trial. The state asserts that appellant-mother's parental rights were properly terminated on statutory grounds and that the termination was in the best interests of the children.

> [Appellate courts] 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. We give considerable deference to the

> district court's decision to terminate parental rights. But we closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing. We affirm the district court's termination of parental rights when at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the best interests of the child, provided that the county has made reasonable efforts to reunite the family.

In re Welfare of Children of S.E.P., 744 N.W.2d 381, 385 (Minn. 2008) (citations omitted); *see also In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004) (same).

The district court concluded that there were three statutory grounds for termination of appellant-mother's parental rights: (1) appellant-mother had substantially, continuously or repeatedly refused or neglected to comply with the duties imposed upon her by the parent-and-child relationship; (2) reasonable efforts under the direction of the court have failed to correct the conditions leading to the out-of-home placement; and (3) the children are neglected and in foster care. Minn. Stat. § 260C.301, subd. 1(b)(2), (5), and (8). The district court also found clear and convincing evidence that it is in the best interests of the children that any and all parental rights be terminated. We conclude that there is insufficient evidence in the record to support any of these statutory bases for termination or to sustain the finding that termination was in the best interests of the children.

A. The finding that appellant-mother failed to comply with parental duties was not supported by clear and convincing evidence in the record.

The district court may terminate parental rights under Minn. Stat. § 260C.301, subd. 1(b)(2) if

> the parent has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship, including but not limited to providing the child with necessary food, clothing, shelter, education, and other care and control necessary for the child's physical, mental, or emotional health and development, if the parent is physically and financially able, and either reasonable efforts by the social services agency have failed to correct the conditions that formed the basis of the petition or reasonable efforts would be futile and therefore unreasonable[.]

The primary concern in the state's dealings with appellant-mother has been her chemical dependency. The first child-protection case was filed in July 2006 due to drug use and domestic violence. The children were returned to their parents in December 2006 after appellant-mother and R.B., Sr. completed chemical-dependency treatment and substantially complied with the case plan. The case was closed in March 2007. In October, appellant-mother was found to be in possession of cocaine. She lost her children again, was reunited with them after substantial case-plan compliance, only to be implicated in another situation involving the police and drugs less than a year later. At the time of the second police stop, she was found to be in possession of drug paraphernalia and prescription drugs belonging to someone else.

Appellant-mother insists that she has been sober since August 2006 and that she has never used drugs in front of the children. The district court did not find this testimony credible, and we generally defer to the district court's credibility determinations. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). But, even accepting the district court's credibility determinations, we conclude that there is not clear and convincing evidence in the record to support termination. Mother has not failed

any UAs, and the only evidence of appellant-mother's continued drug use is from other drug users. Furthermore, R.B., Sr.'s testimony articulated that appellant-mother used drugs during the summer of 2008. This was arguably a relapse, however, appellant-mother's drug use has always been tied to R.B., Sr., against whom appellant-mother now has an OFP, and there is no evidence in the record, except for R.B., Sr.'s testimony, of any drug use between July 2008 and the TPR trial, which was five months later. Therefore, the evidence in the record relied on by the district court to support a finding of appellant-mother's continued drug use is simply not clear and convincing.

The fact that the UAs do indicate Vicodin use by appellant-mother likewise does not constitute clear and convincing evidence that she is abusing drugs. Her personal physician has been prescribing Vicodin for back pain. The state points to two instances of appellant-mother requesting an extra prescription as indicative of chemical dependency problems. Her doctor, however, testified that people often have various reasons for needing to get a refill before the actual date of the refill. At trial, appellant-mother testified that she has stopped using Vicodin altogether in an effort to be reunited with her children. Indeed, her doctor testified that he was not concerned about appellant-mother's level of Vicodin usage.

Moreover, at trial, the child-protection worker who had been assigned to this case for the last few years testified that appellant-mother was in substantial compliance with her case plan. Finally, there were two unannounced visits to appellant-mother's home by the guardian ad litem in May and June 2008. The guardian ad litem did not observe any signs of drug use or the presence of drug paraphernalia during the visits.

Appellant-mother has passed every UA that has been administered. In fact, the state was ready to dismiss jurisdiction over the children in June 2008 and only reinstated TPR proceedings after learning of the Motley traffic stop. The objective evidence at trial showed that appellant-mother was not presently using illegal drugs, was employed and had safe, secure housing, had obtained an OFP against R.B., Sr., and most significantly, had substantially complied with the case plan. On this record, we conclude that there is not clear and convincing evidence that appellant-mother has failed to comply with parental duties such that termination of parental rights was proper.

B. The finding that appellant-mother failed to correct conditions following reasonable efforts was not supported by clear and convincing evidence in the record.

The district court may terminate parental rights if it finds "that 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." Minn. Stat. § 260C.301, subd. 1(b)(5).

Appellant-mother argues that it was improper to terminate her parental rights because she has corrected the conditions that led to out-of-home placement by obtaining an order for protection against R.B., Sr. and being sober since August 2006. We agree. As discussed above, the objective evidence in the record at most establishes one relapse months before the TPR trial. Furthermore, it is undisputed that appellant-mother obtained an order for protection against R.B., Sr., which indicates that she is attempting to remove him from her life. This is a positive step for appellant-mother considering R.B., Sr. admitted that he is unable to parent his children due to continued drug use and

voluntarily terminated his parental rights. The original out-of-home placement occurred because of domestic violence and drug use. The evidence in the record indicates that appellant-mother has substantially complied with the case plan and corrected conditions that led to the out-of-home placement. Therefore, the district court erroneously terminated her parental rights based on this statutory ground.

C. The finding that the children were neglected and in foster care was not supported by clear and convincing evidence in the record.

Minn. Stat. § 260C.301, subd. 1(b)(8) provides that parental rights can be terminated if the district court finds "that the child is neglected and in foster care[.]" A child neglected and in foster care means a child:

> (1) who has been placed in foster care by court order; and
>
> (2) whose parents' circumstances, condition, or conduct are such that the child cannot be returned to them; and
>
> (3) whose parents, despite the availability of needed rehabilitative services, have failed to make reasonable efforts to adjust their circumstances, condition or conduct, or have willfully failed to meet reasonable expectations with regard to visiting the child or providing financial support for the child.

Minn. Stat. 260C.007, subd. 24 (2008).

To determine whether a child meets this definition, the district court considers the following factors: (1) the length of time in foster care; (2) parental effort to adjust the "circumstances, conduct, or conditions that" caused the child's removal "to make it in the child's best interest to be returned to the parent's home in the foreseeable future"; (3) the amount of parental visitation for the three months before the petition; (4) regular contact with those "temporarily responsible for the child"; (5) "the appropriateness and adequacy

of services" given to the parent for reunification; (6) "whether additional services would . . . bring about lasting parental adjustment" within a definite time period, and (7) the nature of social services' efforts to rehabilitate and reunite and "whether the efforts were reasonable." Minn. Stat. § 260C.163, subd. 9 (2008).

To support its conclusion that these children were neglected and in foster care, the district court noted that the children had been in out-of-home placement on three separate occasions totaling 476 days as of trial. This amount of time is substantial, but the statutes require more than just evidence of the length of time that the children have been in foster care to support the termination of parental rights on this basis. There must be a separate discussion of the other statutory factors and the district court's order reveals none. This single finding does not demonstrate that these children were neglected and in foster care pursuant to the statutory definition.

D. The record did not contain clear and convincing evidence that termination was in the best interests of the children.

A child's best interests, by themselves, are not sufficient to terminate parental rights. *In re Welfare of the Children of R.W.*, 678 N.W.2d 49, 54-55 (Minn. 2004). Thus, because the record does not support the grounds for termination found by the district court, termination of mother's parental rights is inappropriate here. Moreover, "[c]onsidering a child's best interests is particularly important in a termination proceeding because a child's best interests may preclude terminating parental rights even when a statutory basis for termination exists." *In re Tanghe*, 672 N.W.2d 623, 625-26 (Minn. App. 2003) (quotation omitted). "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.* The district court determined that it was in the best interests of the child for appellant-mother's parental rights to be terminated.

These children were initially removed from their home due to domestic violence and drug use. Appellant-mother argues that because she continues to be sober, she has substantially complied with the case plan, and she obtained an order for protection against R.B., Sr., termination of her parental rights was improper. We agree. The district court considered the stated preference of R.B., Jr. that he be reunited with his mother, but determined that this factor could not outweigh the benefit that would arise from the relationship being terminated. This finding is inadequately supported by the record. Appellant-mother has substantially complied with the case plan in an effort to be reunited with her children, and both children have explicitly stated their preference to be returned to their mother. Appellant-mother and these children have a significant interest in the preservation of the parent-child relationship. The evidence in the record does not clearly and convincingly demonstrate that termination was in the best interests of the children. Consequently, we reverse the district court's decision and remand the case to the district court so that appellant-mother may be reunified with her children under such conditions, if any, as the district court deems appropriate pursuant to Minn. Stat. § 260C.312 (2008).

Reversed and remanded.