STATE OF MINNESOTA
IN COURT OF APPEALS
A10-382

In the Matter of the Welfare of the Child of: T. L. P. and N. R. S., Parents.

Filed June 15, 2010
Affirmed
Kalitowski, Judge

Wright County District Court
File No. 86-JV-09-6699

Cathleen Gabriel, Annandale, Minnesota (for appellant T.L.P.)

Ethne Hedren, Elk River, Minnesota (for respondent N.R.S.)

Thomas N. Kelly, Wright County Attorney, Anne L. Mohaupt, Assistant County Attorney, Buffalo, Minnesota (for respondent Wright County Human Services)

Angela Olson, Cokato, Minnesota (guardian ad litem)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Ross, Judge.

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

KALITOWSKI, Judge

Appellant T.L.P. challenges the district court order terminating her parental rights to A.H.S. Appellant argues that: (1) the district court lacked subject-matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act; (2) the district court erred by denying appellant's motion to remove the judge; and (3) the evidence was not

sufficient to support the district court's finding that appellant was palpably unfit to be a party to the parent and child relationship. We affirm.

D E C I S I O N

A.H.S. was born in Fargo, North Dakota, on May 29, 2009, during the pendency of a Wright County child-in-need-of-protection-or-services (CHIPS) matter concerning appellant's five older children. Wright County filed a separate CHIPS petition as to A.H.S. shortly after her birth. In August 2009, the district court terminated appellant's parental rights to four of her older children and placed her oldest child in long-term foster care. In September 2009, the district court dismissed the CHIPS petition regarding A.H.S. and the county filed a petition to terminate appellant's parental rights to A.H.S. based on the statutory presumption that appellant was palpably unfit to be a party to the parent and child relationship because her parental rights to other children were involuntarily terminated. Following a two-day trial, the district court terminated appellant's parental rights to A.H.S.

I.

Appellant argues that the district court lacked subject-matter jurisdiction over the matter under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). We disagree.

Application of the UCCJEA involves questions of subject-matter jurisdiction that we review de novo. *Schroeder v. Schroeder*, 658 N.W.2d 909, 911 (Minn. App. 2003).

Under Minn. Stat. § 518D.101-317 (2008) adopting the UCCJEA, a Minnesota court has jurisdiction to make an initial child custody determination if any of the

following exist: (1) Minnesota is the "home state" of the child within six months before commencement of the proceeding; (2) another state does not have jurisdiction as the home state, the child and child's parents have a significant connection with Minnesota, and there is substantial evidence available in Minnesota concerning the child's care, protection, training, and personal relationships; (3) all courts having home-state jurisdiction have declined to exercise jurisdiction; or (4) no court of any state can claim jurisdiction under the previous three clauses. Minn. Stat. § 518D.201. The home state of a child is defined as:

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Minn. Stat. § 518D.102(h).

Here, Minnesota has subject-matter jurisdiction over the TPR matter under section 518D.201(1), as A.H.S.'s home state, or in the alternative, under section 518D.201 (2), because no other state has home-state jurisdiction and A.H.S. has a significant connection with Minnesota. Although A.H.S. was born in North Dakota, the record shows that she did not live there from birth with a parent or a person acting as a parent. *See* Minn. Stat. § 518D.102(h) (defining home state). When Wright County picked A.H.S. up in July 2009, she was staying with a babysitter and appellant was in Minnesota. And although appellant testified that she and A.H.S. lived in Nebraska following A.H.S.'s birth, the district court did not find this testimony to be credible. *See In re Welfare of L.A.F.*, 554

N.W.2d 393, 396 (Minn. 1996) (stating that this court defers to the district court's credibility determinations). Because A.H.S. has lived in Minnesota since July 2009, and because no other state has home-state jurisdiction, we conclude that Minnesota has subject-matter jurisdiction under section 518D.201.

II.

Appellant argues that the district court erred when it denied appellant's motion to remove the judge. "In construing procedural rules, we look first to the plain language of the rule and its purpose." *State v. Dahlin*, 753 N.W.2d 300, 305 (Minn. 2008). We construe the right to peremptorily remove a judge narrowly. *Id.* at 307.

Minn. R. Juv. Prot. P. 7.07, subd. 3(a), (d), provides that if a party files a notice to remove a judge within ten days of receiving notice of the presiding judge, the chief judge of the judicial district shall assign another judge to hear the matter. But a party may not seek to remove a judge "who has presided at a motion or any other proceeding in the matter" unless the party makes an affirmative showing of prejudice. *Id.*, subd. 3(b). And a termination-of-parental-rights (TPR) matter is to be considered a continuation of a CHIPS matter for purposes of the rule. *Id.*, subd. 4. The advisory committee comment to the rule states that the committee "recommends that courts implement the one-judge one-family concept to the greatest extent possible." *Id.* 2003 comm. cmt; *see also* Minn. R. Juv. Prot. P. 1.02(h), 1999 comm. cmt. (calling for the parties and district court to coordinate separate proceedings involving one family to assure a consistent outcome that is in the best interests of the children).

Appellant first filed a notice to remove the judge in the CHIPS proceeding for A.H.S. The district court denied the motion, noting that Wright County implements the one-judge-one-family rule, and the judge was presiding over the child protection case involving appellant's other children. *See id*. 2003 comm. cmt. Appellant renewed her motion to remove the judge in the TPR proceeding, and the district court again denied appellant's motion.

Appellant argues that she satisfied the removal-notice requirement when she filed a notice to remove the judge in the CHIPS matter because the previous TPR matter for the older children was a separate matter for purposes of the rule. But whether the district court erred by denying appellant's request to remove the judge in the CHIPS matter is not properly before this court. "Prohibition is the appropriate remedy where a [district court] judge has refused to honor a properly filed notice to remove." *Zweber v. Zweber*, 435 N.W.2d 593, 594 (Minn. App. 1989) (citing *McClelland v. Pierce*, 376 N.W.2d 217, 219 (Minn. 1985), *review denied* (Minn. Mar. 29, 1989). Because appellant failed to file a writ of prohibition in either the CHIPS matter or the TPR matter, appellant waived this issue.

III.

Appellant argues that the evidence is insufficient to support the district court's finding that appellant was unfit to be a party to the parent and child relationship. Specifically, appellant argues that: (1) she was not given the opportunity to demonstrate her fitness as a parent; (2) the record shows that appellant was not abusing prescription

medications during the pendency of the proceedings; and (3) the record shows that appellant never harmed or threatened A.H.S.

"[Appellate courts] 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." *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). We will affirm the 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. *Id.*

Minn. Stat. § 260C.301, subd. 1(b) (2008), sets forth nine statutory grounds for involuntarily terminating parental rights. Subdivision 1(b)(4) provides that the district court may terminate an individual's parental rights when it 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.

A parent is presumed to be palpably unfit to be a party to the parent and child relationship when that parent's parental rights to other children were involuntarily terminated. *Id.* When the presumption is established, the parent has the burden to prove fitness to be a parent, and "the absence of other reasons to terminate parental rights is not sufficient to overcome the presumption of unfitness." *In re Welfare of Child of W.L.P.*, 678 N.W.2d

703, 709 (Minn. App. 2004). To sustain this burden, a parent is "inevitably required to marshal any available community resources to develop a plan and accomplish results that demonstrate the parent's fitness." *In re Matter of Welfare of the Child of D.L.D.*, 771 N.W.2d 538, 544 (Minn. App. 2009) (quotation omitted).

Appellant argues that she did not have the opportunity to show that she is fit to parent A.H.S. because A.H.S. was born on May 29, 2009, and the termination petition was filed on September 29, 2009. But the record shows that from A.H.S.'s birth through the trial in November and December 2009, appellant had opportunities to engage in services and prove her fitness to parent A.H.S. but failed to take advantage of them. Appellant's county case plan, incorporated into the district court's pretrial order, provided that appellant was to submit to random drug testing. Appellant missed 23 random drug tests from May 29, 2009, through the date of trial. And although appellant emphasizes that the nine tests she took showed negative results, the case plan explicitly states that a missed test is equivalent to a positive test.

In addition, appellant failed to participate in a chemical dependency evaluation, as required by her case plan. Appellant argues that she made efforts to obtain a rule 25 evaluation, but she was repeatedly denied the opportunity for failure to produce certain documents. The record shows that the county sought to help appellant obtain the required documents and that appellant failed to cooperate or respond to the county's requests. The county caseworker testified that he provided appellant with three alternate assessment opportunities, but appellant provided an excuse as to why she could not participate for each.

The record does show that appellant participated in scheduled visitation opportunities and showed an interest in bonding with A.H.S. But the county's notes show that appellant often appeared distressed, made inappropriate comments to A.H.S., and fell asleep during visitation. The district court found that appellant's behavior during visitation "strongly suggests that [appellant] has been actively abusing controlled substances." Regardless of whether appellant's behavior was a result of substance abuse, appellant's conduct at visitation supports the district court's finding that appellant failed to prove fitness to parent A.H.S. *See In re Matter of Welfare of Children of T.R.*, 750 N.W.2d 656, 661 (Minn. 2008) (stating that "actual conduct of the parent" determines fitness to parent, not the parent's mental illness) (quotation omitted). We conclude that appellant had ample opportunities to prove her fitness to parent A.H.S., but she failed to do so.

Appellant also argues that there is no evidence to show that she was abusing prescription medications during the proceedings. But as discussed above, appellant missed 23 random drug tests, and her case plan and the district court's order indicate that a missed test is equivalent to a positive test. Appellant had the burden to prove fitness to parent by showing that she was not abusing prescription medications; appellant failed to sustain this burden.

Finally, appellant argues that the record does not show that A.H.S.'s health and well-being were threatened while A.H.S. was in the care of appellant, and that the only problematic condition throughout the proceedings was appellant's lack of a permanent residence. Again, the burden was not on the state to show that A.H.S.'s health and well-

being were threatened; the burden was on appellant to show fitness to parent, and appellant failed to meet this burden.

We conclude that the district court's findings on appellant's palpable unfitness to parent A.H.S. address the statutory criteria, are supported by substantial evidence, and are not clearly erroneous. *See In re Welfare of Children of S.E.P.*, 744 N.W.2d at 385 (setting forth the standard of review).

Affirmed.