STATE OF MINNESOTA
IN COURT OF APPEALS
A10-782

In the Matter of the Welfare of the Child of: E. R. and M. M., Parents

Filed October 26, 2010
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-JV-09-11929

William M. Ward, Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for appellant-E.R.)

Michael O. Freeman, Hennepin County Attorney, Cory A. Carlson, Assistant County Attorney, Minneapolis, Minnesota (for respondent-Hennepin County Human Services and Public Health Department)

Bruce Jones, Krisann Kleibacker Lee, Faegre & Benson, Jeremy Harrell (certified student attorney), Minneapolis, Minnesota (for respondent-guardian ad litem)

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

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

CONNOLLY, Judge

Appellant challenges the involuntary termination of his parental rights, arguing that he was entitled to status as a party and to appointment of counsel at the original hearing on the petition to declare his son a child in need of protection or services

(CHIPS), that the district court abused its discretion in denying his request for a continuance of the trial on termination of parental rights, that the termination is not supported by clear and convincing evidence, and that testimony from the guardian ad litem (GAL) about a suitable adoptive placement for appellant's son should have been excluded. Because we see no abuse of discretion and no error in the district court's determinations, we affirm.

FACTS

E.U.R. was born on May 18, 2009, to M.M., who had previously voluntarily terminated her rights to three older children. The child has medical problems: he was born cocaine-positive; he cried for long periods, and, as his GAL testified, the fact that his skull is closing prematurely indicates he "could have some degree of retardation, [which is]. . . a side effect of prenatal drug exposure." E.U.R.'s father, appellant E.R., signed a recognition of parentage when E.U.R. was one day old. Appellant was then living with M.M. but was not married to her. Appellant also has a son in New York with whom he has had no contact for 10 or 11 years.

The Hennepin County Department of Human Services and Public Health (DHS) filed a petition for E.U.R. to be declared CHIPS, and a hearing was held when he was four days old. He was taken from the hospital directly into foster care, and case plans were provided for both M.M. and appellant with the objective of reunification. When E.U.R. was two months old, he was placed with a foster family that had adopted his half-sister. E.U.R. is currently doing well in the stable environment of this foster home.

When he was five months old, DHS filed a petition for termination of parental rights. At the admit/deny hearing, counsel was appointed for appellant. Three months later, M.M. voluntarily terminated her parental rights and, following a trial, the district court terminated appellant's parental rights. Appellant's motion for a new trial was denied.

Appellant challenges the involuntary termination of his parental rights to E.U.R., arguing that he was entitled to be made a party and to be provided with counsel at the CHIPS hearing, that the district court abused its discretion in denying appellant's request for a continuance of the trial, that the termination of parental rights was not supported by clear and convincing evidence, and that the GAL's testimony about a potential adoptive family for E.U.R. should not have been admitted.

D EC I S I O N

I. Appellant's status at the CHIPS hearing

Whether appellant was a party to the CHIPS hearing on four-day-old E.U.R. is a question requiring construction of statutes and rules, for which the standard of review is de novo. *See Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001) ("An appellate court is not bound by, and need not give deference to, the district court's decision on a question of law.").

Appellant argues that, because he had signed a recognition of parentage, the district court, sua sponte, should have recognized him, E.U.R.'s non-custodial father, as a party to the CHIPS proceeding. But "[p]arties to a juvenile protection matter shall include: (a) the child's guardian ad litem; (b) the child's legal custodian; . . . (d) the

petitioner; [and] (e) any person who intervenes as a party pursuant to [Minn. R. Juv. Pro. P. 23.01, subd. 2, permitting 'a parent who is not a legal custodian . . . to intervene as a party'] . . . ." Minn. R. Juv. Pro. P. 21.01, subd. 1. Appellant was not the guardian ad litem or the petitioner, nor was he E.U.R.'s legal guardian. A child's legal guardian is the person "who by court order or statute has sole physical custody of the child." Minn. R. Juv. Pro. P. 2.01(15). No court order had been issued giving appellant sole physical custody, and the relevant statutes gave M.M. sole physical custody. *See* Minn. Stat. § 257.541, subd. 1 (2008) (providing that a biological mother of a child who was not married to the child's father when the child was conceived or born has sole custody until paternity is established or custody determined under the relevant statutes); *see also* Minn. Stat. § 257.75, subd. 3 (2008) (stating that one effect of a recognition of parentage is that it provides the basis for "bringing an action to award custody" but that, "[u]ntil an order is entered granting custody to another, the mother has sole custody"). Appellant also did not seek to intervene under Minn. R. Juv. Pro. P. 23.01, subd. 2.

As a parent who was not a legal custodian and who had not intervened, appellant was properly a participant in, not a party to, the CHIPS hearing. *See* Minn. R. Juv. Pro. P. 22.01 ("[P]articipants to a juvenile protection matter shall include: . . . any parent who is not a legal custodian . . . .") The district court did not err in failing to recognize appellant as a party.

Appellant also argues that he was entitled to be represented by legal counsel at the CHIPS hearing.

> (a) . . . [I]f the child's parent or legal custodian desires counsel but is financially unable to employ it, the court shall appoint counsel to represent the parent or legal custodian in any juvenile protection matter in which the court determines that such appointment is appropriate.
> . . . .
> (d) Timing. The appointment of counsel for the parent [or] legal custodian . . . shall occur as soon as practicable after the request is made.

Minn. R. Juv. Pro. P. 25.02, subd. 2. There is no evidence that appellant requested counsel before or at the CHIPS hearing, and, in any event, the district court had discretion to determine if appointment of counsel would be appropriate. The district court found that "the participants [in the CHIPS proceeding] are in agreement that the disposition herein is in the best interests of the child and all participants." Thus, the district court would have had no reason to appoint counsel for a non-custodial parent who neither contested the CHIPS disposition nor requested appointment of counsel.

On June 24, 2009, the order resulting from the CHIPS proceeding was filed. It stated that appellant was permitted supervised visitation with E.U.R. a minimum of two times per week and that the district court authorized his case plan, which included these items:

> 4.1 Submit urinalysis as requested.
> 4.2 Participate in in-home parenting services.
> 4.3 Complete a parenting assessment and follow recommendations.
> 4.4 Maintain safe and suitable housing.
> 4.5 Cooperate with the public health nurse for the child.
> 4.6 Maintain regular contact with the child protection social worker [(CPSW)].

Two days later, on June 26, appellant signed an acknowledgement that he had received a copy and an explanation of a very similar case plan requiring him to

> 1. complete a parenting assessment and follow any recommendation,

2. submit to random urinalysis testing (UA) as requested by the department [of human services (DHS)]
3. participate in visitation as scheduled;
4. stay in communication with [DHS] by letting his [CPSW] know of changes of address or phone number.
5. maintain safe and suitable housing that is free from the use or sale of illegal drugs and/or alcohol and will remain law abiding.

The document appellant signed also stated that he had "been informed that failure to complete the case plan and refrain from drug use will result in the department considering other permanency options for [E.U.R.] including the option of a court ordered Termination of Parental Rights of [E.U.R.]." Thus, by the end of June 2009, appellant knew that failure to complete his case plan could lead to an involuntary termination of his parental rights.

Appellant now argues that, if he

> had had a lawyer and a dispositional advisor *then* [i.e., at the time of the CHIPS proceeding], he could have been counseled about attending to the parenting assessment quickly, about ceasing his use of marijuana and cocaine, about attending to his urinalyses, about the probable need to separate from [M.M.],[1] about meeting with the agency social worker, and about attending all visits on time.

But appellant does not explain why, since he did not heed directives from the district court and DHS although he knew this could result in termination of his parental rights, he would have heeded counsel's advice.

The district court did not err in not making appellant a party to the CHIPS proceeding or in not appointing counsel for him.

[1] But the CHIPS order envisioned returning E.U.R. to the custody of M.M. when she had corrected the conditions that led to his out-of-home placement, so an attorney would have had no reason to advise appellant to separate from her.

II. Continuance

The decision to grant or deny a continuance will not be reversed absent an abuse of discretion. *In re Welfare of J.A.S.*, 488 N.W.2d 332, 335 (Minn. App. 1992).

In February 2009, about three months after her appointment, counsel for appellant moved at the beginning of trial for a 90-day continuance "to allow [appellant] to continue in his case plan. It would allow him to show that he is no longer with [M.M.] and to see how he can do his case plan without [her.]" Both the DHS and the GAL opposed the motion, which was denied.

Appellant argues that the denial was an abuse of discretion because, if he had had more time, he could have made more progress on the case plan requirements and he could have proved that he and M.M. were no longer living together. We disagree. The record shows that, after receiving the case plan, appellant continued to use drugs, failed to attend two-thirds of his urinalysis appointments, and missed several visitations with E.U.R. Although appellant testified at trial that he was no longer living with M.M. and wanted nothing more to do with her, the GAL testified that "[t]hey are still together."[2] Given appellant's lack of progress in compliance with the case plan from June 2009, when he received it, until trial in February 2010, and the fact that his compliance did not improve after counsel was appointed in November 2009, the district court did not abuse its discretion in denying a continuance.

[2] By saying that a continuance "would allow [appellant] to show that he is no longer with [M.M.]", appellant's counsel may have meant that more time might enable appellant to break off his relationship with M.M.

III. Termination

> We review the termination of parental rights to determine whether the district court's findings address the statutory criteria and whether the district court's findings are supported by substantial evidence and are not clearly erroneous. We give considerable deference to the district court's decision to terminate parental rights. But we closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing. We affirm the district court's termination of parental rights when at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the best interests of the child, provided that the county has made reasonable efforts to reunite the family.

In re Welfare of Children of S.E.P., 744 N.W.2d 381, 385 (Minn. 2008) (citations omitted). Appellant does not argue that termination would not be in the best interest of E.U.R. *See* Minn. Stat. § 260C.301, subd. 7 (2008) (providing that, in any termination proceeding, "the best interests of the child must be the paramount consideration" and that "[w]here the interests of parent and child conflict, the interests of the child are paramount").

A district court may terminate parental rights if it finds any one of the following: that the parent "has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship"; that the parent "is palpably unfit to be a party to the parent and child relationship"; that "reasonable efforts . . . have failed to correct the conditions leading to the child's [out-of-home] placement"; or that "the child is neglected and in foster care." Minn. Stat. § 260C.301, subd. 1(b)(2), (4), (5), (8) (2008). In a detailed and comprehensive opinion, the district court found that all four of these criteria pertain here, and clear and convincing evidence supports those findings.

A. Non-compliance with duties of parent-child relationship

E.U.R. has never lived with appellant. Appellant testified that he has never held a job for longer than a few weeks; that he has another son, with whom he has had no contact for 10 or 11 years, and that he had not been in touch with the CPSW because "I really ain't want to see her and I wasn't calling her . . . it's my fault . . . because every time I seen her she disrespected us."

The CPSW testified that, when she was assigned to the case in June 2009,

> the plan was that [appellant] would provide a few clean UAs and [E.U.R.] would be placed with him. . . . I supervised a visit [of E.U.R. and appellant] and it became apparent to me that [appellant] could not pick up on [E.U.R.'s] cues and did not have the basic parenting skills or knowledge to meet [E.U.R.'s] basic needs.
>
> He could not change his diaper, he did not know how to hold him when he was feeding him; he did not know how to get him in and out of the car seat; he [did] not know how to burp him. He never faced [E.U.R.] towards him; he faced him away from him. There was no interaction. . . .
>
> . . . .
>
> . . . I was not comfortable recommending [appellant] for placement of [E.U.R.] and that's when the visits moved to more intensive on site visitations . . . at Genesis.

The manager of the supervised parenting program at Genesis testified that she had seen evidence that E.U.R. was not bonding with appellant.

> A lot of times [E.U.R.] would cry when he was in [appellant's] care.
>
> . . . .
>
> And there was a few times when [E.U.R.] would be crying during the session and [appellant] was not able to comfort him and would hand him off to [M.M.]
>
> . . . .
>
> [In the November 25 visit, M.M.] had asked [appellant] if he wanted to hold [E.U.R.] and handed him off to [appellant]. [E.U.R.] started to cry and [appellant] said, "Uh, oh, Dude, there you go." He continued to cry and he cried harder and [appellant] handed him back to [M.M.] and then [M.M.] tried to comfort him . . . [but he] continued to cry. [Appellant]

> remained sitting in the chair and was visibly upset and he stated, "Oh, Dude, you don't even know me." . . .
>
> And [M.M.] asked [appellant] to hold [E.U.R.] for a second and [appellant] held him, but he didn't comfort him or cuddle him or try to comfort him when he cried and he continued to scream and cry quite loudly while sitting on [appellant's] lap.
>
> [Appellant] had [E.U.R.] sitting on his lap, screaming, saying, "go ahead and cry Dude, go ahead and cry."
>
> . . . .
>
> [Appellant] stated that [E.U.R.] was spoiled, and I tried to explain to him that he wasn't crying because he was spoiled and . . . [we] kind of disputed that together.

When asked if appellant was responsive to E.U.R.'s crying, the manager answered "Sometimes he would be; sometimes he would not. Most of the time . . . he would not be able to comfort him." Her notes indicated that appellant responded to E.U.R.'s cues when the staff prompted him with suggestions; she testified that "the key word is when staff prompts him."

An assessor of appellant's parenting potential noted that "[g]iven [appellant's] erratic lifestyle and his statement that he is willing to have his sister take care of his child (in spite of saying he has limited contact with her), his ability to form a safe and durable attachment with his infant should be questioned."

Clear and convincing evidence supports the findings underlying the conclusion that appellant neglected to comply with the duties imposed on him by the parent-child relationship.

B. Palpable unfitness

The district court based its conclusion that appellant is palpably unfit on [1] his "consistent use of drugs, [2] his lack of parenting skills, [3] his criminal drug dealing behavior and [4] his pattern of lying."[3]

1. Drug use

The record supports the district court's findings that "Between May of 2009 and January of 2010, [appellant] missed 25 scheduled UAs, provided one UA on the wrong day and provided two UAs that had invalid results. Of the UAs that [appellant] did provide, five UAs were positive for THC, one was positive for THC and cocaine, and one was positive for cocaine"; that appellant "declined to participate" in an "assessment based on the positive UAs"; and that appellant "testified that he did not agree to do a[n] assessment because he did not think that he had a drug problem."

2. Lack of parenting skills

The testimony of the CPSW and the manager at Genesis, both of whom observed appellant with E.U.R., supports the finding of his lack of parenting skills.

3. Criminal drug-dealing behavior

The record includes documents showing that appellant was convicted of felony attempted possession of a controlled substance in New York in 1990, violated the probation imposed for that offense, and went to prison; that he was convicted of the same

[3] Appellant concedes "some failed [missed] urinalyses, a couple of urinalyses positive for cocaine, some initial uncertainty about how to comfort a crying infant, two or three misdemeanor arrests for small marijuana sales, and the [July 2009] misdemeanor arrest for indecent conduct which was dismissed . . . [and] . . two felony convictions, ten and twenty years old."

crime in New York in 2000, served about 40 months in prison, and came to Minnesota after his release in 2007. A document in the record shows that, on August 21, 2008, appellant was arrested in Minneapolis after he was observed selling narcotics in a park and that he "admitted to having and selling the suspected marijuana." Appellant testified that on April 13, 2009, he and M.M. had been stopped by a police officer in Minneapolis who "found some weed on the ground . . . [and said] it was hers and mine" and that he pleaded guilty. The officer testified that she observed a hand-to-hand transaction in which appellant was handed some money and M.M. retrieved something from her bra and handed it to the person who gave appellant the money. Appellant also testified that, on May 12, 2009, he had been arrested for loitering with intent to solicit, to which he later pleaded guilty.

4. Pattern of Lying

This pattern emerges by comparing what appellant told a parenting assessor in July 2009 with what he told another assessor in November 2009 and with what he testified to at trial in February 2010.[4]

In July 2009, appellant told a parenting assessor that he had been with M.M. for two years and that she was pregnant with their second child, who would be born in 2010. In February 2010, appellant testified that he is no longer in a relationship with M.M. and that she was not pregnant with his child "unless she [is] having a miracle baby." That same day, however, the GAL testified that "the other issue . . . is [appellant's] continued

[4] One assessor also noted the pattern of lying and reported that "it [was] difficult to assess the veracity of [appellant's] self report."

relationship with [M.M.]. They are still together and I don't think that would be good for [E.U.R.] either."

In July 2009, appellant told the parenting assessor that he had grown up in Minneapolis with his mother, two sisters, and grandmother and graduated from Henry High school. In November 2009, he told another assessor investigating an allegation of sexual behavior that he was raised by his mother in Minneapolis and graduated from North High School. In February 2010, he testified that he lied during the assessments and had in fact grown up in New York and attended high school there.

In the July parenting assessment, appellant "denied any issues with alcohol/drugs, physical/mental health, or domestic violence/criminal activity," notwithstanding that court records from 2007 and 2008 showed otherwise. In the November 2009 assessment, he said his three contacts with the law were related to disorderly conduct, public urination, and loitering, and that he had spent about seven days in jail. At trial, he testified that he had "minimized" some aspects of his background check for the parenting assessments, that he was now using marijuana but not cocaine, and that he had no idea how he could have tested positive for cocaine.

Clear and convincing evidence supports the finding that appellant is palpably unfit to be a parent because of his drug use, lack of parenting skills, criminal drug dealing, and pattern of lying.

C. Failure of reasonable efforts

> It is presumed that reasonable efforts [to correct the conditions leading to a child's out-of-home placement] under this clause have failed upon a showing that:

> (i) . . . In the case of a child under the age of eight at the time the [CHIPS] petition was filed . . . the presumption arises when the child has resided out of the parental home under court order for six months unless the parent has maintained regular contact with the child and the parent is complying with the out-of-home placement plan.
>
> (ii) the court has approved the out-of-home placement plan . . . ;
>
> (iii) conditions leading to the out-of-home placement have not been corrected. It is presumed that conditions leading to the out-of-home placement have not been corrected upon a showing that the parent or parents have not substantially complied with the court's orders and a reasonable case plan; and
>
> (iv) reasonable efforts have been made by the social services agency to rehabilitate the parent and reunite the family.

Minn. Stat. § 260C.301, subd. 1 (b)(5)(2008).

E.U.R. was three days old when the CHIPS petition was filed in May 2009. He has never resided with either of his parents. Appellant did not maintain regular contact with E.U.R.: he missed many of the scheduled weekly or twice-weekly visits. He and M.M. missed so many Friday visits that these were eventually cancelled.

A major condition leading to E.U.R.'s placement was appellant's drug use; the CPSW testified that "the plan was that [appellant] would provide a few clean UAs and [E.U.R.] would be placed with him." Appellant's numerous missed and failed urinalyses indicate that this condition has not been corrected. He testified that he missed UAs because he was "depressed. . . . This has taken a toll to me. I'm human, too." When asked if he knew that his failure to provide clean UAs "was an important factor" for the court, appellant answered, "Hey, I'm human. I made a mistake. I been through a lot since the baby was born." Appellant testified that he did not make or maintain contact with the CPSW because she allegedly "disrespected" him, but he never requested a

different CPSW and testified that it was his fault that he and the CPSW did not meet. Appellant did not substantially comply with the case plan.

Reasonable efforts to rehabilitate appellant and correct the conditions leading to E.U.R.'s out-of-home placement failed.

D. Neglected and in foster care

To determine whether E.U.R. is neglected and in foster care, a court considers (1) how long he has been in foster care; (2) the parent's effort, including use of rehabilitative services, to make it in the child's best interest to be returned to the parent's home in the foreseeable future; (3) whether the parent had visited the child in the three months prior to the CHIPS petition;[5] (4) whether the parent maintained regular contact with the person or agency responsible for the child; (5) whether the services offered to the parent were appropriate and adequate; (6) whether additional services would be likely to bring about a lasting parental adjustment so the child could return within an ascertainable time; and (7) whether the agency made reasonable efforts to rehabilitate the parent. Minn. Stat. § 260C.163, subd. 9 (2008).

It is undisputed that E.U.R. has always been in foster care. Appellant has declined to make use of a chemical-abuse evaluation or services because he does not think he has a problem, and it is not in E.U.R.'s best interest to be returned to appellant while he is still using drugs. Appellant testified that he had not maintained contact with the CPSW. Appellant's refusal to admit that he has a chemical dependency problem, to have an

[5] This criterion is irrelevant; E.U.R. was only three days old when the CHIPS petition was filed.

evaluation, or to accept treatment, collectively reflect that appropriate services were offered to him, that he declined them, and that offering additional services would be unlikely to result in the possibility of placing E.U.R. with him in the foreseeable future.

Clear and convincing evidence supports the district court's decision that four of the statutory criteria for termination of parental rights have been met in appellant's case.

IV. Admission of GAL's testimony[6]

The GAL testified that E.U.R.'s foster family has already adopted his half-sister and would be a good adoptive home for him.[7] Appellant argues that this testimony should not have been admitted, relying on *In re Welfare of J.M.*, 574 N.W.2d 717 (Minn. 1998) both for the de novo standard of review and for the proposition that "testimony as to the adoptability of a child at issue in a termination proceeding is not relevant to termination and best interests and is not admissible." Appellant misreads *J.M.*, which considered "whether the termination statute, Minn. Stat. § 260.221 [predecessor of Minn. Stat. § 260C.301], requires a juvenile court to make findings as to the adoptability of a child as part of its determination of the child's best interests" and noted that this is "a question of law, subject to de novo review." *Id.* at 722. *But see Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (holding that district court has broad

[6] Appellant concedes that this issue is raised for the first time on appeal but asks that it be reviewed under Minn. R. Civ. App. P. 103.04 (permitting review of any matter in the interest of justice). Normally, we would not address the issue under *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that this court does not generally address matters not presented to and considered by the district court). But, in the interests of completeness, we address the issue.

[7] The GAL also testified that his recommendation for termination of appellant's parental rights would be the same "[i]f this family weren't in the picture . . . because . . . I don't think [appellant] is going to be skilled to handle this child."

discretion in admitting evidence and that admission will not be overturned unless it is based on an erroneous view of the law or is an abuse of that discretion).

J.M. holds "that the termination statute does not require assessment of a child's adoptability. . . ." *J.M.*, 574 N.W.2d at 724. Holding that an assessment of adoptability is not required by statute may equate to holding that testimony on adoptability is not necessary, but it does not equate to holding that such testimony is inadmissible. Appellant's challenge to the GAL's testimony is unpersuasive.

The district court did not err by admitting the GAL's testimony, by declining to recognize appellant as a party to the CHIPS proceeding, or by not appointing counsel for appellant. Clear and convincing evidence supports the findings on which the involuntary termination of appellant's parental rights was based.

Affirmed.