STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2054

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

Filed June 15, 2010
Affirmed
Muehlberg, Judge[*]

Steele County District Court
File No. 74-JV-09-1476

Keith L. Deike, Patton, Hoversten & Berg, P.A., Waseca, Minnesota (for appellant A.N.)

Dan McIntosh, Steele County Attorney, Christine A. Long, Assistant County Attorney, Owatonna, Minnesota (for respondent county)

Julie Nelson, Owatonna, Minnesota (guardian ad litem)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.

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

MUEHLBERG, Judge

Because mother's parental rights to her older children were previously terminated, she was presumed to be palpably unfit to be a party to the parent-child relationship when her third child was born. On appeal from the termination of her parental rights to this third child, mother argues that the district court misapplied the standard for deciding

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

whether she rebutted her presumed unfitness, and that the record shows that she rebutted that presumption. Because the district court applied the standard for rebutting the presumption as set out in prior caselaw and because the record supports the district court's determination that mother did not rebut the presumption, we affirm.

FACTS

Mother's parental rights to her two sons were involuntarily terminated in 2007. Later, when mother's third child was born, the county petitioned to terminate her parental rights to this child. The district court initially ruled that, under Minn. Stat. § 260C.301, subd. 1(b)(4) (2008), the prior termination created a prima facie case that mother is palpably unfit to be a party to the parent-child relationship. Later, after trial, the district court ruled that mother failed to rebut the presumption and terminated her parental rights to the third child as a palpably unfit parent. Mother appeals.

D E C I S I O N

Where, as here, there is no motion for a new trial, this court's scope of review is whether the evidence supports the findings of fact, whether the findings sustain the conclusions of law and the order for termination, and whether the district court correctly decided substantive legal questions that were properly raised at trial. *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 733 (Minn. App. 2009). On appeal from a district court's ruling that a parent failed to rebut a presumption of unfitness, this court stated:

> We review a district court's order for termination of parental rights to determine whether the district court's findings address the statutory criteria and whether those findings are supported by substantial evidence and are not clearly erroneous. We examine the record to determine

> whether the evidence is clear and convincing. Parental rights may be terminated only for grave and weighty reasons. If a parent is found to be palpably unfit to be a party to the parent-child relationship, parental rights may be terminated. But in a TPR proceeding, the best interests of the child are the paramount consideration.

In re Welfare of the Child of D.L.D., 771 N.W.2d 538, 543 (Minn. App. 2009) (quotations and citations omitted).

I.

"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. . . ." Minn. Stat. § 260C.301, subd. 1(b)(4). Generally, the rules of evidence apply to juvenile-protection proceedings. Minn. R. Juv. Prot. P. 3.02, subd. 1. Under the rules of evidence,

> a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Minn. R. Evid. 301. The district court stated that a presumptively-unfit parent "has the burden" of rebutting the presumption by "affirmatively" showing an ability to parent the child and that her parenting abilities "have improved." The district court also stated that mother "has not met her burden of proof to overcome the presumption of terminating her parental rights." Mother argues that the district court improperly shifted the burden of proof and overstated the quantum of proof necessary to rebut the presumption. The crux of mother's argument is that a parent who is presumed to be unfit need not show fitness

to parent, only that her ability to parent has improved since the prior termination. This court has rejected this argument:

> A parent must rebut a presumption of unfitness. *In re Welfare of D.L.R.D.*, 656 N.W.2d 247, 250-51 (Minn. App. 2003). The district court need not establish an independent reason to terminate because it is the parent's burden to "affirmatively and actively demonstrate her or his ability to successfully parent a child." *Id.* On appeal, T.D. argues for a different application of the presumption, arguing that a parent need only produce some evidence of fitness to negate the presumption. T.D. correctly points to the rules of evidence, which provide that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof." Minn. R. Evid. 301. But rule 301 does not conflict with our previous applications of the presumption of parental unfitness. In the context of termination-of-parental-rights cases, the assumed fact is *unfitness*. 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. *See id*. 1977 comm. cmt. (stating that presumption no longer functions when party introduces evidence sufficient to justify a finding of fact contrary to the assumed fact); *In re Child of A.S.*, 698 N.W.2d 190, 194, 196 (Minn. App. 2005) (stating that applying presumption of unfitness shifts burden to parent to prove fitness and rebut presumption), *review denied* (Minn. Sept. 20, 2005).

In re Welfare of T.D., 731 N.W.2d 548, 554 (Minn. App. 2007), *review denied* (Minn. July 17, 2007).

Mother argues that caselaw is inconsistent regarding what is necessary to rebut presumed unfitness. She asserts that *T.D.*, 731 N.W.2d at 554, requires a parent to show that, since a prior termination, the parent has become a fit parent, while *D.L.D.*, 771 N.W.2d at 545, requires only that a parent show that her parenting ability has improved.

We do not read *D.L.D.* to hold that rebutting a presumption of unfitness can occur without evidence allowing a finding of fitness. *D.L.D.* states that, "[i]n order to rebut a presumption of palpable unfitness, . . . a parent must demonstrate that his or her parenting abilities have improved[,]" but then describes the parent's conduct after the first termination and concludes that the parent's behavior is "inconsistent with a finding of parental fitness in the face of a statutory presumption to the contrary." 771 N.W.2d at 545. Also, reading *D.L.D.* to require evidence allowing a finding of fitness is consistent with caselaw. *See In re Welfare of Child of D.L.R.D.*, 656 N.W.2d 247, 251 (Minn. App. 2003) (stating that "[w]hen the presumption of unfitness applies, a parent must affirmatively and actively demonstrate her or his ability to successfully parent a child").

Mother also argues that showing parental fitness cannot be the standard for rebutting the presumption of unfitness because that would improperly shift the burden of nonpersuasion from the county to the parent. But the comments to rule 301 state, "[i]f sufficient evidence is introduced that would justify a finding of fact contrary to the assumed fact the presumption is rebutted and has no further function at the trial." Minn. R. Evid. 301 1977 comm. cmt. Thus, because the prior termination creates a presumption that mother is an unfit parent, rebutting that presumption requires her to introduce evidence that would justify a finding contrary to the assumed unfitness. This is consistent with caselaw indicating that rebutting a presumption of unfitness to parent requires evidence that allows a finding of fitness. *See T.D.*, 731 N.W.2d at 554 (addressing the comment to Minn. R. Evid. 301).

It is also not clear that requiring a presumptively unfit parent to show parental fitness improperly shifts the risk of nonpersuasion: The "risk of nonpersuasion" and the "burden of persuasion" are different ways of referring to the concept that it is "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." *Black's Law Dictionary* at 223 (9th ed. 2009). If a parent fails to rebut a presumption of unfitness and that parent is deemed to be palpably unfit, that fact, *by itself*, neither requires nor allows termination of the parent's parental rights; to terminate parental rights, the district court must find *both* the existence of a statutory basis for termination *and* that termination is in the child's best interests. *D.L.D.*, 771 N.W.2d at 545. Thus, by itself, a failure to rebut a presumption of unfitness cannot cause a district court to terminate parental rights.

Mother argues that the standard for rejecting a presumption of unfitness cannot be that the parent is currently fit because there would be "no point" in a county petitioning to terminate parental rights if the parent is fit. But it is unlikely that a county would petition to terminate the parental rights of a clearly fit parent, even if that parent were statutorily presumed to be unfit. If a county did so, the parent would rebut any presumption of unfitness and, if the county pursued the case, defeat the termination petition. Thus, a county would petition to terminate the parental rights of a parent who is presumptively unfit only if the parent is clearly unfit or if it is unclear whether the parent is unfit. In the former case, a termination proceeding is needed to terminate the parent's parental rights; in the latter, a termination proceeding is needed to determine the propriety of termination. In neither case, however, is there "no point" in petitioning to terminate parental rights.

Because *T.D.* previously rejected mother's argument that a parent who is presumed to be unfit does not need to present evidence allowing a finding of parental fitness and because mother's arguments otherwise have limited weight, we reject her assertion that the district court misapplied the law regarding rejection of the presumption of parental unfitness.

II.

Consistent with the district court's finding that it "heard no testimony that [mother] has the present ability to parent[,]" mother admits that "[t]here was no doubt at the trial that [she] still ha[d] parenting deficits that need[ed] to be corrected in order to have custody of [the child]." We appreciate mother's candor in admitting that she is not currently fit to parent this child.

Mother cites evidence that she alleges shows her improved ability to parent, and argues that it shows that she rebutted the presumption that she is unfit. We disagree. Parental rights may be terminated if, among other things, the parent is both palpably unfit to be a party to the parent-child relationship and that, "for the reasonably foreseeable future" the parent will remain unable to care for the child. Minn. Stat. § 260C.301, subd. 1(b)(4). Here, the district court found that "[t]here is clear and convincing evidence that [mother] will continue for the reasonably foreseeable future to be unable to care appropriately for the ongoing physical, mental and emotional needs of [the child]." Thus, given mother's admission that she cannot currently care for the child, we review whether the record supports the finding that mother will, for the reasonably foreseeable future, be unable to parent the child.

The district court found "clear and convincing evidence that [mother] will continue for the reasonably foreseeable future to be unable to care appropriately for the [child]." We conclude that this finding is supported by this record. First of all, the expert testimony at trial that addressed the subject favored terminating mother's parental rights. Second, the record is unclear about whether mother will even become able to parent this child. Third, the finding that mother will continue for the reasonably foreseeable future to be unable to care for this child is consistent with related evidence indicating limitations in mother's intellectual functioning and the fact that she was diagnosed with an antisocial personality disorder, which her psychologist testified is both a long-standing problem and negatively impacts her ability to parent. Lastly, the finding is consistent with the district court's ancillary findings that mother lacks insight into her personality disorder and how it effects her parenting, that mother currently lacks the psychological capacity and training to fulfill her parental obligations, that mother does not recognize her parenting deficits and cannot identify them, and that mother's failure to professionally address her chemical abuse creates risk that chemical abuse and related problems will recur.

III.

The district court also recognized that if a statutory ground for termination is present—here, the unrebutted presumption of palpable unfitness—it must address whether termination is in the child's best interests, and that this analysis involves balancing the interests of the parent and the child in preserving the parent-child relationship. *See In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992) (addressing this balancing test). Mother does not challenge the district court's best-

interests analysis and we cannot say that the district court's findings are unsupported or that it otherwise misbalanced the competing interests of mother and child.

Affirmed.