STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0534

In the Matter of the Welfare of the Child of:
S. A. B. and D. B.,
Parents.

Filed August 13, 2012
Affirmed
Chutich, Judge

Dakota County District Court
File Nos. 19HA-JV-11-2206, 19HA-JV-11-2207

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Considered and decided by Stauber, Presiding Judge; Chutich, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

CHUTICH, Judge

Appellants S.A.B. and D.B. challenge the district court's decision terminating their parental rights to their child, A.A.B., contending that the evidence was insufficient to support the termination. They assert that the district court improperly focused on their past behaviors, rather than circumstances existing at the time of trial, in determining that they are palpably unfit to parent the child. S.A.B. and D.B. also contend that the county did not make the required reasonable efforts to correct the conditions leading to the child's placement, and that the district court abused its discretion in determining that termination is in the child's best interests. Because we conclude that substantial evidence supports the district court's findings, and that it acted within its discretion, we affirm.

FACTS

On July 14, 2011, 29-year-old S.A.B. gave birth to her fifth child, A.A.B. S.A.B. has been involved with Dakota County Social Services since 2006, when she voluntarily transferred custody of her two oldest children, now ages 8 and 10, to family friends. Her third child, now age 4, is in the custody of the child's father in Willmar. S.A.B. gave birth to her fourth child in 2010, and her parental rights to that child were involuntarily terminated. S.A.B. has a history of drug use and several criminal convictions for theft, drug possession, and disorderly conduct. During her pregnancy with A.A.B., S.A.B. was in and out of various treatment programs without success, and once tested positive for methamphetamine.

S.A.B. met D.B., age 21 at the time of trial, at a bus stop in October 2010, and became pregnant with A.A.B. soon after. They lived together sporadically during the pregnancy, but are no longer romantically involved. D.B. also has a history of drug use and several criminal convictions, including felony convictions for theft and domestic assault. D.B. had no interactions with any social service agency before the child was born.

Dakota County placed A.A.B. in foster care immediately after she was born, based on S.A.B.'s history of drug use and the involuntary termination of parental rights to her fourth child. A.A.B. was placed with the family who adopted S.A.B.'s fourth child, and she has remained in that home since birth. The county ultimately filed an amended petition for termination of the parental rights of S.A.B. and D.B. to A.A.B. Dakota County Social Services filed an out-of-home case plan containing several requirements for S.A.B. and D.B. to meet to reunify them with A.A.B. These conditions included cooperating with social services, completing chemical dependency treatment, abstaining from drugs, obtaining psychological evaluations and therapy, and participating in visits with A.A.B. Both S.A.B. and D.B. entered and failed to complete more than one treatment program after A.A.B.'s birth.

The district court held a trial on the termination petition on February 6, 2012. At the time of trial, S.A.B. had been sober and in an inpatient treatment program for nearly four months. D.B. had also been sober for just over four months, and was participating in an outpatient treatment program. The state introduced 33 exhibits at trial detailing the parents' treatment histories, criminal histories, social services case notes, and other

documents relevant to their ability to parent A.A.B. S.A.B. and D.B. testified at trial, and the district court also received the report of the guardian ad litem. By order dated February 16, 2012, the district court terminated the parental rights of both S.A.B. and D.B. The district court denied the parents' motion for amended findings or a new trial, and this appeal followed.

D E C I S I O N

"We 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 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." *Id.* (citation omitted). In undertaking this review, we afford "considerable deference" to the decision of the district court. *Id.*

Our review of the record and the district court's termination order reflects one apparent clerical error that we must address. The amended petition for termination of parental rights states that the county was seeking termination on the statutory grounds listed in Minn. Stat. § 260C.301, specifically subdivisions 1(b)(4), (5) and (8) (2010). These grounds are also discussed in the district court's memorandum attached to its termination order. In the actual order, however, the district court concludes that "there is clear and convincing evidence to terminate . . . pursuant to Minn. Stat. § 260C.301, subd.

1(b)(2), (4) and (5)." Thus, the court did not expressly base the termination on subsection (8), even though it was alleged in the petition; instead, it based the order in part on subsection (2), which was *not* alleged in the petition.

While we believe this discrepancy is likely a clerical error, the juvenile protection rules provide that the court must base its decision only on the statutory grounds set forth in the petition. Minn. R. Juv. Prot. P. 39.05, subd. 3(a); *see also In re Welfare of T.D.*, 731 N.W.2d 548, 556 (Minn. App. 2007) (holding that it was inappropriate to uphold termination on grounds not stated in the petition). Therefore, we only address the statutory grounds listed in subsections (4) and (5), as those were the only two grounds stated in the petition and the district court's termination order.[1]

A. Palpable Unfitness to Parent

Minn. Stat. § 260C.301, subdivision 1(b)(4) allows the court to terminate parental rights if it finds:

> [T]hat a 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. 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 . . . .

[1] Because we conclude that termination is supported under those subsections, any error on the part of the district court was harmless. *See T.D.*, 731 N.W.2d at 556.

S.A.B. and D.B. contend that the district court improperly focused on conditions that existed in the past, including their past drug use, rather than their circumstances at the time of trial. We disagree. While the district court must not rely wholly on the parents' past behaviors, it can and should give past history due weight in determining whether that behavior is likely to continue and to affect their ability to parent the child. *See In re Welfare of S.Z.*, 547 N.W.2d 886, 893–94 (Minn. 1996) (stating that, even though the father was doing well at the time of trial, the district court properly considered his long history of mental illness and substance abuse in terminating his parental rights); *In re Welfare of J.W.*, 807 N.W.2d 441, 446 (Minn. App. 2011) ("When considering petitions to terminate parental rights, a district court should rely not primarily on past history, but to a great extent upon the projected permanency of the parent's inability to care for his or her child." (quotations omitted)), *review denied* (Minn. Jan. 6, 2012).

S.A.B.

S.A.B.'s parental rights to her fourth child were terminated involuntarily, and therefore she is presumed to be palpably unfit to parent. *See* Minn. Stat. § 260C.301, subd. 1(b)(4). S.A.B. can rebut this presumption by "affirmatively and actively demonstrat[ing] her . . . ability to successfully parent a child. In this context, 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*." *In re Welfare of Child of J.L.L.*, 801 N.W.2d 405, 412 (Minn. App. 2011) (quotations and citations omitted), *review denied* (Minn. July 28, 2011).

The district court concluded that S.A.B. had not made a sufficient showing of parental fitness to overcome the presumption of unfitness. S.A.B. testified that she was completing required group and individual therapy, parenting classes, and skills classes. She also testified that she was beginning to understand and to change the cognitive and behavioral issues that led to her past problems. After treatment, she planned to go into sober housing for a year while doing six months of aftercare. Then, she hoped to qualify for public housing assistance to rent an apartment. The district court noted in the termination order that S.A.B. was doing well in her current inpatient treatment facility, she had been sober for about four months at the time of trial, and she was having twice weekly visits with A.A.B. The court concluded, however, that S.A.B.'s progress over the few months before trial was "not a substantial enough period of time to establish the type of long term sobriety that would ensure a safe home for [A.A.B.]." The evidence in the record is sufficient to support this conclusion.

Other evidence arguably supporting S.A.B.'s fitness as a parent was introduced by the state, and consisted of two letters from a counselor at her current treatment facility. The counselor wrote that although S.A.B. had normal resistance to treatment, she was complying with the program's requirements and had "begun to put forth some effort to change her lifestyle." The counselor also noted, however, that S.A.B. had only become proactive about her termination-of-parental-rights case, probation, and treatment in the few weeks before trial. The district court credited these letters, finding that S.A.B. had not made "significant progress" or "meaningful or demonstrable changes in her

environment and her life to ensure that [A.A.B.] could safely be returned to her care." This finding is not clearly erroneous.

Further, unlike parents in previous cases who have successfully rebutted the presumption of unfitness, S.A.B. did not submit any evidence relating to "her ability to successfully parent a child." *J.L.L.*, 801 N.W.2d at 412. In *J.L.L.*, for example, this court found that the mother had rebutted the presumption of unfitness where she offered the testimony of a licensed therapist, a family counselor, a group facilitator of parenting classes, her individual therapist, and a home visitor. *Id.* at 409, 412–13. All of these people had closely observed the mother, watched her perform parenting tasks and observed her interaction with the child, and opined that she was very capable of parenting the child and meeting her needs. *Id.* at 413; *cf. T.D.*, 731 N.W.2d at 554 (concluding that the mother did not present sufficient evidence to rebut the presumption of unfitness where, even though she "complied with her case plan in terms of attending appointments, . . . the service providers testified that she had failed to demonstrate significant or commensurate progress in her parenting skills").

While S.A.B. clearly showed progress in addressing her own treatment and mental health issues, given her long history of instability and substance abuse, the district court's finding that she failed to rebut the presumption of unfitness is supported by clear and convincing evidence and is not clearly erroneous. *See In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 710 (Minn. App. 2004) (noting that while the mother had made progress, the record, especially the fact that the mother had a long history of substance abuse—including use of methamphetamine while pregnant with the child—supported the

district court's finding that the evidence introduced at the hearing was insufficient to rebut the statutory presumption). Accordingly, we affirm termination of S.A.B.'s parental rights under section 260C.301, subdivision 1(b)(4).

D.B.

Because D.B. has never had his parental rights to a child involuntarily terminated, no presumption of palpable unfitness applies to him. We look instead at "whether the district court's findings provide clear and convincing evidence of a consistent pattern of specific conduct on [his] part, or specific conditions existing at the time of trial, that appear will continue for a prolonged, indefinite period and that are permanently detrimental to the welfare of [the child]." *In re Children of T.R.*, 750 N.W.2d 656, 662 (Minn. 2008).

The district court found that since A.A.B.'s birth, D.B. had alternately been homeless, in jail, using drugs, and unsuccessfully discharged from three treatment facilities with unfavorable prognoses. For his relatively young age, he has a long criminal history, including convictions for theft, possession of controlled substances, criminal damage to property, felony domestic assault, and violation of harassment restraining orders. D.B. was unemployed at the time of trial, did not have any specific plan to find a job, and could not explain how he planned to support A.A.B. The district court found that while D.B. had been sober for just over four months, he had only been in his current outpatient treatment for about one week at the time of trial.

Clear and convincing evidence supports the district court's conclusion that D.B. is palpably unfit to parent A.A.B. While he was making some progress on his own

sobriety, no evidence was presented that, in his current situation, he could physically or emotionally care for a small child. His history of substance abuse and failure in treatment, unemployment, and lack of a permanent, long-term plan was troubling to the district court. The district court's conclusion that grounds existed to terminate D.B.'s parental rights for palpable unfitness under section 260C.301, subdivision 1(b)(4), is supported by clear and convincing evidence and is not clearly erroneous.

B. Reasonable Efforts

A parent's rights to his or her child can be terminated if the district court finds "that following the child's placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement." Minn. Stat. § 260C.301, subd. 1(b)(5). A presumption exists that a failure to correct conditions occurs if a parent has not substantially complied with the court's orders and case plan despite reasonable efforts of the social service agency. *Id.*, (iii) & (iv). In all cases, the county must provide reasonable efforts "to prevent the placement and to reunify the child and the parents." Minn. Stat. § 260C.301, subd. 8(1) (2010). "The nature of the services which constitute 'reasonable efforts' depends on the problem presented." *S.Z.*, 547 N.W.2d at 892.

Here, the district court found in a pre-trial order that "[r]easonable efforts have been made to prevent or eliminate the need for removal of the child from the home and to make it possible for the child to return home, or to provide permanency for the child." S.A.B. and D.B. contend that the efforts made by Dakota County Social Services were not reasonable.

S.A.B.

Dakota County Social Services has been involved with S.A.B. and her children since 2006. Social services staff members continually required and encouraged S.A.B. to seek chemical dependency treatment, and made such treatment a requirement of her previous proceedings and the out-of-home case plan in this proceeding. S.A.B.'s case plan contained detailed requirements for her to follow, and mandated that she have at least monthly contact with a social worker.

As evidenced by these plans and the social worker's extensive case notes introduced at trial, Dakota County Social Services has assisted S.A.B. in getting treatment and completing psychological assessments, therapy, parenting evaluations, chemical dependency evaluations, and random drug testing. Social services staff members also arranged and supervised visits with A.A.B. for both parents throughout this proceeding.

The record demonstrates that these reasonable efforts failed. S.A.B. did not substantially comply with the case plan, as shown by her unsuccessful treatment attempts after A.A.B. was born. We therefore conclude that clear and convincing evidence supports the district court's decision to terminate S.A.B.'s parental rights under the "reasonable efforts" provision of section 260C.301, subdivision 1(b)(5).

D.B.

Before A.A.B.'s birth, D.B. had no contact with any social services agency. The out-of-home placement plan for A.A.B., however, was effective August 2, 2011, only three weeks after she was born. Under this plan, as with S.A.B., Dakota County Social

Services undertook to manage D.B.'s case. It required him to cooperate with psychological and parenting assessments, chemical dependency treatment, and random drug tests. The plan also required D.B. to meet with social services staff members on a regular basis so they could help him access these services and meet the recommendations. While D.B.'s history with social services was not nearly as extensive as S.A.B.'s, we conclude that the district court did not err in finding that the county made reasonable efforts with him to correct the conditions leading to A.A.B.'s placement.

The district court correctly found that these reasonable efforts failed with D.B. He had two positive drug tests after the plan was in place, he failed to successfully complete treatment, he only had one or two contacts with social services personnel in the four months before trial, and he did not otherwise demonstrate that he could successfully parent A.A.B. This finding is supported by clear and convincing evidence and is not clearly erroneous; termination of D.B.'s parental rights was therefore proper under section 260C.301, subdivision 1(b)(5).

C. Best Interests of the Child

In any termination case, "the best interests of the child must be the paramount consideration." Minn. Stat. § 260C.301, subd. 7 (2010); *see also In re Tanghe*, 672 N.W.2d 623, 625–26 (Minn. App. 2003). 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 parent-child relationship, the child's interest in preserving the relationship, and any competing interest of the child, including the need for a stable environment. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). A district court's

determination 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), *review denied* (Minn. Jan. 6, 2012).

In this case, after making nearly 26 pages of detailed findings, the district court concluded that "[i]t is in the best interests of [A.A.B.] to maintain the stability she has now in her current placement." S.A.B. and D.B. contend that insufficient evidence supports this conclusion, and that the district court thus abused its discretion in making its best interests determination.

Our review of the record shows that ample evidence exists to support the district court's determination that termination of parental rights is in A.A.B.'s best interests. The district court appropriately credited the guardian ad litem's detailed report, including the guardian's conclusion that termination is in A.A.B.'s best interests. *See In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996) (noting that appellate courts defer to district court's credibility determinations because of their superior position for assessing credibility). In addition, while S.A.B. and D.B. were making tentative steps at recovery at the time of trial, they both consistently abused drugs in the recent past. S.A.B. had relapsed several times in the past few years, and even though she was progressing in her current treatment, professionals noted her lack of sober support and the consequent likelihood of relapse. S.A.B. and D.B. have several failed attempts at treatment; at the time of trial, S.A.B. had been sober for less than four months, and D.B. only slightly longer.

The district court further noted that A.A.B. has been living in a stable foster home since birth with her biological half-sister. A.A.B.'s interests are best furthered by living in a stable home with a family who loves her and can give her the care she needs. The district court found that at the time of trial, neither S.A.B. nor D.B. can offer the stability that A.A.B. needs to thrive. It would be unfair to make A.A.B. wait any longer for permanency, when neither S.A.B. nor D.B. have the present ability to parent her. Given that A.A.B.'s best interests are the "paramount consideration" in this termination proceeding, we conclude that the district court did not abuse its discretion in concluding that termination is in A.A.B.'s best interests.

Affirmed.