STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1791

In the Matter of the Welfare
of the Children of: R. M., Parent.

Filed March 18, 2013
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. 62JV12836

Patrick D. McGee, Forest Lake, Minnesota (for appellant R. M.)

John J. Choi, Ramsey County Attorney, Kathryn Eilers, Assistant County Attorney, St. Paul, Minnesota (for respondent Ramsey County Community Human Services Department)

James I. Laurence, St. Paul, Minnesota (for respondent guardian ad litem)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Kirk, Judge.

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

STONEBURNER, Judge

Appellant father challenges termination of his parental rights to two children, arguing that respondent county failed to prove by clear and convincing evidence that statutory grounds for termination exist and that termination of his parental rights is in the best interests of the children. We affirm.

FACTS

Between 1989 and April 1993, appellant R.M. (father), whose date of birth is December 10, 1968, was convicted for conduct involving disorderly conduct, harassment, bail jumping, criminal damage to property, obstructing legal process, and criminal trespass. By 1993, he was considered a habitual offender for purposes of sentencing. In 1994, he was sentenced to four years in prison for a controlled-substance crime, and in 1998, he was sentenced to 68 months in prison for another controlled-substance crime. Father continued committing crimes on his release from prison: he was convicted of theft in 2004, disorderly conduct in 2005, and battery and bail jumping in 2006.

On August 18, 2006, P.R.M. (son) was born to father and K.S. (mother). Mother and father have never been married, but were living together when son was born. Father signed a recognition of parentage for son.

Approximately one month after son's birth, father was arrested for driving while impaired (DWI), and he was convicted of that crime in November 2006. On January 6, 2007, father assaulted mother: father was not convicted of this offense until September 2009. In February 2007, father was convicted of third-degree DWI.

P.A.M. (daughter) was born to mother and father on May 28, 2007. Father was adjudicated the father of daughter by court order. Mother and father separated in approximately August 2007, and father moved to his home town, Racine, Wisconsin. Father does not have any custodial rights to the children and is uncertain about whether he has been court-ordered to pay child support. Father testified that he had weekly telephone contact and monthly visits with the children after he moved to Wisconsin and

that he provided support in the form of money whenever mother asked and by providing clothes, shoes, and other items for the children at mother's request. The district court did not find father's testimony credible.

In February 2009, father was convicted of resisting or obstructing an officer. In March 2010, he was convicted of disorderly conduct. In September 2010 and January 2012, father was convicted of controlled-substance crimes. Father is unable to recall the longest consecutive period of time that he has been out of custody since 1989.

Father has never been the primary caretaker of both children, but he testified that he had sole care of daughter for almost two months in 2009 at his Wisconsin residence. Father testified that mother brought both children to Wisconsin, then left with son, leaving a note telling him that he could "keep" daughter. But, after a disagreement, mother changed her mind and sent someone from Minnesota to pick up daughter from father's home; father let daughter return to mother.

On August 10, 2011, while under the influence of cocaine, mother crashed her vehicle into the back of a city bus while transporting the children. The children were immediately placed into protective custody and were adjudicated children in need of protection or services on August 16, 2011. At the time the children were placed out-of-home, father was incarcerated in Wisconsin and had not contacted mother following his June 2011 arrest for possession of THC with intent to sell. Child-protection proceedings involving mother ultimately led to default termination of mother's parental rights in March 2012.

Mother told respondent Ramsey County Community Human Services Department (the county) that she did not know where father was and did not know how to contact him. The county's efforts to locate father consisted of inquiries by a case worker to mother and county kinship workers. Finally, in November 2011, father made contact with mother and first learned about his children's out-of-home placement. Father wrote to the county and received a reply informing him about a hearing set for December 15, 2011, regarding the children. This was the first contact the county had with father. The county case worker first became aware of father's location when she reviewed his letter at the December hearing.

Through the prison chaplain, the case worker scheduled a January 3, 2012 telephone call with father, but when she called, she was told that father was unavailable. The case worker did not attempt to schedule any more telephone calls. She wrote to father on February 27, 2012, telling him about her attempt to make telephone contact. The case worker told father that because his release from prison was four or five months in the future, she intended to seek permanency for the children at a permanency hearing scheduled for March 29, 2012. She stated that it was "unfortunate" she could not discuss the matter with him personally "because it is complicated," and stated that it was "vital" that father contact her.

The case worker's February 27, 2012 letter contained identical case plans for each child, purporting to start on February 1, 2012. Recommended programming was based on the case worker's review of father's criminal history. The case plan recommended that father obtain services relating to: parenting skills, chemical health, housing services,

parenting education, counseling, and anger management. The case plans stated that father should start working on these tasks "while incarcerated and upon his release" and that the children could be returned to father after he is "released from jail and prove[s] first that he is able to provide a safe and stable environment for his children."

On February 29, 2012, the county filed a termination-of-parental-rights (TPR) petition, alleging as statutory grounds for TPR that father abandoned the children, refused or neglected to comply with the duties of a parent, and is palpably unfit to be a parent, and that the children are neglected and in foster care. The county later dismissed the abandonment claim.

Father wrote to the case worker on March 11, 2012. Father asked how the children were doing, asserted that he was doing everything he could to reunite with them, and stated that he was going to be moved to another facility to await notification that he could transfer to an earned-release program where he would receive programming, to improve his cognitive thinking, parenting, and anger management, and then he would serve the remainder of his prison sentence on probation.

The TPR petition was served on father on March 22, 2012. Father requested and was appointed counsel, and the March 29, 2012 admit/deny hearing was rescheduled so that father could appear by telephone. On April 2, 2012, father wrote to counsel explaining his situation. The record reveals that father had very little contact with counsel prior to the TPR trial.

On April 18, 2012, father wrote to the case worker asking about the children and advising her of his new location. The admit/deny hearing was held on May 10, 2012; father, who appeared by telephone, denied the allegations contained in the TPR petition.

The case worker's June 2012 report to the court describes son's anger issues and difficulties adjusting to the foster home and school and reports that daughter "does not appear to be having any difficulty adjusting in the foster home" and enjoys participating in a Head Start program. The report states that case plans had been mailed to father and that the case worker learned from the prison system that father would not be eligible for any programming unless he got into the earned-release program, which, according to father, appeared to be likely. The case worker characterized father as noncompliant with the case plans, stating:

> The [earned-release program] takes a minimum of 6 months to complete. If [father] is not eligible for the program[,] and while he awaits that determination, he is not eligible for any services . . . until he has one year remaining on his sentence. . . . Thus, [father] is not able to comply with any aspect of his case plan at this time or for at least anywhere from 6 month[s] to a year from now. Non-compliant[.]

Father first requested telephone contact with the children in June 2012. The case worker denied father's request for telephone contact with the children because she did not think it was in the children's best interests. Neither child has asked about father or even mentioned father to the case worker or the guardian ad litem since they were removed from mother's home. Both children had been informed that mother would no longer be involved with them after mother's rights were terminated.

At the time of the TPR trial in August 2012, the children had been in out-of-home placement for more than one year. Father appeared by telephone and his counsel appeared in person. The parties stipulated to admission of evidence of 14 of father's convictions, dating back to 1993.

Father testified that his mandatory release date is in July 2014, but if he is admitted to the earned-release program, which he expected to happen within one week after the trial, and if he is successful, his release date will be in 2013. Father did not dispute that he needs the programming recommended in the case plans. He testified that the six months of programming involved in the earned-release program will meet many of the case-plan requirements. But father stated that the need for anger management arises solely from his conviction of domestic assault, and that "to be honest" he does not have any anger issues and that his "situation" does not have anything to do with anger issues. Father testified that he has been in chemical-dependency treatment programs in the past, but could not identify when or where. He does not believe that his problems are related to chemical dependency, but rather due to a "criminal thinking" problem.

Father admitted that he has been incarcerated for about one-half of son's life and for a little more than one-half of daughter's life, but he insisted that the children know who he is.[1] Father testified about his plans to finish a degree in culinary arts and to obtain employment and an apartment when he is released from prison. Father testified that he wants to be reunited with the children and believes that, after he completes the

[1] Father has three additional children whose ages, at the time of trial, were 16, 18, and 23. There is no evidence in the record concerning father's parenting of or relationships with these children.

earned-release program, he will be able to parent both children within the foreseeable future.

The case worker testified about the special needs of the children, both of whom are in therapy. She testified that son has been diagnosed with oppositional defiant disorder, has anger and anxiety issues, and has been in day treatment since the end of April 2012. She characterized son's problems as "significant." The case worker testified that daughter has some attachment issues and that both children need a parent or parents with patience, who are consistent with good boundaries and expectations, and who are consistently in the children's lives, which is the basis of her recommendation for TPR. Specifically, the case worker testified about her concern that, given father's history, he will be re-incarcerated and will not be able to provide the children with the consistency they need. The case worker testified that the children have never asked about or talked about father and that, even after he sent them two cards, the children did not talk about him. The case worker admitted that she has "no clue as to [father's] ability to parent or not to parent."

The guardian ad litem, appointed for the children in September 2011, testified that she first learned that father was involved in the case in December 2011. She has not had any contact with father and knows nothing about him. The guardian ad litem had three interactions with the children in 2012. She testified that she supports TPR based on father's numerous incarcerations, the children's failure to mention him, and the children's need for a consistent, loving, and caring parent who has the patience to deal with the children's lack of ability to bond.

Based on the facts in the record, the district court made findings in support of TPR. The district court found that: (1) despite father's interest in achieving early release, "his denial of issues that have been apparent since at least 1989 raise significant concern about his ability to successfully complete programing that is focused on addressing [his] issues"; (2) father "did not provide credible evidence that he has the ability to financially support or house the children upon his release from prison"; (3) "[t]here is no credible evidence that [father] has in fact had consistent contact with either child since 2007 or that he ever assumed meaningful parental responsibility for them for more than brief periods of time"; (4) father did not telephone mother or the children after his June 2011 incarceration despite having telephone privileges; (5) there is no credible evidence that father has financially supported the children since 2007; and (6) father did not demonstrate a meaningful understanding of son's emotional and psychological needs and did not articulate his understanding or knowledge of any issues daughter has or may have. The district court also found that the children require parents with excellent parenting skills and tools and that father is not able now or in the reasonably foreseeable future to parent the children.

The district court found that the county made "reasonable and diligent efforts" to locate father but first learned of his whereabouts in December 2011 as a result of father's contact with the county. The district court stated in its conclusions of law that "[f]ollowing the out-of-home placement . . . reasonable efforts under the direction of the court have failed to correct the conditions that led to [the children's] out-of-home

placement, within the meaning of Minn. Stat. § 260C.301, [s]ubd. 1(b)(5)." The district court made no finding that the county provided reasonable services to father.

The district court balanced the children's interest in preserving the parent-child relationship, father's interest in preserving that relationship, and any competing interests of the children, to determine if TPR is in the children's best interests. The district court found that the children have no interest in preserving a relationship with father, as demonstrated by their failure to mention him. The district court found that father undoubtedly loves the children, that he has expressed an interest in preserving the parent-child relationship, and that his custodial status has inhibited contact with the county. But the district court found that the competing needs of the children to have a permanent, stable home as soon as possible far outweigh father's interests. The district court found that it is "more than unlikely" that father will be released from prison in less than one year and questionable whether he will complete the programming that he needs, and his "extensive criminal history diminishes reasonable expectations that he will remain law-abiding in the future and be able to consistently parent his children." The district court emphasized that although father's current incarceration alone is not a basis for TPR, his "repeated criminal behavior and repeated incarceration has resulted in his absence from the children's lives since 2007, except for occasional, inconsistent contact," rendering him unable to care for the children physically, emotionally, and financially.

The district court, concluding that the county had proved by clear and convincing evidence all of the alleged statutory bases for TPR and that TPR is in the best interests of the children, granted the TPR petition. This appeal followed.

D E C I S I O N

A district court may terminate parental rights only if clear and convincing evidence establishes that at least one statutory ground for termination exists and that termination is in the best interests of the children. Minn. Stat. § 260C.317, subd. 1 (2012); Minn. R. Juv. Prot. P. 39.04, subd. 2(a); *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). In doing so, the district court must find that "reasonable efforts to finalize the permanency plan to reunify the child and the parent were made," unless reasonable efforts to reunify are not required under the statute. Minn. Stat. § 260C.301, subd. 8 (2012).

"[O]n appeal from a district court's decision to terminate parental rights, we will review the district court's findings of the underlying or basic facts for clear error, but we review its determination of whether a particular statutory basis for involuntarily terminating parental rights is present for an abuse of discretion." *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). "A finding is clearly erroneous if it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660-61 (Minn. 2008) (quotation omitted). We give considerable deference to the district court's credibility determinations, *In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990), and the district court's ultimate decision to terminate parental rights, *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). "Parental rights are terminated only for grave and weighty reasons." *M.D.O.*, 462 N.W.2d at 375.

I. Statutory basis for TPR

Minn. Stat. § 260C.301, subd. 1(b)(4) (2012), provides that a district court may terminate parental rights if 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.

"Palpable unfitness" is determined by a parent's capacity to parent or ability to engage in "constructive efforts to improve [his] ability to parent." *In re Welfare of A.V.*, 593 N.W.2d 720, 722 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999). The petitioner must prove "a consistent pattern of specific conduct or specific conditions existing at the time of the hearing that, it appears, will continue for a prolonged, indefinite period and that are permanently detrimental to the welfare of the child[ren]." *T.R.*, 750 N.W.2d at 661.

The district court concluded that father is palpably unfit to parent, based on its findings about father's repeated criminal conduct and incarcerations, denial of issues that have contributed to his repeated incarcerations, failure to have benefitted from past programming, unlikelihood of being successful in future programming, and the prolonged, indefinite period of time before there is any possibility of placing the children with father, all of which support the conclusion that he is palpably unfit to be a party to the parent-child relationship with these children. The district court's conclusion is

supported by the record and is not an abuse of discretion. Because only one statutory basis will support TPR, we decline to address the additional statutory factors found to support TPR.

II. Reasonable efforts

Before terminating parental rights, the district court must find that the county made reasonable efforts to reunify the family, unless such efforts would be futile. Minn. Stat. §§ 260.012(a)(7), 260C.301, subd. 8(1) (2012); *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996) ("If reasonable efforts will permit a parent to become, in the foreseeable future, able to care for a child, then the provision of reasonable efforts to effect this result is mandated."). Father argues that the county did not provide *any* efforts to reunify him with his children. The state responds that reasonable efforts either were made or would have been futile.

Reasonable efforts are defined as "the exercise of due diligence by the responsible social services agency to use culturally appropriate and available services" to meet the specific needs of the child and the child's family in order to reunite the family. Minn. Stat. § 260.012(f)(2) (2012). Whether services constitute "reasonable efforts" depends on the nature of the problem, the duration of the county's involvement, and the quality of the county's efforts. *In re Welfare of H.K.*, 455 N.W.2d 529, 532 (Minn. App. 1990), *review denied* (Minn. July 6, 1990). "Services must go beyond mere matters of form so as to include real, genuine assistance." *Id.*

We conclude that the county's failure to immediately locate father after the children were placed out of home is inexplicable and inexcusable, and we are troubled by

the district court's failure to specifically address the issue of reasonable efforts by the county directed to father. We nonetheless conclude, given the circumstances of father's incarceration, including his relocation to several facilities while the case was pending and the lack of any programming available to him unless and until he enters the earned-release program, that the district court's "conclusion" that the county made "appropriate and adequate" efforts at reunification is supported by the record.[2] Given father's self-inflicted circumstances, there was nothing more the county could have provided in the way of services to him, even if the county had located him sooner. The record also supports a conclusion that, in this case, additional efforts would have been futile.

III. Best interests of the children

Father argues that the district court erred in finding that TPR is in the best interests of his children. Even if a statutory basis exists for terminating parental rights, a district court may only terminate parental rights if termination is in the best interests of the children. *In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 545 (Minn. App. 2009); Minn. Stat. § 260C.301, subd. 7 (2012).

Here, the district court engaged in the required balancing of the factors used to determine best interests: (1) the children's interest in preserving the parent-child relationship, (2) father's interest in preserving that relationship, and (3) any competing interest of the children. *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992).

[2] Labeling of a finding of fact as a conclusion of law, or vice versa, is not determinative of the true nature of the item. *Bissell v. Bissell*, 291 Minn. 348, 352 n.1, 191 N.W.2d 425, 427 n.1 (1971) (stating that "[a] fact found by the [district] court, although expressed as a conclusion of law, will be treated upon appeal as a finding of fact").

"Competing interests include such things as a stable environment, health considerations and the child's preferences." *Id.* "Where the interests of parent and child conflict, the interests of the child are paramount." Minn. Stat. § 260C.301, subd. 7. We conclude that the record supports the district court's finding that the children's needs, including the need for consistency and permanency, outweigh father's interests in maintaining the parent-child relationship. By the time of trial, the children had been placed out of the home for more than one year and it was apparent that father would be incarcerated for more than six months from the trial date under optimal circumstances. Father's pattern of criminal behavior makes it unlikely that he will be able to provide the necessary permanency and consistency for the reasonably foreseeable future. The children's need for permanency and consistency plainly outweighs father's interest in being their parent.

Affirmed.