STATE OF MINN.ESOTA
IN COURT OF APPEALS
A12-0223

In the Matter of the Welfare of the Children of: N. M. N. and J. M. K., Parents

Filed July 30, 2012
Affirmed
Connolly, Judge

Anoka County District Court
File No. 02-JV-11-1061

Patricia A. Zenner, Zenner Law Office, Stillwater, Minnesota (for appellant J.M.K.)

Joseph Van Thomme, Randall & Goodrich, P.L.C., Anoka, Minnesota (for respondent N.M.N.)

Tony Palumbo, Anoka County Attorney, Kathryn Eilers, Assistant County Attorney, St. Paul, Minnesota (for respondent Anoka County Social Services)

Judi Albrecht, Eagan, Minnesota (guardian ad litem)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges termination of his parental rights, arguing that clear and convincing evidence does not support the district court's findings that appellant is palpably unfit to be a parent, that termination of his parental rights is in his children's

best interests, and that the county made reasonable efforts to reunite appellant with his children. Because we conclude that clear and convincing evidence does support all of these findings, we affirm.

FACTS

In 2005, appellant J.M.K. began a relationship with N.N. In August 2006, they had a son, J.M. J.M. lived in a treatment center with N.N. When she was found to have used drugs, the county filed a petition seeking to have J.M. adjudicated as a child in need of protection or services (CHIPS). Appellant was made a party to the CHIPS proceeding. J.M. was adjudicated CHIPS and placed in foster care.

In 2007, in another county, appellant twice violated a Domestic Abuse No Contact Order (DANCO) with N.N. He was sentenced to a stay of execution of concurrent 24-month and 27-month prison sentences, placed on probation, and ordered to serve 180 days in jail. In 2008, this county filed a CHIPS petition regarding J.M. after N.N. reported that J.M. had been hit by appellant. J.M. was adjudicated CHIPS and placed in foster care, and appellant's contact with him was restricted. In November 2008, a second son, J.T., was born to appellant and N.N.

In 2009, appellant was charged with felony domestic assault against N.N. The district court issued a pretrial DANCO against him for N.N. and the children. Appellant twice violated the DANCO with N.N. He pleaded guilty, requested that his 2007 sentences be executed, and was incarcerated. After a guilty plea to the new felony charge, appellant was committed for 29 months concurrent to the sentences he was already serving.

In October 2010, CHIPS petitions were filed on both boys because appellant was incarcerated and N.N. was homeless and using drugs. After an emergency removal hearing, the boys were adjudicated CHIPS as to N.N.

In December 2010, after a trial, J.M. and J.T. were also adjudicated CHIPS as to appellant. A child protection worker (CPW) met with appellant in prison and asked him to identify relatives as possible placements for the boys. He identified two relatives but both decided shortly after the hearing that they could not be long-term placement options.

In February 2011, the boys were placed with appellant's uncle and his wife, but in April 2011, they asked to have the boys removed because they could no longer be a placement option for them.

In May 2011, appellant told the CPW that he would be released in June, would have a job within three days, and would be able to care for the boys within a few months. By the time of appellant's release in June, J.M., age four, had been in foster care for 24 months and J.T., age two and a half, had been in foster care for 14 months. Appellant had also not seen them for 17 months.

Although no contact with N.N. was one condition of appellant's release from prison, he was found in a park having sex with N.N. in August 2011; he testified that, despite the condition, he had contact with her on multiple occasions. A petition to terminate appellant's parental rights to both boys was filed. N.N.'s parental rights to them had already been voluntarily terminated.

Following a trial, the petition was granted and appellant's parental rights were terminated. He challenges the termination, arguing that clear and convincing evidence

does not support the finding that appellant is palpably unfit to be a parent, that termination of his parental rights is not in his children's best interests, and that the county failed to make reasonable efforts to reunite appellant with the children.

D E C I S I O N

This court "will 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). The district court terminated appellant's parental rights after finding that: (1) the statutory criterion of palpable unfitness of a parent had been met, *see* Minn. Stat. § 260C.301, subd. 1(b)(4) (2010); (2) the termination of appellant's parental rights was in the best interests of his children; and (3) the county had made reasonable efforts to reunite appellant's family.

1. Palpable unfitness

A court may terminate a parent's right to a child if 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.

Minn. Stat. § 260C.301, subd. 1(b)(4). The district court found that this definition applied to appellant. Clear and convincing evidence supports that finding.

Because N.N. has voluntarily terminated her parental rights, appellant would be a single parent. Appellant had two parenting assessments, one in 2007, pertaining only to J.M., and another in 2011, pertaining to both boys. Both the psychologist who did the parenting assessments and the psychologist who evaluated appellant in 2007 and 2011 testified that he would be unable to function as an adequate single parent of his children.

When asked about the implications of his 2007 psychological evaluation on appellant's ability to parent, that psychologist testified:

> [I]n terms of cognitive or intellectual functioning . . . the ability to process, to understand, to take advice, . . . and this would also impact memory . . . to be able to use those skills in a parenting capacity, particularly without substantial assistance, would be a difficulty. . . . [O]ne would [also] have to look at the patterns of impulsive explosive behavior as also impacting how he would relate, say, to the misbehavior of children, or to the [need for] patience and understanding of day-to-day kind of tasks.
> [T]he way [appellant] described his functioning, his history, the troubles he had gotten into, . . . would certainly suggest that he wasn't quite getting the message, that insight was deficient, and that his judgment was rather poor.

In regard to appellant's own opinion that he would be able to "meet the demand of full-time parenting," the psychologist testified that "this is another area where insight and judgment are questionable . . . [I doubt] whether it is realistic that he could fulfill those responsibilities by himself . . . without substantial support."

In his 2011 report on appellant, the psychologist listed appellant's borderline cognitive ability, difficulty with memory and judgment and problem solving, misconduct, unreliability, and lack of responsibility as issues that would still be of concern and could not be easily changed. The report, dated June 29, 2011, noted that appellant last had

contact with J.M. and J.T. two and a half years ago, when J.M. was two and J.T. was an infant, and that "[f]or [appellant] to be primary caregiver for his children would require such substantial ongoing support from others as to be very questionable that it could be achieved. At the very least he would need to rebuild his life and show a positive track record before one could conclude that assuming a solo parenting role is in any way reasonable." The psychologist added that the "track record" would need to be "one to two years."

The psychologist who performed the parenting assessments of appellant testified that, in 2007, appellant told her his "ideal situation" would be for J.M. to live with N.N. and spend weekends with appellant. She also testified that, in 2007, "it didn't appear that [appellant] would be fit for primary caregiving given the various concerns or areas of growth in parenting that were observed within this assessment." The 2007 assessment concluded that appellant's memory problems would be a barrier to his improving or acquiring new skills and said it was unclear whether "lack of parent[ing] knowledge, interpersonal characteristics, or neurological impairment affect [appellant's] abilities to function successfully in parenting and other areas of his life. At this time, it does not appear [appellant] has the capability to be the primary caregiver or full-time parent for his infant son [J.M.]."

Her 2011 parenting assessment of appellant "recommended that [appellant] not be considered as a placement for [J.M.] and [J.T.]." This recommendation was based on the fact that appellant

> has a long history of criminal activity and has only recently been released from jail after a two-year prison sentence. He has a limited support system and lacks awareness that he will need greater support in parenting as a single parent. His cognitive capabilities are also of concern, as his borderline intellectual functioning impacts his ability to learn new information and problem-solve. . . .
> . . . .
> . . . He does not have an attachment relationship established with [J.M.] and [J.T.] given the minimal amount of time he has been in contact with them. Given the level of concerns aforementioned in his parenting abilities, lack of progress since his past parenting assessment and having no contact over the past two years with his sons, it would be detrimental to [them] to begin exploring a parenting relationship.

She also testified that appellant did not have specific plans for either housing or employment and that he did not recognize the problems associated with going into full-time parenting with children with whom he lacked a relationship. Finally, she testified that, if her information about appellant "had shown that there was an opportunity in improving parenting to the place that he could be considered a primary caregiver, [she] would have made that recommendation" but "that [was] not what was obtained in this assessment."

The reports and testimony of each of the two experts were generally consistent from 2007 to 2011, and the experts were also consistent with each other in their view of appellant's inability to parent his sons.

Appellant's own testimony provides additional support for the experts' views. His testimony as to when he had lived with the children, when he had been incarcerated, and when he had contact with the children reflected his lack of ability to remember. He testified that he planned to support his sons by working at a towing company of which he

is part owner, but he could not tell the court how much he earned from that job. He said he planned to live with his sons in a house that he would rent from a friend for $1,250 a month, but he did not explain how he would get the $1,250 and said he did not know when the house would be ready; he also said he had never previously owned or leased a residence. He said he planned to put the children in daycare while he was working but did not know how many hours a week that would be or how much daycare costs. He also testified that he had never paid child support. When asked if he knew that having no contact with N.N. was a condition of his release from prison, he said yes; but he also said a report of their having been found having sex in a park after his release was accurate and that he didn't recall how many times or where he had contact with N.N. after his release.

The reports and testimony of the experts and appellant's own testimony provide clear and convincing evidence to support the district court's findings that he "is not currently able to assume the duties of a full time primary parent and provide a safe and permanent home for the boys" and that "[i]t is not reasonable to expect he will be able to assume parental duties and provide a safe and permanent home anytime soon despite the provision of additional services or efforts." Clear and convincing evidence supports the district court's conclusion that appellant "is palpably unfit to be a party to the parent-child relationship."

2. Best interests of the children

"In any proceeding under this section [on the termination of parental rights], the best interests of the child must be the paramount consideration, provided that . . . at least one condition [such as palpable unfitness for the parent-child relationship is] found by the

court. . . . Where the interests of parent and child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301, subd. 7 (2010); *see also* Minn. Stat. § 260.012(a) (2010) ("In determining reasonable efforts [for reunification with a parent] to be made with respect to a child and in making those reasonable efforts, the child's best interests, health, and safety must be of paramount concern.").

Determining the best interests of a child in the context of a termination petition requires a district court to balance the parent's interest in preserving the relationship against both the child's interest in preserving it and any competing interest of the child, including a stable environment. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). A district court's conclusion that termination of parental rights is in a child's best interests will not be overturned on appeal unless the district court abused its discretion. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 905 (Minn. App. 2011).

The district court concluded that termination of appellant's parental rights was in the best interests of J.M. and J.T., relying in part on *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996) for the proposition that, particularly when providing further services to a palpably unfit parent is not realistic, "the best interests of [a child] are not served by delaying [the child's] availability for permanent placement." *Id.*

The CPW testified that "[J.M.] has been placed in foster care up to this point for 24 months . . . [and] [J.T.] has been placed for 14 months."[1] She continued, "There is no

[1] The amount of time the boys have spent out of the home is beyond that contemplated by the relevant statutes. *See, e.g.*, Minn. Stat. § 260C.201, subd. 11(a) (2010) ("[T]he court shall commence proceedings to determine the permanent status of a child not later than 12 months after the child is placed in foster care . . . .").

reason to believe that [appellant] is going to be prepared to raise these boys. He doesn't have a relationship with them." In regard to the boys' situation at the time of trial, the CPW testified, "[T]hey are in a fantastic home, a skilled home that is committed to making it work for these boys and giving them the life that [they] deserve" and added that getting appellant's family together "[is] not an option for these boys. It's not best for them."

The boys' guardian ad litem provided corroborating testimony, stating that she had not tried to introduce appellant into the boys' lives because "the assessments that had been completed in June [2011] . . . both stated that [appellant] could not parent. And the boys couldn't afford to wait another six, nine, twelve months to see if he could develop the skills he needed to parent. More so, [J.M.] has significant special needs, and he needs the stable support of a home that can meet the needs."

When the court asked, "Tell me about these boys," the guardian ad litem replied,

> [J.T.] is doing pretty well. He is a pretty easygoing child. . . . He is doing really well in the home he is in right now.
> [J.M.], on the other hand, has these outbursts where he has punched holes in the wall. He will scream uncontrollably. He will lash out. He hits. He throws things. He destroys things. He can be fine one minute and out of the blue just completely lose it.
> . . . .
> [For J.T.], this is his fourth placement. [J.M.] was placed five times prior to him coming back into the system last October [i.e., October 2010] so this is his ninth placement. He has moved back and forth in five years a number of times, and he has been in out of home placement a total of two years. [The boys] just need stability.
> [J.M.] . . . doesn't know how long he is going to be in one place before he has to move again. He will talk to the preadoptive mom and want reassurance that he is going to

> stay there . . . he just is so worried that he is going to have to leave again and have to start all over.

The district court did not abuse its discretion in determining that it is in the children's best interests for appellant's parental rights to be terminated so the children can proceed to permanent placement without further interruption or delay.

3. Efforts to reunite the family

When terminating parental rights, a district court must make findings either that reasonable efforts to reunify the child and parent were made by the social services agency or that reasonable efforts at reunification were not required under Minn. Stat. § 260.012 (a)(2010) (allowing a county to not provide reunification services if "(5) the provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances"). Minn. Stat. § 260C.301, subd. 8 (2010). The district court noted in its memorandum that, when it "adopted the placement plan in the case plan dated August 18, 2011, . . . [it] implicitly, if not explicitly, authorized social services to discontinue the provision of 'reasonable efforts.'"

The district court found that:

> [W]ith the filing of the second CHIPS petition in October of 2010, [ACSS] immediately and appropriately embarked on a concurrent placement planning track. This was based upon a number of circumstances, including the fact that by the time of the filing of the second CHIPS petition, the children had already been placed outside the home for extensive periods of time. The children's mother was homeless and a chronic substance abuser. The children's father was in prison. Several family placements were attempted. [ACSS] was clearly aware of the adjustment and attachment problems the children were experiencing. Indeterminate temporary placements were obviously not in the best interests of the

> children and true permanency became an acute need for the children.
>
> The last family placement fell through and [ACSS] correctly concluded the next placement should be a permanent placement, either with [appellant] upon release from prison, or with a pre-adoptive home. [ACSS] commissioned updated parenting and psychological assessments of [appellant]. The assessments confirmed what [ACSS] no doubt believed—[appellant] was not a viable placement option. [Appellant] would not be able to provide the children with a safe and permanent placement in a reasonable time, if at all. The attempt would require significant services and programming and the continued use of temporary foster homes and a supervised transition.
>
> It is important to remember that almost immediately upon his release from prison, [appellant] actively involved [N.N.] in his life. He did so knowing the conditions of his release from prison prohibited the contact and in spite of the historic turmoil of their relationship. [N.N.] had voluntarily terminated her parental rights. There is justification for the fear that [appellant] will return to his pre-prison life of violence and incarcerations and the children would quickly return to an atmosphere of violence, drugs, and chaos.

The district court complied with the statutory mandate to make a finding that "the provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances." Minn. Stat. § 260.012 (a)(5).

Appellant does not address the argument that providing him with further services was futile and therefore unreasonable except to assert that ACSS never brought a motion for an order to cease reasonable efforts and therefore had no right to cease reasonable efforts. But, as the district court observed, ACSS's petition for termination of appellant's parental rights was a de facto petition for a declaration that providing further services to reunite appellant with his children was futile, therefore unreasonable, and therefore not

required by statute.[2] Thus, on this record, if the county erred in not providing services, that error was harmless because providing services would have been futile.

Clear and convincing evidence supported the finding that appellant is palpably unfit to be a party to the parent-child relationship; termination of appellant's parental rights is in his children's best interests; and the county did not fail to make reasonable efforts to reunite appellant with his children because providing further services would have been unreasonable and therefore futile.

Affirmed.

[2] Appellant addressed this same argument to the district court, which replied that the county was implicitly if not explicitly notified that it no longer needed to provide services to the children when the court adopted a permanent placement plan for them.