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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-499

In the Matter of the Welfare of the
Children of: R. J. H. and J. L. B., Parents.

Filed November 3, 2009
Affirmed
Bjorkman, Judge

Clay County District Court
File Nos. 14-JV-08-4379, 14-JV-08-4383

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

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

BJORKMAN, Judge

Appellant father challenges the termination of his parental rights to two children, arguing that the district court's findings with regard to his fitness to parent are insufficient and not supported by the record, and that respondent's efforts to reunite him

with his children were not reasonable. Because clear and convincing evidence supports the district court's findings that appellant is palpably unfit to parent the children and that further efforts to reunite appellant with his children would be futile, we affirm.

FACTS

Appellant J.L.B. is the father of A.B., born May 20, 2005, and J.B., born February 21, 2007. Appellant shared physical custody of the children with their mother, R.J.H., through an informal arrangement wherein each parent had the children every other week.

J.L.B. sustained a traumatic brain injury at age 12. The injury causes him significant concentration, information processing, and comprehension problems, as well as memory loss. J.L.B. has anger management and other mental-health issues; he has been diagnosed with depression, impulse control disorder, and borderline intellectual functioning. As an adult, J.L.B. has never lived on his own. He has lived in group homes from the time that he left high school until 2004. Since then, he has lived with friends and family. J.L.B. has lived with his wife, L.B., since July 2007, and reports that she handles his finances and paperwork and keeps the household in order. J.L.B. is unable to get a driver's license due to his cognitive difficulties. He has held a series of part-time jobs, with a history of frequent job changes and many short-term positions.

Respondent Clay County Social Services (the county) commenced child-protection proceedings involving R.J.H. in December 2007. On February 15, 2008, the district court adjudicated the children as needing protection. The district court ordered an out-of-home placement of the children in April 2008, following an emergency protective

care hearing. At that time, the county began investigating J.L.B. as a potential permanent placement option for the children.

Because J.L.B. lives in North Dakota, the county was required to obtain an interstate compact on the placement of children (ICPC) assessment before moving the children across state lines. Cass County (North Dakota) Social Services conducted the ICPC home study. The evaluator conducted personal interviews and criminal background checks, and reviewed medical and other records. The evaluator concluded that the children should not be placed with J.L.B. due to the significant issues revealed in the home study. The ICPC report states that J.L.B.'s cognitive deficiencies and other mental-health issues are "not likely to be corrected even with services in place" and that J.L.B. "will not be able to parent his children independently." The report concludes that placement of the children with J.L.B. and his wife "could create a high risk parenting situation."

Following denial of the ICPC, the county formulated an out-of-home placement plan with J.L.B. and his wife. The July 25, 2008 reunification plan identified numerous services, including a parental-capacity evaluation, family-skills training, supervised visitation with the children, medical and mental-health care, case planning, family group decision-making, and relative search efforts.

J.L.B. made efforts to comply with the out-of-home placement plan. He met with a psychiatrist on July 25, 2008, and attended five therapy sessions with a psychologist between July 31 and October 21, 2008. He also completed a parental-capacity evaluation. The evaluator administered an I.Q. test that shows J.L.B.'s cognitive capacity

is in the bottom one percentile, meaning that 99 percent of the same age population performs better on cognitive tasks. The evaluator expressed concerns about J.L.B.'s ability to learn parenting skills and to adjust them appropriately as his children grow older, and about his demonstrated lack of motivation for continued efforts.

J.L.B. also attended supervised visits with his children. But he missed 8 of the 49 scheduled visits, and many visits started late or ended early at J.L.B's request. Visitation notes express concern about J.L.B. falling asleep during some of the visits and not taking necessary steps to keep the children safe.

Due to a staffing shortage, the family-skills worker did not begin working with J.L.B. until August 27, 2008. Thereafter, J.L.B. met with the worker on a regular basis. In her 90-day written assessment, the family-skills worker noted J.L.B. was "showing improvement" on objectives they had set. She observed that J.L.B. was doing a better job of spending equal time with both children and was able to complete specific tasks when prompted. But despite his progress, the family-skills worker indicated that J.L.B.'s "attentiveness to both children and his energy to parent both children is concerning."

The county filed termination-of-parental-rights petitions with respect to the children on September 12, 2008. The petitions alleged that J.L.B. is palpably unfit to be a party to the parent-child relationship. A termination-of-parental-rights trial was held on December 10, 11, and 19, 2008. At that time, the children had been in placement for more than seven months. The district court received 51 exhibits, including reports from J.L.B.'s psychologist and the ICPC evaluator, and heard testimony from both parents, J.L.B.'s wife, the family-skills worker, the parental-capacity evaluator, the county case

worker, and the guardian ad litem (GAL). The district court ordered termination of J.L.B.'s parental rights to the children, concluding that J.L.B. is "palpably unfit to be party to the parent and child relationship" under Minn. Stat. § 260C.301, subd. 1(b)(4) (2008), and that the county had made reasonable efforts at reunification under Minn. Stat. § 260C.301, subd. 1(b)(5). The court specifically found that additional efforts at reunification would be futile and that termination of parental rights is in the children's best interests. This appeal follows.[1]

D E C I S I O N

"[P]arental 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 carefully 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). On appeal, we give considerable deference to the district court's decision based on the district court's opportunity to assess the credibility of witnesses. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). But we "will closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *In re Welfare of J.M.*, 574 N.W.2d 717, 724 (Minn. 1998). In all termination cases, our paramount concern is for the best interests of the children. *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990).

[1] R.J.H.'s parental rights were also terminated, but she did not appeal the decision.

I. Clear and convincing evidence supports the district court's finding of palpable unfitness.

The district court may terminate parental rights if it finds

> that a 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). The Minnesota Supreme Court has held that although mental disabilities may be "specific conditions" or lead to "specific conduct" under the statute, mental disabilities alone are not sufficient reason to terminate parental rights. *In re Welfare of P.J.K. & J.L.K.*, 369 N.W.2d 286, 290 (Minn. 1985). Such disabilities must directly relate to parenting and must be permanently detrimental to the physical or mental health of the children to support termination of parental rights based on palpable unfitness. *Id.* When a parent remains "permanently unable" to care for his children, his rights should be terminated. *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996). If, however, evidence demonstrates that the parent will be able to care for the children "within a foreseeable time," parental rights should not be terminated and a reunification plan should be put in place. *Id.*

Here, the district court found that J.L.B. has diminished cognitive abilities and other mental-health issues that make him unable to parent his children. J.L.B. concedes that his disabilities presently affect his ability to parent, but he argues that the county did not establish a consistent pattern or condition that prevents him from parenting the

children in the reasonably foreseeable future. J.L.B. points to the family-skills worker's testimony regarding his progress and argues that because he only received these services for a short period of time, the county failed to meet its burden of proof. We disagree.

Our decision in this matter is guided by our analysis in *In re Welfare of A.V., A.V., A.V., & A.V., Children*, 593 N.W.2d 720 (Minn. App. 1999). In that case, the father, like appellant, had suffered a permanent brain injury that affected his cognitive functioning and his ability to control his anger. *A.V.*, 593 N.W.2d at 721. The father argued that because his disabilities had never placed his children in specific danger, the evidence was not sufficient to support a finding of palpable unfitness. *Id.* The *A.V.* court rejected this argument, noting that a finding of palpable unfitness may be premised on a parent's condition, not simply his conduct. *Id.* The court concluded that the evidence supported termination because the father simply did not have the "capacity to parent or to engage in constructive efforts to improve [his] ability to parent." *Id.* at 722. Despite the love between parent and child, the fact that the father could not be trusted to care for the children by himself rendered him palpably unfit to be a parent under the statute. *Id.* at 722.

The county presented substantial evidence at trial that J.L.B.'s mental disabilities are permanent, and that they render him unable to provide appropriate supervision for his children and to parent on his own. In making its findings, the district court relied on testimony from the GAL, the family-skills worker, the county case worker, and the parental-capacity evaluator, as well as written reports from the ICPC evaluator and J.L.B.'s psychologist. From these sources, the district court received evidence that J.L.B.

did not consistently recognize safety issues for the children, became easily frustrated when things did not go smoothly, lacked insight and the cognitive ability to recognize his own challenges, struggled with attentiveness and motivation, and could not be left alone with the children. The GAL and county case worker expressly recommended termination of J.L.B.'s parental rights. In addition to noting the testimony of the many professionals involved with J.L.B., the district court cited J.L.B.'s wife's testimony that she would not leave him alone with the children for more than five minutes.

All of the service providers and the district court acknowledge J.L.B.'s evident love for his children. But we conclude, on this record, that clear and convincing evidence supports the district court's finding that J.L.B. does not presently have the capacity to parent these young children and is unlikely to overcome this condition in the reasonably foreseeable future.

II. Clear and convincing evidence supports the district court's finding that further reunification efforts would be futile.

The crux of the district court's reasonable-efforts finding is that additional efforts to unite J.L.B. with his children would be futile. 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). Reasonable efforts are (1) relevant to the safety and protection of the children; (2) adequate to meet the needs of the children and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances. *In re*

Children of T.A.A., 702 N.W.2d 703, 709 (Minn. 2005). "Services must go beyond mere matters of form so as to include real, genuine assistance." *In re Welfare of H.K.*, 455 N.W.2d 529, 532 (Minn. App. 1990), *review denied* (Minn. July 6, 1990).

Reasonable efforts do not include efforts that would be futile. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 56 (Minn. 2004). Reasonable efforts are not required where the court determines that "the provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances." Minn. Stat. § 260.012(a)(5) (2008). "The demand of reasonable efforts is one that is entirely constructive, aimed at saving the savable among parents having difficulty providing care for their children." *A.V.*, 593 N.W.2d at 723.

J.L.B. points to the delay he experienced in receiving family-skills training as the basis for his argument that the services he received were not "available and accessible" or "consistent and timely." J.L.B. also challenges the futility finding, arguing that he should be given more time to succeed as a parent, emphasizing that he was making progress with the family-skills worker and that he had only received three months of skills training at the time of trial. These arguments are unavailing.

The county provided numerous services to J.L.B. both prior to and after the formal reunification plan was finalized. The family-skills training was only one component of these services and the delay attributed to staffing issues is not determinative. Under different circumstances, the duration of the reunification services J.L.B. received might be inadequate. But our careful review of the record reveals clear and convincing evidence supporting the district court's finding that additional efforts would be futile. It

is undisputed that J.L.B.'s parenting difficulties are secondary to his diminished cognitive abilities and other mental-health concerns. He scores in the one percentile on cognitive testing, a fact that will not change. The county case worker could not identify any additional services that could help J.L.B. And the GAL stated in response to a direct question that she would have recommended giving J.L.B. six months worth of services if she thought his parenting ability would sufficiently improve in that time period. Instead, the GAL recommended termination. On this record, the district court's finding that continued or additional services would be futile and would not result in reunification of J.L.B. with his children is not clearly erroneous.

Finally, we note that the district court expressly determined that the children need a permanent home and that "[t]he advantages to the children of termination of parental rights outweigh any detriment to the parent or children from severing the parent's rights to the children." J.L.B. does not contest the district court's best-interests findings on appeal, and our review of the record supports these findings. We do not doubt the sincerity of J.L.B.'s desire to parent his two young children, but their needs for permanency and a safe, nurturing home are compelling. Where, as here, evidence of palpable unfitness and of the futility of further reunification efforts is clear and convincing, termination serves the children's best interests.

Affirmed.