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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1665**

In the Matter of the Welfare of the Child of: N. B., Parent

**Filed February 25, 2013
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-JV-11-11277

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Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant-mother challenges the district court's termination of her parental rights, arguing that she rebutted the presumption that she is palpably unfit to be a party to the parent-child relationship. We affirm.

FACTS

Appellant-mother, N.B., is the biological mother of E.A., who was born on September 20, 2011. N.B. was not married when the child was conceived or born. L.N.A. signed an affidavit of paternity for E.A., but genetic testing later excluded him as the biological father of the child.

On December 5, respondent Hennepin County Human Services and Public Health Department (the department) learned that N.B. had given birth to E.A. An individual reported that N.B. had given birth at home because she feared E.A. would be removed from her care and that E.A. had never been to the doctor or received medical attention. Department records indicated that N.B.'s parental rights to four other children had been involuntarily terminated in 2005, 2006, and 2007. The primary issues in those proceedings were N.B.'s violent relationship with the children's father and N.B.'s failure to protect the children from domestic violence. In 2005, the district court found that N.B.'s eldest child was a battered child and that the child's injuries constituted egregious harm.

Roberta Wigfield, a department social worker, was assigned to investigate E.A.'s welfare. Wigfield learned that N.B. had an active warrant in Ramsey County for failing

to appear in court. Wigfield also learned that N.B. had an extensive history of police contact related to domestic violence, disorderly conduct, orders for protection, and harassment. Wigfield, accompanied by Minneapolis police officers, made an unannounced visit to N.B.'s home and observed E.A., who appeared to be in good condition.

During the visit, N.B. provided documentation showing that E.A. was born in a hospital in North Dakota and that he had been seen by a doctor earlier that day. N.B. told Wigfield that she and L.N.A. had been in a relationship for two years and that there was no domestic violence in the relationship. She did admit however that "everyone argues" and stated that L.N.A. had pushed her during their arguments. She also told Wigfield that L.N.A. had thrown a chair once during an argument, but that he threw it outside, not at her. N.B. admitted that she had not continued the services that were put in place during her last child-protection case and that she had stopped taking her medication, Zoloft.

Wigfield contacted the hospital where N.B. gave birth to E.A. Hospital staff informed Wigfield that N.B.'s situation "appeared suspicious" because she unexpectedly came to the hospital for E.A.'s delivery. N.B. told staff that she and L.N.A. were visiting an aunt and that they became stranded. Hospital staff reported that the family did not have infant clothes, diapers, a car seat, or any of the other things needed for a newborn baby, but that they obtained the necessary items before E.A. was discharged.

Wigfield also interviewed L.N.A. L.N.A. told Wigfield that he and N.B. had been in a relationship for about five years. He admitted throwing a chair off the patio during an argument and reported a history of arguments with N.B. that involved pushing. He

also informed Wigfield that N.B. is frequently paranoid and easily frustrated and that he would occasionally take E.A. in another room while N.B. would pace and talk to herself. L.N.A. said that he refuses to bring his other children around N.B. because she put them out in the cold one night and they had to walk from south to north Minneapolis.

On December 8, the department filed a petition to terminate N.B.'s and L.N.A.'s parental rights to E.A. The district court held an emergency protective-care hearing at which it found that the petition established a prima facie case that E.A. was the subject of a juvenile-protection matter. The court also found that E.A.'s health, safety, or welfare would be immediately endangered if he was released to N.B.'s care, awarded the interim legal custody of E.A. to the department, and placed E.A. in foster care. The department offered N.B. a voluntary interim case plan, which was approved by the district court.¹

On January 11, 2012, N.B. agreed to rehabilitative services to remedy the conditions that led to E.A.'s out-of-home placement. The agreed-upon case-plan tasks included, in part, intensive parenting classes at Genesis II for Families, domestic-violence and anger-management programming at the Domestic Abuse Project (DAP), a psychological evaluation and compliance with recommendations, dialectal behavioral therapy to address issues of mental health as it relates to N.B.'s past diagnosis of a major depressive disorder and borderline personality disorder, weekly visitation with E.A. at Genesis II, attendance at E.A.'s medical appointments, and regular meetings with the assigned social worker, Sherry Holloway.

¹ Reasonable efforts for rehabilitation and reunification are not required when a person's parental rights to another child have been involuntarily terminated. Minn. Stat. § 260.012(a)(2) (2012).

The district court scheduled a trial for April 5, but continued that date, over the department's objection, to allow N.B. additional time to work on her case-plan services. The district court held the trial on July 12 and 13. The evidence presented at trial showed that N.B. had missed ten of the twenty-five visits scheduled with E.A. between January 12 and April 26. As of May 10, visitation between N.B. and E.A. took place during Parent Child Interactive Therapy (PCIT) on Wednesdays and Fridays. N.B. missed PCIT sessions on June 8, 15, 27, and 29, and July 11. During visits, N.B. was unable to soothe or console E.A. when he was upset and crying. On one occasion, N.B. became frustrated and tried to force a helmet onto E.A.'s head.² On another occasion, N.B. put a necklace on E.A. and did not remove it after staff informed her that the necklace presented a choking hazard.

The evidence also showed that on March 5, N.B. completed a diagnostic assessment at Psych Recovery Inc. to determine her suitability for Dialectical Behavioral Therapy (DBT). She was diagnosed with major depressive disorder and a borderline personality disorder. Treatment recommendations included weekly individual therapy, weekly DBT skills training, medication compliance, and case monitoring and management. On March 12, N.B. began a 60-week DBT skills group at Psych Recovery Inc. In the first module, she attended eight of ten group meetings. In the second module, she attended one of four group meetings.

On March 16, N.B. completed a neuropsychological evaluation at Sister Kenny Psychological Associates. N.B.'s test profile was mildly abnormal, but the evaluation

² E.A. wears a helmet to reshape his skull.

noted that testing conditions were complicated by her emotional state and lack of confidence.

N.B. reported to Holloway that she had a medical evaluation and received services at the Crisis Center and Acute Psychiatric Services. But medical records indicate that N.B. was not evaluated by a medical professional until April 8, when she was seen at the acute psychiatric services department at the Hennepin County Medical Center. At that time, a doctor prescribed 50 mg of Zoloft. Holloway requested that N.B. establish a permanent relationship with a psychiatrist for ongoing medication management, but she did not do so. N.B. missed an appointment with a doctor on April 16 and did not see an identified psychiatrist until July 11.

On April 24, N.B. was treated for an overdose and suicide gesture. No further information about the overdose and suicide gesture was available because N.B. refused to sign a consent form authorizing release of information regarding the incident. On April 27, N.B. was diagnosed with Depressive Disorder-Major. During a therapy session on May 12, N.B. reported that she had attempted suicide on April 24 by taking eight Zoloft, four ibuprofen, and two other unknown pills, which resulted in vomiting and drowsiness.

N.B. was referred to the Genesis II Family Focus Parent Education Program. She signed an attendance contract, which required attendance at all programming. N.B. had unexcused absences on April 18 and 23, and was late on April 25. She was discharged from the program for inconsistent attendance. Later, the program readmitted her. But N.B. continued to attend inconsistently—she missed four out of twelve programming

days, two of which were unexcused. She also missed three phase meetings, three PCIT meetings, and was late for two meetings. Genesis II staff raised concerns that N.B. let her emotions interfere with her ability to regularly attend programming. Staff stated that N.B. did well when she attended and has evident love and affection for E.A., but staff opined that N.B. would benefit from increased mental-health stability. Staff noted that N.B. had difficulty regulating her emotions and was observed crying during programming. A Genesis II case manager testified that N.B. would likely be discharged from the program for poor attendance and noncompliance with the attendance contract.

The trial evidence also showed that E.A. had 11 scheduled doctor appointments after being placed in foster care. N.B. was given bus cards to enable her to attend those appointments, and E.A.'s foster mother scheduled the appointments at locations near the bus line in an effort to facilitate N.B.'s attendance. N.B. nonetheless attended only two of the eleven appointments.

But the evidence also showed that N.B. successfully completed domestic-abuse counseling at DAP. During her time in the program, N.B. "actively participated in giving and receiving feedback from other group members, appropriately utilized process time, discussed her abuse history and worked on a self-care/protection plan." In addition, N.B. had maintained safe and suitable housing.

The district court determined that N.B. had not rebutted the statutory presumption that she is palpably unfit and that E.A.'s best interests are served by termination of N.B.'s parental rights. This appeal follows.

DECISION

“[P]arental rights may be terminated only for grave and weighty reasons.” *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). A district court’s decision in a termination proceeding must be based on evidence concerning the conditions that exist at the time of trial. *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 554 (Minn. App. 2007). An appellate court “exercises great caution in termination proceedings, finding such action proper only when the evidence clearly mandates such a result.” *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996). On appeal we examine the record to determine whether the district court applied the appropriate statutory criteria and made findings that are not clearly erroneous. *In re Welfare of D.L.R.D.*, 656 N.W.2d 247, 249 (Minn. App. 2003). A finding is clearly erroneous when “it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660-61 (Minn. 2008) (quotation omitted). We give the district court’s decision considerable deference, but “closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing.” *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008).

I.

A district court may terminate parental rights to a child if the district court finds that the 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) (2012).

“It is presumed that a parent is palpably unfit to be a party to the parent and child relationship upon a showing that the parent’s parental rights to one or more other children were involuntarily terminated” *Id.* “Under these circumstances, the parent has the burden of rebutting the presumption of palpable unfitness.” *D.L.R.D.*, 656 N.W.2d at 250. Because N.B.’s parental rights to her first four children were involuntarily terminated, she is presumed to be palpably unfit and bears the burden of rebutting that presumption. The district court determined that N.B. failed to rebut the presumption and is therefore palpably unfit to parent E.A.

N.B. disputes “whether the *presumed* fact, palpable unfitness under Minn. Stat. § 260C.301, subd. 1(b)(4), has in fact been proven by the *predicate* fact, a prior involuntary termination.” N.B. argues that this court “in its decisions since 2003 has not only overstated the burden and type of proof that the parent must offer in order to rebut the presumption, but has also been inconsistent in the manner in which it has described that burden and that proof.” We disagree.

This court has consistently stated that when the presumption applies, the presumed fact is “unfitness.” *See, e.g., In re Welfare of the Child of J.L.L.*, 801 N.W.2d 405, 412 (Minn. App. 2011) (“In this context, the assumed fact is unfitness.”), *review denied* (Minn. July 28, 2011); *T.D.*, 731 N.W.2d at 554 (“In the context of termination-of-

parental-rights cases, the assumed fact is *unfitness*.”); *D.L.R.D.*, 656 N.W.2d at 250 (“[Where a parent’s parental rights to another child have been involuntarily terminated], the parent has the burden of rebutting the presumption of palpable *unfitness*.”). We have also consistently explained that to rebut the presumption of palpable *unfitness*, the parent’s burden is to present sufficient evidence to allow the district court to find the parent to be a fit parent. *See, e.g., T.D.*, 731 N.W.2d at 554 (“[T]o rebut the presumption a parent must introduce sufficient evidence that would allow a factfinder to find parental *fitness*.”); *In re Child of A.S.*, 698 N.W.2d 190, 194, 196 (Minn. App. 2005) (stating that application of the presumption of *unfitness* shifts burden to parent to prove *fitness* and rebut presumption), *review denied* (Minn. Sept. 20, 2005). Thus, “[t]o overcome the presumption of palpable *unfitness* in a termination-of-parental-rights proceeding, the parent must introduce evidence that would permit a factfinder to find parental *fitness*.” *T.D.*, 731 N.W.2d at 551.

Nonetheless, N.B. contends that *D.L.R.D.* presents two inconsistent standards for rebutting the presumption: first, that the parent must establish “conditions that show her *fitness to parent*” and second, that the presumption “is also rebuttable with evidence establishing that the prior condition of *unfitness* no longer exists.” *D.L.R.D.*, 656 N.W.2d at 250-51. We reject this argument for two reasons. First, when taken out of context, as N.B. apparently does, the second phrase could be read to suggest that a parent may rebut the presumption of palpable *unfitness* by presenting evidence that a condition previously relied on to establish palpable *unfitness* no longer exists. But this court did not use the second phrase to define a parent’s burden of production when the presumption applies.

Rather, we used it in rejecting an implicit argument that the presumption conflicts with caselaw that prohibits courts from relying primarily on past history when deciding whether to terminate parental rights. *Id.* at 251. Thus, we stated that although “the presumption based on past unfitness is retrospective, it is also rebuttable with evidence establishing that the prior condition of unfitness no longer exists.” *Id.* When considered in context, the second phrase does not set forth a second, inconsistent standard.

Second, the fact that a parent has successfully addressed a basis for a prior finding of unfitness (e.g., the parent has successfully addressed domestic-abuse issues) does not mean that the parent is necessarily a fit parent (e.g., if the parent has mental-health issues). This would especially be the case if the reason the parent may not be currently fit was asserted but not addressed in the prior proceeding generating the finding of unfitness that the parent is trying to rebut.

N.B. also argues that an unpublished opinion “set forth an entirely different test for rebutting the presumption of palpable unfitness.” Unpublished opinions, however, “are not precedential.” Minn. Stat. § 480A.08, subd. 3(c) (2012).

N.B. further argues that “the law only requires her to produce proof which supports *one* ‘finding of fact contrary to the presumed fact,’ palpable unfitness.” But this court has previously rejected an argument that a parent need only produce “some” evidence of fitness to rebut the presumption. *See T.D.*, 731 N.W.2d at 554 (“Although the burden of persuasion remains with the county, to rebut the presumption a parent must introduce sufficient evidence that would allow a factfinder to find parental *fitness*.”).

N.B. next argues that “the prior termination has little to do with, and does not prove, the statutory elements of palpable unfitness” and that “the presumption does not prove a case for termination as palpably unfit.” Specifically, she argues that her prior terminations are at least five years old and the department “neither discovered nor reported any evidence of abuse, neglect, or deprivation of care.” But “[t]he mere absence of other reasons to terminate parental rights is not sufficient to overcome the presumption of unfitness resulting from a prior involuntary termination of parental rights.” *D.L.R.D.*, 656 N.W.2d at 250. Because of the presumption of unfitness, “the district court need not establish independent reasons for termination.” *Id.* Rather, it was N.B.’s burden to introduce evidence that would allow a finding that she is fit. *See In re Welfare of J.W.*, 807 N.W.2d 441, 445 (Minn. App. 2011) (“[T]o satisfy the burden of production and thereby rebut the presumption created by section 260C.301, subdivision 1(b)(4), a parent must introduce evidence that would justify a finding of fact that he or she is not palpably unfit.” (quotation omitted)), *review denied* (Minn. Jan. 6, 2012). Moreover, it is the legislature’s prerogative to define palpable unfitness to include circumstances in which an individual’s parental rights previously have been involuntarily terminated. *See Indep. Sch. Dist. No. 709 v. Bonney*, 705 N.W.2d 209, 215 (Minn. App. 2005) (“The wisdom or propriety of the statute is not a judicial question, but one solely for the Legislature.” (quotation omitted)).

Lastly, N.B. argues that she has successfully rebutted the presumption, because she left her relationship with the father of her four older children, and she completed DAP with high evaluations. “Whether a parent’s evidence satisfies the burden of

production must be determined on a case-by-case basis.” *J.W.*, 807 N.W.2d at 446. “The burden often is a difficult one.” *Id.* “[A] parent must do more than engage in services and must demonstrate that his or her parenting abilities have improved.” *Id.* (quotation omitted). The “parent must affirmatively and actively demonstrate her or his ability to successfully parent a child.” *Id.* (quotation omitted). “To shoulder this burden, the parent . . . is inevitably required to marshal any available community resources to develop a plan and accomplish results that demonstrate the parent’s fitness.” *Id.* (quotation omitted).

N.B. relies heavily on her completion of domestic-abuse programming to show that she rebutted the presumption. But N.B. had to “do more than engage in services”; she had to present evidence that would allow a finding that her “parenting abilities have improved.” *Id.* Contrary to N.B.’s assertion on appeal, the fact that she ended her prior relationship with the father of her other children is not sufficient to demonstrate parental fitness. N.B.’s current relationship with L.N.A. was also risky. L.N.A. described conflicts with N.B. that involved pushing. The district court found that although the relationship between N.B. and L.N.A. was not as violent as her other relationship, “it does evidence a tendency toward conflicted romantic relationships and exposure of children to those relationships.” Moreover, although N.B. is to be commended for her completion of DAP and encouraged to make healthy relationship choices in the future, her compliance with this component of her voluntary case plan does not eliminate legitimate concerns regarding her current mental health and its impact on her ability to properly parent E.A.

N.B. also emphasizes that her case plan was voluntary, arguing that “[c]ase plan failures are not relevant to a termination under subdivision 1(b)(4).” “Failure to correct the conditions leading to the child’s removal from the home, as evidenced by noncompliance with a case plan, is a factor for termination under Minn. Stat. § 260C.301, subd. 1(b)(5), not under 1(b)(4).” *In re Children of T.R.*, 750 N.W.2d 656, 663 (Minn. 2008). But just because noncompliance with a case plan was not pleaded as a statutory basis for termination, it does not follow that evidence regarding N.B.’s participation in voluntary case-plan services is irrelevant. Because the case-plan services addressed issues that compromised N.B.’s parenting skills, evidence regarding N.B.’s participation in those services was relevant to a parental-fitness determination. *See* Minn. R. Evid. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

In terminating N.B.’s parental rights to E.A., the district court acknowledged that N.B. has the basic ability to care for and love E.A., but it also found that she “has not demonstrated that her mental health is stable” or that “she is able to regulate her emotions or behaviors” such that she “would be able to safely parent [E.A.]” The court further found that N.B. had not consistently visited E.A., that she did not establish a therapeutic relationship with a psychiatrist, and that she engaged in suicidal behavior after she was granted a continuance of her first trial date. In addition, N.B. “exposed [E.A.] to domestic abuse and demonstrated parenting skill deficiencies.” Moreover, the court found that E.A. is “a vulnerable infant and needs safety,” that N.B. “will not be able to

safely parent [E.A.] in the foreseeable future,” and that E.A. “would be at risk upon return to [N.B.’s] care.”

The district court’s decision to terminate N.B.’s parental rights is supported by clear and convincing evidence. *See In re K.S.F.*, ___ N.W.2d ___, ___, No. A12-0631, slip op. at 1 (Minn. App. Oct. 15, 2012) (“The standard of proof in a termination-of-parental-rights proceeding is clear-and-convincing evidence.”). N.B. only attended 15 of the 25 visits scheduled for her and E.A. between January 12 and April 26. She failed to attend the majority of E.A.’s medical appointments, even though they were scheduled in a manner intended to encourage her attendance. N.B. was discharged from the Genesis II program for poor attendance. She was readmitted but continued to miss scheduled meetings. N.B. continued to struggle with her mental-health issues, engaged in suicidal behavior as recently as April 2012, and failed to establish a relationship with a psychiatrist for medication management.

On this record, we cannot say that the district court erred by concluding that N.B. failed to rebut the presumption of palpable unfitness. *Cf. J.W.*, 807 N.W.2d at 446-47 (reversing the district court’s conclusion that mother had not rebutted a presumption of unfitness where mother introduced evidence that she had changed in significant and material ways since the prior TPR proceedings, that she had conducted herself appropriately when engaged in supervised visits of her biological children, that she had made significant progress in her parenting skills through parenting classes and dialectical behavioral therapy, that she had a greater support network than she previously enjoyed, and that she had a more stable living environment than in the past); *J.L.L.*, 801 N.W.2d at

412-13 (affirming the district court’s conclusion that mother had rebutted a presumption of unfitness where, among other things, mother had been sober for more than two years at the time of trial, was committed to avoiding unhealthy relationships that might affect her sobriety or the child’s safety, participated in individual therapy, and sought and participated in supervised visitation with the child).

II.

N.B. argues that the termination of her parental rights under Minn. Stat. § 260C.301, subd. 1(b)(7) (2012) “must be vacated because that subdivision was not pleaded in the T.P.R. petition.” Under subdivision 1(b)(7) a district court may terminate a parent’s parental rights if it finds “that in the case of a child born to a mother who was not married to the child’s father when the child was conceived nor when the child was born the person is not entitled to notice of an adoption hearing . . . and the person has not registered with the fathers’ adoption registry” Minn. Stat. § 260C.301, subd. 1(b)(7).

Although the district court did not explicitly delineate whose rights were terminated under each of the cited statutory grounds on which it based its decision to terminate parental rights, the plain language of subdivision 1(b)(7) indicates that it applies to any unidentified fathers, and not to N.B. *See* Minn. Stat. § 259.49, subd. 1(b)(1) (2012) (providing that a person listed as a parent on a child’s birth record is entitled to notice of an adoption proceeding); Minn. Stat. § 259.52, subd. 6 (2012) (providing that only putative fathers may register with the fathers’ adoption registry); *see*

also Minn. Stat. § 259.21, subd. 12 (2012) (defining a putative father as a “man who may be a child’s father”).

Because the portion of the district court’s order terminating parental rights under subdivision 1(b)(7) does not apply to N.B., we cannot conclude that the district court terminated her parental rights under this provision. *See Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (stating that appellate courts cannot assume district court error); *Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999) (applying *Loth*). We therefore reject N.B.’s argument that this court should reverse the district court’s termination of her parental rights, which she asserts occurred under subdivision 1(b)(7).

Affirmed.