STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1416

In the Matter of the Welfare of the
Child of: N. Y. N. and O. A. A., Parents

Filed January 19, 2010
Reversed; motion denied
Halbrooks, Judge

Sherburne County District Court
File Nos. 71-JV-08-472, 71-JV-08-76

Sean C. Dillon, White & Associates, P.A., Elk River, Minnesota (for appellant father O.A.A.)

Kathleen A. Heaney, Sherburne County Attorney, Arden Fritz, Assistant County Attorney, Elk River, Minnesota (for respondent county)

Cathleen L. Gabriel, Annandale, Minnesota (for mother N.Y.N.)

Charlotte McDonald, Big Lake, Minnesota (guardian ad litem)

Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

Appellant challenges the termination of his parental rights to his daughter, N.Y.N., claiming there is a lack of clear and convincing evidence to support the statutory grounds for termination. While we conclude that on this record termination of appellant's

parental rights would be in his daughter's best interests, a parent's rights to his child cannot be terminated based solely on the best interests of the child. Because there is a lack of clear and convincing evidence that any of the statutory grounds have been met in this case, we reverse.

FACTS

N.Y.N. was born January 27, 2008, at which time both of her parents were incarcerated in the Sherburne County jail on a federal hold for robbing an armored car at gunpoint in May 2007. N.Y.N. was immediately placed with her paternal grandparents, Rebecca and Gene Allen.[1] Shortly after N.Y.N.'s placement, N.Y.N. was adjudicated as a child in need of protection or services (CHIPS) based on the fact that both of N.Y.N.'s parents were incarcerated and therefore unable to care for her.

The county prepared an out-of-home placement plan in March 2008. The permanency option identified by the county was to reunify N.Y.N. with her parents. The plan required both parents to complete certain tasks before reunification could occur. The tasks required of appellant O.A.A. were to (1) "complete a psychological evaluation and follow all recommendations," (2) "participate with parenting education, if available," and (3) "complete a parenting assessment and follow all recommendations." The plan was developed jointly by Brittany Hoskins, a Sherburne County social worker, and N.Y.N.'s mother (mother). There is no indication that appellant was involved in creating the plan other than a written notation that "[i]n the development of this plan, Brittany M.

[1] Rebecca and Gene Allen are licensed foster-care providers. Appellant came to their home as a foster child in 2001, when he was 13 years old, and was adopted by the Allens two years later.

Hoskins consulted with: GAL [guardian ad litem], parents." There is a signature page following the plan, which is signed and dated by mother and Hoskins, but not by appellant.

In May 2008, appellant was sentenced to a term of 28 months, with three years supervised release and credit for time served. He remained incarcerated at the Sherburne County jail pending his transfer to a federal prison. The only visitation available to appellant was through video-conferencing. The unavailability of physical contact led Linda Butau, the GAL assigned to N.Y.N., to determine that visitation with her parents was not in N.Y.N.'s best interests.

On June 2, 2008, the county petitioned to terminate the parental rights of appellant and mother so N.Y.N. could be adopted by the Allens. The termination-of-parental-rights (TPR) petition listed Minn. Stat. § 260C.301, subd. 1(b)(8) (2008), that the child is "neglected and in foster care," as the ground for terminating the rights of her parents. The facts cited in support of the petition do not mention appellant, focusing instead on mother's psychological state and her history involving N.Y.N.'s half-brother,[2] including his previous CHIPS status. An amended TPR petition was filed January 13, 2009. This petition listed three grounds for the termination of appellant's parental rights. In addition to claiming that appellant's parental rights to N.Y.N. should be terminated because N.Y.N. is neglected and in foster care, the amended petition added the grounds that appellant abandoned N.Y.N. (Minn. Stat. § 260C.301, subd. 1(b)(1) (2008)), and that he

[2] Both the CHIPS file and the TPR file intermittently involve N.Y.N.'s half-brother, who is the biological child of mother, but is not appellant's child.

is palpably unfit to be a party to the parent-child relationship (Minn. Stat. § 260C.301, subd. 1(b)(4) (2008)).

In February 2009, the county moved the district court for permission to cease reasonable efforts at reunification because any further efforts would be futile. The motion was supported by an affidavit from Hoskins. The affidavit stated that Hoskins had referred both appellant and mother for a psychological evaluation and parenting assessment, but Hoskins later testified that she never made a referral for appellant to complete a parenting assessment. Hoskins discussed the results of mother's psychological evaluation and parenting assessment in her affidavit, but makes no mention of any efforts involving appellant. The district court granted the motion in an order dated March 6, 2009, finding that "[f]urther efforts would be futile at this time given the efforts already made, the trial continuances past permanency, the unavailability of the parents to care for the children[[3]] throughout their young lives, and the recommendation from the parenting assessor to cease visitation between the mother and the children."

A final amended TPR petition was filed May 15, 2009, three days before appellant's TPR trial. The grounds for termination remained the same, as did the facts supporting termination of mother's parental rights. The facts to support the termination of appellant's parental rights were expanded to include the following:

> [Appellant] has an unstable history. He was in foster care throughout his young life and experienced several moves before he was placed with the Allens in 2001. While in their care he would often steal and lie.

[3] The motion and order included N.Y.N.'s half-brother.

> [Appellant]'s employment history is unstable. [Appellant]'s housing has also been unstable. He was living in a car prior to robbing the armored car.
>
> While incarcerated, [appellant] did not contact [the county] to inquire about [N.Y.N.]. While in prison, [appellant] did not demonstrate a willingness to take advantage of programs in prison such as parenting education in order to progress toward reunification upon his release.
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> [Appellant] has stated that he believes [N.Y.N.] should remain in the care of Rebecca and Gene Allen permanently.
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> [Appellant] has never met [N.Y.N.]. He has never been in a position to care for her and therefore there is no bond between them.

The trial began May 18, 2009, but because appellant was being released from prison on May 19, the trial was continued until that date. On May 18, mother consented to N.Y.N.'s adoption by the Allens. On May 19, appellant's bus from Leavenworth, Kansas did not arrive in time for trial, but because the trial had been continued so many times, the district court went forward with the other witnesses. Appellant testified on May 28.

In its order terminating appellant's parental rights, the district court found that the county's "efforts for reunification included case management, referrals for a psychological evaluation and a parenting assessment, relative placement, transportation, and medical assistance." The district court found that appellant "did not complete a psychological evaluation or a parenting assessment" and that he "never asked Hoskins for assistance in meeting these or other aspects of the case plan." The district court stated that "[b]ecause no tasks were being accomplished and the child was in need of

permanency, the Court granted [the county]'s motion to cease reasonable efforts for reunification." The district court cited a psychological evaluation of appellant from 2003 that found that appellant "has a history of lying, stealing, and defiance to authority," and "was diagnosed with attention deficit hyperactive disorder, adjustment disorder, and borderline intellectual functioning." The order also referred to another psychological assessment from 2004 that concluded that appellant was "impulsive and avoidant of age-appropriate responsibility." The district court found that appellant "made frequent calls to Brittany Hoskins, the Allens, and the guardian ad litem (GAL)" but then went on to state that appellant "had minimal contact with [the GAL]; in the one reported telephone call [the GAL] received, [appellant] simply wanted to know about the court date in the paternity case." The district court noted that "[s]everal witnesses testified that [appellant] expressed his wish for the child to remain with the Allens."

The district court determined that the county had met its burden with regard to all three statutory grounds for termination and that termination of appellant's parental rights is in N.Y.N.'s best interests. Appellant challenges the termination order and alleges ineffective assistance of counsel.

D E C I S I O N

Parenthood is a basic civil right, and the integrity of the family unit warrants constitutional protection. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212–13 (1972) (recognizing this protection in the U.S. Constitution); *In re Child of P.T.*, 657 N.W.2d 577, 588 (Minn. App. 2003) (recognizing that parents have a fundamental right to the custody and companionship of their children), *review denied* (Minn. Apr. 15,

2003). This protection is not lost because one has not been a model parent; every parent has an interest in retaining his or her parental rights and must be provided termination proceedings that are fundamentally fair. *Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S. Ct. 1388, 1394–95 (1982).

I.

We first address whether the county made reasonable efforts to reunify appellant and N.Y.N. In every case when

> a child alleged to be in need of protection or services is under the court's jurisdiction, the court shall ensure that reasonable efforts, including culturally appropriate services, by the social services agency are made to prevent placement or to eliminate the need for removal and to reunite the child with the child's family at the earliest possible time[.] . . . Reasonable efforts to prevent placement and for rehabilitation and reunification are always required except upon a determination by the court . . . that:
>
> . . . .
>
> (5) 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) (2008). In every termination case, the district court must make specific findings either "that reasonable efforts to prevent the placement and to reunify the child and the parent were made" or "that reasonable efforts at reunification are not required as provided under section 260.012." Minn. Stat. § 260C.301, subd. 8(1), (2) (2008). In addition, several statutory grounds for involuntary termination require that certain efforts be made before termination is appropriate. *See, e.g.*, *id.*, subds. 1(b)(2), (5), 2(a)(1) (2008) (stating that a presumption of abandonment may apply if reasonable efforts to facilitate contact have been made); Minn. Stat. § 260C.007, subd. 24 (2008)

(defining "neglected and in foster care" as the failure of a parent to make reasonable efforts to adjust circumstances despite the availability of needed rehabilitative services). "When these statutory provisions are considered together with the inherent difficulty of permitting the agency seeking termination also to deny rehabilitative services, it is clear that [the] provision of reasonable efforts must be evaluated by the court in every case." *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996). "Findings in CHIPS proceedings are not reversed unless clearly erroneous or unsupported by substantial evidence." *In re A.R.M.*, 611 N.W.2d 43, 50 (Minn. App. 2000).

In its March 2009 order granting the county's motion to cease reasonable efforts at reunification, the district court found that reasonable efforts were not required because any further efforts at reunification would be futile. The district court referred to the March 2009 order and reiterated this finding in its termination order. Appellant asserts that the county did not make reasonable efforts to reunify him and N.Y.N. But the county argues that the district court properly determined that efforts at reunification would be futile, or, alternatively, that the services offered to appellant were reasonable.

The factors used to determine the reasonableness of an agency's efforts are defined by statute.

> [T]he court shall consider whether services to the child and family were:
>
> (1) relevant to the safety and protection of the child;
> (2) adequate to meet the needs of the child and family;
> (3) culturally appropriate;
> (4) available and accessible;
> (5) consistent and timely; and
> (6) realistic under the circumstances.

Minn. Stat. § 260.012(h) (2008). A social services agency's efforts toward reunification must be designed to address "the problem presented," *S.Z.*, 547 N.W.2d at 892, and must "include real, genuine help to see that all things are done that might conceivably improve the circumstances of the parent and the relationship of the parent with the child." *In re Welfare of M.A.*, 408 N.W.2d 227, 236 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. Sept. 18, 1987). 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); *S.Z.*, 547 N.W.2d at 892. Reasonable efforts include assisting a parent to complete tasks required in an out-of-home placement plan. As the supreme court noted in *In re Welfare of Children of T.R.*, "[t]he requirement that the parties follow the case plan is a two-way street[.] . . . Until [a finding of futility], the statute requires the county to continue to provide services to the parent as outlined in the case plan or out-of-home placement plan." 750 N.W.2d 656, 665–66 (Minn. 2008).

We recognize that appellant was incarcerated from N.Y.N.'s birth until the TPR trial. But incarceration does not excuse the county from making reasonable efforts. *See, e.g., R.W.*, 678 N.W.2d at 56 (addressing the reasonableness of the county's efforts despite father's incarceration). Here, the county failed to make any genuine effort to reunify appellant with his daughter upon his release. The county's efforts with respect to appellant, specifically, included creating a placement plan for N.Y.N. and referring appellant for a psychological evaluation (one of the required tasks in the plan). The creation of an out-of-home placement plan is required in every CHIPS case and is not directed toward any "problem presented" that would prohibit appellant from parenting

N.Y.N. upon his release. *See S.Z.*, 547 N.W.2d at 892 (clarifying that mental services offered to parent although "not the typical services directed at parenting . . . were tailored to the problem that prevented him from being able to parent" and were therefore reasonable). Referring appellant for a psychological evaluation may well have been an effort by the county to determine whether appellant would be a fit parent upon his release. But that, alone, does not constitute sufficient reasonable efforts because it does not attempt to remedy any potential problem. *See T.R.*, 750 N.W.2d at 666 (concluding that an assessment showing a low-average IQ and lack of verbal skills did not constitute reasonable efforts when the county did not make any effort to remedy the problem the assessment revealed). We cannot conclude on this record that the county's efforts were reasonable.

Nor can we conclude that any efforts would have been futile. Incarceration may be a factor in determining futility of efforts. *In re Children of Vasquez*, 658 N.W.2d 249, 253 (Minn. App. 2003) (holding that efforts were futile when appellant-father would remain incarcerated until children reached adulthood and he had murdered the children's mother); *R.W.*, 678 N.W.2d at 56 (finding that efforts were futile where father was incarcerated and failed to maintain a relationship with his children). But we do not agree that appellant's incarceration, in this case, rendered all efforts toward reunification futile. As of May 2008, the county was aware of appellant's relatively short sentence (28 months with credit for time served). There is no evidence in the record that appellant refused to cooperate with any services offered to him. He testified that his failure to complete the psychological evaluation was due to his transfer to federal prison shortly

after the referral, and the county does not dispute this. The county also does not dispute that appellant was unable to complete a parenting assessment while he was incarcerated. The district court found that appellant successfully completed the third required task in the plan, which was completing a parenting education class. With very little effort on the part of the county and no evidence that appellant refused to cooperate with any services, we conclude that there is insufficient evidence to prove that all further efforts to reunify appellant with his daughter upon his release would have been futile.

As a result, we conclude that the district court's decision to grant the county's motion to cease reasonable efforts at reunification with respect to appellant and N.Y.N.[4] is not supported by substantial evidence and is therefore erroneous. Because the county is required to make reasonable efforts to reunite a family before we can affirm a termination of parental rights, reversal is warranted. *See In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008) (stating that a termination can be affirmed "provided that the county has made reasonable efforts to reunite the family"). But we also address whether reversal is warranted due to the lack of clear and convincing evidence to support the statutory grounds upon which the county petitioned.

II.

We will affirm a district court's termination of parental rights only if clear and convincing evidence establishes that a statutory ground for termination exists and that

[4] The district court's order also involved, and indeed focused on, the reasonableness of the county's efforts to reunify mother with N.Y.N. and N.Y.N.'s half-brother. Because mother is not a party to this appeal, we make no determination as to whether the district court's conclusion with respect to mother is erroneous.

termination is in the child's best interests. *Id.* 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." *T.R.*, 750 N.W.2d at 660–61 (quotation omitted). In conducting its inquiry, the district court must cite evidence "relat[ing] to conditions that exist at the time of termination." *In re Welfare of P.R.L.*, 622 N.W.2d 538, 543 (Minn. 2001). The district court concluded that there is clear and convincing evidence to terminate appellant's parental rights on all three statutory grounds listed by the county in its petition. We address each in turn.

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). A district court can presume abandonment when

> the parent has had no contact with the child on a regular basis and [has] not demonstrated consistent interest in the child's well-being for six months and the social services agency has made reasonable efforts to facilitate contact, unless the parent establishes that an extreme financial or physical hardship . . . or other good cause prevented the parent from making contact with the child.

Minn. Stat. § 260C.301, subd. 2(a)(1). Under the plain language of the statute, this presumption does not apply when the county does not make reasonable efforts to facilitate contact or when good cause prevented contact. Here, N.Y.N.'s GAL

determined that contact with appellant was not in N.Y.N.'s best interests, and therefore contact between appellant and his daughter was prohibited. The district court did not address whether this prohibition constituted "other good cause" that prevented appellant from making contact with N.Y.N. We conclude on this record that this prohibition against contact does constitute "good cause," and therefore the presumption of abandonment is not appropriate under these facts.

If the facts do not support a presumption of abandonment, the supreme court has held that abandonment can be found by actual desertion of the child and "an intention to forsake the duties of parenthood." *In re Welfare of Staat*, 287 Minn. 501, 506, 178 N.W.2d 709, 713 (1970). Abandonment cannot be found due to misfortune or misconduct alone. *Id.* And while parental incarceration is a factor that the district court may consider, incarceration alone cannot constitute intentional abandonment. *Id.* at 505–06, 178 N.W.2d at 712–13. In *Staat*, the supreme court held that an imprisoned father's lack of financial support, visits, correspondence or any evidence showing his interest in the welfare of the child, constituted abandonment. *Id.* at 506–07, 178 N.W.2d at 713–14. Similarly, in *R.W.*, the supreme court upheld a district court's abandonment determination when an incarcerated father failed to maintain contact with his children, failed to inquire about their welfare, and failed to respond to a CHIPS petition. 678 N.W.2d at 56.

The district court determined that appellant abandoned N.Y.N. because appellant

> has . . . never had contact with the child and has failed to show sufficient interest in her well-being. Although [appellant] has been incarcerated almost all of the child's life

> and face-to-face visits were precluded by jail staff, it appears that [appellant] did not attempt to have any contact with the child. For example, there is no evidence that [appellant] sent anything to the child, not even on special occasions, and there is no evidence that he could not do so. Furthermore, he failed to maintain contact with the GAL or social worker.

The fact that appellant never had contact with N.Y.N. is undisputed, but the findings that he did not attempt to have any contact with N.Y.N. and that he failed to maintain contact with the GAL and the social worker are clearly erroneous. The district court's own findings include a finding that appellant "made frequent calls to Brittany Hoskins [the social worker], the Allens, and the guardian ad litem (GAL)." The record supports this finding. The record shows that appellant called the GAL several times from the Sherburne County jail, until the GAL blocked the number. The record shows that appellant made numerous phone calls to the Allens and Hoskins, to the point that the Allens also blocked his number. Hoskins also sent appellant monthly updates.

The district court's finding that appellant "did not attempt to have any contact with the child" is also clearly erroneous. Barbara Jo Londo, a social worker working with the Allens, stated in her report dated July 31, 2008, that N.Y.N.'s "bio-parents are asking for visits with [N.Y.N.]." The only finding in this section that is not clearly erroneous is that "there is no evidence that [appellant] sent anything to the child, not even on special occasions, and there is no evidence that he could not do so." But we conclude that the mere fact that appellant did not send anything directly to N.Y.N. does not constitute clear and convincing evidence that appellant "actually deserted" and therefore abandoned N.Y.N.

The district court also found that appellant "intended to forsake the duties of parenthood" because of his statements to multiple witnesses around the time that N.Y.N. was born that he wanted the Allens to adopt N.Y.N. But even assuming that his statements are sufficient to establish this intention, an intention to forsake parental duties does not establish abandonment without actual desertion. Because the record does not support the conclusion that appellant deserted N.Y.N., his alleged intention to forsake the duties of parenthood, without more, is insufficient to prove that he abandoned N.Y.N. Accordingly, termination of appellant's parental rights to N.Y.N. because he abandoned her is not supported by clear and convincing evidence.

B. Neglected and in Foster Care

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." "Neglected and in foster care" is defined by statute as 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.

To determine whether a child meets this definition, the district court considers the following factors:

> (1) the length of time the child has been in foster care;
>
> (2) the effort the parent has made to adjust circumstances, conduct, or conditions that necessitate[d] the removal of the child to make it in the child's best interest to be returned to the parent's home in the foreseeable future, including the use of rehabilitative services offered to the parent;
>
> (3) whether the parent has visited the child within the three months preceding the filing of the petition, unless extreme financial or physical hardship . . . or other good cause prevented the parent from visiting the child or it was not in the best interests of the child to be visited by the parent;
>
> (4) the maintenance of regular contact or communication with the agency or person temporarily responsible for the child;
>
> (5) the appropriateness and adequacy of services provided or offered to the parent to facilitate a reunion;
>
> (6) whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time, whether the services have been offered to the parent, or, if services were not offered, the reasons they were not offered; and
>
> (7) the nature of the efforts made by the responsible social services agency to rehabilitate and reunite the family and whether the efforts were reasonable.

Minn. Stat. § 260C.163, subd. 9 (2008).

The first element of the definition of "neglected and in foster care" is undisputedly met in this case: N.Y.N. is in court-ordered foster care. The question is whether appellant's circumstances or conditions are such that N.Y.N. cannot be returned to him and that "despite the availability of needed rehabilitative services, . . . [he] failed to make reasonable efforts to adjust [his] circumstances, condition or conduct, or . . . willfully failed to meet reasonable expectations with regard to visiting the child or providing financial support for the child." *See* Minn. Stat. § 260C.007, subd. 24. Because

visitation was prohibited and appellant was incarcerated during N.Y.N.'s entire life preceding the TPR trial, we cannot conclude on this record that appellant willfully failed to meet reasonable expectations regarding visitation or financial support.

The district court considered the seven statutory factors in reaching its conclusion that N.Y.N. was neglected and in foster care based on its finding that despite the availability of rehabilitative services appellant failed to make reasonable efforts to adjust his circumstances. Factors (2), (3), and (4) involve appellant's effort to adjust his circumstances, his visitation with N.Y.N., and his contact with those responsible for N.Y.N. With respect to factors (3) and (4), the district court noted that appellant "failed to keep in adequate contact with Hoskins or the GAL" and that appellant "never even expressed a desire to meet the child." As discussed above, these findings are clearly erroneous. The district court also found that appellant's efforts to adjust his circumstances were insufficient because "he is presently unemployed and lives in a federal halfway house." This finding ignores the statutory language that a parent's efforts should address correction of the circumstances that "necessitate[d] the removal of the child." As appellant correctly points out, N.Y.N. was placed in foster care solely because her parents were incarcerated and therefore unable to care for her. She was not removed from her home because of appellant's housing or employment history. We therefore disagree that factors (2), (3), and (4) support a finding that N.Y.N. is neglected and in foster care.

Factors (5), (6), and (7) involve the services offered to appellant to facilitate a reunion with N.Y.N. The district court supported its conclusion that N.Y.N. is neglected

and in foster care by noting appellant's "lack of cooperation with [the county]," and that "the lack of any effort by [appellant] to meet the case plan led the Court to grant [the county's] motion to cease reasonable efforts for reunification." As discussed, there is no evidence in the record that appellant ever refused to cooperate with the county. This finding is therefore clearly erroneous. In addition, the district court ignores its own finding that appellant completed a parenting-education class while incarcerated when it cites "the lack of any effort" by appellant. There is not clear and convincing evidence in the district court's findings or in the record that supports the conclusion that N.Y.N. is neglected and in foster care. We therefore conclude that the district court's conclusion that appellant's parental rights should be terminated because N.Y.N. is neglected and in foster care is based on clearly erroneous findings.

C. Palpable Unfitness

The next question is whether there is clear and convincing evidence to support the district court's decision to terminate appellant's parental rights under Minn. Stat. § 260C.301, subd. 1(b)(4). This section provides that parental rights may be terminated if 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 the burden under this statute is onerous and that "[t]he petitioning party 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." *T.R.*, 750 N.W.2d at 661 (quotation omitted). "In each case, the actual conduct of the parent is to be evaluated to determine his or her fitness to maintain the parental relationship with the child in question so as to not be detrimental to the child." *S.Z.*, 547 N.W.2d at 892 (quotation omitted). The focus of the district court in finding a parent palpably unfit should not be on past history, but the projected permanency of the specific conditions that render the parent unable to care for his child. *In re Welfare of Solomon*, 291 N.W.2d 364, 368 (Minn. 1980). In order to support termination of a parent's rights, the specific conditions relied on by the district court must have a causal connection to the parent's inability to care for the child. *T.R.*, 750 N.W.2d at 662–63.

The district court found that appellant is palpably unfit based, in part, on appellant's lack of employment or housing at the time of trial. The district court found, based on the disputed testimony of appellant's father, that appellant had once lived in his car. The district court also noted the undisputed fact that appellant's longest employment prior to incarceration was eight months at a Wendy's restaurant. The district court concluded that "[appellant's] history demonstrates that he will be unable in the foreseeable future to provide the permanent stability that the child needs."

We disagree that the district court's findings provide enough "history" to be considered clear and convincing evidence to support the termination of appellant's parental rights on the ground that he is palpably unfit. At the time of the TPR trial, appellant had been out of his parents' home for approximately three years, almost two of which were spent incarcerated. Appellant was released from prison the day before his TPR trial started. We simply cannot conclude that appellant's one-year history presents clear and convincing evidence that his unstable housing and employment will continue "for the foreseeable future." Additionally, because N.Y.N. was born during appellant's incarceration, his history of unstable housing and employment occurred before he was a father. We do not agree that these "specific conditions" that occurred before N.Y.N. was born "directly relate to the parent and child relationship." Accordingly, we conclude that there is not clear and convincing evidence that appellant's lack of employment or housing render him palpably unfit.

The district court also concluded that appellant is palpably unfit because he does not have "the skills or traits necessary to care for a child who does not know him and who will be grieving the loss of the only family she does know" and that appellant "has shown no motivation to care for the child." As in *T.R.*, where a father's perceived lack of understanding of his child's needs fell short of a finding that he was "unable, for the reasonably foreseeable future, to care appropriately" for his daughter, appellant's perceived lack of parenting skills falls short of the required showing that he is palpably unfit to be a parent. *See id.* at 663–64 ("Although the district court found . . . that [the father] 'has no understanding of [the child's] mental health diagnosis, special needs or the

significant challenges facing [the child] . . . ,' this stops short of a finding that [the father] is 'unable, for the reasonably foreseeable future, to care appropriately' for his daughter."). As far as appellant's motivation to care for N.Y.N., the record shows that he requested visitation with N.Y.N. in July 2008 and took a parenting class while incarcerated. Appellant also attempted to maintain contact with the GAL and foster parents. This contradicts the conclusion that appellant has shown *no* motivation to care for N.Y.N., and the district court's finding on that point is clearly erroneous.

The district court also noted that appellant's "testimony was completely devoid of any emotion or desire to meet [N.Y.N.]. The fact that he even referred to his daughter as 'the child' shows the depth of his detachment towards her." Although this court defers to the district court's assessment of witness credibility, *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992), we cannot support a termination of parental rights based on a parent's detached demeanor alone. Because we conclude that there is not clear and convincing evidence to support the conclusion that appellant is palpably unfit due to his lack of employment, housing, parenting skills, or motivation to meet and care for N.Y.N., his detached demeanor alone cannot support the termination of his parental rights. Given the onerous burden to prove this statutory ground for termination, we conclude that there is not clear and convincing evidence in this record that appellant is palpably unfit to be a party to the parent-child relationship.

In any TPR proceeding "the best interests of the child must be the paramount consideration." Minn. Stat. § 260C.301, subd. 7 (2008). Although it is presumed that it is in the child's best interests to be in the natural parent's care, *In re Welfare of Clausen*,

289 N.W.2d 153, 156 (Minn. 1980), we agree with the district court's conclusion here that it appears to be in N.Y.N.'s best interests to be adopted by the Allens. She has thrived in their care and has not known any other home. But if there is no statutory ground for termination, a parent's rights cannot be terminated on the child's best interests alone. *R.W.*, 678 N.W.2d at 54–55. Because the Allens are the only parents N.Y.N. has ever known, and appellant has yet to prove that he can provide a safe, stable home for N.Y.N., staying with the Allens at this time likely serves N.Y.N.'s best interests. But "there is no legal basis for granting termination solely because the child cannot be returned immediately to the parental home." *M.A.*, 408 N.W.2d at 233. Given the passage of time since the TPR trial and the district court's order, we presume that there is now much more information to utilize in evaluating appellant's fitness as a parent.[5]

III.

Appellant claims that his trial counsel's failure to meaningfully cross-examine witnesses at the TPR trial and failure to submit a closing argument constituted ineffective assistance of counsel. Because we are reversing the district court's termination of appellant's parental rights, we do not need to address this claim and decline to do so.

IV.

The county moved to strike the assertions in appellant's brief that refer to any exhibit numbered greater than 19, because only 19 exhibits were admitted at trial. The

[5] We share a concern similar to that expressed by the supreme court in *T.R.* "[W]e express our desire that the proper authorities carefully monitor the situation and promptly seek termination of [appellant's] parental rights again if [he] is unable to meet the challenge of parenthood." *T.R.*, 750 N.W.2d at 666 n.9 (quotation omitted).

county's motion would unduly limit the record. The record on appeal includes the papers filed in the district court, the exhibits admitted at trial, and the transcript of the proceedings. Minn. R. Civ. App. P. 110.01. Appellant's method of referring to exhibits makes it difficult to pinpoint the document in the record. But our review of the record indicates that his numbering system is based on an exhibit list filed with the district court that was more extensive than what was ultimately admitted at trial. After deciphering appellant's numbering system, it is clear that some of appellant's record citations refer to documents admitted as trial exhibits, albeit with a different exhibit number. But other citations refer to documents outside of the record—namely, several letters appellant wrote to the Allens.

We deny the county's motion to strike the requested portions of appellant's brief because some of appellant's cited documents are part of the record, and because, in reaching our decision, we did not consider his assertions that refer to the extra-record letters. *See In re Children of T.A.A.*, 702 N.W.2d 703, 711 n.4 (Minn. 2005) (declining to rule on a motion to strike on the ground that the materials that are the subject of the motions were not considered in reaching the decision).

Reversed; motion denied.