STATE OF MINNESOTA
IN COURT OF APPEALS
A12-157

In the Matter of the Welfare
of the Children of:
M. P. and G. P., Parents.

Filed June 25, 2012
Reversed and remanded
Toussaint, Judge[*]

Blue Earth County District Court
File No. 07-JV-09-2748

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

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

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

TOUSSAINT, Judge

Appellant M.P. previously challenged the order denying her motion to vacate an order voluntarily terminating her parental rights. This court reversed and remanded. In this appeal after that remand, appellant challenges the resulting involuntary termination of her parental rights, arguing that the county failed to show that a basis for terminating her parental rights existed as of the date of the hearing on remand. Because the county did not, in fact, show the existence of a statutory basis to terminate appellant's parental rights as of the date of the hearing on remand, we reverse and remand.

D E C I S I O N

I.

Appellant argues that, to involuntarily terminate her parental rights on remand, the county had to show that conditions allowing an involuntary termination existed as of the date of the hearing on remand. The county disagrees. "The order of the juvenile court shall stand, pending the determination of the appeal, but the reviewing court may in its discretion and upon application stay the order." Minn. Stat. § 260C.415, subd. 1 (2010). Pending the prior appeal, no party applied to stay the order denying appellant's motion to vacate the termination. Therefore, the order denying her motion to vacate the termination was effective during that appeal and, during the pendency of that appeal, appellant's parental rights were terminated.

This court reversed and remanded "for proceedings in accord with Minn. R. Juv. Prot. P. 42.08, subd. 2(b)." *In re Welfare of Children of M.P.*, No. A11-766, 2011 WL

4783685, at *3 (Minn. App. Oct. 11, 2011). Minn. R. Juv. Prot. P. 42.08, subd. 2(b) requires that, in cases involving a parent's request to voluntarily terminate parental rights, the parent be put under oath for purposes of "asking" that the request be granted and establishing "good cause" to grant the request. Because such proceedings would be unnecessary if appellant's parental rights were still terminated as of the date of the hearing on remand, our previous decision in this case reversed the termination of appellant's parental rights.

On remand, appellant did not ask to voluntarily terminate her parental rights, and the matter proceeded as an involuntary termination of parental rights. When reviewing an involuntary termination of parental rights, appellate courts determine whether, among other things, the conditions supporting the termination existed "at the time of the hearing." *In re Welfare of Chosa*, 290 N.W.2d 766, 769 (Minn. 1980); *see In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 386 (Minn. 2008); *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 900-02 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012); *In re Welfare of J.S.*, 470 N.W.2d 697, 701 (Minn. App. 1991), *review denied* (Minn. July 24, 1991). Because appellant's parental rights had not been terminated as of the time of the hearing on remand, and because caselaw requires that conditions for an involuntary termination exist as of the hearing addressing the propriety of that termination, the conditions for termination had to exist as of the date of the hearing on remand.[1]

[1] This conclusion is consistent with related caselaw. *See generally In re Welfare of P.R.L.*, 622 N.W.2d 538, 544 (Minn. 2001) (stating, in the context of a termination of

II.

The district court involuntarily terminated appellant's parental rights because she failed to satisfy the duties of the parent-child relationship, and failed to correct the conditions leading to the child's out-of-home placement. *See* Minn. Stat. § 260C.301, subd. 1(b)(2), (5) (2010). Appellant challenges each basis for termination. The standard generally used for reviewing a district court's termination of parental rights is set out in *S.E.P.*, 744 N.W.2d at 385 and *J.R.B.*, 805 N.W.2d at 900-02. For two reasons, we conclude that neither statutory basis for terminating appellant's parental rights is satisfied here.

First, at the hearing on remand, only three witnesses testified; appellant's case manager, the guardian ad litem (GAL), and appellant. None of these witnesses, however, presented viable evidence on appellant's circumstances on the date of the hearing on remand. The case manager and the GAL admitted that they lacked any information regarding the case more recent than the hearing generating the prior appeal. While appellant testified to her circumstances since the prior appeal, the district court found her testimony not credible, and we defer to this credibility determination. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). Further, of the exhibits submitted at the

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parental rights that the district court stayed but later effected by lifting the stay, that "[t]he issue" before the court was whether grounds to terminate parental rights existed "at the time of the *second* termination" (emphasis added)); *In re Welfare of Child of J.W.*, 807 N.W.2d 441, 446 (Minn. App. 2011) (stating, where a parent had rebutted the presumption of palpable unfitness arising from a prior involuntary termination, that a subsequent termination on the ground of palpable unfitness still "requires a petitioner to prove specific conditions existing at the time of the hearing that appear will continue for a prolonged, indefinite period and that are permanently detrimental to the welfare of the child" (quotation omitted)), *review denied* (Minn. Jan. 6, 2012).

hearing on remand, only three are dated after the original hearing, and none of those shows the existence of a statutory condition allowing the termination of appellant's parental rights as of the date of the hearing on remand. Nor do the undated exhibits show the existence of such a condition. Therefore, this record is insufficient to affirm the district court's termination of appellant's parental rights.

Second, most of the district court's order on remand addresses appellant's conditions up to the date of the first hearing. Regarding the period since the hearing generating the prior appeal, however, the district court stated:

> Even as of the remand trial date, November 10, 2011, [*appellant*] *has not shown that she is able to presently care for the children*. Too many questions remain regarding her continued stability in light of her history, and regarding her ability to adequately supervise her children and keep them safe.

(Emphasis added.) Because this finding puts the burden of producing evidence to avoid an involuntary termination of parental rights on appellant, it is inconsistent with caselaw: "The petitioner . . . bears the burden of producing clear and convincing evidence that one or more of the statutory termination grounds exists." *In re Welfare of C.K.*, 426 N.W.2d 842, 847 (Minn. 1988). Nor, on a record that does not address appellant's circumstances at the time of the hearing on remand, is this error harmless. *See In re Welfare of Children of D.F.*, 752 N.W.2d 88, 98 (Minn. App. 2008) (declining to reverse the revocation of a stay of a termination of parental rights for harmless error). Therefore, we reverse the termination of appellant's parental rights and remand for further proceedings.

Reversed and remanded.