STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2149, A09-2150

In the Matter of the Welfare of the
Child of: D.L.D. and W.H., Parents.

Filed March 30, 2010
Remanded
Hudson, Judge
Concurring in part, dissenting in part, Lansing, Judge

St. Louis County District Court
File No. 69HI-JV-08-214

Todd E. Deal, Virginia, Minnesota (for appellant mother DLD)

Terri Port Wright, Esko, Minnesota (for cross-appellant father WH)

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Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Connolly, Judge.

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

HUDSON, Judge

In these consolidated termination-of-parental-rights proceedings, this court previously affirmed the district court's determination that appellant-parents are palpably unfit to be parties to the parent-child relationship, but remanded for findings on whether termination is in the child's best interests. *In re Welfare of Child of D.L.D.*, 771 N.W.2d

538 (Minn. App. 2009). On remand, the district court ruled that termination is in the child's best interests. Appellants have re-appealed, arguing that, on remand, the district court erroneously merged the palpable-unfitness and the best-interests analyses. Because it is unclear whether the district court ruled that termination is in the child's best interests solely because appellants are palpably unfit or based on a separate evaluation the child's best interests, we remand.

D E C I S I O N

I

Appellants argue that the lack of an evidentiary hearing on remand deprived them of their due-process right to a fair hearing. While appellants orally asked the district court for an evidentiary hearing, there is no transcript of the hearing on remand, the record lacks a written motion for an evidentiary hearing raising the due-process question, and due process is addressed in neither the order nor the amended judgment produced on remand. Generally, appellate courts do not address questions not previously presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). This principle applies to constitutional questions raised in termination-of-parental-rights proceedings. *See In re C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (refusing to address constitutional challenges raised for the first time on appeal of a termination of parental rights). Because this record does not show that the due-process question was presented to and considered by the district court, we decline to address it.

II

On remand, the judgment was amended to include a single new finding stating that "[b]ased on all of the forgoing Findings of Fact, it is in the best interests of the minor child that the parental rights of [both parents] be terminated." The order for the amended judgment lacks findings addressing the child's best interests, but its conclusions of law state that "[t]he consideration of 'best interests' in this case is identical to the consideration of 'palpable unfitness'; it is precisely and logically the same issue, involving the exact same relevant evidence." The district court concluded that it "is unable to envision any sort of factual scenario wherein it would possibly be in a child's 'best interests' to deny a termination petition, notwithstanding evidence that leads to factual findings as well as a legal conclusion of 'palpable unfitness.'" The district court went on to conclude that because appellants are palpably unfit, "it cannot then be in the child's best interests to fail to terminate parental rights"; and that "[b]ecause" appellants are palpably unfit "and for all of the same reasons . . . and based on all the same evidence" termination is in the child's best interests. Almost identical conclusions of law are incorporated into the amended judgment.

Under Minn. Stat. § 260C.301, subd. 1(b) (2008), a district court "may" terminate parental rights if it finds the existence of "one or more" of certain statutory conditions, including a parent's palpable unfitness to be a party to the parent-child relationship. Because a parent's palpable unfitness means that the district court "may" terminate parental rights, the existence of that condition does not *require* termination. *Compare* Minn. Stat. § 645.44, subd. 15 (2008) (stating that "'[m]ay' is permissive") *with* Minn.

Stat. § 645.44, subd. 16 (2008) (stating that "'[s]hall' is mandatory"). If a statutory ground for termination of parental rights exists, the paramount consideration in deciding whether to terminate parental rights is the child's best interests. Minn. Stat. § 260C.301, subd. 7 (2008). "Considering a child's best interests is particularly important in a [termination of parental rights] proceeding because a child's best interests may preclude terminating parental rights even when a statutory basis for termination exists." *D.L.D.*, 771 N.W.2d at 545 (internal quotations and citations omitted). Because a child's best interests is the paramount consideration and because that paramount consideration can preclude termination of parental rights despite the existence of a statutory condition allowing termination, evaluating a child's best interests involves an inquiry distinct from that used to determine the existence of a statutory condition allowing termination. Thus, the mere existence of a statutory basis to terminate parental rights is, as a matter of law, insufficient to allow termination of those rights, and a ruling that it is in a child's best interests to terminate parental rights *because* of the existence of a statutory basis to terminate is a misapplication of the law.

In addition, by not distinguishing the statutory basis for termination from the child's best interests, the district court could improperly preclude the possibility of non-termination permanency dispositions in cases where such a disposition is possible. *See* Minn. Stat. § 260C.201, subd. 11(c), (d) (Supp. 2009) (addressing permanency and noting multiple permanency options including, but not limited to, termination of parental rights). Here, the district court's best-interests analysis on remand suggests that it equated the best-interests analysis with the palpable-unfitness analysis. Therefore, we

remand for the district court to readdress the child's best interests, and to do so in a way that is unambiguously distinct from its determination that the appellants are palpably unfit to be parties to the parent-child relationship.

After trial in this matter, Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(3), was amended to require the district court, in its best-interests analysis, to consider the child's interest in preserving the parent-child relationship, the parent's interest in preserving that relationship, and any competing interest of the child. This amendment of the rule was an incorporation of pre-existing caselaw reciting the same analysis. *See, e.g.*, *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 711 (Minn. App. 2004); *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992); *see also In re Welfare of L.A.F.*, 554 N.W.2d 393, 399 (Minn. 1996) (noting that "[t]he district court balanced the interests of [the child] and [the parent] in preserving a parent-child relationship, and the competing interests of [the child], especially her interest in a stable environment"). *But see In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 387 (Minn. 2008) (reviewing a best-interests determination without reference to the factors later incorporated into rule 39.05, subd. 3(b)(3)). While the amended rule does not apply to this case, *D.L.D.*, 771 N.W.2d at 546-47, an analysis under the pre-amendment caselaw would satisfy the district court's duty to perform a best-interest analysis. Therefore, on remand, the district court's best-interest analysis shall include, but not necessarily be limited to, considering the child's interest in preserving the parent-child relationship, the parent's interest in preserving that relationship, and any competing interest of the child. In making this analysis, the district court shall make findings adequate to facilitate effective appellate review, to provide

insight into which facts or opinions were most persuasive of the ultimate decision, and to show its consideration of the factors relevant to its best-interests analysis. *See In re Welfare of M.M.*, 452 N.W.2d 236, 239 (Minn. 1990) (requiring adequate explanatory findings regarding best interests); *see also* Minn. R. Juv. Prot. P. 42.08, subd. 1(b) (2009) (requiring that an order granting involuntary termination of parental rights contain "findings regarding how the order is in the best interests of the child").

Whether to reopen the record on remand shall be discretionary with the district court.

Remanded.

LANSING, Judge (concurring in part and dissenting in part)

I concur with the majority's determination that the issue of an evidentiary hearing was not sufficiently preserved for appellate review. I also concur with the majority's statements on the paramount importance of a thorough analysis on the best-interests of the child. In this case, however, I believe that the district court's best-interests analysis is sufficient, and I would affirm the district court's termination of parental rights.