STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0549
A09-0566
A09-0616

In the Matter of the Welfare of the Children of:
R. W. and T. W., Parents

Filed November 10, 2009
Affirmed
Wright, Judge

Hennepin County District Court
File Nos. 27-JV-07-9965, 72-JV-07-1269, 27-JV-09-1483

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Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

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

WRIGHT, Judge

In these consolidated appeals from the district court's denial of a petition to terminate respondents' parental rights, appellants argue that the district court erred by determining that substantial evidence does not support the termination of parental rights on the statutory grounds of palpable unfitness and failure to correct the conditions that led to the out-of-home placement, and that the record does not support the district court's finding that termination is not in the children's best interests. Appellant guardian ad litem also argues that the district court abused its discretion by disregarding the testimony of the expert witness. And appellant county argues that the district court was required to order a new case plan for respondents. Because the dispositive district court findings are supported by clear and convincing evidence and a new case plan is not required, we affirm.

FACTS

Respondent R.W. is the mother of eight children. Respondent T.W. is R.W.'s husband and the father of the four youngest children: T-a.W., T-o.W., A.W., and T-s.W. R.W.'s parental rights to her two oldest children, D.J. and A.J., were involuntarily terminated in 2005. Those proceedings arose out of T.W.'s reports to law enforcement that seven-year-old D.J. and five-year-old A.J. were sexually abusing three-year-old C.C. and two-year-old K.C. (the third and fourth children of R.W.). During the investigation of these allegations, A.J. stated that T.W. beat him and his siblings "all the time." R.W. reported during that earlier investigation that T.W. had been physically and sexually

assaulting her over a long period of time, he physically abused the children on a regular basis, and the children had witnessed T.W. assaulting her on several occasions.

The present case commenced in January 2007 when appellant Hennepin County (the county) filed a child-in-need-of-protection-or-services (CHIPS) petition for six-year-old C.C., four-year-old K.C., two-year-old T-a.W., and one-year-old T-o.W. The basis of the petition was educational neglect of C.C. by respondents, inadequate supervision of the children by respondents, and physical abuse of C.C. by T.W. The children were taken into emergency protective care. And the CHIPS petition was later amended to include newborn A.W.

In May 2007, following a hearing during which respondents agreed to waive their rights to trial, the district court transferred legal custody of the five children to the county and established case plans for respondents. In August 2007, the county filed a petition to terminate respondents' parental rights to the five children under Minn. Stat. § 260C.301, subd. 1(b)(2) (neglect of parental duties), (4) (palpable unfitness), (5) (failure of reasonable efforts to correct the conditions leading to out-of-home placement), (8) (child is neglected and in foster care) (2008). Respondents denied the allegations set forth in the termination-of-parental-rights (TPR) petition.

In December 2007, the district court transferred legal and physical custody of C.C. and K.C. to their biological father. C.C. and K.C. were then removed from the TPR petition. T-a.W., T-o.W., and A.W. were returned to respondents for a temporary home visit from June 17 to August 7, 2008. And the TPR petition was amended in November 2008 to include newborn T-s.W.

The TPR trial began on October 22, 2008. When the TPR trial commenced on October 22, 2008, T-a.W. and T-o.W. had been in out-of-home placement for a total of 19 months; A.W. had been in placement a total of 16.5 months; and T-s.W. had been in placement for one month. Fourteen witnesses testified, including respondents, appellant guardian ad litem Elaine Frankowski (the GAL), a foster parent of some of the children, and several social-service providers. The district court received 99 exhibits and took judicial notice of prior files involving respondents from Hennepin and Olmsted counties.

On January 12, 2009, the district court denied the TPR petition. In its order, the district court addressed the four proffered statutory grounds for termination and the best interests of the children. The district court ordered that the children be returned to the custody of respondents once respondents obtained safe and suitable housing. The children were returned to respondents on January 22, 2009. On January 26, 2009, the GAL moved the district court for an order involving the assessment of respondents' housing and the transfer of the children. On January 27, 2009, the GAL moved the district court to either assess the testimony of the GAL's expert witness and grant the TPR petition or, alternatively, grant a new trial. On the same date, the county moved the district court to amend the January 12 order to remove the children from respondents' home and to stay the order pending appeal or to grant a new trial. The district court denied the January 26 and January 27 motions on February 26, 2009. And the GAL subsequently moved to amend the February 26 order. The district court denied this motion on March 23, 2009.

The GAL and the county filed notices of appeal from the January 12 and February 26 orders. The GAL later filed a separate appeal from the January 12, February 26, and March 23 orders. These appeals have been consolidated and are addressed herein.

D E C I S I O N

A natural parent is presumed to be "a fit and suitable person to be entrusted with the care of his [or her] child and . . . it is ordinarily in the best interest of a child to be in the custody of [the] natural parent." *In re Welfare of Clausen*, 289 N.W.2d 153, 156 (Minn. 1980). Parental rights may not be terminated unless at least one statutory ground is proved by clear and convincing evidence and termination is in the best interests of the child. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). We review an order denying a TPR petition "to determine whether the district court's findings address the statutory criteria and whether those findings are supported by substantial evidence and are not clearly erroneous." *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005) (quotation omitted). The district court's decision is afforded considerable deference because the district court is in a superior position to assess witness credibility. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

I.

We first address appellants' assignment of error to the district court's finding that respondents' parental rights should not be terminated under Minn. Stat. § 260C.301, subd. 1(b)(4) (palpable unfitness). Proving a parent to be unfit is an onerous burden. *In re Children of T.R.*, 750 N.W.2d 656, 661 (Minn. 2008). The county must prove "a consistent pattern of specific conduct or specific conditions existing at the time of the

hearing that appear will continue for a prolonged, indefinite period and that are permanently detrimental to the welfare of the child." *Id.* (quotation omitted).

A.

"It is presumed that a parent is palpably unfit . . . upon a showing that the parent's parental rights to one or more other children were involuntarily terminated . . . ." Minn. Stat. § 260C.301, subd. 1(b)(4). To rebut this presumption, a parent must introduce sufficient evidence to demonstrate her or his ability to successfully parent a child. *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 554 (Minn. App. 2007), *review denied* (Minn. July 17, 2007); *In re Welfare of D.L.R.D.*, 656 N.W.2d 247, 251 (Minn. App. 2003).

R.W.'s parental rights to D.J. and A.J. were involuntarily terminated in 2005. Appellants argue that R.W. failed to rebut the presumption that she is an unfit parent. The district court acknowledged that R.W. was presumptively unfit but found that R.W. had rebutted the presumption. Specifically, the district court found:

> 3.1.1.1 By all accounts, the testimony shows that during visits with the children, [R.W.] is appropriate, loving, kind and attentive to her children's needs.
>
> 3.1.1.2 [A social worker] stated at trial that she has seen [R.W.] grow and would not be pursuing termination were it not for [T.W.]'s presence in the family.

Appellants' main contentions are that R.W. failed to acknowledge in these proceedings domestic violence committed in the past by T.W.[1] against her and the children and that R.W. failed to demonstrate that she would take appropriate actions to

[1] At trial, R.W. denied that T.W. had ever been violent toward her or the children. This testimony contradicts her previous statements in the earlier child-protection matter that T.W. committed multiple acts of domestic violence against R.W. and the children.

protect the children should domestic violence recur. Appellants' arguments assume that the only effective way for R.W. to address domestic violence was to acknowledge it during the CHIPs and TPR proceedings. But there is no legal requirement for a parent to acknowledge past domestic violence in order to rebut the presumption of unfitness when such acknowledgement is not part of the parent's case plan. *Cf. In re Welfare of M.D.O.*, 462 N.W.2d 370, 377 (Minn. 1990) (noting that the Minnesota Supreme Court has been reluctant to "enter[ ] the psychological debate on whether an initial admission of culpability is a prerequisite to rehabilitative therapy").

There is substantial evidence that R.W. recognizes her responsibility to protect her children from domestic violence. *See T.A.A.*, 702 N.W.2d at 709 (holding that a parent is unfit if she "refuse[s] to acknowledge her responsibility to protect her children from abuse by others"); *In re Welfare of B.M.*, 383 N.W.2d 704, 708 (Minn. App. 1986) (stating that a parent may be considered unfit if he or she is unable to protect children from physical abuse committed by others), *review denied* (Minn. May 22, 1986). On cross-examination, R.W. testified that if T.W. became physically abusive toward her, she would leave her home. She testified that if T.W. became physically abusive toward the children, she would go to a shelter with them, and she would call the police. R.W. testified that she would be able to intervene if T.W. became upset with one of the children, and she described how she would address the conduct with T.W. and reassure the children. The record indicates that R.W. attended group therapy to rebuild her self-esteem. R.W. also participated in couples' therapy with T.W., which involved working on anger management, conflict resolution, parenting strategies, communication, and self-

esteem. The couples' therapist testified that R.W. has become more willing to express herself, and a social worker testified that R.W.'s self-esteem has improved.

Finally, there also is substantial evidence to support the district court's finding that R.W. is "appropriate, loving, kind and attentive" to the needs of the children. A child-services worker testified that R.W. has exhibited love toward the children, has treated them with "tenderness and kindness," has parented them in an appropriate way, and that the children have smiled, laughed, and played with R.W. A case worker for a family-services agency and respondents' family and couples therapist also have observed attentive and appropriate parenting by R.W. In addition, a social worker testified that she might not support termination if T.W. were not involved.[2] Accordingly, because R.W. has shown that she is currently able to parent her children, we conclude that the district court's finding that R.W. has rebutted the presumption of unfitness is not clearly erroneous.

B.

Appellants argue that T.W. is palpably unfit because he has engaged in a pattern of behavior that poses an imminent threat to the physical wellbeing of the children. A parent's propensity for violence can be permanently detrimental to the physical or mental health of a child. *In re Welfare of M.A.*, 408 N.W.2d 227, 232 (Minn. App. 1987), *review*

[2] The GAL contends that Finding 3.1.1.2 is clearly erroneous because the social worker's statement at trial was "ambivalent." But when asked whether she would recommend termination if T.W. were not involved, the social worker stated that "there was a potential that [she] would not make the same recommendation if the situation were different for [R.W.]" In light of the record, we cannot conclude that this finding was clearly erroneous.

denied (Minn. Sept. 18, 1987). Although evidence relating to a TPR decision must address conditions that exist at the time of the hearing, a parent's past violent behavior may support termination if the behavior problem has not been resolved and the "underlying conditions leading to abuse continued to exist at the time of trial." *In re Welfare of J.L.L.*, 396 N.W.2d 647, 651 (Minn. App. 1986).

As part of his case plan, T.W. has engaged in counseling to address his anger. T.W. participated in individual therapy, family therapy, couples' therapy, and parenting education. He also completed a domestic-violence program. The district court found that T.W. did not find certain of these programs helpful and that T.W. became "combative" with some of the service providers, but these findings are not sufficient to support termination of T.W.'s parental rights on the ground of palpable unfitness. Although T.W. still exhibits anger, as evinced by his documented conflicts with service providers and his oral outbursts in court, there is no evidence of current violence or anger directed at the children. T.W.'s case plan was designed to correct his behavior as it relates to the children; his anger toward others does not support appellants' argument for termination of parental rights based on palpable unfitness.

Appellants, in effect, challenge the district court's weighing of the evidence. The district court, which was in the best position to analyze the issues of T.W.'s domestic violence and R.W.'s ability to protect the children, made careful findings as to the issue of respondents' alleged unfitness. As discussed above, these findings are supported by clear and convincing evidence. We, therefore, conclude that the district court's finding

that respondents' parental rights should not be terminated under Minn. Stat. § 260C.301, subd. 1(b)(4), is not clearly erroneous.

II.

We next address appellants' assignment of error to the district court's finding that respondents' parental rights should not be terminated under Minn. Stat. § 260C.301, subd. 1(b)(5). The district court may terminate parental rights if the county proves that, following the child's placement out of the home, reasonable efforts under the direction of the district court have failed to correct the conditions leading to the child's placement. Minn. Stat. § 260C.301, subd. 1(b)(5).

A.

Appellants contend that respondents have not substantially complied with their case plans. Our careful review of the record, however, establishes that the district court's finding that respondents have substantially complied with their case plans is supported by the evidence. R.W. completed a psychological assessment and cooperated with child-protection services and the GAL. She also participated in parenting education, supervised visits with the children, and various therapy programs. T.W. completed all of his required assessments, participated in various therapy programs and supervised visits, and completed a domestic-violence program.

The purpose of a case plan is to assist parents in rehabilitation. *See In re Welfare of J.J.L.B.*, 394 N.W.2d 858, 863 (Minn. App. 1986) ("[T]he purpose of the case plan is to give parents a guideline for correcting the conditions leading to the determination of dependency."), *review denied* (Minn. Dec. 17, 1986); *see also In re Welfare of P.R.L.*,

622 N.W.2d 538, 545 (Minn. 2001) (reviewing compliance with case plan by examining whether conditions leading to child's out-of-home placement had changed). It is within the district court's discretion to determine the extent of compliance; perfect compliance is not necessarily required. *See In re Welfare of M.H.*, 595 N.W.2d 223, 228 (Minn. App. 1999) (upholding district court's finding of compliance with case plan when not all conditions had been completed).

B.

Appellants contend that respondents have failed to correct the conditions that led to the children's out-of-home placement—specifically, domestic violence. The district court found that there is evidence that domestic violence occurred in the past. In 2003, T.W. was reported to Wisconsin child-protection services because of physical abuse toward A.J. In August 2004, R.W. reported that T.W. had physically and sexually assaulted her over an extended period of time, that T.W. had physically abused the children on a regular basis, and that the children had witnessed T.W.'s abuse of R.W. Also in August 2004, several suspicious scars were discovered on D.J.'s back and head, and A.J. stated that T.W. beat him and his siblings "all the time." In January 2007, C.C. reported to a nurse that T.W. had hit him in the head, shoulder, and back with a belt buckle. But it is not clear from the record when these acts of violence against C.C. occurred.

Since the creation of the case plans, T.W. has completed a domestic-violence program. He has undergone several assessments and participated in various therapy programs. R.W. has attended programming designed to help her with family

relationships and her self-esteem; and there is evidence that she now recognizes her duty to protect the children from domestic violence and envisions a way to do so. The evidence demonstrates that T.W. has a volatile personality and has directed his anger, in the form of oral outbursts, at some service providers. But, as the district court observed, T.W. has shown progress in managing his anger. And no evidence was presented to the district court that T.W. has behaved violently toward the children or R.W. since the commencement of the 2007 CHIPS proceedings.

Appellants also argue that the district court's finding that reasonable efforts have not failed to correct the conditions leading to the out-of-home placement of the children is clearly erroneous because the district court expressed concern at trial that T.W. might retaliate against R.W. for her past reports of domestic abuse. During the testimony of a witness who was recounting statements made by R.W. and C.C. about physical abuse by T.W., the district court held a bench conference. The district court remarked that R.W. appeared to be "scared" and expressed concern that T.W. might retaliate against R.W.

We first observe that these statements by the district court about T.W. and R.W.'s behavior in the courtroom while another witness was on the stand do not constitute evidence. *Compare* 4 *Minnesota Practice*, CIVJIG 10.15 (2006) (defining evidence as testimony, exhibits, and stipulations), *and* 29 Am. Jur. 2d *Evidence* §§ 1, 3 (2009) (defining evidence as "any species of proof legally presented at trial through the medium of witnesses, records, documents, exhibits, and concrete objects" and stating that nothing is evidence unless "produced, introduced, and received in a trial"), *with State v. Franks*, 765 N.W.2d 68, 77 (Minn. 2009) (noting that trier of fact has the benefit of observing a

witness's "nonverbal conduct, demeanor, and appearance *while testifying*") (emphasis added). The district court, therefore, was not required to assess its observations of R.W.'s or T.W.'s demeanor as proof of the failure to correct conditions that led to the out-of-home placement.

We further observe that, notwithstanding the district court's comments during the bench conference, the district court found that T.W. had voluntarily removed himself from the courtroom on several occasions during the trial "to avoid stress and outbursts" and that T.W. had removed himself voluntarily from his home when he became angry during a July 2008 meeting with service providers. The district court was in a superior position to this court to assess whether T.W. had shown improvement in managing his anger, and there is substantial evidence to support its determination that he has done so.

The evidence supporting the district court's determination that respondents have not failed to correct the conditions leading to the out-of-home placement of the children is substantial. There is ample evidence that T.W. has made progress in managing his anger, and there is no evidence of domestic violence since the commencement of the CHIPS petition over two years ago. The district court's finding that the county has not proved grounds for termination under subdivision 1(b)(4), therefore, is not clearly erroneous.

III.

Appellants next challenge the district court's finding that termination of parental rights is not in the best interests of the children. We address each of appellants' best-interests arguments in turn.

"The paramount consideration in [TPR] proceedings is the best interests of the child." *In re Welfare of Child of B.J.-M.*, 744 N.W.2d 669, 672 (Minn. 2008) (quotation omitted). In evaluating a child's best interests, the district court balances "(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). "[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). Here, the district court concluded that there were no statutory grounds supporting termination and that it was in the best interests of the children not to terminate parental rights.

Appellants argue that the district court improperly balanced the interests of respondents and the children by prioritizing respondents' parental rights. This argument is unavailing. The district court found: "It is in the best interests of these children to allow this family to reunify. These parents love their children. They are involved and dedicated parents and have made progress in learning the skills necessary to be effective parents." The district court also found that several witnesses had observed instances of caring, attentive, and appropriate parenting by respondents. The district court's findings establish that it considered the children's interests, including their need to be loved and to receive suitable parenting. When there is evidence supporting the district court's best-interests determination, it is not our province to substitute our judgment for the district court's balancing of best-interests considerations. *See Tanghe*, 672 N.W.2d at 625 (stating that district court's best-interests determination "is generally not susceptible to an

appellate court's global review of a record" and that "an appellate court's combing through the record to determine best interests is inappropriate because it involves credibility determinations").

The county argues that T-a.W.'s ability to receive services for her special needs will be negatively impacted by respondents' "inability" to work with service providers. But the record establishes that respondents have demonstrated the ability to seek out and to benefit from certain service providers. They have participated in parenting classes, and there is no evidence of ongoing domestic violence. The district court's finding that termination of parental rights is not in the best interests of the children is supported by substantial evidence and is not clearly erroneous.

IV.

The GAL argues that the district court abused its discretion by disregarding the testimony of the GAL's expert witness. But determining "[t]he weight to be given any testimony, including expert testimony, is ultimately the province of the fact-finder." *In re Welfare of J.B.*, 698 N.W.2d 160, 167 (Minn. App. 2005). The district court received the GAL's expert testimony but "chose not to give the evidence great weight" because the expert's opinions "were not helpful." We are without any legal basis to question the district court's weighing of the evidence and determination of whether it was helpful.[3]

[3] For the same reasons, we conclude that the GAL's argument regarding the weight to be given to her opinion of the children's best interests is unavailing.

V.

Finally, the county argues that the district court erred by failing to order a new case plan or, in the alternative, to order a hearing to determine the need for such a case plan under Minn. Stat. § 260C.312(a) (2008). Statutory interpretation is a question of law, which we review de novo. *R.W.*, 678 N.W.2d at 54.

Minnesota law provides:

> If, after a hearing the court does not terminate parental rights but determines that the child is in need of protection or services, or that the child is neglected and in foster care, the court *may* find the child is in need of protection or services or neglected and in foster care and *may* enter an order in accordance with the provisions of section 260C.201.

Minn. Stat. § 260C.312(a) (emphases added). The county appears to argue that a new case plan or a hearing to address the need for a case plan is mandated by the statute. But section 260C.312(a) does not require the district court to create a case plan or hold a hearing; rather, the statute gives the district court discretion to enter an order in accordance with Minn. Stat. § 260C.201 (2008). *See* Minn. Stat. § 645.44, subd. 15 (2008) (stating that "may" is permissive). The district court's decision not to order a new case plan or to hold a hearing on the matter, therefore, was within its discretion. But nothing in this decision will prevent the county from initiating new child-protection proceedings should the need to do so arise.

The allegations made against respondents are serious. But there is no evidence of ongoing domestic violence, and allegations of domestic abuse predate the 2007 CHIPS

and TPR proceedings. On this record, and given the discretion provided to the district court for making its determinations, there is no reversible error.

Affirmed.